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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sylvia P. Velazquez,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.

No. CV-14-02637-PHX-DLR

ORDER

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16 Plaintiff Sylvia Velazquez seeks review of the final decision of the Commissioner
17 of Social Security (“the Commissioner”), which denied her disability insurance benefits
18 and supplemental security income (“SSI”). For the following reasons, the
19 Commissioner’s decision is remanded for further proceedings.

20 **BACKGROUND**

21 On May 26, 2011, Velazquez applied for disability insurance benefits and SSI,
22 alleging disability beginning on April 1, 2010. (A.R. 193.) She appeared with her
23 attorney and testified before an Administrative Law Judge (“ALJ”) on February 25, 2013.
24 (*Id.* at 36-71.) A vocational expert also testified. (*Id.*) The ALJ found that Velazquez
25 was not disabled within the meaning of the Social Security Act. (*Id.* at 15-35.) The
26 Appeals Council denied Velazquez’s request for review, making the ALJ’s decision the
27 Commissioner’s final decision. (*Id.* at 1-7, 11-14.) Thereafter, Velazquez appealed to
28 this Court. (Doc. 1.)

1 claimant can perform any other work based on the claimant's RFC, age, education, and
2 work experience. § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the
3 claimant is disabled. *Id.*

4 At step one, the ALJ found that Velazquez meets the insured status requirements
5 of the Social Security Act through December 31, 2013, and that she has not engaged in
6 substantial gainful activity since April 1, 2010. (A.R. 20.) At step two, the ALJ found
7 that Velazquez has the following severe impairments: fibromyalgia, asthma, diffuse
8 myofascial pain, morbid obesity, suspected arthritis of the knees, bipolar disorder,
9 posttraumatic stress disorder ("PTSD"), dysthymia, anxiety disorder with depressive
10 features, and polysubstance dependence, which is in remission. (*Id.*) At step three, the
11 ALJ determined that Velazquez does not have an impairment or combination of
12 impairments that meets or medically equals an impairment listed in Appendix 1 to
13 Subpart P of 20 C.F.R. Pt. 404. (*Id.* at 21.) At step four, the ALJ found that Velazquez
14 has the RFC to perform:

15 light work as defined in 20 [C.F.R.] 404.1567(b) and 416.967(b) except
16 [Velazquez] can lift and/or carry 50 pounds occasionally and 10 pounds
17 frequently; [she] has no limitations in her ability to sit, stand, and/or walk;
18 [she] can occasionally climb stairs and ramps, but can never climb ladders,
19 ropes, or scaffolds; [she] can occasionally stop and crouch, but can never
kneel or crawl; [she] must avoid unprotected heights; and, due to mental
health and pain medication side effects, [she] can only perform unskilled
routine work in a socially limited and stable environment.

20 (*Id.* at 22.) Based on this RFC, the ALJ found that Velazquez is unable to perform any of
21 her past relevant work. (*Id.* at 30.) However, at step five the ALJ concluded that jobs
22 exist in significant numbers in the national economy that Velazquez could perform,
23 considering her age, education, work experience, and RFC. (*Id.*)

24 Velazquez argues that the RFC assessed by the ALJ is inconsistent with the
25 limitations imposed by her impairments. Specifically, she contends that the ALJ
26 improperly discounted: (1) medical opinions that assessed limitations inconsistent with
27 sustained work, (2) Velazquez's symptom testimony, and (3) the third-party report of her
28 daughter. (Doc. 15 at 9-24.)

1 **I. Medical Opinion Evidence**

2 The ALJ is responsible for resolving conflicts in medical testimony. *Andrews v.*
3 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Generally, more weight should be given to
4 the opinion of a treating physician than to the opinions of non-treating physicians. *Lester*
5 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Where a treating physician’s opinion is not
6 contradicted by another physician, it may be rejected only for “clear and convincing”
7 reasons, and where it is contradicted, it may not be rejected without “specific and
8 legitimate reasons” supported by substantial evidence in the record. *Id.* Likewise, an
9 examining physician’s opinion generally must be given greater weight than that of a non-
10 examining physician. *Id.* at 830. As with a treating physician, there must be clear and
11 convincing reasons for rejecting the uncontradicted opinion of an examining physician,
12 and specific and legitimate reasons, supported by substantial evidence in the record, for
13 rejecting an examining physician’s contradicted opinion. *Id.* at 830-31.

14 **A. Physiological Opinion Evidence**

15 The ALJ was presented with conflicting medical opinions on the limiting effects
16 of Velazquez’s physical impairments. Dr. Cifuentes, Velazquez’s treating physician,
17 opined that Velazquez would be unable to work for 8 hours per day, 5 days per week on a
18 consistent basis. (A.R. at 534-35, 930-31.) He opined that, in an 8 hour work day, she
19 would be able to sit, stand, and walk for less than 2 hours, and would be able to lift and
20 carry less than 10 pounds. (*Id.*) He indicated that Velazquez could use her hands and
21 feet occasionally, but could bend, reach, and stoop less than occasionally. (*Id.*)
22 Additionally, he opined that Velazquez’s conditions would cause her to miss 4-5 days per
23 month, and that the side effects of her medications would severely limit her ability to
24 work. (*Id.*) These opinions, if credited, would limit Velazquez to a less than sedentary
25 exertional capacity. (*Id.* at 26, 66-68.)

26 However, consultative physician Dr. Cunningham examined Velazquez and
27 assessed functional limitations consistent with a light exertional capacity. (*Id.* at 26, 63,
28 516-21.) Specifically, he opined that, despite her impairments, Velazquez: (1) could

1 occasionally lift 50 pounds and frequently lift 10 pounds; (2) has no sitting, standing, or
2 walking limitations; (3) can occasionally climb ramps and stairs, but can never use
3 ladders, ropes, or scaffolds; (4) can occasionally stoop and crouch, never kneel or crawl,
4 and has no limitations on reaching, handling, fingering, and feeling; and (5) should avoid
5 working around heights. (*Id.* at 517-20.)

6 The ALJ resolved this conflict by giving little weight to Dr. Cifuentes' opinions
7 and great weight to Dr. Cunningham's. (A.R. 26.) The ALJ concluded that Dr.
8 Cifuentes' opinion was less reliable because "the objective treatment records do not
9 support such a debilitating residual functional capacity," and because Velazquez's
10 impairments could be managed conservatively with medication. (*Id.*) Inconsistency with
11 objective medical records and conservative treatment are specific and legitimate reasons
12 for discrediting medical testimony. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th
13 Cir. 2008); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). However, the ALJ
14 did not adequately support her reasons with evidence from the record.

15 Regarding the objective treatment records, the ALJ states that x-rays "showed only
16 mild-thoracic dextrocurvature" and "no abnormal findings" for Velazquez's lumbar
17 spine. (*Id.*) Velazquez argues, and the Court agrees, that the ALJ's rationale reflects a
18 misunderstanding of her conditions. After concluding that Velazquez suffers from
19 fibromyalgia, the ALJ determined that Dr. Cifuentes' opinion as to the limiting effects of
20 the condition was less reliable because x-rays did not reveal spinal abnormalities. Social
21 Security regulations define fibromyalgia as "a complex medical condition characterized
22 primarily by widespread pain in the joints, muscles, tendons, or nearby soft tissues that
23 has persisted for at least 3 months." *See* SSR 12-2p, 2012 WL 3104869, at *2. To
24 establish the existence of fibromyalgia a claimant generally must supply evidence that
25 other disorders that could cause these symptoms have been excluded. *Id.* at *3. That
26 Velazquez's fibromyalgia did not result in abnormal x-rays does not suggest its effects
27 are less limiting than Dr. Cifuentes opined, especially when the condition is defined, in
28 part, by the absence of such objective indicia. *See Benecke v. Barnhart*, 379 F.3d 587,

1 594 (9th Cir. 2004) (noting that fibromyalgia typically eludes objective measurement);
2 *see also Green-Younger v. Barnhart*, 335 F.3d 99, 109 (2d Cir. 2003) (explaining that
3 “negative findings simply confirm a diagnosis of fibromyalgia” by eliminating other
4 medical condition that might manifest similar symptoms).

5 Regarding conservative pain management, the ALJ cites May 18, 2011 and
6 September 27, 2012 treatment notes from Dr. Galindo and Physician’s Assistant
7 Burzinski. (A.R. 26.) But these records do not support the ALJ’s conclusion. Although
8 the May 18, 2011 treatment note indicates that Percocet was prescribed for Velazquez’s
9 lumbago, the note also states that Velazquez “does not have the money to see [a]
10 specialist at this point,” and, consequently, referral to pain management and
11 rheumatology would be deferred. (*Id.* at 340.) Rather than indicating Velazquez’s
12 conditions could be managed conservatively, this treatment note suggests that
13 Velazquez’s course of treatment was the result of her inability to afford more specialized
14 care. Moreover, the September 27, 2012 treatment note states that Velazquez “is on
15 [P]ercocet which is no longer relieving pain.” (*Id.* at 914.)

16 Although the ALJ articulated legitimate reasons for assigning little weight to Dr.
17 Cifuentes’ opinion, she erred by not supporting these reasons with substantial evidence in
18 the record.

19 **B. Psychological Opinion Evidence**

20 The ALJ was presented with conflicting medical opinions on the limiting effects
21 of Velazquez’s mental impairments. Dr. Agosto, Velazquez’s treating psychiatrist,
22 opined that her mental impairments severely limit her ability to respond appropriately to
23 supervision, coworkers, and customary work pressures. (*Id.* at 932.) He opined that
24 Velazquez has moderately severe limitations in understanding, carrying out, and
25 remembering instructions, and in performing simple tasks. (*Id.*) Ultimately, he
26 concluded that Velazquez’s psychiatric symptoms would severely limit the sustainability
27 of her work pace and severely restrict her ability to perform daily work-related activities.
28 (*Id.* at 932-33.)

1 Three consultative psychologists also examined Velazquez. Dr. Steingard opined
2 that Velazquez becomes easily frustrated and confused, even with simple directions, is
3 easily distractible, and that her socialization and ability to adapt to the competitive
4 marketplace are limited. (*Id.* at 526-27.) Dr. Rabara examined Velazquez and concluded
5 that she could not adequately be assessed because of her poor effort and exaggeration.
6 (*Id.* at 532.) He questioned Velazquez’s claims of depression and anxiety, and opined
7 that her low test scores, including a Full Scale IQ score of 55, were implausible. (*Id.*)
8 Finally, Dr. Bowen examined Velazquez and was unable to assess her level of
9 functioning “because of her exaggeration” (*Id.* at 793.) Like Dr. Rabara, Dr.
10 Bowen opined that Velazquez “is clearly embellishing and exaggerating,” and also noted
11 that she “has consistently been inconsistent – across all of the records she reports
12 different symptoms, patterns of substance abuse, and accounts of abuse. She has also
13 consistently put forth very little effort” (*Id.*)

14 The ALJ resolved this conflict by assigning little weight to Dr. Agosto’s opinion,
15 partial weight to Dr. Steingard’s opinion, and some weight to the opinions of Drs. Rabara
16 and Bowen. The ALJ gave Velazquez “the benefit of the doubt,” and found that she “is
17 limited to simple tasks with some social limitations.” (*Id.* at 30.)

18 The ALJ supplied sufficient and adequately supported reasons for weighing the
19 psychological opinion evidence as she did. She explained that Dr. Agosto’s opinion was
20 undercut by evidence that Velazquez’s depression stabilized with medication, and that
21 independent examination findings from the consultative psychologists indicated that
22 Velazquez exaggerated her symptoms, put forward little effort during examinations, and
23 gave conflicting reports of past trauma and substance abuse. (*Id.* at 28-30.) The ALJ did
24 not arbitrarily weigh the psychological opinion evidence.¹

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26 ¹ Velazquez suggests that the ALJ erred in assigning little weight to the Global
27 Assessment of Functioning (“GAF”) scores throughout the record. (Doc. 15 at 17.) The
28 Court disagrees. The ALJ reasonably concluded that, comparatively, the GAF scores
were a less reliable indicator of Velazquez’s functional capacity than the more detailed
medical notes and reports in the record. (A.R. at 27.)

Velazquez also contends that the ALJ erred by failing to address a letter submitted

1 **II. Velazquez’s Symptom Testimony**

2 Velazquez argues that the ALJ improperly discredited her symptom testimony. In
3 evaluating the credibility of a claimant’s symptom testimony, the ALJ is required to
4 engage in a two-step analysis: (1) determine whether the claimant presented objective
5 medical evidence of an impairment that could reasonably be expected to produce some
6 degree of the pain or other symptoms alleged; and, if so with no evidence of malingering,
7 (2) reject the claimant’s testimony about the severity of the symptoms only by giving
8 specific, clear, and convincing reasons for the rejection. *Vasquez v. Astrue*, 572 F.3d
9 586, 591 (9th Cir. 2009). The ALJ found that Velazquez’s impairments could reasonably
10 be expected to cause her alleged symptoms, but that her “statements concerning the
11 intensity, persistence and limiting effects of these symptoms are not entirely credible for
12 the reasons explained in this decision.”² (A.R. at 24.)

13 Although the ALJ, over the course of several pages, summarizes the symptom
14 testimony and medical evidence, the ALJ does not identify which statements she finds
15 credible and which she does not. Nor does the ALJ “link that testimony to the particular
16 parts of the record supporting her non-credibility determination.” *Brown-Hunter v.*
17 *Colvin*, 806 F.3d 487, 494 (9th Cir. 2015.) Instead, “she simply state[s] her non-
18 credibility conclusion and then summarize[s] the medical evidence supporting her RFC
19 determination.” *Id.* As the Ninth Circuit recently reiterated in *Brown-Hunter*, “[t]his is

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21 with her medical records, which found her eligible for Seriously Mentally Ill (“SMI”)
22 benefits through the State of Arizona. (A.R. at 679-80.) Although the findings of other
23 agencies can be probative of disability when the criteria and evaluation processes are
24 similar to those utilized in Social Security disability cases, *see McCartney v. Massanari*,
25 298 F.23d 1072, 1075-76 (9th Cir. 2002), there is no evidence in the record regarding the
26 basis for the SMI determination. Velazquez bears the burden of proving that she is
27 disabled, and the ALJ did not err by not discussing a letter which, without some context
28 and explanation, has little probative value.

² Notably, although Drs. Rabara and Bowen thought Velazquez was exaggerating
her symptoms and observed that she provided inconsistent information about her past
trauma and substance abuse, the ALJ did not make a malingering finding when
discussing the credibility of Velazquez’s symptoms testimony. (A.R. 22-24.) A
reviewing court is “constrained to review the reasons the ALJ asserts,” *Connet v.*
Barnhart, 340 F.3d 871, 874 (9th Cir. 2003), and may not “affirm the agency [decision]
on a ground not invoked by the ALJ,” *Marsh v. Colvin*, 792 F.3d 1170, 1172 (9th Cir.
2015).

1 not the sort of explanation or the kind of ‘specific reasons’ [the Court] must have in order
2 to review the ALJ’s decision meaningfully” *Id.*

3 **III. Third-Party Report**

4 Finally, Velazquez argues that the ALJ improperly discredited the third-party
5 report of her daughter. The ALJ must take lay testimony regarding a claimant’s
6 symptoms into account unless the ALJ “expressly determines to disregard such testimony
7 and gives reasons germane to each witness for doing so.” *Lewis v. Apfel*, 236 F.3d 503,
8 511 (9th Cir. 2001). Here, the ALJ concluded that the statements of Velazquez’s
9 daughter were only partially credible, given that certain of Velazquez’s daily activities
10 were inconsistent with the severity of symptoms reported by her daughter. Additionally,
11 the ALJ found that Velazquez’s daughter is not unbiased because she has a familial
12 motivation and financial interest in seeing Velazquez receive benefits, considering the
13 two lived together. (A.R. at 24.) The ALJ offered germane reasons for only partially
14 crediting the third-party report of Velazquez’s daughter. The Court finds no error.³

15 **CONCLUSION**

16 For the foregoing reasons, the Court finds that the ALJ erred in weighing the
17 medical opinion evidence concerning the limiting effects of Velazquez’s physical
18 impairments and in discrediting Velazquez’s symptom testimony. However, given the
19 conflicts in the medical testimony, the Court finds that remanding for computation of
20 benefits is inappropriate. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090,
21 1105-07 (9th Cir. 2014). Instead, the Court remands this case for further proceedings.
22 On remand, the ALJ shall reassess and resolve the conflicting medical opinion evidence,
23 as well as Velazquez’s symptom testimony, consistent with *Brown-Hunter*.

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27 ³ Velazquez relies on *Brown-Hunter* to argue that the ALJ’s rationale for
28 discrediting the third-party report of her daughter is inadequate. However, *Brown-Hunter*
addressed the “specific reasons” standard applicable to claimant symptom testimony, not
the “germane reasons” standard applicable to third-party reports. 806 F.3d at 494.

