UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TINA THOMPSON, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of the Social Security Administration, Defendant.	Case No. ED CV 08-1603 PJW MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying her application for Supplemental Security Income benefits ("SSI"). Because the Agency's decision that Plaintiff was not disabled within the meaning of the Social Security Act is supported by substantial evidence, it is affirmed.

On December 8, 2005, Plaintiff applied for SSI. (Administrative Record ("AR") 29.) After the Agency denied the application, Plaintiff requested and was granted a hearing before an Administrative Law Judge ("ALJ"). (AR 33-40.) On April 30, 2007, Plaintiff appeared with counsel at the hearing and testified. (AR 187-202.) On May 24, 2007, the ALJ issued a decision denying benefits. (AR 7-16.) After the

Appeals Council denied Plaintiff's request for review, (AR 3-5), she commenced this action.

Plaintiff claims that the ALJ erred by failing to properly consider: 1) the treating psychologist's mental status examination findings; 2) the treating psychologist's work capacity evaluation; and 3) the written testimony of Plaintiff's sister Latania Toliver. (Joint Stip. at 3-4, 7-8, 10-11.) For the reasons set forth below, the Court finds that these claims are without merit.

In her first claim of error, Plaintiff contends that the ALJ improperly rejected, without explanation, the findings contained in a mental status examination form filled out by her treating psychologist Rigoverto Briceno. (Joint Stip. at 3-4.) For the following reasons, the Court disagrees.

Plaintiff first went to see Dr. Briceno on September 7, 2006. During this first visit, Dr. Briceno prepared a mental status examination form, indicating that Plaintiff appeared anxious, had poor concentration, and was "highly distractible." (AR 185.) He also noted that her memory was impaired, that her behavior was destructive, and that she reported experiencing visual and auditory hallucinations. (AR 185.)

In her decision, the ALJ highlighted these findings but also noted that Dr. Briceno had reported on the same form that Plaintiff was fully oriented, her cognition, insight, and judgment were intact, and she displayed normal affect. (AR 13.) In addition, the ALJ pointed out that Plaintiff had reported to Dr. Briceno that she was attending school and caring for her two sons. (AR 13.) After taking into account the less severe diagnosis of examining psychiatrist David Bedrin (discussed *infra*), the ALJ concluded that Plaintiff's history

of bipolar disorder was a severe impairment, which would cause slight restrictions in activities of daily living and social functioning, and moderate limitations on ability to perform activities requiring concentration, persistence, and pace. (AR 11, 14.)

Plaintiff takes exception to these findings. Though she concedes that the ALJ considered Dr. Briceno's mental status examination in the decision, she argues that the ALJ's failure to discuss the report of visual and auditory hallucinations, the "aggressive-destructive-poor impulse control problems," the excessive crying, and the isolated and withdrawn demeanor amounts to a "rejection" of these findings without adequate justification. The Court disagrees.

The starting point for a discussion of the ALJ's treatment of the treating psychologist's report is the ALJ's credibility finding. She found that Plaintiff was not credible, (AR 19), and the record supports this finding. For example, Plaintiff, at the very least, grossly exaggerated her condition and, at the very worst, flat out lied about it in a form she filled out and submitted to the Agency. (AR 66-73.) In that form, entitled "Function Report-Adult," Plaintiff described her activities from the time she woke up until the time she went to bed as follows:

> I just sit around[,] cry, rock back and forth[,] and talk to myself and God and try to be quiet and try to rest to [the] best of my knowledge. And take my motrins and milk [and] advils.

(AR 66.)

The person Plaintiff described to the Agency in this form is someone who would likely be institutionalized, not someone who reported at various times to various doctors that she was taking care

of herself and her 13- and 15-year old sons and going to school. Further, and importantly, Plaintiff has not challenged the ALJ's credibility finding, which undermines her claim that the ALJ erred in rejecting the treating psychologist's findings without proper justification. Where, as here, a claimant does not challenge the ALJ's adverse credibility finding, she cannot argue that the ALJ erred in her decision not to credit the treating psychologist's assessment, which was based in large part on Plaintiff's statements to the doctor. *See Siska v. Barnhart*, No. C 00-4788 MMC, 2002 WL 31750220, at *3 (N.D. Cal. Dec. 4, 2002).

Turning now to the merits of Plaintiff's claim, the Court finds that the ALJ did not err. Dr. Briceno's "findings" in the mental status examination report were not really findings, but, rather, parroting of what Plaintiff told the doctor that she was experiencing. Dr. Briceno did not witness Plaintiff crying, rocking, seeing things, or hearing voices. (AR 184-85.) What he did observe was someone who was fairly stable, except, perhaps, for some anxiety. (AR 185.) Plaintiff was clean, appropriately dressed, spontaneous, friendly, cooperative, and oriented. (AR 185.) Her affect was normal and her cognition, insight, and judgment intact. (AR 185.) These findings are consistent with the ALJ's ultimate conclusion that Plaintiff's psychiatric impairments did not prevent her from working. Because Dr. Briceno's "findings" in the mental status examination report were

based on Plaintiff's allegations, and because Plaintiff was not credible, her argument that the ALJ erred in rejecting these findings is not persuasive.[1]

Plaintiff's complaint that the ALJ failed to fully discuss Dr. Briceno's findings is also without merit. The ALJ summarized Briceno's findings in her decision. (AR 13.) She was not required to fully evaluate every entry Dr. Briceno made, so long as her decision was supported by substantial evidence, which it was. *See Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (holding that ALJ's failure to discuss particular medical report was not error where the record showed the ALJ did not "selectively analyze the evidence."). For this reason, this claim does not warrant remand or reversal.[2]

In her second claim of error, Plaintiff contends that the ALJ improperly rejected Dr. Briceno's work capacity evaluation findings. (Joint Stip. at 7-8.) Again, the Court disagrees.

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[1] The Court also notes that it appears that Plaintiff was focused throughout her treatment sessions with Dr. Briceno on her financial condition, even confessing to him during one session that she was worried about her "SSI application." (AR 180.)

[2] The ALJ also rejected Plaintiff's claims because she found that Plaintiff had not established that her condition had lasted or would last for 12 months, as required under the regulations. (AR 14.) The regulations do require a 12-month period of infirmity, *see* 20 C.F.R. 416.927(d), and the records establish that Plaintiff underwent treatment for only four months, from September 7, 2006 to January 22, 2007. (AR 178-86.) The only other evidence relating to the duration of Plaintiff's psychiatric problems was her written submissions to the Agency and her testimony at the hearing, which were not believed. This is another specific and legitimate reason for rejecting Plaintiff's claimed impairment.

On a "Work Capacity Evaluation (Mental)" check-the-box form dated October 30, 2006, Dr. Briceno indicated that Plaintiff would have "marked" limitation in her ability to do such things as remember locations and work-like procedures; carry out very short and simple instructions; sustain an ordinary routine without special supervision; ask simple questions or request assistance; and maintain socially appropriate behavior or adhere to basic standards of neatness and cleanliness. (AR 155-56.) He also indicated that she would have "extreme" limitation in her ability to do such things as understand and remember very short and simple instructions; maintain attention and concentration for extended periods; maintain regular attendance, and be punctual; and interact appropriately with the general public. (AR 155-56.) The ALJ rejected these findings and adopted the less severe functional limitations assessed by examining psychiatrist Bedrin. (AR 14.) This was not error.

Though, as a general rule, a treating doctor's opinion is given priority over the opinions of non-treating doctors, an ALJ may reject a treating doctor's opinion that is contradicted by another doctor's opinion so long as she provides specific and legitimate reasons supported by substantial evidence in the record for doing so. *See Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

Dr. Briceno's findings were squarely contradicted by Dr. Bedrin's, who examined Plaintiff in July 2006. (AR 13, 14.) In his report, Dr. Bedrin noted many of the same complaints Dr. Briceno did. (127-28.) Plaintiff told Dr. Bedrin that she had been experiencing auditory hallucinations for three years, and that for eighteen months she had experienced visual hallucinations of "something passing by out of the corner of her eye." (AR 127.) He noted her feelings of

paranoia, intermittent depression, and difficulties in sleeping and eating. (AR 127, 128.) He also observed that Plaintiff was pleasant and relaxed, did not appear depressed or anxious, denied suicidal or homicidal ideations, denied any hallucinatory, delusional, or psychotic symptoms during the interview, and was oriented. (AR 130.)

Dr. Bedrin diagnosed bipolar disorder, not otherwise specified, by history, and alcohol abuse, currently in remission, and assigned a GAF score of 59. (AR 132.) He concluded that Plaintiff could function normally in the workplace, but that she might have difficulty performing complex tasks due to memory problems. (AR 132.)

The ALJ was tasked with deciding which opinion to accept and which to reject. In doing so, she was required to provide specific and legitimate reasons supported by substantial evidence if she chose Dr. Bedrin's findings over Dr. Briceno's. She did. She discounted Dr. Briceno's findings because they were not supported by the findings in his mental status examination or by the progress notes that followed. In the mental status examination, which took place in September 2006, less than two months before he completed the work capacity evaluation, Dr. Briceno found that Plaintiff was clean and that her attire and eye contact were appropriate. (AR 185.) By contrast, in the work capacity evaluation he indicated that she would have a "marked" limitation in her ability to "maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness." (AR 156.) Similarly, Dr. Briceno found in September 2006 that Plaintiff's judgement and insight were intact and her thought process goal-directed. (AR 185.) Yet, in October 2006, he indicated that she would be extremely limited in her ability to make work-related decisions and markedly limited in her ability to ask

simple questions, request assistance, be aware of normal hazards, and take appropriate precautions. (AR 155, 156.)

Though the clinical progress notes do not reveal any outright inconsistencies, they consist only of Dr. Briceno's recordation of Plaintiff's subjective complaints, i.e., that she felt depressed, irritable, and worried, and the doctor's advice that she adopt strategies to express anger more appropriately and to feel more motivated. (AR 178-82.) As such, the notes do not support the extreme limitations indicated by Dr. Briceno in October 2006. The ALJ was entitled to rely on these reasons for adopting Dr. Bedrin's opinion and rejecting Dr. Briceno's. *See, e.g.*, *Thomas v. Barnhart*, 278 F.3d 948, 957 (9th Cir. 2002) (affirming rejection of self-contradictory and unsupported treating opinion in favor of examining opinion); *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995) (affirming ALJ's rejection of treating opinion which was conclusory and self-contradictory). This is particularly true in this case, where the ALJ determined that Plaintiff was not credible and Plaintiff has not challenged that finding. *Siska,* 2002 WL 31750220, at *3. As such, the Court finds that this claim is without merit.

In her third claim of error, Plaintiff contends that the ALJ failed to consider the testimony of her sister Latania Toliver. (Joint Stip. at 10-11.) Toliver submitted a report, titled Adult Function Report-Third Party, in which she reported that Plaintiff "does not do anything" except talk about her headaches, talk to herself, and rock. (AR 74.) She also reported that Plaintiff has really bad mood swings, that she no longer does chores, and that "she forgets a lot following instructions." (AR 75, 76, 79.) The ALJ did not consider Toliver's testimony. The Agency concedes that this was

error but argues that the error was harmless. (Joint Stip. at 11-13.) For the following reasons, the Court agrees.

An ALJ is required to consider lay witness "testimony," which includes not only live testimony at the administrative hearing but also written submissions, and may only reject it for reasons that are "germane" to the witness. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). Failure to discuss lay testimony is error. The error is harmless, however, if the Court can "confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Id.* at 1056.

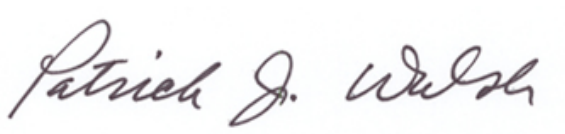
Had any reasonable ALJ considered Ms. Toliver's submission, she would not have concluded that Plaintiff was disabled. First, Ms. Toliver's report makes clear that she does not really know about Plaintiff's daily routines and how they are (or are not) affected by her condition. For example, in response to the question "Does [Plaintiff] prepare []her own meals?", Toliver checked the box marked "No," but explained, "I don't really know if she does or not." (AR 76.) In response to the question, "Is []she able to: handle a savings account/use checkbook money orders?", Ms. Toliver checked the box marked "No," and then wrote "I don't know" in response to the instruction, "Explain all 'NO' answers." (AR 77.) Ms. Toliver responded to the question, "What are []her hobbies and interests?," with "None at all, TV sometimes, church sometimes," and then stated "I don't know" in response to the follow-up question, "How often and how well does []she do these things?" (AR 78.) Ms. Toliver answered "I don't know" in response to questions about Plaintiff's social activities, her ability to get along with authority figures, whether

she had ever been fired, and how well she handled stress. (AR 78, 79, 80.) Additionally, Ms. Toliver's answers are vague and often inconsistent regarding Plaintiff's abilities. For example, though she states that Plaintiff "does not do anything" except talk to herself and rock, she also states that Plaintiff prepares food for her sons, likes to walk, goes shopping, pays bills, counts change, goes to church, and watches TV. (AR 74-78.) Though Ms. Toliver reported that Plaintiff was physically limited in various ways, (AR 79), no doctor found that to be the case, and Plaintiff does not challenge the ALJ's finding that the only physical limitation she had was her hearing. Because Ms. Toliver's testimony, even if credited, would not have resulted in a finding of disability, this claim does not merit reversal or remand.[3] *Stout*, 454 F.3d at 1056.

For all of the above reasons, the Agency's decision is affirmed.

IT IS SO ORDERED.

DATED: August 26, 2009.



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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[3] Ms. Toliver also noted that Plaintiff was not good at following instructions. (AR 79.) Consistent with this, the ALJ concluded that Plaintiff was restricted to work "not involving more than simple tasks at a routine pace." (AR 15.)