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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEREMY KIDWELL CORR,)	NO. ED CV 11-7890-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE, COMMISSIONER)	AND ORDER
OF SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	
)	
_____)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that the decision of the Commissioner of the Social
Security Administration is reversed and the matter is remanded for the
immediate calculation and payment of benefits.

PROCEEDINGS

Plaintiff filed a complaint on September 23, 2011, seeking review
of the Commissioner's denial of disability benefits. The parties
filed a consent to proceed before a United States Magistrate Judge on
October 27, 2011. Plaintiff filed a motion for summary judgment on

1 March 19, 2012. Defendant filed a cross-motion for summary judgment
2 on April 18, 2012. The Court has taken the motions under submission
3 without oral argument. See L.R. 7-15; "Order," filed September 26,
4 2011.

5
6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
7

8 Plaintiff asserts disability based on heart problems (A.R. 140-
9 46, 157-58). Plaintiff testified to symptoms of allegedly disabling
10 severity (A.R. 39-70). Plaintiff's former roommate gave potentially
11 corroborating testimony (A.R. 71-88).
12

13 The Administrative Law Judge ("ALJ") found Plaintiff not disabled
14 (A.R. 28-35). The ALJ determined that Plaintiff suffers from the
15 following severe impairments: "status post AICD (Automatic Implantable
16 Cardiac Defibrillator) cardioversion, probable episode of atrial
17 flutter and ventricular tachycardia, tricuspid atresia, status post
18 fontan with lateral tunnel, and status post pacemaker AICD with history of
19 atrial flutter" (A.R. 30). Plaintiff's treating physicians opined
20 that Plaintiff's cardiac impairments reduce Plaintiff's functional
21 capacity well below the capacity necessary to sustain substantial
22 gainful activity (A.R. 350-51, 469-70). The ALJ disagreed with these
23 opinions (A.R. 30-31). According to the ALJ, Plaintiff retains the
24 capacity to perform "light work" except that Plaintiff can stand or
25 walk only two hours in an eight-hour workday, can perform postural
26 activities only occasionally, cannot crawl, cannot climb ladders,
27 ropes, or scaffolds, cannot be exposed to extreme temperatures, cannot
28 work around heights or around hazardous equipment, and cannot be

1 exposed to concentrated dust, fumes, and gases (A.R. 30-31).¹ With
2 these limitations, according to the ALJ, Plaintiff could perform jobs
3 existing in the national economy including cashier II, food and
4 beverage order clerk, and telephone quotation clerk (A.R. 35 (adopting
5 vocational expert testimony at A.R. 89-90)).

6
7 The ALJ deemed Plaintiff's testimony not credible to the extent
8 the testimony was inconsistent with the ALJ's residual functional
9 capacity determination (A.R. 31, 33). The ALJ also deemed not
10 credible the lay witness observations of Plaintiff's former roommate,
11 to the extent those observations were inconsistent with the ALJ's
12 residual functional capacity determination (A.R. 33-34). The Appeals
13 Council denied review (A.R. 1-4).

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18
19 ¹ Light work involves lifting and carrying no more than
20 20 pounds occasionally and 10 pounds frequently. See 20 C.F.R. §
21 416.967(b). Although the ALJ described Plaintiff as having the
22 residual functional capacity to perform a limited range of light
23 work, the vocational expert testified that a person with the
24 residual functional capacity the ALJ described would be limited
25 to sedentary work due to the standing and walking limitation
26 (A.R. 89). Social Security Ruling 83-10 instructs that "the full
27 range of light work requires standing or walking, off and on, for
28 a total of approximately 6 hours of an 8-hour workday. Sitting
may occur intermittently during the remaining time." See SSR 83-
10; see also Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir.
1990) (Social Security rulings are binding on the
Administration). "[A]t the sedentary level of exertion, periods
of standing or walking should generally total no more than about
2 hours of an 8-hour workday, and sitting should generally total
approximately 6 hours of an 8-hour workday." See SSR 83-10.

1 Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993) ("the Appeals Council
2 considered this information and it became part of the record we are
3 required to review as a whole"); see generally 20 C.F.R. §§
4 404.970(b), 416.1470(b).

5
6 **DISCUSSION**

7
8 Plaintiff contends, inter alia, that the ALJ erred in the ALJ's
9 evaluation of certain opinions rendered by Plaintiff's treating
10 physicians, and that substantial evidence does not support the ALJ's
11 residual functional capacity assessment. See Plaintiff's Motion at 4-
12 9. For the reasons discussed below, the Court agrees.

13
14 **I. Summary of Relevant Portions of the Medical Record.**

15
16 Plaintiff was born with heart defects, which have required 22
17 cardiac interventions or surgical procedures dating back to infancy
18 (A.R. 492). Dr. L. Stephen Gordon, a cardiologist, has treated
19 Plaintiff since birth. See A.R. 326-41, 357-65, 371-96, 438-40, 447-
20 48, 459-66, 474-80, 488-92, 494-567, 572-78, 580-86, 588-94, 607, 622-
21 32, 643-44, 664-73, 681-86, 692-723 (treatment and surgical records).

22
23 Dr. Gordon completed a Cardiac Impairment Questionnaire for
24 Plaintiff dated April 23, 2008 (A.R. 467-72). Dr. Gordon gave
25 Plaintiff a "guarded" prognosis, stating that Plaintiff suffers from
26 chest pain, shortness of breath, fatigue, weakness, edema,
27 palpitations, dizziness, and sweatiness (A.R. 467). Dr. Gordon based
28 his impressions on "laboratory and diagnostic test results" consisting

1 of echocardiograms, cardiac catheterizations, x-rays, and
2 electrocardiograms (A.R. 468). Dr. Gordon opined that Plaintiff could
3 occasionally lift up to 10 pounds, could not carry any weight, could
4 sit only two hours in an eight-hour workday, and could stand/walk only
5 one hour or less in an eight-hour workday (A.R. 469-70). Dr. Gordon
6 indicated that Plaintiff would be absent from work more than three
7 times per month due to Plaintiff's medical condition (A.R. 470).

8
9 Dr. Thomas E. Miles, Jr., is an internist who has treated
10 Plaintiff since July 2002. See A.R. 399-401, 687-90 (treatment
11 records).² Dr. Miles completed a Cardiac Impairment Questionnaire for
12 Plaintiff dated December 20, 2007 (A.R. 348-53). Dr. Miles stated
13 that Plaintiff suffers from chest pain, shortness of breath, fatigue,
14 palpitations, and dizziness (A.R. 348). Dr. Miles gave Plaintiff a
15 "guarded" prognosis, and opined that Plaintiff's symptoms would
16 increase if Plaintiff were placed into a competitive work environment
17 (A.R. 348, 350; see also A.R. 354, 369 (letters describing Plaintiff
18 as "very thin" and "frail" and stating that Plaintiff is limited in
19 terms of his physical activity), 569 (letter noting Plaintiff is
20 limited to "only light physical activity"), 679 (letter opining
21 Plaintiff cannot perform full-time competitive work because of cardiac
22 disease). Dr. Miles opined that Plaintiff could occasionally lift 20-
23 50 pounds, frequently lift 5-10 pounds, occasionally carry 10-20
24 pounds, frequently carry 5-10 pounds, sit no more than four hours in
25 an eight-hour workday, and stand/walk no more than two hours in an
26 eight-hour workday (A.R. 350-51; see also A.R. 369). Dr. Miles also

27
28 ² Dr. Gordon copied Dr. Miles on Dr. Gordon's treatment records.

1 indicated that Plaintiff would be absent from work "about" two or
2 three times per month due to Plaintiff's medical condition (A.R. 351).

3
4 Nonexamining state agency physician, Dr. Rosa Halpern, completed
5 a Physical Residual Functional Capacity Assessment form for Plaintiff
6 dated October 25, 2007 (A.R. 342-47). Dr. Halpern did not review any
7 treating source statements (A.R. 347). Dr. Halpern opined that
8 Plaintiff would be capable of occasionally lifting and carrying 20
9 pounds, frequently lifting and carrying 10 pounds, unlimited
10 pushing/pulling, standing and/or walking at least two hours in an
11 eight-hour workday, and sitting about six hours in an eight-hour
12 workday (A.R. 343). Dr. Halpern stated:

13
14 Claimant with history of heart problems, he has a history of
15 atrial flutter and tachycardia with AICD placement. In late
16 2005/early 2006, claimant received two shocks for supra
17 ventricular tachycardia at heart rates of 240. His cardiac
18 exam is consistently the same from records in 2006 to the
19 present - there is a loud valve click, grade 2/6 systolic
20 ejection murmur and a grade 3/6 blowing diastolic murmur at
21 the base of the heart. Most recent EKG showed nonspecific
22 ST and T wave changes with left ventricular hypertrophy.
23 Echocardiograms show tricuspid atresia with transposition,
24 mild aortic valve regurgitation, normal ventricular
25 function. Stress echo done 2/13/2007 showed single
26 ventricle physiology [status post] Fontan operation, and
27 possible mild ischemic changes. [T]here is a prosthetic
28 mitral valve[.]

1 (A.R. 342-43). Dr. Halpern opined that Plaintiff could occasionally
2 climb, balance, stoop, kneel, and crouch, but never crawl, and stated
3 that Plaintiff should avoid concentrated exposure to extreme cold and
4 heat, fumes, odors, dusts, gases, poor ventilation, and hazardous
5 machinery (A.R. 345-46).

6
7 **II. The ALJ Erred in His Evaluation of the Medical Evidence and in**
8 **His Determination of Plaintiff's Residual Functional Capacity.**

9
10 In determining Plaintiff's residual functional capacity, the ALJ
11 purportedly relied on the opinion of nonexamining state agency
12 physician, Dr. Halpern, and purported to give only "limited weight" to
13 the opinions of the treating physicians, Drs. Miles and Gordon. The
14 ALJ explained:

15
16 I accord limited weight to the opinions of Dr. Miles and Dr.
17 Gordon. They essentially limit the claimant to a very
18 limited range of less than sedentary work or work that
19 entails less than eight hours a day. Their opinions are
20 contradicted by the claimant's actual ability to do things
21 such as play guitar on gigs, live alone, and traveled [sic]

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1 to Phoenix by car to attend a concert.³ Moreover, the
2 claimant had ejection fractions in the normal range. The
3 claimant's regular follow up of his heart generally showed
4 no significant changes. In February 2007 he achieved a METs
5 score of 10.1. Dr. Miles noted that the claimant had been
6 exercising more since his December 2008 surgery. In January
7 2009 there was no evidence of deep vein thrombosis. The
8 claimant weighed 132 pounds. A January 2009 echocardiogram
9 showed that the claimant's overall ventricular function
10 appeared good. In June 2009 Dr. Gordon stated that the
11 claimant was asymptomatic. Based on the above factors, I

13
14 ³ Plaintiff testified that he had played 20-minute coffee
15 shop gigs with his acoustic guitar for a period of time, but had
16 not played for a couple of years (A.R. 52-53, 60). Plaintiff had
17 started a band with friends but the band had not "really done
18 anything" (A.R. 51-52). Plaintiff testified that if he wanted to
19 do something like play 30 minutes somewhere, he would suffer
20 consequences for the next couple of days, if not weeks, because
21 his body does not "enjoy" these things (A.R. 67).

19 Plaintiff's former roommate, Robert Hallback, testified that
20 Plaintiff has a band and practices "maybe" an hour, total, with
21 breaks, and that the performances last anywhere from 30 minutes
22 to an hour (A.R. 83). Plaintiff reportedly would turn blue when
23 he performs and had been defibrillated on stage and rushed to a
24 hospital (A.R. 84). Hallback said that Plaintiff usually knocks
25 himself off his feet for the next couple of days when he does any
26 strenuous activity (A.R. 85-86). Hallback said that he drove
27 Plaintiff six to eight hours to a concert in Phoenix once and had
28 to stop four or five times for food and restroom breaks (A.R.
88).

25 The only evidence concerning Plaintiff's reported daily
26 activities appears in his Disability Report forms, in which
27 Plaintiff reported that he is unable to care for his personal
28 needs (A.R. 172, 184). Plaintiff had been living alone for a few
months in his father's rental house at the time of the hearing
(A.R. 40).

1 find that the opinions of Dr. Miles and Dr. Gordon merit
2 less weight. I find that Dr. Halpern's opinion is more
3 consistent with the overall evidence.
4

5 A.R. 33 (internal citations to the medical record omitted).
6

7 A treating physician's conclusions "must be given substantial
8 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see
9 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must
10 give sufficient weight to the subjective aspects of a doctor's opinion
11 . . . This is especially true when the opinion is that of a treating
12 physician") (citation omitted); see also Orn v. Astrue, 495 F.3d 625,
13 631-33 (9th Cir. 2007) (discussing deference owed to treating
14 physician opinions); see generally 20 C.F.R. §§ 404.1527(d)(2),
15 416.927(d)(2). Even where the treating physician's opinions are
16 contradicted,⁴ "if the ALJ wishes to disregard the opinion[s] of the
17 treating physician he . . . must make findings setting forth specific,
18 legitimate reasons for doing so that are based on substantial evidence
19 in the record." Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987)
20 (citation, quotations and brackets omitted); see Rodriguez v. Bowen,
21 876 F.2d at 762 ("The ALJ may disregard the treating physician's
22 opinion, but only by setting forth specific, legitimate reasons for
23 doing so, and this decision must itself be based on substantial
24 evidence") (citation and quotations omitted).
25

26
27 ⁴ Rejection of an uncontradicted opinion of a treating
28 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 The ALJ's residual functional capacity determination effectively
2 rejected the opinions of Drs. Miles and Gordon without stating legally
3 sufficient reasons for doing so. As summarized above, the ALJ relied,
4 in part, on Plaintiff's daily activities (A.R. 33). A material
5 inconsistency between a treating physician's opinion and a claimant's
6 admitted level of daily activities can furnish a specific, legitimate
7 reason for rejecting the treating physician's opinion. See, e.g.,
8 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001). Contrary to
9 the ALJ's suggestion, however, the fact that Plaintiff was able to
10 play brief guitar gigs, live alone, and travel one time to Phoenix by
11 car (with frequent stops) is not necessarily inconsistent with an
12 inability to sit for more than four hours in an eight-hour workday or
13 to stand/walk for more than two hours in an eight-hour workday.
14 Plaintiff's admitted activities are also not inconsistent with having
15 to miss two or more days of work per month due to his medical issues,
16 or with an inability to engage in sustained activity in a work setting
17 on a regular and continuing basis for eight hours a day, five days a
18 week. See SSR 96-8p (defining scope of residual functional capacity).
19 Significantly, the vocational expert testified that a person with the
20 residual functional capacity the ALJ found to exist (which assumes
21 greater capacity than the treating physicians found) but who would be
22 absent from work, unscheduled, two to three times per month, could not
23 sustain employment (A.R. 90-91).

24
25 Like Plaintiff's admitted activities, the ALJ's characterizations
26 and interpretations of particular medical test results cannot
27 constitute "specific, legitimate" reasons for rejecting the opinions
28 of the treating physicians. The ALJ stated that Plaintiff has

1 ejection fractions in a "normal" range, once achieved a METs score of
2 10.1, has no evidence of deep vein thrombosis, has an echocardiogram
3 that showed overall ventricular function as "good," and once was
4 reportedly "asymptomatic." The record contains no expert medical
5 opinion interpreting these test results in any manner so as to impugn
6 the treating physicians' opinions regarding Plaintiff's functional
7 capacity. Dr. Gordon recorded each of these test results (along with
8 others) and provided his records to Dr. Miles, but each of these
9 physicians concluded that Plaintiff has greater limitations than the
10 limitations the ALJ found to exist. See A.R. 337-38, 363, 365, 382-
11 83, 398, 488, 490, 588 (cited medical records). No physician of
12 record ever discussed how the specific evidence the ALJ cited
13 supposedly proves a greater functional capacity than the treating
14 physicians found to exist.

15
16 It is well-settled that an ALJ may not render his or her own
17 medical opinion or substitute his or her own diagnosis for that of a
18 claimant's physician. See Tackett v. Apfel, 180 F.3d 1094, 1102-03
19 (9th Cir. 1999) (ALJ erred in rejecting physicians' opinions and
20 finding greater residual functional capacity based on claimant's
21 testimony about a road trip; there was no medical evidence to support
22 the ALJ's residual functional capacity finding determination); Day v.
23 Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden
24 from making his own medical assessment beyond that demonstrated by the
25 record); Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) (an "ALJ
26 cannot arbitrarily substitute his own judgment for competent medical
27 opinion") (internal quotation marks and citation omitted); Rohan v.
28 Chater, 98 F.3d 966, 970 (7th Cir. 1996) ("ALJs must not succumb to

1 the temptation to play doctor and make their own independent medical
2 findings"). If the ALJ suspected that the cited test results or other
3 medical evidence pointed toward a greater functional capacity than the
4 treating physicians found to exist, the ALJ should have consulted a
5 qualified medical expert to attempt to confirm or dispel the ALJ's
6 suspicion. See id.

7
8 Dr. Halpern's opinion could not furnish substantial evidence to
9 support the ALJ's rejection of the treating physicians' opinions. Dr.
10 Halpern's opinion predated all of the opinions of record from
11 Plaintiff's treating physicians, and Dr. Halpern did not base her
12 opinion on any independent clinical findings. Where, as here, "a
13 nontreating physician's opinion contradicts that of the treating
14 physician - but is not based on independent clinical findings, or
15 rests on clinical findings also considered by the treating physician -
16 the opinion of the treating physician may be rejected only if the ALJ
17 gives specific legitimate reasons for doing so that are based on
18 substantial evidence in the record." Morgan v. Commissioner of Social
19 Security Administration, 169 F.3d 595, 600 (9th Cir. 1999). Thus, the
20 opinion of a nonexamining physician, by itself, is insufficient to
21 constitute substantial evidence to reject the opinion of a treating or
22 examining physician. See Widmark v. Barnhart, 454 F.3d 1063, 1067
23 n.2 (9th Cir. 2006) (citing Lester v. Chater, 81 F.3d 821, 831 (9th
24 Cir. 1995)).

25
26 Finally, Defendant argues that "the opinions of Drs. Gordon and
27 Miles that Plaintiff could not work is [sic] a legal opinion reserved
28 for the Commissioner" (Defendant's Motion at 6). Although the

1 ultimate issue of disability is reserved to the Administration, the
2 ALJ still must set forth specific, legitimate reasons for rejecting a
3 treating physician's opinion that a claimant is disabled. See
4 Rodriguez v. Bowen, 876 F.2d at 762 n.7 ("We do not draw a distinction
5 between a medical opinion as to a physical condition and a medical
6 opinion on the ultimate issue of disability.").

7
8 In sum, the ALJ rejected the opinions of Drs. Gordon and Miles
9 without stating "specific, legitimate reasons" therefor, and thereby
10 arrived at a residual functional capacity determination unsupported by
11 substantial evidence.

12
13 **III. Reversal for An Award of Benefits is Appropriate.**

14
15 When there exists error in an administrative determination, "the
16 proper course, except in rare circumstances, is to remand to the
17 agency for additional investigation or explanation." INS v. Ventura,
18 537 U.S. 12, 16 (2002) (citations and quotations omitted). When the
19 error is the improper rejection of medical opinion evidence, however,
20 the Ninth Circuit has instructed that such evidence should be credited
21 and an immediate award of benefits directed where: "(1) the ALJ has
22 failed to provide legally sufficient reasons for rejecting such
23 evidence, (2) there are no outstanding issues that must be resolved
24 before a determination of disability can be made, and (3) it is clear
25 from the record that the ALJ would be required to find the claimant
26 disabled were such evidence credited." Harman v. Apfel, 211 F.3d
27 1172, 1178 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) (citations

28 ///

1 and quotations omitted) ("Harman").⁵

2
3 In the present case, application of the Harman rule requires
4 reversal for an immediate award of benefits. As discussed above, the
5 ALJ failed to provide legally sufficient reasons for rejecting the
6 opinions of Drs. Gordon and Miles. If Dr. Gordon's and Dr. Miles'
7 opinions concerning Plaintiff's limitations were fully credited, the
8 ALJ clearly would be required to find Plaintiff disabled. There are
9 no outstanding issues to be resolved before a disability determination
10 may be made. Under the circumstances of this case, the law does not
11 require the Court to afford the Administration a second opportunity to
12 address the improperly rejected medical opinions. See Harman, 211
13 F.3d at 1179; see also Benecke v. Barnhart, 379 F.3d at 595 ("Allowing
14 the Commissioner to decide the issue again would create an unfair
15 'heads we win; tails, let's play again' system of disability benefits
16 adjudication. . . . Remanding a disability claim for further
17 proceedings can delay much needed income for claimants who are unable
18 to work and are entitled to benefits, often subjecting them to
19 tremendous financial difficulties while awaiting the outcome of their
20 appeals and proceedings on remand") (citations and quotations
21 omitted).

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25
26 ⁵ The Ninth Circuit has continued to apply Harman
27 subsequent to INS v. Ventura. See Luna v. Astrue, 623 F.3d 1032,
28 1035 (9th Cir. 2010); Vasquez v. Astrue, 572 F.3d 586, 597 (9th
Cir. 2009); Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir.
2004).

1 **CONCLUSION**

2
3 For all of the foregoing reasons,⁶ Plaintiff's motion for summary
4 judgment is granted, Defendant's motion for summary judgment is
5 denied, the decision of the Commissioner of the Social Security
6 Administration is reversed, and the matter is remanded to the
7 Administration for the immediate calculation and payment of benefits.

8
9 LET JUDGMENT BE ENTERED ACCORDINGLY.

10
11 DATED: May 16, 2012.

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13 _____/S/_____
14 CHARLES F. EICK
15 UNITED STATES MAGISTRATE JUDGE
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27 _____
28 ⁶ The Court need not and does not reach any of the other
issues raised by Plaintiff.