UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIA GONZALEZ DE FABIAN,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of Social Security

Defendant.

No. CV 15-8609-VAP (AGR)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The court submits this Report and Recommendation to the Honorable Virginia A. Phillips, Chief United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that the Commissioner's decision be reversed and the matter remanded for reconsideration of Dr. Hay's opinions.

I.

PROCEDURAL BACKGROUND

On February 27, 2012, Fabian filed an application for disability insurance benefits, alleging a disability onset date of December 19, 2008. Administrative Record ("AR") 17. The application was denied initially and on reconsideration. AR 17, 90, 108. Fabian requested a hearing before an Administrative Law Judge ("ALJ"). On November 6, 2013, the ALJ conducted a hearing at which Fabian and a vocational expert testified. AR 39-67. On January 24, 2014, the ALJ issued a decision denying benefits. AR 11-33. On September 8, 2015, the Appeals Council denied the request for review. AR 1-6. On November 4, 2015, Fabian filed this action.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

"Substantial evidence" means "more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner's decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

III.

DISCUSSION

A. Disability

A person qualifies as disabled and eligible for benefits "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

B. The ALJ's Findings

The ALJ found that Fabian met the insured status requirements through December 31, 2014. AR 19.

Following the five-step sequential analysis applicable to disability determinations, *Lounsburry v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),[1] the ALJ found that Fabian has the severe impairments of obesity, history of diabetes mellitus, chronic bilateral carpal tunnel syndrome, left shoulder chronic impingement syndrome status post failed shoulder surgery, degenerative disc disease of the cervical spine, history of ringing in her right ear, mood disorder and depression. AR 20. She has the residual functional capacity ("RFC") to perform medium work except that she can sit, stand and walk for six hours in an eight-hour workday; frequently push and pull with her left upper extremity; frequently reach above shoulder level with her left upper extremity; and frequently extend and flex her neck in all directions. She must avoid excessive noise. She can work in an environment with a stress level of four on a scale of one to ten (with

[1] The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant's impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsburry*, 468 F.3d at 1114.

one being the work of a night dishwasher and ten being the work of an air traffic controller). AR 23.

The ALJ found that Fabian is capable of performing her past relevant work as an electronic assembler. AR 30-31. Alternatively, Fabian can perform other jobs at the medium level of work that exist in significant numbers in the national economy such as hand packager, furniture cleaner and linen room attendant. AR 31-32.

C. Opinions of Treating and Examining Physicians

Fabian contends that the ALJ did not properly consider the opinions of her treating and examining physicians.

An opinion of a treating physician is given more weight than the opinion of a non-treating physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an uncontradicted opinion of a treating physician, an ALJ must state clear and convincing reasons that are supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When, as here, a treating physician's opinion is contradicted by another doctor, "the ALJ may not reject this opinion without providing specific and legitimate reasons supported by substantial evidence in the record. This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Orn,* 495 F.3d at 632 (citations omitted and internal quotations omitted). "When there is conflicting medical evidence, the Secretary must determine credibility and resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002) (citation and quotation marks omitted).

An examining physician's opinion constitutes substantial evidence when it is based on independent clinical findings. *Orn*, 495 F.3d at 632. An examining physician's uncontradicted opinion may be rejected based on clear and convincing reasons. When an examining physician's opinion is contradicted, it may be rejected for specific and legitimate reasons that are supported by substantial evidence in the record. *Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir. 2008).

"'The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician *or* a treating physician.'" *Ryan v. Comm'r*, 528 F.3d 1194, 1202 (9th Cir. 2008) (citation omitted) (emphasis in original). However, a non-examining physician's opinion may serve as substantial evidence when it is supported by other evidence in the record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *see also Thomas*, 278 F.3d at 957.

1. Opinions of Physical Limitations

Fabian argues that the ALJ improperly rejected the opinions of Dr. Rubanenko, Dr. Hay and Dr. Grogan.

Dr. Hay, a board certified orthopaedic surgeon, performed a second evaluation of Fabian on July 6, 2011. AR 609-46. He reviewed extensive medical records since her work injury on June 7, 2008. Fabian had been a quality control specialist and assembled loud speakers at the time. A very heavy lid on a speaker fell on her left hand. She yanked her hand out and felt a sharp pain from her left hand up to her left shoulder. She had a left phalanx/tuft fracture on her left finger and underwent a left shoulder arthroscopy to repair a partially torn rotator cuff. AR 610, 619. On July 6, 2016, Dr. Hay diagnosed chronic musculoligamentous sprain/strain of the cervical spine; cervical degenerative disc disease; cervical radiculitis/radiculopathy; occipital neuralgia; possible thoracic outlet syndrome; chronic left shoulder sprain/strain resulting in compensable right shoulder sprain/strain; left shoulder teninitis; status post left shoulder arthrocopic subacromial decompression with residual pain and weakness (1/9/09); adhesive capsulitis of the left shoulder; left elbow tendinitis/medial and lateral epicondylitis; chronic bilateral wrist sprain/strain; status post left ring finger and middle proximal phalangeal fractures status post crush injury, left hand, healed; bilateral carpal tunnel syndrome; status post right carpal tunnel release (5/11/10) with residuals; status post left carpal tunnel release (11/27/10) with residuals; and adverse progression, left greater than right, upper extremity chronic pain, complex regional pain syndrome. AR

625-26. Dr. Hay referred to the appropriate specialist Fabian's history of hearing loss due to prolonged exposure to loud noise; Fabian's history of psychological disorder secondary to chronic pain, anxiety and depression; and myalgia, myospasm and myofascitis resulting in chronic pain and hypersensitivity syndrome. AR 626-27.

Dr. Hay's objective findings included palpable tenderness and marked muscular spasm of the cervical and upper periscapular border with painful limited range of motion; positive orthopedic testing suggestive of cervical radiculopathy; decreased motor strength of the left upper extremity, greater than the right, and paresthesia consistent with generalized neuritis and cervical radiculopathy, also shown by Tinel's testing; slight rotator cuff atrophy on the left; moderate to severe tenderness on palpation over the left shoulder with painful limited ranges of motion bilaterally; tenderness of the left elbow with painful limited ranges of motion; and persistent global tenderness over the bilateral wrists/hands, left greater than right. Dr. Hay noted that an electrodiagnostic study on July 15, 2009 was suggestive of significant cervical paraspinal muscle spasm and/or cervical nerve root irritation/traction injury. A repeat electrodiagnostic study on March 18, 2011 revealed abnormal velocities of the left median and ulnar nerves consistent with Fabian's complaints of symptoms on the left greater than the right. Her current physical findings are consistent with chronic myofascial pain syndrome involving the cervical and upper thoracic paravertebral musculature with recurring traction neuritis. AR 628; *see* AR 620-25(detailed findings).

Dr. Hay opined that Fabian was "precluded from lifting over 15 pounds, repetitive pushing and pulling, bending at the neck and head with limited repetitive flexion and extension of the neck and head, forceful gripping and grasping, work at or above shoulder level, and prolonged head positioning." AR 630. Fabian could not return to her pre-injury occupational duties due to her orthopedic injuries and is medically eligible for vocational rehabilitation. AR 637.

On October 29, 2011, Dr. Rubanenko, a board certified orthopedic surgeon who had treated Fabian for over two years, reviewed and agreed with Dr. Hay's findings and

recommendations. AR 688-90. In his previous report on September 15, 2011, Dr. Rubanenko indicated that Fabian had tenderness on palpation of bilateral paraspinal muscles and bilateral trapezius muscles; palpable spasm of trapezius muscles bilaterally; and limited range of motion. Fabian had positive Leer impingement of the left shoulder, tenderness to palpation of the left shoulder; tenderness on palpation of the left biceps muscle, left deltoid muscle and left rotator cuff muscles; and limited range of motion. She had tenderness to palpation over dorsal and palmar aspects of her wrists bilaterally. Tinel's and Phalen's tests were positive. Left shoulder motor strength was 4/5. AR 668-72. On a prophylactic basis, Dr. Rubanenko opined that Fabian could sit, stand or walk for eight hours in an eight-hour workday and could push/pull (including hand or foot controls) no more than 30 pounds. AR 681. Fabian was precluded from repetitive flexion and extension of the head and neck; repetitive bending of the neck; prolonged overhead work; repetitive work at or above shoulder level; and forceful strength activities such as lifting, pushing, pulling, grasping, pinching, holding or torquing. AR 680-81. She could frequently balance and reach; and occasionally climb, crouch, crawl, twist, handle and finger. She was not limited in stooping, kneeling, feeling, seeing, hearing and speaking. AR 682. Dr. Rubanenko opined that Fabian should be afforded vocational rehabilitation and retraining to obtain gainful employment. AR 683.

The ALJ gave great weight to the opinions of Dr. Lim, an examining physician, that Fabian could perform medium work. AR 23, 841-45. The ALJ noted that the opinions of Dr. Hay and Dr. Rubanenko were based on findings two years before the hearing date and one year before Dr. Lim's 2012 report. The ALJ found that Dr. Lim's opinions were more consistent with the treatment record as a whole. AR 26.

The ALJ's rejection of Dr. Hay's opinion is not supported by substantial evidence. Dr. Lim's area of expertise is internal medicine, not orthopedic surgery. 20 C.F.R. § 404.1527(5) (generally giving more weight to opinion of specialist in his/her area of expertise than to opinion of non-specialist). Dr. Lim does not indicate that he

reviewed any of Fabian's medical records. Dr. Lim noted pain on range of motion of the neck and left shoulder, and negative Tinel's and Phalen's tests. He did not examine for muscle spasm or tenderness to palpation, or interpret her electrodiagnostic studies, as Dr. Hay had done. AR 843; 20 C.F.R. § 404.1527(3), (6) (considering extent to which physician's opinion is supported by medical signs and laboratory findings, and physician's familiarity with information in case record). Dr. Lim opined that Fabian was capable of medium work and was limited to frequent use of the left upper extremity for pushing, pulling and overhead reaching. AR 844. Contrary to the ALJ's finding, Dr. Lim's opinion that Fabian is capable of medium work is not consistent with the treatment record as a whole.[2]

The ALJ articulated specific and legitimate reasons for discounting Dr. Grogan's opinions. On September 5, 2012, Dr. Grogan found full range of motion in the right shoulder, elbow, wrist and hand, and reduced range of motion, by 50%, in the left shoulder. Fabian's gait was normal, and she had 5/5 motor strength in upper and lower extremities. She had pain on palpation in the paraspinal region of the cervical spine, and range of motion was 70% of normal. Her lumbar range of motion was 75% of normal. Left shoulder x rays showed AC joint narrowing but was otherwise normal. Cervical spine x rays showed mild degenerative disc disease at C6-C7. Lumbar spine was unremarkable except for osteopenia. Despite these findings, Dr. Grogan opined that Fabian could sit no more than four hours, stand no more than three hours and walk no more than two hours in an eight-hour workday. She could never lift more than five pounds and only occasionally lift up to five pounds. AR 860. In October 2013, Dr.

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[2] Dr. Kattapong, a nonexamining physician, noted that Fabian "appears to have engaged in exam embellishment at CE, generating '0' pounds of force with dynamometer with strength otherwise 5/5 throughout. Furthermore, she has no muscle atrophy and was able to handwrite on her function form. Thus, she appears, in reality, to have more than '0' grip strength." AR 83. Fabian argues that Dr. Lim's report is internally inconsistent in finding 0 grip strength yet finding no limitations in handling, gripping or grasping. AR 842, 844.

Grogan opined that Fabian could sit no more than three hours, stand no more than two hours and walk no more than two hours in an eight-hour workday. The ALJ reasonably concluded that Dr. Grogan's opinions were not supported by his own findings. AR 25-26.

Accordingly, it is recommended that this matter be remanded for reconsideration of Dr. Hay's opinions, which were endorsed by Dr. Rubanenko.

2. Opinions of Mental Limitations

Fabian argues that the ALJ improperly rejected the opinions of Dr. Zhu and Dr. Sitomer. Fabian has not shown error.

The ALJ found that Fabian can work in an environment with a stress level of four on a scale of one to ten (with one being the work of a night dishwasher and ten being the work of an air traffic controller). AR 23. The ALJ reviewed Fabian's treatment records.[3] AR 26-28.

The ALJ properly discounted Dr. Zhu's opinions as inconsistent with her own findings. Dr. Zhu diagnosed Fabian with depression secondary to a medical condition. AR 836. Fabian was well groomed with normal speech, normal motor activity and no behavioral disturbance. Her concentration was intact, her memory was normal, her thought process was goal directed and her judgment was intact. Her mood was anxious and depressed, and her affect was appropriate. AR 836-38. Dr. Zhu assessed a poor ability to complete a normal workday and workweek without interruptions from

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[3] The most recent records in 2013 indicated Fabian had a Global Assessment of Functioning ("GAF") score of 70 at intake and underwent therapy to learn techniques for addressing panic attacks. Her GAF at termination of the program was 90. AR 899. The GAF of 70 at intake was consistent with Dr. Ritvo's assessment that Fabian had a GAF of 70 in 2012. AR 27, 848, 851.

A GAF of 70 indicates "[s]ome mild symptoms (e.g., depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships." Diagnostic and Statistical Manual of Mental Disorders 34 (2000) ("DSM-IV-TR"). A GAF of 90 indicates "[a]bsent or minimal symptoms." *Id.*

psychologically based symptoms and a poor ability to respond to changes in a work setting. Dr. Zhu assessed a fair ability to maintain concentration and regular attendance, and perform activities within a schedule. AR 839. The ALJ's assessment that Dr. Zhu's opinions are inconsistent with her findings is supported by substantial evidence.

Dr. Sitomer diagnosed Fabian with a mood disorder due to a general medical condition and observed that Fabian exhibited a "high level of anxiety." AR 879, 883.

The ALJ properly discounted Dr. Sitomer's opinions on the grounds that she did not perform diagnostic tests and relied on Fabian's self-reported complaints. AR 28. Both findings are supported by substantial evidence. An ALJ does not provide valid reasons for discounting a physician's opinion "by questioning the credibility of the patient's complaints where the doctor does not discredit those complaints and supports his ultimate opinion with his own observations." *Ryan*, 528 F.3d at 1199-1200 (psychiatrist performed mental status examination; no indication psychiatrist relied more heavily on patient complaints than clinical observations); *see also Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here, however, Dr. Sitomer does not indicate any testing and instead relied extensively on Fabian's own complaints to answer the questions on the form. AR 880-83, 885. Under these circumstances, the ALJ may discount her opinion when he properly discounts the credibility of the claimant. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (ALJ may reject physician's opinion "if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted").

B. Vocational Expert

Plaintiff argues that the ALJ erred in finding that Fabian could perform her past relevant work and erred in his step five findings. This matter is being remanded for reconsideration of Dr. Hay's opinions, which would preclude her from performing past relevant work (step four) and representative jobs at the medium work level (step five). Therefore, the court need not address Fabian's arguments except to note that the ALJ

is free, on remand, to consider Fabian's argument that the RFC failed to taken into account the ALJ's assessment that Fabian has moderate limitation in concentration, persistence or pace.

C. Credibility

The ALJ found Fabian's subjective complaints were "not credible to the extent they are inconsistent with" the RFC assessment. AR 29. The ALJ relied upon three reasons: (1) the objective medical evidence did not support the extent of her symptoms; (2) Fabian failed to receive treatment for mental health prior to 2013; and (3) Fabian's testimony was inconsistent with her ability to perform various activities of daily living. AR 29-30.

The ALJ's credibility finding is supported by substantial evidence. The ALJ may consider the objective medical evidence so long as he does not rely on that factor alone. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Fabian's testimony about her physical limitations is inconsistent with Dr. Hay's assessment, and her testimony about mental limitations is inconsistent with the mental health records, including her treatment in 2013 as discussed above.

The ALJ may properly rely upon Fabian's failure to obtain mental health treatment prior to 2013. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) ("ALJ may properly rely on 'unexplained or inadequately explained failure to seek treatment'") (citation omitted). Although Fabian argues that she did not have sufficient funds, the period of time identified by the ALJ is the time in which she had access to treatment through the workers compensation system.

The ALJ may consider inconsistencies between Fabian's testimony and her activities of daily living. *Valentine v. Astrue*, 574 F.3d 685, 694 (9th Cir. 2009); *see also Molina*, 674 F.3d at 1113. Fabian's testimony that she "cannot do anything" (AR 58) is undermined by evidence that she buys food and clothing in stores, uses public transportation, and does most of her personal care (AR 244, 275, 650, 660).

Fabian has not shown error.

D. Lay Witness

"In determining whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work." *Stout v. Comm'r*, 454 F.3d 1050, 1053 (9th Cir. 2006). "When an ALJ discounts the testimony of lay witnesses, 'he [or she] must give reasons that are germane to each witness.'" *Valentine*, 574 F.3d at 694 (citation omitted).

The ALJ discounted the statements of Fabian's sister, who lives with Fabian, for two reasons: (1) inconsistency with the objective medical evidence; and (2) bias due to financial interest and close familial relationship. AR 30. Inconsistency with medical evidence is a germane reason to discount lay witness statements. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("One reason for which an ALJ may discount lay testimony is that it conflicts with medical evidence."). As to financial interest, "regardless of whether they are interested parties, 'friends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to [his or] her condition.'" *Valentine*, 574 F.3d at 694 (citation omitted). On the other hand, evidence that a lay witness "exaggerated a claimant's symptoms *in order* to get access to his disability benefits, as opposed to being an 'interested party' in the abstract, might suffice to reject that [person]'s testimony." *Id.* (emphasis in original).

Fabian has not shown error.

IV.

RECOMMENDATION

For the reasons discussed above, it is recommended that the district court issue an order (1) accepting this Report's findings and recommendation; and (2) reversing the Commissioner's decision and remanding for reconsideration of Dr. Hay's opinions.

DATED: December 2, 2016

Alicia G. Rosenberg

ALICIA G. ROSENBERG
United States Magistrate Judge