

SEP 08 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH J. TAYLOR,

Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant - Appellee.

No. 08-35661

D.C. No. 3:07-cv-05335-BHS

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Submitted August 31, 2009**
Seattle, Washington

Before: HAWKINS, McKEOWN and BYBEE, Circuit Judges.

Kenneth Taylor appeals from the district court's decision affirming the
Commissioner's denial of his applications for Social Security disability and

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

Supplemental Security Income disability benefits. Reviewing *de novo*, we reverse in part, affirm in part, and remand.

Taylor argues that the ALJ failed to properly develop the record because the ALJ did not consider Dr. Tosomeen's medical records, which Taylor's lawyer faxed to the ALJ after the hearing. The Commissioner responds that any error was harmless because the Appeals Council considered the records and held that the records did not warrant a change to the ALJ's decision. Because the Appeals Council did not explain why Dr. Tosomeen's records did not affect the result in Taylor's case, we have no basis upon which to determine whether the ALJ's error was harmless. For example, it is entirely unclear on the administrative record before us what effect, if any, the diagnosis of "failed neck syndrome" might have had on Taylor's residual functional capacity. Consequently, we reverse and remand in order for the ALJ to consider Dr. Tosomeen's records and to explain whether they change the analysis or result.

We do not embrace any of Taylor's other challenges to the ALJ's decision for the reasons given in the magistrate judge's report and recommendation, or because there is no merit to Taylor's arguments.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Each party shall bear its own costs on appeal.