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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIREYA CUEVAS,)	NO. ED CV 12-1004-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, ACTING)	AND ORDER OF REMAND
COMMISSIONER OF SOCIAL SECURITY, ¹)	
)	
Defendant.)	
_____)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
judgment are denied and this matter is remanded for further
administrative action consistent with this Opinion.

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¹ Carolyn W. Colvin, who became Acting Commissioner of
Social Security as of February 14, 2013, is hereby substituted as
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42
U.S.C. § 405(g).

1 **PROCEEDINGS**

2
3 Plaintiff filed a complaint on June 19, 2012, seeking review of
4 the Commissioner's denial of disability benefits. The parties filed a
5 consent to proceed before a United States Magistrate Judge on July 13,
6 2012. Plaintiff filed a motion for summary judgment on November 26,
7 2012. Defendant filed a cross-motion for summary judgment on
8 February 11, 2013. The Court has taken the motions under submission
9 without oral argument. See L.R. 7-15; "Order," filed June 21, 2012.
10

11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

12
13 In 2007 and 2008, Plaintiff, a former physical therapy aid,
14 applied for disability insurance benefits asserting disability since
15 July 3, 2003, based on an alleged herniated disc, impaired vision, and
16 torn left rotator cuff (Administrative Record ("A.R.") 59-60, 159-65
17 (applications), 180-81). Plaintiff reported that she had undergone
18 four eye surgeries and suffered from severe headaches due to her neck
19 problems, had numbness to both hands, and was limited in her ability
20 to lift, walk and sit (A.R. 180). Plaintiff's last insured date was
21 December 31, 2007 (A.R. 19, 174).²
22

23 In a September 10, 2010 decision, an Administrative Law Judge
24 ("ALJ") found Plaintiff not disabled (A.R. 17-29). The ALJ found that
25

26 ² To be eligible for disability insurance benefits,
27 Plaintiff must have become disabled prior to the expiration of
28 her insured status. See 42 U.S.C. § 416(i)(2)(C), 416(i)(2)(D),
416(i)(3)(A); 20 C.F.R. § 404.131; see Burch v. Barnhart, 400
F.3d 676, 679 (9th Cir. 2005).

1 Plaintiff has the following severe impairments: "retrolisthesis of C4
2 over C5 and status post cervical fusion and laminectomy; status post
3 removal of cervical plate and screws; status post cervical
4 foraminotomy due to cervical foraminal stenosis; legally blind right
5 eye; facet disease of lumbosacral spine L5-S1; left shoulder
6 tendonitis; headaches; and depression" (A.R. 19 (adopting medical
7 expert testimony at A.R. 41)). The ALJ stated that Plaintiff's
8 impairments do not meet or equal a listed impairment (A.R. 19-20
9 (adopting medical expert testimony at A.R. 41)).

10
11 The ALJ found that Plaintiff could perform a range of sedentary
12 work limited to simple repetitive tasks in a non-public environment
13 (A.R. 20, 26 (adopting medical expert testimony at A.R. 41-42
14 concerning Plaintiff's physical capacity, and non-examining state
15 agency physician's opinion at A.R. 1198-1200 concerning Plaintiff's
16 mental capacity)). The ALJ believed that, although Plaintiff no
17 longer could perform her past relevant work, there exist other jobs
18 Plaintiff can perform, specifically the jobs of assembler and office
19 helper (A.R. 28 (adopting vocational expert testimony at A.R. 79-80)).
20 The Appeals Council denied review (A.R. 8-10).

21
22 **STANDARD OF REVIEW**

23
24 Under 42 U.S.C. section 405(g), this Court reviews the
25 Administration's decision to determine if: (1) the Administration's
26 findings are supported by substantial evidence; and (2) the
27 Administration used proper legal standards. See Carmickle v.
28 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,

1 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
2 relevant evidence as a reasonable mind might accept as adequate to
3 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
4 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454
5 F.3d 1063, 1067 (9th Cir. 2006).

7 DISCUSSION

8
9 Plaintiff contends, inter alia, that the ALJ failed to evaluate
10 adequately whether Plaintiff met or equaled Listing 1.04(A). As
11 discussed below, the Court agrees with this contention and also
12 discerns an error regarding the vocational evidence. Remand is
13 appropriate.

14 15 I. The ALJ Failed to Evaluate Adequately Whether Plaintiff Meets or 16 Equals Listing 1.04(A).

17
18 At step three of the sequential evaluation process, the ALJ must
19 determine whether a claimant has an impairment or combination of
20 impairments that meets or equals a listed impairment. See 20 C.F.R.
21 §§ 404.1520(d), 416.920(d). If a claimant meets or equals a listed
22 impairment, he or she is "conclusively presumed to be disabled and
23 entitled to benefits." Bowen v. City of New York, 476 U.S. 467, 471
24 (1986); accord Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993);
25 see also 20 C.F.R. §§ 404.1525(a); 416.925(a) (discussing the
26 Listings). An impairment meets a listing if the impairment matches
27 all of the specified medical criteria. Sullivan v. Zebley, 493 U.S.
28 521, 530 (1990); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.

1 1999). An impairment or combination of impairments that manifests
2 only some of the criteria, no matter how severely, does not qualify.
3 Sullivan v. Zebley, 493 U.S. at 530; Tackett v. Apfel, 180 F.3d at
4 1099.

5
6 Although a claimant bears the burden of proving that she has an
7 impairment or combination of impairments that meets or equals the
8 criteria of a listed impairment, an ALJ must still adequately evaluate
9 and discuss the evidence before concluding that a claimant's
10 impairments fail to meet or equal a listing. See Marcia v. Sullivan,
11 900 F.2d 172, 176 (9th Cir. 1990) ("[I]n determining whether a
12 claimant equals a listing under step three . . . the ALJ must explain
13 adequately his evaluation of alternative tests and the combined
14 effects of the impairments."). Remand is appropriate where an ALJ
15 fails adequately to consider a listing that plausibly applies to the
16 claimant's case. See Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir.
17 2001) (to trigger ALJ's duty to compare plaintiff's impairments to a
18 particular listing, plaintiff must present plausible theory as to how
19 an impairment or combination of impairments equals a listed
20 impairment).

21
22 Here, Plaintiff presented a plausible theory that she met Listing
23 1.04(A). Listing 1.04(A) provides:

24
25 Disorders of the spine (e.g., herniated nucleus pulposus,
26 spinal arachnoiditis, spinal stenosis, osteoarthritis,
27 degenerative disc disease, facet arthritis, vertebral
28 fracture), resulting in compromise of a nerve root . . . or

1 the spinal cord. With . . . [e]vidence of nerve root
2 compression characterized by neuro-anatomic distribution of
3 pain, limitation of motion of the spine, motor loss (atrophy
4 with associated muscle weakness or muscle weakness)
5 accompanied by sensory or reflex loss and, if there is
6 involvement of the lower back, positive straight-leg raising
7 test (sitting and supine)

8
9 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04(A).

10
11 At the outset of the administrative hearing, the medical expert
12 opined without explanation that Plaintiff did not meet or equal a
13 listed impairment (A.R. 41). During the hearing, Plaintiff's counsel
14 suggested to the medical expert and to the ALJ that Plaintiff met
15 Listing 1.04 (A.R. 53, 85). Plaintiff's counsel argued that the
16 extensive medical record (summarized below) established that Plaintiff
17 met Listing 1.04(C) (lumbar spine stenosis) (A.R. 53).³

18
19 ³ Counsel's reference to paragraph (C) of Listing 1.04
20 (A.R. 53) appears to have been in error. Plaintiff's treating
21 physician, Dr. Sobol, completed a "Listing §1.04A - Spinal Nerve
22 Root Compression" questionnaire dated March 23, 2009, which
23 tracks the requirements for Listing 1.04(A) (A.R. 228-29). See
24 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.04(A). Dr. Sobol
25 indicated that Plaintiff had a disorder of the spine identified
26 as "cervical lumbar spine injuries[,] history of 3-06 multi-level
27 cervical spine fusion surgery" (A.R. 228). Dr. Sobol indicated
28 that Plaintiff has evidence of nerve root compression and neuro-
anatomic distribution of pain, which he described as bilateral
arm and left leg radiculitis (A.R. 228). Dr. Sobol noted that
Plaintiff has limited motion of the spine, muscle weakness, and
Plaintiff could not walk on her heels or her toes, and could not
squat or rise from a squatting position (A.R. 228). Dr. Sobol
stated that Plaintiff has sensory loss in her upper extremities
and involvement of her lower back and a positive straight leg

(continued...)

1 The medical expert disagreed. Although Plaintiff's treating
2 physician Dr. Sobol had set forth listings-relevant opinions in a
3 questionnaire, the medical expert appeared dismissive, saying, "I
4 don't pay much attention to those things" (A.R. 42-43; see also A.R.
5 53 (expert saying he would want to see the exact examination that Dr.
6 Sobol performed to arrive at his conclusions)). The expert claimed
7 that there was nothing in the medical record to support Dr. Sobol's
8 conclusions that Plaintiff could not walk on her heels or toes and was
9 unable to rise from a squatting position (A.R. 50-51).

10
11 As mentioned above, the ALJ found that Plaintiff did not meet or
12 equal any listed impairment (A.R. 19-20 (apparently adopting medical
13 expert's conclusion at A.R. 41)).⁴ While the ALJ did discuss in
14 detail whether Plaintiff's mental impairment met or equaled listing
15 12.04, the ALJ did not discuss at all whether Plaintiff's physical
16 impairments met or equaled Listing 1.04(A) (id.).

17
18 ³(...continued)
19 raising test (A.R. 229). Dr. Sobol identified "at present" as
20 the earliest date the symptoms and limitations he noted applied
21 (A.R. 229). The Court observes that if Dr. Sobol really intended
22 his opinions regarding Plaintiff's symptoms and limitations to
23 apply only from March 23, 2009 on, Plaintiff would not be
24 entitled to benefits because this date is long after her date
last insured. Given the fact that Dr. Sobol expressly referenced
Plaintiff's status post March 2006 spine surgery, however, Dr.
Sobol almost certainly did not intend that his opinions have no
application before March 23, 2009.

25 ⁴ In adopting the medical expert's conclusion over other
26 opinion evidence of record, the ALJ explained that he gave weight
27 to the expert in part because the expert had the opportunity to
listen to Plaintiff's testimony (A.R. 27). However, the medical
expert was excused from the hearing before Plaintiff testified,
28 so the medical expert did not hear any of Plaintiff's testimony.
See A.R. 58-59.

1 The record suggests that Plaintiff may have had nerve root
2 compression sufficient to meet Listing 1.04(A) for at least a part of
3 the time period at issue. Plaintiff underwent three cervical spine
4 surgeries beginning in 2002 (A.R. 63-64; see also A.R. 406-15, 422-33
5 (available records from surgeries)). The first surgery was performed
6 on December 16, 2002, to fuse the C5 and C6 vertebrae (A.R. 64). The
7 second surgery was performed on March 5, 2004, to remove the hardware
8 used in the first surgery, which had caused permanent nerve damage
9 from improper placement (A.R. 63, 65).⁵ The third surgery was a
10 bilateral C5-6, C6-7 posterior cervical foraminotomy performed on
11 March 27, 2006, to relieve nerve root compression (A.R. 64, 420, 422,
12 424).

13
14 Records from Dr. Sobol and his colleagues consistently report
15 that, following Plaintiff's surgeries, she has suffered from bilateral
16 ///

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20 _____
21 ⁵ Following the first surgery, Plaintiff immediately
22 experienced worsening of her pain and left side radiculopathy due
23 to the improper screw placement (A.R. 416; see also A.R. 566-67
24 (CT scan report noting improper screw placement)). Once the
25 hardware was removed, Plaintiff reported marked improvement in
26 her symptoms but persisting left side radiating pain (A.R. 420).
27 The surgeon who removed the hardware, Dr. Robert Bray, observed
28 in a post-operative appointment that Plaintiff was "mildly
discoordinated" with some sensory loss, and had improvement but
weakness in her left arm (id.). A post-surgery MRI showed
"marked" foraminal narrowing at the C5-6 and C6-7 levels and
stenosis consistent with radiculopathy (id.). Dr. Bray
recommended a posterior cervical foraminotomy at these levels to
relieve compression of the nerve roots as they exit below the
fusion (id.).

1 upper extremity radiculitis ("B UE rad"),⁶ multilevel degenerative
2 disc disease ("DDD"), lumbar spine musculoligamentous sprain/strain
3 with left lower extremity radiculitis ("L/S, S/S L LE rad"), left
4 upper extremity tendinitis and medial and lateral epicondylitis ("L UE
5 tend"), left shoulder strain and impingement with partial tear and
6 tendinitis per ultrasound ("L shldr str/imp"), with restricted range
7 of motion ("ROM"), impingement, and weakness on examination. See A.R.
8 504-21, 868-72, 1389-91, 1463-72, 1481-82 (records from April 2006
9 through April 2010); see also A.R. 522-41 (records predating the last
10 surgery noting similar diagnoses). Although not entirely clear, the
11 doctors also appear to have referenced bilateral lower back pain
12 associated with straight leg raising in records from before
13 Plaintiff's last surgery ("B SLR [up arrow] LBP" (A.R. 522, 525-26,
14 529-30, 533 (positive straight leg raising on the left side with lower
15 back pain on the right side ("+ SLR L & LBP R")), 536-40). Dr. Sobol
16 summarized the medical records and his examination findings and
17 diagnoses in a series of narrative reports. See, e.g., A.R. 570-89
18 (report and supplement from January and March 2007), A.R. 915-46
19 (final report from February 2008 concerning Plaintiff's spine-related
20 limitations showing on examination limited range of motion in the
21 cervical spine and left upper extremities, positive straight leg
22 raising tests both seated and supine on the left side for radiating
23 pain to the left ankle).

24
25
26 ⁶ Plaintiff testified that she suffers from occasional
27 radiating pain on her right side, and constant pain on her left
28 side that radiates all the way down to her left hand which she
described as feeling like raw skin burned with hot water (A.R.
65-66). Plaintiff had been taking Norco, Vicodin, and Oxycontin
for her pain for the past eight years (A.R. 67).

1 An Agreed Medical Examination performed by Dr. Thomas Haider on
2 April 18, 2005, reported evidence from MRI and EMG studies of
3 radiculopathy affecting the left supraspinatus and brachial radialis
4 muscle groups, and "permanent changes of the nerve roots affecting the
5 C4-5 level to the left" with "significant" stenosis to the left (A.R.
6 326-27). Dr. Haider, who examined Plaintiff on February 28, 2005,
7 found, inter alia:

8
9 On exam today the patient has a healed surgical scar to the
10 left and right of the anterior neck region. There is
11 tenderness and muscle spasm at her neck. Her neck range of
12 motion is 90 percent of normal. Spurlings test is positive
13 to the left with some guarding. Sensation is decreased in
14 the left upper extremity C5 and C6 nerve distribution. . . .
15 She has slight tenderness in the upper back. There is
16 tenderness, guarding and some muscle spasm in the lower
17 back. Her lower back range of motion is 80 percent of
18 normal. Straight leg raising test is positive in the left
19 lower extremity [both sitting and supine]. Sensation is
20 decreased in the left lower extremity L3 to S1 nerve
21 distribution. Deep tendon reflexes are 0 at both knees and
22 ankles.

23
24 (A.R. 340; see also A.R. 337, 1427-28, 1434-42 (reports from Dr.
25 Haider for February 2005, April 2007, and July 2007 noting positive
26 straight leg raising in the lower left extremity)). These findings
27 related to a work-related injury Plaintiff suffered on October 23,
28 2001 (A.R. 340).

1 An orthopedic consultation report by Dr. John Simmonds dated
2 January 17, 2008, states that Plaintiff: (1) was able to move about
3 the office slowly; (2) had a notable left antalgic gait with
4 favoritism to the right side, but an ability to walk on her heels and
5 toes with difficulty along the lower extremity; (3) had a limited
6 range of motion; (4) had negative bilateral straight leg raising tests
7 but lower back pain with elevations over 50 degrees; (5) had
8 radiculopathy in her left lower extremity; and (6) has tendonitis in
9 her left shoulder (A.R. 859-63). Dr. Simmonds did not opine whether
10 Plaintiff's condition met or equaled a listing, but did opine that
11 Plaintiff could perform a limited range of sedentary work (A.R. 863).

12
13 Earlier objective tests provide evidence of Plaintiff's
14 degenerative disc disease and possible nerve root compression. A
15 cervical spine MRI report from February 2006 showed protrusion at the
16 C3-4 and C7-T1 levels with minimal contact of the spinal cord (A.R.
17 549; see also A.R. 551 (November 2003 report reflecting similar
18 findings), A.R. 552-53 (May 2004 report noting disc bulges at various
19 levels)). A lumbar spine MRI report from May 2004 showed mild
20 degeneration of the upper four lumbar discs and mild diffuse
21 straightening of the lumbar lordosis (A.R. 550).

22
23 An MRI of Plaintiff's cervical spine dated July 23, 2002, showed
24 minimal reversed lordosis of the upper mid cervical spine, mild
25 posterior bulging of the annulus of the C3-4 disc, minimal
26 retrolisthesis of C4 over C5 with mild posterior bulging of the
27 annulus of C5-6 and C6-7, but no evidence of central canal stenosis or
28 cervical cord compression (A.R. 309; see also A.R. 312 (radiology

1 report dated October 23, 2001, also noting retrolisthesis of C4 over
2 C5)).

3
4 Neurological testing from October 2003 revealed evidence of early
5 peripheral neuropathy in the left upper extremity (A.R. 555-57).
6 Testing from May 2004 showed no evidence of neuropathy affecting the
7 lower extremities (A.R. 560-62; compare A.R. 795-802, 806-23 (testing
8 from December 2003, July 2004, and October 2005 focusing on headache
9 complaints noting normal gait, no evidence of atrophy, limited range
10 of motion in the head and neck, and decreased sensation to the left
11 upper extremity); A.R. 836-51 (testing from August 2006 reporting
12 limited range of motion in the head and neck, slight lower left
13 extremity limp, and give way type weakness of the muscles of the left
14 upper extremity and both lower extremities)).

15
16 On this record, the Court concludes that neither the ALJ nor the
17 medical expert adequately considered and discussed whether Plaintiff
18 met or equaled Listing 1.04(A) during all or any part of the relevant
19 disability period. Defendant contends that the ALJ's discussion of
20 the medical evidence provides sufficient reasoning to support the
21 ALJ's conclusory step three findings. The ALJ did discuss the medical
22 evidence and did reference the various findings concerning nerve root
23 compression, radiculopathy, straight leg raising tests, and the March
24 2006 surgery to address Plaintiff's nerve root compression (see A.R.
25 21-27). However, the ALJ did not explain how these findings comport
26 or fail to comport with Listing 1.04(A). On remand, the ALJ should
27 consider these issues and explain the specific basis for any finding
28 at step three. See Adea v. Astrue, 2011 WL 2261072, at *4 (C.D. Cal.

1 June 8, 2011) (remanding where ALJ failed to make "full and detailed
2 findings of fact essential to" the ultimate finding that the claimant
3 did not meet a listing) (quoting Lewin v. Schweiker, 654 F.2d 631,
4 634-35 (9th Cir. 1981)); Bouchard v. Astrue, 2010 WL 358538, at *4
5 (C.D. Cal. Jan. 25, 2010) (deeming insufficient on similar facts an
6 ALJ's conclusory statement that the claimant "does not have an
7 impairment or combination of impairments that meets or medically
8 equals one of the listed impairments").

9
10 **II. Substantial Evidence Does Not Support the Administration's**
11 **Decision that Plaintiff Can Work.**

12
13 Although not raised specifically by the parties, the Court
14 observes that even if the ALJ had adequately considered and explained
15 whether Plaintiff met the Listings at step three, substantial evidence
16 would not support the ALJ's adverse disability determination at step
17 five of the evaluation process.

18
19 As previously stated, the ALJ relied on the testimony of a
20 vocational expert to determine that there exist jobs that Plaintiff
21 can perform. Specifically, the ALJ found that Plaintiff could perform
22 work as an assembler and an office helper - jobs the ALJ described as
23 sedentary. See A.R. 28 (purportedly adopting vocational expert
24 testimony at A.R. 80). While the assembler job is sedentary, the
25 office helper job is light. See A.R. 80 (vocational expert so
26 explaining); see also Dictionary of Occupational Titles § 734.687-108
27 (assembler) and § 239.567-010 (office helper).

28 ///

1 This distinction may make a difference in Plaintiff's case. The
2 residual functional capacity presented to the vocational expert was
3 not identical to the residual functional capacity the ALJ found to
4 exist. The hypothetical question the ALJ posed to the vocational
5 expert omitted a limitation to no more than occasional bending, and
6 also assumed that Plaintiff could lift less than 10 pounds
7 occasionally and less than 20 pounds frequently, rather than the 10
8 pound lifting limit the ALJ found to exist. Compare A.R. 20
9 (Plaintiff's capacity) with A.R. 79 (hypothetical). A limitation to
10 lifting less than 10 pounds would preclude all light work, including
11 the office helper job. See Social Security Ruling 83-10, 1983 WL
12 31251, at *5-*6 (defining light work as involving lifting no more than
13 20 pounds at a time).⁷

14
15 Whether a person limited to occasional bending could perform the
16 job of an assembler is unclear on the present record. Because of the
17 incompleteness of the hypothetical question, the vocational expert did
18 not consider Plaintiff's bending limitation. Where a hypothetical
19 question fails to "set out all of the claimant's impairments," the
20 vocational expert's answers to the question cannot constitute
21 substantial evidence to support the ALJ's decision. See, e.g.,
22 DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991); Gamer v.
23 Secretary, 815 F.2d 1275, 1280 (9th Cir. 1987); Gallant v. Heckler,
24 753 F.2d 1450, 1456 (9th Cir. 1984).

25 ///

26 ///

27
28 ⁷ Social Security rulings are "binding on ALJs." Terry
v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 **III. Remand is Appropriate.**

2
3 Because the circumstances of this case suggest that further
4 administrative review could remedy the ALJ's errors, remand is
5 appropriate. See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
6 see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of
7 an administrative determination, the proper course is remand for
8 additional agency investigation or explanation, except in rare
9 circumstances).

10
11 **CONCLUSION**

12
13 For all of the foregoing reasons,⁸ Plaintiff's and Defendant's
14 motions for summary judgment are denied and this matter is remanded
15 for further administrative action consistent with this Opinion.

16
17 LET JUDGMENT BE ENTERED ACCORDINGLY.

18
19 DATED: March 18, 2013.

20
21 _____/S/_____
22 CHARLES F. EICK
23 UNITED STATES MAGISTRATE JUDGE
24

25
26 _____
27 ⁸ The Court has not reached any other issue raised by
28 Plaintiff except insofar as to determine that reversal with a
directive for the payment of benefits would not be appropriate at
this time.