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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 M.F.)
12) CIVIL NO. 3:20-cv-08742-WHA
13 Plaintiff,)
14)
15 v.)
16) REPLY TO OPPOSITION TO
17) MOTION UNDER FED. RULE OF
18) CIV.P., RULE 59(e); and RULE 60 (b)(3)
19)
20 Kilolo Kijakai) DATE OF HEARING: JUNE 9, 2022
21)
22 Acting Commissioner of Social Security,)
23)
24 Defendant.)
25)
26)
27)

28 **I. INTRODUCTION**

29 This Motion to Alter Judgment (Rule 59(e), and Rule 60 (b)(3) Fraud, Misrepresentation
30 or Misconduct) are detailed here because prior to this Court’s Order of May 2, 2022, Plaintiff
31 believed this court only adjudicated one important argument, psychotropic medication refusal
32 and not: 1 the use of the Medical Vocational Guidelines (Grids), 2. The non-inclusion of
33 substantial limitations in the VE hypos and 3. the misuse of the regulation providing for hiring a
34 CE, because the Court chose not to adjudicate these issues including of a substantial 40 year

1 fraud against those whose disability is mental and/or developmental . Plaintiff’s counsel was a
 2 senior attorney for the SSA during the 1980s and knew then and now that the Grids cannot
 3 lawfully be used for solely non-exertional impairments as more fully described herein. It was not
 4 until the May 2, 2022 Order on attorney fees that another explanation came to light when this
 5 Court articulated that there was no bad faith because “... Plaintiff provides only unsupported
 6 and conclusory assertions of bad faith....” Order at 5-6 (Doc 35.) The Court should adjudicate
 7 on the merits because Defendant has committed a massive fraud on the public and Plaintiff by
 8 unlawfully applying the Grids to Major Depression and VE hypotheticals not being based on all
 9 functional limitations in the record.
 10

11 **I. THE MEDICAL VOCATIONAL GUIDELINES DO NOT APPLY TO NON-**
 12 **EXERTIONAL DISABILITIES**

13 Because the ALJ found the opinions of the State agency (DDS) consultants were
 14 supported by the medical record, they serve as substantial evidence to support the ALJ's RFC
 15 findings. But the SSA is misrepresenting; it also stated: “... The ALJ adopted these opinions
 16 because they were consistent with the medical record including the “mild objective findings” and
 17 supported subjective statements. AR 22, “SSA MSJ at 11:24-26, 12:2-5. This finding is not
 18 based on substantial evidence since the ALJ adopted the DDS doctors who did find substantial
 19 evidence (See p.6, *infra*.) which violated *the treating source rule* in that the SSA must articulate
 20 specific and legitimate reasons for not giving Drs. Diamond and Yalom more weight than a non
 21 treating, non-examining (like DDS) doctors, without it there is legal error. See *Lester v. Chater*,
 22 81 F.3d 821(9th Cir. 1995) and *Garrison v. Colvin*, 759 F.3d 995. (9th Cir. 2014.)¹
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26 ¹ The Supreme Court analyzed an analogous situation in *Osterneck v. Ernst & Whinney*, 489
 27 U.S. 169 (1987) and found that so long as there are fundamental issues of fairness or justifiable
 unique circumstances, Rule 59(e) is cognizable after 28 days.

1 The premise for the SSA 40-year fraud on our country's population with psychiatric
2 and/or developmental disabilities especially in light of what happened in the underlying facts
3 and resulting waiver law in *Bowen v. New York*, 476 U.S. 467 (1986) justify a deeper look into a
4 vast and continuing fraud into a vulnerable segment of our population "...Where the
5 Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes
6 of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn
7 the facts concerning the cause of action...." *Ibid*.

9 In this 59(e) Motion Plaintiff states "... The DDS also used the Medical Vocational
10 Guidelines, which do not apply to mental/non-exertional disabilities. AR 64. Clear and
11 substantial authority is stated in Plaintiff's MSJ, Argument C - are in Plaintiff's MSJ opening
12 brief at 17:19-24, 17:24-28, 18:3, and 18:18-22.

13 Both the ALJ and DDS rely on a 1985 SSR 85-15 (attached as Ex. A), and Rule 204.00
14 of the Grids for solely non-exertional limitations. ALJ Dec. AR 22, DDS at AR 64 near bottom.
15 The SSA MSJ OPP. at 7: n. 7 references SSR 85-15 which in turn states it is in accord with a
16 non-cited order of a district court in Minnesota (MN) even though the Supreme Court in 1983, 2
17 years prior, issued an opinion on the same guidelines. **Moreover, looking at the 15 most recent**
18 **cases in the Ninth Circuit, it appears that all district courts reject SSR 85-15 as something**
19 **that is not reliable. There did not appear to be any Court of Appeals opinions to cite.**

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21
22 The SSA's MSJ Opp. (Doc 22) at 12:5-22, n.7 The SSA states Plaintiff is presumed to
23 have the highest exertional level, heavy/very heavy. This absurd statement means this 58-year-
24 old woman can lift and carry over 100 pounds daily on a sustained basis day after day and her
25 Major Depression may or may not affect her strength. The SSA cites fake grounds inconsistent
26 with the Supreme Court upholding the Grids arguing that *Thomas*, 278 F.3d at 957 is legal
27

1 support for this. First, the opinions of the DDS doctors are not supportive of this. See *infra* at
 2 5:22-25 and 6:1-21. In other words, this is a misrepresentation, second, Plaintiff *Thomas* was
 3 examined by an orthopedic surgeon, for neck and right wrist pain. He diagnosed right carpal
 4 tunnel syndrome and neck pain radiating into the right arm which means she has exertional,
 5 resulting functional limitations, third, *Thomas v. Barnhart*, 278 F.3d 947(9th Cir. 2002) has been
 6 overruled by 20 C.F.R.§ 404.1529. *How we evaluate symptoms, including pain* states, in part, we
 7 consider all your symptoms, including pain, and the extent to which your symptoms can
 8 reasonably be accepted as consistent with the objective medical evidence and other evidence. In
 9 other words, "adjudicators will not assess an individual's overall character or truthfulness in the
 10 manner typically used during an adversarial court litigation. The focus of the evaluation of the
 11 individual's symptoms should not be to determine whether he or she is a truthful person."
 12

13 The *Heckler* case always overrode SSR 85-15 cited by the ALJ and DDS and states:
 14

15 " . . . These guidelines relieve the Secretary of the need to rely on
 16 vocational experts by establishing through rulemaking the types and numbers of
 17 jobs that exist in the national economy. They consist of a matrix of the four
 18 factors identified by Congress -- **physical ability** (emphasis added), age,
 19 education, and work experience . . . she must consider whether jobs exist in the
 national economy that a person having the claimant's qualifications could
 perform...." *Heckler v. Campbell*, 461 U.S. 458, 461-2, 103 S. Ct.1952 (1983)
 (internal citations omitted.)

20 SSR 85-15 omits the Supreme Court under *citation of authorities* and tries to justify its purpose
 21 as clarifying SSR 83-13 which is not available to the public. The title, the SSA states is the same,
 22 i.e., *the medical vocational rules as a framework for evaluating solely non-exertional*
 23 *impairments, which is unlawful.*

24 The issues in the supreme court case are also due process issues: 1. the ALJ must
 25 consider each of Claimant's functional limitations; specifically, and 2. each person's physical
 26 ability, age, education, work experience and the Claimant's literacy in English. The two basic
 27

1 underlying criteria are 1. Exertional level and skill level. There are four exertional categories;
2 i.e., sedentary, light (a Claimant can frequently or up to 2/3 of a day, lift and carry 10 pounds and
3 occasionally or up to 1/3 of a day, 20 pounds, medium, heavy and very heavy and skills are
4 divided into three categories – unskilled (can be learned under 30 days), semi-skilled and skilled,
5 all as defined. *Id* at 461-465.

6
7 In the present case the SSA's position is bad faith which according to EAJA results in
8 punitive damages. Clear and substantial authority is stated in detail in Plaintiff's Motion for
9 Summary Judgment (MSJ) as Argument C². at 17, 19-22. Its purpose to obviate the need to
10 testimony of a vocational expert (VE) in back/spine impairment cases, the largest number of
11 disability cases.³ For the deficient hypo VE argument in this case, see Plaintiff's opening MSJ at
12 19-22.

13
14 A treating source medical provider's opinion must be given more weight than a 1 time
15 examining provider like Dr. Salvador-Moses, CE or DDS doctors, chart readers who have never
16 seen the patient. See *Lester v. Chater*, 81 F.3d 821(9th Cir. 1995) and *Garrison v. Colvin*, 759
17 F.3d 995. (9th Cir. 2014). The treating source rule applies to M.F. notwithstanding SSA's
18 eliminating their treating source regulation because this case was filed in 2016 before the new
19 regulation took effect. In evaluation of mental impairments 20 C.F.R. § § 416.920a. *Evaluation*
20 *of mental impairments*. This include using the psychiatric technique that was not done and
21 looking back longitudinally which apparently was not done.
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26 ² It should be noted that in Plaintiff's opening brief Argument "C" and "D" are interposed in the
Table of Contents "D" and Argument "C".

27 ³ See <https://www.ssa.gov/policy/docs/ssb/v73n2/v73n2p39.html>

1 **III. THERE WAS EVIDENCE THAT NEEDED TO BE IN VE HYPOS**

2 Moreover, intentionally overruling a Supreme Court case (*Heckler*) is unconstitutional.

3 At AR 58 the DDS doctor states “We believe that Claimant may meet [Listing] 12.04 medical

4 listing...” which is the highest level of severity and Plaintiff’s major depression is so severe that

5 if affects relationships, social interactions, limits concentration, causes sleep disturbance and her

6 prognosis is guarded. Plaintiff’s disability affects her ability to interact with supervisors and it

7 would be difficult to get through the workday without distractions. They go on to find that

8 although the primary major depression is severe, the secondary trauma and stressor related

9 disorder is also severe. AR 58. Cases at the administrative level are supposed to be based on

10 evidence, not on an end result (not disabled) dictated by the SSA. At AR 60 her symptoms are

11 detailed to limitations in understanding and memory limitations, sustained concentration and

12 persistence limitations, social interaction and ability to adapt limitations. AR 60 and AR 61. Her

13 work-related limitations are reaffirmed in major part including concentration, persistence, and

14 attention for extended periods and the ability to complete a workday for extended periods.

15 Plaintiff needs an unreasonable amount of rest periods. Like most individuals with mental

16 disabilities, some limitations are at the highest level of severity. Other are “moderately” limited

17 and others are not significantly limited as is the case here; e.g., when the question is does

18 Plaintiff needs “special supervision.” Indeed, at the highest level of severity, Listing 12.04 of 20

19 C.F.R. Part 404, subpt P, App.1, Listing 12.04 requires 1 from 12.04 A, 2 out of 12.04 B. or C.

20 Specifically, A. has 19 options. B. has 4 options and C. where one does not need A. and B. has 3

21 criteria. As stated in Plaintiff’s MSJ the ALJ declined to continue the hearing because a

22 psychiatrist canceled 10 minutes prior to starting the hearing. P MSJ,14:12-16. It is likely she

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1 would have said Plaintiff meets or equals Listing 12.04 - *Depressive, bipolar and related*
2 *disorders.*

3 **IV. WRONGFUL HIRING OF A CE**

4 20 C.F.R. § 404.1519a(b) - When we will purchase a consultative examination and how
5 we will use it. As the SSA does not deny that any of the reasons under this regulation require
6 hiring a CE (IME). Dr. Salvador- Moses, a CE whose examination and opinion are consistent
7 with the applicable treating source rule. Drs. Diamond and Yalom are both treating sources.
8 Nevertheless, the 2 DDS doctors who never saw the patient apparently were told “this is a denial
9 case.” It is not unusual for the SSA to tell its DDS contractors the outcome or parts of the
10 outcome (AR 64) and this time DDS did not comply with this CE regulation (AR 57.) See SSA
11 MSJ Opp. at 12: n7 along with SSR 85-15 cited by DDS at AR 64.
12

13 **V. CONCLUSION**

14 In the SSA’s MSJ Opp. at 12, the Agency states: “...In this case, the ALJ noted that
15 Plaintiff’s “ability to perform work at all exertional levels was compromised by non-exertional
16 limitations” (AR 22). Regrettably, since there are no exertional limitations, it must be
17 assumed that Defendant’s deceit hurt anyone unfamiliar with what the Grids cover. The
18 Agency also (at p.12) tells the Court that since Plaintiff is 58 or “advanced age” and has no
19 exertional limitations. According to the SSA she can repeatedly lift and carry 100 pounds
20 and over 100 pounds. Presumably the SSA is asking this Court to believe that because
21 someone has a mental disability there is no upper limit to the amount such an individual can
22 lift and carry.
23

24 The situation is reminiscent of *Bowen v. New York*, 476 U.S. 467 (1986) where the SSA
25 used secret non-public rules to deny people with mental impairments. The *Bowen* Court
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1 forbade the use of nonpublic procedures like SSR 85-15 and allowed exhaustion waivers
2 against the SSA so an aggrieved party can go directly into federal court by having a case
3 where exhaustion would be futile, have irreparable harm, and be collateral to benefits since
4 here the SSA's secretive policy-SSR 85-15 based on an uncited district court in "MN and
5 use of Rule 404 is to cover-up the non-applicability of the Grids to psychological
6 disabilities and the Supreme Court *Heckler* case.
7

8 Nonpublic criteria (procedures, practices and/or policies) are illegal when used under the
9 Social Security Act. Fundamental rights such as Constitutional Due Process are cognizable under
10 *Smith v. Berryhill*, 139 S. Ct. 1765 at 1717 (2019), which states "...Congress wanted more
11 oversight by the courts rather than less under §405(g) and that "Congress designed [the statute as
12 a whole] to be 'unusually protective' of claimants." *Id.*

13 Respectfully submitted,

14 Dated: June 3, 2022

15 /s/ Steven Bruce

16 Steven Bruce
17 Attorney for Plaintiff
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