UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TERESA L. COX, Plaintiff, v. CAROLYN W. COLVIN, COMMISSIONER OF SOCIAL SECURITY, Defendant.	NO. ED CV 14-372-E **MEMORANDUM OPINION AND ORDER OF REMAND**

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS HEREBY ORDERED that Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a Complaint on March 5, 2014, seeking review of the denial of social security disability benefits. The parties filed a consent to proceed before a United States Magistrate Judge on April 3, 2014.

Plaintiff filed a motion for summary judgment on August 6, 2014. Defendant filed a motion for summary judgment on November 5, 2014. The Court has taken both motions under submission without oral argument. See L.R. 7-15; "Order," filed March 14, 2014.

BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

Plaintiff asserts disability since February 2, 2010, based on alleged physical and mental impairments (Administrative Record ("A.R.") 160-70, 183). An Administrative Law Judge ("ALJ") examined the medical record and heard testimony from Plaintiff and a vocational expert (A.R. 10-379). The ALJ found Plaintiff has severe degenerative disc disease, obesity, diabetes, asthma, obstructive sleep apnea, and bipolar disorder, but retains the residual functional capacity to perform a limited range of sedentary work (A.R. 12, 14).[1] In

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[1] The ALJ found that Plaintiff:

> can work in an environment with no more air pollutants than in an air-conditioned environment; she cannot work at heights or on ladders; she cannot drive and be exposed to dangerous machinery; she cannot reach above her head with either arm; she can occasionally bend and twist; she can lift 10 pounds occasionally and 10 pounds frequently; she can sit, stand, and walk six hours out of an eight-hour day; she can sit for 30 minutes at a time and she can stand and stretch for one minute or less before resuming sitting; she can stand and walk for 30 minutes at a time with sitting for one minute out of every 30 minutes; she cannot do work involving quick decision making or rapid physical activity like a rapid assembly line; she cannot interact with the public; and she can have non-intense and occasionally [sic] interactions with the coworkers and supervisors.

(continued...)

accordance with the vocational expert's testimony, the ALJ also found Plaintiff can perform work as an "address clerk" or "bench hand," and therefore is not disabled (A.R. 20-21; see also A.R. 52-54 (vocational expert testimony)). The Appeals Council denied review (A.R. 1-3).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

DISCUSSION

Plaintiff contends that the ALJ materially erred in the evaluation of the medical opinion evidence. For the reasons discussed below, the Court agrees. Remand is appropriate.

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[1](...continued)
(A.R. 14).

I. Summary of the Relevant Medical Record.

Plaintiff reported a history of cervical spine pain following a car accident in 1993 (A.R. 33, 228). On January 18, 2009, Plaintiff went to the Desert Valley Hospital with complaints of right arm pain and shoulder pain from a recent fall at work (A.R. 313-25). Plaintiff's treating doctor ordered her off work (A.R. 323). Plaintiff was not released back to work until July 22, 2009 (A.R. 241).

On August 26, 2009, orthopedic surgeon Dr. Rajiv Puri examined Plaintiff and found she had a limited range of motion in the cervical spine with left arm pain, limited left shoulder motion in abduction due to impingement, slightly decreased sensation in the C5 and C6 dermatomes on the left hand, and hypoactive reflexes on both sides (A.R. 229). Plaintiff complained of worsening pain in the neck and left upper extremity (A.R. 229). Dr. Puri diagnosed degenerative disc disease of the cervical spine with radicular pain and numbness in the left arm, and calcific tendinitis of the left shoulder for which he gave Plaintiff a cortisone injection (A.R. 229; see also A.R. 230 (radiology report)). On September 16, 2009, Dr. Puri reviewed a cervical spine MRI showing degenerative disc disease, especially at C4-5, C5-6, and C6-7, causing foraminal stenosis, confirmed by x-rays (A.R 228; see also A.R. 231-32 (cervical spine MRI dated September 9, 2009)). Dr. Puri indicated that Plaintiff would be a candidate for anterior cervical discectomy and fusion from C4 to C7, since Plaintiff's pain and numbness were not getting any better with conservative treatment (A.R. 228). There is no record of surgery,

however.

On February 2, 2010, Plaintiff reportedly took a "stress leave" from work (A.R. 252). Plaintiff was going through a divorce and assertedly felt depressed (A.R. 237, 241, 252). Plaintiff did not return to work (A.R. 183, 363).[2]

High Desert Primary Care Physician's Assistant, Teresa Podgorski, treated Plaintiff from August of 2011 through July of 2012 (A.R. 326-58). On March 12, 2012, Plaintiff was prescribed Norco for her neck pain with radiculopathy (A.R. 334-35). On March 30, 2012, Podgorski referred Plaintiff for a neurosurgical consultation for cervical disc degeneration (A.R. 350). Authorization was provided for Plaintiff to see Dr. Ali H. Mesiwala for a consultation and two follow up visits (A.R. 348). An MRI of Plaintiff's cervical spine on June 8, 2012, showed mild-to-moderate multilevel degenerative changes within the cervical spine, most prominent from C4-5 through C6-7 and "no significant interval change" from the September, 2009 MRI (A.R. 343-44). On July 30, 2012, Plaintiff reported for a follow up visit after her MRI (A.R. 327-29). Plaintiff complained of chronic neck pain with radiculopathy, fatigue, decreased ability to concentrate, and depression (A.R. 327). Podgorski noted that Plaintiff had cervical disc degeneration and related conditions, controlled type 2 diabetes

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[2] Dr. Warris Walayat treated Plaintiff for mental health issues from March of 2012 through at least August of 2012 (A.R. 359-68). Dr. Walayat diagnosed bipolar disorder and anxiety (A.R. 360-62). At various times, Plaintiff was prescribed combinations of Wellbutrin, Zoloft, Ritalin, Abilify, Xanax, and Trileptal (A.R. 243-44, 252-59, 287, 314, 330, 333, 337, 360-63).

mellitus, hyperlipidemia, episodic mood disorders, and bipolar I disorder (A.R. 328-29).

In accordance with Podgorski's referral, Plaintiff consulted with Dr. Mesiwala to determine whether Plaintiff required surgery for her back and neck pain. See A.R. 349 (request for consultation), A.R. 370-79 (consultation records). Dr. Mesiwala examined Plaintiff and reviewed the MRIs of Plaintiff's cervical spine from September of 2009 and June of 2012, and an x-ray of Plaintiff's lumbar spine from November of 2009 (A.R. 370-71; see also A.R. 231-32, 343-44 (cervical spine MRIs); A.R. 248 (lumbar spine x-ray)). On examination, Plaintiff had restricted range of motion in flexion and extension of her neck secondary to pain, restricted range of motion in flexion, extension and twisting of her back secondary to pain, motor strength of 5/5 in her upper and lower extremities, intact sensation, no evidence of cerebellar dysfunction, normal gait, and normal muscular tone and bulk (A.R. 370-71). Dr. Mesiwala recommended a series of epidural injections for pain management in Plaintiff's cervical spine - concluding that surgery for the cervical spine was not required at the time - and ordered an MRI of Plaintiff's lumbar spine to determine if surgery might be necessary for deformities seen on the available x-rays (A.R. 371-72). There is no MRI of Plaintiff's lumbar spine within the available record.

Dr. Mesiwala completed a "Medical Opinion Re: Ability to Do Work-Related Activities (Physical)" form on September 4, 2012, the day of his initial consultation (A.R. 377-79). Dr. Mesiwala indicated that Plaintiff: (1) could lift and carry 10 pounds occasionally and

frequently; (2) could sit less than two hours and stand less than two hours in an 8-hour day; (3) could sit 10 minutes and stand 10 minutes before needing to change positions; (4) must walk around every 10 minutes for 10 minutes; and (5) must be able to shift at will from sitting or standing/walking (A.R. 377-78). Dr. Mesiwala also indicated that Plaintiff could never twist, stoop (bend), crouch, or climb ladders, and could climb stairs only occasionally (A.R. 378). Dr. Mesiwala recorded no impairment in reaching, handling, fingering, feeling, or pushing/pulling, no environmental restrictions, and indicated that Plaintiff's condition would cause her to be absent from work approximately once a month (A.R. 378-79). When asked what medical findings support the assigned limitations, Dr. Mesiwala wrote "cervical deg[enerative] disc disease" and "[Plaintiff] has pain related to cervical [degenerative disc disease]" (A.R. 378-79). Dr. Mesiwala's "Medical Opinion, etc." is the only examining source opinion in the record concerning Plaintiff's ability to work.

A non-examining State agency review physician, Dr. George N. Lockie, reviewed the available record and opined that Plaintiff was not disabled as of May 26, 2011. See A.R. 56-67 ("Disability Determination Explanation"). Although Dr. Lockie requested Dr. Puri's medical records, there reportedly was no medical opinion evidence for Dr. Lockie to review (A.R. 58, 64). Dr. Lockie did review the July, 2009 left shoulder x-ray and the November, 2009 lumbar spine x-ray (A.R. 59; see also A.R. 247-48 (x-rays)). Dr. Lockie believed that a consultative examination was required because "additional evidence needed is not contained in the records of the individual's medical sources" (A.R. 59). However, Plaintiff did not receive any

consultative examination. Dr. Lockie opined that Plaintiff would be capable of performing simple repetitive tasks involving: (1) lifting and carrying 20 pounds occasionally and 10 pounds frequently; (2) standing and/or walking approximately six hours in an eight-hour workday, and sitting approximately six hours in an eight-hour workday; (3) unlimited pushing and/or pulling within the weight limits; (4) occasional climbing of ramps, stairs, ladders, ropes, and scaffolds; (5) occasional stooping, kneeling, crouching, and crawling; and (6) frequent balancing, with no other noted limitations (A.R. 60-63).

On reconsideration, non-examining State agency review physician Dr. Pamela Ombres opined that Plaintiff was not disabled as of December 21, 2011. See A.R. 82-93 ("Disability Determination Explanation"). Dr. Ombres examined the available medical records including Dr. Puri's records and the September, 2009 MRI of Plaintiff's cervical spine (A.R. 83, 86; see also A.R. 228-32 (Dr. Puri's records and September, 2009 MRI)). Like Dr. Lockie, Dr. Ombres indicated that a consultative examination would be required, yet no consultative examination was ever performed (A.R. 86).

II. The ALJ Materially Erred in Connection with the Determination of Plaintiff's Residual Functional Capacity.

In determining Plaintiff's physical residual functional capacity, the ALJ gave "significant weight, but not great weight" to the non-examining State agency physicians' opinions concerning Plaintiff's ability to work, but added the ALJ's own restrictions in light of

Plaintiff's asthma, sleep apnea, diabetes, and her subjective complaints of pain (A.R. 18; see also A.R. 14 (defining residual functional capacity as including environmental and hazard restrictions, as well as restrictions of no reaching above the head with either arm, and sitting/standing restrictions not found by any medical source)). The ALJ purportedly gave "some weight" to Dr. Mesiwala's opinion as "generally consistent with the claimant's mild treatment record," but found Dr. Mesiwala's sitting, standing, and walking restrictions "too restrictive given Dr. Mesiwala's generally mild examination" of Plaintiff (A.R. 17). The ALJ did not discuss Dr. Mesiwala's opinion that Plaintiff should never twist, stoop (bend), or crouch (A.R. 17; see also A.R. 14 (residual functional capacity providing for occasional bending and twisting)).

On the present record, the ALJ erred in rejecting Dr. Mesiwala's opinion in favor of the opinions of the non-examining State agency physicians. The opinion of an examining physician generally should receive more weight than the opinion of a non-examining physician. Andrews v. Shalala, 53 F.3d 1035, 1040-41 (9th Cir. 1995). In fact, "[t]he opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of . . . an examining physician." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1995); see also Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) ("When [a nontreating] physician relies on the same clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions of the [nontreating] physician are not 'substantial evidence.'"); Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990) (nonexamining physician's conclusions, with nothing

more, not substantial evidence in light of "the conflicting observations, opinions, and conclusions" of examining physician).

As summarized above, the State agency physicians initially relied on the 2009 x-rays of Plaintiff's left shoulder and lumbar spine, and on reconsideration relied on the 2009 MRI of Plaintiff's cervical spine and Dr. Puri's clinical observations. Dr. Mesiwala also relied in part on the 2009 lumbar spine x-ray, 2009 MRI of Plaintiff's cervical spine, and the June, 2012 MRI of Plaintiff's cervical spine (which was unchanged from the 2009 MRI). Because the opinions of the State agency physicians regarding Plaintiff's ability to work represent nothing more than conflicting conclusions based on their review of the same clinical records reviewed by Dr. Mesiwala, the opinions of the State agency physicians cannot furnish substantial evidence to support the ALJ's residual functional capacity determination. See id. Buttressing this conclusion is the fact that the State agency physicians expressly qualified their opinions by stating that sufficient development of the medical record required a consultative examination that was never performed.

Additionally, the record contains no assessment by a treating or examining physician supporting the sitting, standing, and walking limitations the ALJ adopted. Rather, the ALJ appears to have made his own lay assessment of what the ALJ thought were "reasonably congruent limitations" for Plaintiff's physical condition (A.R. 18). Absent expert medical assistance, the ALJ could not competently translate the medical evidence into a residual functional capacity assessment. It is well-settled that an ALJ may not render his or her own medical

opinion or substitute his or her own diagnosis for that of a physician. See Tackett v. Apfel, 180 F.3d 1094, 1102-03 (9th Cir. 1999) (ALJ erred in rejecting physicians' opinions and finding greater residual functional capacity based on claimant's testimony that he took a road trip; there was no medical evidence to support the ALJ's determination); Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) (an "ALJ cannot arbitrarily substitute his own judgment for competent medical opinion") (internal quotation marks and citation omitted); Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996) ("ALJs must not succumb to the temptation to play doctor and make their own independent medical findings"); Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is forbidden from making his or her own medical assessment beyond that demonstrated by the record). Rather than adopting his own lay assessment of Plaintiff's limitations, the ALJ should have ordered an examination and evaluation of Plaintiff by a consultative physician. See id.; see also Reed v. Massanari, 270 F.3d 838, 843 (9th Cir. 2001) (where available medical evidence is insufficient to determine the severity of the claimant's impairment, the ALJ should order a consultative examination by a specialist); accord, Kish v. Colvin, 552 Fed. App'x 650 (2014); see generally Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) ("[T]he ALJ has a special duty to fully and fairly develop the record to assure the claimant's interests are considered. This duty exists even when the claimant is represented by counsel.").

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III. Remand is Appropriate.

Because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors, remand is appropriate. See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see also INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, except in rare circumstances); Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014) (court will credit-as-true medical opinion evidence only where, inter alia, "the record has been fully developed and further administrative proceedings would serve no useful purpose"); Harman v. Apfel, 211 F.3d 1172, 1180-81 (9th Cir. 2000) (remand for further proceedings rather than for the immediate payment of benefits is appropriate where there are "sufficient unanswered questions in the record").

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CONCLUSION

For all of the foregoing reasons,[3] Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 4, 2014.

_____/S/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[3] The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time. "[E]valuation of the record as a whole creates serious doubt that [Plaintiff] is in fact disabled." See Garrison v. Colvin, 759 F.3d at 1021.