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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LOURDES C. WALDIE,

Plaintiff,

v.

CAROLYN W. COLVIN, ACTING
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,^{1/}

Defendant.

) Case No. ED CV 12-1090 JCG

) **MEMORANDUM OPINION AND
ORDER**

Lourdes C. Waldie (“Plaintiff”) challenges the Social Security Commissioner’s decision denying her application for disability benefits. Specifically, Plaintiff contends, among other things, that the Administrative Law Judge (“ALJ”) did not properly consider the medical evidence with respect to Plaintiff’s inability to complete a normal work week. (Joint Stip. at 5-8, 12-13.) The Court agrees with Plaintiff for the reasons stated below.

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^{1/} Carolyn W. Colvin is substituted as the proper defendant herein. See Fed. R. Civ. P. 25(d).

1 A. An ALJ Must Provide Sufficient Reasons to Reject the Opinions of
2 Treating and Examining Physicians

3 An ALJ “need not discuss *all* evidence presented,” but rather, “must explain
4 why ‘significant probative evidence has been rejected.’” *Vincent v. Heckler*, 739
5 F.2d 1393, 1394-95 (9th Cir. 1984). “As a general rule, more weight should be
6 given to the opinion of a treating source than to the opinion of doctors who do not
7 treat the claimant.” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *accord*
8 *Benton ex. rel. Benton v. Barnhart*, 331 F.3d 1030, 1036 (9th Cir. 2003). This is so
9 because a treating physician “is employed to cure and has a greater opportunity to
10 know and observe the patient as an individual.” *Sprague v. Bowen*, 812 F.2d 1226,
11 1230 (9th Cir. 1987). “At least where the treating doctor’s opinion is not
12 contradicted by another doctor, it may be rejected only for ‘clear and convincing’
13 reasons.” *Lester*, 81 F.3d at 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396
14 (9th Cir. 1991)). “The opinion of an examining physician is, in turn, entitled to
15 greater weight than the opinion of a nonexamining physician.” *Id.* An examining
16 physician’s uncontradicted opinion, like a treating physician’s uncontradicted
17 opinion, may be rejected only for clear and convincing reasons. *Id.* Even if the
18 opinions of a treating or examining source are contradicted by another doctor, the
19 ALJ may not reject those opinions without providing specific and legitimate reasons
20 supported by substantial evidence for doing so. *Id.*

21 Finally, “[t]he opinion of a nonexamining physician cannot by itself constitute
22 substantial evidence that justifies the rejection of the opinion of either an examining
23 physician *or* a treating physician.” *Id.* at 831.

24 B. The ALJ Failed to Provide Sufficient Reasons for Rejecting the
25 Opinions of Drs. Larson, Khan, Fetterman, and Salek

26 Every medical source that commented on Plaintiff’s ability to maintain a
27 regular work schedule in light of her mental impairments agreed that Plaintiff was
28 more than slightly limited in this regard. In a September 4, 2009, Functional

1 Capacity Questionnaire, Plaintiff’s treating physician, Nizar Salek, M.D., noted that
2 Plaintiff would be absent from work more than four days a month due to her
3 impairments or treatment. (AR at 531.) On March 10, 2010, agency consultative
4 psychologist Douglas Larson, Ph.D., opined that Plaintiff’s “[a]bility to maintain
5 regular attendance in the workplace and perform work activities on a consistent basis
6 is moderately impaired.” (*Id.* at 402.) On March 19, 2010, agency nonexamining
7 physician S. Khan, M.D., concluded that Plaintiff was moderately limited in her
8 ability to complete a normal workday and workweek without interruptions from
9 psychologically based symptoms and in her ability to perform at a consistent pace
10 without an unreasonable number and length of rest periods. (*Id.* at 416.) On July
11 27, 2010, Dr. Salek completed a medical source statement in which he indicated that
12 Plaintiff would be absent from work more than three days a month due to her
13 impairments or treatment. (*Id.* at 535.) In a January 25, 2011 consultative
14 psychological report, Carol W. Fetterman, Ph.D., stated that Plaintiff had a “fair
15 ability to maintain regular attendance in the workplace as mental health symptoms
16 may impact attendance.” (*Id.* at 476.)

17 Other mental health sources examined Plaintiff or reviewed her medical
18 records but did not comment on this particular impairment. For example, Reynaldo
19 Abejuela, M.D., conducted a complete psychiatric evaluation of Plaintiff on May 21,
20 2009. Dr. Abejuela listed a number of impairments and ultimately concluded that
21 Plaintiff’s “psychiatric limitations are none to mild.” (*Id.* at 226.) However, Dr.
22 Abejuela did not give his opinion as to Plaintiff’s ability to maintain regular
23 attendance at work. Similarly, David Glassmire^{2/}, the psychological expert whose
24 opinion was given the greatest weight by the ALJ, asked questions of Plaintiff,
25 discussed Plaintiff’s medical history in detail, and offered his opinions as to the

27 ^{2/} Although Dr. Glassmire’s credentials are not apparent from the record, the
28 Court assumes he is a psychologist.

1 extent of Plaintiff's limitations. (*Id.* at 48-56.) Yet, Dr. Glassmire neither discussed
2 the evidence of Plaintiff's limited ability to maintain attendance nor offered his own
3 opinion in this regard.

4 The opinions of the examining and treating sources^{3/} that Plaintiff had a
5 limited ability to maintain work attendance appear to be uncontradicted in that no
6 other source found that Plaintiff did not suffer such an impairment. Thus, the ALJ
7 was required to give clear and convincing reasons for rejecting the opinions
8 indicating some level of impairment. However, even if the Court assumes that the
9 silence of the other sources on this issue amounted to a contradiction, the ALJ was
10 required to provide specific and legitimate reasons for rejecting these opinions,
11 something the ALJ failed to do.

12 The ALJ did not discuss Plaintiff's impaired ability to maintain work
13 attendance in his opinion. Importantly, in detailing Plaintiff's residual functional
14 capacity, the ALJ did not include a limitation in Plaintiff's ability to maintain work
15 attendance. The ALJ credited Dr. Glassmire's opinion over any of the other medical
16 sources because Dr. Glassmire "gives greater mental work restrictions than the State
17 agency medical consultants and Drs. Abejuela, Larson, and Fetterman" and "[h]is
18 functional assessment is generous given Dr. Fetterman's recent consultative
19 psychological evaluation showing the claimant gave suboptimal effort and greatly
20 exaggerated her symptoms." (*Id.* at 33.)^{4/}

21 First, the ALJ erred to the extent he relied solely on the opinions of the
22 nonexamining psychological expert to reject the opinions of the treating and
23

24 ^{3/} The Court notes that Dr. Khan was a nonexamining source. However, his
25 conclusions are consistent with the examining and treating sources.

26 ^{4/} Significantly, the vocational expert testified at the hearing before the ALJ that
27 Plaintiff would be precluded from all work if she was absent from work three or
28 more days a month, or was off task a total of a third of the day, due to her symptoms.
(AR at 71.)

1 examining sources on this issue. *Lester*, 81 F.3d at 831.

2 Moreover, to the extent the ALJ found that Dr. Glassmire advocated greater
3 limitations than the other medical sources, he is incorrect. Dr. Glassmire did not
4 indicate that Plaintiff had any limitations in her ability to maintain work attendance
5 and seemingly ignored the evidence that Plaintiff suffered such a limitation. Also, to
6 the extent that the ALJ relied on Dr. Fetterman’s conclusion that Plaintiff
7 exaggerated her symptoms, it is important to note that even Dr. Fetterman found that
8 Plaintiff had just a “fair” ability to maintain regular attendance in the workplace
9 because her “mental health symptoms may impact attendance.” (AR at 476.)
10 Accordingly, the ALJ failed to provide the requisite specific and legitimate reasons
11 for rejecting the opinions of the medical sources that Plaintiff was impaired in her
12 ability to maintain work attendance.

13 Accordingly, for the reasons stated above, the Court determines that the ALJ
14 improperly ignored the opinions of Drs. Larson, Khan, Fetterman, and Salek with
15 respect to Plaintiff’s ability to maintain regular attendance in the workplace. The
16 Court therefore concludes that the ALJ’s decision is not supported by substantial
17 evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001).

18 C. Remand is Warranted

19 With error established, this Court has discretion to remand or reverse and
20 award benefits. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no
21 useful purpose would be served by further proceedings, or where the record has been
22 fully developed, it is appropriate to exercise this discretion to direct an immediate
23 award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004).
24 But where there are outstanding issues that must be resolved before a determination
25 can be made, or it is not clear from the record that the ALJ would be required to find
26 a plaintiff disabled if all the evidence were properly evaluated, remand is
27 appropriate. *See id.* at 594.

28 Here, in light of the ALJ’s error, the opinions of Drs. Larson, Khan,

1 Fetterman, and Salek must be properly assessed. Therefore, on remand, the ALJ
2 shall reevaluate the treating and examining source opinions and either credit them as
3 true, or provide valid reasons for any portion that is rejected.

4 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
5 **REVERSING** the decision of the Commissioner denying benefits and
6 **REMANDING** the matter for further administrative action consistent with this
7 decision.^{5/}

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9 Dated: August 7, 2013

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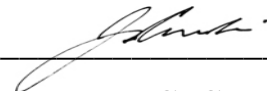
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Hon. Jay C. Gandhi

United States Magistrate Judge

^{5/} In light of the Court's remand instructions, it is unnecessary to address Plaintiff's remaining contentions. (See Joint Stip. at 5-15, 20-22.)