Denise Christine Little v. Carolyn W. Colvin Doc. 20

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

7 Case No. 2:16-CV-05129 (VEB)

8 DENISE CHRISTINE LITTLE,

9 Plaintiff,

DECISION AND ORDER

10 vs.

11 CAROLYN W. COLVIN, Acting
12 Commissioner of Social Security,

Defendant.

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14 **I. INTRODUCTION**

15 In April of 2012, Plaintiff Denise Christine Little applied for Disability
16 Insurance benefits and Supplemental Security Income ("SSI") benefits under the
17 Social Security Act. The Commissioner of Social Security denied the applications.
18 Plaintiff, by and through her attorneys, Law Offices of Lawrence D. Rohlfing,
19 Brian C. Shapiro, Esq., of counsel, commenced this action seeking judicial review of
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1 the Commissioner's denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383
2 (c)(3).
3 The parties consented to the jurisdiction of a United States Magistrate Judge.
4 (Docket No. 11, 12, 17). On November 8, 2016, this case was referred to the
5 undersigned pursuant to General Order 05-07. (Docket No. 16).

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II. BACKGROUND

7 Plaintiff applied for Disability Insurance benefits and SSI benefits on April 9
8 and 23, 2012, respectively, alleging disability beginning September 3, 2010. (T at
9 207-16, 230).[1] The applications were denied initially and on reconsideration.
10 Plaintiff requested a hearing before an Administrative Law Judge ("ALJ").
11 On March 2, 2014, a hearing was held before ALJ James D. Goodman. (T at
12 39). Plaintiff appeared with her attorney and testified. (T at 51-83).
13 On July 25, 2014, the issued a written decision denying the applications for
14 benefits. (T at 19-38). The ALJ's decision became the Commissioner's final
15 decision on May 13, 2016, when the Appeals Council denied Plaintiff's request for
16 review. (T at 1-7).
17 On July 12, 2016, Plaintiff, acting by and through her counsel, filed this action
18 seeking judicial review of the Commissioner's denial of benefits. (Docket No. 1).

19 [1] Citations to ("T") refer to the administrative record at Docket No. 15.

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The Commissioner interposed an Answer on October 25, 2016. (Docket No. 14). Plaintiff filed a supporting Brief on November 16, 2016. (Docket No. 18). The Commissioner filed a Brief in opposition on December 7, 2016. (Docket No. 19).

After reviewing the pleadings, briefs, and administrative record, this Court finds that the Commissioner's decision must be reversed and this case remanded for further administrative proceedings.

III. DISCUSSION

A. Sequential Evaluation Process

The Social Security Act ("the Act") defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if any impairments are of such severity that he or she is not only unable to do previous work but cannot, considering his or her age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and

vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares the claimant's impairment(s) with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work which was performed in the past. If the claimant is able to perform previous work, he or she is deemed not disabled. 20

C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual functional capacity (RFC) is considered. If the claimant cannot perform past relevant work, the fifth and final step in the process determines whether he or she is able to perform other work in the national economy in view of his or her residual functional capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a mental or physical impairment prevents the performance of previous work. The burden then shifts, at step five, to the Commissioner to show that (1) plaintiff can perform other substantial gainful activity and (2) a "significant number of jobs exist in the national economy" that the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

B. Standard of Review

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is

1 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
2 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

3 "The [Commissioner's] determination that a plaintiff is not disabled will be
4 upheld if the findings of fact are supported by substantial evidence." *Delgado v.*
5 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
7 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
8 599, 601-02 (9th Cir. 1989). Substantial evidence "means such evidence as a
9 reasonable mind might accept as adequate to support a conclusion." *Richardson v.*
10 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch inferences and
11 conclusions as the [Commissioner] may reasonably draw from the evidence" will
12 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
13 the Court considers the record as a whole, not just the evidence supporting the
14 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
15 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the Commissioner, not this Court, to resolve conflicts in
17 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
18 interpretation, the Court may not substitute its judgment for that of the
19 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
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Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

C. Commissioner's Decision

The ALJ determined that Plaintiff had not engaged in substantial gainful activity since December 10, 2010, the alleged onset date, and met the insured status requirements of the Social Security Act through December 31, 2015 (the "date last insured"). (T at 25). The ALJ found that Plaintiff's degenerative lumbar disc disease, depression with suicidal ideation, anxiety, and chronic pain syndrome were "severe" impairments under the Act. (Tr. 25).

However, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the impairments set forth in the Listings. (T at 25).

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform sedentary work, as defined in 20 CFR § 404.1567 (a), with the

following limitations: Plaintiff could lift/carry and push/pull up to 10 pounds occasionally and less than that frequently; stand/walk up to 6 hours in an 8-hour workday; sit up to 6 hours in an 8-hour workday for 20 minutes at a time; perform less than occasional climbing, bending, kneeling, stooping, and crawling and occasional reaching above shoulder level with both extremities. (T at 27).

In addition, the ALJ concluded that Plaintiff must avoid concentrated exposure to respiratory irritants and may not perform more than occasional complex technical work, although she may perform a full range of simple routine work. (T at 27). Per the ALJ, Plaintiff may have less than occasional contact with the general public and occasional contact with co-workers and supervisors and may perform work at a stress level of 3 on a scale of 1 to 10 (with 10 being the most stressful). (T at 27).

The ALJ found that Plaintiff could not perform her past relevant work as a warehouse worker, fast food manager, motor vehicle assembler, or outside deliverer. (T at 30). Considering Plaintiff's age (40 years old on the alleged onset date), education (marginal), work experience, and residual functional capacity, the ALJ found that jobs exist in significant numbers in the national economy that Plaintiff can perform. (T at 31).

Accordingly, the ALJ determined that Plaintiff was not disabled within the meaning of the Social Security Act between December 10, 2010 (the alleged onset date) and July 25, 2014 (the date of the decision) and was therefore not entitled to benefits. (T at 32). As noted above, the ALJ's decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. (T at 1-7).

D. Disputed Issue

Plaintiff offers one argument in support of her claim that the Commissioner's decision should be reversed. She argues that the ALJ did not properly assess the opinion of her treating physician.

IV. ANALYSIS

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non:-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons

that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

The courts have recognized several types of evidence that may constitute a specific, legitimate reason for discounting a treating or examining physician's medical opinion. For example, an opinion may be discounted if it is contradicted by the medical evidence, inconsistent with a conservative treatment history, and/or is based primarily upon the claimant's subjective complaints, as opposed to clinical findings and objective observations. *See Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

An ALJ satisfies the "substantial evidence" requirement by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). "The ALJ must do more than state conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id.*

In this case, Dr. Elizabeth Gil, Plaintiff's treating psychologist, performed an initial assessment in July of 2012. She diagnosed major depressive disorder and alcohol dependence (partial remission) and assigned a Global Assessment of

Functioning ("GAF") score[2] of 40 (T at 492). "A GAF score of 31-40 indicates some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) or major impairment in several areas such as work or school, family relations, judgment, thinking or mood." Tagin v. Astrue, No. 11-cv-05120, 2011 U.S. Dist. LEXIS 136237 at *8 n.1 (W.D.Wa. Nov. 28, 2011)(citations omitted).

Dr. Gil completed a mental RFC assessment in October of 2012. She described Plaintiff as suffering from the following symptoms: poor memory, sleep disturbance, mood disturbance, feelings of guilt or worthlessness, difficulty concentrating or thinking, decreased energy, and generalized persistent anxiety. (T at 522). Dr. Gill opined that Plaintiff's experience of symptoms would often interfere with her attention and concentration would cause her to be absent from work three or more times a month. (T at 523). She assessed some evidence of limitations with regard to Plaintiff's understanding and memory, ability to sustain concentration and persistence, ability to make occupational adjustments, and social interaction skills. (T at 523-24).

[2] "A GAF score is a rough estimate of an individual's psychological, social, and occupational functioning used to reflect the individual's need for treatment." *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998).

The ALJ did not mention Dr. Gil's assessment. This Court finds this to be a serious error. "Where an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate reasons for crediting one medical opinion over another, he errs. In other words, an ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it, asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his conclusion." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

Such an error is particularly troubling where, as here, there is support in the record for the treating provider's conclusion that Plaintiff would likely be absent from work three or more times per month due her symptoms. (T at 523). Dr. Pedro Olea and Dr. Phyllis Cohen, treating physicians, likewise opined that Plaintiff was likely to have frequent work absences due to her symptoms or treatment. (T at 520, 923).

The ALJ discounted Dr. Cohen's opinion as it related to Plaintiff's mental health impairments as "beyond [her] area of expertise …." (T at 29). (Dr. Cohen is a family practitioner). However, the ALJ did not discuss the fact that Dr. Cohen's conclusion that Plaintiff would likely be absent from work more than 4 days per month due to her impairments (T at 520) was consistent with the assessment of Dr.

Gil, who *is* a mental health professional. The ALJ also said he was giving "significant weight to the opinions of the mental health practitioners at West Valley Mental Health" without identifying them (T at 30), but then did not address the opinion provided by Dr. Gil (who is a mental health practitioner at West Valley Mental Health).

The ALJ said that he gave "greatest weight" to the opinion of Dr. Karl Manders, a medical expert who reviewed the record and provided responses to written interrogatories. (T at 30). However, Dr. Manders opined that Plaintiff's medication would impact her "ability to pursue vocational activity without absence from work 2-3 days [per] month." (T at 998). He also explained that chronic pain syndrome was frequently associated with depression, the absence of motivation, and other psychological problems that would increase "the likelihood of work absences." (T at 1015).

Dr. Manders qualified his assessment by stating that his opinion was speculative and indicated that the issue was "better answered by a psychologist." (T at 1016). The ALJ gave "greatest weight" to Dr. Manders's opinion, without addressing this aspect of the expert's opinion and without discussing the fact that a psychologist (Dr. Gil) had answered the question of work absences by opining that

Plaintiff would likely have a significant number of such absences due to her mental health impairments.

The Commissioner argues that the ALJ was not bound to accept Dr. Gil's opinion because, as of October 2012 when she provided her assessment, Plaintiff had only been treating with West Valley Mental Health Center for a few months and, thus, Dr. Gil had not established a significant treating relationship with Plaintiff. However, this justification was not offered by the ALJ. "Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ — not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v. Comm'r*, 554 F.3d 1219, 1226 (9th Cir. 2009).

Moreover, even if Dr. Gil's opinion was arguably not entitled to controlling weight because she was not technically a "treating physician," that would not justify the ALJ's overall failure to address the opinion and/or to give careful consideration to the important issue of work absences, which was noted by Dr. Gil, Dr. Manders, Dr. Olea, and Dr. Cohen.

B. Remand

In a case where the ALJ's determination is not supported by substantial evidence or is tainted by legal error, the court may remand the matter for additional

proceedings or an immediate award of benefits. Remand for additional proceedings is proper where (1) outstanding issues must be resolved, and (2) it is not clear from the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

Here, this Court finds that remand for further proceedings is warranted. Although the ALJ erred by failing to address Dr. Gil's assessment regarding work absences, the treating relationship between Plaintiff and Dr. Gil is unclear, as is the basis for Dr. Gil's work absence assessment. The treatment notes and assessments from Dr. Stephen Simonian (a consultative psychiatric examiner) and Dr. R. Singh (a non-examining State Agency review consultant) provide some support for the ALJ's overall assessment. (T at 29-30, 132, 500-505). Dr. Simonian opined that Plaintiff had no limitations with regard to maintaining regular attendance in the workplace or performing work activities on a consistent basis. (T at 504). Dr. Singh opined that Plaintiff could perform at least simple routine tasks. (T at 132).

Although this evidence is not sufficient to sustain the ALJ's decision, given the serious error in failing to adequately address the opinion evidence regarding work absences, it is sufficient to create doubt as to whether Plaintiff is disabled. As such, a remand for further proceedings is the appropriate remedy. *See Strauss v. Comm'r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir. 2011)("Ultimately, a claimant is

not entitled to benefits under the statute unless the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be."). On remand, the ALJ should give careful consideration the evidence concerning work absences, consider re-contacting the treating sources to the extent the ALJ finds their opinions and/or treating relationships unclear, and reassess Plaintiff's RFC in that light.

V. ORDERS

IT IS THEREFORE ORDERED that:

Judgment be entered REVERSING the Commissioner's decision and REMANDING this action for further proceedings consistent with this Decision and Order, and it is further ORDERED that

The Clerk of the Court file this Decision and Order and serve copies upon counsel for the parties.

DATED this 3rd day of April, 2017.

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE