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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM Q. DIESTA, Plaintiff-Appellant, v. NANCY A. BERRYHILL, Acting Commissioner Social Security, Defendant-Appellee.	No. 17-15057 D.C. No. 1:15-cv-00465-HG-KSC MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Helen W. Gillmor, District Judge, Presiding

Argued and Submitted October 10, 2018*
University of Hawaii Manoa

Before: WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

William Diesta appeals the district court's decision upholding the Social Security Administration Commissioner's denial of his applications for disability insurance and supplemental security income benefits. We reverse.

1. The ALJ erred when assessing the uncontradicted opinions of Dr. Dennis Donovan, a consultative examiner who saw Diesta on behalf of the Social Security

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Administration. *See* 20 C.F.R. § 404.1519a(a). Testing administered by Dr. Donovan showed that Diesta had an I.Q. of 77 and performed at the first percentile on a number of supplemental memory tasks. Dr. Donovan also stated that Diesta had a Global Assessment of Functioning (GAF) score of 45, which indicates a level of functioning below what is needed to engage in substantial gainful activity. *See Wellington v. Berryhill*, 878 F.3d 867, 871 n.1 (9th Cir. 2017); *Pate-Fires v. Astrue*, 564 F.3d 935, 944 (8th Cir. 2009); *see also Garrison v. Colvin*, 759 F.3d 995, 1002 n.4 (9th Cir. 2014); Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed., text rev. 2000) (noting that a GAF score between 41 and 50 reflects "serious symptoms" or a "serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)"). After the examination, Dr. Donovan opined that Diesta could not handle his own financial affairs; could not maintain normal persistence, pace, and concentration in the workplace; and would not necessarily be able to remember simple oral instructions. The Social Security personnel who initially reviewed Diesta's claim, and reconsidered Diesta's claim after it was first denied, stated that Dr. Donovan's opinion indicated that Diesta was not capable of performing substantial gainful activity.

"To reject the uncontradicted opinion of a treating or examining doctor, an ALJ must state clear and convincing reasons that are supported by substantial evidence." *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017).

The ALJ did not state clear and convincing reasons for rejecting Dr. Donovan's opinions.

First, the ALJ did not provide any explanation for why she rejected Dr. Donovan's assessment of Diesta's global functioning. Second, the ALJ provided no explanation for rejecting Dr. Donovan's opinion that Diesta could understand simple instructions, but "may not necessarily remember them later on." Third, regarding Diesta's ability to manage his finances, the ALJ stated: "[I]n light of [Diesta's] relatively full activities of daily living, including his ability to handle his finances, I cannot accept Dr. Donovan's opinion that the claimant cannot handle his finances." But this opinion did not go to Diesta's ability to perform substantial gainful activity. Instead, a claimant's ability to handle his own finances is relevant to whether the Social Security Administration could assign him a representative payee to manage benefit payments. 20 C.F.R. § 404.2001(b). Also, although Diesta checked off two boxes indicating that he could "[c]ount change" and "[p]ay bills," Diesta is homeless, does not have a bank account, and nothing in the record indicates that he pays any bills outside of purchasing food using an electronic benefits transfer card.

The ALJ also disagreed with Dr. Donovan's opinion that Diesta could not keep up with the pace of low-stress employment. But that disagreement reflected a fundamental misunderstanding of Dr. Donovan's opinion. After opining in a separately numbered paragraph that "I don't think that [Diesta] can maintain normal pace, persistence, and concentration in the workplace," Dr. Donovan went on separately – after repeating his opinion about Diesta's ability to maintain work pace – to say that he "suspect[ed]" that Diesta would "walk away if something upset[] him" or he was "given expectations beyond his capacities." In her opinion, the ALJ incorrectly stated that Dr. Donovan said that Diesta could not "handle the pace of work *because* he walks away from his work when things are bad" (emphasis added). The ALJ then discussed her disagreement on this point with Dr. Donovan at some length, noting that Diesta had never "walked away from a job when things are bad, . . . [and] there is no evidence the claimant's alleged tendency to walk away arose after he stopped working." But the ALJ provided no explanation at all as to why she discredited Dr. Donovan's separate conclusions regarding Diesta's inability to maintain an acceptable "pace, persistence, and concentration" in the workplace, which was the critical conclusion affecting Diesta's ability to hold a job.

2. Remand for benefits is appropriate "where (1) the record has been fully developed and further administrative proceedings would serve no useful purpose;

(2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand." *Trevizo*, 871 F.3d at 682–83 (internal quotation marks and citations omitted). All three of these criteria are met here.

First, further proceedings would not serve any useful purpose here. There is no indication that the record below was incomplete. And other medical evidence in the record corroborates Dr. Donovan's conclusions. For example, a mental status examination performed in 2012 documents memory testing results consistent with significant memory recall problems.

Second, as discussed above, the ALJ discredited Dr. Donovan's testimony without providing the requisite clear and convincing reasons.

Finally, if Dr. Donovan's opinions are credited as true, the Commissioner would be required to find that Diesta is not capable of engaging in substantial gainful activity. The medical consultants who reviewed Diesta's record stated that Diesta would not be able to work if Dr. Donovan's opinion was accurate. And, as stated above, Dr. Donovan opined that Diesta had a GAF score of 45, which is below what is needed to engage in substantial gainful activity. Moreover, the limitations described by Dr. Donovan would clearly prevent Diesta from performing any of the three jobs that the ALJ believed Diesta could perform. For

example, Dr. Donovan found that Diesta had an I.Q. that "exceeds only 6 percent of his same age peers," but all three jobs require a general learning ability and verbal aptitude above the bottom tenth percentile. *See* Dictionary of Occupational Titles 209.587-034, Marker; Dictionary of Occupational Titles 559.687-074, Inspector and Hand Packager; Dictionary of Occupational Titles 706.684-022, Assembler, Small Products I.

Thus, the judgment of the district court is reversed and remanded with instructions to remand to the ALJ for the calculation and award of benefits.

REVERSED and REMANDED.

***Diesta v. Berryhill*, Case No. 17-15057**
Rawlinson, Circuit Judge, dissenting:

I respectfully dissent. In my view, substantial evidence supports the relative weight the Administrative Law Judge (ALJ) afforded the various medical opinions. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (noting that the ALJ is "responsible for . . . resolving conflicts in medical testimony," and reviewing for substantial evidence). The ALJ's decision must be upheld if "the evidence is susceptible to more than one rational interpretation." *Id.* at 1039-40.

There is a hierarchy of opinions among physicians in the social security arena. The opinion of the treating physician is entitled to the highest weight. The opinion of an examining physician is entitled to lesser weight. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996), *as amended*.

To reject the contradicted opinion of a treating physician or an examining physician, the ALJ must provide "specific and legitimate reasons." *Id.* at 830-31 (citations omitted).

In this case, the ALJ gave "significant weight" to Dr. Donovan's opinion, with the exception of the conclusions that the claimant could not handle his finances or the pace of work.

Dr. Donovan's pertinent opinions were expressed as follows:

1. "I don't think [claimant] can handle his own financial affairs . . .

. . .

3. I don't think [claimant] can maintain normal pace, persistence and concentration in the workplace. . . .

4. [Claimant] states that he just walks away if something upsets him. I suspect this is what would happen in a workplace when given expectations beyond his capacities."[1]

The ALJ gave the following specific and legitimate reasons, supported by the record evidence, for rejecting Dr. Donovan's opinions: 1) the opinion that claimant could not handle his financial affairs was inconsistent with claimant's testimony that he was able to pay bills, shop for necessities, count change, shop in stores and take public transportation; and 2) the opinion that the doctor "suspect[ed]" that claimant would "walk away if something upsets him" was inconsistent with claimant's demonstrated ability to "get along with authority figures, maintain friendships," interact appropriately with clinic staff, and the lack

[1] The majority also relies upon Dr. Donovan's reference to claimant's Global Assessment of Functioning (GAF) score. *See Majority Disposition*, p.4. However, as neither Dr. Donovan nor the ALJ cited the GAF score in their respective discussions of claimant's residual functional capacity, this reliance is misplaced. *See Bray v. Commissioner*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ . . .").

of evidence in the record that claimant's work history included any instances of claimant walking away when something upset him.

Because Dr. Donovan's opinion on claimant's inability to maintain normal pace, persistence, and concentration in the workplace is inconsistent with the opinions of claimant's treating physicians, and because the ALJ provided specific and legitimate reasons supported by the record for rejecting Dr. Donovan's divergent opinion, the decision of the ALJ was supported by substantial evidence and should be affirmed. *See Valentine v. Commissioner*, 574 F.3d 685, 692-93 (9th Cir. 2009).

I respectfully dissent.