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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

MARINA ADEA,)	No. EDCV 10-041 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for further administrative proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff Marina Adea was born on February 29, 1956, and was fifty-three years old at the time of her latest administrative hearing. [Administrative Record (“AR”) 16, 310.] She has a high

1 school education and past relevant work experience as a certified
2 nursing aide. [AR 63.] Plaintiff alleges disability on the basis of
3 back and leg problems arising from an October 2004 workplace injury.
4 [AR 64-5, 141.]

5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was lodged on January 8, 2010, and filed on
7 January 26, 2010. On July 22, 2010, defendant filed an answer and
8 plaintiff's Administrative Record ("AR"). On September 22, 2010, the
9 parties filed their Joint Stipulation ("JS") identifying matters not
10 in dispute, issues in dispute, the positions of the parties, and the
11 relief sought by each party. This matter has been taken under
12 submission without oral argument.

13 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

14 Plaintiff applied for a period of disability and disability
15 insurance benefits ("DIB") on October 26, 2005, alleging disability
16 since October 20, 2004. [AR 121.] Plaintiff last met the insured
17 status requirements of the Social Security Act on December 31, 2010.
18 [AR 10.] After the application was denied initially and upon
19 reconsideration, plaintiff requested an administrative hearing, which
20 was held on August 31, 2007, before Administrative Law Judge ("ALJ")
21 Mason D. Harrell, Jr. [AR 59.] Plaintiff appeared with counsel, and
22 testimony was taken from plaintiff and vocational expert ("VE") Sandra
23 Fioretti. [AR 84.] The ALJ denied benefits in an administrative
24 decision filed on October 26, 2007. [AR 18.] When the Appeals Council
25 denied review on January 25, 2008, the ALJ's decision became the
26 Commissioner's final decision. [AR 88-90.]

27 Plaintiff filed an action in this court, EDCV 08-262 (CW). The
28 matter was remanded for further proceedings pursuant to Sentence Four

1 of 42 U.S.C. §405(g).

2 A remand hearing was held on July 29, 2009. [AR 310-27.]
3 Plaintiff appeared at the hearing with counsel and again testified.
4 [AR 312-327.] The ALJ also took testimony from impartial medical
5 expert ("ME") Samuel Landau, M.D., and VE David Rinehart. [See id.]
6 On October 8, 2009, the ALJ issued a second unfavorable decision. [AR
7 5-15.] This action followed.

8 **IV. STANDARD OF REVIEW**

9 Under 42 U.S.C. § 405(g), a district court may review the
10 Commissioner's decision to deny benefits. The Commissioner's (or
11 ALJ's) findings and decision should be upheld if they are free of
12 legal error and supported by substantial evidence. However, if the
13 court determines that a finding is based on legal error or is not
14 supported by substantial evidence in the record, the court may reject
15 the finding and set aside the decision to deny benefits. See Aukland
16 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
17 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
18 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
19 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
20 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
21 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

22 "Substantial evidence is more than a scintilla, but less than a
23 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
24 which a reasonable person might accept as adequate to support a
25 conclusion." Id. To determine whether substantial evidence supports
26 a finding, a court must review the administrative record as a whole,
27 "weighing both the evidence that supports and the evidence that
28 detracts from the Commissioner's conclusion." Id. "If the evidence

1 can reasonably support either affirming or reversing," the reviewing
2 court "may not substitute its judgment" for that of the Commissioner.
3 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

4 **V. DISCUSSION**

5 **A. THE FIVE-STEP EVALUATION**

6 To be eligible for disability benefits a claimant must
7 demonstrate a medically determinable impairment which prevents the
8 claimant from engaging in substantial gainful activity and which is
9 expected to result in death or to last for a continuous period of at
10 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
11 721; 42 U.S.C. § 423(d)(1)(A).

12 Disability claims are evaluated using a five-step test:

13 Step one: Is the claimant engaging in substantial
14 gainful activity? If so, the claimant is found not
15 disabled. If not, proceed to step two.

16 Step two: Does the claimant have a "severe" impairment?
17 If so, proceed to step three. If not, then a finding of not
18 disabled is appropriate.

19 Step three: Does the claimant's impairment or
20 combination of impairments meet or equal an impairment
21 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
22 so, the claimant is automatically determined disabled. If
23 not, proceed to step four.

24 Step four: Is the claimant capable of performing his
25 past work? If so, the claimant is not disabled. If not,
26 proceed to step five.

27 Step five: Does the claimant have the residual
28 functional capacity to perform any other work? If so, the
claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
"not disabled" at any step, there is no need to complete further
steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

1 Claimants have the burden of proof at steps one through four,
2 subject to the presumption that Social Security hearings are non-
3 adversarial, and to the Commissioner's affirmative duty to assist
4 claimants in fully developing the record even if they are represented
5 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
6 1288. If this burden is met, a *prima facie* case of disability is
7 made, and the burden shifts to the Commissioner (at step five) to
8 prove that, considering residual functional capacity ("RFC")¹, age,
9 education, and work experience, a claimant can perform other work
10 which is available in significant numbers. Tackett, 180 F.3d at 1098,
11 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

12 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

13 Here, the ALJ found plaintiff had not engaged in substantial
14 gainful activity from her alleged disability onset date to the date
15 last insured (step one); that plaintiff had a "severe" impairment,
16 namely degenerative disc disease of the lumbar spine, treated
17 surgically, with residual pain (step two); and that plaintiff did not
18 have an impairment or combination of impairments that met or equaled a
19 "listing" (step three). [AR 10-11.] The ALJ found that plaintiff had
20 the RFC (step four) to:

21 [P]erform less than a full range of light exertion. [She] can
22 lift and carry 20 pounds occasionally and 10 pounds frequently.

23
24 ¹ Residual functional capacity measures what a claimant can
25 still do despite existing "exertional" (strength-related) and
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
28 work without directly limiting strength, and include mental, sensory,
postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 She can stand and walk for 2 hours out of an 8-hour work day, and
2 she can sit for 8 hours out of an 8-hour work day with normal
3 breaks such as every 2 hours and a provision to stand and stretch
4 as needed for 1-3 minutes every hour. [She] can occasionally
5 stoop and bend. She can climb stairs, but she cannot climb
6 ladders, work at heights or balance.

7 [AR 11.] He also found that this RFC would preclude plaintiff's past
8 relevant work. [AR 14.]

9 The VE testified that a person of plaintiff's RFC, age, education
10 and work experience could perform the requirements of significant
11 numbers of jobs, including such representative occupations as
12 information clerk and sewing machine operator (step five).
13 Accordingly, the ALJ found plaintiff not "disabled" as defined by the
14 Act. [AR 15.]

15 **C. ISSUES IN DISPUTE**

16 The Joint Stipulation identifies three disputed issues, whether
17 the ALJ properly:

- 18 1. Considered the treating physician's opinion regarding the
19 presence of nerve root compression;
- 20 2. Analyzed whether Plaintiff's impairment met or equaled
21 Listing 1.04; and
- 22 3. Considered Plaintiff's subjective symptoms and made proper
23 credibility findings.

24 [JS 33.]

25 **D. ISSUES ONE AND TWO: TREATING PHYSICIAN'S OPINION REGARDING**
26 **NERVE ROOT COMPRESSION**

27 The first two issues center on step three of the sequential
28 evaluation, and whether the ALJ adequately weighed the evidence that

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2 suggests plaintiff may have had a listing-level impairment during a
3 closed period from October 2004 to approximately December 2005.
4 Specifically, plaintiff contends the ALJ materially erred in failing
5 to address a probative statement made by her treating orthopedic
6 surgeon, G. Sunny Uppal, M.D., that suggests she met Listing 1.04 and
7 in failing to adequately discuss the evidence of plaintiff's combined
8 symptoms with respect to that listing.²

9 Dr. Uppal treated plaintiff in relation to an October 2004 back
10 injury she suffered on-the-job as a certified nurses' aide, and in
11 connection with her associated claim for state workers' compensation.
12 He performed surgery on plaintiff in September 2005, and by February
13 2, 2006, opined that plaintiff's only work restrictions were that she
14 was "precluded from doing heavy lifting" and "should do no repetitive
15 bending and stooping." [AR 221, 262-63.] In his report discussing
16 the September 5, 2005, laminectomy and discectomy procedures performed
17 on plaintiff's lumbar spine, Dr. Uppal noted that surgery revealed
18 "[t]he nerve root on the right side was matted down severely." [AR
19 262-63.]

20 Plaintiff argues that the ALJ erred by failing to address this
21 notation, which arguably provides support for a finding of severe
22 spine impairment during the closed period under Listing 1.04. Listing
23 1.04A, for example, requires evidence of a herniated nucleus pulposus,
24 spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative
25

26 ² To the extent plaintiff intends to suggest the evidence
27 suggests a listing-level impairment beyond this closed period, this
28 argument is unpersuasive, particularly in light of Dr. Uppal's
notation that the September 5, 2005, surgery freed the nerve root. [AR
231.]

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2 disc disease, facet arthritis, or vertebral fracture, which results in
3 compromise of a nerve root (including the cauda equina) or the spinal
4 cord. There must also be evidence of nerve root compression
5 characterized by neuro-anatomic distribution of pain, limitation of
6 motion of the spine, motor loss (atrophy with associated muscle
7 weakness or muscle weakness) accompanied by sensory or reflex loss
8 and, if there is involvement of the lower back, positive straight-leg
9 raising test (sitting and supine). See 20 C.F.R., Pt. 404, Appx. A.,
10 Subpart P, Sec. 1.04. Similarly, listing 1.04C is met when there is a
11 disorder of the spine with lumbar spinal stenosis resulting in
12 pseudoclaudication, established by findings on appropriate medically
13 acceptable imaging, manifested by chronic nonradicular pain and
14 weakness, and resulting in inability to ambulate effectively, as
15 defined in 1.00B2B. Id.

16 While the ALJ is not required to discuss every piece of evidence
17 in the record, he must explain why any "significant probative evidence
18 has been rejected." Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th
19 Cir. 1984) (emphasis in original). In this case, the conclusion of a
20 medical source that a plaintiff's impairment met one or more of the
21 hurdles of a listing-level impairment during a closed period is
22 "significant and probative" evidence. Dr. Uppal is a treating
23 physician, whose opinions normally should be adopted by the
24 Commissioner, see Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007),
25 and the decision does not indicate that the ALJ found legally
26 sufficient reasons to reject Dr. Uppal's opinions [see AR 23-24].

27 Moreover, plaintiff has cited to other significant and probative
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2 evidence in support of her contention that she meets or medically
3 equals the requirements of Listing 1.04, and the Commissioner does not
4 persuasively argue that the ALJ made legally sufficient findings with
5 respect to that evidence.³ [See JS 7-11.] The written decision fails
6 to make "full and detailed findings of the facts essential to" the
7 ALJ's ultimate finding that plaintiff's impairments did not meet or
8 equal a listing for any twelve month period, as he is required to do
9 so that this court might determine whether substantial evidence
10 supports that finding. See Lewin v. Schweiker, 654 F.2d 631, 634-35
11 (9th Cir. 1981). It simply marshals some of the medical evidence
12 relevant to the closed time period, but makes no effort to weigh or
13 balance it. [AR 13-14.] Thus, the court remains unable to conclude
14 with confidence that plaintiff did not suffer from a listing-level
15 impairment during the closed period.

16 Notwithstanding the Commissioner's arguments here, that the ME's
17 testimony provides substantial evidence for the finding of not
18 disabled, the ME was not asked specifically to address whether the
19 medical evidence suggests plaintiff's symptoms met or equaled Listing
20 1.04 during a closed period - and he did not do so unilaterally. [See
21 AR 316-19.] Nor was the VE asked to address whether a hypothetical
22 individual with limitations plaintiff was under between October 2004
23 and December 2005 would be able to work. [AR 323.] Accordingly,
24 neither the ME or VE testimony provides substantial evidence in
25 support of a finding of non-disability during the period between
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27 ³ Indeed, the Commissioner agrees that plaintiff required
28 approximately five months of convalescence *following* her back surgery.
[JS 11; see also AR 12.]

1
2 October 2004 to December 2005.

3 Reversal is thus required on issues one and two.

4 **E. ISSUE THREE: CREDIBILITY FINDING**

5 Plaintiff next contends the ALJ erred in assessing her
6 credibility. To the extent plaintiff contends she was precluded from
7 working as of 2006, this contention is unpersuasive.

8 If the Commissioner has set forth specific and cogent reasons for
9 disbelieving plaintiff's testimony, Lewin v. Schweiker, 654 F.2d 631,
10 635 (9th Cir. 1981), his assessment should typically be given great
11 weight, Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985).

12 Here, the ALJ set forth multiple, legally sufficient reasons for
13 declining to credit plaintiff's contention that she remains impaired
14 beyond the extent accounted for in the RFC finding, including that she
15 had not sought treatment for allegedly disabling pain in more than a
16 year, that her treating physicians all ultimately opined she is able
17 to perform some degree of work, and that both the objective medical
18 findings and her self-reporting to her physicians did not entirely
19 comport with her complaints, [see AR 12]. See Burch v. Barnhart, 400
20 F.3d 676, 681 (9th Cir. 2005)(lack of consistent treatment, lack of
21 medical support for the degree of disability alleged are proper
22 factors in credibility evaluation); Moncada v. Chater, 60 F.3d 521,
23 524 (9th Cir. 1995) (an ALJ may consider physician opinions that
24 plaintiff could work, which contradict plaintiff's assertion to the
25 contrary, in determining credibility).


26 The credibility assessment is affirmed.

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3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: June 8, 2011



CARLA M. WOHRLE
United States Magistrate Judge