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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 EDNA F. LEWIS on behalf of RANDEL S.
12 DAVIS (Deceased),

13 Plaintiff,

14 vs.

15 MICHAEL ASTRUE, Commissioner of
16 Social Security Administration

17 Defendant.
18

CASE NO. 09-CV-2110-MMA-WMC

**REPORT AND
RECOMMENDATION: (1) TO
GRANT IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; (2) TO DENY
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT;
AND (3) REMAND FOR FURTHER
PROCEEDINGS**

19 **I. INTRODUCTION**

20 Edna F. Lewis ("Plaintiff")¹ brings this action on behalf of Randel S. Davis, deceased,
21 pursuant to section 405(g) of the Social Security Act, 42 U.S.C. § 1383(c)(3), to obtain judicial
22 review of a final decision of the Commissioner of Social Security ("Commissioner") denying
23 Plaintiff's claim for Supplemental Security Income ("SSI") under Title XVI of the Social Security
24 Act ("Act"), 42 U.S.C §§ 1381, et seq. This matter was referred by Judge Michael M. Anello to
25 Magistrate Judge William McCurine, Jr. for a Report and Recommendation pursuant to 28 U.S.C.
26 § 636(b)(2) of Title 28 of the United States Code and Federal Rule of Civil Procedure 72(b).

27 ¹ All subsequent references to "Plaintiff" in this Order will refer to Randel S. Davis, the claimant. As
28 such, even though Edna F. Lewis is the formal Plaintiff in this matter, "Plaintiff" will be referred to in the male
gender. Further, "Ms. Lewis" will be used for all subsequent references to Edna F. Lewis *not* in her capacity
on behalf of Randel S. Davis, *e.g.*, as the author of non-medical witness statements.

1 Plaintiff has filed a motion for summary judgment. In the motion, Plaintiff argues he
2 should have been found “disabled” under the Act beginning February 1, 2003. In addition,
3 Plaintiff argues the Appeals Council’s decision adopting the January 25, 2007 decision of the
4 Administrative Law Judge (“ALJ”), which determined Plaintiff was disabled beginning November
5 22, 2006, should be reversed because the ALJ’s decision is not supported by substantial evidence
6 and is based on legal error. The Commissioner has filed a cross-motion for summary judgment.
7 In the motion, Commissioner argues the contrary, namely the ALJ’s decision is supported by
8 substantial evidence and is not based on legal error.

9 Pursuant to the Southern District of California Local Civil Rule 7.1(d)(1), the Court finds
10 these motions may be decided on the papers precluding need for oral argument. After careful
11 consideration of the papers, the administrative record and the applicable law, the Court
12 recommends the Commissioner’s decision denying disability benefits be **VACATED**, Plaintiff’s
13 motion for summary judgment on behalf of Plaintiff be **GRANTED IN PART**; Defendant’s cross
14 motion to affirm the ALJ’s decision be **DENIED** and this action be **REMANDED** for further
15 proceedings.

16 **II. FACTUAL BACKGROUND**

17 Plaintiff was 45-years-old on the alleged onset date of his disability of February 1, 2003.
18 Plaintiff’s medical reports span the period of 2003 to 2006 and document Plaintiff’s conditions of,
19 *inter alia*, post traumatic stress disorder (“PTSD”), depression, panic disorder,² hepatitis C,
20 cirrhosis, psoriasis, recalcitrant thrombocytopenia, hepatosplenomegaly, gingival bleeding,
21 gastrointestinal bleeding, hypertension, and diabetic hyperglycemia.

22 **III. PROCEDURAL HISTORY**

23 On October 20, 2003, Plaintiff protectively filed an application for SSI under Title XVI of
24 the Act, alleging disability beginning February 1, 2003. (Administrative Record (“A.R.”) at 22).
25 On April 30, 2004, Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”),
26 which took place on January 18, 2005. (A.R. at 53).

28 ² Plaintiff alleges his mental health issues arise from an assault in 2002. He was the victim of an alleged hate-crime related to his homosexual status.

1 At the January 18, 2005 hearing, Plaintiff testified he had not worked since February 2003
2 and was unable to work due to PTSD, depression and other anxiety-related mental illnesses. (A.R.
3 at 562-63). On March 8, 2005, the ALJ issued a decision denying the application. (A.R. at 32).
4 Plaintiff appealed the denial to the Appeals Council. (A.R. at 70).

5 On October 25, 2005, the Appeals Council vacated the ALJ's decision and issued an Order
6 of Remand stating the prior decision by the ALJ did not explain the weight given to the reports of
7 Dr. Sean Ryan and Dr. Brian Miller, or provide the explanation for their rejection. (A.R. at 75-78).
8 Accordingly, the Appeals Council directed the ALJ to: (1) offer an opportunity for a new hearing;
9 (2) give consideration to Plaintiff's treating and examining source opinions, and (3) explain the
10 weight given to this evidence. (A.R. at 22).

11 On January 9, 2007, Plaintiff appeared with counsel at a second administrative hearing and
12 testified that he was unable to work due to PTSD, depression and other anxiety-related mental
13 illnesses. Plaintiff also testified to physical symptoms resulting from several serious physical
14 conditions, particularly hepatitis C. (A.R. at 588-90).

15 On January 25, 2007, the ALJ issued a decision establishing Plaintiff has been disabled
16 under section 1614(a)(3)(A) of the Act beginning on November 22, 2006. (A.R. at 18-29).

17 On March 30, 2007, Plaintiff requested a review of the ALJ's decision before the Appeals
18 Council. (A.R. at 15-17). On April 28, 2009, the Appeals Council denied Plaintiff's request for
19 review. (A.R. at 7-10). Hence, the ALJ's decision became the final decision of the Commissioner.

20 On September 25, 2009, Plaintiff filed a Complaint initiating this action for judicial review.

21 On February 22, 2010, Defendant filed an Answer.

22 As previously mentioned in the Introduction, on June 7, 2010, Plaintiff filed a motion for
23 summary judgment ("MSJ") on several grounds requesting the case be remanded for further
24 administrative proceedings.

25 On July 7, 2010, Defendant filed a cross-motion for summary judgment ("Cross-Motion")
26 and opposition to Plaintiff's MSJ requesting the Court grant Defendant's cross-motion and deny
27 Plaintiff's MSJ.

28 On July 9, 2010, Plaintiff filed a Reply to Defendant's cross-motion.

1 **IV. LEGAL STANDARD**

2 The supplemental security income program established by Title XVI of the Act provides
3 benefits to disabled persons without substantial resources and little income. 42 U.S.C. § 1383. To
4 qualify, a claimant must establish an inability to engage in “substantial gainful activity” because of
5 a “medically determinable physical or mental impairment” that “has lasted or can be expected to
6 last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(A). The
7 disabling impairment must be so severe that, considering age, education, and work experience, the
8 claimant cannot engage in any kind of substantial gainful work that exists in the national economy.
9 42 U.S.C. § 1382(a)(3)(B).

10 **V. DISCUSSION**

11 **A. Evidence**

12 As previously noted herein, two administrative hearings were held in this case: one on
13 January 18, 2005 (“2005 Hearing”), and another on January 9, 2007 (“2007 Hearing”). Medical
14 evidence and/or testimony involving Plaintiff’s physical and mental health, particularly related to
15 Plaintiff’s ability to engage in substantial gainful activity, was presented at each hearing.

16 *a. Medical Evidence Presented*

17 -June 2004: Brian Miller, M.D., completed a mental residual functional capacity (“RFC”)
18 examination of Plaintiff and noted moderate and marked limitations in several functional areas
19 including difficulties in maintaining social functioning and ability to perform simple, repetitive
20 tasks. (A.R. at 291-92). Dr. Miller also noted Plaintiff would be required to be absent from work
21 more than ten days per month due to Plaintiff’s psychological symptoms. (A.R. at 292). In a
22 related examination, Dr. Miller concluded Plaintiff could not complete a regular workday or
23 workweek without interruption from psychiatric symptoms. (A.R. at 292). Lastly, after conducting
24 a mental assessment of Plaintiff, Dr. Miller determined Plaintiff suffers from PTSD, depression
25 and anxiety. (A.R. at 295).

26 -June 2004: Sean Ryan, M.D., completed a RFC examination of Plaintiff and noted
27 moderate and marked limitations in several functional areas including difficulties in maintaining
28 social functioning and ability to perform simple, repetitive tasks. (A.R. at 284-85). Dr. Ryan also

1 noted Plaintiff would be required to be absent from work more than ten days per month due to
 2 Plaintiff's psychological symptoms. (A.R. at 285). In a related examination, Dr. Ryan concluded
 3 Plaintiff could not complete a regular workday or workweek without interruption from psychiatric
 4 symptoms. (A.R. at 285). Lastly, after conducting a mental assessment of Plaintiff, Dr. Ryan
 5 determined Plaintiff exhibited symptoms of PTSD, which "significantly impair Plaintiff's ability
 6 to sustain meaningful work". (A.R. at 288).

7 -January 2007: Sidney Bolter, M.D., a board certified psychiatrist, testified as a medical
 8 expert at the 2007 Hearing after reviewing Plaintiff's medical records. With respect to Plaintiff's
 9 mental health, Dr. Bolter testified the medical records in section 3F of the Administrative Record,
 10 which contain, *inter alia*, the records of Plaintiff's visits to Dr. Miller and Dr. Ryan, are
 11 "conclusory" statements unsupported by adequate "back-up notes" or "mental status
 12 examinations". (A.R. at 601-02). In particular, Dr. Bolter testified there is nothing in Plaintiff's
 13 medical records supporting a finding of depression or PTSD despite notations to the contrary in
 14 the reports of Dr. Miller and Dr. Ryan.³ (A.R. at 601-03). Dr. Bolter acknowledged, however,
 15 Plaintiff may have "some depression in reaction to...[the] Hepatitis C [diagnosis]" and such
 16 depression may be "hard to treat" because of the "real problems" associated with the "chemical
 17 interaction between interferon and anti-depressant[s]". (A.R. at 602). As a result of the lack of
 18 supporting evidence in the reports, Dr. Bolter testified Petitioner did not have severe enough
 19 mental impairment to prevent him from performing "unskilled, low stress, no public, simple,
 20 repetitive task-type work" prior to November 2006. (A.R. at 603).

21 With respect to Plaintiff's physical health, Dr. Bolter acknowledged, as previously
 22 mentioned, Plaintiff's hepatitis C diagnosis. (A.R. at 602). In addition, Dr. Bolter testified

23
 24 ³ In his testimony, Dr. Bolter indicated the methods used by Dr. Miller and Dr. Ryan to determine
 25 Plaintiff's mental health condition were inadequate and led to inaccurate results. In particular, with respect to
 26 diagnosing PTSD, Dr. Bolter contrasted the method of direct questioning with voluntary divulgence; the former
 27 being inadequate, the latter being more reliable. Dr. Bolter testified:

28 When we make these [PTSD] diagnoses, we can squeeze a diagnosis out of a person. If you
 read, in a mental status, patient endorses these symptoms, it means he's been asked
 directly. The patient admits to these symptoms when he's asked directly. A patient
volunteers these symptoms, that's something else. We don't expect the patient to
 understand all the technical aspects of any of these illnesses but there's [sic] some
 symptoms that are so obvious in post-traumatic stress that anybody who has it is going to
 tell you about it and [Plaintiff] hasn't said anything. So I can't use [the reports of Dr. Miller
 and Dr. Ryan]. (A.R. at 602). (Emphasis added).

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