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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUAN MORENO,)	NO. EDCV 12-00584-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
CAROLYN W. COLVIN, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on April 24, 2012, seeking review of the denial of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On May 22, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on July 8, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 payment of benefits; and the Commissioner requests that her decision be
2 affirmed or, alternatively, remanded for further administrative
3 proceedings.

4
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
6

7 Plaintiff filed an application for a period of disability and DIB
8 on October 27, 2008. (Administrative Record ("A.R.") 15.) Plaintiff,
9 who was born on August 29, 1962,² claims to have been disabled since June
10 20, 2007, due to neck and back injuries and "nerves." (A.R. 67, 73,
11 112.)³ Plaintiff has past relevant work experience as a warehouse
12 worker. (A.R. 21.)
13

14 After the Commissioner denied plaintiff's claim initially and upon
15 reconsideration (A.R. 67-71, 73-77), plaintiff requested a hearing (A.R.
16 79-80). On April 22, 2010, plaintiff, who was represented by counsel,
17 appeared and testified at a hearing before Administrative Law Judge
18 Milan M. Dostal (the "ALJ"). (A.R. 361-89.) Vocational expert Victoria
19 Rae also testified. (*Id.*) On July 16, 2010, the ALJ denied plaintiff's
20 claim (A.R. 15-22), and the Appeals Council subsequently denied
21 plaintiff's request for review of the ALJ's decision (A.R. 2-7). That
22 decision is now at issue in this action.
23

24
25 ² On the alleged disability onset date, plaintiff was 44 years
26 old, which is defined as a younger individual. (A.R. 21; citing 20
27 C.F.R. § 404.1563.)

28 ³ In the Joint Stipulation, plaintiff also alleges disability
due to "cervical disc disease, failed cervical spinal surgery, morbid
obesity, depression, and anxiety." (Joint Stipulation ("Joint Stip.")
at 2.)

1 The ALJ found that plaintiff was unable to perform his past
2 relevant work as a warehouse worker. (A.R. 21.) However, based upon
3 his RFC assessment for plaintiff and after having considered plaintiff's
4 age, education,⁴ work experience, and the testimony of the vocational
5 expert, the ALJ found that "there are jobs that exist in significant
6 numbers in the national economy that [plaintiff] can perform," including
7 the jobs of "Assembler, small parts" and "Ticket Taker." (A.R. 21-22.)
8 Accordingly, the ALJ concluded that plaintiff has not been under a
9 disability, as defined in the Social Security Act, from June 20, 2007,
10 the alleged onset date, through July 16, 2010, the date of the ALJ's
11 decision. (A.R. 22.)

12 13 STANDARD OF REVIEW

14
15 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
16 decision to determine whether it is free from legal error and supported
17 by substantial evidence in the record as a whole. Orn v. Astrue, 495
18 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
19 evidence as a reasonable mind might accept as adequate to support a
20 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
21 a mere scintilla but not necessarily a preponderance." Connett v.
22 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
23 record can constitute substantial evidence, only those 'reasonably drawn
24 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
25 1066 (9th Cir. 2006)(citation omitted).

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⁴ The ALJ found that plaintiff has a limited education and is
able to communicate in English. (A.R. 21.)

1 1.04. (Joint Stip. at 3.)
2

3 **I. The ALJ Failed To Set Forth Appropriate Reasons For**
4 **Rejecting The Opinion Of Plaintiff's Treating Physician.**
5

6 It is the responsibility of the ALJ to analyze evidence and resolve
7 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750
8 (9th Cir. 1989). In the hierarchy of physician opinions considered in
9 assessing a social security claim, "[g]enerally, a treating physician's
10 opinion carries more weight than an examining physician's, and an
11 examining physician's opinion carries more weight than a reviewing
12 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.
13 2001); 20 C.F.R. § 404.1527(d).
14

15 The opinions of treating physicians are entitled to the greatest
16 weight, because the treating physician is hired to cure and has a better
17 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When
18 a treating physician's opinion is not contradicted by another physician,
19 it may be rejected only for "clear and convincing" reasons. Lester v.
20 Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another
21 doctor, a treating physician's opinion may only be rejected if the ALJ
22 provides "specific and legitimate" reasons supported by substantial
23 evidence in the record. *Id.*
24

25 On October 17, 2007, plaintiff underwent a complete orthopedic
26 evaluation by Israel Rottermann, M.D, an orthopedic and hand surgeon.
27 (A.R. 218-25.) Dr. Rottermann noted that plaintiff's conversation and
28 head movement were slow and that plaintiff had tenderness in the mid

1 thoracic area, tenderness to palpation in the cervical spine and left
2 shoulder, tightness in the trapezius musculature, restricted motion in
3 the cervical spine and left upper extremity, complaints of left arm
4 pain, and positive impingement sign on his left shoulder. (A.R. 221-
5 23.) Dr. Rottermann also noted that an x-ray of plaintiff's cervical
6 spine showed spurring and a decrease of the cervical lordosis, and an x-
7 ray of the left shoulder showed slight spurring at the AC joint. (A.R.
8 223.) Dr. Rottermann reviewed plaintiff's medical records and noted
9 that, while a CT scan of plaintiff's head was negative, Dr. Allen, a
10 neurologist, diagnosed plaintiff with post-traumatic headaches and
11 cervical strain, prescribed pain medication, and recommended that
12 plaintiff perform modified duties. (A.R. 224.) Based upon his physical
13 examination of plaintiff, the results of the diagnostic examinations
14 performed, and a review of plaintiff's medical records, Dr. Rottermann
15 diagnosed plaintiff with: (1) "[s]tatus post concussion with head
16 trauma, and ongoing headaches"; (2) "[c]ervical strain with left arm
17 symptoms"; and (3) "[l]eft shoulder strain/tendinitis, with
18 impingement." (A.R. 223.) Dr. Rottermann recommended that plaintiff
19 have an MRI of his cervical spine and opined that plaintiff was
20 temporarily totally disabled. (*Id.*)

21
22 On January 2, 2008, Dr. Rottermann re-evaluated plaintiff. (A.R.
23 274-76.) Dr. Rottermann reviewed plaintiff's recent MRI of his cervical
24 spine, which showed: "[a] 2 to 2.5 mm., central and left paramedian
25 disc protrusion at C4-5 with mild central and left root canal
26 narrowing"; "a 2 to 2.5" mm., central and right paramedian disc
27 protrusion, with an endplate ridge complex at C5-6, with mild central
28 and mild to moderate right nerve root canal narrowing"; and "a 3 mm.,

1 based protrusion at C6-7 with central effacement and bilateral foraminal
2 narrowing." (A.R. 274-75.) Dr. Rottermann noted that plaintiff was
3 "quite symptomatic" and recommended that plaintiff be seen by a pain
4 management physician to address his persistent neck pain with ongoing
5 headaches and dizziness. (A.R. 275.) Dr. Rottermann opined that
6 plaintiff was temporarily totally disabled. (*Id.*)

7
8 On April 16, 2008, Dr. Rottermann conducted an orthopedic re-
9 evaluation of plaintiff. (A.R. 301-04.) In addition to plaintiff's
10 pain medication, Dr. Rottermann recommended that plaintiff receive
11 epidural injections for his pain. Dr. Rottermann noted that plaintiff
12 continues to experience "neck pain and headaches, with no improvement in
13 his condition." (A.R. 302.) Plaintiff was assessed as being
14 temporarily totally disabled. (*Id.*)

15
16 In an August 13, 2008 orthopedic re-evaluation of plaintiff, Dr.
17 Rottermann noted that plaintiff "continues to have persistent headaches,
18 and neck and radicular type pain." (A.R. 308.) In addition, plaintiff
19 reported "becoming depressed," and Dr. Rottermann prescribed him
20 medication. (A.R. 309.) Dr. Rottermann recommended that plaintiff
21 undergo a second epidural injection and opined that plaintiff was
22 "temporarily totally disabled." (*Id.*)

23
24 On June 12, 2009, Dr. Rottermann assessed plaintiff's RFC. Dr.
25 Rottermann opined, *inter alia*, that plaintiff: would experience pain or
26 other symptoms which would interfere constantly with his attention and
27 ability to concentrate; could walk one city block without rest; could
28 sit/stand for 15 minutes at a time; could sit for a total of three

1 hours, stand for a total two hours, and walk for a total of three hours
2 during an eight hour day; needs to alternate periods of walking around
3 during an eight-hour workday; needs to shift positions at will from
4 sitting, standing, or walking; needs to take unscheduled breaks during
5 the workday; should elevate his leg(s) for half of the workday; can
6 frequently and occasionally lift and carry 10 pounds; can perform
7 repetitive fingering and handling for 50 percent of the workday and
8 repetitive reaching for 30 percent of the day; can bend and twist at the
9 waist for 10 percent of the workday; and can expect to be absent about
10 once a month as a result of his impairments and treatment. (A.R. 254-
11 56.) Further, Dr. Rottermann opined that plaintiff's impairments could
12 be expected to last at least 12 months (A.R. 253), and Dr. Rottermann
13 noted that plaintiff needed spinal surgery (A.R. 252).⁵

14
15 In his decision, the ALJ gave little weight to the opinion of Dr.
16 Rottermann, because his opinion was not consistent with the objective
17 medical evidence of record. (A.R. 20.) Specifically, the ALJ noted
18 that: (1) the sitting, standing, and walking limitations assessed by
19 Dr. Rottermann were inconsistent with the medical record, because
20 plaintiff had "no involvement of the lumbar spine"; and (2) Dr.
21 Rottermann's diagnosis of "'status post concussion with head trauma'"
22 was inconsistent with the medical record, because plaintiff "was noted
23 as not having head trauma as the computerized tomography scan of the
24 head following his workplace injury was normal." (*Id.*)

25
26

27 ⁵ On April 12, 2010, Dr. Rottermann again assessed plaintiff's
28 RFC. (A.R. 333-37.) As the ALJ noted in his decision, Dr. Rottermann's
April 12, 2012 RFC assessment was identical to his previous, June 12,
2009 assessment. (A.R. 20.)

1 The ALJ's first reason for giving little weight to Dr. Rottermann's
2 opinion is unavailing. While it is true that plaintiff does not have a
3 lumbar spine impairment, plaintiff has other impairments which could
4 limit the duration of time he can sit, stand, and walk. For example,
5 plaintiff has a cervical spine impairment for which surgery has been
6 recommended, is obese, and suffers from headaches and pain in his neck,
7 shoulders, and back. Indeed, in view of plaintiff's pain symptoms
8 alone, the ALJ "afforded [plaintiff] the opportunity to change position
9 from sitting to standing at will" in his RFC assessment for plaintiff.
10 (A.R. 19.) Clearly the ALJ's incorporation of an at will sit/stand
11 option undermines, at least in part, his conclusion that a lumbar spine
12 condition is required for any sitting, standing, and/or walking
13 limitation. As such, the ALJ's reasoning cannot constitute a specific
14 and legitimate reasons for affording Dr. Rottermann's opinion little
15 weight.

16
17 The ALJ's second reason for affording Dr. Rottermann's opinion
18 little weight is also unavailing. The ALJ found Dr. Rottermann's
19 diagnosis of "'status post concussion with head trauma'" to be
20 inconsistent with the objective medical evidence of record, because "the
21 computerized tomography scan of [plaintiff's] head following his
22 workplace injury was normal," and thus, "[plaintiff] was noted as not
23 having head trauma." (A.R. 20.) As an initial matter, it is undisputed
24 that, in June 2007, plaintiff suffered an on-the-job injury when at
25 least one pallet fell on the left side of his head and neck.⁶ (A.R. 19.)

26
27 ⁶ Plaintiff reported to Dr. Rottermann that "he was driving a
28 forklift [and] working with a pallet jack [when] suddenly two pallets[,
weighing approximately 20 pounds each,] fell from a height of 15 feet

1 Plaintiff reported feeling an "immediate sharp pain, 'like a migraine,'
2 in his head. He also noted blurred vision." (A.R. 245.) As Dr.
3 Rottermann noted in his October 17, 2007 examination notes, a CT scan of
4 plaintiff's head was performed on July 17, 2007. (A.R. 224.) The
5 results were negative. (*Id.*) In diagnosing plaintiff, however, Dr.
6 Rottermann relied upon a July 26, 2007 report by Dr. Allen, a
7 neurologist, who diagnosed plaintiff with *post-traumatic* headaches and
8 cervical strain. (*Id.*; emphasis added.) Accordingly, while plaintiff's
9 negative CT scan may not support Dr. Rottermann's diagnosis, Dr. Allen's
10 diagnosis certainly does. Thus, the ALJ's reasoning cannot constitute
11 a specific and legitimate reason for discrediting Dr. Rottermann's
12 opinion.

13
14 For the aforementioned reasons, the ALJ failed to properly reject
15 the opinion of Dr. Rottermann. On remand, the ALJ must provide reasons,
16 if they exist, in accordance with the requisite legal standards for
17 discrediting this physician's opinion.⁷

18
19 . . . [and] hit[] him on his head/neck region. He was dazed but reports
20 he did not lose consciousness." (A.R. 219.)

21 ⁷ Moreover, it is not entirely clear upon whose medical
22 opinion(s) the ALJ relied in assessing plaintiff's RFC and whether that
23 opinion(s) was supported by substantial evidence. In his decision, the
24 ALJ made no mention of the opinions of the State agency physicians and
25 only stated that he gave "some weight" to the opinion of qualified
26 medical examiner and orthopedic surgeon John Santaniello. (A.R. 20.)
27 Specifically, the ALJ: (1) found Dr. Santaniello's opinion that
28 plaintiff can lift no more than 35 pounds at a time to be "well within"
his RFC assessment for plaintiff; and (2) rejected Dr. Santaniello's
opinion that plaintiff was under a permanent disability, because it
"encroach[ed] on the authority of the Commissioner." (*Id.*) Critically,
however, the ALJ did not give any reason, let alone an appropriate
reason, for rejecting Dr. Santaniello's opinion that plaintiff be
limited to no repetitive movements of the cervical spine.

Further, as plaintiff properly asserts and the Commissioner

1 **II. On Remand, The ALJ Should Reconsider Whether Plaintiff's**
2 **Impairments Equal Listing 1.04.**

3
4 Based on the foregoing, there are several matters that the ALJ
5 needs to review and reconsider on remand. As a result, the ALJ's
6 conclusion regarding whether plaintiff's impairments equal Listing 1.04
7 may change. Accordingly, the Court does not reach plaintiff's second
8 claim -- *to wit*, that the ALJ erred in finding that plaintiff's
9 impairments do not equal Listing 1.04. To properly review and
10 reconsider this issue, the ALJ must consider Dr. Rottermann's opinion
11 properly and, if appropriate, should utilize the services of an
12 impartial medical expert to determine if plaintiff's impairments
13 medically equal Listing 1.04.⁸

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15 _____
16 does not contest, it does not appear that Dr. Santaniello reviewed
17 plaintiff's complete medical record before examining plaintiff. See 20
18 C.F.R. § 404.1517 (noting that "[i]f we arrange for [a consultative]
19 examination or test, . . . [w]e will also give the examiner any
20 necessary background information about your condition"). Thus, it is
21 unclear whether Dr. Santaniello based his assessment on a sufficiently
22 complete picture of plaintiff's condition, giving due consideration to
23 all relevant medical evidence of record. As a result, it does not
24 appear that Dr. Santaniello's opinion is supported by substantial
25 evidence.

26 Accordingly, as this case is being remanded for the reasons
27 set forth *supra*, the ALJ should revisit his consideration of the various
28 medical opinions on remand. In so doing, the ALJ may determine that a
consultative examination, based upon a *complete* review of the medical
record, is appropriate under the circumstances.

29 ⁸ In his decision, the ALJ rejected plaintiff's claim that his
30 impairments equaled a listing, because "in order to medically equal a
31 listing, a medical expert must testify that the impairments, in
32 combination, medically equal a listing . . . [and] no impartial
33 medical expert was associated with the case to testify that
34 [plaintiff]'s impairments medically equal a listing." (A.R. 18.)
35 Accordingly, the ALJ concluded that "[plaintiff's] impairments cannot be
36 said to medically equal a listing." (*Id.*)

1 **III. Remand Is Required.**

2
3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings, or
7 where the record has been fully developed, it is appropriate to exercise
8 this discretion to direct an immediate award of benefits. *Id.* at 1179
9 ("[T]he decision of whether to remand for further proceedings turns upon
10 the likely utility of such proceedings."). However, where there are
11 outstanding issues that must be resolved before a determination of
12 disability can be made, and it is not clear from the record that the ALJ
13 would be required to find the claimant disabled if all the evidence were
14 properly evaluated, remand is appropriate. *Id.* at 1179-81.

15
16 Remand is the appropriate remedy to allow the ALJ the opportunity
17 to remedy the above-mentioned deficiencies and errors. See *Bunnell v.*
18 *Barnhart*, 336 F.3d 1112, 1116 (9th Cir. 2003)(affirming remand order
19 based, in part, on ALJ's failure to provide adequate reasons for
20 rejecting claimant's treating physicians' opinions). On remand, the ALJ
21 must correct the above-mentioned deficiencies and errors. After doing
22 so, the ALJ may need to reassess plaintiff's RFC, in which case
23 additional testimony from a vocational expert likely will be needed to
24 determine what work, if any, plaintiff can perform.

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1 **CONCLUSION**

2
3 Accordingly, for the reasons stated above, IT IS ORDERED that the
4 decision of the Commissioner is REVERSED, and this case is REMANDED for
5 further proceedings consistent with this Memorandum Opinion and Order.
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
8 copies of this Memorandum Opinion and Order and the Judgment on counsel
9 for plaintiff and for defendant.
10

11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
12

13 DATED: September 4, 2013

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16 MARGARET A. NAGLE
17 UNITED STATES MAGISTRATE JUDGE
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