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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---------------------------|---|------------------------------|
| YOLANDA TORRES, |) | Case No.: ED CV 13-1345-PJW |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | MEMORANDUM OPINION AND ORDER |
| |) | |
| CAROLYN W. COLVIN, Acting |) | |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). She claims that the Administrative Law Judge ("ALJ") erred when she: (1) found that Plaintiff was not credible, (2) rejected the treating doctors' opinions, and (3) relied on the vocational expert's testimony. For the reasons explained below, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings.

1 substantial evidence in the record. *Thomas v. Barnhart*, 278
2 F.3d 947, 959 (9th Cir. 2002).

3 The ALJ cited a number of reasons for questioning
4 Plaintiff's testimony. She noted that Plaintiff "engaged in a
5 somewhat normal level of daily activity," including driving,
6 shopping, attending her daughter's school meetings, and
7 occasionally eating out in restaurants, and concluded that this
8 undermined her testimony that her pain precluded her from
9 working. (AR 21.) Though the record supports the ALJ's finding
10 that Plaintiff performed these activities, the Court does not
11 agree with the ALJ that her ability to perform them undermined
12 her testimony that she could not work. They are relatively
13 brief, non-strenuous activities that do not establish that
14 Plaintiff was lying when she claimed that she could not work
15 full time. See *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
16 Cir. 2001) ("This court has repeatedly asserted that the mere
17 fact that a plaintiff has carried on certain daily activities,
18 such as grocery shopping, driving a car, or limited walking for
19 exercise, does not in any way detract from her credibility as to
20 her overall disability."). Further, the ALJ failed to explain
21 how Plaintiff's ability to drive, for example, translated into
22 an ability to work full time. See *Gonzalez v. Sullivan*, 914
23 F.2d 1197, 1201 (9th Cir. 1990) (holding ALJ errs in failing to
24 explain how ability to perform daily activities translated into
25 ability to perform work).

26 The ALJ also relied on the fact that Plaintiff seemed to
27 contradict herself when she testified that she had no trouble
28 walking but also testified that she could no longer walk one-

1 half mile two to three times a week because of pain. (AR 21.)
2 Though the ALJ is entitled to rely on inconsistencies in a
3 claimant's testimony in evaluating her credibility, the
4 transcript does not support the ALJ's finding that Plaintiff
5 contradicted herself. She testified that she generally had no
6 problem walking but added that "it depends on the distance."
7 (AR 58.) On the next page of the transcript, she testified that
8 she used to walk one-half mile with her husband two to three
9 times a week but had stopped because of the pain. (AR 59.) The
10 Court does not interpret the testimony as contradictory.

11 The ALJ found that Plaintiff's testimony that she was
12 fatigued was contradicted by her testimony that she took naps
13 for four to six hours on certain days and still slept through
14 the night. (AR 21.) The Court does not see these statements as
15 contradictory, either. In fact, it seems to support Plaintiff's
16 testimony that she suffers from fatigue and that is why she naps
17 during the day.

18 The ALJ next focused on the objective medical evidence and
19 found that it did not support Plaintiff's testimony. She looked
20 at, for example, the fact that Plaintiff had a full range of
21 motion in her right elbow even though she claimed that she
22 suffered from pain in her right arm and hand. (AR 21.) The
23 Court does not find this to be a persuasive reason for
24 questioning Plaintiff's testimony as none of the doctors opined
25 that a full range of motion in her elbow was inconsistent with
26 her claim that she suffered from pain in her arm and hand.

27 The Court has the same reaction to the ALJ's discussion
28 about atrophy. Without citation, the ALJ reported that atrophy

1 is "a common side effect of prolonged and/or chronic pain due to
2 lack of use of a muscle to avoid pain." (AR 21.) The ALJ then
3 pointed out that the examining doctor had not detected any
4 atrophy and surmised that the lack of atrophy indicated that
5 Plaintiff was exaggerating her claims of severe pain. (AR 21.)
6 The problem with this finding is that it is premised on the
7 ALJ's medical conclusion that absence of atrophy establishes
8 regular use of the limb. Though this makes sense, the ALJ
9 cannot rely on her own medical expertise to draw this inference
10 from the evidence.

11 The ALJ concluded that Plaintiff's treatment was
12 conservative and that this indicated a lack of candor. (AR 21.)
13 Again, while the Court would agree that, generally speaking, a
14 claimant's decision to treat a condition conservatively is a
15 valid reason for questioning a claimant's testimony, it
16 disagrees with the ALJ's characterization of Plaintiff's
17 treatment as conservative. Plaintiff received extensive
18 treatment to resolve her carpal tunnel syndrome and other
19 maladies in her wrists and arms, including three surgeries that
20 required her to undergo general anesthesia. She also received
21 cortisone shots, physical therapy, and numerous types of pain
22 medications, including narcotics like Vicodin. The Court does
23 not find this treatment to be conservative nor is there anything
24 in the record to suggest that a more aggressive treatment was
25 called for and that Plaintiff chose to simply forgo it.

26 Thus, in the end, the Court finds that the reasons
27 proffered by the ALJ for discounting Plaintiff's testimony are
28 not valid. The issue that remains is whether the Court should

1 credit Plaintiff's testimony as true and reverse the ALJ's
2 decision or remand the case to the Agency for further
3 consideration of the credibility issue. See *Harman v. Apfel*,
4 211 F.3d 1172, 1178 (9th Cir. 2000). The Court concludes that
5 remand is warranted because it is not clear from the record
6 whether Plaintiff's ailments and the pain caused by them
7 preclude her from performing all work, thus triggering her
8 entitlement to benefits. See *Connett v. Barnhart*, 340 F.3d 871,
9 876 (9th Cir. 2003) (holding "credit as true" doctrine not
10 mandatory and remanding case to Agency for reconsideration of
11 credibility issue). As Plaintiff testified, she has no problem
12 sitting and probably would not have any problem standing. (AR
13 58-59.) And, according to Plaintiff, she can lift five pounds
14 with her right hand and ten with her left. (AR 58.) Thus, even
15 based on her testimony, it appears that there might be jobs that
16 she could perform in the workplace. For that reason, the issue
17 is remanded to the Agency to allow the ALJ to decide anew
18 whether Plaintiff's testimony is credible and whether she can
19 work.

20 B. The ALJ's Analysis of the Doctors' Opinions

21 The ALJ relied primarily on the examining doctor's opinion
22 to conclude that Plaintiff was capable of working and was not
23 disabled. Plaintiff complains that the ALJ erred in doing so
24 and should have relied, instead, on her treating doctors'
25 opinions that she was more limited. For the following reasons,
26 the Court concludes that further development of this issue is
27 necessary.

1 ALJs are tasked with resolving conflicts in the medical
2 evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
3 1995). Generally speaking, three types of doctors supply that
4 evidence: treating doctors, examining doctors, and reviewing
5 doctors. All things being equal, treating doctors' opinions are
6 entitled to the greatest weight because they are hired to cure
7 and have more opportunity to know and observe the patient. *Id.*
8 at 1041; see also 20 C.F.R. 416.927(d)(2) ("Generally, we give
9 more weight to opinions from your treating sources, since these
10 sources are likely to be the medical professionals most able to
11 provide a detailed, longitudinal picture of your medical
12 impairment(s) and may bring a unique perspective to the medical
13 evidence that cannot be obtained from the objective medical
14 findings alone or from reports of individual examinations").
15 Examining doctors are next on the list, followed by reviewing
16 doctors. See *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.
17 1995). ALJs, however, are not required to merely accept the
18 opinion of any doctor and, where the opinion is contradicted,
19 may reject it for specific and legitimate reasons that are
20 supported by substantial evidence in the record. *Id.* at 830.

21 When Plaintiff's ailments caused her to stop working, she
22 filed a workers' compensation action. One of her treating
23 doctors, Dr. Birnbaum, served as her worker's compensation
24 doctor. Plaintiff submitted records from Dr. Birnbaum and the
25 other doctors who examined or treated her in connection with her
26 workers' compensation case in support of her claim for
27 disability in this case. Ultimately, the ALJ did not rely on
28 these doctors' opinions and relied, instead, on the opinion of

1 the examining physician, Dr. Sophon. In explaining why, the ALJ
2 began with her general assessment of doctors in the workers'
3 compensation arena:

4 [P]hysicians retained by either party in the context of
5 workers' compensation cases are often biased and do not
6 provide truly objective opinions. The claimant's treating
7 physician in the context of a workers' compensation claim
8 often serves as an advocate for the claimant and describes
9 excessive limitations to enhance the claimant's financial
10 recovery.

11 (AR 22.)

12 The ALJ then went on to explain that "disability" under
13 workers' compensation law is different from "disability" under
14 Social Security law and concluded that, therefore, "the
15 credibility of and relevance of the opinions of these physicians
16 must be carefully assessed because of the involvement with the
17 workers' compensation claim." (AR 22.)

18 The ALJ's focus on the fact that Plaintiff's treating
19 doctors were employed by Plaintiff in connection with her
20 workers' compensation case is clearly contrary to binding Ninth
21 Circuit case law and is rejected. In *Lester*, the circuit made
22 clear that the Agency is not allowed to discount a doctor's
23 opinion simply because it was procured by a claimant in
24 connection with litigation and the ALJ suspects that the doctor
25 was biased as a result:

26 In rejecting the examining psychologist's opinion, the ALJ
27 considered it to be significant that his reports "were
28 clearly obtained by the claimant's attorney for the purpose

1 of litigation." The purpose for which medical reports are
2 obtained does not provide a legitimate basis for rejecting
3 them. An examining doctor's findings are entitled to no
4 less weight when the examination is procured by the
5 claimant than when it is obtained by the Commissioner.
6 *Ratto v. Secretary*, 839 F. Supp. 1415, 1426 (D. Or. 1993).
7 As the *Ratto* court stated: "The Secretary may not assume
8 that doctors routinely lie in order to help their patients
9 collect disability benefits." *Id.*

10 *Lester*, 81 F.3d at 832.

11 Thus, the ALJ's implication that Plaintiff's treating
12 doctors' opinions were suspect because Plaintiff hired them in
13 connection with her workers' compensation case is rejected.¹

14 The Court also takes exception to the ALJ's decision to
15 rely on the examining doctor's opinion because it was not
16 contradicted by any of the other opinions. (AR 25.) If that is
17 the case, then, all things being equal, the ALJ should have
18 relied on the treating doctors' opinion, since they, too, would
19 have to have been uncontradicted. See *Reddick v. Chater*, 157
20 F.3d 715, 725 (9th Cir. 1998) ("The opinions of treating doctors
21 should be given more weight than the opinions of doctors who do
22 not treat the claimant. *Lester*, 81 F.3d at 830. Where the
23 treating doctor's opinion is not contradicted by another doctor,

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25 ¹ The Court finds it ironic that the ALJ is uncomfortable
26 relying on the treating doctors because they were paid by
27 Plaintiff but is willing to rely on the examining doctor who was
28 paid by the Agency. If the ALJ believes that doctors are
inclined to offer opinions that are consistent with the views of
the person who pays them, then the examining doctor's opinion
should have been equally suspect.

1 it may be rejected only for 'clear and convincing' reasons
2 supported by substantial evidence in the record. *Id.* (internal
3 quotation marks omitted).").

4 The ALJ also discounted the treating doctors' opinions
5 because, contained within them, were the doctors views on
6 disability, an issue reserved to the ALJ. (AR 25-26.) The ALJ
7 erred here, too. She was not at liberty to simply disregard the
8 doctors' entire opinion because, in the context of the worker's
9 compensation case, the doctor determined that Plaintiff was
10 disabled, which is, apparently, what doctors do in workers'
11 compensation cases. *See Orn v. Astrue*, 495 F.3d 625, 631-33
12 (9th Cir. 2007) (explaining, even if treating doctor's opinion
13 is not entitled to controlling weight, it must still be
14 considered by ALJ); *see also Holohan v. Massanari*, 246 F.3d
15 1195, 1203 (9th Cir. 2001) (holding treating doctor's
16 controverted opinion on ultimate issue of disability must be
17 credited unless it can be rejected for specific and legitimate
18 reasons).

19 Thus, none of the reasons offered by the ALJ for
20 discounting the treating doctors' opinions are valid. The Court
21 is again faced with the choice of remanding the case for further
22 consideration or reversing the ALJ's decision and remanding for
23 an award of benefits. *See, e.g., Lester*, 81 F.3d at 834 ("Where
24 the [ALJ] fails to provide adequate reasons for rejecting the
25 opinion of a treating or examining physician, we credit that
26 opinion as a matter of law."). Here, again, the Court finds
27 that remand is appropriate because it is not clear from the
28 record, even accepting the treating doctors' opinions at face

1 value, that Plaintiff is disabled under Social Security law.
2 See *Strauss v. Comm'r of Soc. Sec. Admin.*, 635 F.3d 1135, 1137
3 (9th Cir. 2011) ("A claimant is not entitled to benefits under
4 the statute unless the claimant is, in fact, disabled, no matter
5 how egregious the ALJ's errors may be."). This is primarily
6 because the language used by the workers' compensation doctors
7 is not readily transferable to Social Security proceedings.
8 And, though Plaintiff's counsel attempted to translate the
9 reports for the Court (Joint Stip. at 20-21), it is still not
10 clear based on these doctors' reports whether Plaintiff is
11 disabled under Social Security law. For that reason, the Court
12 finds that the more prudent course is to let the ALJ, with the
13 help of Plaintiff's counsel, translate these reports in the
14 first instance and determine whether Plaintiff is disabled under
15 the law.²

16 C. The Vocational Expert's Testimony

17 Plaintiff's final ground for appeal is that the ALJ failed
18 to question the vocational expert about how Plaintiff's various
19 limitations would impact her ability to perform jobs identified
20 by the vocational expert. This issue, too, is remanded for
21 further consideration. On remand, the ALJ should determine the

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23 ² For example, Dr. Birnbaum determined at the end of his
24 treatment of Plaintiff that she was temporarily totally disabled
25 for four weeks. (AR 404.) Obviously, even crediting this
26 opinion as true, it would not be enough to establish that
27 Plaintiff was disabled under Social Security law because the law
28 requires a showing of disability for at least twelve months.
The same holds true for Dr. Cook's report. (AR 560-631.) He
did not conclude that Plaintiff could not work. Rather, he
restricted her from work involving repetitive or forceful use of
her hands and arms. (AR 601.)

1 full extent of Plaintiff's limitations by readdressing the
2 medical evidence and Plaintiff's testimony and then questioning
3 the vocational expert about what, if any, jobs Plaintiff can
4 still perform despite her limitations.

5 IV. CONCLUSION

6 For these reasons, the ALJ's decision is reversed and the
7 case is remanded to the Agency for further proceedings
8 consistent with this Memorandum Opinion and Order.

9 IT IS SO ORDERED.

10 DATED: November 7, 2014

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13 PATRICK J. WALSH
14 UNITED STATES MAGISTRATE JUDGE
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