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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Sheri Slocum,

Plaintiff,

v.

Carolyn W. Colvin, Acting Commissioner
of Social Security Administration,

Defendant.

No. CV-13-01906-PHX-GMS

ORDER

Pending before the Court is the appeal of Plaintiff Sheri Slocum, which challenges the Social Security Administration’s decision to deny benefits. (Doc. 12.) For the reasons set forth below, the Court vacates that decision and remands for further consideration.

BACKGROUND

Slocum applied for supplemental security income on January 11, 2010.¹ (R. at 158.) She alleged disability beginning February 25, 2009. (R. at 26.) Her claims were denied both initially and upon reconsideration. (*Id.*) She then appealed to an Administrative Law Judge (“ALJ”). (*Id.*) The ALJ conducted a hearing on the matter on February 17, 2012. (R. at 43–56.)

In evaluating whether Slocum was disabled, the ALJ undertook the five-step sequential evaluation for determining disability.² (R. 26–28.) At step one, the ALJ

¹ Slocum also alleges that she made a previous application on February 13, 2009, that was denied on June 18, 2009.

² The five-step sequential evaluation of disability is set out in 20 C.F.R. § 404.1520 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing

1 determined that Slocum had not engaged in substantial gainful activity since February 25,
2 2009, the alleged onset date. (R. at 28.) At step two, the ALJ determined that Slocum
3 suffered from the severe impairments of chronic back and neck pain, degenerative joint
4 disease, fibromyalgia, lupus, history of valley fever, headaches, chronic obstructive
5 pulmonary disease, and nicotine abuse. (R. at 28–29.) At step three, the ALJ determined
6 that none of these impairments met or equaled any of the Social Security
7 Administration’s listed impairments. (R. at 29–30.)

8 At that point, the ALJ made a determination of Slocum’s residual functional
9 capacity (“RFC”),³ concluding that she could perform sedentary work with certain
10 restrictions. (R. at 30.) The ALJ thus determined at step four that Slocum retained the
11 RFC to perform her past relevant work as an administrative assistant. (R. at 35.) The ALJ
12 did not reach step five. Thus, the ALJ concluded that Slocum had not been under a
13 disability from the date of her alleged onset. (*Id.*)

14 supplemental security income). Under the test:

15
16 A claimant must be found disabled if she proves: (1) that she
17 is not presently engaged in a substantial gainful activity[,] (2)
18 that her disability is severe, and (3) that her impairment meets
19 or equals one of the specific impairments described in the
20 regulations. If the impairment does not meet or equal one of
21 the specific impairments described in the regulations, the
22 claimant can still establish a prima facie case of disability by
23 proving at step four that in addition to the first two
24 requirements, she is not able to perform any work that she has
25 done in the past. Once the claimant establishes a prima facie
26 case, the burden of proof shifts to the agency at step five to
27 demonstrate that the claimant can perform a significant
28 number of other jobs in the national economy. This step-five
determination is made on the basis of four factors: the
claimant’s residual functional capacity, age, work experience
and education.

27 *Hoopai v. Astrue*, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal citations and
quotations omitted).

28 ³ RFC is the most a claimant can do despite the limitations caused by his
impairments. *See* S.S.R. 96-8p (July 2, 1996).

1 wanted the Court to consider except for an RFC Questionnaire completed by Dr. Jason
2 Taylor. (Doc. 12 at 6.) She argues that Dr. Taylor’s other records were considered by the
3 ALJ and states that she does not know why this one was not in the record because she
4 thought her lawyer submitted it. (*Id.*)

5 In the Ninth Circuit, “when claimants are represented by counsel, they must raise
6 all issues and evidence at their administrative hearings in order to preserve them on
7 appeal. . . . We will only excuse a failure to comply with this rule when necessary to
8 avoid a manifest injustice” *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999).
9 Here, Slocum was represented by counsel at the administrative hearing and did not
10 preserve the issue of Dr. Taylor’s RFP Questionnaire for this appeal. She has not argued
11 the manifest injustice exception and the Court finds no reason that it would be applicable
12 in this case. The Court further notes that it would have been impossible for Slocum’s
13 attorney to submit the RFP Questionnaire for the ALJ to consider because it was not
14 created until April 12, 2012. (Doc. 1 at Ex. L1.) That was after the ALJ issued his
15 rejection of her claim on March 26, 2012. (R. at 36.) For all of these reasons, the RFP
16 Questionnaire will not be considered.

17 **B. Issues on Appeal**

18 Slocum argues that the ALJ erred by: (A) failing to properly and fully develop the
19 case, (B) failing to follow the treating physician’s rule, (C) failing to support the RFC
20 determination, (D) failing to apply appropriate legal standards in evaluating credibility,
21 (E) failing “to address the medical record as a whole” and offering his own opinion, and
22 (F) improperly rejecting lay witness testimony.

23 The Court finds that the ALJ’s decision to give little weight to the medical source
24 statement of treating physician Dr. Solomon was not based on substantial evidence or
25 clear and convincing reasons. The regulations impose a hierarchy for medical opinions
26 offered by licensed physicians. The opinion of an examining and treating physician is
27 given more weight than non-treating and non-examining medical sources. *See* 20 C.F.R.
28 § 404.1527; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d

1 821, 830 (9th Cir. 1995). When the treating doctor’s opinion is uncontradicted, the ALJ
2 can reject those conclusions only for “‘clear and convincing’ reasons.” *Lester*, 81 F.3d at
3 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Medical opinions
4 are also given more weight when they come from a specialist and are given higher or
5 lower weight based on the length, nature, and extent of the treatment relationship. *See* 20
6 C.F.R. § 404.1527.

7 Slocum submitted an RFC assessment from Dr. Soloman. It is a check-box form
8 that was completed a week before the hearing and is the most restrictive assessment in
9 the record. The ALJ found that the assessment had “no accompanying documentation or
10 records, and there was no further explanation or details given.” (R. at 35.) Slocum argues
11 that the ALJ’s reasoning was in error because there are records of her treatment with Dr.
12 Soloman in the record. These records are twenty-one pages at 17F and twenty-three pages
13 at 32F. They cover lab results and seven appointments from May 2010 to February 2012.
14 In another part of the opinion, the ALJ cited to these records in a list with other citations.
15 (R. at 32.) But, the ALJ makes no mention of them in the section of the opinion where he
16 finds that Dr. Soloman’s RFC assessment should receive little weight. The ALJ
17 mistakenly states that the assessment lacks clinical and laboratory records or any support
18 in the record. In fact, the record contains treatment and lab reports from Dr. Soloman. He
19 is a specialist who had been examining and treating Slocum for almost two years. This
20 Court finds that the ALJ’s decision did not provide clear and convincing evidence or was
21 not based on substantial evidence from the record because it does not address whether Dr.
22 Soloman’s assessment in the RFC is supported by his clinical and laboratory records.

23 The Court does not necessarily find that on remand the ALJ is required to give Dr.
24 Soloman’s assessment great weight, only that the reasons given for discounting it here
25 were incorrect and therefore not substantial evidence or clear and convincing reasons.
26 The Court notes that most of the treatment records indicated fatigue and other ailments
27 rather than the pain that was noted in the RFC assessment. (*See* 17F, 32F.) In fact it was
28 only in records from the final visit to Dr. Soloman, that he included notes that Slocum

1 was or claimed to be in constant pain 100% of the time. (R. at 1417.) It was in the notes
2 from that same final visit that Dr. Soloman mentions lupus for the first time. (R. at 1419.)
3 In determining how much weight to give Dr. Soloman's assessment, this may be
4 considered along with all of the other evidence from the record including the cooperative
5 disability investigation into malingering.

6 In addition to failing to consider these treatment records from Dr. Soloman, the
7 ALJ also improperly found that Slocum's fibromyalgia was not completely supported
8 because physical examinations did not reveal any positive trigger points which are
9 usually associated with fibromyalgia. (R. at 32.) In fact, there are multiple places in the
10 record where trigger point are noted by various providers. (*See, e.g.*, R. at 408, 423,
11 1050.) Slocum also noted that the ALJ discussed an MRI but cited to an X-ray, or
12 misunderstood whether the medical record indicating a cyst referred to a cyst in the lungs
13 or one elsewhere in the body. While these last two are not as meaningful as the other
14 errors, the ALJ should correct them and develop the record fully and accurately.

15 Based on these corrections to the factual basis for the finding, the ALJ will need to
16 redetermine at least the credibility and weight given to the testimony of Slocum and the
17 assessment by Dr. Soloman. Slocum correctly notes on appeal that she was seen by a
18 number of different specialists and their treatments and records should also be considered
19 in determining the amount of weight to give this evidence. She also raises a variety of
20 health problems including memory lapses that the ALJ either did not address, or
21 addressed but considered not to be severe impairments. The existence and effect of all
22 such conditions should be considered as part of the determination of the RFC even if they
23 are not found to be severe impairments under step two. *See* 20 C.F.R. § 404.1545(e) ("we
24 will consider the limiting effects of all your impairment(s), even those that are not severe,
25 in determining your residual functional capacity").

26 Again, the Court does not dictate any outcome at the subsequent determination,
27 only that the decision here was not based on substantial evidence because it relied on
28 factually incorrect determinations from the record.

1 **C. Credit as True**

2 Slocum asks for this case to be remanded for a determination of benefits. The
3 Ninth Circuit allows district courts to do so in certain circumstances:

4 Specifically, we have devised a three-part credit-as-true
5 standard, each part of which must be satisfied in order for a
6 court to remand to an ALJ with instructions to calculate and
7 award benefits: (1) the record has been fully developed and
8 further administrative proceedings would serve no useful
9 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.

10 *Garrison v. Colvin*, 12-15103, 2014 WL 3397218 *21 (9th Cir. July 14, 2014). There is
11 “flexibility” which allows “courts to remand for further proceedings when, even though
12 all conditions of the credit-as-true rule are satisfied, an evaluation of the record as a
13 whole creates serious doubt that a claimant is, in fact, disabled.” *Id.*

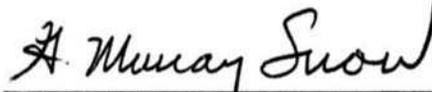
14 Here, the second element is met because this Court has determined that the ALJ’s
15 reasons for rejecting Dr. Soloman’s assessment were legally insufficient. However, even
16 if the Court were to remand and direct the ALJ to credit that assessment as true, the first
17 and third elements are not met. The record is not fully developed because there was no
18 vocational testimony or other evidence given about whether Slocum would have been
19 able to perform past work or other work based on the limitations suggested by Dr.
20 Soloman’s assessment. Dr. Soloman’s mention of lupus, along with the rest of the record,
21 also needs to be considered to determine whether Slocum might meet Listing 14.02. If
22 she does that would require a finding of disability at step three without considering RFC
23 or vocational testimony. For those reasons, it is not clear that the ALJ would be required
24 to find Slocum disabled on remand. Further, the record contains assessments conducted
25 by other medical professionals that may mitigate against any finding that the claimant
26 meets listing 14.02. The ALJ needs to balance against Dr. Soloman’s opinion any such
27 evidence and reach a determination as to whether the listing is met, or the claimant is
28 otherwise qualified, supported by specific reasoning from the record.

1 Accordingly, the credit-as-true rule is not applicable to the facts here. This matter
2 is remanded for a redetermination that corrects the factual errors noted in this Order.

3 **IT IS HEREBY ORDERED** that the ALJ's decision is **VACATED**.

4 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to
5 **REMAND** this action for further determinations consistent with this order.

6 Dated this 20th day of August, 2014.

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9 _____
 G. Murray Snow
 United States District Judge