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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBORAH A. OLGUIN, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	))))))))))	Case No. EDCV 11-1802-OP MEMORANDUM OPINION AND ORDER

The Court[1] now rules as follows with respect to the disputed issues listed in the Joint Stipulation ("JS").[2]

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[1] Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the United States Magistrate Judge in the current action. (See ECF Nos. 6, 11.)

[2] As the Court stated in its Case Management Order, the decision in this case is made on the basis of the pleadings, the Administrative Record, and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g). (ECF No. 4 at 3.)

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I.

DISPUTED ISSUES

As reflected in the Joint Stipulation, the disputed issues raised by Plaintiff as the grounds for reversal and/or remand are as follows:

(1) Whether the Administrative Law Judge ("ALJ") properly considered the findings of Plaintiff's treating physician; and

(2) Whether the Vocational Expert ("VE") provided an adequate basis for her opinion regarding alternative work.

(JS at 8.)

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether the Commissioner's findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at 401 (citation omitted). The Court must review the record as a whole and consider adverse as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation, the Commissioner's decision must be upheld. Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

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III.

DISCUSSION

A. The ALJ's Findings.

The ALJ found that Plaintiff has severe physical impairments, including hypertension, history of hypothyroidism, liver cirrhosis with esophageal varices and history of esophageal bleeding, irregular heartbeat, history of diabetes, and history of anemia. (AR at 17.) The ALJ further found that Plaintiff had the residual functional capacity ("RFC") to perform light work, limited by the following accommodations: lift and carry ten pounds frequently and twenty pounds occasionally; stand and walk up to four hours in an eight-hour day but no more than fifteen minutes at a time; sit unrestricted with normal breaks; occasionally climb, balance, stoop, kneel, crouch, and crawl; work absence once or twice a month; and no detailed or complex tasks. (Id. at 18.) Relying on the testimony of the VE, the ALJ determined that Plaintiff was unable to perform her past relevant work as a property manager, but could perform alternative work as a case aide. (Id. at 20-21.)

B. The ALJ Properly Rejected the Opinion of the Treating Liver Specialist.

Plaintiff contends that the ALJ erred in giving no weight to the functional capacity assessment of Plaintiff's treating liver specialist, Mohamed El-Kabany, M.D. (JS at 8-10.)

On March 15, 2011, after seeing Plaintiff just two times (AR at 75), Dr. El-Kabany signed a boilerplate form reading as follows:

> Mr./Ms. Olguin, Deborah, DOB: 12/31/53, has been under my care since __/__/__. He/She has liver failure manifested by decompensated cirrhosis with ascites, encephalopathy and/or coagulopathy. His/Her prognosis is poor without liver transplantation. Based on his/her terminal condition, he/she cannot work 40 hours/week, lift objects (>10

> lbs), perform job duties requiring intellectual skills, operate machinery or drive an automobile.

(Id. at 472.)

In his decision, the ALJ offered the following discussion of the opinion evidence:

> As for the opinion evidence, the undersigned gives great weight to the State agency medical consultants' opinion. It is consistent with Dr. Siciarz's functional assessment of light work. Treatment records show office visits and prescribed medication for physical ailments without adequate objective medical evidence to support an inability to sustain a 40-hour workweek on a regular and continuing basis or perform even sedentary work, as Dr. El-Kabany mentioned. For that reason, the undersigned gives little weight to Dr. El-Kabany's overly restrictive assessment. Additionally, the claimant acknowledged she manages personal needs independently, performs household chores, drives, and goes shopping.

(Id. at 19.)

It is well established in the Ninth Circuit that a treating physician's opinion is entitled to special weight, because a treating physician is employed to cure and has a greater opportunity to know and observe the patient as an individual. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). In addition, more weight is generally given to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist. See 20 C.F.R. § 404.1527(d)(5). "The treating physician's opinion is not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). The weight given a treating physician's opinion depends on whether it is supported by sufficient medical data and is consistent with other evidence in the record. 20

C.F.R. §§ 404.1527(d), 416.927(d). Where the treating physician's opinion is uncontroverted by another doctor, it may be rejected only for "clear and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995); Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). If the treating physician's opinion is controverted, as will be assumed to be the case here, it may be rejected only if the ALJ makes findings setting forth specific and legitimate reasons that are based on the substantial evidence of record. Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987). The ALJ can "meet this burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Thomas, 278 F.3d at 957 (citation and quotation omitted).

First, Dr. El-Kabany's opinion is not supported by the remainder of the medical record. While Dr. El-Kabany's generic form indicates that Plaintiff suffers from a "terminal condition" that necessitates a liver transplant, there is no support for this in the record. On November 19, 2009, a gastroenterology treatment note indicated that Plaintiff was "clinically doing well." (AR at 355.) In addition, a August 26, 2010, gastroenterology note reported that Plaintiff was suffering no symptoms from her cirrhosis. (Id. at 333.) Most telling of the status of Plaintiff's liver disease is the repeated reports of Plaintiff's Model for End-Stage Liver Disease ("MELD") score of 13. (Id. at 347, 355, 470.) The MELD scale ranges from 6 (less ill) to 40 (gravely ill), and, generally, liver patients are not activated for transplant until the MELD score reaches 15. See United Network for Organ Sharing Policy For Allocation of Donated Liver Organs, Policy 3.6, http://optn.transplant.hrsa.gov/organDatasource/OrganSpecificPolicies.asp?display=Liver (follow pdf hyperlink for policy 3.6, Organ Distribution: Allocation of Livers); www.unos.org/docs/MELD_PELD.pdf). In addition, Plaintiff was assessed a Child-Pugh rating of A, the least severe rating possible under the Child-

Pugh scale for assessing liver disease and not sufficient for listing of the patient for liver transplantation. See Harrison's Manual of Medicine 17/e, Table 163-3: Child-Pugh Classification of Cirrhosis, http://harrisons.unboundmedicine.com/ harrisons/ub/index/Harrisons-Manual-of-Medicine/ (follow "Tables" hyperlink; then follow "Cirrhosis, Child-Pugh Classification of" hyperlink). Ultimately, there is no evidence in the record to support Dr. El-Kabany's severely restricted physical assessment of Plaintiff. In fact, all of the evidence is to the contrary.

In addition, the ALJ correctly pointed out that Plaintiff's admitted activities of daily living far surpass the limitations noted by Dr. El-Kabany. According to the Exertion Questionnaire authored by Plaintiff, since being diagnosed with liver disease, she has remained capable of household shopping about three times a week, laundry, driving 10 to 15 hours a week, and other household duties. (AR at 32, 40, 238-40.) She is capable of lifting a vacuum and a gallon of milk, and requires only a 30-minute rest period during the day. (Id. at 89, 239, 240.) These activities are not supportive of the level of restriction assessed by Dr. El-Kabany.

Accordingly, the Court finds that the ALJ rejected the generic assessment by Dr. El-Kabany on the basis of specific and legitimate reasons supported by substantial evidence in the record. Thus, there was no error.

C. The VE's Testimony Was Properly Supported.

Plaintiff argues that the VE did not provide an adequate basis for her testimony regarding alternative work because she had not personally observed the job of case aide before offering her opinion that Plaintiff was capable of performing such work. In addition, Plaintiff argues that the VE erroneously concluded that Plaintiff had transferrable skills from her past employment because the specified skills were merely aptitudes. Plaintiff also complains that the VE erred in concluding Plaintiff could perform the job of case aide because it was not in the same industry as her past work of property manager. Finally, Plaintiff

complains that the VE's reduction in the numbers of the case aide jobs to compensate for Plaintiff's limitations were unfounded. (JS at 14-18.)

The VE testified that in light of Plaintiff's RFC and past job experience, she would be capable of performing work as a case aide. (AR at 99-100.) The VE further explained that her opinion was mostly consistent with the Dictionary of Occupational Titles ("DOT"), but gave very detailed explanations for how it varied and how she came to the conclusion that Plaintiff could perform such work. (Id. at 101-04.) Plaintiff's counsel pressed the VE on the fact that the DOT specification for the case aide job requires a higher level of functioning than that of Plaintiff, asking the VE if she had "seen this case aide job in and of itself performed at less than what the DOT specifies it being demanded." (Id. at 102.) The VE responded as follows:

> It, it runs a variety, and no, I've not seen -- I've not gone to an office and sat there and visualized it, that's not part of a requirement of a vocational expert. But I do keep up on all of the latest and greatest documents, and periodicals, and publications that come out in my field.

(Id.)

The VE further testified that Plaintiff had the following skills that would transfer from her past work as a property manager to alternate work as a case aide:

> Oh, very low level; very basic decision-making skills, communication skills, the ability to work effectively with the public and professionals, ability to work within an office, using office equipment. I hope I mentioned decision-making skills, organizational planning skills --

(Id. at 100.)

After an ALJ determines that a claimant cannot perform past relevant work at step four, the ALJ must determine if the claimant can perform work in the national economy at step five. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

A VE's recognized expertise provides the requisite foundation for her testimony. Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). An ALJ may take administrative notice of any information the VE provides, including testimony addressing the number of available jobs. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995).

An ALJ may not rely on a VE's testimony regarding the requirements of a particular job, however, without first inquiring whether the testimony conflicts with the DOT, and if so, the reasons for the conflict. Massachi v. Astrue, 486 F.3d 1149, 1152–53 (9th Cir. 2007) (citing Social Security Ruling 00–4p). In order for an ALJ to accept VE testimony that contradicts the DOT, the record must contain "persuasive evidence to support the deviation." Pinto v. Massanari, 249 F.3d 840, 846 (9th Cir. 2001) (quoting Johnson, 60 F.3d at 1435). Evidence sufficient to permit such a deviation may be either specific findings of fact regarding the claimant's residual functionality, or inferences drawn from the context of the expert's testimony. Light v. Soc. Sec. Admin., 119 F.3d 789, 793 (9th Cir.), as amended (1997).

Here, Plaintiff did not object to the qualifications of the VE and has not cited any authority requiring that the VE personally observe every job to which the VE refers. To be sure, the VE exhibited an extensive understanding of the job of case aide and thoroughly explained its requirements. In addition, the VE detailed her opinion as to how Plaintiff could perform the job of case aide despite the variations with the DOT. Furthermore, the VE explained the erosion of available positions that would be available to Plaintiff in light of her RFC. The VE established more than sufficient qualifications to form the basis of her opinion regarding the case aide position, despite never having personally observed the job being performed.

Moreover, the VE properly found that Plaintiff had transferable skills that would assist her in performing the job of case aide. While an aptitude is an inclination, a natural ability, talent, or capacity for learning, see Webster's New

World Dictionary 68 (3d ed. 1988), a skill is a "learned power for doing something competently." 3 Soc. Sec. Law & Practice § 43:72 (1999). In contrast to basic human traits such as perception and motor skills, the abilities identified by the VE constitute vocational assets learned at Plaintiff's past job and, thus, were properly classified as transferable skills. Compare Paulson v. Bowen, 836 F.2d 1249, 1251-52 (9th Cir. 1988) (holding that "[t]he qualities of perception and motor coordination are abilities and aptitudes" and not skills); see also Anglin v. Massanari,18 Fed. App'x 551, 553 (9th Cir. 2001) (finding that "knowledge of office procedures (i.e., responding to telephone inquiries and knowledge of different filing and distribution methods), calculating, posting, and verifying financial data, and recording and retrieving data" amounted to transferable skills, not aptitudes).

Next, Plaintiff is misguided in arguing that the job of case aide was not in the same industry as her past work of property manager. In identifying the job of appointment clerk, the VE testified that the DOT code for appointment clerk "differs sufficiently [from property manager] to indicate it's in a different industry." (AR at 98.) The VE clarified that the job of appointment clerk would be "clerical versus professional technical management." (Id.) She further explained that, in her opinion, Plaintiff's skills would transfer well to the job of appointment clerk, "[b]ut if somebody really wanted to hold my feet to the fire I would have to say it's a different industry." (Id.) To the contrary, when the VE identified the job of case aide, she explained that "it's a closer match than appointment clerk, actually, because it's still in the 100 first three digits of the [DOT]." (Id. at 99.) The VE never testified that the jobs of case aide and property manager, being so close to one another in the DOT listing, were in different industries, and Plaintiff had not presented any evidence to support such a finding.

Finally, Plaintiff's claim fails to the extent she argues that the VE provided no foundation for the erosion on numbers of case aide jobs that would be available

to Plaintiff on the basis of her physical limitations. Plaintiff fails to recognize that the VE's expertise alone provided the basis for such testimony. Bayliss, 427 F.3d at 1218 (VE's "recognized expertise provides the necessary foundation for his or her testimony"); Johnson, 60 F.3d at 1435 (ALJ may take administrative notice of VE testimony addressing the number of available jobs).

Because the VE provided sufficient testimony and maintained the appropriate expertise to support her testimony, the Court finds that the ALJ properly relied on the expert testimony regarding alternative work. Thus, there was no error.

IV.

ORDER

Based on the foregoing, IT THEREFORE IS ORDERED that Judgment be entered affirming the decision of the Commissioner, and dismissing this action with prejudice.

Dated: October 1, 2012

HONORABLE OSWALD PARADA
United States Magistrate Judge