MENTAL IMPAIRMENT, MEDICAL OPINIONS, DAA, STEP FIVE, VA RATING

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. Introduction

In 1966, Plaintiff, Firstname Lastname, dropped out of high school to join the United States Army. (Tr. at 125, 234, 530.) In his first tour of duty of Vietnam, Lastname served with the First Air Cavalry where he was a helicopter crew chief, door gunner, and aviation mechanic. (Tr. at 651.) In his second tour of duty in Vietnam, Lastname served with the 116th Assault Helicopter Company where was a medic, orderly, and door gunner. (Tr. at 651.) During both tours, Lastname was exposed to traumatic events. (Tr. at 447, 611.) After returning to the United States, Lastname worked at various jobs before obtaining employment in a public school system from 1978 until 1994. (Tr. at 125.) Lastname last worked for the school system as a custodian. (Tr. at 125.) Eventually, he could no longer accomplish that job due to combat-related post-traumatic stress disorder (PTSD). (Tr. at 368, 377, 423.) At the time he stopped working as a custodian, Lastname abused illegal drugs and alcohol. (Tr. at 330, 448.) In 1995, Lastname was psychiatrically hospitalized at a Veterans Administration (VA) hospital for substance use, a bipolar affective disorder, and PTSD. (Tr. at 464.) After his hospitalization, Lastname was treated at the VA for

PTSD. (Tr. at 349-403, 529-32, 590-618.) In January 1997, the VA determined that Lastname had been one-hundred-percent disabled due to PTSD since April 1995. (Tr. at 360.) Unfortunately, Lastname's ability to work has not been restored despite receiving regular counseling and medical treatment at the VA. (Tr. at 348-532, 537-662.) But fortunately, after several relapses in the late 1990s, Lastname was able to obtain control of his substance use in 2000. (Tr. at 79, 86.)

Because he was unable to work, Lastname applied for Disability Insurance Benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 416(i), 423(d), and supported his application with reports from his treating VA psychiatrists and counselors. Substantial evidence does not support the ALJ's finding that Lastname was not disabled for the purpose of the Social Security Act. Moreover, the existing evidentiary record demonstrates that Lastname has been disabled since his alleged onset date of DATE, i.e., before his insured status expired on December 31, 1999.

II. Procedural Background

In DATE, Lastname applied for DIB, alleging that he had been disabled since August 31, 1994.[1] (Tr at 210.) After his 1999 application was denied initially and on reconsideration, Lastname requested a de novo hearing before an administrative law judge (ALJ). (Tr. at 177, 188, 191.) On February 6, 2001, Lastname appeared with counsel and testified at an administrative hearing before ALJ Firstname Lastname. (Tr. at 39a, 43, 79.) In addition, psychologist Firstname DoctorME, Ph.D., testified as a medical expert (Tr. at 43, 205), and Firstname Lastname testified as a vocational expert (Tr. at 43, 90, 201). On DATE, the ALJ decided that Lastname was not

[1] Lastname previously applied twice for DIB. In November 1995, Lastname applied for DIB, stating that he had been disabled since September 2, 1994. (Tr at 102.) In December 1995, Lastname's 1995 application was denied at the initial level of administrative adjudication. (Tr. at 118.) Lastname did not seek further administrative review of his 1995 application. In May 1997, Lastname reapplied for DIB, stating that he had been disabled since September 2, 1994, (Tr. at 207.) In September 1997, Lastname's 1997 application was denied initially. (Tr. at 1171, 74.) Lastname did not seek further review of his 1997 application.

disabled at step five of the well-known five-step sequential evaluation. (Tr. at 39-39a.) 20 C.F.R. § 404.1520(f) (2003) (step five). Lastname requested Appeals Council review and submitted additional evidence. (Tr. at 702-87.) On DATE, the ALJ's decision became the Commissioner's final decision when the Appeals Council denied Lastname's request for review. (Tr. at 9.) 20 C.F.R. § 422.210(a) (2003). Lastname then initiated this civil action. 42 U.S.C. § 405(g).

III. Statement of the Facts

A. Age and Insured Status

Lastname was born on DATE. (Tr. at 210.) Therefore, he was forty-seven years old on DATE (his alleged onset date), fifty-two years old on DATE (the date his insured status expired), and fifty-three years old on DATE (the date of the ALJ's decision). (Tr. at 38-39a).

B. Education and Military Service

Lastname dropped out of high school in January 1966, i.e., during his senior year, to join the U.S. Army as his patriotic duty. (Tr. 125, 234, 530.) Lastname served in the Army from 1966 until 1971. (Tr. at 530.) When he served in Vietnam during two tours of duty—from August 1966 until August 1967 and from October 1968 until October 1969—he was an aviation mechanic, helicopter crew chief, door gunner, and medical corpsman. (Tr. at 447, 521, 535, 651.)

C. Post-Military Work Experience

From August 1978 until August 1994, Lastname worked in a public school. (Tr. at 48, 125, 239-42, 278, 281-83.) He last worked in the school as a custodian. (Tr. at 68.) Because he wanted to work by himself, he had requested a change from his prior job working with a nine-person crew. (Tr. at 68-69.) At the hearing, Lastname explained why he stopped working. (Tr. at 48.) "My PTSD was starting to bother me very much. I couldn't get along with people around me. The people were just stressing me out." (Tr. at 48.) He also described difficulties with his supervisor.

(Tr. at 368, 377, 423.) In March 1998, he stated that he stopped working in 1994 because he "just got too tired and was doing drugs." (Tr. at 602.) Lastname did not have any treatment for PTSD before he stopped working for the school system. (Tr. at 71.)

D. VA Disability

In October 1995, Lastname was rated by the VA with a ten-percent disability due to PTSD, a zero-percent disability due to tinnitus, and a zero-percent disability due to hearing loss. (Tr. at 159.)

In January 1997, the VA determined that Lastname was one-hundred-percent disabled due to PTSD since April1995. (Tr. at 360.) The VA also found Lastname ten-percent disabled due to tinnitus. (Tr. at 360.)

In November 2000, the VA made permanent Lastname's one-hundred-percent disability rating

for PTSD. (Tr. at 708.) (This evidence was submitted to the Appeals Council.)

In February 2001, Lastname received $2,238.00 per month in VA benefits. (Tr. at 48.)

E. Vocational Expert's Testimony

The ALJ asked the vocational expert a series of hypothetical questions. As his first hypothetical question, the ALJ asked the vocational expert to assume that a person

- had Lastname's vocational profile (age, education, and work experience),
- could lift and carry fifty pounds occasionally and twenty-five pounds frequently,
- could stand and/walk for six hours in an eight-hour day at one hour intervals,
- could sit without limitation,
- could occasionally climb stairs, ropes, ladders, and scaffolds,
- could not work with the public, and
- could have limited contact with co-workers and occasional contact with supervisors.

(Tr. at 91.) Such a person could work as a hand packer, production inspector, and cleaner. (Tr. at 91-92.) As his second hypothetical question, the ALJ asked the vocational expert to assume that a

person could

- lift and carry ten pounds frequently and twenty pounds occasionally,
- sit without limitation,
- occasionally climb stairs and ladders,
- not have contact with the public, and
- have limited contact with co-workers and supervisors.

(Tr. at 92.) Such a person could work as a stock clerk, messenger, and preparer of food. (Tr. at 92-93.)

On cross-examination, the vocational expert stated that he assumed that all interactions with co-workers would be appropriate. (Tr. at 94.) Further, if one in five interactions with a supervisor were conflictual, a person would have difficulty doing the jobs identified. (Tr. at 97-98.)

F. Testimony

Lastname testified in February 2001 that he had intrusive thoughts of Vietnam (Tr. at 71), frequent nightmares (Tr. at 73), flashbacks (Tr. at 73), and an exaggerated startle response (Tr. at 74). He did not want people to walk behind him: "it aggravates the heck out of me." (Tr. at 77.)

Lastname stated that he had been clean since July 2000 when he last smoked marijuana. (Tr. at 79.)

G. Medical Evidence

The medical evidence is presented in the Argument section below.

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

Substantial evidence is the standard of judicial review. 42 U.S.C. § 405(g).

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

Because the ALJ rendered a step-five decision (Tr. at 38-39a), Lastname sets forth the law of step five.

A. There Are Three Types of Step-Five Decisions.

At step five, the Commissioner has the burden "to show that the claimant can perform some other work that exists in 'significant numbers' in the national economy, taking into consideration the claimant's residual functional capacity, age, education, and work experience." Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999); 20 C.F.R. § 404.1520(f) (2003) (step five). There are three ways the Commissioner may carry this burden and each involves, to some degree, the use of the Medical-Vocational Guidelines (Grid). 20 C.F.R. Pt. 404, Subpt. P, App. 2 (2003) (Grid). First, if a claimant's residual functional capacity and vocational characteristics correspond precisely to a Grid rule, the Grid rule is used to "direct" a finding of "disabled" or "not disabled." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00 (2003). The second and third ways both use the Grid as a "framework" for decisionmaking. 20 C.F.R. Pt. 404, Subpart P, App. 2, § 200.00(e)(2) (2003). The second way uses the Grid as a "framework" without vocational-expert testimony, and the third way uses the Grid as a "framework" with vocational-expert testimony. When a claimant's ability to perform a full range of work at a specific exertional level is "significantly" diminished, the fact-finder must use the Grid as a framework with vocational-expert testimony to make a correct decision. Tackett, 180 F.3d at 1101-04; Reddick v. Chater, 157 F.3d at 715, 729 (9th Cir. 1998).

B. The ALJ Rendered a Step-Five Decision Relying on Vocational-Expert Testimony.

The ALJ recognized that Lastname's insured status expired on December 31, 1999. (Tr. at 38.) Therefore, Lastname needed to show that he had been disabled no later than December 31, 1999. (Tr. at 21.) At step one, the ALJ found that Lastname had not engaged in substantial gainful activity since 1994. (Tr. at 21, 39.) 20 C.F.R. § 404.1520(b) (2003) (step one). At step two, the ALJ determined that Lastname had a "severe" impairment. (Tr. at 39.) 20 C.F.R. § 404.1520(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 the requirements of a listed impairment. (Tr. at 39.) 20 C.F.R. § 404.1520(d) (2003) (step three). At step four, the ALJ stated that Lastname could not do his past relevant work. (Tr. at 39.) 20 C.F.R. § 404.1520(e) (2003) (step four); 20 C.F.R. § 404.1545 (2003) (defining "residual functional capacity"). As his residual functional capacity finding, the ALJ assessed that Lastname had the ability

> to lift or carry 50 pounds occasionally and 25 pounds frequently. He could stand or walk for six hours in an eight-hour period in one hour increments. The claimant has no limitations sitting. He could occasionally climb stairs, ladders, scaffolds, and ropes. However, [Lastname] should not work directly with the public. [Lastname] should have only limited contact with co-workers and only occasional contact with supervisors.

(Tr. at 39.) At step five, the ALJ relied on vocational-expert testimony to decide that Lastname was not disabled at step five. (Tr. at 39.) 20 C.F.R. § 404.1520(f) (2003) (step five).

VI. Argument

A. *PTSD*: The ALJ Did Not Understand PTSD.

According to the ALJ, "the course and progression of the claimant's impairment is atypical, yet not commented on by his treating doctors and counselors." (Tr. at 36.) In the ALJ's view, it was unusual that Lastname's "alleged symptoms actually worsened as the traumatic events which inspired [sic] them became more remote in time." (Tr. at 36.) The ALJ thus believed that PTSD should normally decrease in severity over time. (Tr. at 36.) The ALJ does not understand PTSD.

Contrary to the ALJ's belief, PTSD may wax and wane. Amer. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text rev. 1994) (DSM-IV-TR), at 466 ("In some cases, the course is characterized by a waxing and waning of symptoms."). Moreover, PTSD symptoms "may occur in response to reminders of the original trauma, life

stressors, or new traumatic events." Id. In fact, there is an entire category of PTSD: late or delayed onset PTSD. Id. at 468. Consistent with the fact that PTSD may result from stressors remote in time to the original trauma, Lastname's PTSD since the mid-1990s was triggered by various recent events. (E.g., Tr. at 613 (working on a memorial for veterans); id. at 645 (participating in Vietnam veterans motorcycle group); id. at 652 (seeing a fire on television); id. at 766 (seeing television news about an airplane crash).) Unfortunately for veterans such as Lastname, time does not cure all wounds.

There is another way of understanding the ALJ's error. If the ALJ intended to denigrate Lastname's PTSD because it was based on old, remote trauma from the Vietnam War instead of recent trauma, the ALJ should have asked psychologist Dr. DoctorME at the hearing or another medical professional such as treating VA psychiatrist Dr. TreaterOne about the course of PTSD to test whether the ALJ's lay notions about PTSD had a basis in medical science. The ALJ did not, and this was error. Cf. Wilder v. Chater, 64 F.3d 335, 337 (7th Cir. 1995) ("Severe depression is not the blues. It is a mental illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it."). The ALJ's erroneous lay postulation about the course and progression of PTSD is neither evidence nor substantial evidence.

B. *Substance Use*: The ALJ Erroneously Evaluated Substance Use.

Under the Social Security Act, an "individual shall not be considered to be disabled . . if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). The ALJ correctly found that Lastname's "substance addiction disorder is not a material factor in this case." (Tr. at 39.) The ALJ, however, otherwise erroneously evaluated Lastname's drug and alcohol use. Once

Lastname's substance use is properly evaluated, the Court may safely conclude that Lastname is disabled on the existing record or, at a minimum, that further administrative proceedings are warranted.

1. The ALJ Did Not Follow the *Bustamante* (9th Cir.) Method.

As his core rationale, the ALJ purported to parse the effects of substance use from Lastname's other mental impairments. (Tr. at 32 ("the claimant's PTSD was clearly impacted by his substance abuse").) The ALJ criticized medical sources for not recognizing that Lastname was actually adversely impacted by his substance use, and the ALJ accepted medical sources when they recognized that Lastname was adversely impacted by his substance use. (E.g., Tr. at 29 (agreeing with examining psychiatrist Dr. NonexaminerOne); id. at 28 (disagreeing with treating psychiatrist Dr. TreaterOne); id. at 26 (disagreeing with treating psychiatrist Dr. TreaterTwo); id. at 25 (disagreeing with examining psychiatrist Dr. ExaminerThree).) But when evaluating various medical sources, the ALJ did not follow the method described in Bustamante v. Massanari, 262 F.3d 949, (9th Cir. 2001), for the evaluation of claims of disability in which there is evidence of substance use. Id. at 954-55. Under that method, the ALJ first determines whether a claimant would be disabled taking into account any substance use. Id. Only after an ALJ finds that a claimant would be disabled taking into account substance use does the ALJ ask the next question: whether the claimant would remain disabled not taking into account any substance use? Because the ALJ did not follow the Bustamante method, the Court should not ratify his decision. Instead, the Court should conclude that Lastname was disabled on the existing record.

2. When Substance Use Cannot Be Parsed, Limitations are Not Attributed to Substance Use.

a. Ability to Parse Effects of Substance Use

If a claimant has a substance use disorder and other mental impairment such as PTSD, an adjudicator may or may not be able to parse the effects of the substance use disorder from the other mental impairment. According to the Commissioner, "When it is not possible to separate the mental restrictions and limitations imposed by DAA [drug addiction and/or alcoholism] and the various other mental disorders shown by the evidence, a finding of `not material' would be appropriate." Emergency Teletype -- Questions and Answers Concerning DAA from the 07/02/96 Teleconference--Medical Adjudicators (Aug. 30, 1996 Emergency Teletype) (copy attached).[2] Thus when an ALJ is unable to differentiate between substance-related and non-substance-related effects, the benefit of the doubt goes to the claimant. See also McGoffin v. Barnhart, 288 F.3d 1248, 1253 (10th Cir. 2002) (recognizing Teletype).

The Honorable Robert S. Lasnik, United States District Judge has applied the agency's own rule. In A. William and Eileen Pratt ex rel. Daryl B. Pratt v. Apfel, No. C99-0002L (W.D. Wash. July 5, 2000), Judge Lasnik rejected the Commissioner's objection to the Report and Recommendation of the Honorable Ricardo S. Martinez, United States Magistrate Judge; applied the agency's own policy; and found plaintiff Pratt disabled. Id. at 5 ("The issue, therefore, is whether the record contains substantial evidence to support the ALJ's finding that it is impossible to separate the limitations resulting from plaintiff's bipolar disorder from the limitations resulting from his alcoholism.") (copy attached).

[2] The Teletype is also available at http://www.ssas.com/daa-q&a.htm.

b. Medical Expert Dr. DoctorME's Testimony

The ALJ endorsed without reservation medical expert Dr. DoctorME's testimony. (Tr. at 32.) When Dr. DoctorME was asked whether Lastname would decompensate at work, he stated:

> I think there would be distractibility. I think he might decompensate. The stress of working around people or with a supervisor could create decompensation. I think the difficulty with the janitor job, it sounds . . . like there was also alcohol abuse or drug abuse happening at that same period and whether that exacerbated his reaction to people around [sic]. It's hard to tell.

(Tr. at 82.) Dr. DoctorME also testified that Lastname "probably" self-medicated his PTSD with drugs or alcohol (Tr. at 83) and that it was possible for "people . . . [to] improve being clean and sober" (Tr. at 86). Because Dr. DoctorME did not attribute to substance use specifically Lastname's functional limitations when Lastname used substances, Dr. DoctorME's testimony is not substantial evidence for the ALJ's rejection of opinions of treating psychiatrist Dr. TreaterOne, treating psychiatrist Dr. TreaterTwo, examining psychiatrist Dr. ExaminerOne, and examining psychiatrist Dr. ExaminerThree on the ground that they did not appreciate how substance use adversely affected Lastname.

3. A Longitudinal Perspective Shows That Substance Use Was Not Responsible for Lastname's Inability to Work.

The record includes extensive longitudinal evidence such that the Court can ascertain that substantial evidence does not support the ALJ's attribution to substance use significant functional limitations. The ALJ argued that Lastname was adversely affected by substance use (Tr. at 32), but even the ALJ did not contend that Lastname was significantly abusing substances in 2000 and 2001 (Tr. at 20-39a.) For example, the ALJ adopted medical expert Dr. DoctorME's February 2001

testimony. (Tr. at 32.) Dr. DoctorME testified that there was no longer any substance use.[3] (Tr. at 86 ("Well, it sounds like he's clean and sober now.").) In late 2000 or early 2001, treating physician Dr. TreaterOne reported that Lastname satisfied the requirements of Listing 12.04[4] and Listing 12.06[5] (Tr. at 689-99)—proving that Lastname was disabled at step three—and that Lastname had mostly poor abilities or no abilities to do work-related activities (Tr. at 687-88)—thus proving that Lastname was disabled at step five. 20 C.F.R. § 404.1520(d) (2003) (step three); 20 C.F.R. § 404.1520(f) (2003) (step five). (Lastname will discuss in more detail below Dr. TreaterOne's opinions.) Likewise, in January 2001, examining psychiatrist Dr. ExaminerOne concluded that Lastname equaled the requirements of Listing 12.04 and Listing 12.06 (Tr. at 656-66)—providing an opinion that Lastname was disabled at step three—and that Lastname had mostly poor abilities or no abilities to do work-related activities—thus providing an opinion that Lastname was disabled at step five (Tr. at 668-70.) When treating physician Dr. TreaterOne's and examining psychiatrist Dr. ExaminerOne's opinions are evaluated properly, see Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995), Lastname was disabled on the existing evidentiary record. Thus, even if opinions on which Lastname relied such as Dr. ExaminerThree's November 1996 opinion (Tr. at 375-78) and treating psychiatrist Dr. TreaterTwo's May 1997 opinion (Tr. at 357) were tainted by Lastname's substance use, Lastname provided more recent opinions from Dr. TreaterOne and Dr. ExaminerOne which were not tainted by any substance use.

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[3] Consistent with Dr. DoctorME's acceptance that there was no longer substance use, Dr. DoctorME discussed Listing 12.04, which pertains to affective disorders, and Listing 12.06, which pertains to anxiety disorders, but did not discuss Listing 12.09, which pertains to substance use. (Tr. at 80.) 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, §§ 12.04, 12.06, 12.09 (2003).

[4] 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 12.04 (2003).

[5] 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 12.06 (2003).

4. Sobriety is Not Required.

Although unclear, the ALJ apparently required sobriety as a precondition for being found disabled. For example, the ALJ rejected treating psychiatrist Dr. TreaterOne's October 1998 opinion because Lastname "continued to abuse alcohol and marijuana" during the period Dr. TreaterOne addressed in his October 1998 opinion. (Tr. at 26.) The ALJ seemed to assert that substance use is ipso facto disqualifying from Social Security disability benefits. (Tr. at 26.) On the contrary, there is no requirement for sobriety as a precondition to being found disabled.

The Social Security Act does not require sobriety for a claimant to be found disabled. Instead, the Social Security Act excludes a finding of disability when drug addiction or alcoholism would be contributing factor material to a finding of disability. 42 U.S.C. § 423(d)(2)(C); see also 20 C.F.R. § 404.1535 (2003) ("How we will determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability"). The basic question is whether the claimant who is disabled would still be disabled if the claimant no longer used (illegal) drugs or alcohol. The ALJ must reach the threshold conclusion that the claimant would be disabled taking into account any drug addiction or alcoholism. See Bustamante, 262 F.3d at 955 ("If the ALJ finds that the claimant is disabled and there is medical evidence of his or her drug addiction or alcoholism, then the ALJ should proceed under §§ 404.1535 or 404.1535 to determine if the claimant would still be found disabled if he or she stopped using alcohol or drugs.") (internal punctuation and quotation marks omitted). If the ALJ concludes that the claimant would be disabled taking into account any drug addiction or alcoholism, the next step is to analyze whether the claimant is still disabled subtracting any effect of current consumption of drugs or alcohol. Id.

For example, if a claimant's only medical impairment is drug addiction or alcoholism, then the claimant cannot be found disabled. Cf. Ball v. Massanari, 254 F.3d 817, 819-22 (9th Cir.2001)

(claimant's psychological disorder other than alcoholism was insignificant). For another example, if an alcoholic claimant with depression continues to drink, the claimant's alcoholism is not a contributing factor material to a finding of disability if the claimant would be disabled by depression if, hypothetically, the claimant stopped drinking. There is no requirement for a claimant to stop drinking to be disabled or to prove disability. Instead, the ALJ needs to assess in the subjunctive whether the claimant would still be disabled if, contrary to fact, the claimant stopped drinking. See Bustamante, 262 F.3d at 955. In fact, as mentioned above, the Commissioner has a special rule that if an ALJ cannot differentiate between the effects of drug addiction or alcoholism and other impairments, the ALJ must find that the claimant's limitations are not due to drug addiction or alcoholism. See McGoffin, 288 F.3d at 1253(explaining agency policy in Emergency Teletype -- Questions and Answers Concerning DAA from the 07/02/96 Teleconference--Medical Adjudicators).

There is an obvious reason that the Commissioner understands the Social Security Act as allowing claimants who are drug addicts and alcoholics to be found disabled even if they continue to take drugs or drink alcohol (so long as the drug addiction or alcoholism is not a contributing factor material to a finding of disability). Some of the most profoundly disabled claimants have co-morbid drug addiction and/or alcoholism and serious mental disorders such as bipolar disorder and PTSD. If those claimants would still be disabled notwithstanding any drug or alcohol use, then their continuing drug and alcohol use should not prevent them from being found disabled.[6]

In sum, substantial evidence does not support the ALJ's decision because there are multiple harmful defects in the ALJ's evaluation of Lastname's history of substance use.

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[6] The Commissioner has a mechanism for ensuring that disability benefits are not squandered on illegal drugs or alcohol. A "representative payee" may be appointed for a drug addict or alcoholic. 42 U.S.C. § 405(j).

C. *VA Rating*: The ALJ Should Have Given Great Weight to the VA's 100% PTSD Rating.

In the Ninth Circuit, "an ALJ must ordinarily give great weight to a VA determination of disability." McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002). "Because the VA and SSA criteria for determining disability are not identical, however, the ALJ may give less weight to a VA disability rating if he gives persuasive, specific, valid reasons for doing so that are supported by the record." Id. The ALJ did not give legally sufficient reasons for apparently giving no weight to the VA's one-hundred-percent disability rating for PTSD. (Tr. at 26.) In October 1995, the VA found that Lastname's PTSD had been ten-percent disabling since April 1995. (Tr. at 159.) In January 1997, the VA found that Lastname's PTSD was one-hundred-percent disabling retroactive to April 1995. (Tr. at 360.) In November 2000, the VA concluded that Lastname's one-hundred-percent disability rating for PTSD was permanent: "The evidence indicates that your symptomatology has continued unchanged for the last 5 years and it is doubtful that your condition will improve[.] [T]herefore permanency has been granted."[7] (Tr. at 708.) Substantial evidence does not support the ALJ's decision because the ALJ apparently gave no weight to the VA's one-

[7] The VA's November 2000 statement was submitted to the Appeals Council. (Tr. at 708.) This Court may look to evidence submitted to the Appeals Council. Ramirez v. Shalala, 8 F.3d 1449 (9th Cir. 1993). In Ramirez, 8 F.3d 1449, 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 1180.

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.

hundred-percent disability rating for PTSD. (Tr. at 26.)

The ALJ gave two reason for giving no weight to the VA rating. (Tr. at 26.) First, the ALJ cited the regulation under which a VA rating is not binding in Social Security proceedings. (Tr. at 26 (citing 20 C.F.R. § 404.1504)).) But just because a VA rating is not binding does not mean that an ALJ may give it no weight or less than great weight. McCartey, 298 F.3d at 1076 (citing 20 C.F.R. § 404.1504).

Second, the ALJ justified his rejection of the VA rating on the ground that it was based on Dr. ExaminerThree's November 1996 opinion with which the ALJ disagreed. (Tr. at 26.) The ALJ rejected Dr. ExaminerThree's opinion because Lastname was "vague" in his description of a bipolar affective disorder. (Tr. at 26 (referring to id. at 376).) This is not a good reason to reject Dr. ExaminerThree's opinion given that VA psychiatrists diagnosed a bipolar illness when Lastname was psychiatrically hospitalized in 1995 (Tr. at 464) and given that Dr. DoctorME, the ALJ's own medical expert, diagnosed bipolar illness (Tr. at 79-80).[8] The ALJ also rejected Dr. ExaminerThree's opinion because Dr. ExaminerThree erroneously believed in November 1996 that Lastname had been clean and sober for the past year. (Tr. at 26 (referring to id. at 377).) This does not justify disagreeing with Dr. ExaminerThree. As explained above, the record shows that Lastname was unable to work when he was indisputably not abusing drugs or alcohol. (Tr. at 687-700, 710-27 (treating psychiatrist Dr. TreaterOne's opinions); id. at 648-70 (examining psychiatrist Dr. ExaminerOne's report and opinions).)

Additionally, the VA's one-hundred-percent disability rating is not based solely on Dr. ExaminerThree's examination. In November 2000, i.e., years after the VA's January 1997 rating,

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[8] The ALJ erroneously claimed that Dr. DoctorME "testified [that] the diagnosis of bipolar disorder was not supported by the record." (Compare Tr. at 31 (ALJ decision), with id. at 79-80 (Dr. DoctorME's testimony).)

the VA determined that Lastname's one-hundred-percent disability rating for PTSD was permanent. (Tr. at 708.) Thus, the longitudinal evidence confirmed that Lastname was unable to work due to PTSD.

D. *Treating Psychiatrist Dr. TreaterOne*: The ALJ Erroneously Evaluated Treating Psychiatrist Dr. TreaterOne's Opinions.

Substantial evidence does not support the ALJ's decision because the ALJ erroneously evaluated treating psychiatrist Dr. TreaterOne'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.[9] 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. § 404.1527(d)(2) (2003).

2. The ALJ Erroneously Rejected Dr. TreaterOne's October 1998 Opinion.

In October 1998, Dr. TreaterOne wrote that it would be "unwise over the next year for Mr. Lastname to try engaging in any employment." (Tr. at 350.) Dr. TreaterOne explained:

> I have taken over Mr. Lastname's care after his former psychiatrist, Loren TreaterTwo, M.D., left the . . . . area one year ago. Mr. Lastname has continued in treatment seeing me regularly and attending his group therapy sessions. Despite this he continues (to suffer) symptomatic [sic] from PTSD symptoms with bouts of depression, a profound sleep disturbance with Vietnam combat-related nightmares and memories, [hypervigilance] and a chronically anxious affect.

[9] 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)

(Tr. at 350.) The ALJ gave two reasons to disregard this opinion, each of them insufficient. (Tr. at 28.)

a. Treating Physician's Opinion About a Claimant's Ability to Work

First, the ALJ discounted Dr. TreaterOne's opinion that Lastname was unable to work because the question whether Lastname was employable "is an issue reserved to the Commissioner (SSR 96-5p)." (Tr. at 28.) The ALJ thus objected to Dr. TreaterOne's opinion as a matter of principle. The ALJ failed to recognize Ninth Circuit law under which an ALJ must give clear and convincing reasons or specific and legitimate reasons to reject a treating physician's opinion about a claimant's capacity to work. Lester, 81 F.3d at 830. In any case, SSR 96-5p[10] does not require an ALJ to give no weight to a treating physician's opinion about a claimant's ability to work. Under SSR 96-5p, a treating physician's opinion about whether a claimant can work is not binding, but nonetheless "must never be ignored" and must be evaluated under the factors set forth in 20 C.F.R. § 404.1527(d) (2003). SSR 96-5p. Under 20 C.F.R. § 404.1527(d)(2) (2003), an ALJ should ordinarily give more weight to treating physician's opinion, and under 20 C.F.R. § 404.1527(d)(5) (2003), an ALJ must ordinarily give more weight to the opinion of a specialist. 20 C.F.R. § 404.1527(d)(2), (5) (2003). Dr. TreaterOne saw Lastname on a regular basis for many years and had expertise in treating veterans for PTSD. (Tr. at 350, 529, 622, 710-12.) Therefore, if the ALJ had correctly applied SSR 96-5p, the ALJ would have respected treating physician Dr. TreaterOne's October 1998 opinion.

[10] Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-05-di-01.html.

b. Use of Substances

Second, the ALJ discounted Dr. TreaterOne's October 1998 opinion simply because Lastname "continued to abuse alcohol and marijuana" during the period Dr. TreaterOne addressed. (Tr. at 28.) Lastname explained above that the Social Security Act does not require sobriety and why the Social Security Act does not require sobriety. Therefore, the ALJ did not provide legally sufficient grounds for rejecting Dr. TreaterOne's October 1998 opinions.

3. The ALJ Erroneously Rejected Other Opinions From Dr. TreaterOne

Substantial evidence does not support the ALJ's decision because the ALJ erroneously evaluated opinions from treating psychiatrist Dr. TreaterOne other than his October 1998 opinion. On January 30, 2001, i.e., before the February 6, 2001, administrative hearing, Lastname submitted to the ALJ opinions from treating psychiatrist Dr. TreaterOne and treating counselor Mr. CounselorOne. (Tr. at 671 (cover letter); id. at 672-700 (opinions).) The record before the ALJ now includes two pages of Dr. TreaterOne's three-page Medical Assessment of Ability to Do Work-Related Activities (Mental). (Tr. at 687-88.) The third page of this form signed by Dr. TreaterOne on January 24, 2001 was submitted to the Appeals Council. (Tr. at 727.) The record before the ALJ also includes Dr. TreaterOne's unsigned Psychiatrict Review Technique Form (PRTF). (Tr. at 689-700.) Lastname submitted to the Appeals Council a copy of the same PRTF signed by Dr. TreaterOne on August 7, 2002. (Tr. at 713-24.)

The ALJ rejected in toto Dr. TreaterOne's opinions submitted to the ALJ on January 30, 2001 on the ground that they were unsigned. (Tr. at 31.) If the ALJ doubted the authenticity of Dr. TreaterOne's opinions, the ALJ should have raised this doubt to Lastname at the administrative hearing. Moreover, since the ALJ could not reasonably be sure that his office did not lose page three of Dr. TreaterOne's three-page Medical Assessment of Ability to Do Work-Related Activities

(Mental) (Tr. at 687-88), the ALJ should have contacted Lastname to locate any missing page. See 20 C.F.R. § 404.1512(e) (2003) (regulatory requirement to recontact a treating source); SSR 96-5p ("For treating sources, the rules also require that we make every reasonable effort to recontact such sources for clarification when they provide opinions on issues reserved to the Commissioner and the bases for such opinions are not clear to us.").

In any case, Lastname has cured any defect in his January 30, 2001, submission of opinions from Dr. TreaterOne to the ALJ with his later submission to the Appeals Council. (Tr. at 713-27.) Dr. TreaterOne thus opined that Lastname was disabled at step three because his condition satisfied the requirements of Listing 12.04 and Listing 12.06. (Tr. at 713, 723.) 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, §§ 12.04, 12.06 (2003); 20 C.F.R. § 404.1520(d) (2003) (step three). Dr. TreaterOne also effectively opined that Lastname was disabled at step five. (Tr. at 725-26.) 20 C.F.R. § 404.1520(f) (2003) (step five). Since Lastname had poor or no abilities to interact with supervisors and relate to co-workers (Tr. at 725), he could not perform the jobs the vocational expert identified (Tr. at 94-99). This Court should hold that Lastname was disabled based on evidence from treating specialist Dr. TreaterOne submitted to the ALJ and to the Appeals Council. See Ramirez, 8 F.3d 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").

Besides resubmitting Dr. TreaterOne's January 2001 opinions to the Appeals Council, Lastname also filed with the Appeals Council a declaration from Dr. TreaterOne dated August 7, 2002. (Tr. at 710.) Dr. TreaterOne explained that when he characterized Lastname's condition as "stable," he referred to Lastname's very low baseline functioning. (Tr. at 712.) Dr. TreaterOne further explained why Lastname's ability to get along with other veterans at the VFW and his immediate family did not mean that Lastname could work full-time. (Tr. at 711.) This is

tantamount to an opinion that Lastname was disabled at step five. In order for a claimant to be found not disabled at step five, the claimant must be able to perform full-time work. SSR 96-8p.[11] Dr. TreaterOne summarized:

> . . . It's pretty obvious to me that he is unable to work. He could not deal with the work stressors, with people, with being on the job eight hours per day. If he were able to tolerate a work setting, it would have to be volunteer work where he would have the option of leaving if he needed to. I think he is doing a little bit of volunteer work, for example, for his veteran's motorcycle group. That's far different from competitive employment.

(Tr. at 712.)

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 psychiatrist Dr. TreaterOne'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. TreaterOne's opinions about steps three and five are properly evaluated, the record proves that Lastname was disabled at steps three and five. At step three, his conditions satisfied the requirement of Listing 12.04[12] and Listing 12.06.[13] Cf. Lester, 81 F.3d at 834 (finding claimant disabled at step three). At step four, he could not perform his past relevant work. Finally, at step five, he could not work full-time or tolerate any interaction with supervisors and co-workers. Cf. Reddick, 157 F.3d at 729-30 (recognizing that the claimant was disabled at step five).

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

[12] 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 12.04 (2003).

[13] 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. A, § 12.06 (2003).

E. *Examining Psychiatrist Dr. TreaterOne*: The ALJ Erroneously Evaluated Examining Psychiatrist Dr. ExaminerOne's Report and Opinions.

Substantial evidence does not support the ALJ's decision because the ALJ erroneously evaluated examining psychiatrist Dr. ExaminerOne's report and opinions. (Tr. at 30-31 (ALJ's decision); id. at 648-70 (Dr. ExaminerOne's report and opinions).) See Lester, 81 F.3d at 830-31 (legal analysis for evaluation of an examining source's opinions). The ALJ gave less weight to Dr. ExaminerOne's opinions because Dr. ExaminerOne merely examined Lastname once. (Tr. at 31.) But Dr. ExaminerOne also reviewed Lastname's medical records (Tr. at 648-49), and Dr. ExaminerOne's opinions were in line with treating psychiatrist Dr. TreaterOne's opinions (Tr. at 713-27) and with PTSD counselor Mr. CounselorOne's opinions (Tr. at 672-74, 745-59). These were strong reasons to give more weight to Dr. ExaminerOne's opinions. 20 C.F.R. § 404.1527(d)(2) (2003) ("Generally, we give more weight to opinions from your treating sources"); 20 C.F.R. § 404.1527(d)(3) (2003) ("The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion.").

The ALJ gave little weight Dr. ExaminerOne's opinions because Lastname supposedly "reported worse symptoms" to Dr. ExaminerOne "than are shown elsewhere in the record." (Tr. at 31.) Because the ALJ did not give any example of this, Lastname is unable to rebut the charge. The ALJ's charge is thus mere assertion.

The ALJ criticized Dr. ExaminerOne's opinions because on examination Dr. ExaminerOne supposedly found only a "mild" cognitive impairment. (Tr. at 31.) On the contrary, Dr. ExaminerOne's mental status examination documented difficulties in concentration (Tr. at 653-54), and Dr. ExaminerOne explained why Lastname could not tolerate the stress and pressures of full-

time work given his PTSD (Tr. at 655).

Finally, the ALJ rejected Dr. ExaminerOne's opinions as a matter of principle, stating that "the ultimate issue of disability is reserved to the Commissioner ([SSR] SSR 96-5p)." (Tr. at 31.) This is a non sequitur. Just because an ALJ is the fact-finder does not license the ALJ to reject for legally insufficient reasons the report of an examining specialist such as Dr. ExaminerOne. Lester, 81 F.3d at 830-31; Edlund v. Massanari, 253 F.3d 1152, 1158-60 (9th Cir. 2001) (exemplary evaluation of examining psychologist's opinion).

F. *Examining Psychiatrist Dr. NonexaminerOne and Non-Examining Psychologist Dr. ExaminerTwo*: The ALJ's Mental Residual Capacity Finding is Inaccurate.

In this section, Lastname presents a freestanding argument showing that substantial evidence does not support the ALJ's decision assuming as true the ALJ's rationale.

1. Dr. NonexaminerOne and Dr. ExaminerTwo Restricted Lastname to "Repetitive" Work.

The ALJ endorsed the opinions of examining psychiatrist Dr. NonexaminerOne. (Tr. at 29 ("I give significant weight to Dr. NonexaminerOne's opinion"); id. at 533-36 (Dr. NonexaminerOne's report).) The ALJ also endorsed the opinions of non-examining state-agency psychologist Dr. ExaminerTwo. (Tr. at 30 ("I assign significant weight to Dr. ExaminerTwo's opinion"); id. at 623-37 (Dr. ExaminerTwos's statements).) Both Dr. NonexaminerOne and Dr. ExaminerTwo restricted Lastname to "repetitive" work. (Tr. at 536 ("He seems able to do simple repetitive tasks."); id. at 636 ("He retains the ability to carry out simple and repetitive tasks in a reasonably consistent manner.").) The ALJ's mental residual functional capacity finding and corresponding hypothetical question to the vocational expert did not, however, include a restriction to "repetitive" work. (Tr. at 39 (ALJ's decision); id. at 91-93 (hypothetical question).) Therefore,

the ALJ's residual functional capacity finding and hypothetical question are incomplete accepting as true Dr. NonexaminerOne's and Dr. ExaminerTwo's opinions. See, e.g., Gamer v. Secretary of Health and Human Servs., 815 F.2d 1275, 1279 (9th Cir. 1987) (requiring an accurate hypothetical question).

2. Dr. ExaminerTwo Found "Often" Deficiencies.

Dr. ExaminerTwo determined that Lastname would "often" have deficiencies in concentration, persistence, or pace resulting in failure to complete tasks in a timely manner. (Tr. at 632.) The ALJ himself acknowledged that Lastname had "moderate" deficiencies in concentration, persistence, or pace. (Tr. at 32.) The ALJ did not, however, include in his residual functional capacity finding and corresponding hypothetical question any restriction on Lastname's ability to maintain concentration and attention. (Tr. at 38 (residual functional capacity finding); id. at 91-92 (hypothetical questions).) This was error. See Newton v. Chater, 92 F.3d 688, 694-95 (8th Cir. 1996). In Newton, an ALJ obtained vocational-expert testimony. Newton, 92 F.3d at 694-95. Newton argued that the hypothetical question posed to the vocational expert "was defective because it omitted medical evidence of his deficiencies of concentration, persistence, or pace resulting in a failure to complete tasks in a timely manner," id. at 694, i.e., the often limitation, id. at 695. In Newton, the Commissioner argued that the often limitation was taken into account because the hypothetical question limited the person to "simple jobs." Id. at 695. The Eighth Circuit disagreed, holding that any hypothetical question "should include Newton's deficiencies of concentration, persistence, or pace so that the vocational expert might accurately determine his ability to work." Id.

Thomas v. Barnhart, 278 F.3d 947 (9th Cir. 2002), supports Lastname's reliance on Newton. In Thomas, the claimant relied on Newton and argued that the ALJ's hypothetical

question did not reflect the ALJ's often limitation. Id. at 956. The Ninth Circuit disagreed because a vocational expert testified and took into account the claimant's difficulty concentrating. Id. Unlike Thomas, the ALJ in this case did not ask a vocational expert to take into account Lastname's reduced ability to concentrate. (Tr. at 91-92.)

VII. Conclusion

The Court should enter judgment under sentence four of 42 U.S.C. § 405(g), reversing the Commissioner's final decision without a remand for a rehearing, i.e., for a finding of disability and award of benefits. Lester, 81 F.3d at 834; Reddick, 157 F.3d at 729-30. Lastname was disabled at step three and at step five. Alternatively, the Court should enter judgment under sentence four reversing the Commissioner's final decision with a remand for a rehearing, i.e., for further administrative proceedings.

Respectfully submitted,

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