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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESUS PEREZ GONZALEZ,
Plaintiff

v.

NANCY A. BERRYHILL,¹ Acting
Commissioner of Social Security,
Defendant.

Case No. 5:17-cv-00115-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Jesus Perez Gonzalez (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits (“DIB”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 12 and 13] and briefs addressing disputed issues in the case [Dkt. 23 (“Pltf.’s Br.”) and Dkt. 24 (“Def. Br.”)]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be remanded for further proceedings.

¹ Nancy A. Berryhill, the Acting Commissioner of the Social Security Administration, is substituted as the defendant in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

2 In March 2013, Plaintiff filed an application for DIB, alleging disability as of
3 January 31, 2010. [Dkt. 16, Administrative Record (“AR”) 19, 172-79.] Plaintiff’s
4 application was denied at the initial level of review and on reconsideration. [AR 19,
5 84-87, 91-95.] Hearings were held before Administrative Law Judge Joseph D.
6 Schloss (“the ALJ”) on April 21, 2015 and September 21, 2015. [AR 34-58.] On
7 September 25, 2015, the ALJ issued an unfavorable decision. [AR 19-29.]

8 The ALJ applied the five-step sequential evaluation process to find Plaintiff
9 not disabled. *See* 20 C.F.R. § 404.1520(b)-(g)(1). At step one, the ALJ found
10 Plaintiff had not engaged in substantial gainful activity since his alleged onset date
11 of January 31, 2010, through his date last insured of December 31, 2013. [AR 21.]
12 At step two, the ALJ found that Plaintiff suffered from the severe impairments of
13 diabetes mellitus, osteoarthritis, hypertension, obesity, and gout. [*Id.*] At step three,
14 the ALJ determined that Plaintiff did not have an impairment or combination of
15 impairments that meets or medically equals the severity of one of the impairments
16 listed in Appendix I of the Regulations, (“the Listings”). [AR 23]; *see* 20 C.F.R. Pt.
17 404, Subpt. P, App. 1. Next, the ALJ found that Plaintiff had the residual functional
18 capacity (“RFC”) to perform medium work (20 C.F.R. § 404.1567(c)), with the
19 following limitations:

20
21 [H]e can lift and carry 50 pounds occasionally and 25
22 pounds frequently; . . . stand and walk for six hours in an
23 eight hour workday; . . . sit for six hours in an eight hour
24 workday; . . . push and pull within the aforementioned
25 lift/carry weight restrictions; . . . frequently climb ramps,
26 stairs, ladders, ropes, and scaffolds; . . . [and] frequently
27 balance, stoop, kneel, crouch, and crawl; [but] he must
28 avoid concentrated exposure to machinery and heights.

[AR 23.] At step four, the ALJ found that Plaintiff was unable to perform any past
relevant work. [AR 27-28.] At step five, the ALJ determined that Plaintiff could

1 perform jobs existing in significant numbers in the national economy, including
2 representative occupations such as hospital cleaner, food-service worker, and
3 laundry laborer, based on Plaintiff's RFC, age (56 years on date last insured),
4 limited education, and work experience. [AR 28-29.]

5 The Appeals Council denied review of the ALJ's decision on November 30,
6 2016. [AR 4-10.] This action followed.

7 III. GOVERNING STANDARD

8 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to
9 determine if: (1) the Commissioner's findings are supported by substantial
10 evidence; and (2) the Commissioner used correct legal standards. *Carmickle v.*
11 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*,
12 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant
13 evidence as a reasonable mind might accept as adequate to support a conclusion."
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations
15 omitted); *see also Hoopai*, 499 F.3d at 1074.

16 IV. DISCUSSION

17 Plaintiff contends the ALJ erred by improperly rejecting the opinion of an
18 examining psychiatrist, Dr. Nenita Belen, and finding that Plaintiff's mental
19 impairment was not a severe impairment. [Pltf.'s Br. at 4-7.]

20 At step two of the sequential analysis, the claimant bears the burden to show
21 the existence of medically determinable impairments that have more than a minimal
22 effect on the ability to perform work-related activities. 20 C.F.R. §
23 404.1520(a)(4)(ii); *see also Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir.
24 1996). An impairment or combination of impairments may be found "not severe"
25 only if the evidence establishes a slight abnormality that has 'no more than a
26 minimal effect on an individual's ability to work.'" *Smolen*, 80 F.3d at 1290
27 (quoting Social Security Ruling ("SSR") 85-28); *Yuckert v. Bowen*, 841 F.2d 303,
28 306 (9th Cir. 1988).

1 In general, a treating physician's opinion is entitled to more weight than an
2 examining physician's opinion, and an examining physician's opinion is entitled to
3 more weight than a nonexamining physician's opinion. *See Lester v. Chater*, 81
4 F.3d 821, 830 (9th Cir. 1995). An ALJ must provide clear and convincing reasons
5 supported by substantial evidence to reject the uncontradicted opinion of a treating
6 or examining physician and specific and legitimate reasons supported by substantial
7 evidence to reject the contradicted opinion of a treating or examining physician.
8 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (citing *Lester*, 81 F.3d at
9 830-31).

10 Dr. Belen performed a complete psychiatric evaluation of Plaintiff in June
11 2013. [AR 248-52.] She diagnosed Plaintiff with mood disorder, secondary to
12 medical problems and assessed a Global Assessment of Functioning score of 60.
13 [AR 250-51.] In regards to functioning, Dr. Belen found that Plaintiff would have
14 "moderate" limitations in the following areas: maintaining social concentration,
15 persistence and pace; performing simple and repetitive tasks; performing detailed
16 and complex tasks; and performing work activities on a consistent basis without
17 special or additional supervision. [AR 251.] Dr. Belen also found that Plaintiff
18 would have moderate limitations completing a normal workday or work week, but
19 noted that the limitation may be related to a physical condition. [AR 251.] Dr.
20 Belen stated that her findings were based on the objective findings presented during
21 the evaluation. [AR 251.]

22 Dr. Belen's report and treatment records were subsequently reviewed by two
23 non-examining State agency medical consultants, Drs. Balson and Barrons. [AR 63-
24 65, 67, 72-78, 80.] Both doctors found Plaintiff's mental impairment not severe and
25 considered Dr. Belen's opinion too restrictive, noting that Plaintiff had not had
26 mental health treatment and his mental status examination was not significantly
27 abnormal. [AR 65, 78.] The ALJ gave "great weight" to the opinions of these non-
28 examining physicians. [AR 22.]

1 The ALJ provided three reasons for rejecting Dr. Belen’s opinion: (1) it was
2 “based on a one-time examination of [Plaintiff] rather than a longitudinal history of
3 treatment,” (2) the “highly restrictive functional limitations were not consistent with
4 her own findings from examining [Plaintiff], as that examination showed some
5 evidence of depression and irritability, but no evidence of any diminished
6 functioning and memory, attention, or concentration,” and (3) as Plaintiff “did not
7 receive any treatment from a mental health specialist during the relevant
8 adjudication period, there was no other medical evidence of record that supported
9 the highly restrictive functional limitations she assessed.” [AR 22-23.] Substantial
10 evidence does not support the ALJ’s decision.

11 First, the ALJ’s finding that Dr. Belen’s opinion was based on a “one-time
12 examination rather than a longitudinal history of treatment,” is not a specific and
13 legitimate reason for rejecting her opinion. By definition, an examining physician
14 often will have based his or her conclusions on a single examination. *See, e.g.,*
15 *Hartje v. Astrue*, 2010 WL 3220615, at *13 (W.D. Wash. Aug.13, 2010) (“[T]he
16 fact that a medical source has based his or her opinion on a one-time examination is
17 not a valid basis for rejecting that opinion, given that the opinions of examining
18 medical sources in general tend to be based on only one examination, and that the
19 Commissioner himself often has based his determinations of non-disability on such
20 one-time examinations.”); *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004)
21 (noting that the opinions of physicians who examined the plaintiff only once are
22 given less weight than the physicians who treated her). Further, the ALJ assigned
23 “great weight” to the opinions of Drs. Balson and Barrons, non-examining sources.
24 *See, e.g., Belman v. Colvin*, 2014 WL 5781132, at *6 (C.D. Cal. Nov. 6, 2014)
25 (finding pretense where the ALJ assigned little weight to examining physician
26 opinion based on one examination, but assigned great weight to two physicians who
27 did not examine plaintiff at all). That Dr. Belen examined Plaintiff on only one
28 occasion, without more, is not a sufficient basis for discounting her opinion.

1 Second, the ALJ’s finding that Dr. Belen’s observations on examination were
2 inconsistent with her assessment of Plaintiff’s diminished functioning is not
3 supported by the record. [AR 22.] Regarding Plaintiff’s current level of
4 functioning, Dr. Belen noted Plaintiff was unable to go places by himself and has no
5 hobbies or pastimes. [AR 250.] In the mental status examination portion of the
6 evaluation, Dr. Belen observed that Plaintiff’s mood was depressed and irritable and
7 his affect was constricted. [AR 250.] Dr. Belen also noted that Plaintiff had been
8 taking medication (lorazepam) for many years to treat anxiety and that Plaintiff
9 tended to worry about his future. [AR 249, 251.] While Plaintiff did not
10 demonstrate deficits in memory, attention or concentration on examination, the
11 ALJ’s selective reliance on these findings is not a sufficient basis for undermining
12 Dr. Belen’s opinion. *See Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir.
13 2001) (an ALJ may not properly reject a medical opinion based on a selective
14 reliance of the relevant treatment evidence).

15 Third, Plaintiff’s failure to seek treatment from a mental health specialist
16 before his date last insured, December 31, 2013, was not a valid reason to reject Dr.
17 Belen’s opinion. The Ninth Circuit has “criticized the use of a lack of treatment to
18 reject mental complaints both because mental illness is notoriously underreported
19 and because it is a questionable practice to chastise one with a mental impairment
20 for the exercise of poor judgment in seeking rehabilitation.” *Regennitter v. Comm’r*
21 *of Soc. Sec. Admin.*, 166 F.3d 1294, 1299-1300 (9th Cir. 1999) (internal quotation
22 marks and citations omitted). Plaintiff also explained that he had not sought
23 additional treatment for his other conditions because he did not have medical
24 insurance and did not qualify for financial assistance from the county or the state.
25 [AR 52-53.] Thus, Plaintiff should not be faulted for his inability to afford
26 specialized mental health treatment. *See Regennitter*, 166 F.3d at 1300. Moreover,
27 the record shows that Plaintiff did receive mental health treatment during the
28 relevant period. Plaintiff’s treating physician, Dr. Thomas Oliveira, prescribed

1 medication to treat Plaintiff's generalized anxiety disorder since 2010. [AR 229,
2 232-34, 265-66, 440, 452.] Dr. Oliveira also diagnosed Plaintiff with agoraphobia
3 and noted Plaintiff's complaints of anxiety attacks. [AR 266, 440.] Although Dr.
4 Oliveira is not a mental health specialist, it was improper for the ALJ to disregard
5 the mental health treatment provided to Plaintiff. *Lester*, 81 F.3d at 833 (9th Cir.
6 1995) (finding that treating physician's opinion regarding a claimant's mental health
7 constituted "competent psychiatric evidence").

8 Finally, although the ALJ gave "great weight" to the assessments of Drs.
9 Balson and Barrons, the opinions of non-examining State agency medical
10 consultants, standing alone, do not constitute substantial evidence to overcome Dr.
11 Belen's opinion as an examining physician. *See Lester*, 81 F.3d at 832 ("In the
12 absence of record evidence to support it, the nonexamining medical advisor's
13 testimony does not by itself constitute substantial evidence that warrants a rejection
14 of . . . the examining [physician's] opinion."); *Erickson v. Shalala*, 9 F.3d 813, 818
15 n. 7 (9th Cir.1993) (same).

16 Accordingly, the ALJ erred by rejecting Dr. Belen's opinion regarding
17 Plaintiff's mental impairment without providing specific and legitimate reasons
18 doing so and the ALJ's determination at step two of the sequential analysis is not
19 supported by substantial evidence.

20 V. CONCLUSION

21 Remand for further proceedings and reevaluation of Plaintiff's mental
22 impairment is proper, as questions regarding the extent to which Plaintiff's
23 symptoms limit Plaintiff's ability to work remain unresolved.

24 For all of the foregoing reasons, **IT IS ORDERED** that:

25 (1) the decision of the Commissioner is **REVERSED** and this matter is
26 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further
27 administrative proceedings consistent with this Memorandum Opinion and
28 Order; and

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(2) Judgment be entered in favor of Plaintiff.

IT IS ORDERED.

DATED: March 21, 2018



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE