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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLAUDIA D. WEST,)	Case No. CV 14-2163-PJW
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
CAROLYN W. COLVIN,)	
Acting Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Disability Insurance Benefits and Supplemental Security Income. She claims that the Administrative Law Judge ("ALJ") erred when he rejected the examining doctor's opinion that she would need to take a ten-minute break each hour she worked and when he found that she was not credible. (Joint Stip. at 5-7, 14-17.) For the following reasons, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings.

1 II. SUMMARY OF PROCEEDINGS

2 In October 2011, Plaintiff applied for DIB and SSI, alleging that
3 she had been disabled since December 31, 2008, due to chronic
4 obstructive pulmonary disease, carpal tunnel syndrome, and pain in her
5 back, legs, arms, and neck. (Administrative Record ("AR") 30, 38-39,
6 193, 355.) Her applications were denied initially and on
7 reconsideration and she requested and was granted a hearing before an
8 ALJ. (AR 136-37, 168-69, 193-205, 208.)

9 In January 2013, she appeared with counsel and testified at the
10 hearing. (AR 27-67.) In June 2013, the ALJ issued a decision
11 awarding benefits. (AR 170-80.) Thereafter, on its own motion, the
12 Appeals Council granted review and remanded the case to the ALJ for
13 further consideration. (AR 187-91.) On remand, the ALJ held another
14 hearing, at which Plaintiff again appeared with counsel. (AR 68-115.)
15 In April 2014, the ALJ issued a decision denying benefits. (AR 9-22.)
16 Plaintiff appealed to the Appeals Council, which denied review. (AR
17 1-8.) She then filed this action.

18 III. ANALYSIS

19 A. The Examining Doctor's Opinion

20 Examining internist Bahaa Girgis and testifying medical expert
21 Harvey Alpern arrived at almost identical residual functional capacity
22 findings. They both concluded that Plaintiff could lift and carry 20
23 pounds occasionally and ten pounds frequently and could sit, stand,
24 and walk for six hours in an eight-hour workday. (AR 73-74, 527-30.)
25 Dr. Girgis, however, added an additional restriction, i.e., that
26 Plaintiff be allowed to take a ten-minute break every hour that she
27 was required to stand or walk. (AR 530.)

1 The ALJ claimed to give "significant weight, but not great
2 weight" to Dr. Girgis' opinion but adopted Dr. Alpern's instead. (AR
3 17, 20.) The ALJ explained that he was deferring to Dr. Alpern
4 because Dr. Alpern's opinion was the most recent and most restrictive.
5 (AR 20.)

6 Plaintiff contends that the ALJ erred in rejecting Dr. Girgi's
7 opinion that she needed a ten-minute break every hour she worked on
8 her feet. (Joint Stip. at 6.) The Agency disagrees. It argues that
9 the ALJ rightly relied on Dr. Alpern's opinion because he considered
10 medical records Dr. Girgis had not and because Dr. Alpern's findings
11 were the most restrictive. (Joint Stip. at 9-10.) For the following
12 reasons, the Court rejects the Agency's arguments.

13 It is the province of the ALJ to resolve conflicts in the medical
14 evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
15 There are three types of doctors that supply that evidence: treating
16 doctors, examining doctors, and reviewing doctors. All things being
17 equal, treating doctors are entitled to the greatest weight because
18 they are hired to cure and have more opportunity to know and observe
19 the patient. *Id.* at 1041. Examining doctors are next on the list,
20 followed by reviewing doctors. See *Lester v. Chater*, 81 F.3d 821,
21 830-31 (9th Cir. 1995). ALJs, however, are not required to accept the
22 opinion of any doctor and, where the opinion is contradicted, may
23 reject it for specific and legitimate reasons that are supported by
24 substantial evidence in the record. *Id.* at 830.

25 As a starting point, all things being equal, Dr. Girgis' opinion
26 was entitled to more weight than Dr. Alpern's because Dr. Girgis had
27 examined Plaintiff and Dr. Alpern had not. *Id.* In that context, the
28 Court reviews the ALJ's decision to rely on Dr. Alpern.

1 The ALJ's finding that Dr. Alpern's opinion was entitled to more
2 weight because it was the most restrictive is not supported by the
3 record. Though it is true that Dr. Alpern included some restrictions
4 that Dr. Girgis did not--i.e., no ropes or ladders or work in an
5 environment with concentrated noxious dust, fumes, and irritants (AR
6 73-74)--these restrictions are not at the heart of the ALJ's decision.
7 What is is Plaintiff's purported need to take a break for ten minutes
8 for every hour that she was required to stand or walk. Dr. Alpern did
9 not believe that she would need a break, Dr. Girgis did. So, at least
10 with regard to this limitation, Dr. Girgis' opinion is more
11 restrictive than Dr. Alpern's. This restriction is significant
12 because, had the ALJ adopted it, it is likely that Plaintiff could not
13 have performed the jobs identified by the vocational expert. As such,
14 the ALJ's finding that Dr. Alpern's opinion was more restrictive than
15 Dr. Girgis' is not supported by the record and is rejected.

16 The second reason the ALJ gave for choosing Dr. Alpern's January
17 2014 opinion over Dr. Girgis' December 2011 opinion was that Dr.
18 Alpern had reviewed all of the medical records and Dr. Girgis had not.
19 (AR 19.) There is some support for this finding. Obviously, Dr.
20 Girgis did not take into account the medical records that were
21 generated after he prepared his December 2011 opinion. But, as Dr.
22 Alpern testified at the hearing, he had not reviewed all of the
23 records, either. He had only considered exhibits 1F through 6F and
24 had not reviewed exhibit 7F, which were records from March 13, 2013 to
25 October 16, 2013. (AR 71.) Ultimately, it appears that the breadth
26 of Dr. Alpern's review was significantly greater than that of Dr.
27 Girgis' and that may be enough for the ALJ to accept Dr. Alpern's
28 opinion and reject Dr. Girgis' opinion. As it stands, however, it is

1 not clear to the Court whether the ALJ would have chosen to accept Dr.
2 Alpern's opinion for this reason alone and, therefore, remand for
3 further consideration is warranted.¹

4 B. The ALJ's Credibility Determination

5 At the 2014 administrative hearing, Plaintiff testified that she
6 had fallen several times in the previous year because her legs had
7 given out and that she had hurt her arm in the process, rendering her
8 unable to comb her hair or lift even a gallon of milk. (AR 85-86,
9 90.) She also testified that she could not sleep because of her back
10 pain even though she took pain medication. (AR 86, 88, 98.) She
11 explained that, as a result of her limitations, she had to be cared
12 for by her son and daughter, who fixed her meals and took her out when
13 she needed to go somewhere. (AR 88, 99.) According to Plaintiff, she
14 could not sit down at a job or concentrate for any period of time.
15 (AR 97.) She also claimed that she could not walk for more than half
16 a block because of back and leg pain. (AR 100.)

17 The ALJ found that Plaintiff's severe impairments, consisting of
18 low back strain, bilateral carpal tunnel syndrome, obesity, and
19 chronic obstructive pulmonary disease, could reasonably be expected to
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21 ¹ The Court is also somewhat confused with the ALJ's statement
22 that he was according Dr. Girgis' opinion "significant weight, but not
23 great weight." (AR 20.) "Significant weight" and "great weight" seem
24 to the Court to be very similar terms. If appropriate, the ALJ may
25 want to expand on this language on remand, keeping in mind that, where
26 an ALJ accords a doctor's opinion significant weight, it may be error
27 for him to not include the doctor's limitations in the residual
28 functional capacity finding. See, e.g., *Van Sickle v. Astrue*, 385
Fed. App'x 739, 741 (9th Cir. 2010) (concluding ALJ committed error by
finding consultative medical opinions "highly probative" but failing
to include limitations contained in those opinions in residual
functional capacity determination or to explain why he rejected them)
(citing *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006)).

1 cause her alleged symptoms but that her testimony was not entirely
2 credible. (AR 15, 18-19.) Plaintiff contends that the ALJ erred in
3 doing so because he based his finding solely on the fact that there
4 was no objective medical evidence to support the testimony. (Joint
5 Stip. at 16.) For the following reasons, the Court concludes that the
6 ALJ erred in rejecting her testimony.

7 ALJs are tasked with judging a claimant's credibility. *Andrews*,
8 53 F.3d at 1039. In doing so, they can rely on ordinary credibility
9 techniques. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).
10 Where there is no evidence of malingering, however, they can only
11 reject a claimant's testimony for specific, clear, and convincing
12 reasons that are supported by substantial evidence in the record.
13 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014).

14 The ALJ determined that Plaintiff was not credible because she
15 had elected to pursue only conservative treatment and because the
16 medical evidence did not support her claims of disabling pain and
17 limitation. (AR 19-21.) Though these are legitimate reasons for
18 questioning a claimant's testimony, see *Parra v. Astrue*, 481 F.3d 742,
19 751 (9th Cir. 2007) (noting conservative treatment, including use of
20 only over-the-counter medication to control pain, supported
21 discounting claimant's testimony regarding pain); and *Rollins v.*
22 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (noting ALJ can consider
23 objective medical evidence in determining credibility of claimant),
24 they are not supported by the record.

25 Despite Plaintiff's allegedly crippling pain, there is no
26 evidence that she had ever received any treatment other than pain
27 medication. In December 2011, she told Dr. Girgis that she had never
28 had surgery, injections, or physical therapy for her back. (AR 527.)

1 In July 2012, she told her treating doctor that, despite the fact that
2 she had been suffering from back pain for 15 years, she had never seen
3 an orthopedist or had a CT scan or an MRI. (AR 556.)

4 In a vacuum, Plaintiff's failure to pursue additional treatment
5 would support the ALJ's finding that she was not credible. What the
6 ALJ overlooked, however, was that Plaintiff repeatedly told her
7 doctors that she could not pursue more intensive treatment because she
8 could not afford it and did not have medical insurance. (AR 564, 566,
9 572, 585.) The ALJ erred in rejecting her testimony on the ground
10 that she failed to obtain additional treatment where she was unable to
11 obtain it because she could not afford it. *See Orn v. Astrue*, 495
12 F.3d 625, 638 (9th Cir. 2007) (holding claimant's inability to seek
13 treatment more often because he could not afford it could not be basis
14 for adverse credibility finding); see also Social Security Ruling
15 ("SSR") 96-7P, 1996 WL 374186, at *7 (July 2, 1996) ("[T]he
16 adjudicator must not draw any inferences about an individual's
17 symptoms . . . from a failure to seek or pursue regular medical
18 treatment without first considering any explanations that the
19 individual may provide, or other information in the case record[.]").²

20 The ALJ's only other reason for questioning Plaintiff's testimony
21 was that it was not supported by the objective medical evidence.
22 Though this can be a reason for questioning a claimant's testimony, it
23 cannot be the *only* reason. *Rollins*, 261 F.3d at 856. In light of the
24 fact that the Court has rejected the ALJ's other reason for
25 discounting Plaintiff's testimony, the lack of medical evidence alone

27 ² The ALJ recognized in his June 2013 decision awarding benefits
28 that Plaintiff had not pursued other treatment and tests because she
could not afford it and did not have insurance. (AR 179.) It is not
clear why he left this out of his most recent decision.

1 cannot support that finding. As such, the credibility finding is
2 reversed and the issue is remanded to the Agency for further
3 consideration.

4 IV. CONCLUSION

5 For these reasons, the ALJ's decision is reversed and the case is
6 remanded to the Agency for further consideration consistent with this
7 Memorandum Opinion and Order.³

8 IT IS SO ORDERED.

9 DATED: February 23, 2016.

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11 PATRICK J. WALSH
12 UNITED STATES MAGISTRATE JUDGE

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25 ³ Plaintiff has requested that the Court remand the case for an
26 award of benefits. The Court recognizes that it has the authority to
27 do so but finds that such relief is not warranted here because it is
28 not clear from the record whether Plaintiff is entitled to an award of
benefits. See *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015),
as amended (Feb. 5, 2016) ("Unless the district court concludes that
further administrative proceedings would serve no useful purpose, it
may not remand with a direction to provide benefits.").