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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORALIA DE MONGE SEPULVEDA,)	NO. CV 06-08164-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE, ¹)	
Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on January 10, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for disability insurance benefits ("DIB"). On January 25, 2007, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 30, 2007, in which: plaintiff seeks an order reversing the Commissioner's decision and directing the immediate payment of benefits or, in the alternative,

¹ Michael J. Astrue became the Commissioner of the Social Security Administration on February 12, 2007, and is substituted in place of former Commissioner Joanne B. Barnhart as the Defendant in this action. (See Fed. R. Civ. P. 25(d)(1); Section 205(g) of the Social Security Act, last sentence, 42 U.S.C. § 405(g).)

1 remanding the matter for further proceedings; and defendant seeks an
2 order affirming the Commissioner's decision. The Court has taken the
3 parties' Joint Stipulation under submission without oral argument.
4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND DECISION**
6

7 Plaintiff filed her application for DIB on December 4, 2002,
8 alleging an inability to work since September 21, 2001, due to
9 musculoskeletal and mental impairments.² (A.R. 18, 46-48.) Plaintiff's
10 claim was denied initially and upon reconsideration, and on May 25,
11 2005, plaintiff, who was represented by counsel, testified at a hearing
12 before Administrative Law Judge Lawrence D. Wheeler ("ALJ"). (A.R. 670-
13 90.) On October 25, 2005, the ALJ denied plaintiff's claim (A.R. 18-
14 27), and the Appeals Council subsequently denied plaintiff's request for
15 review of that decision (A.R. 7-10).
16

17 In his written decision, the ALJ partially accepted the opinions of
18 plaintiff's treating physicians and found that plaintiff "has the
19 residual functional capacity ["RFC"] to perform the physical exertion
20 and non-exertional requirements of work except for more than sedentary
21 work, more than occasional climbing, stooping, balancing, kneeling,
22 crouching or crawling, she must avoid working on uneven terrain, and she
23 is limited to simple tasks and minimal contact with others." (A.R. 27.)
24 Additionally, the ALJ found that plaintiff is "not restricted in neck
25

26 ² Specifically, the ALJ found that plaintiff has "severe lower back,
27 bilateral knee, and left shoulder conditions, obesity, depressive
28 disorder with anxiety and psychological factors affecting mental
conditions, but she does not have an impairment or combination of
impairments listed in, or medically equal to one listed in Appendix 1,
Subpart P, Regulations No. 4." (Administrative Record ("A.R.") 26, 27.)

1 movements" (A.R. 21), and the ALJ did "not find a need to restrict above
2 shoulder level work" (A.R. 23). The ALJ further found, based upon his
3 partial acceptance of plaintiff's treating psychiatrist's opinions, that
4 plaintiff has a "slight to less than moderate mental impairment based
5 limitations in daily activities, moderate limitations in maintaining
6 social functioning, slight to less than moderate limitations in
7 concentration, persistence and pace and no episodes of decompensation."
8 (A.R. 25.)

9
10 The ALJ determined that plaintiff is unable to perform her past
11 relevant work as a pre-school teacher, but based upon the vocational
12 expert's testimony and plaintiff's RFC, she is able to perform work as
13 an addresser and lens inserter. (A.R. 27.) Therefore, the ALJ
14 concluded that plaintiff was not under a disability at any time through
15 the date of his decision. (*Id.*)

16 17 STANDARD OF REVIEW

18
19 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
20 decision to determine whether it is free from legal error and supported
21 by substantial evidence in the record as a whole. Orn v. Astrue, 495
22 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
23 evidence as a reasonable mind might accept as adequate to support a
24 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
25 a mere scintilla but not necessarily a preponderance." Connett v.
26 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003)(citation omitted). While
27 inferences from the record can constitute substantial evidence, only
28 those "'reasonably drawn from the record'" will suffice. Widmark v.

1 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006)(citation omitted).

2
3 Although this Court cannot substitute its discretion for that of
4 the Commissioner, the Court nonetheless must review the record as a
5 whole, "weighing both the evidence that supports and the evidence that
6 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y. of
7 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
8 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
9 responsible for determining credibility, resolving conflicts in medical
10 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
11 1035, 1039-40 (9th Cir. 1995).

12
13 The Court will uphold the Commissioner's decision when the evidence
14 is susceptible to more than one rational interpretation. Burch v.
15 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
16 review only the reasons stated by the ALJ in his decision "and may not
17 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
18 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
19 the Commissioner's decision if it is based on harmless error, which
20 exists only when it is "clear from the record that an ALJ's error was
21 'inconsequential to the ultimate nondisability determination.'" Robbins
22 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
23 Comm'r., 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
24 F.3d at 679.

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1 DISCUSSION

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3 Plaintiff alleges two issues: (1) whether the ALJ erred in his
4 assessment of plaintiff's physical RFC; and (2) whether the ALJ erred in
5 his assessment of plaintiff's mental RFC.

6
7 **I. The ALJ Failed To Provide Specific And Legitimate Reasons Supported**
8 **By Substantial Evidence For Rejecting Portions Of Plaintiff's**
9 **Treating Physicians' Opinions Regarding Plaintiff's Physical RFC.**

10
11 A treating physician's conclusions "must be given substantial
12 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even
13 where the treating physician's opinions are contradicted, "if the ALJ
14 wishes to disregard the opinion[s] of the treating physician he . . .
15 must make findings setting forth specific, legitimate reasons for doing
16 so that are based on substantial evidence in the record." Winans v.
17 Bowen, 853 F.2d 643, 647 (9th Cir. 1987).

18
19 In the present case, the ALJ clearly set forth specific reasons for
20 rejecting portions of plaintiff's treating physicians' opinions.
21 However, these reasons were neither legitimate nor based upon
22 substantial evidence. Accordingly, the ALJ's failure to provide
23 specific *and* legitimate reasons, *based upon substantial evidence*,
24 constitutes error.

25
26 In his decision, the ALJ rejected portions of the November 2003
27 assessment of plaintiff's treating orthopedist, Steven Nagelberg, M.D.
28 Specifically, the ALJ rejected Dr. Nagelberg's opinion that plaintiff

1 has "manipulative (or related environmental) restrictions . . . [and]
2 that [plaintiff] is restricted to less than 2 hours of 8 hours standing
3 and/or walking (albeit he indicates that that [sic] she does not require
4 an assistive device) or that she must have a job that permits shifting
5 of positions at will from sitting, standing or walking, or may require
6 unscheduled breaks." (A.R. 22.) In rejecting these limitations, the
7 ALJ cites the following reasons: (1) plaintiff's ability to engage in
8 daily activities suggests that Dr. Nagelberg's assessment of plaintiff's
9 functional capacity is unduly limited; (2) Dr. Nagelberg had not
10 examined plaintiff since May 2003, which was prior to plaintiff's right
11 knee surgery; and (3) there is opposing opinion evidence from one-time
12 consultative examiner, Raymond Lee, M.D. (A.R. 21-22.)

13
14 The ALJ improperly relies on plaintiff's ability to engage in
15 limited daily activities to justify his rejection of Dr. Nagelberg's
16 opinion. It is well-settled that "disability claimants should not be
17 penalized for attempting to lead normal lives in the face of their
18 limitations." Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
19 The ALJ states that plaintiff's daily activities "reflect that she does
20 household chores, including cooking and preparing meals, shopping and
21 other activities during which she is on her feet." (A.R. 22.) However,
22 it is clear that "many home activities are not easily transferrable to
23 . . . the more grueling environment of the workplace, where it might be
24 impossible to periodically rest or take medication." Fair v. Bowen, 885
25 F.2d 597, 603 (9th Cir. 1989). The ALJ's reliance on plaintiff's
26 performance of simple self-care duties, to support his rejection of Dr.
27 Nagelberg's opinion, constitutes error.

1 Additionally, while it is true that Dr. Nagelberg's opinions are
2 based on an examination of plaintiff prior to her right knee surgery, so
3 are Dr. Lee's opinions.³ As a one-time consultative examiner, Dr. Lee's
4 opinion is clearly entitled to less weight than the opinion of Dr.
5 Nagelberg, who regularly examined and treated plaintiff over a year-long
6 period. See Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
7 1989)(treating physician opinions are entitled to great deference). As
8 neither Dr. Nagelberg nor Dr. Lee examined plaintiff after her right
9 knee surgery, the ALJ's reliance on Dr. Lee's "opposing opinion
10 evidence" to support his rejection of portions of the opinions of Dr.
11 Nagelberg and Dr. Hay, as discussed below, constitutes error.

12
13 The ALJ also improperly rejected portions of the opinion of
14 plaintiff's treating orthopedic surgeon, Phillip Hay, M.D., as set forth
15 in his November 2003 and May 2004 assessments. (A.R. 614-17, 618-33.)
16 To diminish the weight accorded to Dr. Hay's opinions, defendant
17 contends that Dr. Hay was not plaintiff's treating physician, but an
18 examining physician for the purpose of plaintiff's worker's compensation
19 case. In fact, Dr. Hay consistently and routinely treated plaintiff for
20 her work-related injuries from May 22, 2003, through May 1, 2004. (A.R.
21 618-38.) For all intents and purposes, Dr. Hay acted as plaintiff's
22 treating physician, and his opinions should have been weighted
23 accordingly.

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25
26 ³ Prior to completing his November 21, 2003 Physical Residual
27 Functional Capacity Questionnaire, Dr. Nagelberg had last examined
28 plaintiff on May 7, 2003. (A.R. 505.) Dr. Lee performed his internal
medicine examination on plaintiff on March 14, 2003. (A.R. 264-68.)
Plaintiff underwent right knee surgery on October 21, 2003. (A.R. 503-
04.)

1 Critically, Dr. Hay, unlike both Drs. Nagelberg and Lee, examined
2 plaintiff following her right knee surgery, opined that her prognosis
3 was "guarded," and diagnosed her with internal derangement of right
4 knee, patellar femoral syndrome of right knee, chondromalacia patella,
5 and synovitis of right knee. (A.R. 614, 629.) Dr. Hay further opined
6 that, as of May 2004, plaintiff's knee and lower back disabilities
7 precluded: prolonged walking, prolonged standing, repetitive bending of
8 knees, kneeling, squatting, heavy lifting, prolonged weight bearing,
9 climbing, walking on uneven ground, crouching, crawling, pivoting, or
10 other activities involving comparable physical effort. (A.R. 631.) Of
11 these limitations, the ALJ adopted as part of his RFC conclusion only
12 "avoidance of working on uneven terrains." (A.R. 19.)

13
14 It appears that, in seeking to diminish the significance of
15 plaintiff's right knee limitations, the ALJ may have overstated the
16 record regarding the extent to which plaintiff "respond[ed] positively
17 . . . to surgery on her right knee. (A.R. 20.) Although plaintiff
18 testified at the hearing that her right knee "improved" after the
19 surgery, plaintiff's testimony is somewhat muddled on this issue, and it
20 is clear from both her testimony and Dr. Hay's records that significant
21 problems with her right knee persisted. (A.R. 679-80.) In his
22 assessment of plaintiff's right knee condition post-surgery, Dr. Hay
23 referred to two "progress reports," dated November 11, 2003, and January
24 5, 2004, that were authored by the orthopedic surgeon who performed
25 plaintiff's right knee surgery, but which are not included in the
26 present record. (A.R. 623.) As it is likely that these post-operative
27 reports may shed light on the extent to which this surgery alleviated
28 her right knee problems, the ALJ should have attempted to procure them,

1 and his failure to do so constitutes error.

2
3 In addition, the ALJ improperly rejected Dr. Hay's opinion that
4 plaintiff should be restricted from engaging in "prolonged forward head
5 position and above shoulder work." (A.R. 22-23.) The ALJ's primary
6 reasons for rejecting Dr. Hay's opinion regarding plaintiff's upper
7 extremity limitations are that: (1) it is "somewhat inconsistent with
8 that of Dr. Nagelberg"; and (2) plaintiff's "denial" of upper extremity
9 limitations to Dr. Lee. (*Id.*)

10
11 The ALJ's assertion, that Dr. Hay's opinion regarding limitations
12 on plaintiff's use of her upper extremities is inconsistent with that of
13 Dr. Nagelberg, is belied by the record. From May 2002, through May
14 2003, Dr. Nagelberg regularly treated plaintiff for work-related
15 injuries sustained to her neck and shoulders. (A.R. 319-53.) Not only
16 did Dr. Nagelberg consistently report that plaintiff suffered from neck
17 and shoulder pain, but also the objective physical examination findings
18 clearly revealed limitations in plaintiff's neck and shoulders. (A.R.
19 319-53, 505-62.) The ALJ ignored Dr. Nagelberg's examination findings
20 of tenderness and positive impingement sign on the left shoulder,
21 tenderness of the lumbar and cervical spine, positive Tinel's signs⁴ at
22 the left elbow, positive Tinel's sign and positive Phalen's test⁵ for

23
24 ⁴ Tinel's sign is a cutaneous tingling sensation produced by pressing
25 on or tapping the nerve trunk that has been damaged or is regenerating
26 following trauma. See TABER'S CYCLOPEDIA MEDICAL DICTIONARY, p. 2192 (20th ed.
2005).

27 ⁵ Phalen's test is a maneuver used in the physical diagnosis of
28 carpal tunnel symptoms. The test is positive when wrist flexion
produces numbness in the distribution of the median nerve. See TABER'S
CYCLOPEDIA MEDICAL DICTIONARY, p. 1650 (20th ed. 2005).

1 carpal tunnel syndrom on the left hand, and decreased sensation to
2 pinprick in the small finger and thumb of plaintiff's left hand. (A.R.
3 319-20, 325, 330, 510, 545.) Consistent with Dr. Nagelberg's findings,
4 Dr. Hay's physical examination of plaintiff revealed cervical lordosis,
5 scoliosis, spasms, decreased range of motion, decreased tendon reflexes,
6 and diminished sensation to pinprick, left more than right. (A.R. 624-
7 25.) Accordingly, the ALJ's reliance on any purported inconsistencies
8 between the opinions of Drs. Nagelberg and Hay, to justify the ALJ's
9 rejection of Dr. Hay's opinion regarding plaintiff's upper extremity
10 limitations, is not based upon substantial evidence and constitutes
11 error.

12
13 Additionally, in support of his rejection of Dr. Hay's opinion that
14 plaintiff could not perform prolonged forward head position and above
15 shoulder work, the ALJ impermissibly relies on plaintiff's purported
16 "denial of such symptoms to Dr. Lee." (A.R. 23.) The fact that
17 plaintiff's documented "chief complaints" were low back pain and right
18 knee pain does not negate plaintiff's consistent complaints of neck and
19 shoulder pain to her treating physicians, and it certainly does not mean
20 that plaintiff affirmatively denied any upper extremity pain to Dr. Lee.
21 (A.R. 264-68.) Indeed, it is unclear whether plaintiff was asked
22 specifically whether she had any upper extremity musculoskeletal
23 complaints. Although Dr. Lee reports that plaintiff "denies any other
24 symptoms," such as "chest pain or shortness of breath, nausea or
25 vomiting, fever or chills, abdominal pain, or significant changes in
26 weight or appetite," he nonetheless diagnoses plaintiff with "decreased
27 sensation along the lateral aspect of the left arm from shoulder to the
28 left hand, uncertain etiology. We would defer to appropriate specialist

1 for further evaluation and management." (A.R. 264, 267.) In view of
2 Dr. Lee's express deference to the appropriate specialist for further
3 evaluation, the ALJ should have inquired further regarding the extent to
4 which plaintiff's upper extremity limitation(s) may impact her ability
5 to work.

6
7 Further, the ALJ improperly rejected Dr. Hay's opinion in his
8 November 2003 assessment that plaintiff should be limited to "a less
9 than sedentary work capacity, with indication that [plaintiff] would
10 miss work 3 or more days a month, can never engage in postural
11 activities, would need to take unscheduled breaks, etc." (A.R. 23.)
12 The ALJ based his rejection of Dr. Hay's opinion on the fact that it is
13 purportedly "inconsistent with his 2004 report and is not supported by
14 this earlier narrative report or by other evidence." (*Id.*) However,
15 this rationale is not supported by substantial evidence. In fact, the
16 ALJ fails to identify any inconsistencies whatsoever between the two
17 reports and fails to provide any legitimate reasons for rejecting Dr.
18 Hay's opinions regarding plaintiff's physical limitations. The ALJ's
19 failure to do so constitutes error.

20
21 On remand, plaintiff's physical limitations and the extent, if any,
22 to which they impact her ability to work, should be assessed on a fully
23 developed record in accordance with the appropriate legal standards.

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1 **II. The ALJ Failed To Provide Specific And Legitimate Reasons Supported**
2 **By Substantial Evidence For Rejecting Portions Of Plaintiff's**
3 **Treating Physician's Opinions Regarding Plaintiff's Mental RFC.**
4

5 In his decision, the ALJ rejected certain findings of plaintiff's
6 treating psychiatrist, Thomas Curtis, M.D., without providing specific
7 and legitimate reasons for doing so. Dr. Curtis' 21-page report
8 contains a thorough analysis of, and test results reflecting,
9 plaintiff's psychological conditions, as well as a comprehensive review
10 of plaintiff's medical records. In his report, Dr. Curtis opines as to
11 the impact plaintiff's present mental functioning may have on her
12 ability to engage in sustained, full-time work. (A.R. 662.) The ALJ
13 asserts that plaintiff's mental limitations are "somewhat greater than
14 [those] assessed by Dr. Bagner, but less severe than Dr. Curtis
15 suggests." (A.R. 25.) Although the ALJ claims that he "has considered
16 the possibility that [plaintiff] has materially worsened since Dr.
17 Bagner's March 2003 report or since August 2004," the ALJ nonetheless
18 concludes that plaintiff's mental limitations are not as severe as Dr.
19 Curtis opines. (A.R. 25.) As the ALJ concedes that Dr. Bagner's
20 consultative psychiatric evaluation was "unimpressive," the ALJ should
21 not have disregarded Dr. Curtis' report without setting forth legally
22 sufficient reasons for doing so. (*Id.*)
23

24 The ALJ's primary reasons for rejecting portions of Dr. Curtis'
25 opinions⁶ -- specifically the opinions set forth in Dr. Curtis' 2005
26

27 ⁶ In October 2003, Dr. Curtis classified plaintiff's mental
28 restrictions as follows: "moderate" ability to understand and remember
short, simple instructions; "moderate" ability to carry out short,

1 report -- are as follows: (1) Dr. Curtis' 2005 report was "likely done
2 to attempt to qualify [plaintiff] for benefits" (A.R. 25); (2) "Dr.
3 Curtis's assessments in narratives generally appear to overstate
4 [plaintiff's] emotional overlay," as plaintiff "did not emphasize her
5 mental problems" at the hearing (*id.*); (3) the 2003 assessment of
6 consultative examiner, Ernest Bagner, M.D.⁷, "seems to better describe
7 reality than does Dr. Curtis' most recent report, in light of
8 [plaintiff's] daily activities, overall presentations, and all other
9 factors" (*id.*); and (4) plaintiff reports that she has benefitted from
10 psychotherapy and psychotropic medications (A.R. 24).

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14 simple instructions; "marked" ability to understand, remember, and carry
15 out detailed instructions; "marked" ability to make judgments on simple
16 work-related decisions; "marked" ability to interact appropriately with
17 the public; "moderate" ability to interact appropriately with
18 supervisor(s), co-workers; "moderate-to-marked" ability to respond
19 appropriately to work pressures; and "marked" ability to respond
20 appropriately to changes in a routine work setting. (A.R. 563-64.) In
21 August 2004, Dr. Curtis assessed a "slight-to-moderate" limitation in
22 all eight of the rated functions and concluded that "the psychological
23 test results confirmed residual abnormal levels of anxiety,
24 somatization, hopelessness and depression with fatigue, low self-esteem
25 and feelings of sadness." (A.R. 582, 586-87.) These eight rated
26 functions assess one's ability to: comprehend and follow instructions;
27 perform simple and repetitive tasks; maintain work pace; perform complex
28 and varied tasks; relate to other people; influence people;
generalizations, evaluations or decisions; and accept and carry out
responsibility. Finally, in June 2005, Dr. Curtis rated most of the
previously identified eight functions as "moderately impaired," with a
"slight-to-moderate" rating in plaintiff's ability to comprehend and
follow instructions, and to perform simple and repetitive tasks. Dr.
Curtis further opined that plaintiff had a "marked" degree of impairment
at about 60% standard level, and she had worsened. (A.R. 659-61.)

25 ⁷ Dr. Bagner diagnosed only a non-specific depressive disorder. He
26 assessed "zero to no limitations" in [plaintiff's] ability to interact
27 with supervisors, peers and the public, to handle normal stresses at
28 work, to maintain concentration and attention, and to complete simple
tasks. He assessed "mild" limitations in her abilities to complete
complex tasks and to complete a normal workweek without interruption.
(A.R. 25, 260-63.)

1 Plaintiff contends, and the Court agrees, that the ALJ "improperly
2 and unfairly rejected the report from Dr. Curtis, dated June 16, 2005
3 (AR 643-664), submitted post-hearing on the basis of his unwarranted
4 speculation that 'this report, which was completed only a few days after
5 the hearing, was likely done to attempt to qualify [plaintiff] for
6 benefits' (AR 24-25)." (Joint Stip. at 19.) The ALJ's assertion lacks
7 foundation and is not a legally sufficient ground upon which to reject
8 a treating doctor's report. See Lester v. Chater, 81 F.3d 821, 832 (9th
9 Cir. 1995) ("The purpose for which medical reports are obtained does not
10 provide a legitimate basis for rejecting them."); see also Ratto v.
11 Sec'y., 839 F. Supp. 1415, 1426 (D. Or. 1993) (an ALJ "may not assume
12 that doctors routinely lie in order to help their patients collect
13 disability benefits). While the ALJ "may introduce evidence of actual
14 improprieties," no such evidence exists here. Lester, 81 F.3d at 832.
15 Thus, the fact that Dr. Curtis' report was prepared in connection with
16 plaintiff's worker's compensation case is of no moment, and Dr. Curtis'
17 report constitutes substantial evidence regarding the extent to which
18 plaintiff's mental impairment may have worsened over time. Accordingly,
19 the ALJ's rejection of Dr. Curtis' 2005 report on this basis is
20 reversible error.

21
22 Further, the ALJ also impermissibly rejected Dr. Curtis'
23 "assessments in narratives" on the ground that they "overstate[d]
24 plaintiff's emotional overlay," because plaintiff "did not emphasize
25 depression or anxiety at the hearing." (A.R. 25.) This stated reason
26 is factually inaccurate and improperly minimizes the severity of
27 plaintiff's mental impairments. In fact, at the hearing, plaintiff
28 testified to having anxiety attacks and symptoms of depression, such as

1 lack of sleep, fatigue, and forgetfulness. (A.R. 675-76.) Plaintiff
2 further testified that she was taking medications for depression
3 prescribed by Dr. Curtis and was attending therapy once a week. (A.R.
4 676, 678.) The ALJ's assertion that plaintiff did not "emphasize" her
5 mental conditions borders on a mischaracterization of the record and is
6 not a legally sufficient reason to minimize the severity of plaintiff's
7 mental limitations or reject the opinions of Dr. Curtis. If the ALJ
8 required further, more specific details regarding the extent of
9 plaintiff's mental impairments, then the ALJ should have asked further,
10 more specific questions.

11
12 In addition, the ALJ impermissibly relied on plaintiff's ability to
13 "do household chores, shop and cook" to support his rejection of Dr.
14 Curtis' opinion. (A.R. 25.) It is well-settled, however, that
15 "disability claimants should not be penalized for attempting to lead
16 normal lives in the face of their limitations." Reddick, 157 F.3d at
17 722. It would be highly inappropriate and unreasonable to require
18 plaintiff to "vegetate in a dark room" in order to be deemed eligible
19 for benefits. Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987).
20 Plaintiff's efforts to care for herself do not translate into an ability
21 to engage in substantial gainful activity and do not constitute a valid
22 reason for rejecting Dr. Curtis' opined limitations.

23
24 Finally, the ALJ impermissibly relied on "evidence showing that
25 [plaintiff] has benefitted from counseling and psychotropic medications"
26 to reject Dr. Curtis' opinion regarding the severity of plaintiff's
27 mental limitations. (A.R. 25.) It is important to note that, since her
28 alleged onset date, plaintiff has been taking medication for her

1 physical and mental impairments. On September 21, 2001, plaintiff was
2 prescribed Vioxx and Paxil (which was later changed to Celexa) for
3 continued pain and symptoms of anxiety and depression. (A.R. 647.) In
4 2003, plaintiff reported to Dr. Bagner that she was taking the following
5 medications: Alprazolam, Celexa 20 mg BID, Sonata, Vioxx, and Motrin.
6 (A.R. 261.) As of June 16, 2005, Dr. Curtis reported that plaintiff had
7 "recently taken Celexa and BuSpar." (A.R. 651.) Although plaintiff
8 reported that she benefitted from participating in therapy and taking
9 medication, she never reported that she was cured. Plaintiff should not
10 be penalized for seeking treatment and taking medication for her
11 impairments and the ALJ's attempt to do so, as a justification for
12 rejecting Dr. Curtis' opinion, constitutes error.

13
14 **III. Because The ALJ's Findings Regarding Plaintiff's Ultimate RFC Must**
15 **Be Reconsidered, Additional Vocational Expert Testimony Likely Will**
16 **Be Required.**

17
18 Based on the fact that the ALJ's findings regarding plaintiff's
19 physical and mental impairments must be reevaluated on remand,
20 plaintiff's ultimate RFC assessment may change. An ALJ must seek the
21 testimony of a vocational expert if the claimant has non-exertional
22 limitations, such as mental limitations. See Reddick, 157 F.3d at 729
23 (because the claimant had non-exertional limitations, it was error not
24 to seek the testimony of a vocational expert). If the vocational
25 expert's testimony is not based on a claimant's complete set of
26 limitations, then it has no evidentiary value. See Embrey v. Bowen, 849
27 F.2d 418, 422-24 (9th Cir. 1987)(in posing a hypothetical to a
28 vocational expert, the ALJ must fully and accurately reflect all of the

1 claimant's limitations).

2
3 **IV. Remand Is Required.**

4
5 Where, as in this case, there is error in the ALJ's findings and
6 the record may require further development, remand is appropriate to
7 allow the ALJ the opportunity to remedy the errors and inadequacies.
8 See Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000)(when there are
9 outstanding issues that must be resolved before the question of
10 disability can be determined, remand is appropriate); McAllister v.
11 Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)(remand appropriate to remedy
12 defects in the record).

13
14 **CONCLUSION**

15
16 Accordingly, for the reasons stated above, IT IS ORDERED that the
17 decision of the Commissioner is REVERSED, and this case is REMANDED for
18 further proceedings consistent with this Memorandum Opinion and Order.

19
20 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
21 copies of this Memorandum Opinion and Order and the Judgment on counsel
22 for plaintiff and for defendant.

23
24 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

25
26 DATED: September 19, 2008

27 _____ /s/
MARGARET A. NAGLE
28 UNITED STATES MAGISTRATE JUDGE