

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 LOLITA ARQUETTE,) Case No. EDCV 09-02295-OP
12 Plaintiff,)
13 v.) MEMORANDUM OPINION AND
14 MICHAEL J. ASTRUE,) ORDER
15 Commissioner of Social)
16 Security,)
Defendant.)

17
18 The Court¹ now rules as follows with respect to the eight disputed issues
19 listed in the Joint Stipulation (“JS”).²
20
21 _____

22 ¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed
23 before the United States Magistrate Judge in the current action. (See Dkt.
Nos. 7, 9.)

24 ² As the Court advised the parties in its Case Management Order, the
25 decision in this case is being made on the basis of the pleadings, the
26 Administrative Record and the Joint Stipulation filed by the parties. In
27 accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court
28 has determined which party is entitled to judgment under the standards set
forth in 42 U.S.C. § 405(g).

1 I.

2 **DISPUTED ISSUES**

3 As reflected in the Joint Stipulation, the disputed issues which Plaintiff
4 is raising as the grounds for reversal and/or remand are as follows:

- 5 (1) Whether the Administrative Law Judge (“ALJ”), F. Keith Varni,
6 properly considered the treating physician’s opinions;
7 (2) Whether the ALJ properly considered the treating psychiatrist’s
8 opinions;
9 (3) Whether the ALJ properly considered the treating clinician’s
10 opinions;
11 (4) Whether the ALJ properly considered the side effects of Plaintiff’s
12 medications;
13 (5) Whether the ALJ properly considered the severity of Plaintiff’s
14 mental impairment;
15 (6) Whether the ALJ properly considered the consultative examiner’s
16 findings;
17 (7) Whether the ALJ properly considered the demands of Plaintiff’s
18 past relevant work; and
19 (8) Whether the ALJ should have obtained vocational expert
20 testimony.

21 (JS at 2-3.)

22 II.

23 **STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s
25 decision to determine whether the Commissioner’s findings are supported by
26 substantial evidence and whether the proper legal standards were applied.
27 DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence
28 means “more than a mere scintilla” but less than a preponderance. Richardson

1 v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971);
2 Desrosiers v. Sec’y of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir.
3 1988). Substantial evidence is “such relevant evidence as a reasonable mind
4 might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
5 401 (citation omitted). The Court must review the record as a whole and
6 consider adverse as well as supporting evidence. Green v. Heckler, 803 F.2d
7 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of more than one
8 rational interpretation, the Commissioner’s decision must be upheld. Gallant v.
9 Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

10 III.

11 DISCUSSION

12 A. The ALJ Failed to Properly Consider the Opinions of the Treating 13 Physician.

14 Plaintiff testified at the hearing before the ALJ that her treating physician
15 was Ibrahim Sumarli, M.D.³ (Administrative Record (“AR”) at 39-40.)
16 According to the record, Plaintiff was under Dr. Sumarli’s care at the Riverside
17 Neighborhood Health Center beginning in late 2006. (Id. at 463, 479, 500,
18 503, 505, 528, 531, 533.) Of particular relevance here is Dr. Sumarli’s March
19 27, 2007, Medical Report of Plaintiff. In that report, Dr. Sumarli indicated that
20 Plaintiff suffered from hypertension, fibromyalgia, carpal tunnel syndrome, and
21 migraine headaches. (Id. at 503.) Dr. Sumarli reported that Plaintiff was
22 unable to work full- or part-time and that she would only be able to work in a
23 zero-stress situation. (Id.) According to Dr. Sumarli, Plaintiff could not
24 participate in training-type activities. (Id.) In denying Plaintiff’s application,
25 the ALJ made no mention of Dr. Sumarli or his March 27, 2007, report.

27 ³ In the transcript of the hearing, the doctor’s name is phonetically
28 spelled “Somarli.” (AR at 39.)

1 It is well established in the Ninth Circuit that a treating physician's
2 opinion is entitled to special weight, because a treating physician is employed
3 to cure and has a greater opportunity to know and observe the patient as an
4 individual. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). "The
5 treating physician's opinion is not, however, necessarily conclusive as to either
6 a physical condition or the ultimate issue of disability." Magallanes v. Bowen,
7 881 F.2d 747, 751 (9th Cir. 1989). The weight given a treating physician's
8 opinion depends on whether it is supported by sufficient medical data and is
9 consistent with other evidence in the record. 20 C.F.R. §§ 404.1527(d),
10 416.927(d). Where the treating physician's opinion is uncontroverted by
11 another doctor, it may be rejected only for "clear and convincing" reasons.
12 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); Baxter v. Sullivan, 923 F.2d
13 1391, 1396 (9th Cir. 1991). If the treating physician's opinion is controverted,
14 as appears to be the case here, it may be rejected only if the ALJ makes
15 findings setting forth specific and legitimate reasons that are based on the
16 substantial evidence of record. Thomas v. Barnhart, 278 F.3d 947, 957 (9th
17 Cir. 2002); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647
18 (9th Cir. 1987). The ALJ can "meet this burden by setting out a detailed and
19 thorough summary of the facts and conflicting clinical evidence, stating his
20 interpretation thereof, and making findings." Thomas, 278 F.3d at 957
21 (citation and quotation omitted).

22 The ALJ's failure to provide any reasons, let alone legally sufficient
23 reasons, for discounting Dr. Sumarli's opinions warrants remand. See Embrey,
24 849 F.2d at 422 (in disregarding the findings of a treating physician, the ALJ
25 must "provide detailed, reasoned and legitimate rationales" and must relate any
26 "objective factors" he identifies to "the specific medical opinions and findings
27 he rejects"); see, e.g., Nelson v. Barnhart, No. C 00-2986 MMC, 2003 WL
28 297738, at *4 (N.D. Cal. Feb. 4, 2003) ("Where an ALJ fails to 'give

1 sufficiently specific reasons for rejecting the conclusion of [a physician],’ it is
2 proper to remand the matter for ‘proper consideration of the physicians’
3 evidence.”) (citation omitted). Accordingly, remand is required for the ALJ to
4 set forth legally sufficient reasons for rejecting the opinions of Dr. Sumarli, if
5 the ALJ again determines rejection is warranted.⁴

6 **B. The ALJ’s Consideration of the Opinions of the Treating**
7 **Psychiatrist.**

8 Plaintiff began psychiatric treatment on April 14, 2007, at the Riverside
9 County Department of Mental Health. (AR at 546-52.) In an April 26, 2007,
10 Initial Psychiatric Assessment of Plaintiff, Denise Joseph, M.D., reported a
11 diagnosis of Major Depressive Disorder with psychotic features, rule out
12 bipolar disorder. (Id. at 556.) Dr. Joseph assessed Plaintiff’s Global
13 Assessment of Functioning (“GAF”) at 40 currently, with the highest score
14 during the past year as 40. (Id.)⁵ Dr. Joseph reported that Plaintiff presented
15 with disorganized/incoherent speech, depressed mood, feelings of
16 worthlessness, decreased ability to concentrate, fatigue, and decreased sleep.
17 (AR at 557.) Dr. Joseph also noted that Plaintiff suffered from excessive

18
19 ⁴ The Court expresses no view on the merits.

20
21 ⁵ A GAF score is the clinician’s judgment of the individual’s overall
22 level of functioning. It is rated with respect only to psychological, social, and
23 occupational functioning, without regard to impairments in functioning due
24 to physical or environmental limitations. See American Psychiatric
25 Association, Diagnostic and Statistical Manual of Mental Disorders (“DSM-
26 IV”) at 32 (4th Ed. 2000). A GAF score of 31-40 indicates: “Some
27 impairment in reality testing or communication (e.g., speech is at times
28 illogical, obscure, or irrelevant) OR major impairment in several areas, such
as work or school, family relations, judgment, thinking, or mood (e.g.,
depressed man avoids friends, neglects family, and is unable to work . . .).”
Id. at 34.

1 anxiety/worry, recurrent distressing dreams, feelings of recurrent traumatic
2 event, muscle tension, and irritability. (Id.)

3 A Mental Status Exam on the same date resulted in findings of poverty
4 of speech, psychomotor slowing, poor eye contact, and distant interactions.
5 (Id. at 559.) Plaintiff was depressed and her thought content was bizarre and
6 poorly organized. (Id.) Plaintiff reported visual hallucinations in the form of
7 shadows. (Id.)

8 In a June 14, 2007, Psychiatric/Psychological Impairment Questionnaire,
9 Dr. Joseph reiterated the diagnosis of severe major depressive disorder with
10 psychotic features. (Id. at 538.) Dr. Joseph indicated that Plaintiff exhibited
11 the following positive clinical findings: poor memory; moderate appetite
12 disturbance; restless sleep; personality changes; mood disturbances; emotional
13 lability; hallucinations; anhedonia or pervasive loss of interests; psychomotor
14 agitation or retardation; difficulty thinking or concentrating; time or place
15 disorientation; social withdrawal or isolation; blunt, flat or inappropriate affect;
16 decreased energy; intrusive recollections of a traumatic experience; and
17 hostility and irritability. (Id. at 539.) Dr. Joseph concluded that Plaintiff was
18 mildly limited in her ability to carry out simple one or two-step instructions;
19 ask simple questions or request assistance; and be aware of normal hazards and
20 take appropriate precautions. (Id. at 541-43.) The doctor further concluded
21 that Plaintiff was moderately limited in her ability to understand and remember
22 detailed instructions; interact appropriately with the general public; accept
23 instructions and respond appropriately to criticism from supervisors; travel to
24 unfamiliar places or use public transportation; and set realistic goals or make
25 plans independently. (Id.) In addition, Dr. Joseph reported that Plaintiff was
26 markedly limited in her ability to remember locations and work-like
27 procedures; carry out detailed instructions; maintain attention and
28 concentration for extended periods; perform activities within a schedule,

1 maintain regular attendance and be punctual within customary tolerance;
2 sustain ordinary routine without supervision; work in coordination with or
3 proximity to others without being distracted by them; complete a normal
4 workweek without interruptions from psychologically based symptoms and
5 perform at a consistent pace without an unreasonable number and length of rest
6 periods; and maintain socially appropriate behavior and adhere to basic
7 standards of neatness and cleanliness. (Id. at 538.) Dr. Joseph explained that
8 she was unable to determine Plaintiff's prognosis at the time of the report. (Id.)
9 The doctor opined that Plaintiff is not a malingerer, is incapable of performing
10 even low stress work, and likely would be absent from work twice a week as a
11 result of her impairments or treatment. (Id. at 544-45.)

12 The ALJ rejected the findings of Dr. Joseph, as follows:

13 [W]hat is said in the form from Denise Joseph, M.D. is
14 astounding Dr. Joseph holds herself out principally as an
15 internist who also dabbles in psychology. However, a graduate of an
16 off-shore medical school, she is not Board certified in psychology or
17 anything else and when she completed the form at Exhibit 24F, had
18 seen the claimant at most twice, if that. The plethora of markedly
19 limited mental functions makes one wonder why the doctor did not
20 institutionalize the claimant, since that number would render her
21 unable to take care of herself, perform any self-help activities, or
22 even entertain any activities of daily living. This is as groundless an
23 assessment as I have seen. It is thoroughly rebutted by the
24 psychological consultative examinations and even more so by the
25 State agency Board certified psychiatrists.

26 (Id. at 28 (citations omitted).)

27 The ALJ's points are not well taken. First, the ALJ concludes that Dr.
28 Joseph "holds herself out principally as an internist who also dabbles in

1 psychology.” The ALJ relies on information from the California Medical
2 Board listing internal medicine as Dr. Joseph’s primary specialty, with
3 psychiatry listed as her secondary specialty.⁶ (*Id.* at 189.) The order in which
4 Dr. Joseph listed her specialties does not indicate that she is any less trained or
5 capable in either area of practice. In addition, the fact that Dr. Joseph was
6 employed at, and treating Plaintiff through, the Riverside County Department
7 of Mental Health indicates that at the time of the assessment she was employed
8 as a psychiatrist, not merely “dabbl[ing]” in the field. Further, Dr. Joseph
9 doesn’t dabble in “psychology” at all, as she is a psychiatrist not a
10 psychologist.

11 Next, the ALJ faults Dr. Joseph for being a graduate of an “off-shore”
12 medical school. According to the California Medical Board, Dr. Joseph is a
13 graduate of the American University of the Caribbean School of Medicine.
14 However, regardless of where she attended medical school, Dr. Joseph is duly
15 licensed to practice medicine within the State of California. Ironically, the two
16 consultative examiners relied on by the ALJ also attended foreign medical
17 schools. According to the California Medical Board, Reynaldo Abejuela, M.D.
18 attended medical school at the Far Eastern University in the Philippines and
19 Sohini Parikh, M.D. attended Gujarat University Medical College in India.

20 The ALJ also rejected Dr. Joseph’s opinions because she is not “Board
21 certified in psychology or anything else.” Of course, the Court would not
22 expect Dr. Joseph, a psychiatrist, to be Board certified in psychology. In
23 addition, consultative psychiatrist Dr. Parikh stated on his report that he is
24 Board eligible (*id.* at 329), but there is no indication in the record or through

25
26 ⁶ The Court notes that the California Medical Board currently lists Dr.
27 Joseph’s primary specialty as psychiatry, with internal medicine listed as her
28 secondary specialty. [http://www2.mbc.ca.gov/LicenseLookupSystem/
PhysicianSurgeon/Lookup.aspx?licenseType=A&licenseNumber=51242](http://www2.mbc.ca.gov/LicenseLookupSystem/PhysicianSurgeon/Lookup.aspx?licenseType=A&licenseNumber=51242).

1 the medical board that he has ever obtained formal certification. In addition,
2 while Dr. Abejuela states in his report that he is a Diplomate of the American
3 Board of Psychiatry and Neurology (id. at 251), his certification is not reflected
4 through the state medical board.⁷ Neither is there any evidence establishing the
5 Board certification of the other identifiable state agency psychiatrist, David E.
6 Goss, M.D.⁸ Accordingly, it was inappropriate for the ALJ to conclude, based
7 on the information reflected by the California Medical Board, that Dr. Joseph
8 was not Board certified, or at the very least Board eligible. Moreover, even
9 assuming that Dr. Joseph is not Board certified, the ALJ improperly rejected
10 her opinions in favor of other apparently non-certified psychiatrists.

11 The ALJ also rejects Dr. Joseph's findings because the extreme
12 limitations reported by Dr. Joseph would have rendered Plaintiff incapable of
13 caring for herself and would have warranted that she be institutionalized.
14 However, although Dr. Joseph believed Plaintiff to be quite impaired, she
15 clearly did not feel that Plaintiff required hospitalization or any other form of
16 "institutionaliz[ation]." It was inappropriate for the ALJ to reject Dr. Joseph's
17 findings by substituting his own medical conclusions for that of the physician,
18 particularly where the ALJ did not even seek the testimony of a medical expert.

20 ⁷ This Court has no reason to doubt that Dr. Abejuela is Board
21 certified. However, the discrepancy in information merely highlights the fact
22 that the California Medical Board, upon which the ALJ apparently relied in
23 determining Dr. Joseph's qualifications, might not maintain accurate and up-
24 to-date information on a physician's status with the Board. Notably, the
25 medical board's homepage does not guarantee the accuracy of information
regarding a physician's Board certification and refers inquiries into those
matter to the American Board of Medical Specialties.

26 ⁸ There is one other state agency psychiatrist relied upon by the ALJ.
27 However, that physician's signature is illegible and his printed name does not
28 appear on the report. (AR at 339-52.)

1 See Tacket v. Apfel, 180 F.3d 1094, 1102-03 (9th Cir. 1999) (finding it
2 inappropriate for an ALJ to substitute his own medical judgment for that of a
3 treating physician); see also Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir.
4 1975) (noting that hearing examiner was not a qualified medical expert).

5 Next, the ALJ concludes that Dr. Joseph's opinions are thoroughly
6 rebutted by the psychological consultative examinations and even more so by
7 the State agency Board certified psychiatrists. First, as explained above, it is
8 not clear that all, or any, of the doctors relied on by the ALJ were Board
9 certified, or that Dr. Joseph was not Board certified. Second, the most recent of
10 the reports relied on by the ALJ was completed in May 2005 (AR at 339),
11 approximately two years before Dr. Joseph began treating Plaintiff and more
12 than two years prior to the ALJ's decision. The ALJ does nothing to account
13 for the possibility of deterioration in Plaintiff's symptoms between the time the
14 state agency physicians considered Plaintiff's condition and the time she began
15 treatment with Dr. Joseph. Third, the fact that a physician's opinion is
16 inconsistent with other evidence might be reason to conclude it not worthy of
17 "controlling weight," but it is not a sufficient reason to reject the opinion
18 outright. Orn v. Astrue, 495 F.3d 625, 631-32 (9th Cir. 2007) (quoting SSR
19 96-2p; 20 CFR § 404.1527).

20 Finally, the ALJ rejected Dr. Joseph's opinions because, at the time she
21 completed the Psychiatric/Psychological Impairment Questionnaire, she had
22 seen the claimant "at most twice." The "[l]ength of the treatment relationship
23 and the frequency of examination" are factors the ALJ may consider in
24 determining the weight to be given the opinions of a treating source. Orn, 495
25 F.3d at 631. Moreover, it is correct that Dr. Joseph had recently begun treating
26 Plaintiff at the time she completed the Psychiatric/Psychological Impairment
27 Questionnaire. However, because the Court has decided above that this action
28 must be remanded for further consideration of Dr. Sumarli's opinions, the

1 Court also directs the ALJ to further consider Dr. Joseph's opinions and to set
2 forth legally sufficient reasons for rejecting those opinions, if the ALJ again
3 determines that such rejection is warranted.⁹

4 **C. The ALJ's Consideration of the Opinions of the Treating Social**
5 **Worker.**

6 On April 16, 2007, a Licensed Clinical Social Worker ("LCSW") at the
7 Riverside County Department of Mental Health conducted an Intake
8 Assessment of Plaintiff. The social worker estimated Plaintiff's GAF to be 50
9 currently, with the highest GAF during the past year at 50.¹⁰ (AR at 546.) The
10 social worker further noted symptoms consistent with Dr. Joseph's later report.
11 (*Id.* at 547-55.) The ALJ did not mention the findings of the social worker in
12 his decision.

13 Standing alone, the ALJ's failure to give reasons for rejecting the
14 evaluation performed by the social worker is not reversible error because an
15 LCSW is not an "acceptable medical source" within the meaning of the
16 regulations. Nonetheless, information from "other sources" may be considered
17 to assess impairment severity and its affect on the ability to work. 20 C.F.R. §§
18 404.1513(a), (d), 416.913(a), (d) (defining an "acceptable medical source," and
19 explaining that information from "other sources" also may be considered); see
20 Gomez v. Chater, 74 F.3d 967, 970-71 (9th Cir. 1996) (holding that the
21 regulations permit the Commissioner to give "less weight" to opinions from
22 "other sources"). Because the Court has concluded that this action must be
23

24 ⁹ The Court expresses no view on the merits.

25
26 ¹⁰ A GAF score of 41-50 indicates "[s]erious symptoms (e.g., suicidal
27 ideation, severe obsessional rituals, frequent shoplifting) OR any serious
28 impairment in social, occupational, or school functioning (e.g., no friends,
unable to keep a job)." DSM IV at 34.

1 remanded for further consideration of Dr. Sumarli's opinions, the Court also
2 directs the ALJ to further consider the opinions of the LCSW.

3 **D. The ALJ Did Not Improperly Neglect to Consider Side Effects of**
4 **Plaintiff's Medications.**

5 Plaintiff explains that, according to a report from Dr. Joseph, she was
6 taking "Depakote ER, Cymbalta and another medication that is unidentifiable."
7 (JS at 27.) Plaintiff then discusses the potential side effects of these
8 medications as described by WebMD and concludes that the ALJ erred by not
9 considering these side effects as they might have related to Plaintiff's
10 impairment. (*Id.* at 27-28.) The Court does not agree.

11 Under Ninth Circuit law, the ALJ must "consider *all* factors that might
12 have a 'significant impact on an individual's ability to work.'" *Erickson v.*
13 *Shalala*, 9 F.3d 813, 817 (9th Cir. 1993) (quoting *Varney v. Sec'y of Health &*
14 *Human Servs.*, 846 F.2d 581, 585 (9th Cir.), *relief modified*, 859 F.2d 1396
15 (1988)). Such factors "may include side effects of medications as well as
16 subjective evidence of pain." *Erickson*, 9 F.3d at 818. When the ALJ
17 disregards the claimant's testimony as to subjective limitations of side effects,
18 he must support that decision with specific findings similar to those required
19 for excess pain testimony, as long as the side effects are in fact associated with
20 the claimant's medications. *See Varney*, 846 F.2d at 545; *see also Muhammed*
21 *v. Apfel*, No. C 98-02952 CRB, 1999 WL 260974, at *6 (N.D. Cal. 1999).

22 In this case, there was no indication in the medical records that Plaintiff
23 reported any side effects from her medications. In fact, Plaintiff does not even
24 attempt to argue that the record contains evidence that she suffered from any of
25 the listed side effects, but rather apparently argues that the ALJ was required to
26 consider potential side effects merely because the medications were known to
27 cause some adverse reactions. In the absence of evidence that Plaintiff actually
28 suffered from side effects of medication, there was no error in the ALJ's failure

1 to mention the potential side effects. See Bayliss v. Barnhart, 427 F.3d 1211,
2 1217 (9th Cir. 2005) (ALJ did not err in failing to “explicitly address the
3 drowsiness side-effect of [the claimant’s] medication” in making an RFC
4 determination as “the ALJ took into account those limitations for which there
5 was record support that did not depend on [the claimant’s] subjective
6 complaints”); Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002) (alleged
7 side effects need not be considered where no objective evidence supported
8 allegations).

9 **E. The ALJ’s Consideration of the Plaintiff’s Mental Impairment.**

10 After rejecting the opinions of Dr. Joseph, the ALJ concluded that
11 Plaintiff “has no severe mental impairment and not one of the ‘B’ criteria exist
12 for any reason.” (AR at 28.) Plaintiff relies on the opinions of Dr. Joseph, as
13 well as the LCSW from the County of Riverside Department of Mental Health,
14 in arguing that the ALJ failed to properly consider the severity of Plaintiff’s
15 mental impairment. (JS at 30-33.) The disposition of Plaintiff’s claim relies on
16 the weight to be given the opinions of Dr. Joseph and the LCSW. As this Court
17 has directed the ALJ to reconsider the opinions of Dr. Joseph and the LCSW on
18 remand, the Court further directs the ALJ to reconsider the severity of
19 Plaintiff’s mental impairment in light of the renewed assessment of the medical
20 evidence.

21 **F. The ALJ’s Consideration of the Opinions of the Consultative**
22 **Examiner.**

23 After an April 27, 2005, Internal Medicine Evaluation, consultative
24 examiner Denny H. Lee, M.D., concluded, among other things, that Plaintiff
25 could push, pull, turn, and twist with her right dominant upper extremity
26 “frequently,” and that she should avoid working near moving machinery or at
27 unprotected heights during her migraine headaches. (AR at 319-20.) Without
28 specifically noting these limitations, the ALJ adopted the opinions of Dr. Lee

1 and concluded that Plaintiff maintained the Residual Functional Capacity to
2 “lift and carry 20 lbs. occasionally and 10 lbs. frequently; stand and walk up to
3 six hours and sit for six hours out of an eight hour workday with a few
4 additional limitations.”¹¹ (Id. at 26.) Presumably, given his adoption of Dr.
5 Lee’s assessment, the limitations reported by Dr. Lee are included in the ALJ’s
6 notation of “a few additional limitations.” Ultimately, the ALJ concluded that
7 Plaintiff could perform her past work as “a rental property leasing agent.” (Id.
8 at 28.) However, the ALJ did not provide a DOT number for this position, or
9 specify that he was relying on the characterization of this job as detailed by
10 Plaintiff.¹²

11 The ALJ’s RFC assessment is relatively consistent with light work,
12 except potentially as Plaintiff is further limited by “a few additional
13 limitations.” The Dictionary of Occupational Titles (“DOT”) defines light
14 work as:

15 Exerting up to 20 pounds of force occasionally, and/or up to 10
16 pounds of force frequently, and/or a negligible amount of force

17
18 ¹¹ The Court notes that the conclusion by the ALJ that Plaintiff has “a
19 few additional limitations,” appears to be in conflict with the heading of this
20 portion of the ALJ’s analysis, which states that Plaintiff “has the residual
21 functional capacity to perform the full range of light work.” (Id. at 25.)
22 Whether these two conclusions are in fact inconsistent, and whether they are
23 materially inconsistent when considered in light of Plaintiff’s past relevant
work, is impossible for the Court to determine in light of the ALJ’s vague
analysis, as discussed below.

24 ¹² Pursuant to Social Security Ruling 82-61, an ALJ may find a
25 claimant “not disabled” at step four of the analysis where the claimant retains
26 the RFC to perform “[t]he actual functional demands and job duties of a
27 particular past relevant job,” or “[t]he functional demands and job duties of
28 the occupation as generally required by employers throughout the national
economy.”

1 constantly (Constantly: activity or condition exists 2/3 or more of the
2 time) to move objects. Physical demand requirements are in excess
3 of those for Sedentary work. Even though the weight lifted may be
4 only a negligible amount, a job should be rated Light Work: (1) when
5 it requires walking or standing to a significant degree; or (2) when it
6 requires sitting most of the time but entails pushing and/or pulling of
7 arm or leg controls; and/or (3) when the job requires working at a
8 production rate pace entailing the constant pushing and/or pulling of
9 materials even though the weight of those materials is negligible.

10 DOT, Fourth Ed., 1991, App. C.

11 Plaintiff's past relevant work as a "rental property leasing agent,"
12 appears to fit within the DOT's definition of Apartment House Manager (DOT
13 No. 186.167-018) or Property Manager (Id. No. 186.167-046). Each of these
14 positions are described as light work and do not on their face appear to require
15 more than frequent pushing, pulling, turning, and twisting of the upper
16 extremities or routine work around moving machinery or at unprotected
17 heights. Id. Nos. 186.167-018, 186.167-046.

18 In addition, at the hearing before the ALJ Plaintiff described her duties
19 as a leasing agent as: "To accept phone calls for people, tenants, prospective
20 tenants interested in apartments, showing apartments, doing move-ins and
21 move-outs." (AR at 37.) In a 2005 Work History Report, Plaintiff described
22 her job duties in more detail. Plaintiff explained that her job required her to
23 "answer phone inquiry for apts - kept records of all calls/showed apts to
24 prospective tenants/wrote up move-in lease packets + move out paperwork/
25 wrote up + served delinquent rent notices/accepted rent + deposit monies/
26 handle complaints/lt bookkeeping/filing/evictions." (Id. at 135.) Plaintiff
27 stated that her job required use of machines, tools, or equipment; technical
28 knowledge or skills; and writing or completing reports. (Id.) In a typical day

1 on the job, Plaintiff estimated that she spent two to three hours walking; one
2 hour standing; three to four hours sitting; one to two hours climbing; forty-five
3 minutes stooping; one hour handling, grabbing, or grasping big objects; and
4 two to three hours writing, typing, or handling small objects. (Id.) Plaintiff
5 explained that she frequently was required to lift ten pounds, which was the
6 heaviest weight she lifted on the job. (Id.)

7 In light of this evidence, it does not appear that the ALJ's RFC
8 assessment conflicts with Dr. Lee's findings. However, the record cannot be
9 completely clear on this point without, at the very least, clarification as to
10 Plaintiff's "few additional limitations" and an analysis of whether those
11 limitations can be accommodated by Plaintiff's past work, either as defined by
12 the DOT or as she described it.

13 Accordingly, on remand the ALJ should further clarify what, if any,
14 limitations Plaintiff has beyond those included in the definition of light work
15 and specify whether those limitations would prevent her from performing her
16 past relevant work.

17 **G. The ALJ's Consideration of Plaintiff's Past Relevant Work.**

18 As explained above, the ALJ concluded that Plaintiff could perform her
19 past work as "a rental property leasing agent." (Id. at 28.) However, the ALJ
20 did not provide a DOT number corresponding to Plaintiff's work or indicate
21 that he was relying on Plaintiff's description of that work. Neither did the ALJ
22 seek testimony from a vocational expert as to the demands of Plaintiff's past
23 work or whether Plaintiff could perform such work in light of her current
24 limitations. Upon remand, the ALJ is directed to further develop the record as
25 to Plaintiff's specific limitations and identify any limitations Plaintiff maintains
26 beyond those recognized in the definition of light work. The ALJ should also
27 identify the DOT number corresponding to Plaintiff's past work, or indicate
28 reliance on the job duties identified by Plaintiff, and thoroughly analyze

1 Plaintiff's ability to perform that work in light of her current limitations.

2 **H. Whether the ALJ Should Have Obtained Vocational Expert**
3 **Testimony.**

4 As mentioned above, in concluding, at step four of the social security
5 analysis, that Plaintiff maintained the RFC to perform her past work, the ALJ
6 did not seek the testimony of a vocational expert. The Plaintiff bears the
7 burden of proving at step four that she is unable to perform her past relevant
8 work. Thus, although vocational expert testimony might be useful at this step,
9 it is not required. Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993).

10 Because the ALJ concluded that Plaintiff did not meet her burden of proving
11 disability at step four of the analysis, he did not err in failing to obtain
12 vocational expert testimony.¹³

13 **I. This Case Should Be Remanded for Further Administrative**
14 **Proceedings.**

15 The law is well established that remand for further proceedings is
16 appropriate where additional proceedings could remedy defects in the
17 Commissioner's decision. Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir.
18 1984). Remand for payment of benefits is appropriate where no useful purpose
19 would be served by further administrative proceedings, Kornock v. Harris, 648
20 F.2d 525, 527 (9th Cir. 1980); where the record has been fully developed,
21 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand
22 would unnecessarily delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d
23

24 ¹³ Whether the ALJ properly concluded at step four that Plaintiff could
25 perform her past work is dependent upon proper consideration of the opinions
26 of the treating physicians and other evidence of record. Accordingly, upon
27 remand the ALJ is directed to reconsider whether VE testimony is necessary
28 and whether Plaintiff maintains the RFC to perform her past work in light of
the medical record.

1 716, 719 (9th Cir. 1985).

2 Here, the Court concludes that this is an instance where further
3 administrative proceedings would serve a useful purpose and remedy
4 administrative defects.

5 **IV.**

6 **ORDER**

7 Pursuant to sentence four of 42 U.S.C. § 405(g), IT IS HEREBY
8 ORDERED THAT Judgment be entered reversing the decision of the
9 Commissioner of Social Security and remanding this matter for further
10 administrative proceedings consistent with this Memorandum Opinion.

11
12 DATED: November 24, 2010



13 **HONORABLE OSWALD PARADA**
14 **United States Magistrate Judge**
15
16
17
18
19
20
21
22
23
24
25
26
27
28