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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LORETTA WILLIAMS,)	NO. CV 08-4082-MAN
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	AND ORDER
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on June 30, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability ("POD") and disability insurance benefits ("DIB"). The parties filed a Joint Stipulation on March 9, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for a new administrative hearing; and defendant seeks an order affirming the Commissioner's decision. On September 3, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2

3 On June 7, 2005, plaintiff protectively filed an application for a
4 POD and DIB. (Administrative Record ("A.R.") 39-41.) Plaintiff alleges
5 an inability to work since December 2, 2004, due to a heart attack,
6 triple bypass surgery, and stress. (A.R. 31, 61.) She has past
7 relevant work experience as an associate assembler.¹ (A.R. 62, 69.)

8

9 The Commissioner denied plaintiff's application initially. (A.R.
10 31-36.) Thereafter, plaintiff filed a written request for hearing, and
11 on April 4, 2007, plaintiff, who was accompanied by a non-attorney
12 representative, testified at a hearing before Administrative Law Judge
13 William C. Thompson, Jr. ("ALJ"). (A.R. 26, 214-32.) On June 12, 2007,
14 the ALJ denied plaintiff's claim, and the Appeals Council subsequently
15 denied plaintiff's request for review of the ALJ's decision. (A.R. 3-5,
16 10-16.)

17

18 **SUMMARY OF ADMINISTRATIVE DECISION**

19

20 In his written decision, the ALJ found that plaintiff has not
21 engaged in substantial gainful activity since December 2, 2004,
22 plaintiff's alleged disability onset date, and she meets the insured
23 status requirements of the Social Security Act through December 31,
24 2010. (A.R. 12.) The ALJ further found that plaintiff suffers from the
25 "severe" impairments of status post-myocardial infarction and coronary
26 artery bypass, but she does not have any impairment or combination of

27

28 ¹ Plaintiff worked as an associate assembler from January 1973,
through December 2004. (A.R. 69.)

1 impairments that meet or medically equal one of the listed impairments
2 in Appendix 1, Subpart P, Regulations No. 4. (*Id.*)

3
4 In reliance on the opinions of the consultative examiner and State
5 Agency medical consultant, the ALJ rejected the opinion of plaintiff's
6 treating cardiologist, Vernon Hattori, M.D. (A.R. 15.) Further, the
7 ALJ found that plaintiff's statements concerning the intensity,
8 persistence, and limiting effects of her subjective pain symptoms were
9 not entirely credible. (A.R. 14.)

10
11 The ALJ determined that plaintiff has the residual functional
12 capacity to perform light exertional activity. (A.R. 12.) Based on
13 this residual functional capacity assessment and the testimony of a
14 vocational expert, the ALJ found that plaintiff is capable of performing
15 her past relevant work as an assembler. (A.R. 15.)

16
17 Accordingly, the ALJ concluded that plaintiff has not been under a
18 disability, as defined in the Social Security Act, from December 2,
19 2004, through the date of the ALJ's decision. (A.R. 15.)

20
21 **STANDARD OF REVIEW**

22
23 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
24 decision to determine whether it is free from legal error and supported
25 by substantial evidence in the record as a whole. Orn v. Astrue, 495
26 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "such relevant
27 evidence as a reasonable mind might accept as adequate to support a
28 conclusion." *Id.* (citation omitted). The "evidence must be more than

1 a mere scintilla but not necessarily a preponderance." Connett v.
2 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
3 record can constitute substantial evidence, only those "'reasonably
4 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
5 1063, 1066 (9th Cir. 2006)(citation omitted).

6
7 Although this Court cannot substitute its discretion for that of
8 the Commissioner, the Court nonetheless must review the record as a
9 whole, "weighing both the evidence that supports and the evidence that
10 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
11 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
12 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
13 responsible for determining credibility, resolving conflicts in medical
14 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
15 1035, 1039-40 (9th Cir. 1995).

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

1 DISCUSSION

2
3 Plaintiff alleges the following two issues: (1) whether the ALJ
4 erred in rejecting the opinion of plaintiff's treating physician; and
5 (2) whether the ALJ failed to provide clear and convincing reasons to
6 reject plaintiff's subjective pain and symptom testimony. (Joint
7 Stipulation ("Joint Stip.") at 3.)

8
9 I. The ALJ Failed To Provide Specific And Legitimate Reasons For
10 Disregarding The Opinion Of Plaintiff's Treating Physician.

11
12 Plaintiff contends that the ALJ improperly rejected the opinion of
13 plaintiff's treating cardiologist, Vernon Hattori, M.D. For the reasons
14 set forth below, the Court agrees.

15
16 A treating physician's conclusions "must be given substantial
17 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). "Even if
18 the treating doctor's opinion is contradicted by another doctor, the ALJ
19 may not reject this opinion without providing specific and legitimate
20 reasons supported by substantial evidence in the record." Orn, 495 F.3d
21 at 633 (*internal punctuation and citation omitted*); see also McAllister
22 v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989) ("broad and vague" reasons
23 for rejecting the treating physician's opinion do not suffice).

24
25 On June 2, 2004, Dr. Hattori completed an assessment regarding
26 plaintiff's ability to perform work and opined that plaintiff was unable
27 to lift anything over five pounds. (A.R. 128.) On November 22, 2004,
28 Dr. Hattori opined that plaintiff was limited to: light duty, with no

1 excessive lifting; no lifting over ten pounds; and no duty requiring any
2 reaching or pulling over shoulder height. (A.R. 125.) On January 18,
3 2006, in a supplemental statement, Dr. Hattori diagnosed plaintiff with
4 coronary artery disease, status post-coronary artery bypass grafts,
5 hypertension, post-operative chest pain, and depression. (A.R. 126.)
6 Dr. Hattori again limited plaintiff to: no lifting over ten pounds; no
7 excessive lifting; and no lifting or pulling over shoulder height.
8 (*Id.*) Dr. Hattori opined that plaintiff would not be able to work from
9 December 1, 2004, through March 13, 2006. (*Id.*)

10
11 In his written decision, the ALJ rejected the opinion of Dr.
12 Hattori because: (1) it was "internally inconsistent, with the
13 physician variously reporting that [plaintiff] was limited to lifting 5
14 pounds on June 22, 2004, limited to lifting 10 pounds on November [22,]
15 2004, and unable to work from December 1, 2004 through March 18, 2006 in
16 January 2006"; and (2) "[t]he subjective information provided by
17 [plaintiff] appeared to be the basis for his findings." (A.R. 15.)

18
19 Contrary to the ALJ's assertion, Dr. Hattori's assessments are not
20 "internally inconsistent." (A.R. 15.) On February 18, 2004, plaintiff
21 underwent double coronary artery bypass surgery. (A.R. 102-04.) Less
22 than four months post-surgery, on June 2, 2004, Dr. Hattori limited
23 plaintiff to lifting no more than five pounds. (A.R. 128.) Nearly
24 nine months post-surgery, Dr. Hattori re-assessed plaintiff's
25 limitations, taking into account plaintiff's relative
26 improvement/healing, and opined that plaintiff was then limited to
27 lifting no more than ten pounds. (A.R. 125.) It hardly seems
28 surprising that following plaintiff's February 2004 heart surgery, her

1 ability to lift gradually increased from 5 pounds in June 2004, to 10
2 pounds in November 2004. Moreover, in January 2006, after experiencing
3 significant discomfort and pain when reaching out and up with her arms,
4 that began in or about December 2004, plaintiff was diagnosed with
5 sternal dehiscence², and on February 27, 2006, she underwent a revision
6 of her sternotomy³ and removal of sternal wires. (A.R. 203-07.) In view
7 of this setback in plaintiff's post-heart surgery healing, it is not
8 surprising that plaintiff might be disabled until March 2006.⁴

9
10 Moreover, the ALJ's rejection of Dr. Hattori's opinion on the
11 ground that "[t]he subjective information provided by [plaintiff]
12 appeared to be the basis for his findings" (A.R. 15) is not a legitimate
13 basis upon which to reject Dr. Hattori's opinion, especially in view of
14 the ALJ's improper rejection of plaintiff's subjective pain complaints,
15 discussed in Section II, *infra*. Invariably, a treating physician relies
16 on a patient's descriptions of the location and intensity of pain, her
17 responses to touch and other stimuli during examination, as well as
18 other types of subjective information, in making a diagnosis and in
19 assessing a patient's limitations. *Cf. Sprague v. Bowen*, 812 F.2d 1226,
20 1230 (9th Cir. 1987). When, as in this case, there is no legal basis
21 for the ALJ's rejection of plaintiff's credibility, the mere fact that

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23 ² According to <http://en.wikipedia.org>, dehiscence is "the premature
24 'bursting' open of a wound along a surgical suture. It is a surgical
complication that results from poor wound healing."

25 ³ According to <http://en.wikipedia.org>, sternotomy is "a type of
26 surgical procedure in which a vertical inline incision is made along the
sternum, after which the sternum itself is divided, or 'cracked.'"

27 ⁴ After a careful review of the record, it remains unclear whether
28 plaintiff continued to be disabled after March 2006, as plaintiff's most
recent medical reports of record are dated February 27, 2006.

1 a physician has considered plaintiff's subjective reports in forming his
2 medical opinion does not constitute a legitimate basis for discrediting
3 that opinion. Cf. Fair v. Bowen, 885 F.2d 597, 605 (9th Cir. 1989).

4
5 Accordingly, remand is required to allow the ALJ the opportunity to
6 provide legally sufficient reasons, if such reasons exist, for rejecting
7 the opinion of Dr. Hattori.

8
9 **II. The ALJ Failed To Provide The Requisite Clear And Convincing**
10 **Reasons For Rejecting Plaintiff's Subjective Pain Testimony.**

11
12 Plaintiff alleges that the ALJ erred in his consideration of
13 plaintiff's subjective symptom testimony. (Joint Stip. at 10-11, 14-
14 15.) For the reasons set forth below, the Court agrees.

15
16 Once a disability claimant produces objective evidence of an
17 underlying physical impairment that is reasonably likely to be the
18 source of her subjective symptom(s), all subjective testimony as to the
19 severity of the symptoms must be considered. Moisa v. Barnhart, 367
20 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
21 (9th Cir. 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining
22 how pain and other symptoms are evaluated). "[U]nless an ALJ makes a
23 finding of malingering based on affirmative evidence thereof, he or she
24 may only find an applicant not credible by making specific findings as
25 to credibility and stating clear and convincing reasons for each."
26 Robbins, 466 F.3d at 883. Further, an ALJ may not rely solely on the
27 absence of objective medical evidence supporting the *degree* of pain
28 alleged as a basis for finding that a plaintiff's testimony regarding

1 subjective symptoms is not credible. Fair, 885 F.2d at 601-02; Stewart
2 v. Sullivan, 881 F.2d 740, 743-44 (9th Cir. 1989).

3
4 Both in her filings with the Commissioner and in her testimony,
5 plaintiff described various subjective symptoms from which she claims to
6 suffer. Plaintiff testified that she had a heart attack on February 13,
7 2004, which required double coronary artery bypass surgery. (A.R. 102,
8 225.) She stopped working because of the residual post-surgery pain in
9 her chest, and because her "manager didn't want to accommodate [her]
10 restrictions" of "no lifting over ten pounds, no lifting over shoulder
11 height, [and] no pushing or pulling." (A.R. 223-24.) Plaintiff
12 further testified that she has pain in both legs, because two veins were
13 removed from one leg, and one vein was removed from the other leg, for
14 her open-heart surgery. (A.R. 230.) Plaintiff stated that, "[a]fter 31
15 years of faithfulness to [her] company, long hours, injuries and
16 stressful conditions, [her] health [has] deteriorated. [She] had open
17 heart surgery [and] since [the] surgery [she] ha[s] not recovered."
18 (A.R. 26.) She further stated that she experiences an "inability to
19 concentrate, [has] pain, insomnia, [and] depression. (*Id.*) Plaintiff
20 claimed that she "cannot take care of [her] hair [and] cannot reach or
21 bend." (A.R. 57.) Plaintiff claimed further that she cannot reach
22 above shoulder height or pull down, and "when [she] pick[s] things up,
23 it pulls against [her] chest and it causes pain." (A.R. 62.) Plaintiff
24 stated that she is unable to sweep or mop, because "it causes [her] to
25 have pain across [her] chest." (A.R. 227.)

26
27 In his written decision, the ALJ found that plaintiff suffers from
28 the "severe" impairments of status post-myocardial infarction and

1 coronary artery bypass, both of which are medically determinable
2 impairments that reasonably could cause the subjective pain symptoms and
3 attendant limitations about which plaintiff complains. (A.R. 12.)
4 However, the ALJ rejected plaintiff's testimony regarding the nature and
5 extent of her pain, because "[plaintiff's] medical records reflect that
6 her treating physicians provided limited and conservative treatment,
7 which is inconsistent with the medical response that would be expected
8 if [plaintiff's] symptoms and limitations were as severe as [plaintiff]
9 alleges." (A.R. 14.) When examined in the light of the record as a
10 whole, this reason does not withstand scrutiny.

11
12 The ALJ's rejection of plaintiff's subjective complaints of
13 residual post-open-heart surgery chest pain and attendant limitations,
14 based on the fact that plaintiff's medical treatment appears to be
15 "limited and conservative," mischaracterizes the record and is not a
16 convincing reason to reject plaintiff's credibility. (A.R. 14.) Viewed
17 in its totality, the record does not support the ALJ's findings that
18 plaintiff's pain treatment has been "conservative" and that plaintiff's
19 treatment history is inconsistent with her claims of disabling pain.
20 Rather, the record reveals that not only did plaintiff treat with Dr.
21 Hattori "every three or four months" but also in-between plaintiff's
22 open-heart surgery in February 2004, and her dehiscence repair in
23 February 2006, plaintiff underwent a series of injections (on March 31,
24 2005, June 3, 2005, and June 7, 2005) to alleviate tenderness and pain
25 associated with a post-operative keloid formation on her sternal scar.
26 (A.R. 153.) In February 2006, a revision of plaintiff's sternotomy and
27 removal of sternal wires was performed to deal with the sternal
28 separation and dehiscence plaintiff experienced following her coronary

1 surgery. (A.R. 203.) Further, there is no substantial evidence in the
2 record to support the ALJ's inference that plaintiff's chest pain and
3 attendant limitations would be alleviated if she were to secure more
4 aggressive treatment, such as additional injections and/or surgery.⁵ The
5 ALJ's finding is based on an incomplete, and misleading, review of the
6 record. The ALJ's selective assessment of the evidence does not
7 constitute a clear and convincing reason to reject plaintiff's
8 subjective complaints of disabling pain.

9
10 Accordingly, the ALJ's rejection of plaintiff's credibility without
11 setting forth clear and convincing reasons for the rejection constitutes
12 reversible error. On remand, the ALJ must provide reasons, if they
13 exist and in accordance with the requisite legal standards, for
14 discrediting plaintiff's pain testimony.

15
16 **III. Remand Is Required.**

17
18 The decision whether to remand for further proceedings or order an
19 immediate award of benefits is within the district court's discretion.
20 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
21 useful purpose would be served by further administrative proceedings, or
22 where the record has been fully developed, it is appropriate to exercise
23 this discretion to direct an immediate award of benefits. *Id.* at 1179
24 ("the decision of whether to remand for further proceedings turns upon
25

26 ⁵ Plaintiff testified at the hearing that, post-sternal dehiscence
27 repair, she continued to treat with Dr. Hattori for medication
28 management and stress test monitoring. (A.R. 226.) It is not
unreasonable for one's post-operative treatment to be less frequent and
less aggressive for a stable, if debilitating, condition.

1 the likely utility of such proceedings"). However, where there are
2 outstanding issues that must be resolved before a determination of
3 disability can be made, and it is not clear from the record that the ALJ
4 would be required to find the claimant disabled if all the evidence were
5 properly evaluated, remand is appropriate. *Id.*

6
7 Here, remand is appropriate to allow the ALJ an opportunity to
8 remedy the above-mentioned deficiencies and errors. See, e.g., Benecke
9 v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for further
10 proceedings is appropriate if enhancement of the record would be
11 useful); McAllister, 888 F.2d at 603 (remand appropriate to remedy
12 defects in the record).

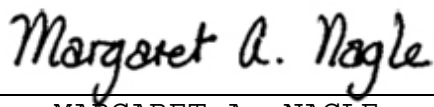
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14 **CONCLUSION**

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 15, 2009

27 
28 _____
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE