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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ALEX SOLIS,)	NO. CV 14-8620-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, Acting)	AND ORDER OF REMAND
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
judgment are denied, and this matter is remanded for further
administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on November 13, 2014, seeking review
of the Commissioner's denial of benefits. The parties consented to
proceed before a United States Magistrate Judge on December 29, 2014.
Plaintiff filed a motion for summary judgment on April 14, 2015.

1 Defendant filed a motion for summary judgment on May 14, 2015. The
2 Court has taken the motions under submission without oral argument.
3 See L.R. 7-15; "Order," filed November 13, 2014.

4
5 **BACKGROUND**

6
7 Plaintiff, a former clerk, painter and housekeeper, asserts
8 disability since March 8, 2006, based on exertional and non-exertional
9 impairments (Administrative Record ("A.R.") 23, 71-92, 189). The
10 Administrative Law Judge ("ALJ") found Plaintiff suffers from several
11 severe impairments, but retains the residual functional capacity to
12 perform a limited range of light work (A.R. 25-26). In defining
13 Plaintiff's functional capacity, the ALJ purported to adopt the
14 opinions of Dr. Gregory Lercel, Plaintiff's treating orthopedist (A.R.
15 29). The ALJ stated:

16
17 I have given great weight to the opinion of Dr. Lercel. He
18 is the claimant's attending physician. He is a specialist
19 in orthopedics. His opinion is supported by his course of
20 treatment and objective findings contained in his progress
21 notes. . . . I have incorporated his findings into the
22 claimant's maximum sustained residual functional capacity.
23 . . . I have adopted the exertional and non-exertional
24 limits as endorsed by attending orthopedic physician Lercel
25 (A.R. 29).

26
27 In fact, for reasons nowhere specifically explained in the ALJ's
28 decision, the ALJ did not adopt certain of Dr. Lercel's opinions

1 regarding Plaintiff's functional limitations, including Dr. Lercel's
2 opinions that Plaintiff would have to shift positions at will, walk
3 for 10 minutes after every 90 minutes of work, and be absent from work
4 approximately one day per month (Compare A.R. 26 (the residual
5 functional capacity defined by the ALJ) with A.R. 437-38 (the opinions
6 of Dr. Lercel)).¹

7
8 The ALJ determined that Plaintiff could not perform his past
9 relevant work (A.R. 29). In reliance on the testimony of a vocational
10 expert, however, the ALJ identified other jobs performable by a person
11 having the residual functional capacity the ALJ found to exist (A.R.
12 30-31, 92-93). The ALJ therefore denied disability benefits (A.R.
13 31). The Appeals Council denied review (A.R. 5-7).

14
15 **STANDARD OF REVIEW**

16
17 Under 42 U.S.C. section 405(g), this Court reviews the
18 Administration's decision to determine if: (1) the Administration's
19 findings are supported by substantial evidence; and (2) the
20 Administration used correct legal standards. See Carmickle v.
21 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
22 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,
23 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
24 relevant evidence as a reasonable mind might accept as adequate to

25
26 ¹ The residual functional capacity defined by the ALJ
27 also failed to adopt Dr. Lercel's opinions that Plaintiff can
28 stand and walk "less than 2 hours," lift 10 pounds only
"occasionally" and lift 20 pounds only "rarely" (Compare A.R. 26
with A.R. 437).

1 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
2 (1971) (citation and quotations omitted); see also Widmark v.
3 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

4
5 If the evidence can support either outcome, the court may
6 not substitute its judgment for that of the ALJ. But the
7 Commissioner's decision cannot be affirmed simply by
8 isolating a specific quantum of supporting evidence.
9 Rather, a court must consider the record as a whole,
10 weighing both evidence that supports and evidence that
11 detracts from the [administrative] conclusion.

12
13 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and
14 quotations omitted).

15
16 **DISCUSSION**

17
18 Plaintiff contends, inter alia, the ALJ materially erred with
19 respect to the opinions of Dr. Lercel. For the reasons discussed
20 herein, the Court agrees. Remand for further administrative
21 proceedings is appropriate.

22
23 A treating physician's conclusions "must be given substantial
24 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see
25 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must
26 give sufficient weight to the subjective aspects of a doctor's
27 opinion. . . . This is especially true when the opinion is that of a
28 treating physician") (citation omitted); see also Orn v. Astrue, 495

1 F.3d 625, 631-33 (9th Cir. 2007) (discussing deference owed to
2 treating physician opinions). Even where the treating physician's
3 opinions are contradicted,² "if the ALJ wishes to disregard the
4 opinion[s] of the treating physician he . . . must make findings
5 setting forth specific, legitimate reasons for doing so that are based
6 on substantial evidence in the record." Winans v. Bowen, 853 F.2d
7 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);
8 see Rodriguez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the
9 treating physician's opinion, but only by setting forth specific,
10 legitimate reasons for doing so, and this decision must itself be
11 based on substantial evidence") (citation and quotations omitted).
12

13 As detailed in the "Background" section, supra, the ALJ's
14 decision purported to adopt Dr. Lercel's opinions regarding
15 Plaintiff's limitations, but actually defined a residual functional
16 capacity inconsistent with those opinions. At least two possibilities
17 exist: (1) the ALJ intended to adopt all of Dr. Lercel's limitations
18 into the residual functional capacity assessment but wrote a decision
19 that failed to implement this intent; or (2) the ALJ intended to
20 reject certain of Dr. Lercel's limitations, but wrote a decision that:
21 (a) claimed to adopt all of Dr. Lercel's limitations, and (b) failed
22 to offer any specific explanation for the implicit rejection of
23 certain of Dr. Lercel's limitations.

24 ///

26
27 ² Rejection of an uncontradicted opinion of a treating
28 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1 Under the first possibility, the residual functional capacity
2 defined in the ALJ's decision and incorporated into the hypothetical
3 question posed to the vocational expert would be in factual error.
4 Such an error could be material. Where a hypothetical question fails
5 to "set out all of the claimant's impairments," the vocational
6 expert's answers to the question cannot constitute substantial
7 evidence to support the ALJ's decision. See, e.g., DeLorme v.
8 Sullivan, 924 F.2d 841, 850 (9th Cir. 1991); Gamer v. Secretary, 815
9 F.2d 1275, 1280 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d at 1456.

10
11 Under the second possibility, the ALJ's implicit, unexplained
12 rejection of certain of Dr. Lercel's limitations would constitute
13 legal error. See Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir.
14 1990) (implicit rejection of treating physician's opinion cannot
15 satisfy Administration's obligation to set forth "specific, legitimate
16 reasons"); see also Lingenfelter v. Astrue, 504 F.3d 1028, 1038 n.10
17 (9th Cir. 2007) (the ALJ cannot avoid the requirement of setting forth
18 "specific legitimate reasons" by failing to mention the treating
19 physician's opinion and making findings contrary to it).³ Such an
20 error also could be material. McLeod v. Astrue, 640 F.3d 881, 887
21 (9th Cir. 2011) (error not harmless where "the reviewing court can
22 determine from the 'circumstances of the case' that further
23 administrative review is needed to determine whether there was

24
25 _____
26 ³ Defendant suggests reasons allegedly supporting the
27 implicit rejection of certain of Dr. Lercel's opinions
28 (Defendant's Motion at 6-7). However, the Court "cannot affirm
the decision of an agency on a ground that the agency did not
invoke in making its decision." Pinto v. Massanari, 249 F.3d
840, 847 (9th Cir. 2001).

1 prejudice from the error"); see also Garcia v. Commissioner, 768 F.3d
2 925, 932-34 (9th Cir. 2014) (a failure to develop the record is not
3 harmless unless it is "clear from the record" that the error was
4 "inconsequential to the ultimate nondisability determination"; citing
5 Tommasetti v. Astrue, 533 F.3d 1035 (9th Cir. 2008)).

6
7 Remand is appropriate because the circumstances of this case
8 suggest that further administrative review could remedy the ALJ's
9 errors. McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura,
10 537 U.S. 12, 16 (2002) (upon reversal of an administrative
11 determination, the proper course is remand for additional agency
12 investigation or explanation, except in rare circumstances); Treichler
13 v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th Cir. 2014) (remand for
14 further administrative proceedings is the proper remedy "in all but
15 the rarest cases"); Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir.
16 2014) (court will credit-as-true medical opinion evidence only where,
17 inter alia, "the record has been fully developed and further
18 administrative proceedings would serve no useful purpose"); Harman v.
19 Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038
20 (2000) (remand for further proceedings rather than for the immediate
21 payment of benefits is appropriate where there are "sufficient
22 unanswered questions in the record"); Rodriguez v. Astrue, 2011 WL
23 1103119, at *9 (E.D. Cal. March 22, 2011) ("remand for further
24 proceedings is proper due to the ambiguity of the ALJ's decision
25 . . ."); Mingo v. Apfel, 1998 WL 373411, at *2 (D. Kan. July 1, 1998)
26 (remand necessary where the Administration conceded the ALJ's findings
27 were internally inconsistent). It is not clear that the ALJ would be
28 required to find Plaintiff disabled for the entire claimed period of

1 disability even if the rejected medical opinions were fully credited.
2 See Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir. 2010); see also
3 Garcia v. Commissioner, 768 F.3d at 932.

4
5 **CONCLUSION**

6
7 For all of the foregoing reasons,⁴ Plaintiff's and Defendant's
8 motions for summary judgment are denied and this matter is remanded
9 for further administrative action consistent with this Opinion.

10
11 LET JUDGMENT BE ENTERED ACCORDINGLY.

12
13 DATED: May 26, 2015.

14
15 _____/s/
16 CHARLES F. EICK
17 UNITED STATES MAGISTRATE JUDGE
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25 _____
26 ⁴ The Court has not reached any other issue raised by
27 Plaintiff except insofar as to determine that reversal with the
28 directive for the immediate payment of benefits would not be
appropriate at this time. "[E]valuation of the record as a whole
creates serious doubt that [Plaintiff] is in fact disabled." See
Garrison v. Colvin, 759 F.3d at 1021.