

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROSA E. TRUJILLO,

Plaintiff,

V.

MICHAEL J. ASTRUE,  
Commissioner of the Social  
Security Administration,

Defendant.

NO. CV 11-1220 SS

**MEMORANDUM DECISION AND ORDER**

I.

## INTRODUCTION

Rosa E. Trujillo ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). Alternatively, she asks for a remand. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the

1 reasons stated below, the decision of the Commissioner is REVERSED and  
2 REMANDED for further proceedings.

3  
4 **II.**

5 **PROCEDURAL HISTORY**

6  
7 Plaintiff initially requested benefits on May 16, 2005, alleging  
8 a disability onset date of August 1, 2000 due to injuries to her back,  
9 neck, and discs; tendonitis in both hands and arms; glaucoma; and  
10 blindness in right eye. (AR 100). After the Agency denied benefits,  
11 Plaintiff requested a hearing before an Administrative Law Judge  
12 ("ALJ"), which was held on February 22, 2007. (AR 608-10). Plaintiff  
13 was not represented by counsel at the hearing. (AR 610-11). On March  
14 7, 2007, the ALJ issued a decision denying benefits. (AR 16-29).  
15 Plaintiff's request for appeal was denied by the Appeals Council on May  
16 25, 2007, making the ALJ's decision the final decision for the Agency.  
17 (AR 9).

18  
19 Subsequently, Plaintiff filed action in federal court, and,  
20 following a Stipulation for Remand, the Court remanded the action. (AR  
21 653-57). On May 9, 2009, the ALJ conducted a second hearing where  
22 Plaintiff appeared with counsel and testified. (AR 728-45). Again, the  
23 ALJ issued an opinion denying benefits on June 26, 2009. (AR 634-46).  
24 On October 30, 2010, the Appeals Council declined jurisdiction, making  
25 the ALJ's most recent opinion the final decision of the Agency. (AR  
26 627). Plaintiff then filed this second action in federal court.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

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

To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
- (2) Is the claimant's impairment severe? If not, the claimant is found not disabled. If so, proceed to step three.
- (3) Does the claimant's impairment meet or equal one of list of specific impairments described in 20 C.F.R. Part 404,

---

<sup>1</sup> 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. §§ 404.1510, 416.910.

1 Subpart P, Appendix 1? If so, the claimant is found  
2 disabled. If not, proceed to step four.

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

6 (5) Is the claimant able to do any other work? If not, the  
7 claimant is found disabled. If so, the claimant is  
8 found not disabled.

9  
10 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
11 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§  
12 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

13  
14 The claimant has the burden of proof at steps one through four, and  
15 the Commissioner has the burden of proof at step five. Bustamante, 262  
16 F.3d at 953-54. If, at step four, the claimant meets his burden of  
17 establishing an inability to perform past work, the Commissioner must  
18 show that the claimant can perform some other work that exists in  
19 "significant numbers" in the national economy, taking into account the  
20 claimant's residual functional capacity ("RFC"),<sup>2</sup> age, education, and  
21 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at  
22 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may  
23 do so by the testimony of a vocational expert or by reference to the  
24 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart  
25 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240  
26

---

27 <sup>2</sup> Residual functional capacity is "what [one] can still do  
28 despite [his] limitations" and represents an "assessment based upon all  
of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional  
2 (strength-related) and nonexertional limitations, the Grids are  
3 inapplicable and the ALJ must take the testimony of a vocational expert.  
4 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

### 6 III.

#### 7 STANDARD OF REVIEW

8  
9 Under 42 U.S.C. § 405(g), a district court may review the  
10 Commissioner's decision to deny benefits. The court may set aside the  
11 Commissioner's decision when the ALJ's findings are based on legal error  
12 or are not supported by substantial evidence in the record as a whole.  
13 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.  
14 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

15  
16 "Substantial evidence is more than a scintilla, but less than a  
17 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
18 which a reasonable person might accept as adequate to support a  
19 conclusion." Id. To determine whether substantial evidence supports  
20 a finding, the court must "'consider the record as a whole, weighing  
21 both evidence that supports and evidence that detracts from the  
22 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny  
23 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can  
24 reasonably support either affirming or reversing that conclusion, the  
25 court may not substitute its judgment for that of the Commissioner.  
26 Reddick, 157 F.3d at 720-21.

27 \\  
28 \\  
29

1 IV.

2 DISCUSSION

3  
4 A. The ALJ Failed To Properly Consider Treating Physician Evidence  
5 When He Evaluated Plaintiff's Fibromyalgia  
6

7 An ALJ must afford the greatest weight to the opinion of the  
8 claimant's treating physician. The opinions of treating physicians are  
9 entitled to special weight because the treating physician is hired to  
10 cure and has a better opportunity to know and observe the claimant as  
11 an individual. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003);  
12 Thomas v. Barnhart, 278 F.3d 947, 956-57 (9th Cir. 2002); Magallanes  
13 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). Where the treating  
14 doctor's opinion is not contradicted by another doctor, it may be  
15 rejected only for "clear and convincing" reasons. Lester v. Chater, 81  
16 F.3d 821, 830 (9th Cir. 1995) (as amended). Even if the treating  
17 physician's opinion is contradicted by another doctor, the ALJ may not  
18 reject this opinion without providing specific, legitimate reasons,  
19 supported by substantial evidence in the record. Id. at 830-31; see  
20 also Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007); Ryan v. Comm'r  
21 of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).  
22

23 Further, when considering a potential disability caused by  
24 fibromyalgia, the Ninth Circuit recognized that objective findings "do  
25 not establish the presence or absence of fibromyalgia." Jordan v.  
26 Northrop Grumman Corp. Welfare Plan, 370 F.3d 869, 872 (9th Cir. 2004).  
27 Specifically, "fibromyalgia's cause or causes are unknown, there is no  
28 cure, and, of greatest importance to disability law, its symptoms are

1 entirely subjective. There are no laboratory tests for the presence or  
2 severity of fibromyalgia." Id. Instead, a fibromyalgia diagnosis can  
3 only be confirmed by a specific test where a patient reports pain in  
4 five parts of the body and when at least eleven of eighteen points cause  
5 pain when palpated by an examiner's thumb. Id. (citing Rollins v.  
6 Massanari, 261 F.3d 853, 855 (9th Cir. 2001)).

7  
8 Where a treating physician's opinion is contradicted "the [ALJ]  
9 must determine credibility and resolve the conflict." Valentine v.  
10 Comm'r, 574 F.3d 685, 692 (9th Cir. 2009) (quoting Lester v. Chater, 81  
11 F.3d 821, 830 (9th Cir. 1995)). "However, to reject the opinion of a  
12 treating physician in favor of a conflicting opinion . . . an ALJ must  
13 make findings setting forth specific, legitimate reasons for doing so  
14 that are based on substantial evidence in the record." Id. (internal  
15 quotation marks omitted). "The ALJ must do more than offer his  
16 conclusions. He must set forth his own interpretations and explain why  
17 they, rather than the [physician's] are correct." Orn v. Astrue, 495  
18 F.3d 625, 632 (9th Cir. 2007) (internal citation omitted).  
19 Additionally, in order for the ALJ to properly reject a treating  
20 physician's opinion relating to fibromyalgia, the ALJ must first attempt  
21 to recontact the treating physician to receive clarification of any  
22 conflict in the evidence. SSR 99-2p at \*6.

23  
24 Here, Dr. Ho clearly diagnosed and treated Plaintiff for over five  
25 years for fibromyalgia. (AR 458-73, 710-24). He based his diagnosis  
26 on clinical findings such as the presence of numerous fibromyalgia  
27 tender points, sleep disturbances, and muscle spasms. (AR 541). Dr.  
28 Ho completed a Fibromyalgia Questionnaire concluding that Plaintiff

1 could be on her feet for only two hours in a workday, and that she would  
2 be incapable of performing low stress jobs because of her pain and  
3 likely prolonged absences from the work place. (AR 542-45). Given the  
4 length and frequency of the treating relationship with Dr. Ho, Dr. Ho's  
5 clinical findings, and Dr. Ho's repeated confirmation of a fibromyalgia  
6 diagnosis, the ALJ's characterization of Dr. Ho's diagnosis of  
7 fibromyalgia as a "naked diagnosis" (AR 641) without support is simply  
8 belied by the record.

9  
10 Further, the ALJ erred by discounting Dr. Ho's opinion on the  
11 grounds that Dr. Ho relied on Plaintiff's subjective complaints of pain.  
12 (Id.). A patient's subjective report of pain and symptoms is paramount  
13 for diagnosing fibromyalgia. Benecke v. Barnhart, 379 F.3d 587, 590  
14 (9th Cir. 2004). Contrary to the ALJ's assertion that Dr. Ho failed to  
15 provide sufficient treatment to support Plaintiff's complaints, the  
16 record shows that Dr. Ho provided substantial treatment. For example,  
17 Dr. Ho submitted reports showing extensive testing (AR 458-59, 463-65,  
18 711-15); record of medications including Vicodin, Effexor, Naproxen,  
19 Tramadol, Prevacid, Prilosec, Trazodone (AR 459-69); and physical  
20 therapy treatment. (AR 458). Additionally, even Dr. Sourehnissani,  
21 whose opinion the ALJ relied upon to determine Plaintiff's RFC, did not  
22 reject Dr. Ho's diagnosis of fibromyalgia. (AR 693). Therefore, the  
23 reasons provided by the ALJ to reject Dr. Ho's diagnosis of fibromyalgia  
24 are not sufficient to meet his burden of specific, legitimate reasons  
25 supported by substantial evidence.

1           **C.    The ALJ Failed To Provide Clear And Convincing Reasons In**  
2           **Rejecting Plaintiff's Pain Testimony**

3  
4           Unless there is affirmative evidence showing that the plaintiff is  
5           malinger, the ALJ's reasons for rejecting a plaintiff's testimony  
6           must be "clear and convincing." Lester, 81 F.3d at 834. An ALJ may not  
7           discredit a plaintiff's testimony solely because the degree of pain  
8           alleged by the plaintiff is not supported by objective medical evidence.  
9           Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991). Moreover,  
10          in cases involving fibromyalgia, "when additional information is needed  
11          to assess the credibility of the individual's statements about symptoms  
12          and their effects, the [ALJ] must make every reasonable effort to obtain  
13          available information that could shed light on the credibility of the  
14          individual's statements." SSR 99-2p at \*7.

15  
16          Here, the ALJ rejected Plaintiff's subjective complaints because  
17          they were "out of proportion to the objective clinical findings" and  
18          there was "no evidence of sever disuse muscle atrophy that would be  
19          compatible with her alleged inactivity and inability to function for the  
20          past 9 years." (AR 644). Additionally, the ALJ claimed that the  
21          "conservative" treatment record was inconsistent with Plaintiff's  
22          testimony. (Id.). These reasons are, again, undermined by the actual  
23          record and are not legitimate reasons for rejecting Plaintiff's  
24          complaints.

25  
26          First, the ALJ's assertion that Plaintiff's complaints were out of  
27          proportion to her treatment record is unfounded. While there are no  
28          objective tests for diagnosing fibromyalgia, at least one doctor, Dr.

1 Ho, performed a trigger point test and confirmed fibromyalgia. Jordan,  
2 370 F.3d at 872. As discussed above, Dr. Ho also submitted numerous  
3 records documenting Plaintiff's pain and suffering. (AR 458-59, 463-65,  
4 711-15). This medical evidence is consistent, in fact, with Plaintiff's  
5 testimony.

6  
7 Second, the absence of muscular atrophy is not inconsistent with  
8 Plaintiff's testimony because she admitted some ability to move, despite  
9 her pain. (AR 736-38); Jordan, 370 F.3d at 594 ("[O]ne does not need  
10 to be utterly incapacitated in order to be disabled.") (internal  
11 citation omitted). Third, the ALJ's characterization of Plaintiff's  
12 treatment as "not aggressive" is inaccurate. Plaintiff has a long list  
13 of strong medications, taken consistently for many years and attended  
14 physical therapy at least twice a week. (AR 710-15, 738). Because  
15 there is no surgery or other known cure for fibromyalgia, this degree  
16 of treatment qualifies as substantial treatment. Therefore, the ALJ  
17 failed to provide legitimate clear and convincing reasons for rejecting  
18 Plaintiff's pain testimony.

19  
20 **D. The ALJ Failed To Provide Reasons Germane To The Witness For**  
21 **Rejecting Lay Testimony**  
22

23 An ALJ must consider lay testimony relating to a plaintiff's  
24 alleged disability. Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir.  
25 2009). If an ALJ rejects lay testimony, he must provide specific  
26 reasons that are germane to each witness. Id. (citing Stout v. Comm'r,  
27 454 F.3d 1050, 1054 (9th Cir. 2006). In cases of fibromyalgia, an ALJ  
28 must also "carefully consider" third-party information because such

1 sources "help to assess an individual's ability to function on a day-to-  
2 day basis and to depict the individual's capacities over a period of  
3 time." SSR 99-2p at \*8.

4  
5 Here, the ALJ erred because he did not "carefully consider" third  
6 party information when he failed to address Plaintiff's daughter's  
7 written statement. Further, although the ALJ recognized the daughter's  
8 testimony, his reason for rejecting it was not germane to the witness.  
9 Bruce, 557 F.3d at 1115. Merely asserting that the daughter's  
10 "subjective statements that Plaintiff is incapable of functioning are  
11 not corroborated by the objective medical evidence" is not a reason  
12 germane to the witness to reject such testimony. Furthermore, the ALJ  
13 cannot discount the daughter's opinion on the grounds that it is not  
14 corroborated by objective medical evidence, because fibromyalgia does  
15 not require the existence of objective medical evidence. See Jordan,  
16 F.3d at 382. Therefore, the ALJ improperly discounted the daughter's  
17 lay opinion.

18  
19 **E. The ALJ Failed To Provide Specific And Legitimate Reasons For**  
20 **Rejecting Other Treating Physician Evidence**

21  
22 The ALJ failed to provide specific, legitimate reasons for  
23 rejecting Dr. Gromis' opinion. Dr. Gromis diagnosed Plaintiff with  
24 musculoligamentous strain of her lumbar and cervical spine, and a 3-4  
25 millimeter protrusion in both her lumbar and cervical spine. (AR 296,  
26 331). According to Dr. Gromis, Plaintiff's limitations precluded her  
27 from "heavy lifting (no lifting over 10 pounds), repeated bending and  
28 stooping . . . ." (AR 298).

1 In his most recent decision, the ALJ discounted Dr. Gromis' opinion  
2 by merely stating it has "already been addressed and discounted" in the  
3 prior decision. (AR 639). In the prior decision, the ALJ discounted  
4 Dr. Gromis' opinion because it conflicted with State Agency examiner Dr.  
5 Workman (AR 298, 412) and "objective imaging testing shows only mild  
6 abnormality, the claimant has never been advised to have any spinal  
7 surgery, and objective functionality testing, such as range of motion  
8 and straight leg testing, do not indicate any acute abnormality." (AR  
9 24). However, the ALJ's reasons are not an accurate reflection of the  
10 record.

11  
12 MRI's of Plaintiff's lumbar and cervical spine support Dr. Gromis's  
13 conclusions, as she was found in 2005 to have a 3 to 4 mm. posterior  
14 disc protrusion, consistent with a disc herniation. (AR 176-77).  
15 Further, while Plaintiff did not have major back surgery, the record  
16 shows substantial treatment including lumbar facet block injections,  
17 epidural injections, radio frequency decompression neurolysis, and  
18 prescription pain medication. (AR 178-206). Moreover, contrary to the  
19 ALJ's assertions, Dr. Gromis's examination revealed decreased cervical  
20 spine range of motion and decreased lumbar spine range of motion. (AR  
21 297). Therefore, the ALJ's reasons for discounting Dr. Gromis' opinion  
22 were not specific and legitimate.

23  
24 Second, the ALJ failed to provide specific, legitimate reasons for  
25 rejecting Dr. Curtis's psychiatric opinion. Dr. Curtis concluded that  
26 "[Plaintiff's] psychological fatigue, impaired concentration and an  
27 associated inability to relate to people without becoming readily  
28 overwhelmed may all add up to an outcome wherein [she] would not be able

1 to sustain employment. . . ." (AR 242-43). The ALJ's reasons for  
2 dismissing Dr. Curtis' opinion were not legitimate. Specifically, while  
3 the ALJ asserted that Dr. Curtis only found one area of slight-to-  
4 moderate functional limitations (AR 25), the record shows that Dr.  
5 Curtis found three areas of functional limitations. (AR 240). Further,  
6 the ALJ's view that Dr. Curtis "actually believes [Plaintiff] can work"  
7 (AR 25) is not supported by the record. Dr. Curtis merely hypothesized  
8 that Plaintiff would be able to return to the work "within the  
9 foreseeable future" without providing reasons for such an assertion.  
10 However, the gravamen of Dr. Curtis' opinion reflected substantial  
11 limitations and the ALJ failed to address those findings either in  
12 rejecting Dr. Curtis' opinion or in Plaintiff's RFC. As such, remand  
13 is required.

14  
15 **F. The ALJ Disregarded The Express Directions Of The**  
16 **Remand Order By Failing To Reevaluate Plaintiff's**  
17 **RFC**  
18

19 In the remand order<sup>3</sup> dated May 6, 2008, the district court's order  
20 specifically stated "It is hereby ordered . . . that this case is  
21 remanded to the Commissioner of Social Security for further proceedings  
22 **consistent with the Stipulation for Remand** . . ." (AR 654). In the  
23 Stipulation for Remand, signed by counsel for each party, the parties  
24 agreed that "Upon remand to an Administrative Law Judge, the claimant's  
25 impairments including her visual problem should be fully addressed. **The**

26 \_\_\_\_\_  
27 <sup>3</sup> The Court notes that this was a stipulated remand, i.e., the  
28 Commissioner's own counsel drafted the language of the stipulation and  
must have believed that these deficiencies needed to be corrected on  
remand.

1 **claimant's credibility and residual functional capacity should be**  
2 **reevaluated.** The issue of whether the claimant can perform her past  
3 relevant work or other jobs should be considered. Supplemental  
4 vocational expert evidence should be obtained, if warranted." (AR 656)  
5 (emphasis added). Because the Court's Order incorporated the  
6 Stipulation for Remand by reference, the ALJ was required to follow the  
7 instructions of the Stipulation for Remand.

8  
9 Instead, the ALJ specifically disregarded these instructions. For  
10 example, the ALJ stated: "I note that neither the District Court nor the  
11 Appeals Council objected by [sic] my analysis of the objective medical  
12 record nor the residual functional capacity found . . . Consequently,  
13 I incorporate by reference my prior decision of March 7, 2007." (AR  
14 639). This statement is directly contrary to the instructions of the  
15 Stipulation for Remand.

16  
17 The ALJ failed to reevaluate Plaintiff's RFC and credibility and  
18 thus did not comply with the Remand Order. In Ischay v. Barnhart, 383  
19 F. Supp. 2d 1199 (C.D. Cal. 2005), the court observed that "the Agency  
20 is not free to disregard its marching orders on remand[.]" Id. at 1214.  
21 "[T]he district court's remand order will often include detailed  
22 instructions concerning the scope of the remand, the evidence to be  
23 adduced, and the [] issues to be addressed . . . [d]eviation from the  
24 court's remand order in the subsequent administrative proceedings is  
25 itself legal error, subject to reversal on further judicial review."  
26 Id. (quoting Sullivan v. Hudson, 490 U.S. 877, 886, 109 S. Ct. 2248, 104  
27 L. Ed. 2d 941 (1989)). Because the ALJ committed legal error by failing  
28 to follow the remand order of the district court, remand is again

1 required. Due to the ALJ's failure to follow the specific directives  
2 of the Court's prior remand order, the Court ORDERS that the case be  
3 assigned to a different Administrative Law Judge following this remand  
4 order.<sup>4</sup>

5 **V.**

6 **CONCLUSION**

7  
8 Consistent with the foregoing, and pursuant to sentence four of 42  
9 U.S.C. § 405(g),<sup>5</sup> IT IS ORDERED that judgment be entered REVERSING the  
10 decision of the Commissioner and REMANDING this matter for further  
11 proceedings consistent with (1) the 2008 prior remand order and  
12 Stipulation for Remand and (2) this decision. IT IS FURTHER ORDERED  
13 that the Clerk of the Court serve copies of this Order and the Judgment  
14 on counsel for both parties.

15  
16 DATED: November 22, 2011.

17  
18 /S/

19 SUZANNE H. SEGAL  
20 UNITED STATES MAGISTRATE JUDGE

21 **THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION NOR IS IT INTENDED TO**  
22 **BE INCLUDED IN OR SUBMITTED TO ANY ONLINE SERVICE SUCH AS WESTLAW OR**  
23 **LEXIS.**

24  
25 <sup>4</sup> Because the Court finds remand is required on the issues  
26 discussed above, it is unnecessary to reach Plaintiff's remaining  
arguments.

27 <sup>5</sup> This sentence provides: "The [district] court shall have power  
28 to enter, upon the pleadings and transcript of the record, a judgment  
affirming, modifying, or reversing the decision of the Commissioner of  
Social Security, with or without remanding the cause for a rehearing."