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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|------------------------------------|---|----------------------------|
| MARY A. SCHEITLIN, |) | NO. CV 12-1799-E |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | MEMORANDUM OPINION |
| |) | |
| CAROLYN W. COLVIN, COMMISSIONER |) | AND ORDER OF REMAND |
| OF SOCIAL SECURITY ADMINISTRATION, |) | |
| |) | |
| 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.

PROCEEDINGS

Plaintiff filed a complaint on October 17, 2012, seeking review
of the Commissioner's denial of social security benefits. The parties
filed a consent to proceed before a United States Magistrate Judge on

1 November 8, 2012. Plaintiff filed a motion for summary judgment on
2 March 21, 2013. Defendant filed a motion for summary judgment on
3 June 22, 2013. The Court has taken both motions under submission
4 without oral argument. See L.R. 7-15; "Order," filed October 19,
5 2012.

6
7 **BACKGROUND**
8

9 Plaintiff filed applications for Title II and Title XVI benefits
10 on April 24, 2007, asserting disability since May 26, 2006
11 (Administrative Record ("A.R.") 196-202).¹ Plaintiff alleged she
12 suffers from fibromyalgia, heart problems, diabetes, personality
13 disorders, neuropathy, Barrett's esophagus, depression, restless leg
14 syndrome, and angina (A.R. 211). Plaintiff's last insured date was
15 December 31, 2006 (A.R. 13, 203).

16
17 An Administrative Law Judge ("ALJ") found that Plaintiff has
18 severe morbid obesity, heart disease, diabetes mellitus II,
19 degenerative joint disease of the left knee, osteoarthritis of both
20 knees, degenerative disc disease of the lumbar and sacral spine, and
21 fibromyalgia syndrome (A.R. 13 (appearing to adopt conditions
22 identified by the medical expert at A.R. 32-33)). The ALJ also
23 determined, however, that Plaintiff retains the residual functional
24 capacity to perform a limited range of light work (A.R. 14-15) (citing
25

26 ¹ Plaintiff previously had filed an application for
27 benefits on March 24, 2003, which was denied initially and on
28 reconsideration, and her request for a hearing was dismissed on
May 25, 2006, for failure to appear at the scheduled hearing.
See A.R. 65-68; Plaintiff's Motion, p. 1.

1 20 C.F.R. 404.1567(b) and 416.967(b)).² In reaching this
2 determination, the ALJ deemed not credible Plaintiff's subjective
3 complaints suggesting greater limitation (A.R. 15-16). The ALJ found
4 that Plaintiff's limitations preclude the performance of Plaintiff's
5 past relevant work, but not the performance of the jobs of information
6 clerk and investigator - dealer accounts (which are light jobs), or
7 charge account clerk (which is a sedentary job) (A.R. 20 (adopting
8 vocational expert testimony at A.R. 44-45)).³ The Appeals Council
9 denied review (A.R. 1-3).

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14 ² Specifically, the ALJ found that Plaintiff could:

15 . . . stand/walk [one] hour in an [eight] hour workday,
16 15-30 minutes at a time; no restrictions on sitting;
17 she must be able to use a cane occasionally; avoid
18 uneven surfaces; lifting/carrying 10 pounds frequently,
19 20 pounds occasionally; occasional stooping and
20 bending; no squatting, kneeling, crawling, running,
21 jumping, or pivoting; no foot pedals or controls; she
22 can climb stairs but not ladders, ropes, or scaffolds;
23 no work on heights or balancing; she cannot do forceful
gripping, grasping, or twisting with her left hand; she
can occasionally do fine manipulations such as
keyboarding; she can do frequent gross manipulation
such as opening drawers and carrying files; no
restrictions on her right dominant hand; and her work
environment should be air conditioned.

24 (A.R. 14-15 (appearing to adopt medical expert's testimony at
25 A.R. 33-34)). Portions of the medical expert's testimony
26 reportedly were inaudible and so could not be transcribed from
the sound recording made at the hearing. See A.R. 33-34, 37-41.

27 ³ The vocational expert testified that if Plaintiff were
28 limited to performing only non-public, simple repetitive tasks,
she still could perform sedentary jobs as a call out operator and
a cutter and paster - press clipping (A.R. 46-47).

1 **A. Summary of the Opinions of Dr. Combs and Dr. Landau**

2
3 Plaintiff reportedly began seeing Dr. Combs in November 2005, and
4 returned in July 2008 (A.R. 450, 1061). Dr. Combs summarized
5 Plaintiff's medical history when Plaintiff presented for a complete
6 physical in August 2008. See A.R. 448. Dr. Combs indicated in
7 September 2008 that Plaintiff needed meniscus surgery, had foot
8 problems, and had a torn right rotator cuff (A.R. 442; see also A.R.
9 443-45 (MRI of Plaintiff's left knee showing degenerative change,
10 strain, and tear); A.R. 789-95, 957-59 (records from March 2004 and
11 January 2009 MRIs showing rotator cuff tear to the right shoulder);
12 A.R. 796-801, 839-42 (records from 2001 through 2004 for foot and knee
13 pain issues)). X-rays of Plaintiff's feet and ankles in October 2008
14 showed bilateral soft tissue swelling and a large left plantar
15 calcaneal spur (A.R. 436-38). In August 2009, Plaintiff reportedly
16 had significant low back pain when she sat and edema to the upper
17 shins, for which she needed to elevate her legs (A.R. 467). A note
18 from December of 2009 observed that Plaintiff seemed to be doing
19 better (A.R. 455).

20
21 Dr. Combs wrote a letter dated June 21, 2010, concerning
22 Plaintiff's alleged conditions and limitations (A.R. 1061-63). Dr.
23 Combs stated he believed that Plaintiff has been "permanently disabled
24 since 2001" and that she has not been "capable of full-time work for
25 much of the past decade" based on her medical conditions (A.R. 1062).
26 Dr. Combs explained that due to multiple orthopedic issues and
27 fibromyalgia, Plaintiff would have to take off up to five or more days
28 per month, because her problems are exacerbated by sitting or standing

1 for any length of time in one position (A.R. 1062). Dr. Combs would
2 limit Plaintiff to lifting no more than 15 pounds with no bending,
3 twisting or stooping, with periods where she could stand, sit or lie
4 down to alleviate pain, neuropathy and edema (A.R. 1062). Plaintiff
5 needed knee and shoulder surgeries and could not have the surgeries
6 until she lost weight (A.R. 1062-63). Dr. Combs opined that
7 Plaintiff's condition would prevent her from returning to work within
8 a year (A.R. 1063).

9
10 In his testimony, Dr. Landau stated several opinions regarding
11 Plaintiff's alleged conditions and limitations. See A.R. 32-41. Dr.
12 Landau appeared to opine Plaintiff retains a residual functional
13 capacity similar to the capacity the ALJ found to exist (A.R. 33-34).
14 Dr. Landau also opined, however, that he believed Plaintiff would have
15 difficulties adhering to a normal eight-hour-a-day schedule or 40 hour
16 work week schedule (A.R. 39). Dr. Landau stated that Plaintiff had a
17 consistent twenty-year history of chronic complaints regarding her
18 alleged limitations (A.R. 39). Dr. Landau initially characterized
19 those complaints as subjective, but on further examination Dr. Landau
20 said he could not sort out which of Plaintiff's complaints have an
21 objective basis and which have a subjective basis, because her
22 complaints have been so numerous (A.R. 39-40). Dr. Landau stated that
23 fibromyalgia is a subjective diagnosis, but he did not question the
24 diagnosis of fibromyalgia in Plaintiff's case (A.R. 39).

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1 **B. Analysis**

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3 A treating physician's conclusions "must be given substantial

4 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see

5 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must

6 give sufficient weight to the subjective aspects of a doctor's

7 opinion. . . . This is especially true when the opinion is that of a

8 treating physician") (citation omitted); see also Orn v. Astrue, 495

9 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to

10 treating physician opinions). Even where the treating physician's

11 opinions are contradicted,⁴ as here, "if the ALJ wishes to disregard

12 the opinion[s] of the treating physician he . . . must make findings

13 setting forth specific, legitimate reasons for doing so that are based

14 on substantial evidence in the record." Winans v. Bowen, 853 F.2d

15 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);

16 see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the

17 treating physician's opinion, but only by setting forth specific,

18 legitimate reasons for doing so, and this decision must itself be

19 based on substantial evidence") (citation and quotations omitted).

20

21 In the present case, Dr. Combs opined Plaintiff has been unable

22 to work since December of 2001 (A.R. 1062). Dr. Combs believed that

23 Plaintiff's "multiple orthopedic issues" and fibromyalgia cause

24 disabling limitations, including a need to miss work five or more days

25 per month (A.R. 1061-63). The ALJ rejected Dr. Combs' opinions,

26

27 ⁴ Rejection of an uncontradicted opinion of a treating

28 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 claiming: (1) the opinions were not supported by objective evidence;
2 and (2) there was no indication that Dr. Combs had a specialty in
3 mental health or relied on anything beyond Plaintiff's subjective
4 complaints as to her mental health on which to base Dr. Combs' mental
5 health diagnoses (A.R. 17). These claimed reasons for rejecting Dr.
6 Combs' opinions are legally insufficient.

7
8 The first claimed reason is impermissibly vague and unspecific.
9 See, e.g., McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989)
10 ("broad and vague" reasons for rejecting treating physician's opinions
11 do not suffice); Embrey v. Bowen, 849 F.2d at 421 ("To say that the
12 medical opinions are not supported by sufficient objective findings or
13 are contrary to the preponderant conclusions mandated by the objective
14 findings does not achieve the level of specificity our prior cases
15 have required. . . ."). Moreover, it does not necessarily appear from
16 the record that there is a lack of objective evidence to support Dr.
17 Combs' opinions. Dr. Combs opined that prolonged sitting or standing
18 would exacerbate Plaintiff's orthopedic issues and pain, and that
19 Plaintiff would need to be able to sit, stand, or lie down at will to
20 alleviate associated pain, neuropathy, and edema (A.R. 1062). X-rays
21 of Plaintiff's feet and ankles showed bilateral soft tissue swelling
22 and a large left plantar calcaneal spur (A.R. 436-38), an MRI showed
23 degenerative changes, strain, and tear to Plaintiff's left knee (A.R.
24 443-45), and edema was observed during Plaintiff's visits with Dr.
25 Combs, requiring that Plaintiff elevate her legs (A.R. 467). The
26 neurologic consultation from October 2007 reported that Plaintiff had
27 lumbar radiculopathy and peripheral polyneuropathy (A.R. 557). On
28 this record, the ALJ's vague assertion that Dr. Combs' opinions were

1 not supported by objective evidence fails to provide a specific or
2 legitimate reason for rejecting those opinions.

3
4 The ALJ's second claimed reason for rejecting Dr. Combs' opinions
5 essentially involves a non sequitur. Dr. Combs did mention that
6 Plaintiff reported times of depression, post traumatic stress
7 disorder, anxiety, and other stress-related problems, which supposedly
8 had caused problems with short term memory, following simple
9 directions, and staying on task. See A.R. 1062-63. However, Dr.
10 Combs did not assign any limitations related to these complaints of
11 alleged mental problems. (Id.). The limitations Dr. Combs assigned
12 in his 2010 opinions were limitations assertedly stemming from
13 fibromyalgia and "multiple orthopedic issues." Thus, Dr. Combs'
14 salient opinions did not concern Plaintiff's mental health, and
15 properly could not be rejected on the basis of Dr. Combs' alleged lack
16 of mental health expertise.

17
18 Although not clearly stated as a reason for rejecting Dr. Combs'
19 2010 opinions, another portion of the ALJ's decision appears to
20 describe perceived insufficiencies in Dr. Combs' documentation of his
21 2009 opinions:

22
23 On December 15, 2009, Dr. Combs opined the claimant seems to
24 be doing better yet he reports filling out her forms from
25 her lawyer for work . . . Dr. Combs did not identify what
26 limitations the claimant had which prevent her from working
27 or discuss her inability to work within her treatment
28 records. Instead, this opinion must have been contained on

1 separate document [sic], which was not submitted with the
2 December 15, 2009 (A.R. 17).

3
4 Assuming these comments constitute part of the ALJ's rationale
5 for rejecting Dr. Combs' 2010 opinions, the rationale is insufficient.
6 If the ALJ believed that the bases of Dr. Combs' 2010 (or 2009)
7 opinions concerning Plaintiff's limitations were insufficiently
8 documented, the ALJ should have further developed the record. See 20
9 C.F.R. § 404.1512(e) (the Administration "will seek additional
10 evidence or clarification from your medical source when the report
11 from your medical source contains a conflict or ambiguity that must be
12 resolved, the report does not contain all of the necessary
13 information, or does not appear to be based on medically acceptable
14 clinical and laboratory diagnostic techniques"); see also Smolen v.
15 Chater, 80 F.3d at 1288 ("If the ALJ thought he needed to know the
16 basis of Dr. Hoeflich's opinions in order to evaluate them, he had a
17 duty to conduct an appropriate inquiry, for example, by subpoenaing
18 the physicians or submitting further questions to them. He could also
19 have continued the hearing to augment the record.") (citations
20 omitted). The ALJ has a special duty to fully and fairly develop the
21 record and to assure that the claimant's interests were considered,
22 even where (as here) the claimant was represented by counsel. Brown
23 v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983).

24
25 Additionally, even if the Court were to discern no error in the
26 ALJ's rejection of Dr. Combs' opinions, the Court would be unable to
27 find that substantial evidence supports the Administration's decision.
28 The ALJ relied primarily on Dr. Landau's testimony in finding that

1 Plaintiff could work (A.R. 17-19). However, the ALJ failed to
2 acknowledge the portion of Dr. Landau's testimony in which Dr. Landau
3 opined that Plaintiff would have difficulties adhering to a normal
4 eight-hour-a-day schedule or 40 hour work week (see A.R. 17-19, 39).
5 Dr. Landau also stated that Plaintiff had a 20-year history of
6 consistent chronic subjective complaints (A.R. 39). Dr. Landau added,
7 "[a]s far as objective, underlying disease is concerned, though,
8 [inaudible]" (A.R. 39).⁵ When questioned further, Dr. Landau stated,
9 "I would have a great deal of difficulty sorting out which complaint
10 has an objective basis and which complaint has a subjective basis"
11 (A.R. 40). The ALJ's failure to address this portion of Dr. Landau's
12 testimony, while relying heavily on other portions of Dr. Landau's
13 testimony, was error. See Tonapetyan v. Halter, 242 F.3d 1144, 1150-
14 51 (9th Cir. 2001) (given ALJ's reliance on medical expert testimony,
15 ALJ was not free to ignore a medical expert's equivocations).

16
17 An individual's residual functional capacity is the ability to
18 perform "sustained work-related physical and mental activities in a
19 work setting on a regular and continuing basis," which means "8 hours
20 a day, for five days a week, or an equivalent work schedule." See
21 Social Security Ruling 96-8p. Even assuming, arguendo, that the ALJ
22 properly discounted Plaintiff's subjective complaints, in light of
23 ambiguity in the record and Dr. Landau's uncertainty regarding the

24
25 ⁵ For this possibly critical portion of Dr. Landau's
26 testimony, the lack of a complete transcript tends to frustrate
27 meaningful review. See Smith v. Califano, 470 F. Supp. 898, 898
28 (D.D.C. 1978) ("In view of 42 U.S.C. § 405(g) (1976), the
inability of the Secretary to produce a complete record of the
proceedings before the Agency frustrates judicial review"); see
also Greer v. Astrue, 322 Fed. App'x 513, 516 (9th Cir. 2009)
(remanding because of inaudible hearing testimony).

1 subjective/objective bases for Plaintiff's complaints, the ALJ should
2 have addressed and reconciled all of Dr. Landau's testimony if the ALJ
3 wanted to rely on Dr. Landau's opinions. See id.

4
5 **II. Remand is Appropriate.**

6
7 Plaintiff requests that the Court reverse the Commissioner's
8 determination and remand the case for the immediate payment of
9 benefits, or alternatively remand for reconsideration in light of the
10 errors found above. See Plaintiff's Motion, p. 10. In the event the
11 case is remanded for further proceedings, Plaintiff requests that the
12 matter be assigned to a different ALJ.⁶

13
14 Because the circumstances of this case suggest that further
15 administrative review could remedy the ALJ's errors, remand is
16 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
17 generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an
18 administrative determination, the proper course is remand for
19 additional agency investigation or explanation, except in rare
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23
24 ⁶ Plaintiff claims the ALJ refused "properly [to]
25 consider all of the relevant medical evidence" (id.). Although
26 the ALJ stated during the hearing that he did not have to "look
27 beyond one year prior to the date of the application" (A.R. 36),
28 the record is clear that the ALJ and the medical expert did
review and consider all of the medical records Plaintiff
submitted. See A.R. 16 (ALJ stating that all of Plaintiff's
medical records had been reviewed and considered); A.R. 36
(medical expert testifying he had reviewed all of the medical
records).

1 circumstances).⁷

2
3 Plaintiff's request that the case be assigned to a different ALJ
4 is denied. Plaintiff has not carried her considerable burden of
5 demonstrating judicial bias. See Liteky v. United States, 510 U.S.
6 540, 555 (1994) ("judicial rulings alone almost never constitute a
7 valid basis for a bias or partiality motion . . . judicial remarks
8 during the course of a trial that are critical or disapproving of, or
9 even hostile to, counsel, the parties, or their cases, ordinarily do
10 not support a bias or partiality challenge"); see also Verduzco v.
11 Apfel, 188 F.3d 1087, 1089-90 (9th Cir. 1999) ("ALJs and other similar
12 quasi-judicial administrative officers are presumed to be unbiased");
13 Travis v. Sullivan, 985 F.2d 919, 924 (7th Cir. 1993) ("[s]electing a
14 new ALJ is a decision for the [Commissioner] to make when there has
15 been no proof of bias or partiality by the original ALJ in the case");
16 cf. Lidy v. Sullivan, 745 F. Supp. 1411, 1418 (S.D. Ind. 1989) (court
17 will consider ordering assignment to a different ALJ on remand only
18 where "there is some legitimate, compelling reason" to do so).

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26 ⁷ There are outstanding issues that must be resolved
27 before a proper disability determination can be made in the
28 present case. For this reason, the Ninth Circuit's decision in
Harman v. Apfel, 211 F.3d 1172 (9th Cir.), cert. denied, 531 U.S.
1038 (2000) does not compel a reversal for the immediate payment
of benefits.

1 **CONCLUSION**

2
3 For all of the foregoing reasons, Plaintiff's and Defendant's
4 motions for summary judgment are denied and this matter is remanded
5 for further administrative action consistent with this Opinion.⁸
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.
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9 DATED: July 26, 2013.
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11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE
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26 _____
27 ⁸ The Court has not reached any of the other issues
28 raised by Plaintiff, except insofar as to determine that reversal
with a directive for the immediate payment of benefits would not
be appropriate at this time.