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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTIN ROSOL,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

NO. EDCV 08-1692 AGR

MEMORANDUM OPINION AND
ORDER

Kristin Rosol filed this action on November 21, 2008. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before Magistrate Judge Rosenberg on November 26, 2008 and January 23, 2009. (Dkt. Nos. 6-7.) On June 15, 2009, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. (Dkt. No. 14.) The Court has taken the matter under submission without oral argument.

Having reviewed the entire file, the Court remands this matter to the Commissioner for proceedings consistent with this Opinion.

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1 I.

2 **PROCEDURAL BACKGROUND**

3 On February 2, 2006, Rosol filed an application for disability insurance
4 benefits. Administrative Record (“AR”) 10. The application was denied initially
5 and upon reconsideration. AR 47-48. An Administrative Law Judge (“ALJ”)
6 conducted a hearing on April 24, 2008, at which Rosol, a medical expert (“ME”),
7 and a vocational expert (“VE”) testified. AR 28-46. On June 26, 2008, the ALJ
8 issued a decision denying benefits. AR 7-18. On September 26, 2008, the
9 Appeals Council denied Rosol’s request for review. AR 1-4.

10 This lawsuit followed.

11 II.

12 **STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner’s
14 decision to deny benefits. The decision will be disturbed only if it is not supported
15 by substantial evidence, or if it is based upon the application of improper legal
16 standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v.*
17 *Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18 “Substantial evidence” means “more than a mere scintilla but less than a
19 preponderance – it is such relevant evidence that a reasonable mind might
20 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In
21 determining whether substantial evidence exists to support the Commissioner’s
22 decision, the Court examines the administrative record as a whole, considering
23 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the
24 evidence is susceptible to more than one rational interpretation, the Court must
25 defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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III.

DISCUSSION

A. Disability

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

B. The ALJ’s Findings

The ALJ found that Rosol meets the insured status requirements through December 31, 2003. AR 12.

Rosol has the following severe impairment: bipolar disorder. *Id.* Rosol has the residual functional capacity (“RFC”) “to perform a full range of work at all exertional levels but with the following nonexertional limitations: moderately complex tasks with up to three to four steps of instructions; and occasional non-intense contact with others. AR 13. Rosol is unable to perform past relevant work. AR 16. However, “there are jobs that exist in significant numbers in the national economy that the claimant can perform.” AR 17.

C. The Medical Evidence

The ALJ accepted treating psychiatrist Dr. John’s initial evaluation dated November 3, 2004, which indicated impaired concentration. AR 15, 479-83. At the initial evaluation, Dr. John found Rosol’s psychomotor behavior to be within normal limits, with a cooperative attitude, appropriate speech and mildly elevated mood. AR 480-81. Dr. John estimated Rosol’s intellectual functioning to be average, her judgment to be within normal limits, and her concentration to be impaired (as distinguished from adequate or severely impaired). AR 481-82.

1 However, the ALJ did not give great weight to Dr. John's Mental
2 Impairment Questionnaire dated May 9, 2007. AR 15, 445-50. Dr. John checked
3 the box for "unable to meet competitive standards" as to Rosol's ability to
4 maintain regular attendance and be punctual within customary tolerances, sustain
5 an ordinary routine without special supervision, complete a normal workday and
6 workweek without psychological interruptions, perform at a consistent pace
7 without unreasonable rest periods, deal with normal work stress, and deal with
8 stress of semiskilled or skilled work. AR 447-48. Although the form requested an
9 explanation of those limitations, Dr. John provided none. *Id.* Dr. John assessed
10 moderate limitations on activities of daily living, social functioning, and
11 deficiencies of concentration, persistence or pace, but found three episodes of
12 decompensation within a 12-month period, each of which lasted at least two
13 weeks. AR 449. Although the form asked for dates of the episodes, Dr. John
14 provided none. *Id.* Dr. John estimated that Rosol would be absent from work
15 more than four days per month. *Id.*

16 An opinion of a treating physician is given more weight than the opinion of
17 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).
18 "Where the treating doctor's opinion is not contradicted by another doctor, it may
19 be rejected only for 'clear and convincing' reasons supported by substantial
20 evidence in the record." *Id.* at 632 (citation omitted). When, as here, a treating
21 physician's opinion is contradicted by another doctor, "the ALJ may not reject this
22 opinion without providing 'specific and legitimate reasons' supported by
23 substantial evidence in the record. This can be done by setting out a detailed
24 and thorough summary of the facts and conflicting clinical evidence, stating his
25 interpretation thereof, and making findings." *Id.* at 632 (citations omitted).

26 Rosol appears to argue in her reply that Dr. John's opinion is
27 uncontradicted. JS 6. The medical expert expressed an opinion as to Rosol's
28 abilities that contradicted Dr. John. A non-examining physician's opinion

1 is sufficient to establish a conflict among medical opinions even if it could not
2 constitute substantial evidence for rejecting a treating physician's opinion. See
3 *Widmark v. Barnhart*, 454 F.3d 1063, 1066 n.2 (9th Cir. 2005).

4 The ALJ discounted Dr. John's evaluation based on the medical expert's
5 testimony and because the evaluation was a check-the-box report whose
6 limitations were inconsistent with Dr. John's treatment records and Rosol's good
7 response to medication when compliant and not binge drinking.¹ AR 15-16.

8 The ALJ asked for and considered the opinion of a medical expert, Dr.
9 Glasmire. AR 16, 20 C.F.R. § 404.1527(f)(iii). It is undisputed that the ME did
10 not have Dr. John's treatment records because they were submitted after the
11 hearing. AR 16, 36, 452. The ME felt he had "insufficient evidence really to
12 comment on" episodes of decompensation because there were no treatment
13 records and Dr. John's May 9, 2007 evaluation provided no dates or evidence on
14 that issue. AR 39-40. The ME also stated that there was insufficient evidence to
15 determine whether Rosol met the C criteria for the same reason. AR 40. The
16 ME's limitations were "[b]ased on the records I've reviewed," which did not
17 include treatment records. *Id.*

18 The ALJ stated that he gave "great weight" to the ME's opinion. AR 16. A
19 non-examining physician's opinion constitutes substantial evidence when it is
20 supported by other evidence in the record and consistent with it. *Andrews v.*
21 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). However, a non-examining
22 physician's opinion cannot by itself constitute substantial evidence. *Widmark*,
23 454 F.3d at 1066 n.2. The ME stated that his opinion was based only on the
24 records he reviewed and stated repeatedly that he found insufficient evidence
25 based on the absence of treating records. AR 36, 39-43. Having relied upon the

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27 ¹ The ALJ accepted Dr. John's Global Assessment of Functioning (GAF)
28 score of 60, which indicates moderate symptoms defined as "more than a slight
limitation in this area but is still able to function satisfactorily." AR 15 n.1. The
ALJ found that moderate symptoms were not inconsistent with his findings. *Id.*

1 ME's opinion, the ALJ is not free to ignore the ME's equivocal testimony that
2 there was insufficient evidence without treatment records to review. *Cf.*
3 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150-51 (9th Cir. 2001) (ALJ erred in failing
4 to develop record where ME's testimony, on which ALJ relied, indicated need for
5 a more complete report from the doctor).² The ME's testimony does not
6 constitute substantial evidence to discount Dr. John's opinion.

7 Rosol submitted the treatment records after the hearing. AR 16, 452. An
8 ALJ may reject a treating physician's opinion that is unsupported or contradicted
9 by treatment records. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
10 2005); *Batson v. Comm'r of the SSA*, 359 F.3d 1190, 1195 (9th Cir. 2004) (ALJ
11 may reject conclusory and unsupported check list report); *Thomas v. Barnhart*,
12 278 F.3d 947, 957 (9th Cir. 2002); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir.
13 1996) (ALJ may reject check-off report that did not explain bases of conclusions).
14 As discussed above, the report itself did not provide explanations for Dr. John's
15 limitations. The ALJ interpreted Dr. John's treatment records as reflecting good
16 response to medications when she is compliant, except during the time period
17 surrounding Rosol's father's death when Rosol drank heavily. Even then, Rosol's
18 condition during that time period was brought on by a situational event and
19 resolved. AR 15.

20 The ALJ's interpretation of the treatment records as reflecting good
21 response to medications except during binge drinking does not appear to be
22 supported by substantial evidence. *See Holohan v. Massanari*, 246 F.3d 1195,
23 1205 (9th Cir. 2001) (insufficient evidence to support ALJ's finding of conflict
24 between opinion and treatment notes). During the period November 2004 until
25 June 2005 (when Rosol's father died), Rosol "is definitely doing better with the
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27 ² The ALJ did not fail to develop the record in this case. The treatment
28 records were requested on more than one occasion, and arrived after the
hearing. AR 36, 452.

1 depression and is able to get up and do things around the home.” AR 474; AR
2 472-78. However, there continue to be reports of mood swings, although without
3 rage episodes or excessive shopping. AR 473, 475-76. In June 2005, Rosol
4 “went manic for 2 weeks and spent \$1000” and “then went depressed for 3 days.”
5 AR 472. In August 2005, Rosol reported “some mood swings with irritability and
6 mild depression.” AR 471. In October 2005, Rosol reported a “hypomanic
7 episode for 2 weeks and then crashed.” AR 470. In the period November 2005
8 through March 2006, Rosol reports being depressed over her mother’s lawsuit
9 and the breakdown of that relationship. AR 466-69. During May-September
10 2006, Rosol had panic and depression, mixed with racing thoughts and insomnia
11 associated with having to move out of her home. AR 463-65. In November 2006,
12 Rosol reports “definitely doing better with her mood” with her switch to Zoloft. AR
13 462. However, in January through March 2007, Rosol again has trouble with her
14 mood and depression. Dr. John notes that “Pt to be hospitalised if not doing
15 well.” AR 460-61. In May 2007, Rosol again reports “doing reasonably well on
16 the combination of meds she is on right now with some break through anxiety and
17 agitation,” and states that she is doing things around the home. AR 459. In July
18 2007, Rosol reports that she went into hypomania, then drank heavily due to the
19 anniversary of her father’s death and went into depression. AR 458. There is no
20 improvement through February 2008, when none of the medications seem to
21 work and she is still experiencing mood swings throughout the day. AR 454-57.

22 On remand, the ALJ should consult a medical expert and provide him or
23 her with Dr. John’s treatment notes. In addition, the court notes that the ALJ
24 found that the date last insured was December 31, 2003. “[T]o obtain disability
25 benefits, [a claimant] must demonstrate he was disabled prior to his last insured
26 date.” *Morgan v. Sullivan*, 945 F.2d 1079, 1080 (9th Cir. 1991). The claimant
27 “bears the burden of proof and must prove that he was ‘either permanently
28 disabled or subject to a condition which became so severe as to disable [him]

1 prior to the date upon which [his] disability insured status expired.” *Armstrong v.*
2 *Commissioner of the SSA*, 160 F.3d 587, 589 (9th Cir. 1998) (citation omitted). If
3 the “medical evidence is not definite concerning the onset date and medical
4 inferences need to be made, SSR 83-20 requires the administrative law judge to
5 call upon the services of a medical advisor and to obtain all evidence which is
6 available to make the determination.” *DeLorme v. Sullivan*, 924 F.2d 841, 848
7 (9th Cir. 1991). The onset date must be “supported by the evidence.” See Social
8 Security Ruling (“SSR”) 83-20.³

9 **D. Step Two Analysis**

10 Rosol appears to argue that the ALJ erred in failing to find her migraines
11 constitute a severe impairment. JS 6-7.

12 At Step Two of the sequential analysis, the claimant bears the burden of
13 demonstrating a severe, medically determinable impairment that meets the
14 duration requirement. 20 C.F.R. § 404.1520(a)(4)(ii); *Bowen v. Yuckert*, 482 U.S.
15 137, 146 n.5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). To satisfy the duration
16 requirement, the severe impairment must have lasted or be expected to last for a
17 continuous period of not less than 12 months. *Id.* at 140.

18 Your impairment must result from anatomical, physiological,
19 or psychological abnormalities which can be shown by
20 medically acceptable clinical and laboratory diagnostic
21 techniques. A physical or mental impairment must be
22 established by medical evidence consisting of signs,
23 symptoms, and laboratory findings, not only by your
24 statement of symptoms.

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26 ³ Social Security rulings do not have the force of law. Nevertheless, they
27 “constitute Social Security Administration interpretations of the statute it
28 administers and of its own regulations,” and are given deference “unless they are
plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882
F.2d 1453, 1457 (9th Cir. 1989) (footnotes omitted).

1 20 C.F.R. § 404.1508; 20 C.F.R. § 416.908. “[T]he impairment must be one that
2 ‘significantly limits your physical or mental ability to do basic work activities.’”⁴
3 *Yuckert*, 482 U.S. at 154 n.11 (quoting 20 C.F.R. § 404.1520(c)); *Smolen*, 80
4 F.3d at 1290 (“[A]n impairment is not severe if it does not significantly limit [the
5 claimant’s] physical ability to do basic work activities.”) (citation and internal
6 quotation marks omitted).

7 “An impairment or combination of impairments may be found ‘not severe
8 *only if* the evidence establishes a slight abnormality that has no more than a
9 minimal effect on an individual’s ability to work.” *Webb v. Barnhart*, 433 F.3d
10 683, 686-87 (9th Cir. 2005) (emphasis in original, citation omitted). Step Two is
11 “a *de minimis* screening device [used] to dispose of groundless claims” and the
12 ALJ’s finding must be “clearly established by medical evidence.” *Id.* at 687
13 (citations and quotation marks omitted).

14 Rosol does not identify medical records indicating a severe impairment of
15 migraines that lasted or is expected to last for a continuous period of not less
16 than 12 months. There is a reference to headaches in treatment notes during the
17 period November 2000 through March 2001. AR 244-55. There is no definitive
18 diagnosis of migraines. AR 254-55. A February 2001 notation states that Rosol’s
19 “headaches are virtually gone.” AR 246. In March 2001, there is a referral to a
20 psychiatrist for evaluation of “various types of migrainous disorders associated
21 with mood disorders.” AR 244. The headaches are “not disabling.” *Id.* The next
22 episode appears to have occurred in February 2003. AR 267. While the
23 physician agreed that visual paroxysms are consistent with migraine, he stated
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25 ⁴ The ability to do basic work activities includes “physical functions such as
26 walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling,”
27 “capacities for seeing, hearing, and speaking,” “understanding, carrying out, and
28 remembering simple instructions,” “use of judgment,” “responding appropriately to
supervision, co-workers, and usual work situations,” and “dealing with changes in
a routine work setting.” *Yuckert*, 482 U.S. at 168 n.6 (internal quotations
omitted); *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

1 that her symptoms were “most consistent with a complex partial seizure.” AR
2 268. In January 2005, there is a reference to Nexium being discontinued due to
3 headaches. AR 316. Rosol last complained of headache pressure in May 2006.
4 AR 334. The ALJ did not err.

5 **E. Hypothetical to the Vocational Expert**

6 The ALJ may rely on testimony a vocational expert gives in response to a
7 hypothetical that describes “all of the limitations that the ALJ found credible and
8 supported by substantial evidence in the record.” *Bayliss*, 427 F.3d at 1217-18.
9 The ALJ is not required to include limitations that are not in his findings. *Rollins*
10 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Osenbrock v. Apfel*, 240 F.3d
11 1157, 1165 (9th Cir. 2001).

12 On remand, the ALJ is free to revisit the issue of his hypothetical to the
13 vocational expert if appropriate after further analysis of the treating physician’s
14 records and Rosol’s residual functional capacity.

15 **IV.**

16 **ORDER**

17 IT IS HEREBY ORDERED that this matter is remanded for proceedings
18 consistent with this Opinion.

19 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
20 Order and the Judgment herein on all parties or their counsel.

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23 DATED: September 25, 2009



ALICIA G. ROSENBERG
United States Magistrate Judge