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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE POTTS,

Plaintiff - Appellant,

v.

COMMISSIONER SOCIAL SECURITY
ADMINISTRATION,

Defendant - Appellee.

No. 08-36020

D.C. No. 3:07-cv-00701-HA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted November 4, 2009
Portland, Oregon

Before: KOZINSKI, Chief Judge, FISHER and PAEZ, Circuit Judges.

When the Commissioner conducts a continuing disability review to determine if a claimant is still eligible to receive disability benefits, the Commissioner must determine whether there has been “any decrease in the medical severity of [the claimant’s] impairment(s) which was present at the time of the

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

most recent favorable medical decision that [the claimant was] disabled or continued to be disabled.” 20 C.F.R. § 404.1594(b)(1), (f)(3). Here, the Administrative Law Judge (“ALJ”) incorrectly used the February 1995 decision finding Potts to be disabled as the comparison point for improvement. As the Commissioner conceded in briefing and in oral argument, the correct comparison point was Potts’ continuing disability review in March 2000. Because the ALJ’s findings were based on legal error, we reverse the district court’s judgment and remand with instructions to remand to the Commissioner for further proceedings consistent with this memorandum. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Upon remand, Potts’ benefits may be reinstated consistent with the provisions of 20 C.F.R. § 404.1597a(i)(6).

REVERSED and REMANDED.