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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HELEN D. KIRK,)	NO. EDCV 06-01432-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE ¹ ,)	
Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint in January 11, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's applications for a period of disability ("POD"), disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On February 9, 2007, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on September 18, 2007, in which: plaintiff seeks an order reversing the Commissioner's decision

¹ Michael J. Astrue became the Commissioner of the Social Security Administration on February 12, 2007, and is substituted in place of former Commissioner Joanne B. Barnhart as the Defendant in this action. (See Fed. R. Civ. P. 25(d)(1); Section 205(g) of the Social Security Act, last sentence, 42 U.S.C. § 405(g).)

1 and awarding benefits or, in the alternative, remanding the matter for
2 further administrative proceedings; and defendant seeks an order
3 affirming the Commissioner's decision. The Court has taken the parties'
4 Joint Stipulation under submission without oral argument.

5
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
7

8 Plaintiff filed applications for a POD, DIB, and SSI on August 3,
9 2001, alleging an inability to work since August 15, 2000, due to a
10 combination of exertional and non-exertional impairments. Specifically,
11 plaintiff's alleged impairments consist of: two ruptured discs and a
12 plate in her neck; herniated discs in her low back; shoulder problems;
13 carpal tunnel in both wrists; arthritis in both hips, right knee, arms,
14 and shoulders; difficulty with balance; visually impaired; difficulty
15 concentrating; and forgetfulness. (A.R. 103, 134, 371-72.)
16 (Administrative Record ("A.R.") 112-15, 457-59). She has past relevant
17 work experience as a cashier, grinding machine operator, fast foods
18 worker, stock clerk, and sewing machine operator. (A.R. 147.)
19

20 The Commissioner denied plaintiff's claims initially and upon
21 reconsideration. (A.R. 92-97, 103-06.) On February 10, 2004,
22 plaintiff, who was represented by counsel, testified at a hearing before
23 Administrative Law Judge Helen Hesse ("ALJ"). (A.R. 40-91.) On April
24 12, 2004, the ALJ issued an unfavorable decision, but found that
25 plaintiff has the following severe impairments: lumbosacral spine
26 musculoligamentous sprain and strain; cervical disc disease status post
27 discectomies and fusions at C5-6 and C6-7 with bone graft and implant of
28 cervical plate; status post bilateral carpal tunnel releases; status

1 post right anterior acromioplasty; and history of alcohol abuse, in
2 remission, nicotine abuse, and depressive disorder, not otherwise
3 specified. (A.R. 16-27.) On May 12, 2004, plaintiff timely filed a
4 request for review of that decision, and on June 5, 2004, the Appeals
5 Council denied review of the ALJ's decision.² (A.R. 4-7.)
6

7 On August 3, 2004, plaintiff filed a complaint in this Court in
8 Case No. EDCV 04-00948-MAN. On March 30, 2006, this Court reversed the
9 ALJ's decision and remanded the case for further administrative
10 proceedings (the "2006 Order").³ (A.R. 507-26.) On June 7, 2006, the
11 Appeals Council remanded the case to the ALJ for compliance with the
12 2006 Order.⁴ (A.R. 527-28.)
13
14

15 ² On June 8, 2004, plaintiff filed subsequent applications for DIB
16 and SSI, which resulted in a finding of disability as of April 13, 2004.
17 (Joint Stipulation ("Joint Stip.") at 2.)

18 ³ The 2006 Order found a remand warranted for two reasons: first,
19 the ALJ failed to develop the record adequately regarding plaintiff's
20 limitations because, *inter alia*, the ALJ failed to consider properly the
21 opinion of plaintiff's treating physician, Patricia Christie, M.D.; and
22 second, the ALJ improperly rejected the side effects of plaintiff's
23 medications. (A.R. 511-25.)

24 ⁴ In effectuating this Court's 2006 Order, the Appeals Council
25 stated:

26 Upon remand, the Administrative Law Judge will further
27 evaluate the treating source opinions pursuant to the
28 provisions of 20 C.F.R. 404.1527 and 416.927 and Social
Security Rulings 96-2p and 96-5p, and explain the weight given
to such opinion evidence. As appropriate, the Administrative
Law Judge may request the treating sources to provide
additional evidence and/or further clarification of the
opinions and medical source statements about what the claimant
can still do despite the impairments (20 C.F.R. 404.1512 and
416.912). The Administrative Law Judge may enlist the aid and
cooperation of the claimant's representative in developing
evidence from the claimant's treating sources. (A.R. 528.)

1 On August 15, 2006, plaintiff, who was represented by counsel,
2 testified at a hearing before the same ALJ. (A.R. 693-710.) On October
3 24, 2006, the ALJ again denied plaintiff's claims, the decision now at
4 issue in this action. (A.R. 714-21.)

5
6 **SUMMARY OF ADMINISTRATIVE DECISION**
7

8 In her decision, the ALJ rejected the opinion of plaintiff's
9 treating physician, Dr. Christie, because it was "unsupported by any
10 actual objective medical findings." (A.R. 717.) Specifically, the ALJ
11 stated that Dr. Christie's treatment "notes do not mention any radicular
12 symptoms," and "[a]bsent actual objective findings, the undersigned must
13 reject this assessment." (*Id.*)

14
15 Additionally, the ALJ concluded that "[t]here is no credible
16 evidence of regular usage of strong medication to alleviate pain that
17 would significantly impair [plaintiff's] ability to do basic work
18 activities. There was no evidence in the medical record of any
19 significant side effects." (A.R. 718.)

20
21 Based upon the ALJ's residual functional capacity assessment, and
22 vocational expert testimony, the ALJ found that plaintiff was unable to
23 perform her past relevant work. (A.R. 720.) However, the ALJ found
24 that plaintiff could perform the following jobs: usher/lobby attendant
25 and ride operator. (*Id.*) Accordingly, the ALJ concluded that plaintiff
26 was not disabled within the meaning of the Social Security Act during
27 the time period at issue. (*Id.*)

1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
3 the Commissioner's decision if it is based on harmless error, which
4 exists only when it is "clear from the record that an ALJ's error was
5 'inconsequential to the ultimate nondisability determination.'" Robbins
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
7 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
8 F.3d at 679.

10 DISCUSSION

11
12 Plaintiff alleges that the ALJ failed to comply with the Court's
13 2006 Order in two respects. First, plaintiff contends that the ALJ
14 again failed to consider properly the side effects of plaintiff's
15 medications. Second, plaintiff contends that the ALJ again failed to
16 consider adequately the opinion of plaintiff's treating physician, Dr.
17 Christie, and to develop the record properly. For the reasons detailed
18 below, the Court agrees and concludes there is no reason to remand this
19 case again for further administrative proceedings.⁵

21 I. The ALJ Wholly Disregarded The Court's Order To Consider Properly 22 The Side Effects Of Plaintiff's Medications On Her Ability To Work.

23
24 When an ALJ evaluates a claimant's limitations, he must consider

25
26 ⁵ Plaintiff alleges a third issue in the Joint Stipulation: whether
27 the ALJ properly considered the opinion of S.B. Pordazi, M.D. In view
28 of the Court's conclusion that an award of benefits is warranted based
on the two issues addressed herein, the Court need not, and does not,
address the third issue raised by plaintiff.

1 evidence regarding the side effects of medications. Social Security
2 Ruling 96-7p indicates that the "type, dosage, effectiveness, and side
3 effects of any medication the individual takes or has taken to alleviate
4 pain or other symptoms" should be considered in the disability
5 evaluation. See also 20 C.F.R. § 404.1529(c)(3)(iv). The Ninth Circuit
6 has observed that an ALJ must "consider all factors that might have a
7 significant impact on an individual's ability to work." Erickson v.
8 Shalala, 9 F.3d 813, 817 (9th Cir. 1993)(citation omitted). Such
9 factors "may include side effects of medications as well as subjective
10 evidence of pain." *Id.* at 818.

11
12 In its last remand Order, the Court determined that the ALJ
13 improperly rejected the side effects of plaintiff's medications. The
14 case was remanded to allow the ALJ the opportunity to correct this
15 error.⁶ However, the ALJ's latest decision is totally devoid of any
16 express consideration of the side effects of plaintiff's medications
17 and/or their impact on plaintiff's ability to work.

18
19 In her decision, the ALJ simply states "[t]here is no credible
20 evidence of regular usage of strong medication to alleviate pain that
21 would significantly impair [plaintiff's] ability to do basic work
22 activities. There was no evidence in the medical record of any
23 significant side effects." (A.R. 718.) Not only is this assertion
24 legally insufficient as it relates to the evaluation of plaintiff's
25 disability claim, but it also borders on a mischaracterization of the

26
27 ⁶ Specifically, this Court found that "the ALJ's finding that
28 Plaintiff has no side effects from her medications that 'would
significantly impair her ability to do basic work activities' is in
error." (A.R. 525.)

1 record. Factually, the record is replete with evidence of plaintiff's
2 regular usage of strong pain medication, which could produce the side
3 effects about which plaintiff complained, and the ALJ should have
4 discussed this evidence.

5
6 For example, in her Reconsideration Disability Report, plaintiff
7 reports taking the following medications: Flexeril, Tylenol 3, Relafen,
8 and Neurontin; and reports the following symptoms and/or side effects:
9 joint pain and swelling, vision impaired, difficulty concentrating, and
10 forgetfulness. (A.R. 155-57.) At the 2004 hearing, plaintiff testified
11 that she feels "very fatigued," and she "can't focus." (A.R. 51, 54.)
12 Dr. Christie's treatment records clearly show that plaintiff
13 consistently has been taking Vicodin, Neurontin, and Tylenol III since
14 at least August 2002, when Dr. Christie began treating her. (A.R. 375,
15 381, 384, 385, 399, 404, 413.) Dr. Christie affirms plaintiff's
16 complaints of medication side effects in her June 12, 2003 Medical
17 Evaluation Form, in which Dr. Christie notes that "Pain causes severe
18 depression, medications cause drowsiness and confusion."⁷ (A.R. 373.)

19
20 ⁷ Consistent use of narcotic medication could affect plaintiff's
21 ability to function in the workplace and could produce the symptoms
22 about which plaintiff complained, namely fatigue and inability to
23 concentrate. The manufacturer of Vicodin warns that: "Hydrocodone
24 [Vidodin ES], like all narcotics, may impair the mental and/or physical
25 abilities required for the performance of potentially hazardous tasks
26 such as driving a car or operating machinery; patients should be
27 cautioned accordingly." PHYSICIAN'S DESK REFERENCE, p. 1487 (53rd ed.
28 1999). In addition, the manufacturer of Neurontin notes that the most
commonly observed adverse effects of this medication are dizziness,
fatigue, and abnormal vision. (*Id.* at 2302-03.) The manufacturer of
Relafen states that adverse reactions include: diarrhea, abdominal
pain, dizziness, drowsiness, and fatigue. (*Id.* at 3087.) Finally, the
manufacturer of Tylenol with Codeine (Tylenol III) warns that this drug
contains controlled substances, tolerance can develop to it, and adverse
reactions to the drug may be experienced, such as "lightheadedness,
dizziness, sedation, shortness of breath, nausea and vomiting." (*Id.* at

1 Despite the fact that there is substantial evidence in the record
2 documenting plaintiff's severe and continuing medication side effects,
3 the ALJ persists in failing to acknowledge them, and to consider
4 expressly their impact on plaintiff's ability to engage in full-time
5 work. The ALJ was required to consider these side effects in evaluating
6 plaintiff's disability claim, and her failure to do so, once again,
7 constitutes error.

8
9 **II. The ALJ Failed To Develop The Record Adequately And Failed To**
10 **Evaluate Dr. Christie's Opinion Properly.**

11
12 The ALJ has a "special duty to fully and fairly develop the
13 record." Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996). "An
14 ALJ's duty to develop the record further is triggered . . . when the
15 record is inadequate to allow for proper evaluation of the evidence."
16 Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001); see Thomas v.
17 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002)(requirement in 20 C.F.R. §§
18 404.1512(e) and 416.912(e) that the Commissioner re-contact treating
19 sources is triggered where the information from the treating sources is
20 inadequate to make a determination regarding disability).

21
22 A treating physician's conclusions "must be given substantial
23 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). "If a
24 treating or examining doctor's opinion is contradicted by another
25 doctor's opinion, an ALJ may only reject it by providing specific and
26 legitimate reasons that are supported by substantial evidence." Ryan v.

27
28 _____
2252-53.)

1 Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008)(citations
2 omitted).

3
4 In her first unfavorable decision, the ALJ rejected Dr. Christie's
5 opinion regarding plaintiff's residual functional capacity, because,
6 *inter alia*, Dr. Christie "did not provide a comprehensive rational[e] to
7 support her decision."⁸ (A.R. 22.) In its 2006 Order, the Court
8 concluded that the ALJ's rejection of Dr. Christie's opinion was not
9 based on substantial evidence and offered the ALJ an opportunity to
10 obtain clarification from Dr. Christie regarding the reasons for her
11 opinion. Specifically, the Court ruled that "as it appears that the ALJ
12 primarily rejected Dr. Christie's opinion due to a lack of understanding
13 regarding the bases for her opinions, it is appropriate here to remand
14 the case for the ALJ to develop the record more fully." (A.R. 519.)
15

16 In the most recent unfavorable decision, at issue here, plaintiff
17 contends that the ALJ substantially failed to comply with the Court's
18 2006 Order. (Joint Stip. at 4-7, 12-14, 16.) Plaintiff argues that not
19 only did the ALJ fail to develop the record adequately, but also she
20 failed, once again, to set forth the requisite specific and legitimate
21

22 ⁸ Dr. Christie opined that plaintiff: would not be able to work at
23 least six hours on a sustained daily basis even if provided a sit only,
24 stand only, or alternating sit and stand option; would need three to
25 five hours of rest throughout an eight-hour day; should do no lifting;
26 cannot use her hands and arms repetitively for grasping, pulling,
27 pushing, or fine manipulation for eight hours on a sustained daily
28 basis; cannot climb or reach on a repetitive sustained daily basis;
should not work in certain environments (those with unprotected heights,
dust, fumes, and gases; moving machinery; marked changes in temperature
or humidity; or automotive equipment that she must drive); and would not
be able to maintain adequate attendance on a sustained daily basis at
any job following her alleged onset date. (A.R. 373-74.) Dr. Christie
diagnosed plaintiff with lower back pain with radiculopathy, neck pain,
depression, and anxiety. (*Id.*)

1 reasons, supported by substantial evidence, for rejecting Dr. Christie's
2 opinion. (*Id.*) For the reasons set forth below, the Court agrees.

3
4 In rejecting Dr. Christie's opinion, the ALJ states that she:
5
6 rejects [Dr. Christie's] assessment as unsupported by any
7 actual objective medical findings. While the treatment notes
8 at exhibit 14F/4-14, 18F and 21F note continued complaints of
9 pain, there is little documented objective findings. The
10 notes do not mention any radicular symptoms. There were no
11 motor or sensory deficits noted. There was only subjective
12 pain and subjective range of motion deficits noted. Absent
13 actual objective findings, the undersigned must reject this
14 assessment.

15
16 (A.R. 717.)
17

18 Rather than simply re-contacting Dr. Christie for clarification of
19 her opinion (which would not have required an extraordinary effort), the
20 ALJ instead chose to rely on the testimony of a non-examining medical
21 expert, Sami Nafosi, M.D. Dr. Nafosi, however, did not rely on any
22 new evidence in rendering her opinion at the 2006 hearing. As such, the
23 fundamental problem with the ALJ's reliance on Dr. Nafosi's opinion is
24 clear: Dr. Nafosi's testimony was based on the same inadequately
25 developed record upon which the ALJ improperly relied in her last
26 decision that was reversed and remanded by this Court.

27
28 More importantly, the ALJ's mere solicitation of testimony from a

1 non-examining medical expert was not calculated to get to the core
2 issue, *i.e.* whether any objective medical evidence of radiculopathy
3 exists to support Dr. Christie's opinion. The ALJ should have re-
4 contacted Dr. Christie for clarification of her opinion; her reliance
5 instead on Dr. Nafosi's opinion, which the Court cannot be certain is
6 based upon substantial evidence, falls short of compliance with the
7 Court's 2006 Order.

8
9 Notwithstanding the ALJ's errors, upon further review of the
10 present record, the Court has determined that substantial objective
11 evidence of radiculopathy indeed does exist. On January 4, 2000,
12 plaintiff underwent a spine consultation and evaluation in which one of
13 her treating physicians, Cyrus Ghavam, M.D., reported that plaintiff's
14 "cervical spine MRI shows diffuse disc protrusions at the C5-6 and C6-7
15 level which result in some neural foraminal stenosis" and she "has a
16 right cervical radiculopathy which clinically seems to be primarily
17 related to the C6 level. She has definite abnormalities at C6-7 as
18 well." (A.R. 202, Exhibit 3F/18.)⁹

19
20 ⁹ Critically, at the hearing, no testimony was adduced regarding this
21 exhibit, as neither plaintiff's counsel nor Dr. Nafosi could seem to
locate it in the record. The following colloquy took place:

22 Q: Could you take a look, doctor, at 3F-13.

23 A: 3F-13.

24 Q: There's references to radiculopathy.

25 A: January. Oh, yeah, she did. This is -- that was the
26 indication for surgery.

27 Q: Okay.

28 A: That is not in 3F-13. It was -- let me see. Where did I
see that? 3F-10. . . .

1 Therefore, although the ALJ substantially failed to comply with the
2 Court's directive to develop the record further, the Court is satisfied
3 that there is objective medical evidence of radiculopathy to support Dr.
4 Christie's opinion. Accordingly, the ALJ's primary reason for rejecting
5 Dr. Christie's opinion -- that the record lacked "actual objective
6 findings" of radiculopathy -- does not pass muster and constitutes
7 reversible error.

8
9 **III. Remand And Payment Of Benefits Is Appropriate.**

10
11 As indicated above, the Court finds that the ALJ's decision is in
12 error for the reasons set forth above. For the reasons set forth below,
13 the Court concludes that there is no reason to remand this case again
14 for further administrative proceedings.

15
16 In the Ninth Circuit, courts have the discretion to "credit as
17 true" both the opinions of treating physicians and the testimony of
18 claimants when the ALJ has failed to provide legally sufficient reasons
19 for rejecting the same. See, e.g., Widmark, 454 F.3d at 1069; Benecke
20 v. McCarthy, 379 F.3d 587, 594 (9th Cir. 2004); Connett, 340 F.3d at
21 876; Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000). In addition,

22
23 Q: Also, at 3F-14 there was a lumbar MRI that showed --

24 A: 3F-14.

25 Q: -- some pretty significant findings in the Impressions
26 section.

27 A: 3F-14. No, this is cervical. Let me see, might be close
28 by. 3F-4, you mean? Maybe you mean 3F-4. Yeah, 3F-4 is the
MRI of the lumbar spine.

(A.R. 703-04.)

1 the decision whether to remand for further proceedings or order an
2 immediate award of benefits is within the district court's discretion.
3 Harman, at 1175-78. As the Ninth Circuit has repeatedly held, when the
4 record is fully developed and a remand for further administrative
5 proceedings would serve no purpose, the Court should remand for an award
6 and payment of benefits. See, e.g., Benecke, 379 F.3d at 593; Smolen,
7 80 F.3d at 1292. That principle governs here.

8
9 This case was remanded in 2006, based on errors by the ALJ in her
10 consideration of the side effects of plaintiff's medications and the
11 opinion of plaintiff's treating physician. As discussed above, the ALJ
12 repeated these same errors on remand. In Benecke, the Ninth Circuit
13 emphasized that "[a]llowing the Commissioner to decide the issue again
14 would create an unfair 'heads we win; tails, let's play again' system of
15 disability benefits adjudication," and unfairly "delay much needed
16 income for claimants who are unable to work and are entitled to
17 benefits." 379 F.3d at 595. Moreover, in Moisa v. Barnhart, 367 F.3d
18 882, 887 (9th Cir. 2004), after finding that reversal was justified due
19 to the ALJ's commission of clear error in rejecting the claimant's pain
20 testimony, the Ninth Circuit concluded that a remand for an award of
21 benefits, rather than for further proceedings on the credibility issue,
22 was appropriate, reasoning: "The Commissioner, having lost this appeal,
23 should not have another opportunity to show that [plaintiff] is not
24 credible any more than [plaintiff], had he lost, should have an
25 opportunity for remand and further proceedings to establish his
26 credibility." See also Sisco v. United States Dep't of Health and Human
27 Servs., 10 F.3d 739, 746 (10th Cir. 1993)(after noting that the
28 claimant's benefits claim had been adjudicated by the Commissioner twice

1 at all levels over a four-year period and finding that substantial
2 evidence did not support the finding that the claimant was not disabled,
3 reversing and remanding for an award of benefits, opining: "The
4 Secretary is not entitled to adjudicate a case 'ad infinitum until it
5 correctly applies the proper legal standard and gathers evidence to
6 support its conclusion.'" (citation omitted)).

7
8 As discussed above, Dr. Christie opined, *inter alia*, that plaintiff
9 would not be able to work at least six hours on a sustained daily basis
10 even if provided a sit only, stand only, or alternating sit and stand
11 option, and would need three to five hours of rest throughout an eight-
12 hour day. (A.R. 373-74.) If such evidence is credited as true, which
13 the Court believes is appropriate under the circumstances, the record
14 shows that plaintiff is disabled. As previously noted, plaintiff was
15 determined to be disabled as of April 13, 2004, and has been awarded
16 Social Security benefits since that date. The vocational expert
17 testified at the August 2006 hearing that, if plaintiff is "unable to
18 work an eight-hour day, forty-hour work week, or would miss more than
19 two days of work per month," then there would be "No jobs" that
20 plaintiff could perform. (A.R. 708.)

21
22 In this case, remand for an award of benefits, rather than for
23 additional administrative proceedings, is appropriate. Thus, the Court
24 finds that plaintiff was disabled throughout the relevant period, and
25 she is entitled to receive benefits from her claimed onset date
26 consistent with the Commissioner's regulations for the timing of the
27 payment of DIB and SSI.

1 **CONCLUSION**

2
3 Accordingly, for the reasons stated above, the Commissioner's
4 decision is REVERSED, and this case is remanded to the Commissioner for
5 the payment of benefits to plaintiff. Judgment shall be entered in
6 favor of plaintiff and this action shall be dismissed with prejudice.

7
8 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
9 copies of this Memorandum Opinion and Order and the Judgment on counsel
10 for plaintiff and for defendant.

11
12 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

13
14 DATED: November 19, 2008

15 _____
16 /s/
17 MARGARET A. NAGLE
18 UNITED STATES MAGISTRATE JUDGE
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