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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESLIE MASSEY,
Plaintiff

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:16-cv-05001-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Leslie Massey (“Plaintiff”) filed a complaint seeking review of Defendant Commissioner of Social Security’s (“Commissioner”) denial of his application for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11, 12] and briefs addressing disputed issues in the case [Dkt. 19 (“Pltf.’s Br.”) and Dkt. 22 (“Def.’s Br.”)]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be remanded for further proceedings.

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1 severity of one of the listed impairments. [AR 327 (citing 20 C.F.R. Part 404,
2 Subpart P, Appendix 1; 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d),
3 416.925, and 416.926).]

4 The ALJ found that Plaintiff had the following residual functional capacity
5 (RFC):

6 [M]edium work as defined in 20 CFR 404.1567(b) and
7 416.967(c) except the claimant is restricted to simple,
8 routine tasks in a nonpublic environment that involves
9 only incidental or superficial contact with the public. The
claimant must avoid concentrated exposure to dust, fumes,
and respiratory irritants.

10 [AR 328.] Applying this RFC, the ALJ found that Plaintiff was unable to perform
11 his past relevant work, but determined that based on his age (44 years old) limited
12 education, and ability to communicate in English, he could perform representative
13 occupations such as hand packer (DOT 920.587-018), laundry worker (DOT
14 361.685-018), hospital food server (DOT 319.677-014), retail marker (DOT
15 209.587-034), and hotel/motel housekeeper (DOT 323.687-014) and, thus, is not
16 disabled. [AR 333-334; 387-388.]

17 III. GOVERNING STANDARD

18 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to
19 determine if: (1) the Commissioner's findings are supported by substantial evidence;
20 and (2) the Commissioner used correct legal standards. *See Carmickle v. Comm'r*
21 *Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
22 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a
23 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
24 *Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations omitted); *see*
25 *also Hoopai*, 499 F.3d at 1074.

26 IV. DISCUSSION

27 Plaintiff contends that the ALJ rejected the opinions of a treating psychiatrist
28 and two consultative psychiatric examiners without stating legally sufficient reasons

1 for doing so. [Pltf.'s Br. at 5-12.] As set forth below, the Court agrees with Plaintiff
2 and remands the matter for further proceedings.

3 In evaluating medical opinions, the case law and regulations distinguish
4 among the opinions of three types of physicians: (1) those who treat the claimant
5 (treating physicians); (2) those who examine, but do not treat the claimant
6 (examining physicians); and (3) those who neither examine nor treat the claimant
7 (non-examining physicians). *See* 20 C.F.R. §§ 404.1502, 404.1527; *see also Lester*
8 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ is obligated to take into
9 account all medical opinions of record, resolve conflicts in medical testimony, and
10 analyze evidence. 20 C.F.R. § 404.1527(c); *Magallanes v. Bowen*, 881 F.2d 747,
11 750 (9th Cir. 1989).

12 In conducting this analysis, the opinion of a treating or examining physician is
13 entitled to greater weight than that of a non-examining physician. *Garrison v.*
14 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014). To reject the uncontradicted opinion of
15 a treating or examining physician, the ALJ must provide clear and convincing
16 reasons. *Ghanim v. Colvin*, 763 F.3d 1154, 1160-61 (9th Cir. 2014); *Lester*, 81 F.3d
17 at 830. When a treating or examining physician's opinion is contradicted by another
18 opinion, an ALJ may not reject the opinion without "specific and legitimate
19 reasons" that are supported by substantial evidence in the record. *Ghanim*, 763 F.3d
20 at 1161; *Garrison*, 759 F.3d at 1012; *Lester*, 81 F.3d at 830-31. "This is so because,
21 even when contradicted, a treating or examining physician's opinion is still owed
22 deference and will often be 'entitled to the greatest weight . . . even if it does not
23 meet the test for controlling weight.'" *Garrison*, 759 F.3d at 1012 (internal citation
24 omitted).

25 Although ALJs "are not bound by any findings made by [non-examining]
26 State agency medical or psychological consultants, or other program physicians or
27 psychologists," ALJs must still "consider findings and other opinions of State
28 agency medical and psychological consultants and other program physicians,

1 psychologists, and other medical specialists as opinion evidence, except for the
2 ultimate determination about whether [a claimant is] disabled” because such
3 specialists are regarded as “highly qualified . . . experts in Social Security disability
4 evaluation.” 20 C.F.R. §§ 404.1527(e)(2)(i). “Unless a treating source’s opinion is
5 given controlling weight, the [ALJ] must explain in the decision the weight given to
6 the opinions of a State agency medical or psychological consultant or other program
7 physician, psychologist, or other medical specialist.” 20 C.F.R. §
8 404.1527(e)(2)(ii); *see also* SSR 96-6p (“Findings...made by State agency medical
9 and psychological consultants and other program physicians and psychologists
10 regarding the nature and severity of an individual’s impairment(s) must be treated as
11 expert opinion evidence of nonexamining sources,” and ALJs “may not ignore these
12 opinions and must explain the weight given to these opinions in their decisions.”)

13 **A. The ALJ Failed To Provide Specific and Legitimate Reasons For**
14 **Rejecting The Opinions Of The Two Consultative Examiners.**

15 Plaintiff first contends that the ALJ erred in rejecting the opinions of
16 consultative psychiatric examiners, Isadore Wendel, Ph.D. and Stephen Simonian,
17 M.D. [Pltf.’s Br. at 5-12.]

18 **i. Dr. Wendel**

19 Plaintiff argues that the ALJ improperly rejected Dr. Wendel’s opinion in
20 favor of the opinion of a State Agency medical consultant. [Pltf.’s Br. at 5-8.]
21 Given that Dr. Wendel’s opinion was contradicted, the ALJ was required to provide
22 specific and legitimate reasons for rejecting Dr. Wendel’s opinion. The Court finds
23 that the ALJ erred in her assessment of Dr. Wendel’s psychological evaluation, for
24 the reasons set forth below.

25 Dr. Wendel, a clinical psychologist, examined Plaintiff in September 2008.
26 [AR 221-224.] Dr. Wendel diagnosed Plaintiff with schizoaffective disorder and a
27 history of polysubstance abuse in remission. [AR 223.] Dr. Wendel assessed a
28 Global Assessment of Functional (“GAF”) score of 50 and concluded that Plaintiff

1 had marked impairments in activities of daily living, maintaining concentration,
2 persistence, and pace, and social functioning. [AR 223-224.] He also found that
3 Plaintiff would have repeated episodes of emotional deterioration in a work setting.
4 [AR 224.]

5 The ALJ stated two reasons for rejecting Dr. Wendel’s opinion.¹ First, the
6 ALJ stated that Dr. Wendel’s opinion was “completely unsupported by his mental
7 status examination of [Plaintiff]” conducted during the evaluation. [AR 331.]
8 However, Dr. Wendel made several significant clinical observations that supported
9 his opinion, including: Plaintiff’s overly bright affect, which was “[n]ot in sync with
10 his fundamental mood and the topics of discussion; Plaintiff’s pressed and
11 simultaneously manic mood; and Plaintiff’s demonstrated difficulty with simple
12 abstract reasoning questions.” [AR at 222-223.] These documented impairments in
13 mood, affect, and thought processes, are consistent with Dr. Wendel’s opinion that
14 Plaintiff had marked impairment in activities of daily living, maintaining
15 concentration, persistence, pace, social functioning, and would have repeated
16 episodes of emotional deterioration in a work setting. Accordingly, the Court finds
17 that the mental status examination conducted by Dr. Wendel supports his opinion
18 regarding Plaintiff’s mental impairments.

19 The second reason the ALJ gave for rejecting Dr. Wendel’s opinion was that
20 it was “based primarily on [Plaintiff’s] subjective complaints.” [AR at 331.] An
21 “ALJ may reject a treating physician’s opinion if it is based to a large extent on a
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24 ¹ The Court notes that the ALJ articulated the same two reasons for rejecting Dr.
25 Wendel’s opinion in her prior decision. [Compare AR 26 and 331.] The Court
26 previously rejected these rationales in *Massey v. Colvin*, Case No. 2:13-cv-07353-
27 CW, Dkt. 16. However, because of the additional medical evidence adduced at
28 Plaintiff’s subsequent hearing; the relevant record; and the discretionary nature of
the law of the case doctrine, the Court declines to apply the law of the case doctrine
to the ALJ’s assessment of Dr. Wendel’s opinion subject to review herein. *See U.S.*
v. Park Place Associate, 563 F.3d 907, 925 (9th Cir. 2009); *Earl Old Person v. Bob*
Brown 312 F.3d 1036, 1039 (9th Cir. 2002).

1 claimant’s self-reports that have been properly discounted as incredible.”
2 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (internal quotations and
3 citations omitted). However, this is distinguishable from a situation where a treating
4 or examining physician makes independent observations and supports his or her
5 conclusions with other evidence. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d
6 1194, 1199-1200 (9th Cir. 2008); see also *Edlund v. Massanari*, 253 F.3d 1152,
7 1159 (9th Cir. 2001). Here, questioning the credibility of Plaintiff’s complaints was
8 not a sufficient reason to reject Dr. Wendel’s opinion, which was based on objective
9 medical evidence and Dr. Wendel’s observations in addition to Plaintiff’s
10 statements. Accordingly, the Court finds that the ALJ failed to provide specific and
11 legitimate reasons for rejecting Dr. Wendel’s opinion.

12 **ii. Dr. Simonian**

13 Plaintiff next contends that the ALJ improperly rejected the opinion of Dr.
14 Stephan Simonian, M.D., consultative psychiatrist, in favor of the opinion of the
15 State agency medical consultant. [Pltf.’s Br. at 6.] The Court agrees.

16 In June 2010, Plaintiff underwent a consultative psychiatric evaluation by Dr.
17 Simonian. [AR 251-257.] Dr. Simonian diagnosed schizoaffective disorder, ruled
18 out depressive disorder, NOS, and also found substance abuse in remission. [AR
19 254-255.] He concluded that Plaintiff was able to understand, remember, and carry
20 out simple instructions. [AR 255-256.] He found marked impairment in social
21 interaction, adaption to work stresses, maintaining regular attendance, and
22 performing daily activities. [*Id.*] He found moderate impairment in concentration
23 and working without special supervision. [*Id.*]

24 As stated previously, when an examining physician’s opinion is contradicted
25 by another opinion, an ALJ may not reject the opinion without “specific and
26 legitimate reasons” that are supported by substantial evidence in the record.
27 *Ghanim*, 763 F.3d at 1161; *Garrison*, 759 F.3d at 1012; *Lester*, 81 F.3d at 830-31.
28 Here, the ALJ stated only one reason for rejecting Dr. Simonian’s opinion—it was

1 inconsistent with Dr. Simonian’s mental status examination of Plaintiff. However,
2 the ALJ’s finding that Dr. Simonian’s mental status examination results were
3 inconsistent with his own opinion is not supported by substantial evidence. Dr.
4 Simonian opined that Plaintiff would have marked impairments in social interaction,
5 adaption to work stresses, maintaining regular attendance, and performing daily
6 activities and moderate impairments in concentration and working without special
7 supervision. [AR 254.] These conclusions are not out of line with impairments in
8 mood and affect and thought processes documented in his evaluation. [AR 253-
9 254.] “[W]here the purported existence of an inconsistency is squarely contradicted
10 by the record, it may not serve as the basis for the rejection of an examining
11 physician’s conclusion.” *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).
12 Accordingly, that the ALJ failed to provide specific and legitimate reasons for
13 rejecting Dr. Simonian’s opinion.

14 **B. The ALJ Failed To Provide Specific and Legitimate Reasons for**
15 **Assigning Dr. Barg’s Opinion Less Weight.**

16 Plaintiff also contends that the ALJ improperly gave Dr. Barg’s opinion little
17 probative weight. [Pltf.’s Br. at 12- 15.] In March 2012, Dr. Barg, Plaintiff’s
18 treating physician, assessed Plaintiff’s functional capacity. [AR 307-312.] She
19 diagnosed Plaintiff with depressive disorder, NOS and explosive disorder. [AR
20 307.] She opined that Plaintiff had a GAF score of 45, which indicates impairment
21 in multiple areas of functioning. [*Id.*] Specifically, Dr. Barg opined that Plaintiff
22 suffered from marked limitation in maintaining social functioning, concentration,
23 persistence or pace and will have four or more episodes of decompensation within a
24 12-month period, each at least two weeks long. [AR 311.] The ALJ was required to
25 provide specific and legitimate reasons for rejecting Dr. Barg’s opinion. For the
26 reasons set forth below, the Court finds that the ALJ erred in her assessment of Dr.
27 Barg’s opinion.

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1 In assigning Dr. Barg's opinion limited probative weight, the ALJ found that
2 Dr. Barg's opinion: (1) "consisted almost entirely of boxes checked on a form
3 without any narrative discussion of clinical findings" and did not include any
4 corroborating treatment notes; and (2) the mental status examinations in the record
5 did not support Dr. Barg's opinion regarding Plaintiff's limitations. [AR 331.]

6 In evaluating Dr. Barg's opinion, the ALJ failed to recognize that the opinion
7 expressed on the check-box form was based on significant experience with Plaintiff
8 and supported by numerous of Dr. Barg's own treatment notes, and was therefore
9 entitled to weight that an otherwise unsupported and unexplained check-box form
10 would not merit. *See Garrison*, 759 F. 3d at 1013. Dr. Barg personally examined
11 Plaintiff from June 2010 to March 2014 and provided treating notes documenting
12 Plaintiff's impairments in mood and affect. [AR 590-611.] The ALJ ignored these
13 treatment notes as well as the first page of the check-box form, which provided
14 narrative detailing Dr. Barg's length of treatment of Plaintiff, multi-axial evaluation,
15 prescribed treatment and responses from Plaintiff, as well as a list of medications,
16 side effects, clinical findings, and prognosis. [AR 307.] Therefore, the ALJ's
17 conclusion that Dr. Barg's opinion consisted of boxes checked on a form without
18 any narrative discussion of clinical findings or any corroborating treatment notes is
19 erroneous.

20 The second reason the ALJ gave for rejecting Dr. Barg's opinion was that it
21 was inconsistent with multiple mental status examinations in the record. [AR 331.]
22 However, the ALJ does not cite to any specific mental status examination to support
23 her position. As stated previously, Dr. Wendel and Dr. Simonian both provided
24 mental status examinations documenting impairments in mood, affect, and thought
25 processes, which is consistent with Dr. Barg's opinion. Other mental treatment
26 evaluations contain similar findings. [*See, e.g.*, AR 229, 555, 569, 594, 596, 597,
27 602.] Accordingly, the ALJ's conclusion that the record contains mental status
28 examinations that are inconsistent with Dr. Barg's opinion is not supported by

1 substantial evidence.

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3 In sum, the ALJ erred by giving little weight to the opinions of Drs. Wendel,
4 Simonian, and Barg. The record shows that each doctor conducted professional
5 clinical assessments, and came to conclusions based on personal observation or test
6 results. There is no indication the doctors simply relied on the statements Plaintiff
7 made to them in arriving at their conclusions. The opinions of these three doctors
8 are largely consistent with all the other medical opinions in the record, aside from
9 that of the non-examining State Agency physician, Dr. R. Paxton. The Court
10 accordingly concludes the ALJ erred in discounting the three doctors' opinions
11 because her findings are not supported by substantial evidence. These errors are
12 significant because they affect Plaintiff's RFC.

13 Finally, the Court notes that the ALJ assigned significant probative weight to
14 the opinion of Dr. Paxton. [AR at 332; AR 266-279.] Dr. Paxton diagnosed
15 Plaintiff with schizoaffective disorder personality disorder, and substance abuse.
16 [AR 269-276.] He opined that Plaintiff was limited to simple work in a non-public
17 setting, but did not impose any other limitations. [AR 268; 277.] To the extent the
18 ALJ relied on Dr. Paxton's opinion to discount the medical opinions discussed
19 above, the ALJ erred. "Unless a treating source's opinion is given controlling
20 weight, the [ALJ] must explain in the decision the weight given to the opinions of a
21 State agency medical or psychological consultant or other program physician,
22 psychologist, or other medical specialist." 20 C.F.R. §§ 404.1527(e)(2)(ii). Here,
23 Dr. Paxton provided a check-box form with no narrative explaining his findings.
24 "[A]n ALJ may discredit [] physicians' opinions that are conclusory, brief, and
25 unsupported by the record as a whole or by objective medical findings." *Burrell v.*
26 *Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014) (internal quotation, emphasis, and
27 citations omitted). Given this, the ALJ should reevaluate the medical opinion
28 evidence of Drs. Wendell, Simonian, Barg, and Paxton on remand.

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V. CONCLUSION

The decision of whether to remand for further proceedings or order an immediate award of benefits is within the district court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). When no useful purpose would be served by further administrative proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *Id.* at 1179 ("the decision of whether to remand for further proceedings turns upon the likely utility of such proceedings"). But when there are outstanding issues that must be resolved before a determination of disability can be made, and it is not clear from the record the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. *Id.*

The Court finds that remand is appropriate because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, "except in rare circumstances"); *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (remand for award of benefits is inappropriate where "there is conflicting evidence, and not all essential factual issues have been resolved"); *Harman*, 211 F.3d at 1180-81. The Court has found that the ALJ erred at step two of the sequential evaluation process. Thus, remand is appropriate to allow the Commissioner to continue the sequential evaluation process starting at step two.

For all of the foregoing reasons, **IT IS ORDERED** that:

(1) the decision of the Commissioner is REVERSED and this matter

REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Memorandum Opinion and Order; and

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(2) Judgment be entered in favor of Plaintiff.

IT IS SO ORDERED.

DATED: June 26, 2017



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE