UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACLYN DELICE CALI,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,[1]

Defendant.

Case No. CV 16-6679 JC

MEMORANDUM OPINION AND ORDER OF REMAND

I. SUMMARY

On September 6, 2016, Jaclyn Delice Cali ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; September 7, 2016 Case Management Order ¶ 5.

[1]Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is hereby substituted for Carolyn W. Colvin as the defendant in this action.

Based on the record as a whole and the applicable law, the decision of the Commissioner is REVERSED AND REMANDED for further proceedings consistent with this Memorandum Opinion and Order of Remand.

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On August 17, 2011, plaintiff filed an application for Disability Insurance Benefits alleging disability beginning on February 16, 2011, due to trigeminal neuralgia, supraventricular tachycardia (svt), depression, and restless leg syndrome. (Administrative Record ("AR") 12, 140, 164).

On October 24, 2012, the Administrative Law Judge ("ALJ") determined that plaintiff was not disabled through the date of the decision ("Pre-Remand Decision"). (AR 12-22). The Appeals Council denied plaintiff's application for review of the Pre-Remand Decision. (AR 1).

On January 28, 2015, a different United States Magistrate Judge entered judgment reversing and remanding the case for further proceedings because the ALJ had improperly evaluated plaintiff's subjective complaints. (AR 401-13). The Appeals Council in turn remanded the case for a new hearing. (AR 414-16). On remand, the ALJ held a hearing on April 14, 2016 ("Post-Remand Hearing"), during which the ALJ heard testimony from plaintiff (who was represented by counsel) and a vocational expert. (AR 305-37).

On May 26, 2016, the ALJ again determined that plaintiff was not disabled through the date of the decision ("Post-Remand Decision"). (AR 288-99). Specifically, the ALJ found: (1) plaintiff suffered from the following severe impairments: anxiety, asthma, depression, hypertension, migraine headaches, and trigeminal neuralgia (AR 290); (2) plaintiff's impairments, considered singly or in combination, did not meet or medically equal a listed impairment (AR 290-91); (3) plaintiff retained the residual functional capacity to perform work at all

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exertional levels with additional nonexertional limitations[2] (AR 292); (4) plaintiff could not perform any past relevant work (AR 297); (5) there are jobs that exist in significant numbers in the national economy that plaintiff could perform, specifically receptionist, appointment clerk, and general clerk (AR 298); and (6) plaintiff's statements regarding the intensity, persistence, and limiting effects of subjective symptoms were "not entirely consistent with the medical evidence and other evidence in the record" (AR 292).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that the claimant is unable "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 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The impairment must render the claimant incapable of performing the work the claimant previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is required to use the following five-step sequential evaluation process:

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

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[2]The ALJ determined that plaintiff could perform work that (i) "requires no fast-paced quotas and is otherwise low stress"; (ii) has a specific vocational preparation ("SVP") level of five or less; and (iii) requires no more than occasional bending over, and no concentrated exposure to fumes, odors, gases, and dust. (AR 292).

(2) Is the claimant's alleged impairment sufficiently severe to limit the claimant's ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 ("Listings")? If so, the claimant is disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform claimant's past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow the claimant to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citations omitted); see also 20 C.F.R. § 404.1520(a)(4).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citation omitted).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389,

401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)). To determine whether substantial evidence supports a finding, a court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)).

While an ALJ's decision need not discuss every piece of evidence or be drafted with "ideal clarity," at a minimum it must explain the ALJ's reasoning with sufficient specificity and clarity to "allow[] for meaningful review." Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (citations and internal quotation marks omitted); Hiler v. Astrue, 687 F.3d 1208, 1212 (9th Cir. 2012) (citation and quotation marks omitted); see also Craft v. Astrue, 539 F.3d 668, 673 (7th Cir. 2008) (ALJ must provide "accurate and logical bridge" between evidence and conclusion that claimant is not disabled so reviewing court "may assess the validity of the agency's ultimate findings") (citation and quotation marks omitted); see generally 42 U.S.C. § 405(b)(1) ("ALJ's unfavorable decision must, among other things, "set[] forth a discussion of the evidence" and state "the reason or reasons upon which it is based").

An ALJ's decision to deny benefits must be upheld if the evidence could reasonably support either affirming or reversing the decision. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457). Nonetheless, a court may not affirm "simply by isolating a 'specific quantum of supporting evidence.'" Id. at 882 (citation omitted). In addition, federal courts may review only the reasoning in the administrative decision itself, and may affirm a denial of benefits only for the reasons upon which the ALJ actually relied. Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014) (citation omitted).

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Even when an ALJ's decision contains error, it must be affirmed if the error was harmless. Treichler v. Commissioner of Social Security Administration, 775 F.3d 1090, 1099 (9th Cir. 2014). An ALJ's error is harmless if (1) it was inconsequential to the ultimate nondisability determination; or (2) despite the error, the ALJ's path may reasonably be discerned, even if the ALJ's decision was drafted with less than ideal clarity. Id. (citation and quotation marks omitted).

A reviewing court may not conclude that an error was harmless based on independent findings gleaned from the administrative record. Brown-Hunter, 806 F.3d at 492 (citations omitted). When a reviewing court cannot confidently conclude that an error was harmless, a remand for additional investigation or explanation is generally appropriate. See Marsh v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015) (citations omitted).

IV. DISCUSSION

Plaintiff contends that the ALJ improperly rejected certain medical opinions provided by Dr. Gopal Gabbur, a state agency examining psychiatrist. (Plaintiff's Motion at 9-10). The Court agrees. As the Court cannot find that the ALJ's error was harmless, a remand is warranted.

A. Pertinent Facts

In an October 25, 2011 report of a Complete Psychiatric Evaluation (which included review of plaintiff's medical records, and a mental status examination of plaintiff), Dr. Gabbur, in part diagnosed plaintiff with major depressive disorder (single, moderate), and anxiety disorder (not otherwise specified), and provided the following "Functional Assessment" for plaintiff (collectively "Dr. Gabbur's Opinions"):

> The [plaintiff's] ability to follow simple oral and written instructions was moderately limited.
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> Her ability to follow detailed instructions was severely limited.
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> Her ability to interact with the public, coworkers and supervisor [sic]

was not limited. The [plaintiff's] ability to comply with job rules, such as safety and attendance, was mildly limited. Her ability to respond to changes in a routine work setting was not limited. Her ability to respond to work pressure in a usual working setting was mildly limited. Her daily activities were mildly limited.

(AR 245-49).

In the Pre-Remand Decision, the ALJ gave "significant probative weight" to Dr. Gabbur's Opinions, explaining:

> Based on his clinical findings and observations, Dr. Gabbur opined the [plaintiff's] mental impairments caused moderate limitation in her ability to follow simple oral and written instructions, and severe limitation in her ability to follow detailed instructions. However, her mental impairments caused only mild limitation in the following work-related activities: complying with job rules; responding to changes in a routine work setting; and responding to work pressure in a routine work setting. Further, her mental impairments caused no limitation in responding to changes in a routine work setting (Exhibit 2F/5 [AR 249]). This opinion is deserving of significant probative weight because it is consistent with the objective medical evidence, which showed some signs of depressed and anxious mood and impaired concentration, but otherwise normal cognitive, expressive, intellectual, and receptive function. Further, as a psychiatrist, Dr. Gabbur has knowledge, training, and a perspective that could reasonably be expected to give him greater insight into the limitations imposed by the [plaintiff's] mental impairments.

(AR 19-20).

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In the Post-Remand Decision, the ALJ gave "significant probative weight" to the opinions provided by the reviewing, state agency medical consultants, Drs. Herbert Ochitill and R. Tashjian. The ALJ explained:

> [B]oth State agency medical consultants[] opined the [plaintiff] could understand, remember, and carry out simple and some detailed tasks. They opined the [plaintiff's] depression would slow the [plaintiff's] work pace, but would not prevent the [plaintiff] from adequate concentration, persistence, and pace over extended periods (Exhibit 1A/8-10 [AR 64-66]; Exhibit 3A/8-9 [AR 77-78]). These opinions are deserving of significant probative weight because they are largely consistent with each other and the objective medical evidence, which shows a history of complaints of anxious and depressive symptoms, but otherwise mostly normal cognitive, expressive, intellectual, receptive, and social functioning. Dr. Ochitill and Dr. Tashjian had the opportunity to review a considerable portion of the relevant documentary evidence. Further, as psychiatrists, Dr. Ochitill and Dr. Tashjian have knowledge, training, and a perspective that could reasonably be expected to give them greater insight into the limitations imposed by the [plaintiff's] mental impairments.

(AR 296).

In the Post-Remand Decision, the ALJ rejected portions of Dr. Gabbur's Opinions, explaining as follows:

> Based on his clinical findings and observations, Dr. Gabbur opined the [plaintiff's] mental impairments caused moderate limitation in the [plaintiff's] ability to follow simple oral and written instructions and severe limitation in the [plaintiff's] ability to follow detailed instructions (Exhibit 2F/5 [AR 249]). This opinion is

> deserving of little probative weight because it is not supported by the other evidence of record, including the objective medical evidence, as discussed above, and the opinions of Dr. [Herbert] Ochitill and Dr. [R.] Tashjian [state agency reviewing doctors], which the undersigned has determined are deserving of significant probative weight.

(AR 296).

B. Pertinent Law

In Social Security cases, the amount of weight given to medical opinions generally varies depending on the type of medical professional who provided the opinions, namely "treating physicians," "examining physicians," and "nonexamining physicians." 20 C.F.R. §§ 404.1527(c)(1)-(2) & (e), 404.1502, 404.1513(a); Garrison, 759 F.3d at 1012 (citation and quotation marks omitted). A treating physician's opinion is generally given the most weight, and may be "controlling" if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record[.]" 20 C.F.R. § 404.1527(c)(2); Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007) (citations and quotation marks omitted). In turn, an examining, but non-treating physician's opinion is entitled to less weight than a treating physician's, but more weight than a nonexamining physician's opinion. Garrison, 759 F.3d at 1012 (citation omitted).

An ALJ may reject the uncontroverted opinion of an examining physician by providing "clear and convincing reasons that are supported by substantial evidence" for doing so. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (citation omitted). Where an examining physician's opinion is contradicted by another doctor's opinion, an ALJ may reject the examining physician's opinion only "by providing specific and legitimate reasons that are supported by substantial evidence." Garrison, 759 F.3d at 1012 (citation and footnote omitted).

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An ALJ may provide "substantial evidence" for rejecting a medical opinion by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his [or her] interpretation thereof, and making findings." Id. (citing Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998)) (quotation marks omitted). An ALJ must provide more than mere "conclusions" or "broad and vague" reasons for rejecting an examining physician's opinion. Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir. 1988); McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989) (citation omitted). "[The ALJ] must set forth his [or her] own interpretations and explain why they, rather than the [physician's], are correct." Embrey, 849 F.2d at 421-22.

C. Analysis

Here, a remand is warranted to permit the ALJ to reevaluate the medical opinion evidence regarding plaintiff's mental impairments.

First, the ALJ's evaluation of Dr. Gabbur's Opinions appears to be inconsistent. For example, in the Pre-Remand Decision the ALJ apparently gave "significant probative weight" to all of Dr. Gabbur's Opinions, while in the Post-Remand Decision the ALJ gave "little probative weight" to a portion of Dr. Gabbur's Opinions. (Compare AR 19-20 with AR 296). The ALJ did not provide any explanation for the apparent inconsistency.

Second, the ALJ purportedly rejected Dr. Gabbur's opinions that plaintiff had "moderate limitation in [her] ability to follow simple . . . instructions," and "severe limitation in [her] ability to follow detailed instructions" (collectively "Dr. Gabbur's Task Limitations") in part, because such opinions were "not supported by the other evidence of record, including the objective medical evidence, as discussed above[.]" (AR 296). Nonetheless, the ALJ failed to explain precisely how the objective medical evidence or "other evidence" as a whole undermined Dr. Gabbur's Task Limitations. The broad and vague reasons provided by the ALJ are insufficient for giving less weight to any of Dr. Gabbur's Opinions. See

McAllister, 888 F.2d at 602. Defendant suggests that the ALJ might have been able to reject Dr. Gabbur's Task Limitations on other grounds. (Defendant's Motion at 9-10). However, the ALJ did not do so in the Post-Remand Decision and this Court may not affirm the ALJ's non-disability determination on the additional grounds the defendant proffers. See Garrison, 759 F.3d at 1010 (citation omitted).

Third, the ALJ also rejected Dr. Gabbur's Task Limitations purportedly because they were "not supported by . . . the opinions of Dr. Ochitill and Dr. Tashjian. . . ." (AR 296). The mere fact that the opinions of the state agency reviewing doctors in some manner conflicted with Dr. Gabbur's Task Limitations, however, is not a specific or legitimate reason for rejecting any portion of Dr. Gabbur's Opinions. See Garrison, 759 F.3d at 1012 (citations omitted); cf, e.g., Brewer v. Astrue, 2013 WL 140241, *2 (C.D. Cal. Jan. 9, 2013) ("[T]he contradiction of a treating physician's opinion by another physician's opinion triggers rather than satisfies the requirement of stating 'specific, legitimate reasons.'") (citations omitted).

Even so, the opinions provided by Drs. Ochitill and Tashjian do not constitute substantial evidence for rejecting of Dr. Gabbur's Task Limitations. For example, the state agency reviewing doctors provided their opinions very shortly after Dr. Gabbur did (*i.e.*, on November 8, 2011 and February 6, 2012) and apparently relied almost entirely on the same objective findings as Dr. Gabbur (*i.e.*, other medical evidence of record that Dr. Gabbur may also have reviewed as well as the results of Dr. Gabbur's own examination of plaintiff). (AR 61-62, 64-66, 74-78, 246); see Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (contrary opinion of non-examining medical expert may be "substantial evidence" supporting an ALJ's decision only to the extent it is consistent with other *independent* medical evidence) (citation omitted); cf. Orn, 495 F.3d at 632 ("When an examining physician relies on the same clinical findings as a treating physician,

but differs only in his or her conclusions, the conclusions of the examining physician are not 'substantial evidence.'"). Indeed, the Social Security Disability Determination records suggest that plaintiff's claim could not adequately be evaluated without a psychiatric consultative examination like Dr. Gabbur's. (See, e.g., AR 61, 74 [Disability Determination Explanation at Initial and Reconsideration levels noting need for consultative examination(s) because "[t]he evidence as a whole, both medical and non-medical, [was] not sufficient to support a decision on the claim" and "[s]pecialized medical evidence . . . [was] not available from the [plaintiff's] treating or other medical sources."]).

Moreover, even if, for the sake of argument, the ALJ properly gave the most weight to the opinions regarding plaintiff's mental limitations provided by Drs. Ochitill and Tashjian, the Post-Remand Decision still failed properly to account for those opinions. As the Post-Remand Decision noted, Drs. Ochitill and Tashjian opined, in pertinent part, that plaintiff had the residual functional capacity to "understand, remember, and carry out simple and some detailed tasks." (AR 65, 77-78, 296). The ALJ's residual functional capacity assessment for plaintiff, however, did not include any restriction on the skill level of work plaintiff could perform. The ALJ did limit plaintiff to "low stress" jobs. (AR 292). Such restriction, however, did not necessarily account for the limitations in plaintiff's ability to complete job tasks of any particular complexity. Cf., e.g., Social Security Ruling 85-15, 1985 WL 56857, *5-*6 ("skill level" of work "not necessarily related to" a claimant's ability to handle stress in the workplace). The ALJ also limited plaintiff to work involving SVP levels of five or less. (AR 292). Nonetheless, a job's degree of simplicity is addressed by General Educational Development ("GED") reasoning development rating, not the level of SVP. See, e.g., Meissl v. Barnhart, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005) ("SVP ratings speak to the issue of the level of vocational preparation necessary to perform the

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job, not directly to the issue of a job's simplicity. . . .") (citation and quotation marks omitted).

Finally, the Court cannot confidently conclude that the ALJ's errors were harmless. For example, as noted above, Dr. Gabbur opined, in part, that plaintiff's "ability to follow simple . . . instructions" was "moderately limited." (AR 249). At the Post-Remand Hearing, the vocational expert testified that there would be no jobs available if a hypothetical individual like plaintiff had a 10 to 15 percent reduction in the ability to follow simple oral and written instructions. (AR 334). Moreover, the Dictionary of Occupational Titles ("DOT")[3] reflects that each of the representative occupations the ALJ identified at step five requires Level 3 reasoning development – a level of complexity which appears to exceed the abilities of a claimant who can understand, remember, and carry out only "some detailed tasks" – as Drs. Ochitill and Tashjian found for plaintiff. See DOT § 237.367-038 ["Receptionist"], DOT § 237.367-010 ["Appointment Clerk"]; DOT § 209.562-010 ["Clerk, General"]. In light of the foregoing, the Court cannot confidently conclude that the failure properly to consider Dr. Gabbur's Task Limitations was inconsequential to the ALJ's nondisability determination at step five.

Accordingly, a remand is required, at a minimum, so the ALJ can reevaluate the medical opinion evidence regarding plaintiff's mental impairments.

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[3]The DOT is the Social Security Administration's "'primary source of reliable job information' regarding jobs that exist in the national economy." Zavalin v. Colvin, 778 F.3d 842, 845-46 (9th Cir. 2015) (citing Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990)); see also 20 C.F.R. §§ 404.1566(d)(1), 404.1569.

V. CONCLUSION[4]

For the foregoing reasons, the decision of the Commissioner of Social Security is reversed in part, and this matter is remanded for further administrative action consistent with this Opinion.[5]

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 4, 2017

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

[4]The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's decision, except insofar as to determine that a reversal and remand for immediate payment of benefits would not be appropriate.

[5]When a court reverses an administrative determination, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and quotations omitted). Remand is proper where, as here, "additional proceedings can remedy defects in the original administrative proceeding. . . ." Garrison, 759 F.3d at 1019 (citation and internal quotation marks omitted).