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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 RENE M.,

12 Plaintiff,

13 v.

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

15 Defendant.
16

No. CV 18-5854 AGR

MEMORANDUM OPINION AND ORDER

17 Plaintiff¹ filed this action on July 3, 2018. On January 7, 2019, the parties filed a
18 Joint Stipulation (“JS”) that addressed the disputed issues. The court has taken the
19 matter under submission without oral argument.²

20 Having reviewed the entire file, the court reverses the decision of the
21 Commissioner and remands for reconsideration of Dr. Montes’ opinions.
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25 ¹ Plaintiff’s name has been partially redacted in compliance with Fed. R. Civ. P.
26 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and
Case Management of the Judicial Conference of the United States.

27 ² Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the
28 magistrate judge. (Dkt. Nos. 10, 12.)

I.

PROCEDURAL BACKGROUND

Plaintiff filed applications for disability insurance benefits and supplemental security income benefits in October 2014 and alleged an onset date of October 2, 2014. Administrative Record (“AR”) 16. The applications were denied initially. AR 17, 72-73. Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). On May 8, 2017, the ALJ conducted a hearing at which Plaintiff and a vocational expert (“VE”) testified. AR 30-51. On July 6, 2017, the ALJ issued a decision denying benefits. AR 13-25. On May 21, 2018, the Appeals Council denied 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 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.

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III.

DISCUSSION

A. Disability

A person qualifies as disabled, and thereby eligible for such 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 (2003) (citation and quotation marks omitted).

B. The ALJ’s Findings

The ALJ found that Plaintiff met the insured status requirements through March 31, 2015. AR 18. Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),³ the ALJ found that Plaintiff had the severe impairments of stroke, diabetes, diabetic retinopathy, chronic kidney disease, hypertension, and loss of visual acuity and cataracts in both eyes. AR 18.

The ALJ found that Plaintiff had the residual functional capacity to perform light work except that he could sit, stand and walk six hours in an eight-hour workday; occasionally climb ramps and stairs; occasionally stoop, crouch and crawl; and frequently balance and kneel. He could not drive; climb ladders and scaffolds; or see small objects at a distance due to poor visual acuity. He must avoid all exposure to moving mechanical parts and unprotected heights. AR 19.

³ 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. *Lounsbury*, 468 F.3d at 1114.

1 The ALJ found that Plaintiff acquired work skills from past relevant work as a
2 salesperson of office machines that are transferable to other occupations with jobs
3 existing in significant numbers in the national economy such as salesperson-furniture,
4 salesperson-household appliance and salesperson-men's furnishing. AR 24.

5 **C. Treating Physician**

6 Plaintiff argues that the ALJ improperly rejected the opinions of his treating
7 physician, Dr. Montes. AR 365-67.

8 An opinion of a treating physician is given more weight than the opinion of
9 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an
10 uncontradicted opinion of a treating physician, an ALJ must state clear and convincing
11 reasons that are supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d
12 1211, 1216 (9th Cir. 2005). When a treating physician's opinion is contradicted by
13 another doctor, "the ALJ may not reject this opinion without providing specific and
14 legitimate reasons supported by substantial evidence in the record. This can be done
15 by setting out a detailed and thorough summary of the facts and conflicting clinical
16 evidence, stating his interpretation thereof, and making findings." *Orn*, 495 F.3d at 632
17 (citations and quotation marks omitted).

18 An examining physician's opinion constitutes substantial evidence when it is
19 based on independent clinical findings. *Id.* at 632. When an examining physician's
20 opinion is contradicted, "it may be rejected for 'specific and legitimate reasons that are
21 supported by substantial evidence in the record.'" *Carmickle v. Comm'r*, 533 F.3d 1155,
22 1164 (9th Cir. 2008) (citation omitted). "The opinion of a nonexamining physician
23 cannot by itself constitute substantial evidence that justifies the rejection of the opinion
24 of either an examining physician or a treating physician." *Ryan v. Comm'r*, 528 F.3d
25 1194, 1202 (9th Cir. 2008) (citation and emphasis omitted). However, a non-examining
26 physician's opinion may serve as substantial evidence when it is supported by other
27 evidence in the record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
28 1041 (9th Cir. 1995).

1 "When there is conflicting medical evidence, the Secretary must determine
2 credibility and resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir.
3 2002) (citation and quotation marks omitted).

4 On March 25, 2016, Dr. Montes opined that Plaintiff could lift 10 pounds
5 occasionally and less than 10 pounds frequently. He could stand/walk about 3 hours
6 and sit about 4 hours in a workday with a sit/stand option. AR 365. He could frequently
7 twist, occasionally stoop, and never crouch or climb stairs/ladders. Dr. Montes opined
8 that Plaintiff had muscle weakness from his stroke that affected his ability to reach,
9 handle, finger, feel and push/pull. AR 366. He should avoid concentrated exposure to
10 extreme cold and heat, noise and fumes. He should avoid all exposure to hazards.
11 With these limitations, Plaintiff's impairments would not cause him to be absent from
12 work. AR 367.

13 The ALJ gave little weight to Dr. Montes' opinion because it was not well
14 supported by his treatment notes and was provided in the form of a checklist without
15 sufficient rationale to support the "extreme limitations." AR 22.

16 The ALJ's reasons are not supported by substantial evidence. Plaintiff had a
17 stroke on or about October 2, 2014. AR 279-80, 286. Dr. Montes' medical group
18 subsequently began treating Plaintiff. On February 4, 2015, Plaintiff's was referred to a
19 nephrologist "as soon as possible" for elevated protein urea. He reported pain with
20 walking. Plaintiff had decreased medial arches with tenderness to palpation but had
21 normal gait and station bilaterally with full range of motion. He was prescribed diabetic
22 shoes. AR 421-22, 427, 430, 432. On March 18, 2015, Plaintiff reported walking 20
23 minutes per day, five times per week. AR 415. The examining physician saw Plaintiff
24 on March 17, 2015. AR 349.

25 However, on June 30, 2015, Dr. Montes noted mild facial droop on the right,
26 decreased strength of the right upper and lower extremity (3+/5) and a limp. Dr. Montes
27 diagnosed diabetes, type II, hypertension, chronic kidney disease and hemiplegia
28 affecting right side due to cerebrovascular disease. Dr. Montes continued Plaintiff's

1 medications and advised him to get a cane. AR 405-06. On November 13, 2015,
2 Plaintiff's neurologic examination showed right sided weakness 4+/5 and diminished
3 sensation from the toes to mid calf bilaterally. Mentation showed slow cognition and
4 slow response. Speech was understandable but deliberate and hesitant. Plaintiff
5 walked with a cane. AR 457. On March 15, 2016, Plaintiff requested the completion of
6 a disability form to be off work indefinitely due to his neurological disability. AR 453.
7 Plaintiff's examination was unchanged. "Mentally he appears detached from current
8 environment." Dr. Montes noted that, according to Plaintiff's significant other, Plaintiff's
9 mentation has been present for the past several weeks. Dr. Montes stated Plaintiff "will
10 be placed on indefinite disability due to his neurological deficit." AR 454. Subsequent
11 medical records note hemiparesis (weakness on one side of the body) and dysarthria
12 (speech disorder caused by muscle weakness) as late effects of cerebrovascular
13 disease. AR 441, 443, 445, 448, 450. Plaintiff also had stage IV (severe) chronic
14 kidney disease. AR 443.

15 Dr. Montes' opinions are well supported by the medical group's treatment notes,
16 which evidence a deterioration of Plaintiff's condition. This matter will be remanded for
17 reconsideration of Dr. Montes' opinions.

18 **D. Residual Functional Capacity**

19 The RFC measures the claimant's capacity to engage in basic work activities.
20 *Bowen v. New York*, 476 U.S. 467, 471 (1986). The RFC is a determination of "the
21 most [an individual] can still do despite [his or her] limitations." 20 C.F.R. §
22 404.1545(a); *Treichler v. Comm'r*, 775 F.3d 1090, 1097 (9th Cir. 2014). It is an
23 administrative finding, not a medical opinion. 20 C.F.R. § 404.1527(e). The ALJ's RFC
24 assessment must be supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d
25 1211, 1217 (9th Cir. 2005).

26 Plaintiff argues that the ALJ's residual functional capacity ("RFC") assessment
27 failed to account for his need for an assistive device, his cognitive deficits and other
28 opinions rendered by Dr. Montes. Because this matter is being remanded for

1 reconsideration of Dr. Montes' opinions, which cover these areas, the court need not
2 address the issue of residual functional capacity separately.

3 **IV.**

4 **ORDER**

5 IT IS HEREBY ORDERED that the decision of the Commissioner is reversed and
6 remanded for reconsideration of Dr. Montes' opinions.

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8 DATED: March 18, 2019



ALICIA G. ROSENBERG
United States Magistrate Judge