

O

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. 5:16-CV-02284 (VEB)

CELSA BIBIANO,

Plaintiff,

vs.

NANCY BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In September of 2012, Plaintiff Celsa Bibiano applied for Disability Insurance benefits and Supplemental Security Income benefits under the Social Security Act. The Commissioner of Social Security denied the applications.¹

¹ On January 23, 2017, Nancy Berryhill took office as Acting Social Security Commissioner. The Clerk of the Court is directed to substitute Acting Commissioner Berryhill as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

1 Plaintiff, by and through her attorney, Lawrence D. Rohlfing, Esq.
2 commenced this action seeking judicial review of the Commissioner’s denial of
3 benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

4 The parties consented to the jurisdiction of a United States Magistrate Judge.
5 (Docket No. 10,11). On August 16, 2017, this case was referred to the undersigned
6 pursuant to General Order 05-07. (Docket No. 17).

7 8 **II. BACKGROUND**

9 Plaintiff applied for benefits on September 14, 2012, alleging disability
10 beginning October 20, 2010. (T at 170-76).² The applications were denied initially
11 and on reconsideration. Plaintiff requested a hearing before an Administrative Law
12 Judge (“ALJ”).

13 On March 5, 2015, a hearing was held before ALJ Nancy Stewart. (T at 51).
14 Plaintiff appeared with her attorney and testified with the assistance of an interpreter.
15 (T at 56-70). The ALJ also received testimony from Troy Scott, a vocational expert.
16 (T at 70-74).

17 On May 15, 2015, the ALJ issued a written decision denying the applications
18 for benefits. (T at 25-50). The ALJ’s decision became the Commissioner’s final

19 ² Citations to (“T”) refer to the administrative record transcript at Docket No. 15.

1 decision on September 15, 2016, when the Appeals Council denied Plaintiff's
2 request for review. (T at 1-9).

3 On November 1, 2016, Plaintiff, acting by and through her counsel, filed this
4 action seeking judicial review of the Commissioner's denial of benefits. (Docket No.
5 1). The Commissioner interposed an Answer on March 29, 2017. (Docket No. 14).
6 The parties filed a Joint Stipulation on June 27, 2017. (Docket No. 16).

7 After reviewing the pleadings, Joint Stipulation, and administrative record,
8 this Court finds that the Commissioner's decision must be reversed and this case
9 remanded for further proceedings.

11 III. DISCUSSION

12 A. Sequential Evaluation Process

13 The Social Security Act ("the Act") defines disability as the "inability to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which has
16 lasted or can be expected to last for a continuous period of not less than twelve
17 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
18 claimant shall be determined to be under a disability only if any impairments are of
19 such severity that he or she is not only unable to do previous work but cannot,

1 considering his or her age, education and work experiences, engage in any other
2 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
3 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
7 one determines if the person is engaged in substantial gainful activities. If so,
8 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
9 decision maker proceeds to step two, which determines whether the claimant has a
10 medically severe impairment or combination of impairments. 20 C.F.R. §§
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

12 If the claimant does not have a severe impairment or combination of
13 impairments, the disability claim is denied. If the impairment is severe, the
14 evaluation proceeds to the third step, which compares the claimant's impairment(s)
15 with a number of listed impairments acknowledged by the Commissioner to be so
16 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
17 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
18 equals one of the listed impairments, the claimant is conclusively presumed to be
19 disabled. If the impairment is not one conclusively presumed to be disabling, the

1 evaluation proceeds to the fourth step, which determines whether the impairment
2 prevents the claimant from performing work which was performed in the past. If the
3 claimant is able to perform previous work, he or she is deemed not disabled. 20
4 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant’s residual
5 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
6 work, the fifth and final step in the process determines whether he or she is able to
7 perform other work in the national economy in view of his or her residual functional
8 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a *prima facie*
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
12 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
13 is met once the claimant establishes that a mental or physical impairment prevents
14 the performance of previous work. The burden then shifts, at step five, to the
15 Commissioner to show that (1) plaintiff can perform other substantial gainful
16 activity and (2) a “significant number of jobs exist in the national economy” that the
17 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

1 **B. Standard of Review**

2 Congress has provided a limited scope of judicial review of a Commissioner’s
3 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
4 made through an ALJ, when the determination is not based on legal error and is
5 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
6 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

7 “The [Commissioner’s] determination that a plaintiff is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
10 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
11 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
12 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
15 conclusions as the [Commissioner] may reasonably draw from the evidence” will
16 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
17 the Court considers the record as a whole, not just the evidence supporting the
18 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
19 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the Commissioner, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence and
7 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
8 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
9 administrative findings, or if there is conflicting evidence that will support a finding
10 of either disability or non-disability, the finding of the Commissioner is conclusive.
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

12 **C. Commissioner’s Decision**

13 The ALJ determined that Plaintiff had not engaged in substantial gainful
14 activity since October 20, 2010, the alleged onset date, and met the insured status
15 requirements of the Social Security Act through March 30, 2016 (the “date last
16 insured”). (T at 33). The ALJ found that Plaintiff’s degenerative disc disease of the
17 cervical spine; carpal tunnel syndrome of the bilateral hands; disorder of the bilateral
18 shoulders (right worse than left); obesity; affective disorder; and anxiety disorder
19 were “severe” impairments under the Act. (T at 33).

1 However, the ALJ concluded that Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled one of the impairments
3 set forth in the Listings. (T at 34).

4 The ALJ determined that Plaintiff retained the residual functional capacity
5 (“RFC”) to perform less than the full range of light work, as defined in 20 CFR
6 §404.1567 (b), as follows: she can lift/carry 20 pounds occasionally and 10 pounds
7 frequently; push/pull occasionally with the upper extremities; stand/walk for 6 hours
8 in an 8-hour workday; sit for 6 hours in an 8-hour workday; cannot climb ladders,
9 ropes, or scaffolds; cannot work around hazards; cannot perform above-shoulder
10 work; cannot perform forceful gripping, grasping or torquing bilaterally; can
11 perform frequent handling and fingering with the bilateral hands; and is limited to
12 non-complex tasks. (T at 36).

13 The ALJ found that Plaintiff could not perform her past relevant work as an
14 upholstery sewer (cover maker) or cushion maker. (T at 43). Considering Plaintiff’s
15 age (38 years old on the alleged onset date), education (at least high school), work
16 experience, and residual functional capacity, the ALJ found that jobs exist in
17 significant numbers in the national economy that Plaintiff can perform. (T at 43-44).

18 Accordingly, the ALJ determined that Plaintiff was not disabled within the
19 meaning of the Social Security Act between October 20, 2010 (the alleged onset
20

1 date) and May 15, 2015 (the date of the decision) and was therefore not entitled to
2 benefits. (T at 45). As noted above, the ALJ's decision became the Commissioner's
3 final decision when the Appeals Council denied Plaintiff's request for review. (T at
4 1-9).

5 **D. Disputed Issues**

6 As set forth in the Joint Stipulation (Docket No. 16, at p. 5), Plaintiff offers
7 three (3) main arguments in support of her claim that the Commissioner's decision
8 should be reversed. First, she contends that the ALJ did not adequately assess the
9 medical opinion evidence. Second, she challenges the ALJ's credibility
10 determination. Third, Plaintiff asserts that the ALJ did not sufficiently address the
11 impact of numbness in her hands. This Court will address each argument in turn.

13 **IV. ANALYSIS**

14 **A. Medical Evidence**

15 In disability proceedings, a treating physician's opinion carries more weight
16 than an examining physician's opinion, and an examining physician's opinion is
17 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,
18 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1995). If the treating or examining physician's opinions are not contradicted, they

1 can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
2 contradicted, the opinion can only be rejected for “specific” and “legitimate” reasons
3 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d
4 1035, 1043 (9th Cir. 1995).

5 The courts have recognized several types of evidence that may constitute a
6 specific, legitimate reason for discounting a treating or examining physician’s
7 medical opinion. For example, an opinion may be discounted if it is contradicted by
8 the medical evidence, inconsistent with a conservative treatment history, and/or is
9 based primarily upon the claimant’s subjective complaints, as opposed to clinical
10 findings and objective observations. *See Flaten v. Secretary of Health and Human*
11 *Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

12 An ALJ satisfies the “substantial evidence” requirement by “setting out a
13 detailed and thorough summary of the facts and conflicting clinical evidence, stating
14 his interpretation thereof, and making findings.” *Garrison v. Colvin*, 759 F.3d 995,
15 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).
16 “The ALJ must do more than state conclusions. He must set forth his own
17 interpretations and explain why they, rather than the doctors’, are correct.” *Id.*
18 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

1 In this case, Dr. Raymond Zarins, an orthopedic surgeon, performed a
2 consultative examination on March 22, 2011. Dr. Zarins opined that Plaintiff could
3 not return to her prior employment, should avoid repeated or sustained work at or
4 above shoulder level, avoid repeated or sustained flexion of the left elbow, avoid
5 repeated forceful grasping bilaterally, and avoid repetitive flexion and extension of
6 the wrist. (T at 410). Dr. Zarins reaffirmed these findings following a subsequent
7 evaluation in July of 2014. (T at 1520).

8 The ALJ gave “significant weight” to Dr. Zarins’s opinions. (T at 41). She
9 stated that her RFC findings were not inconsistent with those of Dr. Zarins. (T at
10 38).

11 However, the ALJ found that Plaintiff was precluded from “above shoulder
12 work,” but could perform shoulder level work bilaterally. (T at 36). This contradicts
13 Dr. Zarins’s conclusion that Plaintiff needed to “avoid repeated or sustained work *at*
14 *or* above shoulder level” (T at 410)(emphasis added).

15 In addition, Dr. Zarins opined that Plaintiff was to “avoid repeated forceful
16 grasping bilaterally as well as repetitive flexion and extension of the wrist.” (T at
17 410). The ALJ determined that Plaintiff could perform “frequent handling and
18 fingering with the bilateral hands” (T at 36).

1 The ALJ did not reconcile her decision to give significant weight to Dr.
2 Zarins's opinions while apparently rejecting or discounting his assessment of
3 limitation regarding work at shoulder level and repetitive wrist activities. The
4 Commissioner argues that this lack of clarity was harmless because it is not clear
5 that the occupations identified by the vocational expert involve exertional demands
6 that exceed the limitations assessed by Dr. Zarins. This Court declines to find this
7 error harmless or to engage in post-hoc rationalizations. "Long-standing principles
8 of administrative law require us to review the ALJ's decision based on the reasoning
9 and factual findings offered by the ALJ — not post hoc rationalizations that attempt
10 to intuit what the adjudicator may have been thinking." *Bray v. Comm'r*, 554 F.3d
11 1219, 1226 (9th Cir. 2009).

12 The critical point is that Dr. Zarins assessed limitations that materially differ
13 from those included in the ALJ's RFC determination. The ALJ gave significant
14 weight to Dr. Zarins's opinions without reconciling the inconsistency. This was
15 error requiring remand.

16 **B. Credibility**

17 A claimant's subjective complaints concerning his or her limitations are an
18 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
19 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's findings with regard to the

1 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*
2 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
3 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
4 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
5 findings are insufficient: rather the ALJ must identify what testimony is not credible
6 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
7 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

8 However, subjective symptomatology by itself cannot be the basis for a
9 finding of disability. A claimant must present medical evidence or findings that the
10 existence of an underlying condition could reasonably be expected to produce the
11 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
12 § 404.1529(b), 416.929; SSR 96-7p.

13 In this case, Plaintiff testified as follows: She was 42 years old as of the date
14 of the administrative hearing. (T at 57). She has her GED. (T at 57). She is 5' 6"
15 tall and weighed 236 pounds. (T at 58). She has had carpal tunnel surgeries on both
16 hands, as well as right shoulder surgery for a rotator cuff tear. (T at 59). Her ability
17 to grip and hold objects is impaired. (T at 61). Pain and sensitivity in her hands,
18 radiating to her shoulders, presents difficulties. (T at 61-62). Other issues, including
19 sleep problems, anxiety, and depression, are related to her problems with her upper
20

1 extremities. (T at 66). She lives with her husband. (T at 67). Stress and depression
2 are challenges. (T at 68).

3 Plaintiff also reported that she was very limited in her ability to perform
4 household chores and attend to personal care. (T at 303). She prefers to be alone due
5 to depressive symptoms. (T at 306). Repetitive movement with the left hand is a
6 significant challenge. (T at 309).

7 The ALJ concluded that Plaintiff’s medically determinable impairments could
8 reasonably be expected to cause the alleged symptoms, but that her statements
9 regarding the intensity, persistence, and limiting effects of the symptoms were not
10 fully credible. (T at 36-37).

11 This Court finds that the ALJ erred by discounting Plaintiff’s credibility,
12 particularly with regard to the use of her hands. Dr. Zarins opined that Plaintiff was
13 to “avoid repeated forceful grasping bilaterally as well as repetitive flexion and
14 extension of the wrist.” (T at 410). This is consistent with Plaintiff’s testimony. In
15 addition, the record documents that Plaintiff experienced pain and limitation in her
16 wrists and hands even after multiple carpal tunnel release surgeries. (T at 38, 43,
17 373, 376, 385-86, 399-400). The ALJ afforded great weight to Dr. Zarins’s
18 assessments and reviewed the treatment history, but then determined that Plaintiff
19 could perform “frequent handling and fingering with the bilateral hands” (T at

1 36). The ALJ erred by discounting Plaintiff's testimony regarding limitations
2 arising from hand/wrist pain, which testimony was supported by a medical opinion
3 given great weight and by the contemporaneous treatment record. Moreover,
4 Plaintiff has an excellent work record, which provides another reason for crediting
5 her claims. *Pazos v. Astrue*, No. 08-6882, 2009 U.S. Dist. LEXIS 33970, at *29
6 (Cal. C.D. Mar. 30, 2009). In particular, Plaintiff maintained employment in a
7 physically demanding occupation (furniture manufacturing) with the same employer
8 for more than a decade and occasionally worked two jobs. (T at 312).

9 **C. RFC**

10 Here, as noted above, the ALJ found that Plaintiff could perform a limited
11 range of light work, including frequent use of her hands bilaterally. (T at 36). This
12 finding is not supported by substantial evidence. While the record indicated some
13 periods of relative improvement regarding Plaintiff's experience of numbness and
14 grip strength in her hands bilaterally (T at 376-77, 392-93), significant symptoms
15 and limitations are nevertheless well-documented. (T at 397-98, 405, 406, 546, 561,
16 575, 1110-11, 1130, 1132). Dr. Zarins opined that Plaintiff was to "avoid repeated
17 forceful grasping bilaterally as well as repetitive flexion and extension of the wrist."
18 (T at 410). As discussed above, the ALJ afforded great weight to Dr. Zarins'
19 assessments, without reconciling that assessment with the RFC finding that Plaintiff

1 could frequent handling and fingering with the bilateral hands” (T at 36). A
2 remand is therefore required for reconsideration and more careful determination
3 regarding the extent of limitation arising from hand and wrist symptoms bilaterally.

4 **D. Remand**

5 In a case where the ALJ's determination is not supported by substantial
6 evidence or is tainted by legal error, the court may remand the matter for additional
7 proceedings or an immediate award of benefits. Remand for additional proceedings
8 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from
9 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379
10 F.3d 587, 593 (9th Cir. 2004).

11 Here, this Court finds that remand for further proceedings is warranted.
12 Although Plaintiff's limitations with regard to the use of her hands and wrists appear
13 to be greater than those assessed by the ALJ, the precise degree of limitation must
14 still be determined and then the impact of that limitation must be considered relative
15 to whether there are jobs that exist in the national economy in significant numbers
16 that Plaintiff might still be able to perform. Because it is not clear from the record
17 that Plaintiff's conditions render her disabled within the meaning of the Social
18 Security Act, a remand for further proceedings is the appropriate result. *See Strauss*
19 *v. Comm'r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir. 2011)(“Ultimately, a claimant

1 is not entitled to benefits under the statute unless the claimant is, in fact, disabled, no
2 matter how egregious the ALJ's errors may be.”).

3
4 **V. ORDERS**

5 IT IS THEREFORE ORDERED that:

6 Judgment be entered REVERSING the Commissioner's decision and
7 REMANDING this action for further proceedings consistent with this Decision and
8 Order, and it is further ORDERED that

9 The Clerk of the Court shall file this Decision and Order, serve copies upon
10 counsel for the parties, and CLOSE this case without prejudice to a timely
11 application for attorneys' fees and costs.

12 DATED this 19th day of March, 2018,

13 /s/Victor E. Bianchini
14 VICTOR E. BIANCHINI
15 UNITED STATES MAGISTRATE JUDGE
16
17
18
19