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I.

PROCEDURAL BACKGROUND

Jones filed an application for disability insurance benefits on April 2, 2012 and an application for supplemental security income benefits on July 12, 2012. Administrative Record (“AR”) 106. In both applications, she alleged an onset date of April 1, 2012. AR 24. The applications were denied initially and on reconsideration. AR 83, 84, 101, 102. Jones requested a hearing before an Administrative Law Judge (“ALJ”). On July 10, 2014, the ALJ conducted a hearing at which Jones and a vocational expert testified. AR 44-55. The ALJ issued a decision denying benefits on July 25, 2014. AR 103-112.

On March 26, 2015, the Appeals Council granted the request for review, vacated the decision and remanded for (1) a determination at step five of the sequential analysis; (2) evaluation and rating of Jones’ mental impairment; (3) reconsideration of Jones’ residual functional capacity; and (4) supplemental evidence from a vocational expert. AR 117-120.

On September 24, 2015, the ALJ conducted a hearing at which Jones and a vocational expert testified. AR 56-68. On October 20, 2015, the ALJ issued a decision denying benefits. AR 24-31. On November 22, 2016, the Appeals Council denied the request for review. AR 1-5. This action followed.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court has authority to review 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

1 adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether
2 substantial evidence exists to support the Commissioner’s decision, the court examines
3 the administrative record as a whole, considering adverse as well as supporting
4 evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than
5 one rational interpretation, the court must defer to the Commissioner’s decision.
6 *Moncada*, 60 F.3d at 523.

7 III.

8 DISCUSSION

9 A. Disability

10 A person qualifies as disabled, and thereby eligible for such benefits, “only if his
11 physical or mental impairment or impairments are of such severity that he is not only
12 unable to do his previous work but cannot, considering his age, education, and work
13 experience, engage in any other kind of substantial gainful work which exists in the
14 national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed.
15 2d 333 (2003) (citation and quotation marks omitted).

16 B. The ALJ’s Findings

17 The ALJ found that Jones met the insured status requirements through
18 December 31, 2015. AR 26. Following the five-step sequential analysis applicable to
19 disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹
20 the ALJ found that Jones had the severe impairments of chronic left leg pain and
21 depressive disorder. AR 26.

22 The ALJ found that Jones had the residual functional capacity (“RFC”) to perform
23 a full range of work at all exertional levels except that she requires a cane for standing
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25 ¹ The five-step sequential analysis examines whether the claimant engaged in
26 substantial gainful activity, whether the claimant’s impairment is severe, whether the
27 impairment meets or equals a listed impairment, whether the claimant is able to do his
28 or her past relevant work, and whether the claimant is able to do any other work.
Lounsbury, 468 F.3d at 1114.

1 and balancing, and can attend and maintain concentration, attention, persistence and
2 pace for two hours at a time with 10 minute breaks. AR 28. She is capable of
3 performing past relevant work as a dispatcher as generally performed. AR 30-31.

4 **C. Effects of Stroke, Ataxia and Dizziness on Residual Functional**
5 **Capacity**

6 Jones argues that the ALJ failed to find that stroke, ataxia and dizziness were
7 severe impairments at step two of the sequential analysis. When, as here, the ALJ
8 finds in a claimant's favor at step two, an error at step two is harmless unless a claimant
9 shows error at a later step. *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

10 Jones contends that the ALJ failed to consider the effects of these conditions on
11 her residual functional capacity at step four of the sequential analysis. The ALJ noted
12 that a CT scan of Jones' head revealed two small focal infarcts, chronic deep white
13 matter changes and a question of ongoing right mastoiditis. She had been assessed
14 with disequilibrium. AR 29. However, the medical records do not contain a diagnosis of
15 ataxia. Jones points to one mention of a history of ataxia since May 2012 in a record
16 dated January 9, 2013. AR 443. That record, however, describes Jones' description of
17 her past history at an ear, nose and throat consultation. The physician did not diagnose
18 ataxia. AR 445. The medical records do not contain a diagnosis of ataxia in May 2012
19 or at any other time. Instead, her condition is described as dizziness or balance
20 problems. *E.g.*, AR 387. Her motor skills were normal. *E.g.*, AR 867, 888.

21 The ALJ found that Jones was capable of performing her past relevant work as a
22 dispatcher as generally performed. AR 30-31. The dispatcher job is listed as sedentary
23 work with exertion of up to 10 pounds of force occasionally and a negligible amount of
24 force frequently to lift, carry, push, pull or otherwise move objects or the body.
25 Dictionary of Occupational Titles ("DOT") 249.167-014. The job functions are to assign
26 motor vehicles and drivers for conveyance of passengers or freight according to factors
27 such as length and purpose of trip, and passenger or freight requirements. A

1 dispatcher may also issue keys and record sheets to the drivers; record times of
2 departure, destination and expected time of return; investigate overdue vehicles; and
3 communicate with drivers using a two-way radio. A dispatcher may also maintain
4 records of mileage, fuel and repairs. *Id.*

5 The vocational expert testified that a claimant would be able to perform the
6 dispatcher job as generally performed even if she required a cane for standing and
7 balancing, and could maintain concentration, persistence and pace for only two hours
8 before requiring a break of 10 minutes or so. AR 66-67.

9 Jones does not specifically identify how the ALJ erred and how stroke and
10 disequilibrium would affect her ability to perform the job of dispatcher. The ALJ noted
11 Jones' testimony that when she experiences a dizzy spell, she sits down. AR 28, 62-
12 63. The medical records do not indicate that she cannot function while sitting due to
13 dizziness. To the extent the ALJ erred at step two, the error was harmless. *Burch*, 400
14 F.3d at 682.

15 **D. Treating Physician**

16 Jones argues that the ALJ erred in discounting the opinion of her treating
17 psychiatrist, Dr. Barnes.

18 An opinion of a treating physician is given more weight than the opinion of
19 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an
20 uncontradicted opinion of a medically acceptable treating source, as in this case, an
21 ALJ must state clear and convincing reasons that are supported by substantial
22 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

23 The ALJ gave Dr. Barnes' opinions in May 2014 little weight because Jones had
24 just commenced treatment in April 2014 and had not yet started her psychotropic
25 medications. AR 30. Subsequent mental health treatment records indicate the
26 medications helped reduce depressive symptoms without side effects. *Id.*

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1 Dr. Barnes completed a medical source statement of ability to do work related
2 activities (mental) on May 9, 2014. AR 812-814. The form instructed the physician to
3 rate the claimant's "mental abilities to function independently, appropriately, effectively,
4 and on a sustained, consistent, useful and routine basis without direct supervision or
5 undue interruptions or distractions – 8 hours a day, 5 days a week – in a regular,
6 competitive work setting." AR 812. The ratings fell within four categories: Category I
7 (not precluded), Category II (precludes performance for 5% of 8-hour workday);
8 Category III (precludes performance for 10%) and Category IV (precludes performance
9 for more than 15%).

10 Dr. Barnes opined that Jones was not precluded from maintaining socially
11 appropriate behavior and take appropriate precautions for normal hazards (Category I).
12 AR 813. Jones was precluded for 5% of an 8-hour workday in the areas of
13 understanding and carrying out short and simple instructions; making simple work
14 related decisions; and setting realistic goals and making plans independently of others
15 (Category II). AR 812-13. Jones was precluded for more than 15% of an 8-hour
16 workday (Category IV) from understanding and carrying out detailed instructions;
17 maintaining attention and concentration for extended periods of time; maintaining
18 attendance and being punctual within customary tolerances; sustaining an ordinary
19 routine without special supervision; working in coordination with others without being
20 distracted by them; completing a normal workday and workweek without psychological
21 symptoms; interacting with the general public; accepting instructions from supervisors;
22 responding appropriately to changes in the workplace; and using public transportation.
23 AR 812-13. Jones would likely be absent more than three days per month. Dr. Barnes
24 opined Jones was "unable to work at all in a competitive work environment." AR 814.

25 A treating physician's opinion as to the ultimate determination of disability is not
26 binding on the ALJ. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011). "A treating
27 physician's evaluation of a patient's ability to work may be useful or suggestive of useful
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1 information, but a treating physician ordinarily does not consult a vocational expert or
2 have the expertise of one. . . . A disability is an administrative determination of how an
3 impairment, in relation to education, age, technological, economic, and social factors,
4 affects ability to engage in gainful activity. . . . The law reserves the disability
5 determination to the Commissioner.” *Id.* (footnote omitted).

6 Dr. Barnes’ assessment that Jones is in Category II for simple tasks appears
7 inconsistent with the ALJ’s determination that Jones is capable of performing her past
8 relevant work as a dispatcher. The dispatcher job requires Reasoning Level 3, which
9 means to “[a]pply commonsense understanding to carry out instructions furnished in
10 written, oral, or diagrammatic form. Deal with problems involving several concrete
11 variables in or from standardized situations.” DOT 249.167-014. Although a limitation
12 to simple tasks may be consistent with Reasoning Level Two, there is an apparent
13 conflict between a limitation to simple, routine tasks and the demands of Level 3
14 Reasoning. *Zavalin v. Colvin*, 778 F.3d 842, 847 (9th Cir. 2015).

15 Dr. Barnes’ opinions are uncontradicted on this record. Jones was not sent to a
16 consultative psychological examination, and the state agency physicians did not review
17 Dr. Barnes’ records.

18 The ALJ is correct that Dr. Barnes’ opinions occurred shortly after he first saw
19 Jones. AR 808 (setting up appointment with Dr. Barnes for medical evaluation on April
20 23, 2014). However, while later progress notes indicate that Jones reported reduced
21 depressive symptoms with no side effects from Celexa, Dr. Barnes’ later progress notes
22 do not indicate improvement in the area of functioning at Reasoning Level 3. The
23 earliest progress note in the record is dated July 24, 2014. Jones reported that her son
24 returned home after being incarcerated for one year and was having difficulty living by
25 her rules. She felt that Celexa was not helping and she had difficulty performing daily
26 activities. AR 825. In September 2014, Jones reported she was doing “fair” and Celexa
27 was modestly helpful. Her application for SSI benefits was denied. Dr. Barnes noted

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1 her mood “remains mildly depressed.” AR 823. In November 2014, Jones reported she
2 has been a foster parent of a three-year-old who may be returning to her biological
3 parents. Jones was concerned that the parents abuse drugs and may be a negative
4 influence. Jones’ mood was dysphoric and anxious. AR 822. In January 2015, Jones
5 reported being under financial stress because she has to move and has no funds to do
6 so. Dr. Barnes referred her to a housing coordinator. Jones’ mood was dysphoric. AR
7 821. In April 2015, Jones’ mood was somber. She reported being under increased
8 financial stress. Celexa reduced her depressive symptoms without side effects but
9 some depressive symptoms remained. AR 819. In March 2015, Jones took the PPD
10 (purified protein derivative) skin test in connection with her application to do foster care.
11 AR 970.

12 The ALJ therefore has not stated clear and convincing reasons supported by
13 substantial evidence to reject Dr. Barnes’ opinion. *Trevizo v. Berryhill*, 2017 U.S. App.
14 LEXIS 12263, *23-*26 (9th Cir. July 10, 2017) (finding ALJ failed to articulate clear and
15 convincing reasons to discount treating physician’s uncontradicted opinion). Although
16 Dr. Barnes’ opinion precludes work at Reasoning Level 3, it is not clear from the record
17 whether there are other jobs existing in significant numbers in the national economy that
18 Jones could perform. *Treichler v. Comm’r*, 775 F.3d 1090, 1101 (9th Cir. 2014) (when
19 outstanding issues must be resolved before determination can be made, remand is
20 appropriate).

21 Because this matter is being remanded, the ALJ is free to reconsider Jones’
22 credibility in light of Dr. Barnes’ opinion. The court notes that Jones testified at her first
23 hearing that she was unable to perform her past relevant work due to the level of stress.
24 AR 48. The vocational expert agreed that the dispatcher job is stressful. AR 55.
25 However, to the extent Jones testified in her second hearing that she does not think
26 clearly (AR 61), her testimony is not supported by the objective medical evidence. Dr.
27 Barnes’ progress notes consistently indicate that her thought processes are clear. AR
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1 819, 821-22, 825; see also AR 810 (intake sheet). Nevertheless, the ALJ may not rely
2 on this reason alone. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

3 **IV.**

4 **ORDER**

5 IT IS HEREBY ORDERED that the decision of the Commissioner is
6 reversed and this matter is remanded for further proceedings at step five of the
7 sequential analysis.

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10 DATED: July 26, 2017

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12 ALICIA G. ROSENBERG
13 United States Magistrate Judge
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