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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RAFAELA G. CHIPREZ,  
Plaintiff,  
v.  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
Defendant.



CASE NO. EDCV 12-1100 AGR

MEMORANDUM OPINION AND  
ORDER

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Plaintiff Rafaela G. Chiprez filed this action on July 11, 2012. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge on August 8 and 9, 2012. (Dkt. Nos. 8, 9.) On March 11, 2013, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court remands this matter to the Commissioner for proceedings consistent with this Opinion.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On November 19, 2009, Chiprez filed applications for disability insurance  
4 benefits and supplemental security income benefits, and alleged a disability  
5 onset date of October 14, 2008. Administrative Record (“AR”) 36. The  
6 applications were denied initially and upon reconsideration. AR 74-77. On  
7 February 17, 2011, the ALJ conducted a hearing at which Chiprez and a  
8 vocational expert testified. AR 54-73. On March 4, 2011, the ALJ issued a  
9 decision denying benefits. AR 33-43. On May 5, 2012, the Appeals Council  
10 denied the request for review. AR 1-5. This action followed.

11 II.

12 **STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner’s  
14 decision to deny benefits. The decision will be disturbed only if it is not  
15 supported by substantial evidence, or if it is based upon the application of  
16 improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995)  
17 (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18 “Substantial evidence” means “more than a mere scintilla but less than a  
19 preponderance – it is such relevant evidence that a reasonable mind might  
20 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In  
21 determining whether substantial evidence exists to support the Commissioner’s  
22 decision, the court examines the administrative record as a whole, considering  
23 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the  
24 evidence is susceptible to more than one rational interpretation, the court must  
25 defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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III.

**DISCUSSION**

**A. Disability**

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (citation and quotation marks omitted).

**B. The ALJ’s Findings**

The ALJ found that Chiprez met the insured status requirements through September 30, 2011. AR 38. Chiprez had the severe impairments of status post knee surgery, lumbosacral strain, and left greater trochanteric bursitis. *Id.* She had the residual functional capacity to perform light work, “which permits lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing for 6 hours, sitting for 6 hours, and walking for 6 hours a day.” AR 39. Chiprez also had “some depression slightly affecting her capability of maintaining attention, concentration and memory.” *Id.* Chiprez was capable of performing her past relevant work of commercial industrial cleaner as actually performed, and her past relevant work of housekeeper and day care teacher as generally performed. AR 42.

**C. Treating Psychiatrist**

Chiprez argues the ALJ did not properly consider the opinions of her treating psychiatrist, Dr. Nguyen. In addition to the opinions in the record before the ALJ, she submitted to the Appeals Council a Mental Impairment Questionnaire completed by Dr. Nguyen. AR 5, 560-64. The Appeals Council

1 made the submission part of the record.<sup>1</sup> AR 5. “When the Appeals Council  
2 denies a request for review, it is a non-final agency action not subject to judicial  
3 review because the ALJ’s decision becomes the final decision of the  
4 Commissioner.” *Taylor v. Comm’r of SSA*, 659 F.3d 1228, 1231 (9th Cir. 2011).  
5 The reviewing court’s role is “to determine whether, in light of the record as a  
6 whole, the ALJ’s decision was supported by substantial evidence and was free of  
7 legal error.” *Id.* at 1232 (citing *Ramirez v. Shalala*, 8 F.3d 1449, 1451-54 (9th Cir.  
8 1993)). In doing so, the reviewing court considers both the ALJ’s decision and  
9 the additional material submitted to the Appeals Council. *Id.*; *Lingenfelter v.*  
10 *Astrue*, 504 F.3d 1028, 1030 n.2 (9th Cir. 2007).

11 An opinion of a treating physician is given more weight than the opinion of  
12 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To  
13 reject an uncontradicted opinion of a treating physician, an ALJ must state clear  
14 and convincing reasons that are supported by substantial evidence. *Bayliss v.*  
15 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a treating physician’s  
16 opinion is contradicted by another doctor, “the ALJ may not reject this opinion  
17 without providing specific and legitimate reasons supported by substantial  
18 evidence in the record. This can be done by setting out a detailed and thorough  
19 summary of the facts and conflicting clinical evidence, stating his interpretation  
20 thereof, and making findings.” *Orn*, 495 F.3d at 632 (citations and quotation  
21 marks omitted). “When there is conflicting medical evidence, the Secretary must

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23 <sup>1</sup> Under 20 C.F.R. § 404.970(b):

24 If new and material evidence is submitted, the Appeals Council shall  
25 consider the additional evidence only where it relates to the period  
26 on or before the date of the administrative law judge hearing  
27 decision. The Appeals Council shall evaluate the entire record  
28 including the new and material evidence submitted if it relates to the  
period on or before the date of the administrative law judge hearing  
decision. It will then review the case if it finds that the administrative  
law judge’s action, findings, or conclusion is contrary to the weight of  
the evidence currently of record.

1 determine credibility and resolve the conflict.” *Thomas v. Barnhart*, 278 F.3d  
2 947, 956-57 (9th Cir. 2002) (citation and quotation marks omitted).

3 On July 29, 2010, Dr. Nguyen completed a Mental Disorder Questionnaire  
4 Form. AR 522-25. Dr. Nguyen treated Chiprez for approximately seven years.  
5 AR 525. The report consists almost entirely of Chiprez’s reported symptoms. Dr.  
6 Nguyen observed that Chiprez appeared anxious, nervous and distressed, and  
7 was tearful during the session. AR 522-23. Dr. Nguyen stated that Chiprez “has  
8 been disabled due to a car accident that she was in. Client is unable to work due  
9 to her disability.” AR 524. Dr. Nguyen diagnosed a major depressive disorder,  
10 recurrent, moderate, and stated that her prognosis was fair. *Id.*

11 On July 14, 2011, Dr. Nguyen completed a Mental Impairment  
12 Questionnaire. AR 560-63. Dr. Nguyen diagnosed a major depressive disorder  
13 with a Global Assessment of Functioning (“GAF”) score of 45.<sup>2</sup> AR 560. In  
14 response to a question asking for a description of the clinical findings, including  
15 results of mental status examinations, which demonstrate the severity of the  
16 mental impairments and symptoms, Dr. Nguyen responded “guarded.” AR 561.  
17 Dr. Nguyen indicated that drowsiness is a side effect of her medications, Zoloft  
18 and Vistaril. AR 562. Dr. Nguyen anticipated that she would be absent from  
19 work more than three times per month. *Id.* Dr. Nguyen assessed that Chiprez  
20 would have difficulty working at a regular job on a sustained basis, but did not  
21 provide any explanation in the space provided. AR 563. Dr. Nguyen circled  
22 “moderate” for restrictions in activities of daily living and difficulties in maintaining  
23 social functioning; “frequent” deficiencies of concentration, persistence or pace  
24 resulting in failure to complete tasks in a timely manner; and “repeated (three or

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26 <sup>2</sup> A GAF of 45 indicates “Some impairment in reality testing or  
27 communication (e.g., speech is at time illogical, obscure, or irrelevant) or major  
28 impairment in several areas, such as work or school, family relations, judgment,  
thinking, or mood (e.g., depressed man avoids friends, neglects family, and is  
unable to work . . .).” American Psychiatric Association, *Diagnostic and Statistical  
Manual of Mental Disorders* 34 (4th ed. Text Revision 2000).

1 more)” for episodes of decompensation. *Id.*

2 The ALJ did not cite or address Dr. Nguyen’s opinion dated July 29, 2010,  
3 and could not have addressed the later opinion because it was submitted to the  
4 Appeals Council. In the decision, the ALJ noted that the record contained only  
5 three mental health notes, one of which reflected that Chiprez was a no show.  
6 AR 38, 555-57 (dated 1/6/11, 10/25/10 and 8/26/10). The ALJ concluded that  
7 these records “reflect minimal clinical evidence to corroborate or support any  
8 finding o[f] significant impact related to depression.” AR 38. These records  
9 indicated treatment with medication with no adverse side effects. *Id.* The court  
10 notes that the record contains additional treatment records from Dr. Nguyen for  
11 the period June 21, 2006 through March 25, 2010. AR 365-398, AR 504-06.  
12 These records also indicate no side effects from the medications. Of these  
13 records, however, the 2010 records indicate diagnosis of major depressive  
14 disorder, recurrent, with GAF of 45. AR 504.

15 This matter must be remanded for the ALJ to consider Dr. Nguyen’s  
16 opinions and the treatment records. Certainly, a treating physician’s opinion as  
17 to the ultimate determination of disability is not binding on an ALJ. *McLeod v.*  
18 *Astrue*, 640 F.3d 881, 885 (9th Cir. 2011). On the other hand, an ALJ may not  
19 overlook a treating physician’s opinion and whether it conflicts with the RFC  
20 assessment. *See Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012);  
21 *Lingenfelter*, 504 F.3d at 1038 n.10 (ALJ cannot avoid requirements for  
22 consideration of treating physician opinion “simply by not mentioning the treating  
23 physician’s opinion and making findings contrary to it.”).

#### 24 **D. Credibility**

25 Chiprez argues the ALJ failed to provide clear and convincing reasons to  
26 reject her subjective complaints.

27 “To determine whether a claimant’s testimony regarding subjective pain or  
28 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*,

1 504 F.3d at 1035-36.

2 At step one, “the ALJ must determine whether the claimant has presented  
3 objective medical evidence of an underlying impairment ‘which could reasonably  
4 be expected to produce the pain or other symptoms alleged.’” *Id.* (citing *Bunnell*  
5 *v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). The ALJ found that  
6 Chiprez’s “medically determinable impairments could reasonably be expected to  
7 cause the alleged symptoms.” AR 40.

8 “Second, if the claimant meets this first test, and there is no evidence of  
9 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of  
10 [the claimant’s] symptoms only by offering specific, clear and convincing reasons  
11 for doing so.’” *Lingenfelter*, 504 F.3d at 1036 (citations omitted). “In making a  
12 credibility determination, the ALJ ‘must specifically identify what testimony is  
13 credible and what testimony undermines the claimant’s complaints.’” *Greger v.*  
14 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “If the ALJ’s  
15 credibility finding is supported by substantial evidence in the record, we may not  
16 engage in second-guessing.” *Thomas*, 278 F.3d at 958-59 (citing *Morgan v.*  
17 *Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)).

18 Here, the ALJ found that Chiprez’s “statements concerning the intensity,  
19 persistence and limiting effects of these symptoms are not credible to the extent  
20 they are inconsistent with the above residual functional capacity assessment.”  
21 AR 40. The ALJ discounted Chiprez’s credibility for at least three reasons: (1)  
22 the objective medical evidence was inconsistent with allegations of disabling  
23 levels of pain; (2) conservative treatment; and (3) daily activities inconsistent with  
24 the alleged severity of pain. AR 40-42.

25 For the reasons already discussed, the ALJ did not address Dr. Nguyen’s  
26 opinions and appears to have overlooked certain of his treatment records.  
27 Remand is appropriate so the ALJ may consider this evidence and determine  
28 whether it affects his findings as to Chiprez’s credibility.

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**IV.**  
**ORDER**

IT IS HEREBY ORDERED that this matter is remanded for further proceedings consistent with this Opinion.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

DATED: March 15, 2013

  
ALICIA G. ROSENBERG  
United States Magistrate Judge