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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KIMBERLY KEZELI,	)	Case No. CV 11-8251-PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
COMMISSIONER OF THE	)	
SOCIAL SECURITY ADMINISTRATION,	)	
	)	
Defendant.	)	

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I.

INTRODUCTION

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying her application for disability insurance benefits ("DIB") and Supplemental Security Income ("SSI"). Plaintiff claims that the Administrative Law Judge ("ALJ") erred when he failed to take into account the opinions of the medical expert and the treating psychiatrist who believed that she would have difficulty maintaining a job. For the reasons set forth below, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings.

1 II.

2 SUMMARY OF PROCEEDINGS

3 In 2006, Plaintiff Kimberly Kezeli applied for DIB and SSI,  
4 alleging that she had been unable to work since October 2004, due to  
5 depression, bipolar disorder, anxiety, fibromyalgia, and lower back  
6 problems. (Administrative Record ("AR") 194, 212-19, 224.) The  
7 Agency denied the application initially and on reconsideration. (AR  
8 114-22, 126-30.) She then requested and was granted a hearing before  
9 an ALJ. (AR 71, 132.) Plaintiff appeared with counsel and testified  
10 at the hearing. (AR 88-113.) The ALJ subsequently issued a decision  
11 denying benefits. (AR 30-44.) Plaintiff appealed to the Appeals  
12 Council, which denied review. (AR 13-15.) This action followed.

13 III.

14 ANALYSIS

15 A. The ALJ's Treatment of the Medical Expert's Opinion

16 Plaintiff contends that the ALJ erred when he failed to address  
17 the medical expert's opinion that Plaintiff would have difficulty  
18 sustaining a full-time job. (Joint Stip. at 13-16, 18-19.) The  
19 Agency disagrees. Acknowledging that the ALJ failed to explicitly  
20 discuss the medical expert's opinion, it argues that the ALJ took the  
21 opinion into account and essentially adopted it in formulating the  
22 residual functional capacity finding. (Joint Stip. at 16-18.) For  
23 the following reasons, the Court finds that the ALJ erred when he  
24 failed to address the medical expert's opinion and that remand is  
25 required to give him an opportunity to do so.

26 The ultimate issue in this case was whether Plaintiff would be  
27 able to maintain a full-time job despite the fact that she suffered  
28 from affective disorder (either bipolar disorder or major depressive

1 disorder) and generalized anxiety. Plaintiff's treating psychiatrist  
2 believed that she would not be able to do so. The reviewing and  
3 examining doctors felt that she could. The ALJ called a medical  
4 expert at the administrative hearing, presumably in an effort to sort  
5 this out. This doctor summarized Plaintiff's medical and psychiatric  
6 treatment records. (AR 103-04.) He then pointed out that Plaintiff  
7 was working part time and questioned whether she would be able to  
8 sustain full-time employment:

9           So, I mean, even though she can do these tasks  
10           like this I don't really think that she's been  
11           able to sustain these tasks. But she's making an  
12           effort now to try to do so. And her [treating  
13           psychiatrist], you know, Dr. Fisher back in  
14           California said she can't do it. I'm sort of on  
15           the fence about that. She ought to be able to do  
16           some of these things but she's heavily medicated,  
17           she's tired, she's in pain a lot and she has been  
18           missing work, so I don't know about  
19           sustainability. *Sustainability is more like a*  
20           *goal than it is a reality at present time.*

21 (AR 105 (emphasis added).)

22           The ALJ did not discuss the medical expert's opinion at all in  
23 reaching his conclusion that Plaintiff could sustain full-time work.  
24 (AR 41-42.) This was error. The medical expert's opinion was  
25 critical to the resolution of this case and should have been  
26 discussed. Had the ALJ accepted the medical expert's opinion, it  
27 appears that he would have had to conclude that Plaintiff could not  
28 hold down a full-time job. The Court finds that remand is required to

1 allow the ALJ to reconcile his finding that Plaintiff can hold down a  
2 full-time job with the medical expert's opinion that sustaining full-  
3 time work is more likely "a goal than it is a reality at present  
4 time." (AR 105.)

5 The Agency argues that the ALJ tacitly accepted and then adopted  
6 the medical expert's testimony in reaching his decision as evidenced  
7 by the fact that he essentially adopted the medical expert's residual  
8 functional capacity assessment. (Joint Stip. at 16.) This argument  
9 is rejected. In the first place, generally speaking, the Court will  
10 not assume that an ALJ has tacitly accepted a doctor's opinion.<sup>1</sup> The  
11 rules and regulations that govern social security cases as well as the  
12 case law that has developed over the years mandate that an ALJ address  
13 a doctor's opinion and explain why it is or is not entitled to weight.  
14 See, e.g., *Tackett v. Apfel*, 180 F.3d 1094, 1102-03 (9th Cir. 1999)  
15 (holding ALJ erred in disregarding medical expert's testimony without  
16 giving reasons for doing so). The ALJ's failure to do so here was  
17 error.

18 Second, the Court disagrees with the Agency that the ALJ  
19 essentially adopted the medical expert's opinion. Clearly, the  
20 medical expert was concerned that Plaintiff could not sustain full-  
21 time employment. There is nothing in the ALJ's decision to reflect  
22 that concern. In fact, the ALJ concluded that Plaintiff could work  
23 full time, without qualification.

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26 <sup>1</sup> In his decision, the ALJ mentioned that the medical expert had  
27 testified in discussing the fact that Plaintiff did not meet the  
28 requirements of any of the Listings. (AR 35.) But, other than that  
brief mention, the ALJ never discussed the medical expert or the  
medical expert's opinions.

1 Finally, it defies common sense to believe that the ALJ would  
2 carefully craft a 15-page decision, discussing all of the medical  
3 evidence and all of the opinions of the other doctors and then, when  
4 it came to the basis for his residual functional capacity finding,  
5 simply leave out the evidence he was relying on, leaving it to the  
6 reader to assume that he must have been relying on the opinion of a  
7 doctor he did not discuss.

8 For these reasons, remand is required. On remand, the ALJ should  
9 address the medical expert's testimony and, if the ALJ concludes again  
10 that Plaintiff can work full time, he should explain how that  
11 conclusion can be reconciled with the medical expert's opinion that  
12 she cannot.

13 B. The Treating Doctor's Opinion

14 Plaintiff also takes exception to the ALJ's rejection of the  
15 opinion of her treating psychiatrist Duke D. Fisher. Dr. Fisher  
16 believed that Plaintiff was completely disabled due to chronic mental  
17 illness. (AR 586.) The ALJ rejected this opinion because: (1) it was  
18 an opinion of disability, which is reserved to the ALJ; (2) it  
19 appeared to be a mere recitation of Plaintiff's description of her  
20 symptoms; (3) it was not supported by objective medical evidence;  
21 (4) Dr. Fisher's treatment was brief, only seven months; and (5) Dr.  
22 Fisher's opinion was inconsistent with the other doctors' opinions.  
23 For the reasons explained below, the Court remands this issue as  
24 well.<sup>2</sup>

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26 <sup>2</sup> The Agency argues that the ALJ also based this finding on the  
27 fact that Dr. Fisher had not provided any treatment notes, citing to  
28 page 41 of the record. (Joint Stip. at 9.) The Court was unable to  
find any reference to Dr. Fisher's treatment notes at page 41 or any

(continued...)

1 Dr. Fisher's ultimate opinion that Plaintiff was disabled is an  
2 issue left to the ALJ. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th  
3 Cir. 2001). As such, the ALJ was empowered to reject that portion of  
4 the opinion for that reason. *Id.* That does not, however, support a  
5 wholesale dismissal of the entire opinion.

6 The ALJ was warranted in questioning Dr. Fisher's opinion because  
7 it appeared that it was based in large measure on Plaintiff's claimed  
8 symptoms and the ALJ found that Plaintiff was not credible--a finding  
9 that she does not challenge here. See *Morgan v. Comm'r of Soc. Sec.*,  
10 169 F.3d 595, 602 (9th Cir. 1999) (approving ALJ's rejection of  
11 psychiatrists' opinions based, in part, on the fact that they were  
12 premised on claimant's subjective complaints, which the ALJ found to  
13 be incredible); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)  
14 (upholding ALJ's rejection of treating doctor's opinion that was based  
15 solely on discredited statements claimant made to treating doctor).

16 The ALJ's third reason for rejecting Dr. Fisher's opinion was  
17 that it was not supported by the objective evidence in the record.  
18 (AR 41.) The ALJ does not explain what objective evidence he is  
19 referring to. As such, the Court cannot uphold the ALJ's rejection of  
20 Dr. Fisher's opinion on this ground. See *Regennitter v. Comm'r*, 166  
21 F.3d 1294, 1299 (9th Cir. 1999) ("To say that medical opinions are not  
22 supported by sufficient objective findings or are contrary to the  
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24 <sup>2</sup> (...continued)  
25 other page and assumes that what the Agency is referring to is the  
26 following sentence from page 41: "[Dr. Fisher's opinions] are not  
27 supported by objective or subjective evidence submitted by Dr. Fisher  
28 independently or contained elsewhere in the record." (AR 41.) The  
Court acknowledges that Plaintiff's failure to submit the treatment  
notes from Dr. Fisher undermines Dr. Fisher's opinion. On remand,  
Plaintiff should obtain these notes and submit them to the ALJ.

1 preponderant conclusions mandated by the objective findings does not  
2 achieve the level of specificity our prior cases have required[.]”  
3 (citation omitted).

4 The ALJ’s fourth reason was that Dr. Fisher only treated  
5 Plaintiff for seven months. (AR 41.) That reason is rejected out of  
6 hand. First, seven months is more than an adequate period of time for  
7 Dr. Fisher to become well acquainted with Plaintiff’s condition and  
8 render an opinion on it, particularly in light of Dr. Fisher’s  
9 statement that he was seeing her every two weeks during that period.  
10 See generally *Benton v. Barnhart*, 331 F.3d 1030, 1035-39 (9th Cir.  
11 2003) (declining to hold that doctor who may have seen patient only  
12 once did not have “treating physician” status). Second, in lieu of  
13 relying on Dr. Fisher’s opinion, the ALJ chose to rely on the opinions  
14 of the examining doctor, who saw Plaintiff only once, and the  
15 reviewing doctors, who never saw her at all. (AR 41-42.) The ALJ  
16 must treat the doctors equally. If approximately 28 visits over seven  
17 months is not enough to know a patient sufficiently to render an  
18 opinion, then certainly one visit or no visits disqualify the  
19 examining and treating doctors as well. See, e.g., *Suseyi v. Astrue*,  
20 2010 WL 842329, at \*5 (W.D. Wash. Mar. 8, 2010) (holding that “having  
21 ‘met claimant only once’ is not a convincing or legitimate ground to  
22 reject a medical opinion. If it were, the opinions of most examining  
23 doctors . . . should be rejected.”).

24 Finally, the ALJ concluded that Dr. Fisher’s opinion was entitled  
25 to less weight because it was inconsistent with the other doctors’  
26 opinions. Though this is a valid reason for not giving a treating  
27 doctor’s opinion controlling weight, see, e.g., *Orn v. Astrue*, 495  
28 F.3d 625, 631 (9th Cir. 2007), it is not necessarily supported by the

1 record. Though some of the doctors disagreed with Dr. Fisher, not all  
2 of them did, particularly the medical expert who, like Dr. Fisher,  
3 questioned whether Plaintiff could sustain full-time employment. On  
4 remand, the ALJ should address this reason as well.<sup>3</sup>

5 IV.

6 CONCLUSION

7 For these reasons, the Agency's decision is reversed and the case  
8 is remanded for further consideration.<sup>4</sup>

9 IT IS SO ORDERED.

10 DATED: November 26, 2012.

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13 PATRICK J. WALSH  
14 UNITED STATES MAGISTRATE JUDGE

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21 \_\_\_\_\_  
22 <sup>3</sup> Where, as here, the Court finds that some of the ALJ's reasons  
23 for questioning the treating doctor are valid and others are not, the  
24 Court remands the issue to allow the ALJ to reconsider it and decide  
25 in the first instance whether the valid reasons are enough to reject  
26 the opinion. See *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d  
27 1155, 1162 (9th Cir. 2008) (noting relevant harmless error inquiry "is  
28 whether the ALJ's decision remains legally valid, despite [the ALJ's]  
error.").

<sup>4</sup> The Court has considered Plaintiff's request that the case be  
remanded for an award of benefits and finds that this relief is not  
warranted here because it is not clear whether Plaintiff is entitled  
to benefits.