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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARILYN HARDT

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of the Social
Security Administration,

Defendant.

No. CIV 05-494-TUC-CKJ

ORDER

On September 17, 2007, Magistrate Judge Hector C. Estrada issued a Report and Recommendation [Doc. # 18] in which he recommended that Plaintiff’s Motion for Summary Judgment [Doc. # 12] be granted, Defendant's Cross-Motion for Summary Judgment [Doc. # 15] be denied, and this matter be remanded for an award of benefits. On October 5, 2007, Defendant filed Objections to Report and Recommendation.

Magistrate Judge’s Recitation of the Record on Appeal

Defendant asserts that the magistrate judge erred in presenting the subjective statements of Plaintiff Marilyn Hardt (“Hardt”) as fact. Defendant, however, does not dispute that the information recited was evidence included in the record. The Court adopts the recitation of the record on appeal as stated by the magistrate judge. However, the Court accepts the facts as stated by Hardt as subjective statements, subject to a credibility determination.

1 In addition to the facts as set forth by the magistrate judge, the Court finds mention
2 of the following additional facts to be appropriate.

3 Hardt was treated by Milton J. Klein, D.O., from May 2000 through September 2002.
4 Although Dr. Klein stated on December 15, 2003, that Hardt remained unimproved, he, at
5 other times, noted that Hardt responded well and had good results. Dr. Klein repeatedly
6 characterized Hardt as alert, cooperative, and stable.

7 In March 2003, Edward K. Lovejoy, Ph.D., conducted a mental status examination.
8 Dr. Lovejoy told Hardt that she could take a break outside during the course of the interview,
9 but Hardt did not exhibit any signs of distress. Hardt informed Dr. Lovejoy that she did her
10 own cooking, laundry, and bill paying and that she spent her time, reading, seeking medical
11 services, walking, and meeting people in the community. Dr. Lovejoy noted that Hardt was
12 alert, responsive, and talkative. Her speech was normal, eye contact strong, and her thought
13 processes were logical and coherent.

14 On March 17, 2003, Paul Tangeman, Ph.D., a state agency doctor, reviewed the record
15 and completed a psychiatric review technique form. The doctor concluded that Hardt's
16 depressive symptoms did not constitute a severe impairment. Dr. Tangeman noted that,
17 while Hardt was dramatic and obsessive, she maintained adequate social skills and there was
18 not a history of or records to support a psychosomatic disorder.

19 On December 31, 2003, B. Robert Crago, Ph.D., completed a disability evaluation
20 concerning Hardt. Although Dr. Crago opined that Hardt was disabled and would most
21 likely remain so in the foreseeable future, he did determine that Hardt's cognitive defects
22 were not totally disabling.

23 Dr. Crago completed a Mental Residual Functional Capacity Assessment. He opined
24 that Hardt was not significantly limited in 15 categories of functioning including sustaining
25 an ordinary routine without special supervision, work in coordination with others, and
26 making simple work-related decisions.

1 *Standard of Review*

2 The findings of the Commissioner are meant to be conclusive, 42 U.S.C. §§ 405(g),
3 1383(c)(3), and a decision to overturn a denial of benefits is appropriate only if the denial “is
4 not supported by substantial evidence or [if the denial] is based on legal error.” *Matney v.*
5 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992), *citations omitted*; *Massachi v. Astrue*, 486 F.3d
6 1149 (9th Cir. 2007). “Substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
8 Cir. 2007). The standard is less than a “preponderance of the evidence” standard. *Matney*,
9 981 F.2d at 1019. Further, a denial of benefits is to be set aside if the Commissioner has
10 failed to apply the proper legal standards in weighing the evidence even though the findings
11 may be supported by substantial evidence. *Frost v. Barnhart*, 314 F.3d 359, 367 (9th Cir.
12 2002). Indeed, this Court must consider both evidence that supports, and evidence that
13 detracts from, the conclusion of the Administrative Law Judge (“ALJ”). *Frost*, 314 F.3d at
14 366-67.

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16 *Credibility of Hardt*

17 Defendant asserts that the magistrate judge improperly reassessed the evidence in
18 rejecting the ALJ’s reasons for finding Hardt not fully credible. Defendant, referring to his
19 Brief in Support of Defendant’s Cross-Motion for Summary Judgment and in Opposition to
20 Plaintiff’s Motion for Summary Judgment (“Defendant’s Brief”), sets forth that the ALJ
21 noted that Hardt alleged symptoms out of proportion to the objective findings, 20 C.F.R. §
22 404.1529(b) (medical evidence must reasonably support subjective claims); *Rollins v.*
23 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (addressing objective evidence in context of
24 credibility analysis), noted the Hardt’s objective findings were consistently referred to as
25 mild or minimal, and noted that Hardt showed evidence of somatization, i.e., doctors reported
26 the Hardt’s symptoms were out of proportion to the evidence. The ALJ also noted that,
27 although Hardt alleged disability based on confusion, fatigue and pain, Hardt was able to
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1 read, visit, shop, do laundry and cook – the ALJ noted that the physical and mental demands
2 of maintaining a household and Hardt’s social interaction were consistent with a significant
3 degree of overall functioning. *See* 20 C.F.R. § 404.1529(c)(3)(i) (daily activities considered
4 in credibility analysis); *Rollins*, 261 F.3d at 586 (“maintaining a household and raising two
5 young children, with no significant assistance from her ex husband” inconsistent with
6 disability); *Morgan v. Commissioner*, 169 F.3d 595, 600 (9th Cir. 1999) (ALJ properly
7 concluded subjective complaints were exaggerated where claimant fixed meals, did laundry,
8 worked in yard and occasionally cared for a friend’s child). However, the Court notes that
9 Dr. Rothbaum, a state agency examining physician, diagnosed a fibromyalgia-like syndrome
10 with entities of depression, fatigue, and cognitive impairment. The ALJ also stated that
11 Hardt’s ability to take a 12 day trip to Germany was inconsistent with her claim of disability.
12 The ALJ also noted that Hardt showed no evidence of weight loss, diffuse atrophy or muscle
13 wasting, which are common side effects of disabling pain. *Macri*, 93 F.3d at 540; *Meanel*
14 *v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (claimant who did not show muscle atrophy
15 or other physical signs of a totally disabled person not fully credible).

16 Hardt has produced objective medical evidence of an underlying impairment that
17 could reasonably give rise to her symptoms. Moreover, there has not been an affirmative
18 finding of malingering by the ALJ. The ALJ’s reasons for rejecting Hardt’s testimony,
19 therefore, must be clear and convincing. *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007).
20 “The ALJ must state specifically which symptom testimony is not credible and what facts
21 in the record lead to that conclusion.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).

22 The ALJ found that Hardt’s stated symptoms of confusion, fatigue and pain were not
23 consistent with Hardt ability to read, visit, shop, do laundry and cook. The ALJ has set forth
24 specific symptom testimony and what facts he relied upon to determine it was not credible.
25 “With respect to daily activities, [the Ninth Circuit] has held that if a claimant ‘is able to
26 spend a *substantial part* of her day engaged in pursuits involving the performance of physical
27 functions that are transferable to a work setting, a specific finding as to this fact may be
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1 sufficient to discredit a claimant's allegations.'" *Vertigan v. Halter*, 260 F.3d 1044, 1049
2 (9th Cir. 2001). In *Vertigan*, the court noted that Vertigan's physical activities (grocery
3 shopping, hour-long walks, getting together with friends, swimming, watching television,
4 reading, taking physical therapy, and exercising at home), did not consume a substantial part
5 of Vertigan's day. *Id.* at 1049-50. Similarly, in this case, Hardt's activities did not consume
6 a substantial part of Hardt's day. See also *Benecke v. Barnhart*, 379 F.3d 587 (9th Cir.
7 2004). The Court considers that Hardt's activities did not consume a substantial part of her
8 day in determining whether the ALJ has set forth clear and convincing reasons for finding
9 that Hardt was not credible.

10 The ALJ also noted that Hardt's ability to take a 12 day trip to Germany was
11 inconsistent with her claim of disability. However, the Ninth Circuit has found that periodic
12 restricted travel does not gainsay a claim of disability. *Howard v. Heckler*, 782 F.2d 1484,
13 1488 (9th Cir. 1986). Moreover, Hardt asserts, and the documentation of Dr. Klein supports,
14 that Hardt received medical treatment while she was in Germany. Again, the Court considers
15 the entire circumstances, as set forth in the record, in determining whether the ALJ has set
16 forth clear and convincing reasons for finding Hardt was not credible.

17 The ALJ also noted that Hardt showed no evidence of weight loss, diffuse atrophy,
18 or muscle wasting, which are common side effects of disabling pain. The magistrate judge
19 concluded, based on the stated weight contained in the medical reports, that Hardt had lost
20 14 to 17 pounds between 2000 and 2004. Additionally, Defendant noted Hardt reported a
21 weight loss of 4½ pounds between April 2004 and July 2004. The record does show a
22 weight loss and the ALJ does not set forth any basis for concluding why either a 4½ or 17
23 pound weight loss should not be considered. Furthermore, while diffuse muscle wasting is
24 a *common* side effect of disabling pain, there is no medical evidence in the record that muscle
25 wasting (or weight loss) necessarily accompanies disabling pain. The record established (and
26 the ALJ found) that Hardt is able to perform some daily activities. Further, she participated
27 in treatments and a home stretching program. There is no basis in the record to disbelieve
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1 Hardt because she did not show evidence of diffuse atrophy or muscle wasting. The Court
2 does not find this reason to be a clear and convincing reason to discount Hardt’s testimony.

3 The ALJ also cited to Hardt’s symptom testimony that she was unable to work
4 because of fatigue, confusion, low back pain radiating to the hands and legs, chest pain,
5 shortness of breath, and dizziness, but determined that it could be inferred that Hardt has
6 maintained a somewhat normal level of daily activity and interaction. As to Hardt’s
7 testimony regarding low back pain, Dr. Cameron assessed scoliosis with upper body, neck
8 spasm, and recurrent hip pain. Further, when Hardt saw Dr. Pfoff for complaints of pain in
9 her fingers, his exam showed some very minimal degenerative changes. The remaining
10 symptoms were repeatedly reported to medical professions as documented in their reports.
11 The Court notes that “pain is a highly idiosyncratic phenomenon, varying according to the
12 pain threshold and stamina of the individual victim[.]” *Howard v. Heckler*, 782 F.2d 1484,
13 1488 (9th Cir. 1986); *see also Rogers v. Commissioner of Social Security*, 486 F.3d 234, 248
14 (6th Cir. 2007) (“given the nature of fibromyalgia, where subjective pain complaints play an
15 important role in the diagnosis and treatment of the condition, providing justification for
16 discounting a claimant’s statements is particularly important”). The Court considers the
17 variances of pain in determining whether the ALJ has set forth clear and convincing reasons
18 for finding Hardt was not credible.

19 The ALJ also found that the numerous references in the medical evidence to Hardt’s
20 noncompliance with the medical regimen specified by her physicians as a basis for
21 determining that Hardt was not credible – the ALJ found that Hardt’s noncompliance did not
22 support the intensity and duration of the pain and subjective complaints as reported by Hardt.
23 However, the ALJ failed to cite to any of the numerous references. Where a claimant had
24 a good reason for not taking medication, that failure cannot be relied upon as a basis for
25 determining that the claimant is not credible. *See Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir.
26 1989). Hardt has explained why she did not take certain medications (e.g., she only took the
27 flurbiprofen at night because it made her sleepy, she stopped taking sholestyramine because
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1 of swelling in her ankles). The ALJ has not supported his decision by reference to any
2 medication regimen not followed by Hardt without a reason. The Court finds this does not
3 present a clear and convincing reason to find Hardt's testimony to not be credible.

4 Furthermore, Defendant asserts that the magistrate judge inappropriately acted as a
5 fact finder in rejecting the ALJ's conclusions. However, the reviewing court is to determine
6 whether or not the ALJ has set forth clear and convincing reasons for rejecting a claimant's
7 testimony. The magistrate judge's review of whether the ALJ's reasons set forth a clear and
8 convincing basis for rejecting Hardt's testimony, therefore, is appropriate. However, the
9 Court disagrees with the magistrate judge's determination that the ALJ did not provide
10 legally sufficient reasons for rejecting Hardt's credibility. The ALJ set forth his reasons and,
11 while each reason alone may not provide a clear and convincing reason to discount Hardt's
12 testimony, the cumulative reasons are reasonable and supported by substantial evidence.
13 *Rogers*, 486 F.3d 249.

14 15 *Treating Physicians' Opinions*

16 Defendant asserts that the ALJ correctly rejected the opinions of disability proffered
17 by Hardt's treating doctors. In evaluating evidence to determine whether a claimant is
18 disabled, the opinions of treating physicians are entitled to great weight. *Curry v. Sullivan*,
19 925 F.2d 1127, 1129 (9th Cir. 1989). Where a treating physician's opinion contradicts the
20 opinion of an examining or consulting physician, there must be "specific and legitimate
21 reasons' supported by substantial evidence in the record" to reject a treating physician's
22 opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996), quoting *Murray v. Heckler*, 722
23 F.2d 499, 502 (9th Cir. 1983). Where the treating physician's opinion is not contradicted,
24 the opinion may be rejected as long as clear and convincing reasons are given. *Montijo v.*
25 *Secretary of HHS*, 729 F.2d 599, 601 (9th Cir. 1984).

26 Dr. Klein determined that Hardt was unable to continue working as a speech
27 pathologist. The ALJ did not set for any reasons, let alone specific and legitimate reasons
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1 supported by substantial evidence in the record, to discount Dr. Klein's opinion. The Court
2 finds the ALJ, having failed to provide specific reasons for rejecting Dr. Klein's opinion,
3 improperly rejected Dr. Klein's opinion. Dr. Klein's opinion, therefore, is credited as a
4 matter of law. *Lester*, 81 F.3d at 834.

5 Dr. Kerry opined that Hardt, after her move to Arizona, continued to be disabled for
6 her occupation and that it would appear to be impossible for her to work in the area due to
7 the prevalent mold environment. The ALJ stated that Dr. Kerry did not provide rationale for
8 his opinion. However, Dr. Kerry's records documented Hardt's claims of allergic rhinitis,
9 sinusitis, physical reaction to allergy injections, and complaints of physical discomfort that
10 he attributed to Hardt's allergies including mold sensitivity. Further, Dr. Kerry's records
11 document testing and treatment of Hardt (e.g., IgE Rast, dilution of dust mold serum).
12 Moreover, the ALJ's finding that Hardt must work in an environment that is free of fumes,
13 chemicals, mold, dust, humidity and other airborne irritants is inconsistent with his rejection
14 of Dr. Kerry's rationale for his opinions. The Court finds the ALJ failed to provide specific
15 and *legitimate* reasons for rejecting Dr. Kerry's opinion. Dr. Kerry's opinion, therefore, is
16 credited as a matter of law.

17 Dr. Gray identified work restrictions which would render Hardt disabled under the
18 Act. The ALJ did not reject Dr. Gray's opinion, but did not give Dr. Gray's opinion
19 significant weight because it was based on diagnoses which were not generally accepted in
20 the medical community. Determination of the weight to afford Dr. Gray's opinion requires
21 consideration of (1) the frequency of examination and the length, nature, and extent of the
22 treatment relationship; (2) the evidence in support of Dr. Gray's opinion; (3) the consistency
23 of the opinion and the record as a whole; (4) whether Dr. Gray is a specialist, and; (5) other
24 factors that would support or contradict Dr. Gray's opinion. 20 C.F.R. § 404.1527(d)(2)-(6).

25 As stated by the magistrate judge:

26 Dr. Gray began treating [Hardt] after her arrival in Arizona in July 2003 and saw her
27 on a regular basis through the date of the ALJ's decision. [Citations omitted.] In
28 detailed treatment notes, he documented [Hardt's] test results, the findings of his

1 physical examinations, [Hardt's] reports about her symptoms, his observations of
2 same, and [Hardt's] responses to various medication, supplements and treatments. He
3 prescribed an array of medications, made recommendations concerning air filters, and
4 administered trigger point injections.

5 R & R, p. 51. Furthermore, examining physician Dr. Rothbaum had asserted that treating
6 physician Dr. Gray's diagnosis of mycotoxicosis was not a generally accepted medical
7 diagnosis. Yet, Dr. Gray determined that Hardt's impairments included mold and chemical
8 sensitivity as supported by laboratory testing and physical examination. This opinion was
9 consistent with Dr. Kerry's opinion that Hardt was unable to work due to mold and chemical
10 sensitivities. Although not referring to mycotoxicosis, the ALJ also accepted the mold and
11 chemical sensitivities of Hardt because the ALJ determined Hardt must work in an
12 environment that is free of fumes, chemicals, mold, dust, humidity and other airborne
13 irritants. Moreover, Dr. Gray had also diagnosed a fibromyalgia-like syndrome – Dr.
14 Rothbaum also diagnosed a fibromyalgia-like syndrome. The ALJ, therefore, was not
15 specific in this reason (not generally accepted in medical community) for not giving Dr.
16 Gray's opinion (functional limitations which Dr. Gray asserted rendered Hardt disabled
17 under the Act.) significant weight.¹ Additionally, Dr. Gray's opinion of a fibromyalgia-like
18 syndrome is consistent with Dr. Rothbaum's finding of "[f]ibromyalgia-like syndrome (with
19 entities of depression, fatigue, and cognitive impairment)[.]" A.R. 351. Similarly, Dr.
20 Gray's opinion of mold and chemical sensitivity is consistent with Dr. Rothbaum's finding
21 that Hardt's exposure to dust, humidity, wetness, fumes, odors, chemicals, and gases should
22 be limited. This opinion is also consistent with non-examining physicians Frank A.
23 Shallenberger, Jr., M.D., and the July 9, 2003 consultant (name illegible) who completed a
24 Residual Functional Capacity Assessment.

25 The ALJ also stated that Dr. Gray's opinion was not entitled to significant weight
26 because it appeared to rely a great deal on Hardt's less than credible subjective complaints

27 ¹Indeed, the ALJ concluded that Hardt suffered from the severe impairment of a
28 fibromyalgia-like syndrome.

1 and because Dr. Gray’s opinion was inconsistent with Hardt’s actual activity level. These
2 “other factors” that may contradict Dr. Gray’s opinion are appropriately considered in
3 determining the weight that should be given to Dr. Gray’s opinion. 20 C.F.R. §
4 404.1527(d)(6). However, a “patient’s report of complaints or history[] is an essential
5 diagnostic tool.” *Green-Younger v. Barnhart*, 335 F.3d 99, 107 (2nd Cir. 2003); *see also*
6 *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998) (disagreeing with ALJ’s rejection of
7 physician’s opinion for relying on subjective complaints because chronic fatigue syndrome
8 is primarily evaluated on the basis of plaintiff’s subjective complaints).

9 The ALJ’s decision indicates that he only considered these “other factors,” and not
10 all of the factors set forth in 20 C.F.R. § 404.1527(d)(2)-(6). When all factors are considered,
11 the Court finds that the ALJ has not set forth specific and *legitimate* reasons supported by
12 *substantial evidence* to reject Dr. Gray’s opinion. Dr. Gray’s opinion, therefore, is credited
13 as a matter of law.

14
15 *Lay Testimony*

16 Defendant asserts that the magistrate judge incorrectly considered the statements of
17 lay witnesses because Hardt did not present that argument on appeal. Judicial review is
18 appropriate “only [on] issues which are argued specifically and distinctly in a party’s opening
19 brief.” *Independent Towers of Washington, Inc. v. Washington*, 350 F.3d 925, 929 (9th Cir.
20 2003), *quoting Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).
21 “Because the testimony of the lay witnesses encompassed only symptoms, any failure of the
22 ALJ to adequately address that testimony does not affect the outcome of this case.” *Ukolov*
23 *v. Barnhart*, 420 F.3d 1002, 1006 n. 6 (9th Cir. 2005). The Court declines to find that the
24 ALJ’s failure to address the statements of the lay witnesses requires reversal because Hardt
25 has failed to present this issue on appeal.

1 *Remand for Benefits or Remand for Further Development*

2 Hardt has requested this Court to determine that she is disabled on the existing record
3 and remand for an award of benefits. Defendant asserts, however, that this Court should
4 remand for further vocational development. A reviewing court should "credit improperly
5 rejected evidence" and remand the matter for an award of benefits when:

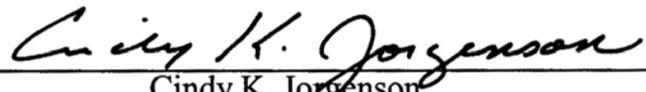
- 6 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence,
7 (2) there are no outstanding issues that must be resolved before a determination of
8 disability can be made, and (3) it is clear from the record that the ALJ would be
9 required to find the claimant disabled were such evidence credited.

10 *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003). In this case, the ALJ failed to
11 provide legally sufficient reasons for rejecting the opinions of Drs. Klein, Kerry, and Gray.
12 The Court has found it appropriate to credit their opinions as a matter of law. Dr. Klein's
13 opinion that Hardt is unable to continue working as a speech pathologist, Dr. Kerry's opinion
14 that Hardt continues to be disabled for her occupation (and the impossibility to work due to
15 prevalent mold environment), and Dr. Gray's opinion regarding work restrictions which
16 would render Hardt disabled under the Act establishes that there are no outstanding issues
17 that must be resolved before a determination can be made and it is clear from the record that
18 the ALJ would be required to find Hardt disabled were such evidence credited.

19 Accordingly, after an independent review, IT IS ORDERED:

- 20 1. The Report and Recommendation [Doc. # 18] is ADOPTED in part;
21 2. Plaintiff's Motion for Summary Judgment [Doc. # 12] is GRANTED;
22 3. Defendant's Cross-Motion for Summary Judgment [Doc. # 15] is DENIED;
23 4. The decision of the ALJ is REVERSED;
24 5. This matter is REMANDED for an award of benefits, and;
25 6. The Clerk of the Court shall enter judgment in this case and shall then close
26 its file in this matter.

27 DATED this 6th day of February, 2008.

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Cindy K. Jorgenson
United States District Judge