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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIDGETTE ROULHAC,)	NO. EDCV 07-01676-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on January 4, 2008, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On February 4, 2008, 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 24, 2008, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for a new administrative hearing; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.

1 On July 24, 2007, a remand hearing was held before Administrative
2 Law Judge Lowell Fortune ("ALJ"). (A.R. 632-68.) On October 19, 2007,
3 the ALJ issued an unfavorable decision; that decision is now at issue in
4 this case. (A.R. 435-48.)

5
6 **SUMMARY OF ADMINISTRATIVE DECISION**

7
8 In his written decision, the ALJ found that plaintiff suffers from
9 the following "severe" impairments: human immunodeficiency virus (HIV);
10 chronic dislocation, left shoulder; mood disorder secondary to medical
11 condition; and cocaine dependence. (A.R. 438.) The ALJ further found
12 that plaintiff does not have an impairment or combination of impairments
13 that meets or medically equals Listings 1.02B, 12.04, 12.09, or 14.08,
14 or any other listed impairment set forth in 20 C.F.R. Part 404, Subpart
15 P, Appendix 1. (*Id.*)

16
17 The ALJ determined that plaintiff had the physical residual
18 functional capacity to perform light exertion, and mentally, plaintiff
19 is able to understand moderately detailed instructions and perform
20 moderately complex tasks in a habituated setting. (A.R. 436.) In
21 reliance on the opinion of the medical expert, the ALJ rejected the

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23 _____
24 became disabled on May 1, 2005. The State agency relied on
25 new evidence from [plaintiff's] treating sources. The Appeals
26 Council hereby affirms the finding that [plaintiff] was
27 disabled beginning May 1, 2005.

28 The Appeals Council vacates the Administrative Law Judge's
decision and remands this case to an Administrative Law Judge
for further proceedings on the issue of disability prior to
May 1, 2005.

(A.R. 481.) Accordingly, the time period in issue is January 17, 2003,
through April 30, 2005.

1 opinions of plaintiff's treating physicians, Harvey A. Elder, M.D., and
2 Wilfred W. Shiu, M.D. (A.R. 441, 445-46.)

3
4 Based on the ALJ's residual functional capacity assessment and the
5 testimony of a vocational expert, the ALJ found that plaintiff is unable
6 to perform any of her past relevant work, but jobs exist in significant
7 numbers in the national economy that plaintiff can perform. (A.R. 446-
8 47.) Accordingly, the ALJ concluded that plaintiff has not been under
9 a disability, as defined by the Social Security Act, since February 7,
10 2003, the date the application was filed, through April 30, 2005. (A.R.
11 448.)

12 13 STANDARD OF REVIEW

14
15 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
16 decision to determine whether it is free from legal error and supported
17 by substantial evidence in the record as a whole. Orn v. Astrue, 495
18 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
19 evidence as a reasonable mind might accept as adequate to support a
20 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
21 a mere scintilla but not necessarily a preponderance." Connett v.
22 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
23 record can constitute substantial evidence, only those "'reasonably
24 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
25 1063, 1066 (9th Cir. 2006)(citation omitted).

26
27 Although this Court cannot substitute its discretion for that of
28 the Commissioner, the Court nonetheless must review the record as a

1 whole, "weighing both the evidence that supports and the evidence that
2 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
3 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
4 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
5 responsible for determining credibility, resolving conflicts in medical
6 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
7 1035, 1039-40 (9th Cir. 1995).

8
9 The Court will uphold the Commissioner's decision when the evidence
10 is susceptible to more than one rational interpretation. Burch v.
11 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
12 review only the reasons stated by the ALJ in his decision "and may not
13 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
14 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
15 the Commissioner's decision if it is based on harmless error, which
16 exists only when it is "clear from the record that an ALJ's error was
17 'inconsequential to the ultimate nondisability determination.'" Robbins
18 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
19 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
20 F.3d at 679.

21 22 DISCUSSION

23
24 Plaintiff alleges the following four issues: (1) whether the ALJ
25 properly considered the opinion of plaintiff's treating physician,
26 Harvey A. Elder, M.D.; (2) whether the ALJ properly considered the
27
28

1 opinion of plaintiff's treating physician, Wilfred W. Shiu, M.D.;³ (3)
2 whether the ALJ properly considered the side effects of plaintiff's
3 medications; and (4) whether the ALJ posed a complete hypothetical
4 question to the vocational expert. (Joint Stipulation ("Joint Stip.")
5 at 3.) The Court addresses plaintiff's first two issues together.

6
7 **I. The ALJ Failed To Provide Specific And Legitimate Reasons For**
8 **Disregarding The Opinions Of Plaintiff's Treating Physicians.**
9

10 A treating physician's conclusions "must be given substantial
11 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Even when
12 the treating physician's opinions are contradicted, "if the ALJ wishes
13 to disregard the opinion[s] of the treating physician he . . . must make
14 findings setting forth specific, legitimate reasons for doing so that
15 are based on substantial evidence in the record." Winans v. Bowen, 853
16 F.2d 643, 647 (9th Cir. 1987); see also McAllister v. Sullivan, 888 F.2d
17 599, 602 (9th Cir. 1989) ("broad and vague" reasons for rejecting the
18 treating physician's opinion do not suffice). The ALJ can meet this
19 burden "by setting out a detailed and thorough summary of the facts and
20 conflicting clinical evidence, stating his interpretation thereof, and
21 making findings." Magallanes v. Brown, 881 F.2d 747, 751 (9th Cir.
22 1989).

23
24 On March 1, 2002, Wilfred W. Shiu, M.D., a public health physician
25 who treated plaintiff from May 2000, through November 2002, and from
26 April 2005, through January 2006, completed a Physician Statement at the

27
28 ³ The ALJ mistakenly refers to Dr. Shiu as "Dr. Shier." (A.R. 445.)

1 request of the Social Security Administration.⁴ (A.R. 228-29.) Dr. Shiu
2 opined that plaintiff was limited to less than sedentary exertion, will
3 have difficulties in maintaining social functioning, and difficulties in
4 completing tasks in a timely manner due to deficiencies in
5 concentration, persistence, and pace as a result of "chronic fatigue⁵,"
6 "depression," and "probable schizophrenia." (A.R. 228-29.) Dr. Shiu
7 further noted that plaintiff has an "inability to concentrate fully,"
8 and her "fatigue leads to some weakness." (A.R. 229.)

9
10 In a March 20, 2003 report, Harvey A. Elder, M.D., an internist who
11 treated plaintiff approximately monthly throughout most of the period
12 from April 19, 2000, through August 2005, opined that plaintiff is
13 limited to a less than sedentary physical exertional level, primarily
14 due to difficulties standing and walking because of knee and back pain.
15 (A.R. 329.) In response to a question asking for a description of
16 plaintiff's "functional level," Dr. Elder noted that plaintiff had a
17 Global Assessment of Functioning ("GAF") of 60,⁶ had a "limited ability
18 to care for [herself]," and was "depressed." (A.R. 329.) In response

19
20 ⁴ Plaintiff treated with various physicians at the San Bernardino
21 Department of Corrections and the San Bernardino County Department of
Public Health during 2003, and 2004.

22 ⁵ According to <http://www.mayoclinic.com>, chronic fatigue is a
23 "complicated disorder characterized by extreme fatigue that may worsen
24 with physical or mental activity, but doesn't improve with rest.
25 Although there are many theories about what causes the condition -
ranging from viral infections to psychological stress - in most cases
the cause is still unknown." The primary signs and symptoms of chronic
fatigue are: "fatigue" and "loss of memory or concentration."

26 ⁶ A GAF of 51-60 shows moderate symptoms, such as those which would
27 affect speech, or moderate difficulty in social, occupational, or school
28 functioning. Diagnostic and Statistical Manual of Mental Disorders Text
Revision ("DSM"), 34 (4th ed. 2000).

1 to the same question in his July 23, 2003 report, Dr. Elder noted that:
2 "[plaintiff] has problems with chronic fatigue, weakness, concentration,
3 diarrhea, lower back pain, depression, [and] possible [schizophrenia]."
4 (A.R. 363.) In describing the objective findings supporting the
5 limitations he found, Dr. Elder noted plaintiff's "fatigue" and
6 "inability to concentrate fully," and he further observed that plaintiff
7 exhibited "findings/indications of a diagnosed mental impairment," *i.e.*,
8 "depression" and "possible [schizophrenia]." (A.R. 364.)
9

10 In his written decision, the ALJ rejected the opinions of both Dr.
11 Elder and Dr. Shiu, because in the ALJ's view, neither opinion is
12 "supported by the evidence [and plaintiff] was working in illicit
13 activity during this period," which "is indicative of her ability to
14 work during the relevant time frame." (A.R. 445-46.) When examined in
15 the light of the record as a whole, these reasons do not withstand
16 scrutiny.
17

18 While the ALJ properly rejected Dr. Elder's opinion regarding
19 plaintiff's back and knee limitations, which are not supported by the
20 objective medical evidence, the ALJ's discussion of the evidence
21 pertaining to plaintiff's mental impairment does not fairly represent
22 the significance of her mental impairment and the limitations arising
23 from it, as reflected in the record. For instance, although Dr. Elder's
24 reports indicate that plaintiff has a limited ability to care for
25 herself due to depression, as the ALJ acknowledges, Dr. Elder's reports
26 also show more significant symptoms and limitations than the ALJ
27 described in his discussion of the evidence. Specifically, Dr. Elder
28 noted that plaintiff has "problems with chronic fatigue, weakness,

1 concentration [and] possible schizophrenia." (A.R. 363.) Dr. Elder
2 opined that plaintiff's mental impairment renders her unable to
3 concentrate fully -- a limitation that would clearly impact plaintiff in
4 the workplace. (A.R. 364.) Although these aspects of Dr. Elder's
5 opinion -- specifically, his opinion regarding plaintiff's problems with
6 chronic fatigue, weakness, concentration, and possible schizophrenia --
7 are consistent with the record as a whole, the ALJ failed to mention
8 these limitations in his discussion of the evidence, much less provide
9 specific and legitimate reasons for rejecting them.⁷

10
11 Further, while the ALJ briefly mentions Dr. Shiu's opinion
12 regarding plaintiff's chronic fatigue, depression, and possible
13 schizophrenia, the ALJ fails to set forth the requisite specific and
14 legitimate reasons for rejecting it. See Lester v. Chater, 81 F.3d 821,
15 830 (9th Cir. 1995)(when the ALJ rejects the opinion of a treating
16 physician, even if it is contradicted, the ALJ may reject that opinion
17 only by providing specific and legitimate reasons for doing so,
18 supported by substantial evidence in the record); Gallant v. Heckler,
19 753 F.2d 1450, 1456 (9th Cir. 1984)(it is error for an ALJ to ignore or
20 misstate the competent evidence in the record to justify his
21 conclusion).

22
23 Moreover, the ALJ's rejection of the opinions of Drs. Elder and
24 Shiu based on the fact that plaintiff, admittedly, is capable of working

25
26 ⁷ The ALJ also rejected Dr. Elder's opinion because he is not a
27 licensed psychiatrist. (A.R. 446.) While it is true that Dr. Elder is
28 not a psychiatrist, he has been plaintiff's internist and has treated
plaintiff regularly since April 19, 2000. Dr. Elder's dealings with
plaintiff over the several years certainly have given him insight into
plaintiff's physical and mental health.

1 as a prostitute for two hours a day, this fact does not constitute a
2 legitimate reason to reject their opinions. (A.R. 224, 438, 637-38.)
3 The ALJ's casual reference to plaintiff's ability to engage in limited
4 "illicit activity" to support his rejection of the opinions of
5 plaintiff's treating physicians fails to demonstrate how plaintiff's
6 ability to work part-time as a prostitute translates into the ability to
7 engage in, and sustain, full-time competitive work. (A.R. 445.) See
8 Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987)(disability claimant
9 need not 'vegetate in dark room' to be deemed eligible for benefits);
10 Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989)("The Social Security
11 Act does not require that an individual be utterly incapacitated to be
12 eligible for benefits, and many home activities may not be easily
13 transferable to a work environment where it might be impossible to rest
14 periodically or take medication.").

15
16 Accordingly, remand is required to allow the ALJ the opportunity to
17 provide legally sufficient reasons, if such reasons exist, for rejecting
18 the opinions of Drs. Elder and Shiu regarding plaintiff's mental
19 limitations.

20
21 **II. The ALJ Failed To Consider Properly The Side Effects Of Plaintiff's**
22 **Medications On Her Ability To Work.**

23
24 When an ALJ evaluates a claimant's limitations, he must consider
25 evidence regarding the side effects of medications. Social Security
26 Ruling 96-7p indicates that the "type, dosage, effectiveness, and side
27 effects of any medication the individual takes or has taken to alleviate
28 pain or other symptoms" should be considered in the disability

1 evaluation. See also 20 C.F.R. § 416.929(c)(3)(iv). The Ninth Circuit
2 has observed that an ALJ must "consider all factors that might have a
3 significant impact on an individual's ability to work." Erickson v.
4 Shalala, 9 F.3d 813, 817 (9th Cir. 1993)(citation omitted). Such
5 factors "may include side effects of medications as well as subjective
6 evidence of pain." *Id.* at 818.

7
8 In his decision, the ALJ briefly acknowledges plaintiff's testimony
9 and records regarding the side effects of her medications,⁸ but the ALJ
10 does not expressly consider the impact of these side effects on
11 plaintiff's ability to work.⁹ The ALJ neither properly dismisses the
12 significance of the alleged side effects nor, in his hypothetical to the
13 vocational expert, references them. (A.R. 666.) The ALJ is required to
14 consider those side effects in evaluating plaintiff's disability claim,
15 and his failure to do so constitutes error.

16
17 As this case is being remanded so that the ALJ can reconsider the
18 opinions of plaintiff's treating physicians, the ALJ should consider the
19

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21 ⁸ Plaintiff's treatment records and the list of medications submitted
22 by plaintiff at the hearing reveal that, at various times, plaintiff has
23 been prescribed the following medications: viramune, risperdal, tylenol
24 3, norco, metronidazole, benzatropine, ranitidine, lotensin, megestrol,
25 seroquel, and wellbutrin. (A.R. 138, 248, 272, 367-69.)

26 ⁹ Plaintiff complained of medication side effects of fatigue,
27 weakness, nausea, diarrhea, and hair loss as a result of taking several
28 medications for her mental impairment(s), HIV, and high blood pressure.
(A.R. 248, 272, 363, 427, 656-57.) The Court notes, however, that
although plaintiff may experience these symptoms, there are multiple
references throughout the record to non-compliance with prescribed
medication. (A.R. 253, 395, 535, 545, 560). The Court questions the
extent to which these symptoms can be attributed to medication side
effects or whether plaintiff's non-compliance is related to the side-
effects of her medication.

1 impact of plaintiff's medication side effects, if any, prior to
2 rendering his ultimate determination regarding plaintiff's disability.

3
4 **III. Until The ALJ Has Properly Considered Plaintiff's The Opinions Of**
5 **Plaintiff's Treating Physicians, And Medication Side Effects, The**
6 **Court Cannot Assess The Adequacy Of The Hypothetical Posed To The**
7 **Vocational Expert.**

8
9 In posing a hypothetical to a vocational expert, the ALJ must
10 accurately reflect all of the claimant's limitations. Embrey, 849 F.2d
11 at 422-24. For the vocational expert's testimony to constitute
12 substantial evidence, the hypothetical question posed must "consider all
13 of the claimant's limitations." Andrews, 53 F.3d at 1044 (holding that
14 hypothetical questions that do not include all of claimant's limitations
15 are insufficient and warrant remand).

16
17 In this case, the hypothetical posed to the vocational expert may
18 be incomplete to the extent that it does not reflect appropriately, in
19 whole or in part, the opinions of Drs. Elder and Shiu and the alleged
20 side effects of plaintiff's medication. On remand, the ALJ should
21 either properly reject the treating physicians' opinions and the alleged
22 side effects of plaintiff's medications in accordance with the governing
23 legal standards, or the ALJ must incorporate them into the hypothetical
24 posed to the vocational expert.

25
26 **IV. Remand Is Required.**

27
28 The decision whether to remand for further proceedings or order an

1 immediate award of benefits is within the district court's discretion.
2 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
3 useful purpose would be served by further administrative proceedings, or
4 where the record has been fully developed, it is appropriate to exercise
5 this discretion to direct an immediate award of benefits. *Id.* at 1179
6 ("the decision of whether to remand for further proceedings turns upon
7 the likely utility of such proceedings"). However, where there are
8 outstanding issues that must be resolved before a determination of
9 disability can be made, and it is not clear from the record that the ALJ
10 would be required to find the claimant disabled if all the evidence were
11 properly evaluated, remand is appropriate. *Id.* Here, remand is
12 appropriate to allow the ALJ an opportunity to remedy the above-
13 mentioned deficiencies and errors. See, e.g., Benecke v. Barnhart, 379
14 F.3d 587, 593 (9th Cir. 2004)(remand for further proceedings is
15 appropriate if enhancement of the record would be useful); McAllister,
16 888 F.2d at 603 (remand appropriate to remedy defects in the record).

17
18 Although not raised as an issue by the parties, it is unclear to
19 the Court whether the payment of benefits to plaintiff is prohibited by
20 her extensive substance abuse, of which there is abundant evidence in
21 the record. (See, e.g., A.R. 204, 400, 532, 545, 548, 556, 567, 569.)
22 Indeed, although the ALJ erred in his assessment of the opinions of
23 plaintiff's treating physicians regarding her mental health limitations
24 and possible medication side effects, the Court is not suggesting that
25 the ALJ's ultimate disability determination is incorrect. It does
26 appear, however, that the ALJ side-stepped the issue of whether
27 plaintiff's substance abuse is a "contributing factor material to" her
28 mental limitations. See Bustamonte v. Massanari, 262 F.3d 949, 954 (9th

1 Cir. 2001)(ALJ errs by deciding an impairment is the product and
2 consequence of alcohol abuse or drug abuse before deciding whether the
3 impairment is disabling). Given the ALJ's express recognition that
4 "[i]t appears [plaintiff] has never discontinued her cocaine abuse for
5 any prolonged period" (A.R. 443), and Dr. Kikani's opinion that
6 plaintiff's condition is "secondary to her problem related to
7 psychoactive substance abuse, mostly crack cocaine" (A.R. 209), the
8 Court questions whether the ALJ dismissed the significance of
9 plaintiff's mental health limitations because of the extensive evidence
10 of her substance abuse.¹⁰

11
12 Plaintiff bears the burden of proving that her substance abuse is
13 "not a contributing factor material to [her] disability." See Parra v.
14 Astrue, 481 F.3d 742, 747 (9th Cir. 2007)(plaintiff bears the burden of
15 proving that substance abuse is "not a contributing factor material to
16 his disability"). Nevertheless, on remand, if after properly addressing
17 plaintiff's treating physicians' opinions regarding plaintiff's mental
18 limitations and the alleged side effects, if any, of her medications,
19 the ALJ concludes that plaintiff has a "severe" mental health
20 impairment, then the ALJ should consider whether that impairment would
21 remain in the absence of her substance abuse and, if so, whether it is
22 disabling.

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26 ¹⁰ Divy Kikani, M.D., a psychiatrist who examined plaintiff at the
27 request of the Commissioner, opined that, "[f]rom the psychiatric point
28 of view, [plaintiff] is moderately psychiatrically disabled from the
underlying psychiatric condition, which, in my opinion, is in reaction
to the medical condition and also secondary to her problem related to
psychoactive substance abuse, mostly crack cocaine." (A.R. 209.)

1 **CONCLUSION**

2
3 Accordingly, for the reasons stated above, IT IS ORDERED that the
4 decision of the Commissioner is REVERSED, and this case is REMANDED for
5 further proceedings consistent with this Memorandum Opinion and Order.
6

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

10
11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

12
13 DATED: September 21, 2009

Margaret A. Nagle

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16 MARGARET A. NAGLE
17 UNITED STATES MAGISTRATE JUDGE
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