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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-SOUTHERN DIVISION

PETRA RIOS,)	Case No. SA CV 16-01049-AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
NANCY A. BERRYHILL, ¹)	
Acting Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	
_____)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter be remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On June 6, 2016, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Docket

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration and is substituted in for Acting Commissioner Carolyn W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Entry No. 1). The parties have consented to proceed before the
2 undersigned United States Magistrate Judge. (Docket Entry Nos. 11, 13).
3 On October 14, 2016, Defendant filed an Answer along with the
4 Administrative Record ("AR"). (Docket Entry Nos. 16-17). On January
5 19, 2017, the parties filed a Joint Stipulation ("Joint Stip.") setting
6 forth their respective positions regarding Plaintiff's claims. (Docket
7 Entry No. 18).

8
9 The Court has taken this matter under submission without oral
10 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
11 Security Case," filed June 7, 2016 (Docket Entry No. 9).

12
13 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
14

15 On March 5, 2013, Plaintiff, formerly employed as a garment labeler
16 and as a mail room person in a cosmetic warehouse (see AR 53-54, 204,
17 213-14, 235-36), filed an application for Disability Insurance Benefits
18 alleging an inability to work because of a disability since March 12,
19 2009. (See AR 192-93). On December 2, 2014, the Administrative Law
20 Judge ("ALJ"), Helen E. Hesse, heard testimony from Plaintiff
21 (represented by counsel), and vocational expert Susan Allison. A
22 Spanish interpreter was present for Plaintiff. (See AR 39-72). On
23 February 11, 2015, the ALJ issued a decision denying Plaintiff's
24 application. (See AR 20-29). After determining that Plaintiff had
25 severe impairments -- "degenerative disc disease of the lumbar and
26 cervical spine; bilateral shoulder impingement syndrome, status post
27 arthroscopy with manipulation for frozen shoulder; chronic pain
28 syndrome; mild depression; bilateral knee chondromalacia; and thoracic
outlet syndrome" (AR 22-24) --, the ALJ found that Plaintiff had the

1 residual functional capacity ("RFC")² to perform light work³ with the
2 following limitations: sitting, standing and walking for 4 hours in an
3 8-hour workday with normal breaks; lifting and carrying 20 pounds
4 occasionally and 10 pounds frequently; climbing stairs, bending,
5 balancing, stooping, kneeling, crouching, or crawling occasionally;
6 precluded from climbing ropes, ladders, or scaffolding; performing gross
7 and fine manipulation frequently, but not continuously; performing
8 overhead reaching with both upper extremities occasionally; performing
9 moderately complex tasks with Specific Vocational Preparation ("SVP") 3
10 to 4 involving no hypervigilance; precluded from being in charge of
11 safety operation of others; and precluded from intense interpersonal
12 interactions such as taking complaints or encounters similar to those
13 experienced by law enforcement or emergency personnel. (AR 24-29).
14 Finding that Plaintiff was capable of performing past relevant work as
15 a marker/tagger as actually performed and as generally performed, the
16 ALJ found that Plaintiff was not disabled within the meaning of the
17 Social Security Act. (AR 29).

18
19 Plaintiff requested that the Appeals Council review the ALJ's
20 Decision. (See AR 9-13). The request was denied on April 19, 2016.
21 (See AR 1-5). The ALJ's Decision then became the final decision of the
22 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
23 §§ 405(g), 1383(c).

24
25 ² A Residual Functional Capacity is what a claimant can still do
26 despite existing exertional and nonexertional limitations. See 20
27 C.F.R. § 404.1545(a)(1).

28 ³ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. § 404.1567(b).

1 **PLAINTIFF'S CONTENTIONS**

2
3 Plaintiff alleges that the ALJ erred in: (1) failing to give proper
4 weight to Plaintiff's treating physicians and evidence favorable to
5 Plaintiff; (2) finding that Plaintiff was literate in English; and (3)
6 finding that Plaintiff was not fully credible with respect to her
7 testimony regarding her subjective pain and limitations. (See Joint
8 Stip. at 4-9, 16-27, 33).

9
10 **DISCUSSION**

11
12 After consideration of the record as a whole, the Court finds that
13 Plaintiff's first claim of error (in part) warrants a remand for further
14 consideration. Since the Court is remanding the matter based on
15 Plaintiff's first claim of error (in part), the Court will not address
16 Plaintiff's first claim of error (in part), second claim of error, or
17 third claim of error.

18
19 **A. The ALJ Did Not Properly Reject the Opinion of Plaintiff's Treating**
20 **Physician, Lawrence Miller, M.D., and Examining Physician Ernest**
Bagner, III, M.D.

21
22 Plaintiff asserts that the ALJ failed to provide specific and
23 legitimate reasons for rejecting the opinions of Plaintiff's treating
24 physicians, Drs. Miller, Schmidt, Kahn, and Larsen. Plaintiff further
25 asserts that the ALJ failed to proved a proper reason for rejecting the
26 opinion of examining physician Dr. Bagner (See Joint Stip. at 4-9, 16-
27
28

1 17).⁴ Defendant asserts that the ALJ provided valid reasons for giving
2 Plaintiff's treating physicians' and examining physician's opinions
3 little weight. (See Joint Stip. at 9-16).

4
5 Although a treating physician's opinion is generally afforded the
6 greatest weight in disability cases, it is not binding on an ALJ with
7 respect to the existence of an impairment or the ultimate determination
8 of disability. Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190,
9 1195 (9th Cir. 2004); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
10 1989). The weight given a treating physician's opinion depends on
11 whether it is supported by sufficient medical data and is consistent
12 with other evidence in the record. 20 C.F.R. § 416.927(b)-(d).
13 "Generally, a treating physician's opinion carries more weight than an
14 examining physician's, and an examining physician's opinion carries more
15 weight than a reviewing physician's." Holohan v. Massanari, 246 F.3d
16 1195, 1202 (9th Cir. 2001); see also Lester v. Chater, 81 F.3d 821, 830
17 (9th Cir. 1995).

18
19 If a treating or examining doctor's opinion is not contradicted by
20 another doctor, the ALJ can reject the opinion only for "clear and
21 convincing reasons." Carmickle v. Commissioner, 533 F.3d 1155, 1164
22 (9th Cir. 2008); Lester v. Chater, 81 F.3d at 830-31. If the treating
23 or examining doctor's opinion is contradicted by another doctor, the ALJ
24 must provide "specific and legitimate reasons" for rejecting the
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⁴ These were the treating physicians and examining physician
Plaintiff specifically identified. The Court's analysis of Plaintiff's
claim will be limited to the opinions of Drs. Miller and Bagner.

1 opinion. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007); Lester v.
2 Chater, supra.

3
4 **Dr. Miller**

5
6 Lawrence Miller, M.D., a pain management specialist, treated
7 Plaintiff as part of her California Worker's Compensation claim from
8 August 22, 2011 to December 9, 2013. (See AR 564-676, 877-89).

9
10 In an Initial Evaluation Report, Progress Notes and/or
11 Supplementary Reports dated August 22, 2011, October 3, 2011, October
12 31, 2011, December 19, 2011, January 30, 2012 and February 27, 2012, Dr.
13 Miller diagnosed Plaintiff with right shoulder internal derangement;
14 chronic cervical discogenic disease; chronic lumbar discogenic disease
15 with possible left lumbar radiculitis; and chronic pain syndrome with
16 anxiety, depression and sleep disturbance. (See AR 603-08, 610-17, 658-
17 76). In Supplementary Reports dated April 9, 2012 and May 21, 2012,
18 Dr. Miller gave Plaintiff the same diagnoses, except with the added
19 diagnosis of bruxism. (See AR 597-602). In Progress Notes and/or
20 Supplementary Reports dated July 2, 2012, August 13, 2012, and November
21 12, 2012, Dr. Miller gave Plaintiff the same diagnoses, but added to
22 rule out right thoracic outlet syndrome. (See AR 581-82, 590-91, 594-
23 95). In Progress Notes dated January 21, 2013 and January 28, 2013, and
24 March 18, 2013, Dr. Miller gave Plaintiff the same diagnoses, except for
25 the definitive diagnosis of right thoracic outlet syndrome. (See AR
26 570-73, 579-80). In Progress Notes dated May 13, 2013, June 24, 2013
27 and August 5, 2013, Dr. Miller gave Plaintiff the same diagnoses, except
28 for the added diagnosis of bilateral knee patellofemoral

1 arthralgia/chondromalacia. (See AR 564-69). On each occasion, Dr.
2 Miller found Petitioner's disability status to be Totally Temporarily
3 Disabled. (See AR 564-73,579-82, 590-91, 594-95, 597-608, 610-17, 658-
4 76).

5
6 In a Report dated December 9, 2013, Dr. Miller diagnosed Plaintiff
7 with bilateral shoulder internal derangement, cervical discogenic
8 disease, lumbar discogenic disease, right thoracic outlet syndrome,
9 bilateral knee patellofemoral arthralgia/chondromalacia, and chronic
10 pain syndrome with depression, bruxism and sleep disorder, and found
11 Plaintiff's disability status to be permanent and stationary. (See AR
12 877-89).

13
14 In a Physician's Source Statement dated November 25, 2014, Dr.
15 Miller opined that Plaintiff had the following physical capacity:
16 Plaintiff is precluded from sitting, standing, lifting, fine
17 manipulation and gross manipulation for 20 percent or more of an 8-hour
18 workday; Plaintiff can use a keyboard 15 minutes per hour; based on
19 Plaintiff's physical and/or mental limitations, Plaintiff would be
20 unable to perform a job ("unable to perform work and/or away from [the]
21 work environment) more than 30 percent of an 8-hour workday, 5 days a
22 week; Plaintiff is likely to be absent from work an average of 5 days or
23 more per month; Plaintiff is likely to be unable to complete an 8-hour
24 workday an average of 6 days per month; and compared to an average
25 worker, Plaintiff could be expected to perform a job 8 hours per day, 5
26 days per week, on a sustained basis less than 50 percent. (See AR 890).

1 After reciting the first portion of Dr. Miller's opinions about
2 Plaintiff's functional limitations (see AR 27), the ALJ addressed Dr.
3 Miller's opinions as follows: "The opinions of Dr. Miller are given
4 little weight since limitation of '20% or more of an 8 hour' is vague
5 and unclear in the Social Security disability claims. For instance, 20%
6 of 8 hours is 1.6 hours, which leaves 6.4 hours in an 8 hour day for the
7 claimant to perform sitting, standing, lifting, and fine/gross
8 manipulation. However, it is not clear how much "more of an 8 hour' the
9 claimant would be restricted from performing such activities." (AR 27).⁵

10
11 Here, the ALJ erred in failing to translate Dr. Miller's opinions
12 about Plaintiff's limitations in the Workers' Compensation context into
13 the Social Security context. See Booth v. Barnhart, 181 F.Supp.2d 1099,
14 1105-06 (C.D. Cal. 2002) ("[T]he ALJ may not disregard a physician's
15 medical opinion simply . . . because it is couched in the terminology
16 used in such proceedings."; "The ALJ must 'translate' terms of art
17 contained in such medical opinions into the corresponding Social
18 Security terminology in order to accurately assess the implications of
19 those opinions for the Social Security disability determination.");
20 Vasquez-Pamplona v. Colvin, 2015 WL 5796994, *4 (C.D. Cal. Sept. 30,
21 2015) ("A Social Security decision must, however, reflect that the ALJ
22 properly considered the pertinent distinctions between the state and
23 federal statutory schemes, and that the ALJ accurately assessed the
24 implications medical findings drawn from a worker's compensation opinion
25 may have for purposes of a Social Security disability determination.");

26
27 ⁵ The Court will not consider reasons for rejecting Dr. Miller's
28 opinions (see Joint. Stip. at 12, 15) that were not given by the ALJ in
the Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir.
2001); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

1 citing Booth v. Barnhart, 181 F.Supp.2d at 1106); see also Lester v.
2 Chater, 81 F.3d at 830 (“[T]he purpose for which medical reports are
3 obtained does not provide a legitimate basis for rejecting them.”).
4

5 Moreover, the ALJ erred in failing to develop the record to
6 determine what Dr. Miller meant when he opined that Plaintiff was
7 precluded from certain activities (sitting, standing, lifting, fine
8 manipulation and gross manipulation) for “20 percent or more of an 8-
9 hour work day”. See Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.
10 1996) (“If the ALJ thought he needed to know the basis of [a doctor’s]
11 opinions in order to evaluate them, he had a duty to conduct an
12 appropriate inquiry, for example, by subpoenaing the physicians or
13 submitting further questions to them” or by “continuing the hearing to
14 augment the record”) (citation omitted); see also Tonapetyan v. Halter,
15 242 F.3d 1144, 1150 (9th Cir. 2001) (the ALJ’s duty to develop the
16 record is triggered when there is “ambiguous evidence” or when “the
17 record is inadequate to allow for proper evaluation of the evidence”);
18 Brown v. Heckler, 713 F.2d 441, 441 (9th Cir. 1983) (“In Social Security
19 cases the ALJ has a special duty to fully and fairly develop the record
20 and to assure that the claimant’s interests are considered[,]” even when
21 the claimant is represented by counsel).
22

23 Finally, the ALJ erred in failing to discuss or address Dr.
24 Miller’s other opinions (i.e., Plaintiff was likely to likely to be
25 absent from work an average of 5 days or more per month; Plaintiff was
26 likely to be unable to complete an 8-hour workday an average of 6 days
27 per month). See 20 C.F.R. § 404.1527(c) (“Regardless of its source, we
28 will evaluate every medical opinion we receive.”); Embrey v. Bowen, 849

1 F.2d 418, 421 (9th Cir. 1988) ("We have made it clear that the medical
2 opinions of a claimant's treating physicians are entitled to special
3 weight and that, if the ALJ chooses to disregard the, 'he must set forth
4 specific, legitimate reasons for doing so, and this decision must be
5 based on substantial evidence.'") (citation omitted).

6
7 **Dr. Bagner**
8

9 In a report dated August 2, 2011 (following a psychiatric
10 evaluation), Ernest Bagner, III, M.D., a psychiatrist, diagnosed
11 Plaintiff with major depressive disorder, with physical issues and
12 moderate psychosocial/environmental stressors, and with a Global
13 Assessment Functioning score of 63; and found that Plaintiff had the
14 following functional limitations: mild limitations in maintaining
15 concentration and attention and in completing complex tasks; moderate
16 limitations in handling normal stresses at work, due to depression, and
17 in completing a normal work week without interruption, due to low
18 motivation and nervousness; and no limitations in interacting with
19 supervisors, peers and the public and in completing simple tasks. (See
20 AR 412-15).

21
22 In a report dated August 6, 2013 (following a psychiatric
23 evaluation), Dr. Bagner diagnosed Plaintiff with major depressive
24 disorder, with educational, occupational, economic and health problems,
25 and with a Global Assessment Functioning Score of 65; and found that
26 Plaintiff had the following functional limitations: mild limitations in
27 the abilities to follow detailed instructions, to comply with job rules
28 such as safety and attendance, and to respond to changes in a work

1 setting; moderate limitations in the abilities to respond to work
2 pressure in a usual work setting, due to depression and nervousness, and
3 to perform daily activities, due to emotional and physical conditions;
4 and no limitations in the abilities to follow simple, oral and written
5 instructions, and to interact appropriately with the public, co-workers
6 and supervisors. (See AR 679-83, 686-90).

7
8 After reciting Dr. Bagner's opinions (see AR 28), the ALJ addressed
9 Dr. Bagner's opinions as follows:

10
11 The opinions of Dr. Bagner are given little weight
12 because there is no evidence of on-going psychiatric
13 documenting significant mental conditions, and his own mental
14 status examination showed intact speech, no flight of thought,
15 looseness of association, thought blocking, or
16 distractibility, average intelligence, ability to perform
17 serial three, intact judgment and insight, normal reality
18 contact, and no suicidal or homicidal evidence (Exhibit 11F/5;
19 21F/5).

20
21 (AR 28).

22
23 Contrary to Defendant's assertion (see Joint. Stip. at 13), Dr.
24 Bagner's examination findings that (1) Plaintiff had intact speech, no
25 flight of thought, no looseness of association, no thought blocking and
26 no distractibility; (2) Plaintiff was of average intelligence; (3)
27 Plaintiff was ability to perform serial threes; (4) Plaintiff had intact
28 judgment and insight; (5) Plaintiff had normal reality contact, and (6)

1 Plaintiff did not have suicidal or ideation (see AR 413-14, 681-82),
2 were not inconsistent with Dr. Bagner's opinions about Plaintiff's
3 moderate limitations in her abilities to handle normal stresses at work
4 (due to depression) and to complete a normal work week without
5 interruption (due to low motivation and nervousness). Indeed, the ALJ
6 failed to state how such findings were inconsistent with Dr. Bagner's
7 opinions. See Garrison v. Colvin, 759 F.3d 995, 1012-13 (9th Cir. 2014)
8 ("[A]n ALJ errs when he rejects a medical opinion or assigns it little
9 weight while doing nothing more than . . . criticizing it with
10 boilerplate language that fails to offer a substantive basis for his
11 conclusion."). Moreover, as Plaintiff points out (see Joint. Stip. at
12 681), Dr. Bagner's opinions appear to have been supported by other
13 examination findings (see AR 413-14 [the August 2, 2011 examination
14 reflected that Plaintiff's "affect [was] mood congruent," Plaintiff's
15 speech was "moderately decreased in volume rate and rhythm," Plaintiff
16 could only "register one out of three objects after five minutes," and
17 Plaintiff was unable to do "serial sevens"]; AR 681 [the August 6, 2013
18 examination reflected that Plaintiff's speech and volume were soft,
19 Plaintiff's "mood was depressed" and her "[a]ffect were blunted," and
20 Plaintiff was not able to perform "serial sevens"])).

21
22 Defendant's contention that "moderate limitations are not evidence
23 of a disabling impairment and are not limitations that need to be
24 presented to a vocational expert" (Joint Stip. at 13-14, citing Hoopai
25 v. Astrue, 499 F.3d 1071, 1076-77 (9th Cir. 2007) and Young v. Heckler,
26 803 F.2d 963, 967 (9th Cir. 1986)) is not relevant to the issue
27 concerning the adequacy of the ALJ's reasons to give little weight to an
28

1 examining psychiatrist's opinions about a claimant's moderate
2 limitations.

3
4 Since it does not appear that another doctor has contradicted Dr.
5 Bagner's opinions about Plaintiff's moderate limitations, the ALJ has
6 failed to provide "clear and convincing reasons" for giving little weight
7 to Dr. Bagner's opinions. See Carmickle v. Commissioner, supra; Lester
8 v. Chater, supra.

9
10 **B. Remand Is Warranted**

11
12 The decision whether to remand for further proceedings or order an
13 immediate award of benefits is within the district court's discretion.
14 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
15 useful purpose would be served by further administrative proceedings, or
16 where the record has been fully developed, it is appropriate to exercise
17 this discretion to direct an immediate award of benefits. Id. at 1179
18 ("[T]he decision of whether to remand for further proceedings turns upon
19 the likely utility of such proceedings."). However, where, as here, the
20 circumstances of the case suggest that further administrative review
21 could remedy the Commissioner's errors, remand is appropriate. McLeod
22 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
23 211 F.3d at 1179-81.

24
25 Since the ALJ failed to properly assess the opinions of Drs. Miller
26 and Bagner, remand is appropriate. Because outstanding issues must be
27 resolved before a determination of disability can be made, and "when the
28 record as a whole creates serious doubt as to whether the [Plaintiff]

1 is, in fact, disabled within the meaning of the Social Security Act,"
2 further administrative proceedings would serve a useful purpose and
3 remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
4 2014)(citations omitted).⁶

5
6 **ORDER**

7
8 For the foregoing reasons, the decision of the Commissioner is
9 reversed, and the matter is remanded for further proceedings pursuant to
10 Sentence 4 of 42 U.S.C. § 405(g).

11
12 LET JUDGMENT BE ENTERED ACCORDINGLY.

13
14 DATED: April 21, 2017

15 _____
16 /s/
17 ALKA SAGAR
18 UNITED STATES MAGISTRATE JUDGE
19
20

21 _____
22 ⁶ The Court has not reached any other issue raised by Plaintiff
23 except insofar as to determine that reversal with a directive for the
24 immediate payment of benefits would not be appropriate at this time.
25 "[E]valuation of the record as a whole creates serious doubt that
26 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
27 1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
28 claims regarding the ALJ's errors in (1) giving little weight to the
opinions of Plaintiff's other treating physicians (Drs. Schmidt, Kahn
and Larsen) (see Joint Stip. at 4-9, 16-17); (2) finding that Plaintiff
was literate in English (see Joint Stip. at 4, 17-21); and (3) finding
that Plaintiff was not fully credible with respect to her testimony
regarding her subjective pain and limitations (see Joint Stip. at 4, 21-
27, 33). Because this matter is being remanded for further
consideration, these issues should also be considered on remand.