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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AQELA AKBARY,) NO. SACV 10-00793-MAN
Plaintiff,)
v.) MEMORANDUM OPINION
MICHAEL J. ASTRUE,) AND ORDER
Commissioner of Social Security,)
Defendant.)

18 Plaintiff filed a Complaint on June 17, 2010, seeking review of the
19 denial of plaintiff's application for supplemental security income
20 ("SSI"). On July 27, 2010, the parties consented, pursuant to 28 U.S.C.
21 § 636(c), to proceed before the undersigned United States Magistrate
22 Judge. The parties filed a Joint Stipulation ("Joint Stip.") on
23 February 14, 2011, in which: plaintiff seeks an order reversing the
24 Commissioner's decision and remanding this case for the payment of
25 benefits or, alternatively, for further administrative proceedings; and
26 the Commissioner requests that his decision be affirmed or,
27 alternatively, remanded for further administrative proceedings. (Joint
28 Stip. at 5, 7-8, 11, 16-17.)

On October 4, 2011, this Court issued a minute order ("Minute Order") requesting supplemental briefing by both parties. The Commissioner filed a Response to the Minute Order on October 21, 2011, and plaintiff filed a Response on October 24, 2011 ("Plaintiff's Response"). On November 17 and 24, 2011, the parties participated in telephonic conferences with the Court, and the Court thereafter took the parties' Joint Stip. and supplemental briefing under submission.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

On February 19, 2004, plaintiff filed an application for SSI. (Administrative Record ("A.R.") 72-73, 256.) Plaintiff, who was born on December 8, 1962 (A.R. 20),¹ claims to have been disabled since January 14, 2004 (A.R. 9), due to anxiety, depression, and various aches and pains.² (A.R. 12-15, 257-58; Joint Stip. at 2.) Plaintiff has no apparent past relevant work experience. (A.R. 20-21.)

After the Commissioner denied plaintiff's claim initially and upon reconsideration (A.R. 256), plaintiff requested a hearing (A.R. 47, 55-

¹ On the date the application was filed, plaintiff was 41 years old, which is defined as a younger individual. (A.R. 20; citing 20 C.F.R. § 416.963.)

² In her decision, the Administrative Law Judge notes that:
In addition to allegations of mental problems, [plaintiff] alleges she has pain in her lower back and left leg, has migraine headaches, dizziness and asthma; and cannot lift with her right hand due to having broken her wrist. [Plaintiff] reports that her pain is constant, especially in terms of her back with pain spreading to her upper back at time and headaches. She also reports she is fatigued all the time.
(A.R. 12; internal citations omitted.)

1 56). On September 25, 2006, plaintiff, who was represented by counsel,
2 appeared and testified with the assistance of interpreter Jayla Rochan
3 at a hearing before Administrative Law Judge Helen E. Hesse (the "ALJ").
4 (A.R. 318-357.) Medical expert Joseph Malancharvil, vocational expert
5 Stephen Berry, and plaintiff's daughter, Zermina Akbary, also testified.
6 (Id.) On October 27, 2006, the ALJ denied plaintiff's claims (A.R. 256-
7 61), and the Appeals Council subsequently denied plaintiff's request for
8 review of the ALJ's decision (A.R. 306-09). On June 12, 2007, plaintiff
9 sought review in this Court, which remanded the case for further
10 proceedings in an August 14, 2008 Order ("Remand Order"). (A.R. 452-
11 65.)

12

13 On February 27, 2009, the Appeals Council effectuated the Court's
14 Remand Order and remanded the matter to the ALJ for further actions
15 consistent with the Remand Order. (A.R. 310-11.) The Appeals Council
16 also directed that plaintiff have an opportunity for a supplemental
17 hearing and that a subsequent, duplicative SSI application, filed by
18 plaintiff on January 29, 2008, be consolidated with the remanded case.
19 (Id.) On September 1, 2009, plaintiff, who was represented by an
20 attorney and assisted by Pashto interpreter Kasem Gardizi, testified
21 before the ALJ at a supplemental hearing. (A.R. 421-51.) Medical
22 expert Sami Nafoosi, vocational expert Alan Ey, and plaintiff's
23 daughter, Zarmina Akbary, also testified. (Id.) On March 24, 2010, the
24 ALJ denied plaintiff's claims. (A.R. 9-22.) That decision is now at
25 issue in this action.

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SUMMARY OF ADMINISTRATIVE DECISION

The ALJ found that plaintiff has not engaged in substantial gainful activity since February 19, 2004, her application date. (A.R. 11.) The ALJ determined that plaintiff has the following severe impairments: "somatoform disorder not otherwise specified; anxiety disorder not otherwise specified, mild; and depressive disorder not otherwise specified." (*Id.*) The ALJ also determined that plaintiff does not have an impairment or a combination of impairments that meets or equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. § 416.920(d), 416.925, 416.926). (A.R. 15.)

After reviewing the record, the ALJ determined that plaintiff has the residual functional capacity ("RFC") to perform a full range of work at all exertional levels with the following nonexertional limitations: "[plaintiff] can perform moderately complex tasks, up to four steps, requiring no hypervigilence [sic]; and she should not be in charge of safety operations of others." (A.R. 16.)

The ALJ determined that plaintiff has no past relevant work experience and, therefore, transferability of job skills is not an issue. (A.R. 20-21.) Having considered plaintiff's age, education, work experience, RFC, and the testimony of the vocational expert, the ALJ found that jobs exist in the national economy that plaintiff could perform, including dining room attendant, hand packager, and laundry laborer. (A.R. 21.) Accordingly, the ALJ concluded that plaintiff has not been under a disability, as defined in the Social Security Act, since February 19, 2004, the date her SSI application was filed. (A.R.

1 22.)

2

3 **STANDARD OF REVIEW**

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5 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
6 decision to determine whether it is free from legal error and supported
7 by substantial evidence in the record as a whole. *Orn v. Astrue*, 495
8 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
9 evidence as a reasonable mind might accept as adequate to support a
10 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
11 a mere scintilla but not necessarily a preponderance." *Connett v.*
12 *Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
13 record can constitute substantial evidence, only those 'reasonably drawn
14 from the record' will suffice." *Widmark v. Barnhart*, 454 F.3d 1063,
15 1066 (9th Cir. 2006)(citation omitted).

16

17 Although this Court cannot substitute its discretion for that of
18 the Commissioner, the Court nonetheless must review the record as a
19 whole, "weighing both the evidence that supports and the evidence that
20 detracts from the [Commissioner's] conclusion." *Desrosiers v. Sec'y of*
21 *Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988); *see also*
22 *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
23 responsible for determining credibility, resolving conflicts in medical
24 testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d
25 1035, 1039 (9th Cir. 1995).

26

27 The Court will uphold the Commissioner's decision when the evidence
28 is susceptible to more than one rational interpretation. *Burch v.*

1 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
2 review only the reasons stated by the ALJ in his decision "and may not
3 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
4 at 630; see also Connell, 340 F.3d at 874. The Court will not reverse
5 the Commissioner's decision if it is based on harmless error, which
6 exists only when it is "clear from the record that an ALJ's error was
7 'inconsequential to the ultimate nondisability determination.'" Robbins
8 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
9 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
10 at 679.

11

12 **DISCUSSION**

13

14 Plaintiff claims that the ALJ: (1) failed to comply with the
15 Remand Order; and (2) improperly considered the treating doctors'
16 opinions regarding plaintiff's inability to work. (Joint Stip. at 3.)

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18 **I. The Alleged Failure To Comply With The Remand Order Does Not
19 Warrant Remand.**

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21 It is well established that an ALJ must comply with a district
22 court's remand order. *Sullivan v. Hudson*, 490 U.S. 877, 886, 109 S. Ct.
23 2248, 104 L. Ed. 2d 941 (1989)(noting that "[d]eviation from the court's
24 remand order in the subsequent administrative proceedings is itself
25 legal error, subject to reversal on further judicial review"). However,
26 as with other errors, an ALJ's failure to comply with a court's remand
27 order is subject to a harmless error analysis. See *Burch*, 400 F.3d at
28 679 ("A decision of the ALJ will not be reversed for errors that are

1 harmless"); Juarez v. Astrue, 2011 U.S. Dist. LEXIS 96220, at *6 (C.D.
2 Cal. Aug. 26, 2011)(applying harmless error analysis to ALJ's failure to
3 comply with a court's remand order); Banquet v. Astrue, 2011 U.S. Dist.
4 LEXIS 6879, at *12 (C.D. Cal. Jan. 24, 2011)(same); Fuller v. Astrue,
5 2010 U.S. Dist. LEXIS 122676, at *6 (D. Ariz. Nov. 5, 2010)(same).

6

7 In its Remand Order, dated August 14, 2008, this Court noted that:

8

9 As the ALJ recognized that [p]laintiff needed to see a
10 culturally-appropriate doctor to obtain a proper disability
11 determination, the ALJ should have ensured that a suitable
12 examination was obtained. Once the ALJ was made aware that
13 [p]laintiff failed to receive the requisite follow-up
14 treatment, the ALJ should have met **her burden** of developing
15 the record.

16

17 (A.R. 462-63; emphasis in original.) Accordingly, the Court remanded
18 the matter so that the ALJ could develop properly the record regarding
19 plaintiff's claimed mental impairment. (A.R. 452-64.)

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21 Prior to the issuance of the Remand Order, however, plaintiff
22 received a psychiatric evaluation from consultative examiner Ernest A.
23 Bagner, M.D., a board eligible psychiatrist, apparently in connection
24 with plaintiff's subsequent, January 29, 2008 SSI application. (A.R.
25 310.) Dr. Bagner diagnosed plaintiff with depressive disorder, not
26 otherwise specified, and opined that plaintiff would be "significantly
27 better" with psychiatric treatment. (A.R. 384-85.) Based on his
28 assessment of plaintiff, Dr. Bagner concluded that plaintiff would have:

1 "no limitations interacting with supervisors, peers or the public,"
2 "zero to mild limitations maintaining concentration and attention and
3 completing tasks"; "mild limitations completing complex tasks and
4 completing a normal workweek without interruption"; and "mild to
5 moderate limitations handling normal stresses at work."³ (A.R. 385.)

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7 Following the issuance of this Court's Remand Order, the Appeals
8 Council vacated the ALJ's March 24, 2010 decision, remanded the matter
9 for further proceedings consistent with the Remand Order, and directed
10 that plaintiff's subsequent, duplicative SSI application be consolidated
11 with the remanded case. (A.R. 310-11.)

12

13 In her post-remand decision, the ALJ notes that the Appeals
14 Council, pursuant to the Remand Order, "directed [her] to fully and
15 fairly develop the record regarding [plaintiff]'s mental impairment."
16 (A.R. 9.) The ALJ also notes that, while plaintiff "has not been under
17 the care of any mental health professional since her treatment at
18 Windstone Behavioral Health in 2006," she did have "a complete
19 psychiatric evaluation [in March 2008] while this case was pending at
20 the District Court." (*Id.*) That psychiatric evaluation "was completed
21 with the help of Jaleh Roshan, an interpreter." (A.R. 382.)

22

23 Plaintiff argues that the ALJ failed to comply with the Remand
24 Order, because she did not develop the record and obtain a proper

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26 ³ Although the ALJ afforded Dr. Bagner's opinion great weight,
27 the ALJ accorded "greater weight" to the opinion of medical expert
28 Joseph Malancharuvil, Ph.D., a psychologist, because his assessment was
"more consistent with the record as a whole and accord[ed] [plaintiff] every reasonable benefit of the doubt." (A.R. 18.)

1 consultative examination from a culturally sensitive and/or appropriate
2 doctor for plaintiff, as directed. (Joint Stip. at 3-5.) Based on the
3 record before the Court, there is no evidence to indicate that Dr.
4 Bagner was not a culturally sensitive and/or appropriate doctor or that
5 there was anything deficient about Dr. Bagner's examination and
6 diagnosis of plaintiff. Dr. Bagner's psychiatric evaluation of
7 plaintiff was completed with the help of a female interpreter, which, as
8 the Commissioner properly asserts, indicates that efforts were made to
9 obtain appropriate linguistic and/or cultural reference in completing
10 plaintiff's examination.⁴ Accordingly, while it appears that the
11 directives of the Remand Order may have not been followed precisely,
12 plaintiff does not allege, and the Court cannot find, that Dr. Bagner's
13 interpreter-assisted, psychiatric evaluation of plaintiff was inadequate
14 and/or prejudiced plaintiff in any way. Indeed, beyond alleging,
15 without any evidentiary support, that Dr. Bagner was not a culturally
16 appropriate and/or sensitive doctor, plaintiff alleges no error in Dr.
17 Bagner's psychiatric evaluation of plaintiff.⁵ As such, any error
18 committed by the ALJ in not complying fully with the Remand Order was
19 harmless and does not constitute a ground for reversal.

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23 ⁴ Although the spelling is slightly different, it appears that
24 plaintiff was assisted by the same interpreter who assisted her at the
25 September 25, 2006 hearing. Plaintiff neither asserted any objection to
the use of the interpreter at that hearing nor gave any indication that
the interpretation provided was inadequate or incorrect.

26 ⁵ In fact, in Plaintiff's Response, it was noted that plaintiff
27 "has not been able to find a treating physician that speaks her
language" and that "having a culturally-sensitive physician at a
28 [consultative examination] . . . would be impractical and expensive."
(Plaintiff's Response at pp. 1-2.)

1 **II. The ALJ Committed No Reversible Error In Considering The Opinions**
2 **Of Plaintiff's Treating Physicians Regarding Plaintiff's Alleged**
3 **Inability To Work.**

5 It is the responsibility of the ALJ to analyze evidence and resolve
6 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750
7 (9th Cir. 1989). In the hierarchy of physician opinions considered in
8 assessing a social security claim, "[g]enerally, a treating physician's, and an
9 examining physician's opinion carries more weight than an examining physician's, and an
10 examining physician's opinion carries more weight than a reviewing
11 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.
12 2001); 20 C.F.R. § 416.927(d).

14 The opinions of treating physicians are entitled to the greatest
15 weight, because the treating physician is hired to cure and has a better
16 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When
17 a treating physician's opinion is not contradicted by another physician,
18 it may be rejected only for "clear and convincing" reasons. Lester v.
19 Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another
20 doctor, a treating physician's opinion may only be rejected if the ALJ
21 provides "specific and legitimate" reasons supported by substantial
22 evidence in the record. *Id.* It is well established that "[w]hen a
23 treating physician's opinion is contradicted . . . , the ALJ must assess
24 its persuasiveness in light of specified factors, including the 'length
25 of the treatment relationship and the frequency of examination;' the
26 'nature and extent of the treatment relationship;' and the treating
27 opinion's consistency 'with the record as a whole.'" Aranda v. Comm'r
28 SSA, 405 Fed. Appx. 139, 141 (9th Cir. 2010)(quoting Orn, 495 F.3d at

1 631).

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3 "The opinion of a nonexamining physician cannot by itself
4 constitute substantial evidence that justifies the rejection of the
5 opinion of . . . a treating physician." Lester, 81 F.3d at 831; see
6 also Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990)(finding
7 that the nonexamining physician's opinion "with nothing more" did not
8 constitute substantial evidence). However, "[w]here the opinion of the
9 claimant's treating physician is contradicted, and the opinion of a
10 nontreating source is based on independent clinical findings that differ
11 from those of the treating physician, the opinion of the nontreating
12 source may itself be substantial evidence." Andrews, 53 F.3d at 1041.
13 Independent clinical findings include "(1) diagnoses that differ from
14 those offered by another physician and that are supported by substantial
15 evidence, or (2) findings based on objective medical tests that the
16 treating physician has not herself considered." Orn, 495 F.3d at 632
17 (internal citations omitted).

18

19 An ALJ "has a special duty to fully and fairly develop the record
20 and to assure that claimant's interests are considered." Brown v.
21 Heckler, 713 F.2d 441, 443 (9th Cir. 1983). Pursuant to 20 C.F.R. §
22 416.912(e), the Administration "will seek additional evidence or
23 clarification from your medical source when the report from your medical
24 source contains a conflict or ambiguity that must be resolved, [or] the
25 report does not contain all the necessary information" See
26 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996)(noting that "[i]f
27 the ALJ thought he needed to know the basis of [the doctor's] opinions
28 in order to evaluate them, he had a duty to conduct an appropriate

1 inquiry").

2

3 Plaintiff contends that the ALJ improperly rejected the opinions of

4 plaintiff's treating physicians -- *to wit*, Dr. Charles J. Barbanel, Dr.

5 Daniel N. Blum, and Dr. Emmanuel O. Fashakin. (Joint Stip. at 3, 8-11.)

6 Specifically, plaintiff claims that the ALJ failed to give specific and

7 legitimate reasons for rejecting their opinions regarding plaintiff's

8 alleged inability to work. (*Id.* at 3, 10-11.)

9

10 Dr. Barbanel

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12 In an August 20, 2003 letter, Charles J. Babanel, a psychiatrist,

13 stated the following: "[Plaintiff] is a patient under my care at the

14 above named facility. She is suffering from a Major Depression. She is

15 unable to work at this time. If you have any questions, please feel

16 free to contact me" (A.R. 103.)

17

18 In her decision, the ALJ summarized Dr. Barbanel's brief August 20,

19 2003 letter. (A.R. 18-19.) The ALJ stated that she could not assign

20 any weight to his opinion, because it is "conclusory, without any

21 objective basis supporting his opinion, and without any indication as to

22 [plaintiff]'s functional abilities. Furthermore, Dr. Barba[n]el's

23 statement is not supported by objective evidence elsewhere in the record

24 and the determination of disability is a matter reserved to the

25 Commissioner." (*Id.*)

26

27 Contrary to plaintiff's contention, the ALJ gave specific and

28 legitimate reasons for giving no weight to the opinion of Dr. Barbanel.

1 As the ALJ correctly noted, Dr. Barbanel's four sentence letter is
2 conclusory, lacks objective support, and contains no opinion regarding
3 plaintiff's abilities. Further, Dr. Barbanel's opinion that plaintiff
4 is "disabled" is not binding on the ALJ. Ukolov v. Barnhart, 420 F.3d
5 1002, 1004 (9th Cir. 2005)(“Although a treating physician’s opinion is
6 generally afforded the greatest weight in disability cases, it is not
7 binding on an ALJ with respect to the existence of an impairment or the
8 ultimate determination of disability”)(internal quotations and citations
9 omitted); 20 C.F.R. § 416.927(e)(1)(“We are responsible for making the
10 determination or decision about whether you meet the statutory
11 definition of disability A statement by a medical source that
12 you are ‘disabled’ or ‘unable to work’ does not mean that we will
13 determine that you are disabled’”); Boardman v. Astrue, 286 Fed. App’x
14 397, 399 (9th Cir. 2008)(“ALJ is correct that a determination of a
15 claimant’s ultimate disability is reserved to the Commissioner, and that
16 a physician’s opinion on the matter is not entitled to special
17 significance”).

18

19 Moreover, as the Commissioner properly notes, Dr. Barbanel’s
20 “opinion” predates plaintiff’s alleged disability onset date, and, thus,
21 it is of limited relevance. Carmickle v. Comm’r, Soc. Sec. Admin., 533
22 F.3d 1155, 1165 (9th Cir. 2008)(noting that “[m]edical opinions that
23 predate the alleged onset of disability are of limited relevance”).
24 Accordingly, for the aforementioned reasons, the ALJ committed no
25 reversible error in assigning no weight to the opinion of Dr. Barbanel.

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1 Dr. Blum
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3 In a September 15, 2003 "Physician's Employability Report,"
4 plaintiff's internist, Daniel N. Blum, M.D., noted that plaintiff's
5 current diagnosis is anxiety, with an onset date of November 2002. (A.R.
6 110.) In that report, Dr. Blum advised that plaintiff should have a
7 "psych consult for counseling." (*Id.*) With respect to work, Dr. Blum
8 opined that plaintiff "can't function well enough to perform job duties
9 at this time due to emotional distress." (*Id.*)

10
11 After summarizing Dr. Blum's report, the ALJ afforded it no weight,
12 because: (1) "Dr. Blum's statements are . . . without any objective
13 basis"; (2) "Dr. Blum's opinion is not supported by his own treating
14 records, which suggest his report was made based on sympathy rather than
15 objectivity"; and (3) "the determination of disability is an issue that
16 is reserved to the Commissioner." (A.R. 19.)

17
18 The ALJ provided specific and legitimate reasons supported by
19 substantial evidence for rejecting Dr. Blum's opinion. First, as the
20 ALJ properly noted, there is no objective evidence supporting Dr. Blum's
21 statements. Second, Dr. Blum's opinion is not supported by his own
22 treating records. For example, prior to his September 15, 2003
23 treatment note, there appears to be only one treatment note, dated April
24 28, 2003, which notes that plaintiff has "+ anxiety" and that a "psych
25 consult" was discussed. (A.R. 204.) This brief reference to
26 plaintiff's anxiety and possible need for a psychiatric consultation,
27 however, does not support, or provide a solid basis for, his September
28 15, 2003 opinion that plaintiff is unable to perform work due to

1 emotional distress.⁶ Third, as noted *supra*, Dr. Blum's finding of
2 disability is not binding on the ALJ and, as the ALJ properly
3 recognized, is a matter ultimately reserved to her. Lastly, as with Dr.
4 Barbanel, Dr. Blum's opinion is of limited relevance, because it
5 predates plaintiff's alleged disability onset date. As such, the ALJ
6 committed no reversible error in rejecting the opinion of Dr. Blum.

7

8 Dr. Fashakin

9

10 In a November 15, 2004 "Physician's Employability Report,"
11 plaintiff's treating doctor, Emmanuel O. Fashakin, M.D., noted that
12 plaintiff's current diagnoses include dizziness, syncope, anxiety,
13 depression, and low back pain. (A.R. 235.) Dr. Fashakin also noted
14 that plaintiff was to start taking Paxil and Zyprexa. (*Id.*) Dr.
15 Fashakin reported that plaintiff "has episodes of dizziness . . . and
16 sudden attacks of blackouts." (*Id.*) In reference to work, Dr. Fashakin
17 noted that plaintiff "needs [a] psychiatric evaluation [and] follow-up,"
18 and, until that is completed, he does not "see [plaintiff] being able to
19 perform any work." (*Id.*)

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21

22 ⁶ In finding Dr. Blum's opinion to be not supported by his
23 treatment notes, the ALJ noted that Dr. Blum's report appears to be
24 "based on sympathy rather than objectivity." (A.R. 19.) In his
25 September 15, 2003 treatment note, Dr. Blum noted, *inter alia*, that
26 plaintiff is "stress[ed]," "anxious," "tearful," "req[uires]
27 disability," "can't function," has "5 children," "no husband," and is
28 the "sole supporter" in her family. (A.R. 204.) Based on a review of
Dr. Blum's treatment notes, it is certainly plausible that his finding
of disability was based on sympathy for plaintiff. However, even
assuming that the ALJ erred in opining that Dr. Blum's report was
motivated by sympathy, the ALJ provided other specific and legitimate
reasons for rejecting Dr. Blum's opinion which are supported by
substantial evidence in the record. Accordingly, any error committed by
the ALJ with respect to her reference to "sympathy" was harmless.

1 Plaintiff alleges that there is no indication that the ALJ
2 considered Dr. Fashakin's November 15, 2004 "opinion" -- *to wit*, that
3 plaintiff is unable to perform any work. (Joint Stip. at 9-11.) As an
4 initial matter, and as discussed in detail *supra*, Dr. Fashakin's opinion
5 that plaintiff is unable to work is an opinion on a matter reserved to
6 the Commissioner and, thus, not given any "special significance." 20
7 C.F.R. § 416.927(e). Notwithstanding this fact, the ALJ did address
8 plaintiff's alleged inability to work. In pertinent part, although the
9 ALJ did not specifically mention Dr. Fashakin's November 15, 2004
10 Report, the ALJ noted that "[i]n terms of [plaintiff]'s alleged
11 inability to work, the record does not contain evidence which shows that
12 [plaintiff] is functionally unable to work. Indeed, the medical
13 evidence regarding [plaintiff]'s alleged disabling mental impairments is
14 sparse and is fully consistent with [her RFC determination]." (A.R.
15 17.) As the ALJ properly notes, the record, which includes the
16 treatment notes of Dr. Fashakin, does not include any evidence
17 supporting plaintiff's functional inability to work. Accordingly, to
18 the extent the ALJ erred in not rejecting specifically Dr. Fashakin's
19 November 15, 2005 statement that plaintiff is unable to work, any such
20 error was harmless in view of the ALJ's determination that the medical
21 record provides no evidence to support such a finding.⁷

22

23 ⁷ Moreover, although not mentioned by plaintiff, the ALJ did
24 reference Dr. Fashakin's later treatment notes. For example, with
25 respect to plaintiff's dizziness and reports of syncope, the ALJ noted
26 that while Dr. Fashakin reported that plaintiff "has had various
27 episodes of syncope[,] [a]ll work[up] ha[s] been negative." (A.R. 14;
28 internal quotation marks omitted.) In addition, the ALJ noted that a
later treatment note from Dr. Fashakin stated that "[plaintiff]'s workup
for syncope had been negative." (*Id.*) The ALJ also noted that Dr.
Fashakin had prescribed plaintiff Zyprexa and Zoloft and that plaintiff
later reported that the Zoloft was helping her. (A.R. 18.) Accordingly,
while the ALJ did not reference Dr. Fashakin's November 15,
2004 report specifically, she did reference and discuss the findings in

Accordingly, for the aforementioned reasons, the ALJ committed no reversible error in considering the opinions of plaintiff's treating physicians.

CONCLUSION

For the foregoing reasons, the Court finds that the Commissioner's decision is supported by substantial evidence and is free from material legal error. Neither reversal of the Commissioner's decision nor remand is warranted.

Accordingly, IT IS ORDERED that Judgment shall be entered affirming the decision of the Commissioner of the Social Security Administration. IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for the Commissioner.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 30, 2012

Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

later reports, none of which contained an opinion regarding plaintiff's inability to work.