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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARK W. SCHOENING,) NO. CV 10-03330 SS
)
Plaintiff,)
)
v.) **MEMORANDUM DECISION AND ORDER**
)
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

**I.
INTRODUCTION**

Plaintiff Mark W. Schoening ("Plaintiff") brings this action seeking to reverse the decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

1 issued an unfavorable decision on October 14, 2009. (AR 13-29).
2 Plaintiff requested review by the Appeals Council which was denied on
3 March 4, 2010. (AR 9-12, 6-8). On May 6, 2010, Plaintiff filed the
4 instant action.

5
6 **III.**

7 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

8
9 To qualify for disability benefits, a claimant must demonstrate a
10 medically determinable physical or mental impairment that prevents him
11 from engaging in substantial gainful activity¹ and that is expected to
12 result in death or to last for a continuous period of at least twelve
13 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
14 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
15 incapable of performing the work he previously performed and incapable
16 of performing any other substantial gainful employment that exists in
17 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
18 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

19
20 To decide if a claimant is entitled to benefits, an ALJ conducts
21 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 22
23 (1) Is the claimant presently engaged in substantial gainful
24 activity? If so, the claimant is found not disabled.
25 If not, proceed to step two.
26

27 _____
28 ¹ Substantial gainful activity means work that involves doing
significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. § 416.910.

1 (2) Is the claimant's impairment severe? If not, the
2 claimant is found not disabled. If so, proceed to step
3 three.

4 (3) Does the claimant's impairment meet or equal the
5 requirements of any impairment listed at 20 C.F.R. Part
6 404, Subpart P, Appendix 1? If so, the claimant is
7 found disabled. If not, proceed to step four.

8 (4) Is the claimant capable of performing his past work? If
9 so, the claimant is found not disabled. If not, proceed
10 to step five.

11 (5) Is the claimant able to do any other work? If not, the
12 claimant is found disabled. If so, the claimant is
13 found not disabled.

14
15 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
16 949, 953-54 (9th Cir. 2001); 20 C.F.R. § 416.920(b)-(g)(1).

17
18 The claimant has the burden of proof at steps one through four, and
19 the Commissioner has the burden of proof at step five. Bustamante, 262
20 F.3d at 953-54. If, at step four, the claimant meets his burden of
21 establishing an inability to perform the past work, the Commissioner
22 must show that the claimant can perform some other work that exists in
23 "significant numbers" in the national economy, taking into account the
24 claimant's residual functional capacity ("RFC"),² age, education and
25 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).
26 The Commissioner may do so by the testimony of a vocational expert or

27
28 ² Residual functional capacity is "the most [one] can still do
despite [his] limitations" and represents an assessment "based on all
the relevant evidence." 20 C.F.R. § 416.945(a).

1 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.
2 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids").
3 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a
4 claimant has both exertional (strength-related) and nonexertional
5 limitations, the Grids are inapplicable and the ALJ must take the
6 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869
7 (9th Cir. 2000).

8 9 IV.

10 STANDARD OF REVIEW

11
12 Under 42 U.S.C. § 405(g), a district court may review the
13 Commissioner's decision to deny benefits. The court may set aside the
14 Commissioner's decision when the ALJ's findings are based on legal error
15 or are not supported by substantial evidence in the record as a whole.
16 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
17 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

18
19 "Substantial evidence is more than a scintilla, but less than a
20 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
21 which a reasonable person might accept as adequate to support a
22 conclusion." Id. To determine whether substantial evidence supports
23 a finding, the court must "'consider the record as a whole, weighing
24 both evidence that supports and evidence that detracts from the
25 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
26 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
27 reasonably support either affirming or reversing that conclusion, the
28

1 court may not substitute its judgment for that of the Commissioner.
2 Reddick, 157 F.3d at 720-21.

3
4 V.

5 DISCUSSION

6
7 **The ALJ Failed to Provide Specific and Legitimate Reasons To**
8 **Reject The Treating Physician's Opinion**

9
10 Plaintiff contends that the ALJ failed to provide specific and
11 legitimate reasons to reject the opinion of his treating physician, Dr.
12 Sandler. (Memorandum in Support of Complaint ("Complaint Memo.") at 6,
13 17). Specifically, Plaintiff argues that the ALJ failed to properly
14 consider Dr. Sandler's findings regarding Plaintiff's ability to
15 tolerate non-concentrated forms of pulmonary irritants, Plaintiff's
16 ability to stand and walk in a day, Plaintiff's ability to use his hands
17 for manipulation, and Plaintiff's mental health. (Id. at 9-13). This
18 Court agrees.

19
20 Where a treating physician's opinion is not contradicted by another
21 doctor, it may be rejected only for "clear and convincing" reasons.
22 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even if the
23 treating physician's opinion is contradicted by another doctor, the ALJ
24 may not reject this opinion without providing specific, legitimate
25 reasons, supported by substantial evidence in the record. Id. (citing
26 Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983)); Rollins v.
27 Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (citing Reddick, 157 F.3d
28 at 725). The opinions of treating physicians are entitled to special

1 weight because the treating physician is hired to cure and has a better
2 opportunity to know and observe the claimant as an individual.
3 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

4
5 The opinion at issue here is that of Dr. Joel M. Sandler, who the
6 ALJ recognized as Plaintiff's treating physician. (AR 23). Dr. Sandler
7 began treating Plaintiff in February of 2005. (AR 488). The record
8 demonstrates that Dr. Sandler treated Plaintiff from March of 2007 to
9 July of 2009. (AR 485-94, 598-02, 604-11, 620-49)³. On January 6,
10 2009, Dr. Sandler completed a residual functional capacity
11 questionnaire, (AR 486-87), and a mental work restriction questionnaire.
12 (AR 488-494).

13
14 The ALJ rejected Dr. Sandler's January 2009 assessment, "even
15 though he []is the treating physician," because the ALJ concluded that
16 Dr. Sandler's opinion was "brief, conclusory and inadequately supported
17 by the clinical findings." (AR 19). The ALJ explained that he gives
18 "greater weight to the signs, test results, and medical findings noted
19 in the longitudinal medical records" than to an "unsupported assessment
20 . . . completed for the sole purpose of qualifying [Plaintiff] for
21 benefits." (AR 19-20). However, the ALJ's rejection of Dr. Sandler's
22 medical opinion as conclusory and unsupported by clinical findings is
23 contradicted by the record. Indeed, the record contains ample office
24 visit reports and treatment notes which support and explain Dr.
25 Sandler's findings. (AR 598-02, 604-11, 620-49). For example, Dr.

26 ³ Plaintiff has been a patient of Dr. Sandler since March of 2007.
27 (AR 642). Dr. Sandler documented Plaintiff's office visits on the
28 following dates: 3/5/2007, 11/5/2008, 12/8/2008, 12/17/2008, 1/5/2009,
2/5/2009, 3/19/2011, 4/2/2009, 4/22/2009, 5/21/2009, 5/21/2009, and
7/2/2009. (AR 485-89, 598-02, 604-11, 620-49).

1 Sandler examined Plaintiff's respiration during physical exams (See AR
2 598, 601), tested Plaintiff for tender points during musculoskeletal
3 physical exams (AR 599, 606), and prescribed Plaintiff medicine for
4 attention deficit disorder (AR 488, 606, 611, 632). Thus, the Court
5 concludes that the ALJ's rejection of Dr. Sandler's findings as
6 conclusory and unsupported by clinical findings is not legitimate.

7
8 **1. The ALJ Erred In Rejecting Dr. Sandler's Respiratory**
9 **Limitations**

10 _____
11 With respect to Plaintiff's respiratory limitations, Dr. Sandler
12 found that Plaintiff could not tolerate any exposure to dust, fumes, and
13 gases. (AR 487). In his treatment notes, Dr. Sandler noted that
14 Plaintiff "has a daily nonproductive cough[,] . . . occasional tightness
15 in his chest[,] . . . [he] wheezes at night[,] and uses an albuterol
16 inhaler." (AR 642). In addition, Dr. Sandler noted that "[Plaintiff]
17 currently can walk one block without dyspnea and has to stop." (Id.).
18 Based on these findings, Dr. Sandler diagnosed Plaintiff with chronic
19 obstructive pulmonary disease [COPD] with an asthmatic component. (AR
20 598, 622, 642). Dr. Sandler noted in July 2009 that COPD continued to
21 be an active problem for Plaintiff. (AR 598).

22
23 The ALJ rejected Dr. Sandler's findings regarding Plaintiff's
24 respiratory limitations because he opined that Dr. Sandler's findings
25 were not supported "by the information in the treatment notes". (AR
26 20). After rejecting the findings of Dr. Sandler, the ALJ relied on the
27 findings of a consulting physician, Dr. Taylor, to determine Plaintiff's
28 respiratory limitations. (Id.). The ALJ noted that Dr. Taylor found

1 "a history of COPD [chronic obstructive pulmonary disease], but normal
2 chest and lung excursions without wheezing, rhonchi or rubs." (Id.).
3 Dr. Taylor recommended that Plaintiff be "only occasionally . . .
4 exposed to any fumes, dust, pollutions [sic], extremes in temperature,
5 gasses, and chemicals based on pulmonary problems." (AR 560). The ALJ
6 therefore concluded that Plaintiff needs to avoid only "concentrated
7 exposure to pulmonary irritants." (AR 19).

8
9 The Court finds that the ALJ's rejection of Dr. Sandler's
10 respiratory limitations because they are allegedly not supported by the
11 doctor's treatment notes is not a legitimate reason. To the extent the
12 ALJ rejected Dr. Sandler's findings as brief and conclusory, the record
13 contradicts this finding as set forth above. After examining
14 Plaintiff's lungs during office visits, Dr. Sandler diagnosed Plaintiff
15 with COPD. (AR 598, 601). While Plaintiff's lungs were clear on some
16 office visits, Dr. Sandler noted in July 2009 that COPD continued to be
17 an active problem for Plaintiff. (AR 598). Additionally, Dr. Sandler's
18 findings are corroborated by the findings of Dr. Sedgh, who conducted
19 an internal medicine consultation and found that Plaintiff suffered from
20 "[a]sthma" and "expiratory weezing." (AR 432). Dr. Sedgh concluded in
21 his functional assessment that Plaintiff "should avoid exposure to dust
22 and fumes secondary to asthma." (Id.). Thus, to the extent that the
23 ALJ rejected Dr. Sandler's opinion with respect to Plaintiff's
24 respiratory condition as conclusory and unsupported by Dr. Sandler's
25 treatment notes, these reasons are not supported by the record.

26 //
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1 **2. The ALJ Erred In Rejecting Dr. Sandler's Diagnosis of**
2 **Fibromyalgia and Plaintiff's Physical Limitations**

3
4 With respect to Plaintiff's physical condition, Dr. Sandler
5 diagnosed Plaintiff with fibromyalgia. (AR 599, 596). Dr. Sandler made
6 this assessment after he found "[m]ultiple tender points in [the]
7 muscles of [Plaintiff's] trunk [and] upper and lower extremities [which
8 meet] the criteria for fibromyalgia." (AR 599). In his treatment
9 notes, Dr. Sander stated that "[plaintiff] has tenderness over the
10 paralumbar area and over the lumbar vertebrae at about L1, 2, and 3."
11 (AR 606). Dr. Sandler also diagnosed Plaintiff with Rheumatoid
12 Arthritis and Chronic Pain Syndrome. (AR 598, 604, 606). In light of
13 these findings, Dr. Sandler limited the amount of weight that Plaintiff
14 may lift and carry, as well as his ability to sit, stand, or walk for
15 extended periods of time. (AR 486). Dr. Sandler limited the use of
16 Plaintiff's hands for simple grasping, pushing & pulling, and fine
17 manipulation. (AR 486). Dr. Sandler also prescribed Plaintiff pain
18 medications such as Lortab and Neurontin. (AR 598).

19
20 The ALJ rejected Dr. Sandler's diagnosis of fibromyalgia because
21 "the medical records do not show . . . objective corroborative findings
22 or show that the claimant has ongoing treatment for fibromyalgia." (AR
23 21). In forming his opinion, the ALJ relied on the report of Dr. Taylor
24 who found "no evidence of deformities, swelling or tenderness to direct
25 palpation of any joint." (AR 21, 558). The ALJ stated that Plaintiff
26 only had "subjective pain complaints and [reported] that he sometimes
27 says he has subjective tenderness." (AR 21). The ALJ further stated
28 that fibromyalgia, "if it is severe, should result in objective

1 functional restrictions . . . [but] the medical records do not show any
2 severe functional limitations secondary to pain.” (Id.). The ALJ
3 therefore concluded that Plaintiff “demonstrates no functional
4 limitations of the hands or fingers.” (Id.).

5
6 The ALJ failed to provide legitimate reasons to reject Dr.
7 Sandler’s diagnosis of fibromyalgia. The Ninth Circuit has recognized
8 that objective findings “do not establish the presence or absence of
9 fibromyalgia.” Jordan v. Northrop Grumman Corp. Welfare Benefit Plan,
10 370 F.3d 869, 872 (9th Cir. 2004), overruled in part on other grounds,
11 Abatie v Alta Health & Life Ins. Co., 458 F.3d 955, 969 (9th Cir. 2006).
12 As stated in Jordan:

13
14 [F]ibromyalgia’s cause or causes are unknown, there is no
15 cure, and, of greatest importance to disability law, its
16 symptoms are entirely subjective. There are no laboratory
17 tests for the presence or severity of fibromyalgia.

18
19 370 F.3d at 872; accord Salomaa v. Honda Long Term Disability Plan, __
20 F.3d __, 2011 WL 2040934 at *10 (9th Cir. May 26, 2011). Instead, a
21 fibromyalgia diagnosis can only be confirmed by a specific test where
22 a patient reports pain in five parts of the body and when at least
23 eleven of eighteen points cause pain when palpated by an examiner’s
24 thumb. (Id.). Here, the ALJ erroneously rejected Dr. Sandler’s
25 fibromyalgia diagnosis based on the lack of objective findings.
26 Moreover, Dr. Sandler found “multiple tender points in [the] muscles of
27 [Plaintiff’s] trunk [and] upper and lower extremities [which meet] the
28 criteria for fibromyalgia.” (AR 599). Dr. Sandler also prescribed

1 Plaintiff pain medicines Lortab and Neurontin which are common
2 treatments for fibromyalgia. (AR 598). On remand, the ALJ must either
3 provide specific and legitimate reasons to reject the evidence of
4 Plaintiff's fibromyalgia or analyze its affect on Plaintiff's ability
5 to work.

6
7 **3. The ALJ Erred In Rejecting Dr. Sandler's Opinion Regarding**
8 **Plaintiff's Mental Capacity**
9

10 With respect to Plaintiff's mental health, Dr. Sandler diagnosed
11 Plaintiff with attention deficit disorder, and noted that he becomes
12 easily upset and has difficulty focusing and ordering his thoughts. (AR
13 488-499). Plaintiff's medical records indicate a long history of mental
14 health treatment with a variety of different physicians.⁴ Specifically,
15 at issue in the present case is Dr. Sandler's mental work restriction
16 questionnaire which he completed on January 6, 2009. (AR 488-94). In
17 assessing the affect of Plaintiff's mental condition on his ability to
18 perform work, Dr. Sandler found that Plaintiff has a severe impairment
19 in his ability to complete a normal work day without interruptions from
20 psychologically based symptoms and performing at a consistent pace
21 without an unreasonable number of and length of rest periods. (AR 489).
22 In addition, Dr. Sandler noted that Plaintiff has a marked impairment
23 in his ability to: maintain attention for two hour segments, to work in
24 coordination with or in close proximity to other people without being

25 _____
26 ⁴ Plaintiff has been diagnosed with ADD (AR 255-56), Affective
27 (Mood) Disorder (AR 663), Depressive Disorder (AR 402), and Borderline
28 Intellectual Functioning (AR 402). Consultative physician Dr. Izzi
diagnosed Plaintiff with depressive disorder, polysubstance abuse, and
borderline intellectual functioning. (AR 551). (See also AR 239-40,
259, 400-02, 420-26, 582-592, 663, 670).

1 distracted by them, to make simple work-related decisions, and to get
2 along with co-workers or peers without distracting them or exhibiting
3 behavior extremes. (AR 488-89). Dr. Sandler prescribed Plaintiff with
4 a number of medications designed to treat his mental condition including
5 Ritalin, Desipramine, and Diazepam. (AR 598, 632).

6
7 The ALJ rejected Dr. Sandler's mental work restrictions because Dr.
8 Sandler is not a mental health specialist and because he was not
9 treating the Plaintiff for mental health problems. (AR 23-24). The ALJ
10 therefore declined to "endorse Dr. Sandler's assessment and [gave] no
11 weight to any of the functional limitations alleged on his disability
12 form." (AR 24). The ALJ specifically emphasized that "NO intellectual
13 testing was done [and that] [n]o psychiatric evaluation was performed."
14 (AR 23) (emphasis in original). As a result, the ALJ relied instead on
15 the less restrictive mental limitations reported by consultative
16 physician, Dr. Izzi (AR 23-24, 551).

17
18 The ALJ did not give legitimate reasons based on the record for
19 rejecting Dr. Sandler's assessment of Plaintiff's mental condition.
20 Although the ALJ emphasized that no intellectual testing or psychiatric
21 evaluations were performed, Dr. Sandler noted in an office visit report
22 on January 5, 2009 that the Plaintiff has "ADD which has been documented
23 with a TOVA test⁵, which was authorized on March 8, 2007, and done with
24 Dr. Middleton." (AR 23, 488, 606). Dr. Sandler also noted on March 5,
25 2007 that Plaintiff was diagnosed with "ADHD which had been validated

26 _____
27 ⁵ "The T.O.V.A. [Test of Variables of Attention] is an objective,
28 neurophysiological measure of attention, not a subjective rating of
behavior." THE TOVA COMPANY, <http://www.tovatest.com> (last visited June
15, 2011).

1 by a psychologist in the past.” (AR 611). Although Dr. Sandler is not
2 a mental health specialist, as noted earlier, he treated the Plaintiff
3 for mental health conditions by prescribing him psychiatric drugs in
4 addition to treating the Plaintiff for other health conditions. (AR
5 598, 622, 632). Plaintiff’s extensive mental health records corroborate
6 Dr. Sandler’s medical assessment. (See supra n.4). The ALJ’s rejection
7 of Dr. Sandler’s mental health restrictions because he is not a mental
8 health care specialist is not a proper rationale in light of the
9 extensive record of mental health treatment and tests from a variety of
10 treating doctors, including psychologists. Although ordinarily a lack
11 of expertise in the mental health field may be a legitimate reason to
12 discount a doctor’s opinion on mental limitations, here it was not a
13 legitimate reason. Although Dr. Sandler is not a mental health
14 specialist, given the quantity and quality of evidence contained in the
15 records regarding the mental health treatment he provided Plaintiff, the
16 ALJ should have given some weight to the mental limitation findings of
17 Dr. Sandler. The ALJ must either provide specific and legitimate
18 reasons to reject Dr. Sandler’s opinion or incorporate the mental health
19 limitations provided by Dr. Sandler into the RFC determination.

20 Remand for further proceedings is appropriate where additional
21 proceedings could remedy defects in the Commissioner’s decision. See
22 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000); Kail v. Heckler,
23 722 F.2d 1496, 1497 (9th Cir. 1984). Because the ALJ failed to provide
24 specific and legitimate reasons for rejecting the treating physician’s
25 opinion, or, instead, to fully credit the opinion, the case must be
26 remanded to remedy this defect. Upon remand, the ALJ must either
27 provide specific and legitimate reasons to reject Dr. Sandler’s opinion
28

1 or incorporate the limitations provided by Dr. Sandler into the RFC
2 determination.

3
4 **VII.**
5 **CONCLUSION**

6
7 Consistent with the foregoing, IT IS ORDERED that judgment be
8 entered REVERSING the decision of the Commissioner and REMANDING this
9 matter for further proceedings consistent with this decision. IT IS
10 FURTHER ORDERED that the Clerk of the Court serve copies of this Order
11 and the Judgment on counsel for both parties.
12

13 DATED: June 21, 2011
14

15 _____/s/_____
16 SUZANNE H. SEGAL
17 UNITED STATES MAGISTRATE JUDGE
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