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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

|                        |   |                        |
|------------------------|---|------------------------|
| ALICE SAMANIEGO SMITH, | ) | No. ED CV 10-00805-VBK |
|                        | ) |                        |
| Plaintiff,             | ) | MEMORANDUM OPINION     |
|                        | ) | AND ORDER              |
| v.                     | ) |                        |
|                        | ) | (Social Security Case) |
| MICHAEL J. ASTRUE,     | ) |                        |
| Commissioner of Social | ) |                        |
| Security,              | ) |                        |
|                        | ) |                        |
| Defendant.             | ) |                        |
| _____                  | ) |                        |

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 considered the treating physician's opinion; and

2 2. Whether the ALJ properly considered the law witness  
3 testimony.

4 (AR at 2.)

5  
6 This Memorandum Opinion will constitute the Court's findings of  
7 fact and conclusions of law. After reviewing the matter, the Court  
8 concludes that for the reasons set forth, the decision of the  
9 Commissioner must be reversed.

10  
11 I

12 **THE ALJ DID NOT PROPERLY CONSIDER THE OPINION**  
13 **OF TREATING PSYCHIATRIST DR. UMAKANTHAN**

14 In his Decision (AR 9-16), the ALJ determined that one of  
15 Plaintiff's severe impairments is depression, but that she does not  
16 meet or equal a Listing as defined in 20 C.F.R. Part 404, subpart P,  
17 Appendix 1. (AR 11.) The ALJ noted that Dr. Umakanthan completed a  
18 "check-off form" in November 2008 which indicated mental functional  
19 limitations ranging from moderate to extreme. (AR 14, citing AR 408-  
20 409.) This opinion was rejected because it was found to be "entirely  
21 conclusory and without basis or support in the record." (AR 14.)  
22 Instead, the ALJ found that the opinion of the psychiatric  
23 consultative examiner was "credible." (*Id.*) (*See* Complete Psychiatric  
24 Evaluation of Dr. Yang, dated January 18, 2006, at AR 185-189.)

25 Plaintiff frames her first issue as a challenge to the ALJ's  
26 rejection of Dr. Umakanthan's check-off form, asserting that, contrary  
27 to the ALJ's conclusion, the report is not conclusory, but is based on  
28 and consistent with numerous prior treatment notes. For the reasons

1 to be discussed the Court agrees with Plaintiff's contention.

2  
3 **A. Applicable Law.**

4 The Ninth Circuit has repeatedly reaffirmed the principle that  
5 greatest weight is ordinarily given to the opinions of treating  
6 physicians versus those physicians who do not treat:

7 "We afford greater weight to a treating physician's  
8 opinion because 'he is employed to cure and has a greater  
9 opportunity to know and observe the patient as an  
10 individual.'" Magallanes v. Bowen, 881 F.2d 747, 751 (9th  
11 Cir. 1989), quoting Sprague v. Bowen, 812 F.2d 1226, 1230  
12 (9th Cir. 1987).

13  
14 Even so, the treating physician's opinion is not necessarily  
15 conclusive as to either a physical condition or the ultimate issue of  
16 disability. Id., citing Rodriguez v. Bowen, 876 F.2d 759, 761-62 & n.  
17 7 (9th Cir. 1989) The ALJ may disregard the treating physician's  
18 opinion whether or not that opinion is contradicted, Id., citing  
19 Cotton v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986). However, if the  
20 ALJ chooses to do so, the ALJ must "'make findings setting forth  
21 specific, legitimate reasons for doing so that are based on  
22 substantial evidence in the record.'" Id., citing Winans v. Bowen,  
23 853 F.2d 643, 647 (9th Cir. 1987), quoting Sprague, 812 F.2d at 1230;  
24 see also Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983).

25 This clearly articulated rule, set forth by the Circuit in its  
26 opinions in Magallanes and Cotton, has been often cited in later  
27 decisions. (See, Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir.  
28 1995): "The ALJ may reject the opinion only if she provides clear and

1 convincing reasons that are supported by the record as a whole.”;  
2 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995): “Even if the  
3 treating doctor’s opinion is contradicted by another doctor, the  
4 Commissioner may not reject this opinion without providing ‘specific  
5 and legitimate reasons’ supported by substantial evidence in the  
6 record for so doing.” (Citation omitted).

7 In those cases where the opinion of the treating physician  
8 conflicts with that of an examining physician, such as occurred in  
9 this case, the Ninth Circuit has held that the ALJ can resolve the  
10 differences between these opinions by setting out a detailed and  
11 thorough summary of the facts and conflicting clinical evidence,  
12 stating his interpretation, and making findings. Magallanes, 881 F.2d  
13 at 751, citing Cotton v. Bowen, 799 F.2d 1403, 1408 (9<sup>th</sup> Cir. 1986).

14 Also instructive is the Ninth Circuit’s discussion of this issue  
15 in Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995):

16 “Where the opinion of the claimant’s treating physician  
17 is contradicted, and the opinion of a nontreating source is  
18 based on independent clinical findings that differ from  
19 those of the treating physician, the opinion of the  
20 nontreating source may itself be substantial evidence; it is  
21 then solely the province of the ALJ to resolve the conflict.  
22 Magallanes, 881 F.2d at 751. Where, on the other hand, a  
23 nontreating source’s opinion contradicts that of the  
24 treating physician but is not based on independent clinical  
25 findings, or rests on clinical findings also considered by  
26 the treating physician, the opinion of the treating  
27 physician may be rejected only in the ALJ gives specific,  
28 legitimate reasons for doing so that are based on

1 substantial evidence in the record. Id. at 751, 755. See  
2 Ramirez v. Shalala, 8 F.3d 1449, 1453 (9th Cir. 1993)  
3 (applying test where ALJ relied on contradictory opinion of  
4 nonexamining medical advisor)."

5 (53 F.3d at 1041.)  
6

7 With regard to "check-off" forms, they are disfavored when they  
8 are unsupported by objective findings. See Crane v. Shalala, 76 F.3d  
9 251, 253 (9<sup>th</sup> Cir. 1996), citing Murray v. Heckler, 722 F.2d 499, 501  
10 (9<sup>th</sup> Cir. 1983). See also Magallanes v. Bowen, 881 F.2d 747, 751 (9<sup>th</sup>  
11 Cir. 1989).  
12

13 **B. Analysis.**

14 The Court's task here is to determine whether, in fact, Dr.  
15 Umakanthan's check-off form is without any basis or support in the  
16 record, as the ALJ concluded.<sup>1</sup>

17 The importance of functional evaluation in mental health cases is  
18 underscored in 20 C.F.R. §404.1520(a)(C)(3)(4) and  
19 §416.920(a)(C)(3)(4), which mandate that consideration be given, among  
20 other things, to activities of daily living ("ADLs"); social  
21 functioning; concentration, persistence or pace; and episodes of  
22 decompensation. The revised regulations, embodied in 20 C.F.R.  
23 §404.1520(a)(E)(2) and §416.920(a)(E)(2) identify five discrete  
24 categories for the first three of four relevant functional areas:  
25 activities of daily living, social functioning, concentration,  
26 persistence or pace, and episodes of decompensation. These categories

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27  
28 <sup>1</sup> By definition, check-off forms are conclusory, and therefore  
the question is whether they are backed up by objective evidence.

1 are None, Mild, Moderate, Marked, and Extreme. These evaluations are  
2 important in the Step Two and Step Three sequential evaluation process  
3 to determine whether a claimant has a severe mental impairment, and if  
4 so, whether it meets or equals any of the Listings. Consequently, Dr.  
5 Umakanthan's check-off form conclusions are relevant in the sequential  
6 evaluation process.

7 In the JS, Plaintiff has summarized numerous treatment records  
8 which, she argues, are relevant to and supportive of Dr. Umakanthan's  
9 check-off conclusions. (See JS at 4-6.) The time line of these notes  
10 ranges from October 27, 2005, when an Adult Intake Assessment was  
11 completed by the Los Angeles County Department of Mental Health (AR  
12 172-177), to November 24, 2008, when Dr. Umakanthan completed another  
13 progress note. (AR 412.) In between, there are treatment and progress  
14 notes from July 9, 2008 (AR 422-426); August 1, 2008 (AR 420-421);  
15 August 22, 2008 (AR 418); August 28, 2008 (AR 417); September 19, 2008  
16 (AR 416); October 9, 2008 (AR 415); and October 31, 2008 (AR 413).  
17 The Commissioner acknowledges the existence of these progress notes,  
18 but vigorously argues that they do not support Dr. Umakanthan's  
19 functional assessments. Certainly, these treatment and progress notes  
20 do not contain specific mental functional assessments, as Dr.  
21 Umakanthan provided in his check-off form. Nevertheless, they do  
22 provide relevant evaluations which may provide evidentiary support for  
23 Dr. Umakanthan's assessments. If the ALJ had reviewed them, and  
24 discussed them in the Decision, the Court might have some basis to  
25 evaluate the correctness of the ALJ's rejection of Dr. Umakanthan's  
26 check-off form. Simply stating, as he did, that the check-off form is  
27 "entirely conclusory and without basis or support in the record,"  
28 provides no basis for adequate judicial review. Simply put, and in

1 view of the fact that Dr. Umakanthan's report does appear to be at  
2 odds with the conclusions reached by Dr. Yang in his complete  
3 psychiatric evaluation,<sup>2</sup> the ALJ's rejection of Dr. Umakanthan's  
4 conclusions is not supported by the requisite specific and legitimate  
5 reasons.<sup>3</sup>

6 The Commissioner spends significant time arguing that the ALJ was  
7 not required to discuss all of these treatment and progress notes, an  
8 argument which the Court rejects as unavailing in view of the fact  
9 that the progress notes are clearly relevant evidence, as the  
10 Commissioner appears to concede later in his argument. Indeed, these  
11 progress notes are clearly the type of classic probative evidence that  
12 should and must be examined in this type of case. See Vincent ex.  
13 rel. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9<sup>th</sup> Cir. 1984). The  
14 failure to examine probative evidence can never be viewed as harmless.  
15 In any event, the Commissioner's contention that the progress notes do  
16 not support Dr. Umakanthan's functional conclusions as set forth in  
17 the check-off form is not persuasive. It would certainly appear that  
18 there is significant evidence of serious mental health issues  
19 contained in these progress and treatment notes which may well support  
20 Dr. Umakanthan's conclusions. Further, and in addition to the fact

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22 <sup>2</sup> It should be noted, however, that Dr. Yang completed his  
23 examination almost three years before Dr. Umakanthan's check-off form  
was completed.

24 <sup>3</sup> Here, the Commissioner, in the JS, inserts an argument that  
25 the well-established standards of the Ninth Circuit for evaluation of  
26 opinions of treating, examining, and non-examining physicians exceed  
27 the requirements set forth by Congress and "would appear to be  
28 improper." The Commissioner's apparent suggestion to the Court that  
it should ignore the dictates of the Ninth Circuit, which the  
Commissioner has never succeeded in overturning in the Supreme Court  
(if indeed, such an attempt has been made), is rejected in its  
entirety.

1 that Dr. Yang's evaluation appears to be somewhat stale, having been  
2 completed on January 18, 2006, the Court notes that Dr. Yang did not  
3 review any medical or psychiatric records, did not perform any  
4 testing, and instead seems to have relied upon a brief mental status  
5 evaluation in reaching his conclusions. All in all, this makes the  
6 validity of those conclusions somewhat suspect.

7 For the foregoing reasons, the Court determines that the ALJ's  
8 rejection of Dr. Umakanthan's opinion is not supported by proper legal  
9 standards, and merits remand for further hearing consistent with this  
10 decision.

11 The Court will only briefly discuss Plaintiff's second issue,  
12 which questions whether the ALJ properly considered the lay witness  
13 testimony of Plaintiff's mother, Ruby Samaniego. Ms. Samaniego  
14 testified at the hearing before the ALJ (41-43), and also completed a  
15 Function Report - Adult - Third Party. (AR 99-106.) Plaintiff  
16 summarized Ms. Samaniego's statements and comments in the JS, and  
17 certainly, many of them are relevant to an evaluation of Plaintiff's  
18 mental health, and to an assessment of her mental functional  
19 abilities. Nevertheless, the ALJ failed to discuss this testimony in  
20 his decision, a fact which the Commissioner concedes, but argues  
21 constitutes harmless error. The Court rejects that contention, and  
22 finds that the ALJ's failure to address Ms. Samaniego's testimony  
23 indeed was error, because the testimony was material, and should have  
24 been considered and evaluated in the Decision. See Smolen v. Chater,  
25 80 F.3d 1273, 1288-89 (9<sup>th</sup> Cir. 1986).

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