

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIBEL ALVARADO,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of the Social
Security Administration,
Defendant.

Case No. SACV 14-1510 (SS)

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Plaintiff Maribel Alvarado ("Plaintiff") brings this action seeking to reverse the final decision of the Commissioner of the Social Security Administration denying her application for Disability Insurance Benefits and Supplemental Security Income. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is

1 REVERSED and the action is REMANDED for an award of benefits
2 consistent with this decision.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 Plaintiff filed applications for Disability Insurance
8 Benefits and Supplemental Security Income on July 28, 2010, and
9 August 10, 2010, respectively. (AR 158-63, 164-68). Plaintiff
10 alleged disability beginning on March 16, 2004. (AR 160, 164).
11 Both applications were denied on initial review. (AR 111-14, AR
12 115-7). The applications were also denied upon reconsideration.
13 (AR 118-22, 123-27). Plaintiff requested a hearing before an
14 administrative law judge, and a hearing (the "ALJ Hearing") was
15 held on August 6, 2012 in Orange, California, before
16 Administrative Law Judge John Kays ("the ALJ"). (AR 128, 81-
17 102). Plaintiff was represented by counsel. (AR 35, 156).
18 Plaintiff testified at the hearing, along with Dr. Samuel Landau,
19 a Medical Expert, and Alan Boroskin, a Vocational Expert. (AR
20 81-102). On September 20, 2012, the ALJ issued an unfavorable
21 decision, finding that Plaintiff was not disabled and was capable
22 of performing her past work as an office clerk. (AR 35-49).
23 Plaintiff sought review of the ALJ's decision before the Appeals
24 Council, which the Council denied on July 22, 2015. (AR 1). As
25 a result, the ALJ's decision became the final decision of the
26 Commissioner. (AR 1-6). Plaintiff filed this action on February
27 25, 2015.

28 \\

1 III.

2 FACTUAL BACKGROUND

3
4 Plaintiff was thirty-two years old at the alleged onset of
5 her disability on March 16, 2004. (AR 160). She last worked in
6 March or April of 2004 as an office clerk for an automobile
7 finance company. (AR 89). She completed the eleventh grade.
8 (AR 186). In her application, Plaintiff alleged that she
9 suffered from bilateral carpal tunnel syndrome, back pain,
10 depression and migraines. (AR 186). She alleges that she
11 developed carpal tunnel syndrome at her last job, where an expert
12 found that her work station was improperly set up with regard to
13 the repeated reaching that was required. (AR 89-90).

14
15 **A. Plaintiff's Medical History**

16
17 **1. Mark Giglio, M.D.**

18
19 Dr. Mark Giglio is Plaintiff's general care physician, and
20 records show that he has been treating Plaintiff on a monthly
21 basis since approximately June 2006. (AR 2150, 2248). In July
22 2006, Dr. Giglio ordered a CT scan of the pelvis, which showed an
23 enlarged spleen and liver as well as thickness and fluid
24 surrounding the gallbladder. (AR 2336-37). In October 2006,
25 Plaintiff presented with depression and requested a prescription
26 to help with her alcohol addiction. (AR 2244). Plaintiff had
27 increased her alcohol consumption in 2004, after her multiple
28 carpal tunnel surgeries and resulting complications. (Id.). Dr.

1 Giglio diagnosed Plaintiff with alcohol dependence with episodic
2 drinking behavior and depression. (AR 2246). In March 2007,
3 Plaintiff reported that she completed an alcohol detoxification
4 program and that a psychiatrist, Dr. Michael Wu, was treating her
5 for depression. (AR 2242). Examination in June 2008 showed an
6 enlarged liver, though Plaintiff was not drinking again. (AR
7 2232). In April 2009, Plaintiff reported daily headaches for the
8 past two months, for which Dr. Giglio prescribed medication. (AR
9 2218-19). Dr. Giglio also referred Plaintiff to a neurologist
10 for migraine treatment. (AR 2204-09). In April 2011, an
11 ultrasound of the abdomen revealed an enlarged liver and spleen,
12 consistent with underlying cirrhosis. (AR 2334). In May 2011,
13 Plaintiff reported symptoms of depression, including fatigue,
14 sadness, weight gain, and a lack of motivation. (AR 2193). Over
15 the ensuing follow-up visits, Dr. Giglio continued to adjust
16 Plaintiff's antidepressant medications to relieve her symptoms.
17 (AR 2187-92). In January 2012, Plaintiff reported that her
18 depression symptoms were controlled by a combination of
19 medications prescribed by her new treating psychiatrist, Dr. Greg
20 Sentenn. (AR 2179).

21
22 In January 2012, Dr. Giglio completed a Multiple Impairment
23 Questionnaire on the basis of his monthly treatment of Plaintiff.
24 (AR 2150-57). In the Questionnaire, Dr. Giglio noted the
25 following diagnoses: chronic major depression, alcoholic liver
26 disease with cirrhosis, lumbar disc disease, multi-factorial
27 headaches, hypothyroidism, carpal tunnel syndrome and fatigue.
28 (AR 2150). Plaintiff's major symptoms included fatigue,

1 insomnia, nausea, headaches, weight gain, anxiety and depression.
2 (AR 2150-51). He estimated that Plaintiff could sit or
3 stand/walk for no more than one hour each, with the need to get
4 up every thirty minutes, and that she could lift and carry only
5 five pounds frequently and ten pounds occasionally. (AR 2153-
6 54). Plaintiff would have moderate limitations in her ability to
7 perform fine and gross manipulations and reach with either arm
8 due to carpal tunnel syndrome in both hands. Id. She could not
9 keep her neck in a constant position. (AR 2154). Dr. Giglio
10 indicated that Plaintiff's symptoms would "frequently" interfere
11 with her attention and concentration, and she was capable of only
12 a "low stress" work environment. Plaintiff would also miss more
13 than three work days each month due to her impairments. (AR
14 2155-56).

15
16 **2. Rick Pospisil, M.D.**

17
18 Dr. Rick Pospisil is Plaintiff's treating orthopedic
19 surgeon. Plaintiff first saw Dr. Pospisil on March 7, 2005 for
20 pain in both wrists and in the low back. (AR 936). Dr. Pospisil
21 diagnosed Plaintiff with carpal tunnel syndrome bilaterally,
22 status post attempted release of right wrist on January 18, 2005,
23 post-operative swelling and stiffness suggestive of a causalgia
24 or complex regional pain syndrome and lumbar strain. (AR 944-
25 45). EMG and NCV studies from March 18, 2005 were abnormal, the
26 EMG consistent with ongoing moderate denervation due to right
27 carpal tunnel syndrome and mild to chronic denervation due to
28 left carpal tunnel syndrome, and the NCV consistent with moderate

1 to severe right carpal tunnel syndrome and moderate left carpal
2 tunnel syndrome. (AR 948-51).

3
4 On May 25, 2005, an MRI of Plaintiff's right wrist ordered
5 by Dr. Pospisil revealed an ulnar artery aneurysm of the right
6 palm. (AR 1013-14). On September 20, 2005, Dr. Arthur Salibian
7 surgically repaired the aneurysm. (AR 1056-57). At the post-
8 operative follow-up visit on November 1, 2005, Dr. Salibian found
9 that Plaintiff could use Plaintiff's right hand without any
10 restrictions. (AR 1090). On November 2, 2005, Dr. Pospisil
11 noted that her right hand, low back and shoulder continued to
12 improve, but examination still showed complications with the left
13 wrist. (AR 1085-88). On November 28, 2005, Dr. Pospisil noted
14 that Plaintiff remained symptomatic in the left hand, reporting
15 pain, numbness and tingling in the left index finger, third
16 finger and thumb. (AR 1094).

17
18 On January 20, 2006, Dr. Pospisil performed a carpal tunnel
19 release on Plaintiff's left wrist. (AR 1133-34). On May 1,
20 2006, an exam showed minimal swelling and good mobility with
21 negative Phalen's signs in both wrists and no dyesthesias, but
22 Plaintiff was still reporting numbness and tingling in both
23 wrists with radiation into all fingers. (AR 1169-70). On June
24 28, 2006, Plaintiff reported that she felt numbness and tingling
25 in her hands, the left worse than the right. (AR 1178). On
26 January 15, 2007, Plaintiff continued to have dyesthesias in
27 both hands, the left worse than the right, with mid- and upper
28 back pain. (AR 1214-15). Plaintiff reported the same symptoms

1 at monthly visits between February and July 2007. (AR 1222-52).
2 On October 1, 2007, the examination showed spasm and tenderness
3 in the low back, with slight restriction of lumbar mobility, as
4 well as dysesthesias to light touch. (AR 1293). Dr. Pospisil
5 precluded Plaintiff from repetitive fine motion of either hand or
6 lifting more than fifteen pounds with either hand. (AR 1294).

7
8 In January 2008, Dr. Pospisil adopted a workers'
9 compensation Agreed Medical Examiner's restrictions on
10 Plaintiff's abilities, precluding Plaintiff from repetitive fine
11 motion of the hand and lifting more than fifteen pounds. (AR
12 1329). Dr. Pospisil added the need for Plaintiff to change
13 positions as necessary and avoid all pushing, pulling, carrying,
14 and lifting because of her back symptomatology. (AR 1329). In
15 February 2008, Plaintiff noted that the back pain had worsened,
16 and Dr. Pospisil precluded her from more than occasional fine
17 motion of the hands, lifting more than fifteen pounds, carrying
18 and/or lifting more than fifteen pounds and pushing or pulling
19 more than twenty pounds. (AR 1334). He again reported that
20 Plaintiff needed the opportunity to change positions as necessary
21 to relieve pain.

22
23 On April 30, 2008, Dr. Pospisil diagnosed Plaintiff with
24 lumbar strain with lower extremity radiculopathy, supported by
25 MRI findings. (AR 1364). On January 12, 2009, Plaintiff
26 reported continued pain in her low back, radiating into her lower
27 extremities, and pain in both wrists. (AR 1498-99). Plaintiff's
28 symptoms and Dr. Pospisil's clinical findings remained constant

1 throughout regular visits between February and December 2009.
2 (AR 1509-12, 1547-48, 1574-77, 1591-94, 1608-11, 1643-46, 1659-
3 62, 1677-80, 1692-95).

4
5 On September 19, 2011, Dr. Pospisil completed an Upper
6 Extremity Impairment Questionnaire on the basis of his treatment
7 of Plaintiff since 2008. (AR 2125). He diagnosed Plaintiff with
8 cervicogenical headaches, lumbar disc protrusion, and residual
9 carpal tunnel syndrome status post three release procedures. (AR
10 2125). In the Questionnaire, Dr. Pospisil opined that Plaintiff
11 could lift or carry only ten pounds occasionally and five pounds
12 frequently, had moderate limitations in her abilities to perform
13 gross and fine manipulations with her right hand, moderate
14 limitations in her abilities to reach with either arm, would need
15 to take ten to fifteen minute breaks four to six times a day, and
16 that she would likely miss three or more workdays each month due
17 to her impairments. He also marked that Plaintiff's impairments
18 restricted her from all pushing, pulling, kneeling, bending and
19 stooping. (AR 2130).

20
21 **3. Andrew Morovati, M.D.**

22
23 Dr. Andrew Morovati, a neurologist, began treating Plaintiff
24 for migraines on March 3, 2011. (AR 2104). Dr. Morovati works
25 with Dr. Jack Florin, another treating neurologist. (AR 2104).
26 Plaintiff began seeing Dr. Florin in March 2010 and reported
27 suffering headaches on a daily basis for the last two years. (AR
28 838-39). Dr. Florin diagnosed chronic migraine without aura and

1 cervical dystonia. (AR 839). Dr. Florin treated Plaintiff's
2 migraines with Botox, and Plaintiff reported that the Botox
3 injections provided a five to ten percent improvement in the
4 severity of her headaches and that she was only headache-free for
5 five to six hours each day. (AR 832). On October 12, 2010, Dr.
6 Florin completed a Treating Physician's Migraine Headache Form
7 and indicated that Plaintiff's headaches occur more than once a
8 week, lasted an average of two to three hours each, two to three
9 times a day, caused nausea, photophobia, phonophobia and were
10 throbbing and pulsating. (AR 841). He indicated that Plaintiff
11 had a "fair" response to Indocin, Botox, Cymbalta, Tylenol and
12 Topamax and had failed nerve blocks. (Id.). He opined that the
13 migraines would interfere with her ability to work and cause her
14 to miss two to three days of work per week. (Id.). In September
15 2011, Plaintiff reported that the Botox injections were
16 ineffective and the oral medications were not working either.
17 (AR 2347).

18
19 Dr. Morovati began to treat Plaintiff for migraines in March
20 2011. (AR 2104). Dr. Morovati treated her every two to three
21 months. (AR 2143). He described her migraines as "uncontrolled"
22 and "severe, daily, and unresponsive to multiple treatment
23 modalities." (AR 2104). On October 25, 2011, Dr. Morovati
24 completed a Headaches Impairment Questionnaire on the basis of
25 his treatment of Plaintiff. (AR 2143-48). In the Questionnaire,
26 Dr. Morovati wrote that Plaintiff's headaches were severely
27 intense, accompanied by nausea and photosensitivity, occur daily
28 for up to eight hours, or sometimes the entire day, without any

1 specific triggers. (AR 2144). He opined that her symptoms are
2 frequently severe enough to interfere with her attention and
3 concentration, that she would be incapable of tolerating a "low
4 stress" work environment and that she would likely miss more than
5 three days of work each month because of her headaches. (AR
6 2146-47).

7
8 **B. Examining Physician's Opinion**

9
10 On March 25, 2011, state agency examining psychiatrist Fahmy
11 Ibrahim, M.D., performed a psychiatric evaluation of Plaintiff.
12 (AR 1931-35). Plaintiff reported feeling depressed since she
13 developed carpal tunnel syndrome and stopped working in 2004.
14 (AR 1932). She also stated that she is unable to work because of
15 low back pain, limitations on her standing and sitting and
16 migraines. (Id.). Dr. Ibrahim reported that Plaintiff was able
17 to dress and bathe herself, tried to do house cleaning and cook
18 and had good relationships with her family and friends. (AR
19 1933). He reported that Plaintiff's mood was depressed and her
20 affect restricted. (Id.).

21
22 In his functional assessment, Dr. Ibrahim wrote that
23 Plaintiff's ability to maintain focus and concentration is mildly
24 limited, her ability to understand and carry out complex or
25 detailed instructions is mildly to moderately limited and her
26 ability to cope with workplace stress is mildly to moderately
27 limited. (AR 1934). Plaintiff's ability to relate and interact

28 \\

1 with co-workers, colleagues and supervisors is normal, as is her
2 ability to understand and carry out simple instructions. Id.

3
4 **C. Medical Expert's Opinion**

5
6 Dr. Samuel Landau testified at the ALJ Hearing that
7 Plaintiff suffered from degenerative disc disease of the neck and
8 low back, bilateral carpal tunnel lesions with pain, persistent
9 pain and headaches. (AR 83-84). Dr. Landau opined that
10 Plaintiff's impairments would affect her ability to function.
11 (AR 84). Plaintiff could only stand and walk for two out of
12 eight hours each day, could sit with breaks every two hours,
13 could lift and carry ten pounds frequently and twenty pounds
14 occasionally and could occasionally stoop or bend. Id. She
15 could climb stairs but could not climb ladders, work at heights
16 or balance. Id. She was restricted from operating heavy
17 equipment or motorized vehicles, working around unprotected
18 machinery, or doing work where the safety of others could be
19 compromised. Id. She could engage in occasional neck motion,
20 but should avoid extremes, and should hold her head in a
21 comfortable position at other times. Id. She could occasionally
22 hold her head in a fixed position for fifteen to thirty minutes
23 at a time. Id. She was precluded from forceful gripping,
24 grasping, or twisting, but not from frequent fine and gross
25 manipulation as required for keyboarding, opening drawers and
26 carrying files. Id.

27 \\

28 \\

1 Dr. Landau opined that Plaintiff could engage in frequent
2 fine and gross manipulation despite bilateral carpal tunnel
3 syndrome because the carpal tunnel was released and the aneurysm
4 repaired. (AR 85-86). Dr. Landau also acknowledged that the
5 release may not have "made any difference at all . . . in her
6 symptoms." (AR 86).

7
8 **D. Vocational Expert**

9
10 Vocational Expert ("V.E.") Alan Boroskin identified
11 Plaintiff's past work in the Dictionary of Occupational Titles
12 ("DOT") as "office clerk." (AR 98). He noted that Plaintiff
13 performed this work at the sedentary level, though the DOT
14 classifies it as light. Id.

15
16 The ALJ then posed two hypotheticals to the V.E. First, the
17 ALJ proposed a hypothetical individual with the same education,
18 training and work history as Plaintiff who was limited to
19 standing and walking for no more than two hours each day and
20 could sit without restriction, but required breaks every two
21 hours. (AR 99). She could lift and carry ten pounds frequently
22 and twenty pounds occasionally and could stoop and bend
23 occasionally, but was precluded from jobs requiring her to use
24 ladders, ropes, or scaffolding, work at heights or requiring
25 balance, operating heavy equipment or motor vehicles, or being
26 responsible for the safety and welfare of others. (AR 99-100).
27 The individual was also precluded from jobs that required
28 forceful gripping or grasping, but she could engage in frequent

1 fine and gross manipulation such as keyboarding, and could
2 occasionally hold her head in a fixed position for fifteen to
3 thirty minutes at a time, though only in a comfortable position.
4 (AR 100). The V.E. testified that that such a hypothetical
5 individual would be able to perform Plaintiff's past work.
6 (Id.). However, if the hypothetical individual could only
7 occasionally use her hands for fine manipulation and gross
8 handling, she would not be able to perform Plaintiff's past work
9 as an office clerk. Id. Additionally, if the hypothetical
10 individual experienced extreme pain for up to one third of the
11 day that prevented her from focusing on simple and repetitive
12 tasks, she could not work. (AR 100-01). In response to a second
13 hypothetical, the V.E. testified that a hypothetical individual
14 who misses two days of work a month regularly would not be able
15 to do any work. (AR 101).

16
17 **E. Plaintiff's Testimony Before The ALJ And Statements On Her**
18 **Benefits Application**

19
20 Plaintiff testified that she suffers from carpal tunnel
21 syndrome in both hands. (AR 89-90). After her carpal tunnel
22 surgeries, Plaintiff continued to experience symptoms of
23 bilateral carpal tunnel syndrome, including numbness and the
24 feeling that her hands "fall[] asleep." (AR 86, 93). She also
25 had problems typing. (AR 93). She was able to hold onto and
26 lift light objects, but her hands would spasm if she lifted heavy
27 objects, and she "can't get a good grip." (AR 93-94). Plaintiff

28 \\

1 testified that she cannot lift anything more than five or ten
2 pounds and that "it can't be like an everyday situation." (AR
3 100).

4
5 Plaintiff also described her back pain. (AR 94-95). She
6 could sit for only fifteen minutes at a time, alternating with
7 standing fifteen minutes. (AR 94). She had not had surgery on
8 her back because she was afraid this would interfere with her
9 ability to interact with her young child. Id.

10
11 Plaintiff testified that she suffered from migraines, a
12 condition for which she saw a neurologist. (AR 95). She
13 experienced migraines every day, and they sometimes lasted for
14 over a week. Id. She tried different treatments for her
15 migraines, but "nothing works." Id. When experiencing a
16 migraine, she would lie down, close her eyes in a dark room, and
17 ice or heat her forehead. Id. Plaintiff also testified that she
18 saw a psychiatrist to treat her depression and experienced blurry
19 vision. (AR 96, 97).

20
21 Plaintiff did not have any difficulties with personal care.
22 (AR 206). She cared for her husband and two sons, aged nine and
23 nineteen, and a pet, prepared meals, performed household chores,
24 read, watched television, drove a car, took her mother and
25 grandmother to doctors' appointments, had lunch with a friend
26 occasionally, and shopped on a weekly basis. (AR 205-09, 90).
27 It took her a long time to complete household chores and she
28 sometimes needed help to complete these tasks, as well as to

1 bathe and change her clothes. (AR 207, 98). She admitted to
2 being an alcoholic but stated that she had not had any alcohol in
3 the last five years. (AR 97).

4
5 **IV.**

6 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7
8 To qualify for disability benefits, a claimant must
9 demonstrate a medically determinable physical or mental
10 impairment that prevents him from engaging in substantial gainful
11 activity¹ and that is expected to result in death or to last for
12 a continuous period of at least twelve months. Reddick v.
13 Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. §
14 423(d)(1)(A)). The impairment must render the claimant incapable
15 of performing the work he previously performed and incapable of
16 performing any other substantial gainful employment that exists
17 in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098
18 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

19
20 To decide if a claimant is entitled to benefits, an ALJ
21 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
22 The steps are:

23 \\
24 \\
25 \\
26

27 ¹ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done
for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

- 1 (1) Is the claimant presently engaged in substantial
2 gainful activity? If so, the claimant is found
3 not disabled. If not, proceed to step two.
- 4 (2) Is the claimant's impairment severe? If not, the
5 claimant is found not disabled. If so, proceed
6 to step three.
- 7 (3) Does the claimant's impairment meet or equal one
8 on the list of specific impairments described in
9 20 C.F.R. Part 404, Subpart P, Appendix 1? If
10 so, the claimant is found disabled. If not,
11 proceed to step four.
- 12 (4) Is the claimant capable of performing his past
13 work? If so, the claimant is found not disabled.
14 If not, proceed to step five.
- 15 (5) Is the claimant able to do any other work? If
16 not, the claimant is found disabled. If so, the
17 claimant is found not disabled.

18
19 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
20 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R.
21 §§ 404.1520(b)-404.1520(f)(1) & 416.920(b)-416.920(f)(1).

22
23 The claimant has the burden of proof at steps one through
24 four and the Commissioner has the burden of proof at step five.
25 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
26 affirmative duty to assist the claimant in developing the record
27 at every step of the inquiry. Id. at 954. If, at step four, the
28 claimant meets his burden of establishing an inability to perform

1 past work, the Commissioner must show that the claimant can
2 perform some other work that exists in "significant numbers" in
3 the national economy, taking into account the claimant's residual
4 functional capacity, age, education, and work experience.
5 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20
6 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). The Commissioner may do
7 so by the testimony of a vocational expert or by reference to the
8 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404,
9 Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock
10 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett).
11 When a claimant has both exertional (strength-related) and
12 nonexertional limitations, the Grids are inapplicable and the ALJ
13 must take the testimony of a vocational expert. Moore v. Apfel,
14 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856
15 F.2d 1335, 1340 (9th Cir. 1988)).

16
17 V.

18 **THE ALJ'S DECISION**

19
20 The ALJ employed the five-step sequential evaluation process
21 and concluded that Plaintiff was not disabled within the meaning
22 of the Social Security Act. (AR 49). At step one, the ALJ found
23 that Plaintiff had not been engaged in substantial gainful
24 employment since her alleged onset date of March 16, 2004. (AR
25 37).

26
27 At step two, the ALJ found that Plaintiff had the severe
28 impairments of status-post bilateral carpal tunnel releases,

1 degenerative disc disease of the lumbar spine, cervicalgia and
2 cervical dystonia and headaches. Id. The ALJ also found that
3 Plaintiff's other impairments, such as blurry vision, erosive
4 gastritis and depression, were not severe. (AR 38). The ALJ
5 found that Plaintiff's depression caused only mild limitations in
6 the functional areas of daily living, social functioning and
7 concentration, persistence or pace, and no extended episodes of
8 decompensation, and was therefore non-severe. (AR 37-38).

9
10 At step three, the ALJ found that Plaintiff does not have an
11 impairment or combination of impairments that meets or medically
12 equals the severity of from of the listed impairments in 20
13 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404 1520(d),
14 416.1525, 414.1526, 416.920(d), 416.925, 416.926). (AR 41).
15 The ALJ then found that Plaintiff had the residual functional
16 capacity ("RFC") to:

17
18 lift and carry twenty pounds occasionally and ten
19 pounds frequently; sit without restrictions but stand
20 or walk for only two hours in an eight-hour work day;
21 never climb ladders, ropes, or scaffolds; never
22 balance; only occasionally stoop or bend; never perform
23 forceful gripping or grasping and only frequently
24 perform fine and gross manipulation; only occasionally
25 hold her head in a fixed position for fifteen to thirty
26 minutes at a time and must hold her head in a
27 comfortable position; never operate heavy equipment or
28 motor vehicles; never work at heights; and never

1 perform jobs involving the safety operations or the
2 safety and welfare of others. Id.

3
4 The ALJ also specified that, in reaching this opinion, he had
5 considered all symptoms and the extent to which these symptoms
6 could reasonable be accepted as consistent with the objective
7 medical evidence and the other evidence. Id. He stated that he
8 considered opinion evidence in his finding as well. Id.

9
10 In considering Plaintiff's symptoms, the ALJ followed a two-
11 step process in which he first determined whether there is an
12 underlying medically determinable physical or mental
13 impairment(s) that could reasonably be expected to produce the
14 Plaintiff's pain or other symptoms. Id. Next, after the
15 underlying impairment(s) had been shown, he evaluated the
16 intensity, persistence, and limiting effects of Plaintiff's
17 symptoms to determine the extent to which they limit Plaintiff's
18 functioning. Id. The ALJ reviewed the specific findings of
19 Plaintiff's physicians and questioned their findings, ultimately
20 finding that the opinion of the testifying medical expert, Dr.
21 Landau, found the greatest support in the medical record. (AR
22 48). Accordingly, the ALJ gave "great weight" to Dr. Landau's
23 testimony. (Id.).

24
25 The ALJ questioned Plaintiff's testimony and stated that
26 Plaintiff's "allegations of generally disabling symptoms and
27 limitations are not corroborated by the evidence of record,"
28 noting that Plaintiff's activities, such as caring for her two

1 sons and husband, performing household chores, taking her mother
2 and grandmother to the doctor, having lunch with a friend, and
3 working in her son's classroom, are "inconsistent with
4 allegations of disability and indicate that [Plaintiff] is
5 capable of performing appropriate work activities on an ongoing
6 and daily basis." Id. The ALJ found that Plaintiff's medically
7 determinable impairments could reasonably be expected to cause
8 the alleged symptoms, but Plaintiff's statements about the
9 intensity, persistence and limiting effects of these symptoms
10 were not credible. Id.

11
12 At step four, the ALJ found that Plaintiff is capable of
13 performing her past work as an office clerk and that such work
14 does not require the performance of work-related activities
15 precluded by Plaintiff's RFC. (AR 48-49). The ALJ opined that
16 this finding was consistent with the testimony of the Vocational
17 Expert, Mr. Boroskin. (AR 49). As a result, the ALJ found that
18 Plaintiff was not disabled. Id.

19
20 **VI.**

21 **STANDARD OF REVIEW**

22
23 Under 42 U.S.C. § 405(g), a district court may review the
24 Commissioner's decision to deny benefits. The court may set aside
25 the Commissioner's decision to deny benefits. "The court may set
26 aside the Commissioner's decision when the ALJ's findings are
27 based on legal error or are not supported by substantial evidence
28 in the record as a whole." Auckland v. Massanari, 257 F.3d 1033,

1 1035 (9th Cir. 2001) (citing Tackett, 180 F. 3d at 1097); Smolen
2 v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v.
3 Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

4
5 "Substantial evidence is more than a scintilla, but less
6 than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson
7 v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
8 evidence which a reasonable person might accept as adequate to
9 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;
10 Smolen, 80 F.3d at 1279). To determine whether substantial
11 evidence supports a finding, the court must " 'consider the
12 record as a whole, weighing both evidence that supports and
13 evidence that detracts from the [Commissioner's] conclusion.' "
14 Auckland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d
15 953, 956 (9th Cir. 1993)). If the evidence can reasonably
16 support either affirming or reversing that conclusion, the court
17 may not substitute its judgment for that of the Commissioner.
18 Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y of Health &
19 Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

20
21 **VII.**

22 **DISCUSSION**

23
24 Plaintiff contends that the ALJ improperly assessed and
25 rejected the opinions of Plaintiff's treating physicians.
26 (Compl. 18, 21, 23). Plaintiff also contends that had the
27 treating physicians' opinions been given proper weight, she would
28 have been found disabled. (Compl. 25). This Court agrees.

1 **A. The ALJ Improperly Rejected The Treating Physicians'**
2 **Opinions**

3
4 Plaintiff claims that the ALJ's finding that Plaintiff can
5 perform frequent fine and gross manipulations like keyboarding,
6 the lifting and carrying requirements of light work and the non-
7 exertional requirements of full-time work is based on an
8 erroneous rejection of the opinions of treating physicians
9 Pospisil, Giglio and Morovati. (Compl. 21, 23). The Court
10 agrees.

11
12 The Ninth Circuit recognizes three types of physicians: (1)
13 treating physicians, who examine and treat, (2) examining
14 physicians, who examine but do not treat, and (3) non-examining
15 physicians who neither examine nor treat. Valentine v. Comm'r,
16 Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir. 2009). Treating
17 physicians are given the greatest weight because they are
18 "employed to cure and [have] a greater opportunity to know and
19 observe the patient as an individual." Magallanes v. Bowen, 881
20 F.3d 747, 751 (9th Cir. 1989); Thomas v. Barnhart, 278 F. 3d 947,
21 956-57 (9th Cir. 2002); Connett v. Barnhart, 340 F.3d 871, 874
22 (9th Cir. 2003). Accordingly, where the treating physicians'
23 opinion is refuted by another doctor, the ALJ may not reject this
24 opinion without providing specific, legitimate reasons, supported
25 by substantial evidence in the record. Lester v. Chater, 81 F.3d
26 821, 830-31 (9th Cir. 1995); see also Orn v. Astrue, 495 F.3d
27 625, 632 (9th Cir. 2007); Ryan v. Comm'r of Soc. Sec., 528 F.3d
28 1194, 1198 (9th Cir. 2008). Where the treating physician's

1 opinion is not refuted by another doctor, the ALJ must provide
2 clear and convincing reasons for rejecting the treating
3 physician's opinions. Lester, 81 F.3d at 830; Holohan v.
4 Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). The opinion of a
5 non-examining, non-treating physician does not constitute
6 substantial evidence to justify rejecting the opinion of either
7 an examining or a treating physician unless it is consistent with
8 and supported by other evidence in record. Lester, 81 F.3d at
9 831; Morgan v. Comm'r of Soc. Sec., 169 F.3d 595, 600-01 (9th
10 Cir. 1998). However, treating physicians' opinions are not given
11 more weight if they are conclusory or not supported by medical
12 evidence. Batson v. Comm'r of Soc. Sec., 359 F.3d 1190, 1195
13 (9th Cir. 2004).

14
15 Here, the opinions of treating physicians Pospisil and
16 Giglio are contradicted by the opinion of Dr. Landau. Because
17 Plaintiff's treating physicians are presumed to be in the best
18 position to assess Plaintiff's functional limitations, the ALJ
19 must provide specific and legitimate reasons, supported by
20 substantial evidence in the record, for rejecting their opinions.
21 See Lester, 81 F.3d at 830; see also Magallanes, 881 F.2d at 751.
22 The ALJ found that Dr. Pospisil's assessments were inconsistent
23 and lacked support in the record, and that Dr. Giglio's opinions
24 also lacked support in the record. These reasons are not
25 legitimate because substantial evidence in the record does, in
26 fact, support the treating doctors' opinions.

27 \\

28 \\

1 Dr. Pospisil, Plaintiff's treating orthopedic surgeon,
2 treated Plaintiff on a monthly basis, beginning in 2005, for both
3 her upper extremity and spinal impairments. Dr. Pospisil also
4 performed one of her carpal tunnel release procedures. Despite
5 undergoing three procedures to treat her bilateral carpal tunnel
6 syndrome, Plaintiff continued to report numbness and tingling in
7 both hands, and examinations showed that Plaintiff had
8 dysesthesias in both hands along with back pain. (AR 1169-70,
9 1178, 1214-15, 1222-52, 1293). In October 2007, Dr. Pospisil
10 precluded Plaintiff from repetitive fine motion of either hand or
11 lifting more than fifteen pounds with either hand. (AR 1294).
12 In January 2008, Dr. Pospisil again precluded Plaintiff from
13 repetitive fine motion of either hand or lifting more than
14 fifteen pounds with either hand. (AR 1329). In January 2008,
15 Dr. Pospisil also precluded Plaintiff from all pushing, pulling,
16 carrying and lifting "because of her back symptomatology." Id.
17 In February 2008, Dr. Pospisil precluded Plaintiff from fine
18 motions of the hands "more than occasionally," lifting more than
19 fifteen pounds, carrying and/or lifting more than fifteen pounds
20 and pushing or pulling more than twenty pounds. (AR 1334). In
21 September 2011, Dr. Pospisil completed an Upper Extremity
22 Impairment Questionnaire in which he opined that Plaintiff could
23 lift or carry only ten pounds occasionally and five pounds
24 frequently, had moderate limitations in her abilities to perform
25 gross and fine manipulations with her right hand, moderate
26 limitations in her abilities to reach with either arm, is
27 restricted from all pushing, pulling, kneeling, bending and
28 stooping, would need to take short breaks four to six times a

1 day, and that she was likely to miss three or more workdays a
2 month because of her impairments. (AR 2125-30). Dr. Pospisil's
3 assessments were not consistent with Dr. Landau's testimony,
4 which placed fewer restrictions on Plaintiff's abilities.
5 (AR 84).

6
7 The ALJ rejected Dr. Pospisil's more restrictive assessments
8 of Plaintiff's abilities because of alleged internal
9 inconsistencies in his assessments. (AR 42-43). Specifically,
10 the ALJ opined that Dr. Pospisil's February 2008 assessment,
11 allowing for Plaintiff to push and pull up to twenty pounds, was
12 inconsistent with his opinion in the 2011 Questionnaire, which
13 precluded all regular pushing and pulling and applies to
14 Plaintiff's symptoms and limitations as early as 2007-08. Id.
15 The ALJ also opined that the 2011 Questionnaire was inconsistent
16 with Dr. Pospisil's October 2007 limitations report because the
17 former imposed only minimal limitations on fine manipulations
18 with the left hand, and the latter precluded all continuous,
19 repetitive fine motion with either the left or right hand. Id.
20 Although these assessments did identify different limitations, it
21 is likely that Plaintiff's condition was worse when Dr. Pospisil
22 completed the 2011 Questionnaire due to the passage of time.
23 Instead of addressing this likelihood, however, the ALJ rejected
24 the findings of the physician who had been treating Plaintiff for
25 nearly a decade.

26
27 Dr. Giglio, Plaintiff's primary care provider, was the only
28 other treating physician to have assessed Plaintiff's functional

1 limitations due to residual carpal tunnel symptoms. In January
2 2012, Dr. Giglio completed a Multiple Impairment Questionnaire,
3 finding that Plaintiff could lift or carry only ten pounds
4 occasionally and five pounds frequently and that she would have
5 moderate limitations in her ability to perform fine and gross
6 manipulations and reach with either arm. (AR 2152-54). The ALJ
7 rejected Dr. Giglio's opinion, finding that it was contradicted
8 by the opinion of other doctors, including Dr. Pospisil. (AR 45-
9 46). However, Dr. Giglio's assessment in the January 2012
10 Questionnaire was almost identical to Dr. Pospisil's September
11 2011 assessment, save for Dr. Pospisil's conclusion that
12 Plaintiff was moderately limited in her ability to perform fine
13 and gross manipulations with only the right hand. (AR 2129,
14 2152-54). Accordingly, there was no basis for the ALJ to
15 conclude that Dr. Giglio's opinion was contradicted by the
16 findings of Plaintiff's other physicians.

17
18 The ALJ found that Dr. Giglio's "conclusions...lack
19 support," but the medical evidence undermines this conclusion.
20 (AR 46). Moreover, the ALJ failed to provide specific and
21 legitimate reasons, supported by substantial evidence in the
22 record, for rejecting Drs. Pospisil and Giglio's opinions. In
23 rejecting the treating physicians' opinions, the ALJ adopted the
24 opinion of Dr. Landau, the medical expert. (AR 41, 48, 84). Dr.
25 Landau testified at the ALJ Hearing that Plaintiff was precluded
26 from forceful gripping, gasping or twisting, but not precluded
27 from frequent fine and gross manipulation, as required for
28 keyboarding, opening drawers and carrying files. (AR 84).

1 According to Dr. Landau, Plaintiff could also lift and carry ten
2 pounds frequently and twenty pounds occasionally. (Id.). Dr.
3 Landau's opinion is not supported by substantial evidence in the
4 record. The ALJ failed to provide specific and legitimate
5 reasons for disregarding the opinions of treating physicians who
6 cared for the Plaintiff for several year years and provided
7 opinions supported by extensive treatment records. See 20 C.F.R.
8 §§ 404.1527(d)(2), (3); see also Holohan, 246 F.3d at 1207.

9
10 The ALJ also failed to provide clear and convincing reasons
11 for rejecting the uncontradicted findings of treating neurologist
12 Andrew Morovati, as required. See Lester, 81 F.3d at 830;
13 Holohan, 246 F.3d at 1202. The ALJ rejected Dr. Morovati's
14 opinions because the "objective medical evidence" failed to
15 support his assessments of Plaintiff, and because Plaintiff's
16 treatment history reflects recent improvement in the frequency of
17 her migraines. (AR 47). These two reasons are not clear and
18 convincing because they lack substantial support in the record.

19
20 Plaintiff received treatment for migraines from Drs. Florin
21 and Morovati beginning in March 2010. Dr. Florin found that
22 Plaintiff's headaches occur more than once a week, last two to
23 three hours each, two to three times a day, cause nausea, and are
24 throbbing and pulsating. (AR 841). He opined that migraines
25 would interfere with Plaintiff's ability to work and that she
26 would miss two to three workdays each week. Id. Similarly, Dr.
27 Morovati found that Plaintiff's headaches are severely intense,
28 accompanied by nausea and photosensitivity, occur daily for up to

1 eight hours, sometimes lasting the entire day, and have no
2 specific triggers. (AR 2144). He opined that Plaintiff's
3 symptoms would frequently be severe enough to interfere with her
4 attention and concentration, that she would be incapable of
5 tolerating even a "low stress" work environment and that she
6 would likely miss more than three workdays each month because of
7 her headaches. (AR 2146-47).

8
9 The treating neurologists' notes show that Botox injections
10 were somewhat effective in relieving Plaintiff's symptoms in late
11 2010. However, by September 2011, Plaintiff reported that the
12 injections were no longer consistently effective and none of the
13 oral medications worked. (AR 2084-920, 2347). Her headaches
14 became responsive to Botox injections again in November 2011 and
15 January 2012, but as of April 2013 they were "uncontrolled off
16 Botox." (AR 2490). Plaintiff had not had Botox treatments in
17 the preceding ten months, as her insurer would not approve such
18 frequent injections. (AR 2494-95). These medical records are
19 consistent with Plaintiff's testimony at the hearing before the
20 ALJ, where she testified that she gets migraines every day and
21 that she has tried different treatments for her migraines but
22 "nothing works." (AR 95).

23
24 The ALJ rejected the opinions of the treating neurologists
25 for two reasons. First, the ALJ opined that "[t]he objective
26 medical evidence, including the normal brain MRI and an absence
27 of significant neurological abnormalities," failed to support the
28 neurologists' restrictions on Plaintiff. However, neurological

1 examinations did show that her headaches are caused by
2 neurological abnormalities, specifically cervical dystonia. (AR
3 839, 836-37). Examinations showed moderate bilateral
4 suboccipitalis and temporalis tenderness, cervical dystonia with
5 30 degrees anterocolis and 30 degrees right lateral shift, and
6 slightly reduced cervical extension and rotation. Id. The ALJ
7 noted that Plaintiff's brain MRI was "normal," but did not rely
8 on any opinion from a medical professional in arriving at his
9 conclusion that a normal brain MRI undermines Morovati and
10 Florin's restrictions on Plaintiff. Second, the ALJ opined that
11 the neurologists failed to account for "recent improvement" in
12 the frequency of Plaintiff's migraines. (AR 47). However, the
13 record shows substantial evidence supporting the neurologists'
14 assessments that Plaintiffs' migraines remained severe and
15 constant. Thus, because the ALJ did not provide clear and
16 convincing reasons supported by substantial evidence for
17 rejecting the treating neurologists' opinions, remand is
18 required.

19
20 Plaintiff also claims that the ALJ's finding at step two
21 that Plaintiff's depression imposes no mental restrictions on her
22 overall functional capacity is based on error. (Compl. at 18-
23 20). The Court agrees with this contention. By its own terms,
24 the evaluation at step two is a de minimis test intended to weed
25 out the most minor of impairments. See Webb v. Barnhart, 433
26 F.3d 683, 687 (9th Cir. 2005) (step two is "de minimis
27 threshold"); Smolen, 80 F.3d at 1290 (internal quotations and
28 citations omitted). Where there is evidence of a mental

1 impairment that prevents a claimant from working, however, the
2 Agency supplements the five-step sequential evaluation process
3 with additional inquiries. Maier v. Comm'r, 154 F.3d 913, 914-15
4 (9th Cir. 1998) (per curiam) (citing 20 C.F.R. § 416.920a).
5 Here, the degree of treatment received by Plaintiff for her
6 depression, combined with the medical evidence and her own
7 testimony, confirms that Plaintiff's mental impairment qualified
8 as a "severe" impairment at step two. (AR 2179, 2190-96, 2242).
9 Remand is required on this ground, as well.

10
11 **B. If The Treating Physicians' Opinions Were Given Proper**
12 **Weight, Plaintiff Would Be Found Disabled**

13
14 The Court must ordinarily remand for an award of benefits
15 where "(1) the record has been fully developed and further
16 administrative proceedings would serve no useful purpose; (2) the
17 ALJ has failed to provide legally sufficient reasons for
18 rejecting evidence, whether claimant testimony or medical
19 opinion; and (3) if the improperly discredited evidence were
20 credited as true, the ALJ would be required to find the claimant
21 disabled on remand." Garrison v. Colvin, 759 F.3d 995, 1020 (9th
22 Cir. 2014) (citing, inter alia, Lingenfelter v. Astrue, 504 F.3d
23 1028, 1041 (9th Cir. 2007); Orn, 495 F.3d at 640; Smolen, 80 F.3d
24 at 1292). The "credit-as-true" rule allows courts the
25 flexibility to remand for further proceedings, rather than an
26 award, only where the record as a whole "creates serious doubt"
27 that a claimant is disabled. Id. at 1021.

28 \\

1 Here, if the opinions of Plaintiff's treating physicians had
2 been properly weighted, the ALJ would have found Plaintiff unable
3 to perform fine and gross manipulations, the lifting and carrying
4 requirements of light work, or the non-exertional requirements of
5 full-time work. The V.E. testified that Plaintiff would not be
6 able to perform the work of an office clerk if she could only
7 occasionally use her hands for fine manipulation and gross-
8 handling. (AR 100). The V.E. also testified that "there would
9 be no work," if Plaintiff were to regularly miss two days of work
10 a month because of medical impairments. (Id.). If fully
11 credited, the treating physicians' medical evidence regarding
12 Plaintiff's migraines would support a finding that Plaintiff
13 would regularly miss two days or more of work each month.
14 Finally, a person who experiences extreme pain for up to one
15 third of the day, during which he or she cannot focus even on
16 simple and repetitive tasks, like Plaintiff, "could not work."
17 (AR 101). The Court is satisfied that the record has been fully
18 developed, that further administrative proceedings would serve no
19 useful purpose, and that if the discounted evidence were credited
20 as true, Plaintiff would be entitled to benefits.

21 \\

22 \\

23 \\

24 \\

25 \\

26 \\

27 \\

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VIII.
CONCLUSION

Consistent with the foregoing, it is ORDERED that Judgment be entered REVERSING the decision of the Commissioner and REMANDING this action for the award of benefits. The Clerk of the Court shall serve copies of this order and the Judgment on counsel for both parties.

DATED: June 29, 2015

/S/ _____
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR ANY OTHER LEGAL DATABASE.