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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MOUSTAFA METWALLY,)	CASE NO. ED CV 12-00429 RZ
)	
Plaintiff,)	
)	MEMORANDUM OPINION
vs.)	AND ORDER
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff’s chronic myeloid leukemia is in remission, and the oncologist has advised Plaintiff to continue taking an oral chemotherapy called Gleevec to keep it that way. Plaintiff asserts that taking the medication causes pain and dizziness, and that these side effects disable him. The Administrative Law Judge found, however, that Plaintiff was not disabled, and that disagreement forms the basis for Plaintiff’s first argument for reversal in this court.

Plaintiff points to a statement from his oncologist, made on February 25, 2010, that the chemotherapy pills cause severe back pain, which in turn causes Plaintiff to take pain medication, and that these medications collectively produce dizziness, all of which render Plaintiff unable to work. [AR 483] The Administrative Law Judge gave “little weight” to the statement that the chemotherapy caused back pain, because, she said, it was inconsistent with two progress notes stating that standing and walking do not affect the

1 claimant's back pain, as well as lumbar MRIs that were normal. [AR 21] The
2 Administrative Law Judge misread the record.

3 As support for her determination that the treating oncologist's opinion was
4 inconsistent with treating notes, the Administrative Law Judge referenced Exhibits 15F/2-
5 3, 9 and 12. Whereas the Administrative Law Judge stated that these pages of the exhibit
6 indicated that "standing and walking do not affect the claimant's back pain" [AR 21], the
7 exhibit states that "Pt c/o severe low back pain," "Patient is experiencing . . . radicular
8 pain in right and left leg," "Pain radiates to the foot bilateral, genitals, groin and leg;" and
9 then, "Patient indicates . . . standing doesn't change condition and walking improves
10 condition." [AR 484] Thus, far from saying that "standing and walking do not affect the
11 claimant's back pain," as the Administrative Law Judge did, the record indicates that
12 Plaintiff felt a great deal of pain and that standing did not change the fact that Plaintiff felt
13 a great deal of pain; walking, however (like narcotics), did improve his condition. The next
14 page of the exhibit, also cited by the Administrative Law Judge, states (under the *objective*
15 assessment) that Plaintiff's "gait and station examination reveals moving slowly due to
16 lower back pain and with the appearance of discomfort;" it also states that Plaintiff's
17 lumbar range of motion shows flexion "with pain," and bending on both sides is normal
18 "with pain," as is Plaintiff's rotation. [AR 485] Pages 9 and 12 of the exhibit, also cited
19 by the Administrative Law Judge as a basis for discrediting the treating physician's
20 statement, contain the same statements as to lumbar range of motion, bending and rotation,
21 all with pain. [AR 491, 494]

22 The Administrative Law Judge's references to the MRI results do accurately
23 reflect that the MRI's were normal. [AR 502, 587] But the treating oncologist did not say
24 that Plaintiff's back pain was caused by a disc problem; he stated that it was a consequence
25 of the oral chemotherapy. The fact that Plaintiff did not have a disc problem appearing on
26 an MRI therefore does not discredit the statement of the treating oncologist as to pain
27 caused by the chemotherapy.

1 The Administrative Law Judge also stated that she preferred the opinions of
2 the testifying medical expert and the State agency physicians, none of whom examined
3 Plaintiff, much less treated him. The State agency physicians filled out a form in July
4 2009, only five months after Plaintiff's diagnosis, basing the proposed residual functional
5 capacity on Plaintiff's *expected* ability to perform light work after his cancer treatment
6 would have ended. [AR 313] It is hard to see how this mid-treatment opinion could
7 gainsay the assessment of the treating physician, after a year's treatment had concluded,
8 that the continuing chemotherapy caused pain and the pain medications caused dizziness.

9 The Administrative Law Judge also said that she preferred the opinions of
10 both the testifying medical expert and the State agency physicians because they were
11 consistent with the medical evidence. The evidence she cited, however, usually omitted
12 the statements of Plaintiff's pain (including the objective manifestations of that pain,
13 mentioned above). The evidence did show improvement of Plaintiff's cancer, leading to
14 remission, but the Administrative Law Judge did not address the fact that Plaintiff
15 continued to take the oral chemotherapy (presumably to keep the cancer in remission), and
16 that the oral chemotherapy affected Plaintiff's pain levels.

17 It is clear that the law requires that the opinion of a treating physician be given
18 greater weight than that of a non-treating, examining physician, and certainly greater
19 weight than that of non-examining physicians like the testifying expert and the state agency
20 physicians. *Holohan v. Massanari*, 246 F.3d 1195, 1201-03 (9th Cir. 2001). Also, of
21 course, the opinion of a specialist, like an oncologist, should receive greater weight than
22 that of a non-specialist. *Id.*; 20 C.F.R. § 404.1527(d)(5). And, although an Administrative
23 Law Judge may reject the opinion of a treating physician, she must provide specific and
24 legitimate reasons for doing so. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).

25 The above discussion of the Administrative Law Judge's review of the record
26 makes clear that she did not have specific and legitimate reasons for rejecting the treating
27 physician's opinion. Nor does this fact change because the main symptom was pain. The
28 law is clear that, where an impairment reasonably could be expected to produce pain, a

1 claimant's description of unexpected pain levels may be rejected only for specific and
2 legitimate reasons — sometimes the cases even say only for clear and convincing evidence.
3 *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991) (*en banc*); *Smolen v. Chater*, 80 F.3d
4 1273 (9th Cir. 1996). This is also the case when a claimant asserts that medications have
5 produced injurious side effects. *Varney v. Secretary of Health and Human Services*, 846
6 F.2d 581, 585-86 (9th Cir. 1988). Here, although she discounted the extent of the pain, the
7 Administrative Law Judge did find that Plaintiff's impairment could reasonably be
8 expected to cause the alleged symptom. [AR 21] In going the next step and discrediting
9 Plaintiff on the basis of inconsistencies that, as indicated, were not inconsistencies, the
10 Administrative Law Judge committed further error.

11 Because of the Court's handling of this issue, it is not necessary to address the
12 other matters that Plaintiff raises. There remains, however, the question of remedy. In this
13 case there is little to be gained by remanding for the Administrative Law Judge to take
14 another look at the doctor's views or the claimant's testimony as to pain, dizziness, and
15 their impact on the ability to work. Those should be credited as true, *see Benecke v.*
16 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004), and the testimony makes clear that therefore
17 Plaintiff is entitled to benefits. The period for which he is entitled to benefits is not so
18 clear, however. The record contains evidence, cited by the Administrative Law Judge, that
19 at some point, after twelve months had passed, the same treating oncologist who stated that
20 Plaintiff's pain and dizziness from the chemotherapy were debilitating concluded that the
21 pain and dizziness were under control. [AR 21, citing AR 605, 614] Thus, the matter is
22 remanded for the Commissioner to determine the period during which Plaintiff was entitled
23 to receive benefits.

24 IT IS SO ORDERED.

25 DATED: November 7, 2012

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28 _____
RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE