UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TAMMY BINGER, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. EDCV 08-0852-RC OPINION AND ORDER

Plaintiff Tammy Binger filed a complaint on July 3, 2008, seeking review of the Commissioner's decision denying her application for disability benefits, and on November 12, 2008, the Commissioner answered the complaint. The parties filed a joint stipulation on April 7, 2009.

BACKGROUND

I

On April 1, 2005, plaintiff applied for disability benefits under the Supplemental Security Income program of Title XVI of the Social Security Act ("the Act"), 42 U.S.C. § 1382(a), claiming an inability

to work since June 28, 2003, due to a broken tail bone, ankle inflammation, sciatica, left leg numbness and adenomyosis. Certified Administrative Record ("A.R.") 80-82, 88. The plaintiff's application was initially denied on July 22, 2005, and was denied again on November 10, 2005, following reconsideration. A.R. 43-55. The plaintiff then requested an administrative hearing, which was held before Administrative Law Judge Lowell Fortune ("the ALJ") on February 9 and September 7, 2007. A.R. 42-42A, 420-96. On September 28, 2007, the ALJ issued a decision finding plaintiff is not disabled. A.R. 14-27. The plaintiff appealed this decision to the Appeals Council, which denied review on May 27, 2008. A.R. 4-6, 13.

II

The plaintiff, who was born on March 9, 1960, is currently 49 years old. A.R. 80, 423. She has a ninth-grade education, and has previously worked as a waitress, stock clerk, and merchandiser. A.R. 89-90, 323, 423, 427-28, 437-38, 486-90.

Between October 13, 2005, and August 8, 2007, plaintiff received mental health treatment at the Riverside County Department of Mental Health ("DMH").[1] A.R. 211, 213, 260-318, 385-417. On October 13, 2005, plaintiff was diagnosed with an unspecified depressive disorder and a history of attention deficit hyperactivity disorder and antisocial personality traits, and her Global Assessment of

[1] Although plaintiff has both physical and mental complaints, she challenges only the ALJ's assessment of her mental condition; therefore, the Court only summarizes the medical records pertaining to plaintiff's mental state.

Functioning ("GAF") was determined to be 45.[2] A.R. 300, 304. On December 7, 2005, Coney Ebro, M.D., examined plaintiff, diagnosed her as having mixed bipolar disorder and intermittent explosive disorder, determined plaintiff's GAF was 50, and prescribed medication for plaintiff. A.R. 307.

On September 15, 2006, Dr. Ebro determined plaintiff has poor impulse control, is easily angered, has been isolated and withdrawn, and is afraid of hurting other people. A.R. 211. Dr. Ebro opined plaintiff cannot complete a forty-hour workweek without decompensating, and she cannot maintain a sustained level of concentration, sustain repetitive tasks for an extended period, adapt to new or stressful situations, or interact appropriately with family, strangers, or co-workers, although she can interact appropriately with supervisors and authority figures. Id.

On February 1, 2007, Dr. Ebro found plaintiff has severe angry outbursts and can be violent and hurt other people, but her aggressive behavior is controlled with medication. A.R. 213. Dr. Ebro again concluded plaintiff cannot complete a forty-hour workweek without decompensating, and she cannot maintain a sustained level of concentration, sustain repetitive tasks for an extended period, or adapt to new or stressful situations. Id.

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[2] A GAF of 41-50 means that the plaintiff exhibits "[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job)." American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR"), 34 (4th ed. (Text Revision) 2000).

On May 24, 2007, Oluwafemi Adeyemo, M.D., a psychiatrist, examined plaintiff and diagnosed her as having a recurrent severe major depressive disorder with psychotic features, an unspecified impulse control disorder, rule out dysthymic disorder and bipolar disorder with psychotic features, and determined plaintiff's GAF was 55.[3] A.R. 322-28. Dr. Adeyemo opined:

> [plaintiff] does not appear to have any restrictions of daily activities at home but she has difficulty maintaining social functioning outside her home environment. She does not appear to have significant difficulties with concentration and is able to understand, retain and execute simple and complex instructions. She does not have [a] history of emotional deterioration in a work environment. [She] may have mild to moderate difficulties interacting with co-workers and supervisors but should be able to respond appropriately to usual work situations with accommodations for her current symptoms (basically limiting her interaction with co-workers and supervisors). She . . . appears to have moderate to mild difficulties interacting with the public but her symptoms should improve with optimal treatment. There was no obvious evidence of ongoing substance abuse.

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[3] A GAF of 55 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." DSM-IV-TR at 34.

A.R. 324. Dr. Adeyemo further opined plaintiff's ability to understand, remember, and carry out instructions is not affected by her impairment, but she has: a "marked "limitation in her ability to interact appropriately with the public; "moderate" limitations in her ability to respond appropriately to usual work situations and to changes in a routine work setting; and a "mild" limitation in her ability to interact appropriately with supervisors and co-workers. A.R. 327.

Medical expert Dr. Michael Kania testified at the administrative hearing, and opined plaintiff has an unspecified depressive disorder, an intermittent explosive disorder, and anti-social personality traits, and that none of these conditions meets or equals a listing. A.R. 462-73. Dr. Kania opined plaintiff has a "mild" restriction in her activities of daily living, "moderate" difficulty maintaining social functioning, "mild" difficulties maintaining concentration, persistence or pace, and no episodes of decompensation. A.R. 463. Dr. Kania also opined plaintiff should be limited to a non-public job with limited contact with other workers "[s]o, if she was working independently or with one or two other people there probably would not be any difficulty, but beyond that there might be." A.R. 463-64. Dr. Kania reviewed the DMH records, and observed that plaintiff's response to medication has been very positive, there was no problem with impulse control, and "she was less agitated, less irritable, she had better control and the auditory hallucinations, when they were reported, are few and far between and don't seem to impair her functioning at all." A.R. 464-65.

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DISCUSSION

III

The Court, pursuant to 42 U.S.C. § 405(g), has the authority to review the Commissioner's decision denying plaintiff disability benefits to determine if his findings are supported by substantial evidence and whether the Commissioner used the proper legal standards in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).

"In determining whether the Commissioner's findings are supported by substantial evidence, [this Court] must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001). "Where the evidence can reasonably support either affirming or reversing the decision, [this Court] may not substitute [its] judgment for that of the Commissioner." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007), cert. denied, 128 S. Ct. 1068 (2008); Bray v. Astrue, 554 F.3d 1219, 1222 (9th Cir. 2009).

The claimant is "disabled" for the purpose of receiving benefits under the Act if he is unable to engage in any substantial gainful activity due to an impairment which has lasted, or is expected to last, for a continuous period of at least twelve months. 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the burden of establishing a prima facie case of disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122

(1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

The Commissioner has promulgated regulations establishing a five-step sequential evaluation process for the ALJ to follow in a disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ must determine whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the **Second Step**, the ALJ must determine whether the claimant has a severe impairment or combination of impairments significantly limiting her from performing basic work activities. 20 C.F.R. § 416.920(c). If so, in the **Third Step**, the ALJ must determine whether the claimant has an impairment or combination of impairments that meets or equals the requirements of the Listing of Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the **Fourth Step**, the ALJ must determine whether the claimant has sufficient residual functional capacity despite the impairment or various limitations to perform her past work. 20 C.F.R. § 416.920(f). If not, in **Step Five**, the burden shifts to the Commissioner to show the claimant can perform other work that exists in significant numbers in the national economy. 20 C.F.R. § 416.920(g). Moreover, where there is evidence of a mental impairment that may prevent a claimant from working, the Commissioner has supplemented the five-step sequential evaluation process with additional regulations addressing mental impairments.[4] Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914 (9th Cir. 1998) (per curiam).

Applying the five-step sequential evaluation process, the ALJ

[4] See 20 C.F.R. § 416.920a.

found plaintiff has not engaged in substantial gainful activity since the application date of April 1, 2005. (Step One). The ALJ then found plaintiff has the severe impairments of: a lumbar spine disorder, a knee disorder, an unspecified depressive disorder, an intermittent explosive disorder, now in remission, and antisocial personality traits (Step Two); however, she does not have an impairment or combination of impairments that meets or equals a Listing. (Step Three). The ALJ next determined plaintiff cannot perform her past relevant work. (Step Four). Finally, the ALJ concluded plaintiff can perform a significant number of jobs in the national economy; therefore, she is not disabled. (Step Five).

IV

A claimant's residual functional capacity ("RFC") is what she can still do despite her physical, mental, nonexertional, and other limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001); Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). Here, the ALJ found plaintiff has the RFC to perform:

> sedentary work[5] in a non-public, habituated work setting with limited contact with her co-workers, except she requires an option to stand and stretch every 30 minutes and

[5] "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 416.967(a).

> is limited to occasional climbing of ramps or stairs, occasional balancing, and occasional, not repetitive, bending, stooping, or crouching. The [plaintiff] is also limited to less than occasional kneeling, and precluded from climbing ladders, ropes or scaffolds, from crawling, or working on uneven terrain. She must avoid all excessive noise and vibrations, dangerous, or fast moving machinery and unprotected heights.

A.R. 20 (footnote added). However, plaintiff contends the ALJ's decision is not supported by substantial evidence because the ALJ did not properly consider the opinions of her treating psychiatrist Dr. Ebro or examining psychiatrist Dr. Adeyemo. There is no merit to these contentions.

The medical opinions of treating physicians are entitled to special weight because the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999). Therefore, the ALJ must provide clear and convincing reasons for rejecting the uncontroverted opinion of a treating physician, Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008); Reddick, 157 F.3d at 725, and "[e]ven if [a] treating doctor's opinion is contradicted by another doctor, the ALJ may not reject this opinion without providing 'specific and legitimate reasons' supported by substantial evidence in the record." Reddick, 157 F.3d at 725; Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). Similarly,

the ALJ "must provide 'clear and convincing' reasons for rejecting the uncontradicted opinion of an examining physician[,]" Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006), and "[e]ven if contradicted by another doctor, the opinion of an examining doctor can be rejected only for specific and legitimate reasons that are supported by substantial evidence in the record." Regennitter v. Comm'r of the Soc. Sec. Admin., 166 F.3d 1294, 1298-99 (9th Cir. 1999); Ryan, 528 F.3d at 1198.

Dr. Ebro opined plaintiff cannot complete a forty-hour workweek without decompensating, and she cannot maintain a sustained level of concentration, sustain repetitive tasks for an extended period, adapt to new or stressful situations, or interact appropriately with family, strangers, or co-workers, although she can interact appropriately with supervisors and authority figures. A.R. 211. The ALJ rejected Dr. Ebro's opinion, stating:

> The doctor's opinion is without substantial support from the other evidence of record, which obviously renders it less persuasive. Although the [plaintiff] has received on-going treatment for her allegedly disabling symptoms, which would normally weigh somewhat in the [plaintiff's] favor, the record also reveals that the treatment has been generally successful in controlling those symptoms. She has had no hospitalizations or crises since commencing treatment and has shown improvement.

A.R. 24-25. The ALJ's rationale is supported by substantial evidence

in the record, which shows, as Dr. Kania opined, that plaintiff has responded positively to medication and she is able to control her anger. See, e.g., A.R. 260, 263, 289, 294. Moreover, contrary to Dr. Ebro, Dr. Adeyemo opined that plaintiff "does not appear to have significant difficulties with concentration[,]" "does not have a history of emotional deterioration in a work environment[,]" and "should be able to respond appropriately to usual work situations. . . ." A.R. 324, 326. "Inconsistencies between [treating and examining physicians'] conclusions provided the ALJ additional justification for rejecting [the treating physician's] opinion." Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999); see also Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003) (ALJ properly rejected treating physician's opinion that was contradicted by his own notes and was inconsistent with other physicians' examination of claimant.); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) ("The contrary opinions of [the examining and nonexamining physicians] serve as . . . specific and legitimate reasons for rejecting the opinion[] of [the treating physician], and provide assurance that the record was sufficiently developed with regard to the issue of physical impairment.").

Dr. Adeyemo also opined plaintiff has a "marked" limitation in her ability to deal with the public; a "moderate" limitation in her ability to respond appropriately to usual work situations and changes in a routine work setting; and "mild" limitations in her ability to interact appropriately with supervisors and co-workers. A.R. 327. More specifically, Dr. Adeyemo explained that plaintiff "should be able to respond appropriately to usual work situations" if she has

only limited interaction with co-workers and supervisors. A.R. 324. Plaintiff contends, however, that "the ALJ failed to discuss or mention . . . plaintiff's mild limitations" in her ability to interact with supervisors and co-workers. Jt. Stip. at 9:2-10:2. The Court disagrees. As noted above, the RFC determination specifically limited plaintiff to non-public work with limited contact with co-workers, A.R. 20, which the ALJ further described as "working independently or with one or two coworkers." A.R. 493. Therefore, "the RFC actually incorporated the evidence that [the plaintiff] argues it ignored[,]" and plaintiff's contention is without merit. Valentine v. Astrue, 574 F.3d 685, __, 2009 WL 2138981, *4 (9th Cir. (Or.)).

V

At Step Five, the burden shifts to the Commissioner to show the claimant can perform other jobs that exist in the national economy. Hoopai v. Astrue, 499 F.3d 1071, 1074-75 (9th Cir. 2007); Widmark, 454 F.3d at 1069. There are two ways for the Commissioner to meet this burden: "(1) by the testimony of a vocational expert, or (2) by reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R. pt. 404, subpt. P, app. 2."[6] Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999); Widmark, 454 F.3d at 1069. Moreover, the

[6] The Grids are guidelines setting forth "the types and number of jobs that exist in the national economy for different kinds of claimants. Each rule defines a vocational profile and determines whether sufficient work exists in the national economy. These rules represent the [Commissioner's] determination, arrived at by taking administrative notice of relevant information, that a given number of unskilled jobs exist in the national economy that can be performed by persons with each level of residual functional capacity." Chavez v. Dep't of Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996) (citations omitted).

Commissioner "must 'identify specific jobs existing in substantial numbers in the national economy that [the] claimant can perform despite her identified limitations.'" Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (quoting Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995)).

Hypothetical questions posed to a vocational expert must consider all of the claimant's limitations, Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001), and "[t]he ALJ's depiction of the claimant's disability must be accurate, detailed, and supported by the medical record." Tackett, 180 F.3d at 1101. Here, the ALJ asked vocational expert Sandra Fioretti the following hypothetical question:

> [A]ssume an individual of the same age, education and work experience as the claimant. . . . I want you to assume an individual with the following [RFC] based – exertionally at sedentary, posturally this person is able to climb ramps and stairs occasionally, but not ladders, scaffolds or ropes, occasionally able to balance. Now, in terms of bending, stooping and crouching – no repetitive motions . . . on either of those – accumulation can be occasionally up to a third of the day. Kneeling less than occasionally. Crawling – no crawling. And no walking on uneven terrain. Environmentally – avoid all exposure to excessive vibration, avoid all exposure to dangerous or fast moving machinery and unprotected heights. Mentally . . . non-public tasks. . . . Limited contact with other workers, which means according to the medical expert, working independently or with one or two

> coworkers. . . . Based on these circumstances[,] . . . could this hypothetical person perform any other work in the regional or in the national economy?

A.R. 492-93. The vocational expert responded that such a person could work as a buttons and notions assembler (Dictionary of Occupational Titles ("DOT")[7] no. 734.687-018), with 900 job positions regionally and 12,000 nationally, an optical assembler (DOT no. 713.687-018), with 600 job positions regionally and 4,800 nationally, or an agricultural sorter (DOT no. 521.687-086), with 450 job positions regionally and 5,000 nationally. A.R. 493-94.

The plaintiff contends, however, that the hypothetical question to the vocational expert "fails to set out all of [her] particular limitations and restrictions" as identified by Drs. Ebro and Adeyemo. Jt. Stip. at 14:20-15:19, 16:21-25. Since the ALJ's rejection of Dr. Ebro's opinion is supported by substantial evidence, those limitations need not be included in a hypothetical question to the vocational expert. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); Magallanes v. Bowen, 881 F.2d 747, 756-57 (9th Cir. 1989). Moreover, as discussed above, the hypothetical question to the vocational expert accommodates the limitations found by Dr. Adeyemo. Therefore, the vocational expert's testimony constitutes substantial evidence to support the ALJ's Step Five determination that plaintiff is not

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[7] The DOT is the Commissioner's primary source of reliable vocational information. Johnson, 60 F.3d at 1434 n.6.

disabled. Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

ORDER

IT IS ORDERED that: (1) plaintiff's request for relief is denied; and (2) the Commissioner's decision is affirmed, and Judgment shall be entered in favor of defendant.

DATE: August 31, 2009

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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