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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ELIZA M. ROBERTSON,	)	No. CV 09-08365-VBK
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	AND ORDER
v.	)	
	)	(Social Security Case)
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 considered the medical evidence as contained in the treating  
2 opinion from Dabney Blankenship, Ph.D. (JS at 4);

- 3 2. Whether the ALJ properly considered the testimony of  
4 Plaintiff (JS at 17).

5  
6 This Memorandum Opinion will constitute the Court's findings of  
7 fact and conclusions of law. After reviewing the matter, the Court  
8 concludes that for the reasons set forth, the decision of the  
9 Commissioner must be reversed.

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11 I

12 **THIS MATTER MUST BE REMANDED FOR RECONSIDERATION OF**

13 **DR. BLANKENSHIP'S OPINIONS**

14 In Plaintiff's first issue, she questions whether the ALJ  
15 properly considered the medical evidence contained in the treating  
16 opinion from Dabney Blankenship, Ph.D. ("Dr. Blankenship"). Prior to  
17 addressing this question, the Court will briefly review Plaintiff's  
18 treatment record.

19 Plaintiff was first seen by Dr. Blankenship on December 19, 2005,  
20 following her filing of a workers' compensation claim related to work  
21 place harassment. (AR 191-210.) Dr. Blankenship performed a  
22 comprehensive examination, including a Mental Status Evaluation, along  
23 with eight other components which Dr. Blankenship described,  
24 generally, as objective tests. For example, Dr. Blankenship  
25 administered the Revised Hamilton Rating Scale for Depression  
26 ("RHRSD"), which he described as "one of the best known, most  
27 reliable, and most widely used tools for evaluating depressive  
28 symptoms. The scale has been used in the medical and psychiatric

1 communities and is appropriate for any medical or mental health  
2 setting where depressive symptoms must be assessed." (AR 200.) Dr.  
3 Blankenship diagnosed Plaintiff as suffering from major depression,  
4 severe, with psychotic features and post-traumatic stress disorder.  
5 (AR 207.) There are monthly treatment notes which post-date the  
6 initial treatment date in December 2005, and go through October 17,  
7 2006. (AR 211-223.)

8       Following Dr. Blankenship's last treatment visit with Plaintiff  
9 in October 2006, he completed a 19-page Permanent and Stationary  
10 Report on the 31<sup>st</sup> of that month in connection with Plaintiff's  
11 workers' compensation case. (AR 248-267.) In that report, Dr.  
12 Blankenship diagnosed major depression, single episode, moderate. He  
13 indicated that psychotic features initially present appeared to be in  
14 remission, and also diagnosed post-traumatic stress disorder, residual  
15 and slowly resolving. (AR 260.) He assessed a current General  
16 Assessment of Functioning ("GAF") score of 58, reflecting a moderate  
17 level of difficulty with social, occupational, and school functioning.  
18 (AR 261.) Significantly, Dr. Blankenship completed a "Work Function  
19 Impairment Rating" (AR 263), prefacing this with definitions. (AR  
20 262.) In these definitions, the term "slight" indicates a noticeable  
21 impairment, while "moderate" indicates a marked impairment. "Severe"  
22 is defined by Dr. Blankenship as inability to perform a work function.  
23 These definitions were provided within the context of Workers'  
24 Compensation terminology. Dr. Blankenship found slight impairment in  
25 Plaintiff's ability to maintain a work pace appropriate to a given  
26 workload; slight to moderate impairment in her ability to perform  
27 complex or varied tasks, and her ability to accept and carry out  
28 responsibility for directions; moderate limitations in her ability to

1 influence people and her ability to make generalizations, evaluations  
2 or decisions without immediate supervisors; and moderate to severe  
3 limitations in her ability to relate to others beyond giving and  
4 receiving instructions.

5       Following Dr. Blankenship's last treatment visit with Plaintiff  
6 in October 2006, he referred her to Dr. Musher, a psychiatrist, who  
7 performed an evaluation and wrote a report. (AR 269-278.) Dr. Musher  
8 assessed Plaintiff with an anxiety disorder, NOS, and major depressive  
9 disorder, recurrent. (AR 276.) Dr. Musher agreed with Dr.  
10 Blankenship's work function disability rating. (AR 276.)

11       There is an apparent gap in Plaintiff's treatment (which,  
12 unfortunately, was not resolved during the hearing before the ALJ on  
13 March 12, 2008 (AR 31-61), although Plaintiff testified), until  
14 February 19, 2008, when Plaintiff again visited Dr. Blankenship, who  
15 examined her, performed essentially the same psychological tests as  
16 were administered during her initial visit, and provided a current  
17 diagnosis of post-traumatic stress disorder and major depressive  
18 disorder, severe, with a history of psychotic symptoms. (AR 279.) Dr.  
19 Blankenship indicated that Plaintiff was having a marginal response to  
20 treatment (AR 270-81) and noted resurfacing symptoms. (*Id.*) He  
21 completed a Mental Residual Functional Capacity Questionnaire which  
22 contained "marked" and "extreme" limitations in areas of social  
23 interaction and adaptation. (AR 283.)<sup>1</sup> In the same report, he  
24 indicated that Plaintiff would require 20- to 30-minute breaks every  
25 two hours if she attempted an eight-hour workday, and further

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27       <sup>1</sup> Dr. Blankenship's definitions of these terms is set out at  
28 AR 282. The definitions he utilized in 2008 are consistent with  
Social Security terminology. See 20 C.F.R. §404.1520a(c)(4).

1 indicated that, at present, she would never have any "good" days.  
2 (Id.) On the same date, Dr. Blankenship conducted the aforementioned  
3 Psychological Reevaluation and Testing. (AR 295-309.) He essentially  
4 reaffirmed the same limitations he had found in December of 2006. (AR  
5 308.)

6 It is noted that there are supplemental treatment notes from  
7 March 2008 through January 2009. (AR 311-324.) Dr. Blankenship  
8 completed a third questionnaire, entitled "Mental Work Restriction  
9 Questionnaire," which provided for mostly marked limitations in mental  
10 work activities, as of January 22, 2009. (AR 318-319.) He defined  
11 "marked" as a seriously limited ability to function in the work  
12 environment. (AR 320.) This information post-dated the ALJ's  
13 decision, but was submitted to the Appeals Council (AR 4-8), which  
14 gave it "little weight" because it was unsupported by Dr.  
15 Blankenship's treatment records, which the Appeals Council interpreted  
16 as documenting steady improvement in Plaintiff's mental condition. By  
17 September 23, 2008, the Appeals Council noted, Plaintiff "was doing  
18 well adjusting to her independent living status, was isolating less  
19 ... was calm and pleasant and her appearance was good; ... (AR 5-6.)  
20 The Court's review of these treatment notes indicates that they  
21 contain, in addition, substantial cautionary and less sanguine  
22 descriptions of Plaintiff's mental health recovery. These notes, in  
23 addition to the other mental health evidence, will receive careful  
24 scrutiny on remand.

25 The only other examining report of a mental status nature  
26 contained in the Administrative Record is a complete psychiatric CE  
27 performed on December 9, 2006 at the request of the Department of  
28 Social Services by Dr. Aguilar, a Board-eligible psychiatrist. (AR

1 224-227.) This report reflects that only a brief mental status  
2 examination was performed, with no other testing of any kind. Dr.  
3 Aguilar made a diagnosis on Axis I of post-traumatic stress disorder.  
4 (AR 226.)<sup>2</sup>

5 The Medical Expert, Dr. Peterson, testified at the hearing.<sup>3</sup> Dr.  
6 Peterson had reviewed medical records, up to December of 2006. (AR  
7 36.) At the hearing, he was provided with Dr. Blankenship's February  
8 19, 2008 report. (Id.) In Dr. Peterson's opinion, there was an  
9 unexplained deterioration in Plaintiff's condition between Dr.  
10 Blankenship's 2006 report, and his 2008 report. (See AR at 37, 41, 42,  
11 43, 46, 48.) In Dr. Peterson's view, comparing Dr. Blankenship's 2006  
12 and 2008 reports, "suddenly everything is markedly impaired --." (AR  
13 37.) Dr. Peterson indicated, sensibly, that he needed "a little help  
14 ... understanding ... between the beginning of '07 to now what, what  
15 happened?" (Id.) At that point in the hearing, a break was taken from  
16 Dr. Peterson's testimony, and Plaintiff herself was examined. Other  
17 than briefly testifying that she had no recollection that she told any  
18 of her treating doctors that she felt better, she was not asked  
19 anything which would tend to provide an answer to Dr. Peterson's  
20 question. (See AR at 37-38.)

21 Dr. Peterson indicated that Dr. Blankenship's remarks are not  
22 consistent with the remainder of the record, although he did not  
23 identify exactly what parts of the record are inconsistent. Moreover,

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25 <sup>2</sup> At the hearing, Plaintiff testified that she recalled  
26 spending about five minutes in Dr. Aguilar's office "and she talked so  
fast that I hardly didn't understand what she was saying." (AR 40.)

27 <sup>3</sup> While the face page of the transcript identifies the medical  
28 expert as "David Peterson, M.D. (AR 31), Dr. Peterson's curriculum  
vitae indicates that he is a licensed psychologist with a Ph.D. (AR  
74-78.)

1 he stated that reviewing all of Dr. Blankenship's records, Plaintiff's  
2 functioning "varies over time ... within the Blankenship record ..."  
3 (AR 39.)

4 Dr. Peterson's principal complaint was that there was a lack of  
5 "objective testing" to support Dr. Blankenship's conclusions. (See,  
6 e.g., AR 41, 43-44.) In particular, Dr. Peterson testified that the  
7 various tests performed by Dr. Blankenship are simply "screens." (AR  
8 43.)<sup>4</sup>

9 When Dr. Peterson was questioned by Plaintiff's attorney, he was  
10 asked whether or not Dr. Blankenship's initial assessment did not in  
11 fact contain "severe" findings [as to mental functioning]. (AR 49.)  
12 Dr. Peterson responded that "it wasn't all marked as it is here ..."  
13 (Id.)<sup>5</sup>

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15 <sup>4</sup> The tests to which Dr. Peterson referred in his testimony  
16 are those set forth in Dr. Blankenship's report of December 19, 2005  
(at AR 199, et seq. and in his February 19, 2008 report, at AR 300).

17 <sup>5</sup> Although Dr. Peterson did not specifically indicate what  
18 data of Dr. Blankenship's he was referencing, it might appear logical  
19 to conclude that Dr. Peterson was comparing Dr. Blankenship's October  
20 31, 2006 Work Function Impairment Rating (AR 263) with Dr.  
21 Blankenship's Mental Residual Functional Capacity Questionnaire of  
22 February 19, 2008 (AR 279-283). While the Court would note (see infra  
23 for further discussion) that Dr. Blankenship typically recorded  
24 "slight" to "moderate" impairments in his October 31, 2006 evaluation,  
25 while in 2008, Dr. Blankenship noted mostly "marked" to "extreme"  
26 limitations, some of the difference may, as Plaintiff's counsel  
27 suggests, be due to definitional differences. For example, in 2006,  
28 Dr. Blankenship defined "moderate" as a "marked impairment" (AR 262),  
while in 2008, the term "marked" was defined as a serious limitation  
with substantial loss in the ability to effectively function. (AR  
282.) Moreover, the scale of terms in 2006 went from slight to  
moderate to severe, without any provision for a notation of a marked  
limitation, while in 2008, the scale went from mild to moderate to  
marked to extreme. As the Court has noted, in 2006, Dr. Blankenship  
utilized workers' compensation terminology. In 2008, he utilized  
definitions applicable in Social Security evaluation. None of these  
definitional differences, however, were discussed or accounted for by  
(continued...)

1 After the hearing, the ALJ, on April 28, 2008, wrote to Dr.  
2 Peterson, enclosing additional medical evidence, including Dr.  
3 Blankenship's February 19, 2008 reports (Dr. Peterson had seen some of  
4 this information at the hearing, as noted), and on May 30, 2008, Dr.  
5 Peterson responded to the ALJ. (AR 310.) Dr. Peterson now made the  
6 following indication:

7 "The new evidence provides clarity as to the duration  
8 of impairment reported in Dr. Blankenship's checklist dated  
9 2/19/08. [Exhibit] 10 F/3. [See AR 295-309.] Of the same  
10 date, notes 'resurfaced' symptoms, which may explain the  
11 sudden change in severity as noted in the checklist.  
12 However, we have no longitudinal data to support this level  
13 of severity ... Given the history of previously successful  
14 treatment and lack of contact with Dr. Blankenship from  
15 10/31/06 to 2/19/08, combined medication and talk-therapy  
16 should improve functioning within the next six months."

17 (AR 310.)  
18

19 Dr. Peterson's view of Dr. Blankenship's conclusions as to  
20 Plaintiff's mental functional abilities on February 19, 2008 was that  
21 "the levels of severity were a remarkable departure from the rest of  
22 the record. Treating records were requested to find evidence to  
23 support this remarkable change." (Id.)  
24

25 \_\_\_\_\_  
26 <sup>5</sup>(...continued)

26 Dr. Peterson during his testimony at the hearing. Rather, Dr.  
27 Peterson simply interpreted the 2008 findings by Dr. Blankenship as  
28 indicating an unexplained deterioration in Plaintiff's functioning  
which, according to Dr. Peterson, contradicted the balance of the  
medical records. For reasons discussed infra, the Court disagrees.



1           **A. Analysis.**

2           The ALJ's decision rejected Dr. Blankenship's conclusions in a  
3 somewhat perfunctory fashion: "No objective test results or diagnostic  
4 studies were used by Dr. Blankenship to establish the increase in  
5 symptoms that he noted [in February 2008]." (AR 23.) The ALJ also  
6 cited the December 9, 2006 report of the psychiatric CE, Dr. Aguilar  
7 (AR 21), and Dr. Musher's December 5, 2006 report. (Id.) Although  
8 stating, generally, that "great weight is given to the treating source  
9 opinions and to the opinion of the medical expert at the hearing" (AR  
10 24), the ALJ made no specific findings as to the reports of Dr.  
11 Aguilar or Dr. Musher, and other than noting his conclusion (in  
12 agreement with the ME) that Dr. Blankenship's findings were not  
13 supported by any objective test results or diagnostic studies, the  
14 decision is unclear as to whether or not the ALJ gave any credibility  
15 whatsoever to Dr. Blankenship. All of this makes it very difficult  
16 for the Court to accord any credibility to the ALJ's conclusions.  
17 Certainly, on remand, there must be an objective analysis of Dr.  
18 Blankenship's conclusions with regard to Plaintiff's mental functional  
19 limitations, in particular, factoring in the different definitional  
20 standards which were used in his different reports. It appears to the  
21 Court very likely that Dr. Blankenship's conclusions between 2006 and  
22 2008 may not be significantly different; rather, any perceived  
23 difference may lie in the different definitional terms used. Dr.  
24 Blankenship should be contacted to explain whether there is, in fact,  
25 such a discrepancy. Moreover, the ALJ failed to address the findings  
26 of the psychiatrist, Dr. Musher, who examined Plaintiff in 2006, and  
27 who agreed with Dr. Blankenship's mental functional limitation  
28 conclusions. It is also very critical that a determination be made as

1 to whether Dr. Blankenship did perform "objective" tests. While Dr.  
2 Peterson felt that this was not the case, the Court is unaware of any  
3 greater expertise of Dr. Peterson over and above that of Dr.  
4 Blankenship. Both are psychologists who have earned Ph.D.s. As the  
5 Court has noted in this Opinion, Dr. Blankenship asserted that several  
6 of the tests he performed are, in fact, of an objective nature.  
7 Further, many of the tests appear to have built-in validity  
8 components. If this amounts to nothing more than reliance upon  
9 subjective self-reporting, then much more needs to be explained to  
10 reach that conclusion.

11 The Court is, further, concerned with what would appear to be a  
12 double standard in terms of accepting or rejecting Plaintiff's  
13 subjective self-reporting in this case. That is, when Plaintiff may  
14 have reported that she was at times feeling better or doing better, in  
15 general terms, this was seemingly accepted by the ALJ, as it was by  
16 the ME. On the other hand, when Plaintiff stated that she was not  
17 doing well, this was rejected by the ALJ pursuant to a depreciated  
18 credibility finding. (See AR at 23.) These inconsistencies in  
19 evaluation are not reconciled in the ALJ's decision. Either Plaintiff  
20 is credible, or she is not credible.

21 Finally, in addition to further developing the record as the  
22 Court has indicated, on remand, the ALJ should take every opportunity  
23 to determine what, if any, treatment Plaintiff received during the  
24 apparent "gap" period of 2007.<sup>6</sup> If this apparent or possible lack of  
25 treatment is as significant as Dr. Peterson claims, an attempt should

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27 <sup>6</sup> For example, Dr. Blankenship's treatment notes for 2008 (AR  
28 311-317) make reference to apparent treatment by Dr. Musher, and the  
administration by him of medications. Did this begin in 2008? 2007?  
2006?

1 be made to resolve this hanging question.

2 Because this matter will be remanded as to Issue No. 1, Issue No.  
3 2, concerning the ALJ's rejection of Plaintiff's testimony, need not  
4 be extensively discussed, because Plaintiff's testimony, and her  
5 credibility, will be reevaluated de novo on remand. The Court will  
6 note, however, that the reasons cited in the ALJ's decision are wholly  
7 insufficient. At first, the ALJ makes the conclusory statement that,  
8 "The [Plaintiff's] hearing allegations were not credible or consistent  
9 with the credible medical evidence." (AR 23.) This is a  
10 generalization which is routinely rejected by Courts, both at the  
11 trial and appellate levels. The Court need not cite basic concepts of  
12 credibility assessment to make this point. Further, the ALJ  
13 apparently relied upon a conclusion that Plaintiff does not suffer  
14 adverse side effects to medications she has taken for her mental  
15 condition. This does not constitute a basis for a credibility  
16 assessment. Finally, the ALJ comments that Plaintiff continues to  
17 "enjoy" a normal level of activities of daily living, such as meal  
18 preparation, and maintaining personal hygiene, using public  
19 transportation, and interacting with family and friends and performing  
20 household chores. (Id.) Even if, in fact, this is correct (which the  
21 Court has not evaluated), it would not appear to be a basis for a  
22 credibility assessment. A person can brush her teeth and still have  
23 mental functional limitations. A person can take a bus and still have  
24 such limitations. The point is clear. Plaintiff's credibility will  
25 be properly and correctly evaluated on remand.

26 For the foregoing reasons, this matter will be remanded for  
27 further hearing consistent with this Memorandum Opinion.

28 **IT IS SO ORDERED.**

