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

Case No. 8:16-CV-00643 (VEB)

JOHN MARTINEZ,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In February of 2013, Plaintiff John Martinez applied for supplemental security income benefits under the Social Security Act. The Commissioner of Social Security denied the application.¹ Plaintiff, represented by Lawrence D. Rohlfig, Esq.,

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 commenced this action seeking judicial review of the Commissioner’s denial of
2 benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

3 The parties consented to the jurisdiction of a United States Magistrate Judge.
4 (Docket No. 11, 12). On March 27, 2017, this case was referred to the undersigned
5 pursuant to General Order 05-07. (Docket No. 22).

6 **II. BACKGROUND**

7 Plaintiff applied for SSI benefits on February 22, 2013, alleging disability
8 beginning March 1, 2007. (T at 191-99).² The application was denied initially and
9 on reconsideration. Plaintiff requested a hearing before an Administrative Law
10 Judge (“ALJ”). On August 14, 2014, a hearing was held before ALJ Sharilyn
11 Hopson. (T at 39). Plaintiff appeared with his attorney and testified. (T at 42-45, 52-
12 61). The ALJ also received testimony from Dr. Reuben Beezy (T at 46-51) and
13 Elizabeth Ramos, a vocational expert (T at 62-69).

14 On October 24, 2014, the ALJ issued a written decision denying the
15 application for benefits. (T at 18-38). The ALJ’s decision became the
16 Commissioner’s final decision on February 9, 2016, when the Appeals Council
17 denied Plaintiff’s request for review. (T at 1-7).

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² Citations to (“T”) refer to the administrative record at Docket No. 17.

1 On April 7, 2016, Plaintiff, acting by and through his counsel, filed this action
2 seeking judicial review of the Commissioner’s decision. (Docket No. 1). The
3 Commissioner interposed an Answer on September 6, 2016. (Docket No. 16).
4 Plaintiff filed a supporting memorandum of law on November 10, 2016 (Docket No.
5 20); Defendant filed an opposing memorandum of law on December 7, 2016.
6 (Docket No. 21).

7 After reviewing the pleadings, memoranda of law, and administrative record,
8 this Court finds that the Commissioner’s decision should be reversed and this case
9 remanded for further proceedings.

10 III. DISCUSSION

11 A. Sequential Evaluation Process

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

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

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

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

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

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

17 **B. Standard of Review**

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

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

17 It is the role of the Commissioner, not this Court, to resolve conflicts in
18 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
19 interpretation, the Court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
2 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
3 set aside if the proper legal standards were not applied in weighing the evidence and
4 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
5 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
6 administrative findings, or if there is conflicting evidence that will support a finding
7 of either disability or non-disability, the finding of the Commissioner is conclusive.
8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

9 **C. Commissioner’s Decision**

10 The ALJ determined that Plaintiff had not engaged in substantial gainful
11 activity since February 22, 2013, the application date. (T at 23). The ALJ found that
12 Plaintiff’s diabetes mellitus, diabetic peripheral neuropathy, hepatitis C, asthma,
13 mood disorder, and psychotic disorder were “severe” impairments under the Act.
14 (Tr. 24).

15 However, the ALJ concluded that Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled one of the impairments
17 set forth in the Listings. (T at 24).

18 The ALJ determined that Plaintiff retained the residual functional capacity
19 (“RFC”) to occasionally lift/carry 20 pounds; frequently lift/carry 10 pounds;

1 stand/walk for 4 hours in an 8-hour workday (with the use of a cane as needed); sit
2 for 6 hours in an 8-hour workday (with the option to stand and stretch every hour for
3 1-3 minutes); occasionally climb stairs, bend, stoop, kneel, crouch, and crawl; never
4 climb ladders, ropes, scaffolds; avoid exposure to unprotected heights and
5 moving/dangerous machinery; avoid concentration exposure to pulmonary irritants;
6 perform work involving simple, routine tasks with no more than occasional contact
7 with the public, co-workers, and supervisors, and no teamwork requirements. (T at
8 26).

9 The ALJ found that Plaintiff could not perform his past relevant work as a
10 construction worker, delivery driver, or loader/unloader. (T at 31). Considering
11 Plaintiff's age (41 on the application date), education (limited), work experience,
12 and residual functional capacity, the ALJ determined that there were jobs that exist
13 in significant numbers in the national economy that Plaintiff can perform. (T at 32).

14 As such, the ALJ found that Plaintiff was not entitled to benefits under the
15 Social Security Act from February 22, 2013 (the application date) through October
16 24, 2014 (the date of the ALJ's decision). (T at 33). As noted above, the ALJ's
17 decision became the Commissioner's final decision when the Appeals Council
18 denied Plaintiff's request for review. (T at 1-7).

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2 **D. Disputed Issue**

3 Plaintiff offers a single argument in support of his claim that the
4 Commissioner’s decision should be reversed. He contends that the ALJ did not
5 properly weigh the medical opinion evidence.

6 **IV. ANALYSIS**

7 **A. Medical Opinion Evidence**

8 In disability proceedings, a treating physician’s opinion carries more weight
9 than an examining physician’s opinion, and an examining physician’s opinion is
10 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,
11 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
12 1995). If the treating or examining physician’s opinions are not contradicted, they
13 can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
14 contradicted, the opinion can only be rejected for “specific” and “legitimate” reasons
15 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d
16 1035, 1043 (9th Cir. 1995). Historically, the courts have recognized conflicting
17 medical evidence, and/or the absence of regular medical treatment during the alleged
18 period of disability, and/or the lack of medical support for doctors’ reports based
19 substantially on a claimant’s subjective complaints of pain, as specific, legitimate

1 reasons for disregarding a treating or examining physician’s opinion. *Flaten v.*
2 *Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

3 An ALJ satisfies the “substantial evidence” requirement by “setting out a
4 detailed and thorough summary of the facts and conflicting clinical evidence, stating
5 his interpretation thereof, and making findings.” *Garrison v. Colvin*, 759 F.3d 995,
6 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).
7 “The ALJ must do more than state conclusions. He must set forth his own
8 interpretations and explain why they, rather than the doctors,’ are correct.” *Id.*

9 This Court will review the pertinent medical opinions and then address the
10 ALJ’s consideration of that evidence.

11 **1. Dr. Krieg**

12 Dr. Charlene K. Krieg performed a consultative psychological evaluation in
13 June of 2013. Dr. Krieg diagnosed substance abuse, in remission, as well as
14 personality disorder NOS. (T at 526). She reported that Plaintiff “did not evidence
15 any disorder on mental status” and opined that he had no mental impairment(s) that
16 would limit his ability to engage in work activities and/or complete a normal
17 workday or workweek. (T at 526).

1 Assessment of Functioning (“GAF”) score³ of 48 (T at 794), which is indicative of
2 serious impairment in social, occupational or school functioning. *Haly v. Astrue*, No.
3 EDCV 08-0672, 2009 U.S. Dist. LEXIS 76881, at *12-13 (Cal. CD Aug. 27, 2009).

4 **4. Ms. Rosen**

5 Sandra Rosen, a treating social worker, completed a report in March of 2011,
6 wherein she noted a diagnosis of bipolar disorder and assigned a GAF score of 45 (T
7 at 657). Ms. Rosen described Plaintiff as isolating himself from others, unable to
8 work, and experiencing visual hallucinations. (T at 657).

9 **5. ALJ’s Consideration of Medical Opinion Evidence**

10 The ALJ assigned “little weight” to the opinion of Dr. Lissaur, the treating
11 psychiatrist, finding his opinion “conclusory” and “not consistent with the record in
12 its entirety.” (T at 30-31). The ALJ also noted that Dr. Lissaur “did not have the
13 benefit” of reviewing other medical reports in the record. (T at 30-31).

14 The ALJ afforded some weight to the opinion of Dr. Krieg, the consultative
15 examiner, finding her assessment not “inconsistent” with the evidence, but
16 nevertheless concluding that Plaintiff’s mental health impairments were more
17 restricting than Dr. Krieg’s assessment indicated. (T at 31). The ALJ likewise

18 ³ “A GAF score is a rough estimate of an individual's psychological, social, and occupational
19 functioning used to reflect the individual's need for treatment.” *Vargas v. Lambert*, 159 F.3d 1161,
1164 n.2 (9th Cir. 1998).

1 afforded less weight to the opinions of the State Agency review consultants, finding
2 Plaintiff somewhat more limited with regard to his mental health impairments. (T at
3 31).

4 For the following reasons, this Court finds the ALJ’s consideration of the
5 medical opinion evidence inadequate and not supported by substantial evidence. In
6 sum, the ALJ characterized Dr. Lissaur’s opinion as “conclusory” and faulted the
7 treating psychiatrist for “providing very little explanation of the evidence relied on
8 in forming that opinion.” (T at 30). The ALJ also noted that Dr. Lissaur “did not
9 have the benefit” of reviewing the other medical reports in the record. (T at 31). The
10 ALJ’s assessment is flawed in four respects.

11 First, Dr. Lissaur is not required to state the obvious, namely, that his opinion
12 is based, in significant measure on his clinical expertise and experience treating
13 Plaintiff on numerous occasions over a period covering three and a half years. (T at
14 569-585, 794, 796, 798). *See Ghokassian v. Shalala*, 41 F.3d 1300, 1303 (9th Cir.
15 Cal. 1994)(“[W]e also hold that the ALJ committed a *legal* error when he failed to
16 grant deference to the conclusions [of claimant’s treating physician]...[The courts
17 have] ‘accorded deference to treating physicians precisely because they are the
18 doctors with ‘greater opportunity to observe and know the patient.’”)(emphasis in
19 original)(quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1993)). Moreover,

1 assessments of mental health impairments are not generally amendable to precise
2 measurement or reference to “objective” test results. As such, the ALJ erred by
3 faulting Dr. Lissaur for allegedly failing to provide an adequate explanation of his
4 findings.

5 Second, it is simply not accurate to characterize Dr. Lissaur’s assessment as
6 “conclusory.” The treatment notes consistently report clinical findings and indicate
7 that Plaintiff had depressed mood, poor concentration and attention, impaired insight
8 and judgment, and occasionally experienced auditory and visual hallucinations. (T at
9 569-89, 794, 796, 798). This is not a case where a treating provider completed a
10 “checkbox” assessment of limitations. Rather, the record contains detailed treatment
11 notes from Dr. Lissaur, over an extended period of time, documenting significant
12 impairments and assessing significant limitations. The ALJ’s characterization of
13 this record as “conclusory” is not supported by substantial evidence.

14 Third, the ALJ apparently believed Dr. Lissaur would have altered his
15 assessment if he had “the benefit of reviewing the other medical reports contained in
16 the current record” (T at 31). Presumably, the ALJ is referring to the opinions
17 provided by Dr. Krieg (the consultative examiner) and Drs. Barron and Balson (the
18 non-examining State Agency review consultants). However, if that was the case,
19 then the proper course would have been for the ALJ to re-contact Dr. Lissaur,

1 provide him with those reports, and inquire as to whether they altered the treating
2 provider's opinion. There is no question that "the ALJ has a duty to assist in
3 developing the record." *Armstrong v. Commissioner of Soc. Sec. Admin.*, 160 F.3d
4 587, 589 (9th Cir. 1998); 20 C.F.R. §§ 404.1512(d)-(f); *see also Sims v. Apfel*, 530
5 U.S. 103, 110-11, 147 L. Ed. 2d 80, 120 S. Ct. 2080 (2000) ("Social Security
6 proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to
7 investigate the facts and develop the arguments both for and against granting
8 benefits . . ."). This duty includes an obligation to re-contact a treating physician
9 under appropriate circumstances.

10 In the present case, there was a significant discrepancy between the findings
11 of the treating provider, on the one hand, and the consultative examiner and State
12 Agency consultants, on the other. The treating provider assessed severe limitations;
13 the non-treating professionals found moderate to no impairment.

14 The ALJ noted this inconsistency, recognized that the treating provider had
15 not had the "benefit" of reviewing the other reports, and then resolved the conflict by
16 adopting findings more consistent with the non-treating providers. (T at 30-31).
17 This was not proper; the ALJ should have re-contacted Dr. Lissaur before resolving
18 the inconsistency in favor of the non-treating opinions. *See* SSR 96-5p; *see also*

1 *Estrada v. Astrue*, No EDCV 07-01226, 2009 U.S. Dist. LEXIS 15824, at *11 (C.D.
2 Cal. Feb. 25, 2009).

3 Fourth, the ALJ placed great emphasis on Plaintiff's difficulties complying
4 with treatment recommendations and his ability to engage in a "somewhat normal
5 level of daily activity and interaction." (T at 30). While not explicitly stated, it
6 appears the ALJ believed Dr. Lissaur's assessment was based on Plaintiff's
7 subjective complaints, which the ALJ found not credible because of non-compliance
8 with treatment recommendations and because of Plaintiff's ability to engage in
9 "somewhat normal" activities of daily living. Although these are, in general, proper
10 considerations when assessing a treating provider's opinion, *Flaten v. Secretary of*
11 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995), the ALJ's
12 analysis here was insufficient.

13 For example, the ALJ did not give adequate consideration to the impact that
14 Plaintiff's impairments, including his recognized difficulties with social interaction,
15 may have had on his difficulties consistently complying with treatment
16 recommendations. *See Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.1996)
17 (noting that "it is a questionable practice to chastise one with a mental impairment
18 for the exercise of poor judgment in seeking rehabilitation")(quoting *Blankenship v.*
19 *Bowen*, 874 F.2d 1116, 1124 (6th Cir.1989)).

1 Moreover, the ALJ’s reliance on Plaintiff’s “somewhat normal” activities of
2 daily living does not adequately account for the evidence indicating that Plaintiff
3 relied heavily on very supportive family members and could not perform his
4 activities of daily living without assistance. A clear implication of Dr. Lissaur’s
5 assessments is that, notwithstanding Plaintiff’s ability to maintain a relatively stable,
6 albeit modest, level of activity, that ability would degrade if he was required to
7 consistently follow directions, keep appointments, or maintain a schedule.

8 Individuals with chronic mental health problems “commonly have their lives
9 structured to minimize stress and reduce their signs and symptoms.” *Courneya v.*
10 *Colvin*, No. CV-12-5044, 2013 U.S. Dist. LEXIS 161332, at *13-14 (E.D.W.A.
11 Nov. 12, 2013)(quoting 20 C.F.R. Pt. 404, Subp’t P, App. 1 § 12.00(D)). “The
12 Social Security Act does not require that claimants be utterly incapacitated to be
13 eligible for benefits, and many home activities are not easily transferable to what
14 may be the more grueling environment of the workplace, where it might be
15 impossible to periodically rest or take medication.” *Fair v. Bowen*, 885 F.2d 597,
16 603 (9th Cir. 1989); *see also Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir.
17 2012)(“The critical differences between activities of daily living and activities in a
18 full-time job are that a person has more flexibility in scheduling the former than the
19 latter, can get help from other persons . . . , and is not held to a minimum standard of

1 performance, as she would be by an employer. The failure to recognize these
2 differences is a recurrent, and deplorable, feature of opinions by administrative law
3 judges in social security disability cases.”)(cited with approval in *Garrison v.*
4 *Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014)).

5 For the reasons outlined above, this Court finds that the ALJ’s consideration
6 of Dr. Lissaur’s opinion was inadequate and a remand is therefore required.

7 **B. Remand**

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

14 Here, this Court finds that remand for further proceedings is warranted.
15 Although the ALJ’s consideration of Dr. Lissaur’s opinion was flawed for the
16 reasons outlined above, there is evidence in the record calling into question whether
17 Plaintiff is disabled within the meaning of the Social Security Act. The consultative
18 examiner and State Agency review consultants assessed little to no limitations
19 arising from Plaintiff’s mental health impairments. The divergence of opinion

1 between well-qualified professionals creates some doubt as to the extent of
2 Plaintiff's limitations. Although the treating provider's opinion is entitled to
3 deference, and while the ALJ here did not satisfy his duty to resolve the conflicting
4 evidence in a manner supported by substantial evidence, the doubt as to disability
5 means a remand for further proceedings is the appropriate remedy. There is also
6 some evidence in the record suggesting that Plaintiff's symptoms were managed
7 with medication when he was compliant with treatment recommendations.
8 Accordingly, this Court finds that a remand for further proceedings is the correct
9 result. *See Strauss v. Comm'r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir.
10 2011)("Ultimately, a claimant is not entitled to benefits under the statute unless the
11 claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be.").

12 **V. ORDERS**

13 IT IS THEREFORE ORDERED that:

14 Judgment be entered REVERSING the Commissioner's decision and
15 REMANDING this matter for further proceedings consistent with this Decision and
16 Order; and

