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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CATHY L. ADAMS,)	NO. EDCV 11-01509-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Plaintiff filed a Complaint on September 27, 2011, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On October 26, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on July 2, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings.

1 He concluded that these impairments do not meet or medically equal the
2 criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P,
3 Appendix 1, the Listing of Impairments. (A.R. 21.)
4

5 After reviewing the record, the ALJ determined that plaintiff has
6 the residual functional capacity ("RFC") to perform less than the full
7 range of medium work as defined in 20 C.F.R. §§ 404.1567(c) and
8 416.967(c). (A.R. 22.) Specifically, the ALJ found that plaintiff:
9

10 can lift and/or carry 50 pounds occasionally; push and pull
11 within these weight restrictions; stand and/or walk 6 hours in
12 an 8-hour workday; and sit 6 hours in an 8-hour workday. She
13 can perform postural activities frequently, including
14 climbing, bending, stooping, crouching, squatting, crawling,
15 and reaching. She can do fine fingering frequently.
16

17 (*Id.*)
18

19 The ALJ found that plaintiff is capable of performing her past
20 relevant work as a home attendant, companion, and day worker on a full
21 time basis. (A.R. 24.) Accordingly, the ALJ concluded that plaintiff
22 has not been under a disability, as defined in the Social Security Act,
23 from March 16, 2006, the date her application was filed, through June
24 10, 2010, the date of his decision. (*Id.*)
25

26 _____
27 objective medical evidence and are found to be non-severe impairments[,]
28 . . . [and her] hypertension is controlled with medication and is a non-
severe impairment." (A.R. 21.) The ALJ's findings in this respect are
not challenged by plaintiff.

1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
3 the Commissioner's decision if it is based on harmless error, which
4 exists only when it is "clear from the record that an ALJ's error was
5 'inconsequential to the ultimate nondisability determination.'" Robbins
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
8 at 679.

10 DISCUSSION

11
12 Plaintiff claims the ALJ failed to consider properly: (1) the
13 opinion of plaintiff's treating physician, Ted Lee, M.D.; and
14 (2) plaintiff's testimony. (Joint Stipulation ("Joint Stip.") at 4.)

16 I. The ALJ Failed To Give Specific And Legitimate Reasons 17 Supported By Substantial Evidence For Rejecting The 18 Opinion Of Plaintiff's Treating Physician, Ted Lee, M.D..

19
20 Plaintiff claims that the ALJ improperly rejected the opinion of
21 her treating physician, Dr. Ted Lee. (Joint Stip. at 5-8.) The Court
22 agrees.

23
24 The opinions of treating physicians are entitled to the greatest
25 weight, because the treating physician is hired to cure and has a better
26 opportunity to observe the claimant. Magallanes v. Bowen, 881 F.2d 747,
27 750 (9th Cir. 1989). When a treating physician's opinion is not
28 contradicted by another physician, it may be rejected only for "clear

1 and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
2 1995)(as amended). When contradicted by another doctor, a treating
3 physician's opinion may only be rejected if the ALJ provides "specific
4 and legitimate" reasons supported by substantial evidence in the record.
5 *Id.*

6
7 Fibromyalgia is not well-understood and is difficult to
8 diagnose. See Jordan v. Northrop Grumman Corp. Welfare Plan, 370 F.3d
9 869, 872 (9th Cir. 2004)(noting that "fibromyalgia's cause or causes are
10 unknown, there is no cure, and, of greatest importance to disability
11 law, its symptoms are entirely subjective"), *overruled on other grounds*
12 *in Abatie v. Alta Health & Life Ins.*, 458 F.3d 955, 970 (2006); Sarchet
13 v. Chater, 78 F.3d 305, 306 (7th Cir. 1996)("fibromyalgia . . . [is an]
14 elusive and mysterious . . . disease"). "The principal symptoms [of
15 fibromyalgia] are 'pain all over,' fatigue, disturbed sleep, stiffness,
16 and . . . multiple tender spots, more precisely 18 fixed locations on
17 the body (and the rule of thumb is that the patient must have at least
18 11 of them to be diagnosed as having fibromyalgia) that when pressed
19 firmly cause the patient to flinch." Rollins v. Massanari, 261 F.3d
20 853, 855 (9th Cir. 2001)(*quoting Sarchet*, 78 F.3d at 306.) Because of
21 the nature of fibromyalgia, its diagnosis necessarily hinges on a
22 claimant's subjective symptoms; "[t]here are no laboratory tests for the
23 presence or severity of fibromyalgia." Jordan, 370 F.3d at 872;
24 Sarchet, 78 F.3d at 306 (same).

25
26 On January 6, 2010, plaintiff's treating doctor, Dr. Lee, completed
27 a "Medical Opinion Re: Ability To Do Work-Related Activities (Physical)"
28 in which he diagnosed plaintiff with fibromyalgia, severe back pain, and

1 degenerative disc disease. (A.R. 318-20.) Dr. Lee noted that
2 plaintiff's impairments limited her ability to work. (A.R. 320.) He
3 opined that plaintiff was limited to, *inter alia*: lifting and carrying
4 less than ten pounds on an occasional and frequent basis; sitting,
5 standing, and walking less than two hours in an eight-hour workday;
6 never twisting, crouching, climbing stairs or ladders, and occasional
7 reaching; avoid moderate exposure to extreme cold, wetness, humidity,
8 noise, and fumes; and avoid all exposure to extreme heat and hazards.
9 (A.R. 318-20.) Dr Lee also opined that plaintiff would miss at least
10 three days of work per month due to her impairments. (A.R. 320.)
11

12 The ALJ gave "limited weight" to the limitations that "Dr. Lee
13 ascribes . . . to [plaintiff]'s fibromyalgia pain," because it was "not
14 supported by the treatment records from Neighborhood Health[c]are
15 including those prepared by Dr. Lee." (A.R. 23.) This sole reason
16 given by the ALJ for rejecting the opinion of Dr. Lee is inadequate, as
17 it fails to reach the level of specificity required for rejecting a
18 medical opinion. Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.
19 1988)("To say that medical opinions are not supported by sufficient
20 objective findings or are contrary to the preponderant conclusions
21 mandated by the objective findings does not achieve the level of
22 specificity our prior cases have required The ALJ must do more
23 than offer his conclusions. He must set forth his own interpretations
24 and explain why they, rather than the doctors', are correct.")(footnote
25 omitted).

26
27 Further, the ALJ's assertion that Dr. Lee's medical opinion lacks
28 support in the treatment records is incorrect. Although many of the

1 treatment notes from Neighborhood Healthcare are illegible, the record
2 contains various reports related to plaintiff's treatment for
3 fibromyalgia or some of its symptoms (i.e., pain, fatigue, stiffness,
4 and disturbed sleep). (See A.R. 251 - 11/17/08 (fibromyalgia noted by
5 Dr. Lee); A.R. 252 - 01/07/09 (fibromyalgia and insomnia noted by Dr.
6 Lee); A.R. 378 - 04/28/09 (fibromyalgia and pain noted by Gerard J.
7 Carvalho, M.D.); A.R. 401 - 09/08/09 (fibromyalgia, back pain, and
8 spasms noted by Dr. Lee); A.R. 400 - 09/22/09 (fibromyalgia noted by Dr.
9 Lee); A.R. 375 - 10/12/09 (chest pain, palpitations, back pain, joint
10 stiffness, joint swelling noted by Bryan Sauter, PA-C); A.R. 392 -
11 12/09/09 (fibromyalgia noted, although doctor's name is illegible); A.R.
12 365 - 01/27/10 (mild sleep apnea and fatigue noted by Robert Troell,
13 M.D.); A.R. 383-84 - 03/02/10 (chest pain palpitations, back pain, joint
14 stiffness, and joint swelling noted by Bryan Sauter, PA-C); A.R. 388 -
15 03/10/10 (reflecting Dr. James Y. Tsai's opinion that plaintiff's
16 "[e]levated Haptoglobin [is] likely due to Fibromyalgia and IBS".)

17
18 Moreover, on August 24, 2010, after the ALJ rendered his decision,
19 Dr. Lee completed a "Fibromyalgia Disease Residual Functional Capacity
20 Questionnaire" in which he noted that he had monthly contact with
21 plaintiff.² (A.R. 418.) He noted "clinical exam consistent with
22

23 ² This Questionnaire was not part of the record when the ALJ
24 rendered his decision on June 10, 2010. (See A.R. 4.) Although this
25 Questionnaire was submitted to the Appeals Council after the ALJ had
26 issued his decision -- and thus, contrary to plaintiff's contention, the
27 ALJ cannot be faulted for failing to address it -- defendant does not
28 argue that this evidence is not part of the record or that this Court
cannot consider it in determining whether the ALJ's decision is
supported by substantial evidence. See Ramirez v. Shalala, 8 F.3d 1449,
1451-52 (9th Cir. 1993)(reviewing court may consider evidence submitted
to Appeals Council in determining whether ALJ's decision is supported by
substantial evidence); Harman v. Apfel, 211 F.3d 1172, 1180 (9th Cir.

1 fibromyalgia." (*Id.*) Dr. Lee listed plaintiff's symptoms as including
2 multiple tender points, nonrestorative sleep, chronic fatigue, morning
3 stiffness, muscle weakness, numbness, tingling, and breathlessness.
4 (*Id.*) He noted that plaintiff had severe pain at all tender points.
5 (A.R. 419.) Dr. Lee also noted that plaintiff's medications cause
6 certain side effects, such as nausea and sedation. (A.R. 420.) He
7 further indicated that during a typical workday, plaintiff frequently
8 experiences pain or other symptoms severe enough to interfere with her
9 attention and concentration. (*Id.*) Specifically, with respect to
10 plaintiff's functional limitations, he stated that plaintiff cannot sit
11 longer than ten minutes at one time, she cannot stand for longer than
12 five minutes at one time, and she can only sit and stand/walk for less
13 than two hours in total during an eight hour working day. (*Id.*) Dr.
14 Lee further opined that plaintiff can lift and carry less than ten
15 pounds occasionally, but never anything over ten pounds, and has
16 significant limitations in doing repetitive reaching, handling or
17 fingering. (A.R. 421.) Significantly, Dr. Lee also opined that
18 plaintiff is likely to be absent from work more than three times a month
19 as a result of her impairments or treatment. (A.R. 422.) Dr. Lee
20 concluded that plaintiff was permanently disabled due to fibromyalgia.
21 (*Id.*)
22

23 Thus, the ALJ's conclusion that Dr. Lee's assessment is not
24 supported by the treatment records, including those prepared by Dr. Lee
25

26 2000)(additional materials submitted to Appeals Council properly may be
27 considered, because Appeals Council addressed them in context of denying
28 claimant's request for review); Gomez v. Chater, 74 F.3d 967, 971 (9th
Cir. 1996)(evidence submitted to Appeals Council is part of record on
review to federal court).

1 himself, is undermined not only by the evidence of record before the ALJ
2 at the time of his decision but also by the August 24, 2010
3 Questionnaire submitted by plaintiff to the Appeals Council after the
4 ALJ rendered his decision.³ Accordingly, considering the record as a
5 whole, including the additional evidence submitted by plaintiff to the
6 Appeals Council, the ALJ's rejection of the opinion of Dr. Lee is not
7 supported by substantial evidence and free from legal error.

8
9 On remand, Dr. Lee's opinion must be considered in its entirety
10 with proper evaluation of his August 24, 2010 Questionnaire. Further,
11 should the ALJ again elect to give Dr. Lee's opinion "limited weight"
12 and, instead, to give controlling weight to the opinion of a
13 nonexamining State agency physician, then the ALJ must set forth
14 specific and legitimate reasons for doing so.

15
16 **II. The ALJ Failed To Give Clear And Convincing Reasons For**
17 **Finding Plaintiff's Testimony To Be Not Credible.**
18

19 Once a disability claimant produces objective medical evidence of
20 an underlying impairment that is reasonably likely to be the source of
21 claimant's subjective symptom(s), all subjective testimony as to the
22

23 ³ The Appeals Council considered the August 24, 2010
24 Questionnaire (A.R. 4.), which it made part of the Administrative
25 Record, but determined that the evidence "d[id] not provide a basis for
26 changing the [ALJ]'s decision" (A.R. 2). Notwithstanding the Appeals
27 Council's determination, this Court must consider such evidence in
28 determining whether the ALJ's decision is supported by substantial
evidence and free from legal error. See Brewes v. Comm'r of SSA, 682
F.3d 1157, 1163 (9th Cir. 2012)(holding that "when the Appeals Council
considers new evidence in deciding whether to review a decision of the
ALJ, that evidence becomes part of the administrative record, which the
district court must consider when reviewing the Commissioner's final
decision for substantial evidence").

1 severity of the symptoms must be considered. Moisa v. Barnhart, 367
2 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
3 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)
4 (explaining how pain and other symptoms are evaluated). “[U]nless an
5 ALJ makes a finding of malingering based on affirmative evidence
6 thereof, he or she may only find an applicant not credible by making
7 specific findings as to credibility and stating clear and convincing
8 reasons for each.” Robbins, 466 F.3d at 883. The factors to be
9 considered in weighing a claimant’s credibility include: (1) the
10 claimant’s reputation for truthfulness; (2) inconsistencies either in
11 the claimant’s testimony or between the claimant’s testimony and her
12 conduct; (3) the claimant’s daily activities; (4) the claimant’s work
13 record; and (5) testimony from physicians and third parties concerning
14 the nature, severity, and effect of the symptoms of which the claimant
15 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
16 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

17
18 The ALJ found plaintiff has the severe impairments of fibromyalgia
19 syndrome and diabetes mellitus. (A.R. 20.) However, he found that
20 plaintiff’s “statements concerning the intensity, persistence and
21 limiting effects of her symptoms are credible only to the extent they
22 are consistent with [his RFC] assess[ment].” (A.R. 23.) The ALJ cited
23 no evidence of malingering by plaintiff. Accordingly, the ALJ’s reason
24 for rejecting plaintiff’s credibility must be clear and convincing.

25
26 The ALJ found plaintiff’s subjective complaints to be “not fully
27 credible,” because (1) “[a]lthough [plaintiff] subscribes to a wide
28 variety of pains and other physical complaints, there are no objective

1 medical, clinical, laboratory, or radiographic findings to support these
2 asserted symptoms"; and (2) plaintiff "has demonstrated for at least the
3 past 3 years that she is able to work for 15 hours per week," and
4 "[t]here is a total lack of medical evidence to show that she could not
5 do the same work for 40 hours per week." (A.R. 23.)
6

7 The ALJ's first ground for finding plaintiff to be not credible
8 cannot, by itself, constitute a clear and convincing reason for
9 discrediting plaintiff. The failure of the objective medical record to
10 corroborate fully plaintiff's subjective symptom testimony is not, by
11 itself, a legally sufficient basis for rejecting such testimony.
12 Rollins, 261 F.3d at 856; Burnell, 947 F.2d at 347 (noting that "[i]f an
13 adjudicator could reject a claim of disability simply because
14 [plaintiff] fails to produce evidence supporting the severity of the
15 pain there would be no reason for an adjudicator to consider anything
16 other than medical findings"). Moreover, the lack of objective medical
17 evidence is consistent with the nature and symptoms of fibromyalgia.
18 Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004)(stating that
19 fibromyalgia "is diagnosed entirely on the basis of patients' reports of
20 pain and other symptoms"). Accordingly, the ALJ's finding that the
21 objective evidence does not support the extent of plaintiff's symptoms
22 cannot, without more, constitute a clear and convincing reason for
23 discrediting plaintiff's testimony. See Varney v. Secretary, 846 F.2d
24 581, 584 (9th Cir. 1988); Cotten v. Bowen, 799 F.2d 1403, 1407 (9th Cir.
25 1986).
26

27 The ALJ's second ground for discrediting plaintiff is also not
28 clear and convincing. While it is true that plaintiff works 15 hours

1 per week (three hours a day, five days a week), plaintiff did not
2 indicate that she is capable of sustained work. (A.R. 33.) In fact,
3 when asked by the ALJ "why can't you work through the pain and put in
4 another 15 hours a week," plaintiff responded that she cannot do so,
5 because the pain is "very severe" and the "medicine that they put me on
6 makes me very groggy."⁴ (A.R. 36.) Thus, the ALJ fails to demonstrate
7 how plaintiff's ability to work part-time as a caregiver amounts to the
8 ability to engage in, and sustain, full-time competitive work. See
9 Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987)(disability claimant
10 need not 'vegetate in dark room' to be deemed eligible for benefits);
11 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)("The Social Security
12 Act does not require that [an individual] be utterly incapacitated to be
13 eligible for benefits, . . . and many home activities are not easily
14 transferable to what may be the more grueling environment of the
15 workplace, where it might be impossible to periodically rest or take
16 medication.")(internal citations omitted). As such, the ALJ's second
17 reason for discrediting plaintiff's testimony is unavailing.

18
19 Accordingly, for the aforementioned reasons, the ALJ failed to give
20 clear and convincing reasons, as required, for discrediting plaintiff's
21

22 ⁴ While not raised by plaintiff, the Court notes that the ALJ
23 must also consider all the side effects of plaintiff's pain medication
24 and their impact on plaintiff's ability to work. There is no indication
25 that the side effects of plaintiff's medications were considered in the
26 ALJ's disability evaluation. See Erickson v. Shalala, 9 F.3d 813,
27 817-18 (9th Cir. 1993)(noting that an ALJ must consider all factors,
28 including the side effects of medications, that might have a
"significant impact on an individual's ability to work")(citation
omitted); see also Soc. Sec. Ruling 96-7p, 1996 WL 374186, at *2-*3,
1996 SSR LEXIS 4, at *7-*8 (noting that the type, dosage, effectiveness,
and side effects of any medication the individual takes or has taken to
alleviate pain or other symptoms should be considered in the disability
evaluation); 20 C.F.R. §§ 404.1529(c)(3)(iv), 416.929(c)(3)(iv).

1 subjective pain testimony.⁵

2
3 **III. Remand Is Required.**

4
5 The decision whether to remand for further proceedings or order an
6 immediate award of benefits is within the district court's discretion.
7 Harman, 211 F.3d at 1175-78. Where no useful purpose would be served by
8 further administrative proceedings, or where the record has been fully
9 developed, it is appropriate to exercise this discretion to direct an
10 immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to
11 remand for further proceedings turns upon the likely utility of such
12 proceedings."). However, where there are outstanding issues that must
13 be resolved before a determination of disability can be made, and it is
14 not clear from the record that the ALJ would be required to find the
15 claimant disabled if all the evidence were properly evaluated, remand is
16 appropriate. *Id.* at 1179-81.

17
18 Remand is the appropriate remedy to allow the ALJ the opportunity
19 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
20 Benecke, 379 F.3d at 593 (remand for further proceedings is appropriate
21 if enhancement of the record would be useful); *see* *Dodrill v. Shalala*,
22 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so that the ALJ could
23 articulate specific and appropriate findings, if any existed, for
24 rejecting the claimant's subjective pain testimony).

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⁵ While the Commissioner now offers other reasons to explain the
28 ALJ's credibility determination, the Court cannot entertain these post
hoc rationalizations. *See, e.g., Orin*, 495 F.3d at 630; *Connett*, 340
F.3d at 874.

1 The ALJ needs to reconsider plaintiff's testimony regarding her
2 pain and ability to work and, if appropriate, give clear and convincing
3 reasons for rejecting it. In addition, the ALJ must give plaintiff's
4 treating physician's opinion its deserved weight or give specific and
5 legitimate reasons for not doing so.

6
7 **CONCLUSION**

8
9 Accordingly, for the reasons stated above, IT IS ORDERED that the
10 decision of the Commissioner is REVERSED, and this case is REMANDED for
11 further proceedings consistent with this Memorandum Opinion and Order.

12
13 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
14 copies of this Memorandum Opinion and Order and the Judgment on counsel
15 for plaintiff and for defendant.

16
17 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

18
19 DATED: August 27, 2012

Margaret A. Nagle

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21
22

MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE