NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANN PENNY BATEN,

Plaintiff-Appellant,

v.

KILOLO KIJAKAZI, Acting Commissioner of Social Security,

Defendant-Appellee.

No. 22-15067

D.C. No. 5:20-cv-07336-SVK

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan G. Van Keulen, Magistrate Judge, Presiding

Argued and Submitted November 15, 2022
San Jose, California

Before: GRABER, TALLMAN, and FRIEDLAND, Circuit Judges.
Dissent by Judge TALLMAN

Plaintiff Ann Penny Baten appeals the district court's order affirming an administrative law judge's ("ALJ") decision denying Plaintiff's claim for disability insurance benefits and supplemental security income. We review de novo the district court's ruling and may set aside the ALJ's denial of benefits only for legal

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

error or lack of substantial evidence. Trevizo v. Berryhill, 871 F.3d 664, 674 (9th Cir. 2017). We reverse and remand for further proceedings.

Plaintiff was found disabled, and is receiving benefits, for the period beginning on May 27, 2017. Plaintiff argues that the ALJ erred in finding that Plaintiff was not disabled for the period from January 1, 2015, through May 26, 2017.

On July 1, 2015, examining physician Dr. Calvin Pon found that Plaintiff could stand and/or walk for four to six hours during an eight-hour workday. Medical consultants Dr. D. Chan and Dr. Joan Bradus later reviewed Plaintiff's medical records, including Dr. Pon's report, and found—without examining Plaintiff or explaining their conclusion—that Plaintiff could stand or walk for six hours. The ALJ purported to afford "significant weight" to Dr. Pon's assessment because he examined Plaintiff thoroughly. But the ALJ ultimately found that "prior to May 27, 2017," Plaintiff could "stand or walk a total of six hours" during an eight-hour workday.

The ALJ did not explain why Dr. Pon's assessment that Plaintiff could stand or walk for "four to six hours" meant "six hours" for the period between July 1, 2015, and May 27, 2017. Dr. Pon's opinion reflected a range of Plaintiff's walking and standing limitations and suggested that there might be times when Plaintiff could stand or walk for only a maximum of four hours. And we can find no

explanation in the record or in the ALJ's decision that would justify totally precluding the more disabled end of that range in favor of a less restrictive residual functional capacity ("RFC"). See Moore v. Apfel, 216 F.3d 864, 867 (9th Cir. 2000) (noting that an assessment of "four to six hours" of sitting does not mean "up to six hours" of sitting and is ambiguous, requiring further analysis and clarification). The distinction between a four-hour and a six-hour limitation is critical because the ALJ based the post-May 27, 2017 disability finding on the later report of examining physician Dr. Emily Cohen, who endorsed the four-hour figure. Thus, had the ALJ adopted the four-hour limitation based on Dr. Pon's assessment, he likely would have found Plaintiff disabled during all or most of the disputed period.

Relatedly, the ALJ also erred by failing to address the competing opinions of the medical experts. The ALJ must resolve any conflicts in the medical evidence. Thomas v. Barnhart, 278 F.3d 947, 956–57 (9th Cir. 2002). In light of the dispute over Plaintiff's walking and standing limitations, the ALJ had to provide an explanation for adopting the opinions of Dr. Chan and Dr. Bradus, who only reviewed Plaintiff's medical records, over the opinion of Dr. Pon, who examined Plaintiff. See Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) ("If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported

by substantial evidence." (quoting Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008))). Because the ALJ failed to give adequate consideration to Dr. Pon's assessment, he erroneously rested the RFC determination on the reports of non-examining state-agency physicians.

We therefore reverse the district court's judgment with instructions to remand the case to the ALJ for further proceedings consistent with this disposition. See Brown-Hunter v. Colvin, 806 F.3d 487, 496 (9th Cir. 2015) ("Where there is conflicting evidence, and not all essential factual issues have been resolved, a remand for an award of benefits is inappropriate." (quoting Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d. 1090, 1101 (9th Cir. 2014))).

**REVERSED AND REMANDED.**

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22-15067—*Baten v. Kijakazi*

TALLMAN, Circuit Judge, dissenting.

Ann Penny Baten suffers from various degenerative medical conditions. It is undisputed that in the fall of 2017 Baten severely decompensated and exhibited an obviously disabled symptomology. Because of the degenerative nature of her conditions, Baten likely became disabled some time prior to the fall of 2017. Thus, the ALJ faced the difficult task of searching for objective evidence in the record that would establish Baten's disability onset date—i.e., the point at which Baten exhibited a disabling residual functional capacity (RFC). But Baten was ultimately "responsible for providing the evidence . . . use[d] to make a finding about [her] residual functional capacity." 20 C.F.R. § 404.1545(a)(3) (2022).

The majority reverses and remands this case solely because it believes the ALJ rejected Dr. Pon's opinion without explanation. In July 2015, Dr. Pon—who was not her regular treating physician but rather a consultative agency evaluator—examined Baten and concluded that she "should be able to stand and/or walk for a total of 4-6 hours" per day. Later that month, reviewing physician Dr. Chan found that Baten could stand or walk for "[a]bout 6 hours" per day "with normal breaks" provided she "[m]ust periodically alternate sitting and standing to relieve pain and discomfort." In January 2016, Dr. Bradus, another reviewing physician, made the same findings after reviewing Baten's updated records. Thus, the ALJ was faced

with generally consistent medical opinions with minor differences: Dr. Pon found that Baten could stand or walk for four to six hours, whereas Drs. Chan and Bradus found she could stand or walk for up to six hours if permitted breaks and the opportunity to alternate between standing and sitting.

After an extensive and "careful consideration of the entire record," including the above opinions, the ALJ found that Baten was not disabled prior to May 27, 2017. Relevant to the majority's holding, the ALJ reconciled the scant differences in the medical opinions by finding that "the record as a whole" established Baten could "stand or walk a total of six hours in one-hour intervals throughout an eight-hour workday with normal breaks" prior to the onset date.

In concluding that the ALJ credited Drs. Chan and Bradus's opinions over Dr. Pon's, the majority strains to find inconsistency where there is none. The ALJ never purported to reject Dr. Pon's opinion. Rather, the ALJ "considered Dr. Pon's assessment," found it to be "well supported and consistent with the available evidence during [the relevant] period," and "afforded it significant weight." Glossing over this, the majority essentially concludes that the ALJ must have rejected Dr. Pon's opinion because the ALJ found Baten could stand or walk for a total of six hours instead of Dr. Pon's four to six hours. But the majority incorrectly assumes that the opinions of Dr. Chan, Dr. Bradus, and the ALJ are necessarily inconsistent with Dr. Pon's opinion.

The Social Security Administration defines RFC as "the *most* [a claimant] can still do despite [their] limitations." 20 C.F.R. § 404.1545(a)(1) (2022) (emphasis added). Our cases routinely reaffirm this principle. *See, e.g.*, *Zavalin v. Colvin*, 778 F.3d 842, 845 (9th Cir. 2015); *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1097 (9th Cir. 2014); *Berry v. Astrue*, 622 F.3d 1228, 1233 (9th Cir. 2010). Accordingly, it was not error for the ALJ to rely on the upper limit of Dr. Pon's estimate. Furthermore, the ALJ's RFC provided for adequate breaks and frequent alternation between sitting and standing—something Dr. Pon did not consider. In this way, the ALJ's RFC was more restrictive than Dr. Pon's findings. The ALJ reasonably reconciled the minor differences between the opinion evidence and reached an RFC that was most consistent with each of the doctors' findings and the record as a whole.[1]

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[1] The majority's reliance on *Moore v. Apfel*, 216 F.3d 864 (9th Cir. 2000) is inapposite. In that case, the ALJ contradicted *himself* by finding the claimant could sit four to six hours but then inexplicably directed the vocational expert to consider jobs for individuals able to sit for six hours. *Id.* at 866. Our review was limited to whether the ALJ's clarification that four to six hours meant up to six hours complied with the district court's remand order. *Id.* In holding that the ALJ had complied with the order on remand, we implicitly concluded that it was reasonable for the ALJ to clarify that four to six hours also meant up to six hours. *Id.* at 867. Regardless, our task in *Moore* was to determine the purely procedural issue of whether the ALJ complied with the district court's remand order; we expressed no opinion as to the validity of the district court's underlying logic.

The ALJ faced the difficult task of determining the precise point in time that Baten became disabled. This task was made more difficult by significant gaps in Baten's medical treatment while she traveled abroad and by her persistent refusal to take her diabetes seriously and accept the prescribed medications for it. Many of the symptoms that she alleges indicate an earlier disability onset date were direct consequences of her own actions contrary to medical advice. *See Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015) (explaining a failure to seek treatment is relevant to credibility).

I would not add to the ALJ's task of drawing a line when disability commenced—that is without question difficult to draw with precision on this record—by requiring him to readdress an insignificant discrepancy in the record. We should faithfully adhere to the deferential standard of review the law prescribes and respect where the line was drawn. I respectfully dissent.