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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ZOE L. WATT,)	NO. ED CV 12-1875-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 gainful activity (A.R. 520-24). For example, Dr. George opined that
2 Plaintiff's impairments likely would cause her to be absent from work
3 more than three times per month, and a vocational expert testified
4 that a person so limited could not perform any jobs (A.R. 68-69, 523).
5 Dr. Hill, a state agency psychologist, opined Plaintiff is moderately
6 mentally limited in several respects and can perform only work that is
7 "simple in nature" (A.R. 510-12).

8 9 STANDARD OF REVIEW

10
11 Under 42 U.S.C. section 405(g), this Court reviews the
12 Administration's decision to determine if: (1) the Administration's
13 findings are supported by substantial evidence; and (2) the
14 Administration used proper legal standards. See Carmickle v.
15 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
16 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
17 relevant evidence as a reasonable mind might accept as adequate to
18 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
19 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454
20 F.3d 1063, 1067 (9th Cir. 2006).

21
22 Where, as here, the Appeals Council considered additional
23 material but denied review, the additional material becomes part of
24 the Administrative Record for purposes of the Court's analysis. See
25 Brewes v. Commissioner, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen
26 the Appeals Council considers new evidence in deciding whether to
27 review a decision of the ALJ, that evidence becomes part of the
28 administrative record, which the district court must consider when

1 reviewing the Commissioner's final decision for substantial
2 evidence."; expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452
3 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1231 (2011)
4 (courts may consider evidence presented for the first time to the
5 Appeals Council "to determine whether, in light of the record as a
6 whole, the ALJ's decision was supported by substantial evidence and
7 was free of legal error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th
8 Cir. 1993) ("the Appeals Council considered this information and it
9 became part of the record we are required to review as a whole"); see
10 generally 20 C.F.R. §§ 404.970(b), 416.1470(b).

11 12 DISCUSSION

13 14 I. The ALJ Erred With Respect to Dr. George.

15
16 A treating physician's conclusions "must be given substantial
17 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see
18 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must
19 give sufficient weight to the subjective aspects of a doctor's
20 opinion. . . . This is especially true when the opinion is that of a
21 treating physician") (citation omitted); see also Orn v. Astrue, 495
22 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to
23 treating physician opinions). Even where the treating physician's
24 opinions are contradicted,² "if the ALJ wishes to disregard the
25 opinion[s] of the treating physician he . . . must make findings

26
27 ² 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 setting forth specific, legitimate reasons for doing so that are based
2 on substantial evidence in the record." Winans v. Bowen, 853 F.2d
3 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);
4 see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the
5 treating physician's opinion, but only by setting forth specific,
6 legitimate reasons for doing so, and this decision must itself be
7 based on substantial evidence") (citation and quotations omitted).

8
9 Furthermore, "[t]he ALJ has a special duty to fully and fairly
10 develop the record and to assure that the claimant's interests are
11 considered. This duty exists even when the claimant is represented by
12 counsel." Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983).
13 Section 404.1512(e) of 20 C.F.R. provides that the Administration
14 "will seek additional evidence or clarification from your medical
15 source when the report from your medical source contains a conflict or
16 ambiguity that must be resolved, the report does not contain all of
17 the necessary information, or does not appear to be based on medically
18 acceptable clinical and laboratory diagnostic techniques." See Smolen
19 v. Chater, 80 F.3d at 1288 ("If the ALJ thought he needed to know the
20 basis of Dr. Hoeflich's opinions in order to evaluate them, he had a
21 duty to conduct an appropriate inquiry, for example, by subpoenaing
22 the physicians or submitting further questions to them. He could also
23 have continued the hearing to augment the record") (citations
24 omitted).

25
26 The ALJ plainly erred in failing to mention Dr. George's
27 opinions, and in failing to state "specific, legitimate" reasons for
28 implicitly rejecting those opinions. See Lingenfelter v. Astrue, 504

1 F.3d 1028, 1038 n.10 (9th Cir. 2007) ("Of course, an ALJ cannot avoid
2 these requirements [to state specific, legitimate reasons] by not
3 mentioning the treating physician's opinion and making findings
4 contrary to it."); Salvadore v. Sullivan, 917 F.2d 13, 15 (9th Cir.
5 1990) (implicit rejection of treating physician's opinion cannot
6 satisfy Administration's obligation to set forth "specific, legitimate
7 reasons").

8
9 Defendant appears to argue that the ALJ's reliance on the
10 conflicting opinion of the non-examining medical expert suffices to
11 justify the ALJ's implicit rejection of Dr. George's opinions. Such
12 argument must be rejected for at least two reasons. First, the
13 contradiction of a treating physician's opinion by another physician's
14 opinion triggers rather than satisfies the requirements of stating
15 "specific, legitimate reasons." See, e.g., Valentine v. Commissioner,
16 574 F.3d 685, 692 (9th Cir. 2009); Orn v. Astrue, 495 F.3d at 631-33;
17 Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995). Second, the
18 opinions of a non-examining physician cannot form the sole basis for
19 rejecting the opinion of a treating physician. See, e.g., Morgan v.
20 Commissioner, 169 F.3d 595, 602 (9th Cir. 1999) ("The opinion of a
21 non-examining medical advisor cannot by itself constitute substantial
22 evidence that justifies the rejection of the opinion of an examining
23 or treating physician"); Lester v. Chater, 81 F.3d at 830 ("The ALJ's
24 primary reason for rejecting [the treating physicians'] opinions was
25 that they conflicted with the testimony of a non-examining medical
26 advisor. In so doing, the ALJ committed an error of law"); Pitzer v.
27 Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) ("The nonexamining
28 physicians' conclusion, with nothing more, does not constitute

1 substantial evidence, particularly in view of the conflicting
2 observations, opinions, and conclusions of an examining physician").

3
4 **II. The ALJ Erred With Respect to Dr. Hill.**

5
6 Social Security Ruling ("SSR") 96-6p states that "[f]indings of
7 fact made by state agency medical and psychological consultants and
8 other program physicians and psychologists regarding the nature and
9 severity of an individual's impairment(s) must be treated as expert
10 opinion evidence of nonexamining sources. . . ." Consequently, ALJs
11 "may not ignore these opinions and must explain the weight given to
12 the opinions in their decisions." SSR 96-6p.³

13
14 The ALJ erred by failing to mention the opinions of Dr. Hill when
15 discussing Plaintiff's residual functional capacity.⁴ See id.; Van
16 Sickle v. Astrue, 385 Fed. App'x 739, 741 (ALJ erred by failing to
17 mention the opinions of the state agency psychologist that the
18 claimant had "moderate mental limitations" and could only work in a
19 "low stress setting"); Bain v. Astrue, 319 Fed. App'x 543, 546 (9th
20 Cir. Mar. 12, 2009) ("Here, the ALJ failed to discredit or incorporate
21 the limitations enumerated by state agency consultant Frank Lahman,
22 including that Bain was moderately limited in her ability to accept
23 instructions and respond appropriately to criticism from supervisors

24
25 ³ Social Security rulings are binding on the
26 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1
(9th Cir. 1990).

27 ⁴ The ALJ did briefly reference some but not all of Dr.
28 Hill's opinions when discussing Plaintiff's failure to meet or
equal the Listings (A.R. 24).

1 and moderately limited in her ability to respond appropriately to
2 changes in the work setting. Accordingly, on remand the ALJ must
3 address these limitations"); Hambrick v. Apfel, 1998 WL 329368, at *3
4 (N.D. Tex. June 11, 1998) ("The ALJ's decision does not mention the
5 weight he gave to the state agency review physician's opinions. The
6 court cannot determine whether the ALJ, in contravention of the
7 purpose for SSR 96-6p, ignored the opinion.").

8
9 Contrary to Defendant's argument, the Court cannot confidently
10 conclude that a hypothetical application of the Grids would render
11 this error harmless. Where, as here, a claimant's non-exertional
12 impairments significantly limit his or her range of work "the grids do
13 not apply, and the testimony of a vocational expert is required to
14 identify specific jobs within the claimant's abilities." Polny v.
15 Bowen, 864 F.2d 661, 663-64 (9th Cir. 1988); see Tackett v. Apfel, 180
16 F.3d 1094, 1103 (9th Cir. 1999); Burkhart v. Bowen, 856 F.2d 1335,
17 1340-41 (9th Cir. 1988).

18
19 **III. Remand is Appropriate.**

20
21 Remand is appropriate because the circumstances of this case
22 suggest that further administrative review could remedy the ALJ's
23 errors. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
24 generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an
25 administrative determination, the proper course is remand for
26 additional agency investigation or explanation, except in rare
27 circumstances).

28 ///

1 The Ninth Circuit's decision in Harman v. Apfel, 211 F.3d 1172
2 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) ("Harman") does not
3 compel a different result herein. In Harman, the Ninth Circuit stated
4 that improperly rejected medical opinion evidence should be credited
5 and an immediate award of benefits directed where "(1) the ALJ has
6 failed to provide legally sufficient reasons for rejecting such
7 evidence, (2) there are no outstanding issues that must be resolved
8 before a determination of disability can be made, and (3) it is clear
9 from the record that the ALJ would be required to find the claimant
10 disabled were such evidence credited." Harman, 211 F. 3d at 1178
11 (citations and quotations omitted). Assuming, arguendo, the Harman
12 holding survives the Supreme Court's decision in INS v. Ventura, 537
13 U.S. at 16,⁵ the Harman holding does not direct a benefits award in
14 the present case. There are outstanding issues concerning the
15 physicians' opinions that must be resolved before a determination of
16 disability can be made. Moreover, it is not clear that the ALJ would
17 be required to find Plaintiff disabled for the entire claimed period
18 of disability if Dr. George's and Dr. Hill's opinions were fully
19 credited. See Luna v. Astrue, 623 F.3d at 1035.

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27 ⁵ The Ninth Circuit has continued to apply Harman despite
28 INS v. Ventura. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th
Cir. 2010); Vasquez v. Astrue, 572 F.3d 586, 597 (9th Cir. 2009);
Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004).

1 **CONCLUSION**

2
3 For all of the foregoing reasons,⁶ 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.
6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.
8

9 DATED: July 26, 2013.
10

11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE
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27 ⁶ The Court has not reached any other issue raised by
28 Plaintiff except insofar as to determine that reversal with a
directive for the immediate payment of benefits would not be
appropriate at this time.