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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTI CALKINS,

Plaintiff,

No. CIV S-08-2385 KJM

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying applications for Disability Income Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act (“Act”), respectively. For the reasons discussed below, the court will deny plaintiff’s motion for summary judgment, deny the Commissioner’s cross-motion for summary judgment, and remand this matter under sentence four of 42 U.S.C. § 405(g).

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1 I. Factual and Procedural Background

2 In a decision dated February 25, 2008, the ALJ determined plaintiff was not
3 disabled.¹ The ALJ’s decision became the final decision of the Commissioner when the Appeals
4 Council denied plaintiff’s request for review. The ALJ found plaintiff has severe impairments of
5 degenerative disc disease of the lumbar spine, spondylosis and herniated disc, adjustment
6 disorder with depressed mood, generalized anxiety disorder with rule out pain disorder associated
7 with both psychological factors and a general medical condition, and obesity, but these
8 impairments do not meet or medically equal a listed impairment; plaintiff can perform light work
9 limited to the performance of simple, routine tasks; plaintiff is not fully credible; and using the

11 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
12 Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income (“SSI”) is paid
13 to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Under both provisions, disability
14 is defined, in part, as an “inability to engage in any substantial gainful activity” due to “a
15 medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &
16 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. See 20 C.F.R.
17 §§ 423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The
18 following summarizes the sequential evaluation:

16 Step one: Is the claimant engaging in substantial gainful
17 activity? If so, the claimant is found not disabled. If not, proceed
18 to step two.

17 Step two: Does the claimant have a “severe” impairment?
18 If so, proceed to step three. If not, then a finding of not disabled is
19 appropriate.

19 Step three: Does the claimant’s impairment or combination
20 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
21 404, Subpt. P, App.1? If so, the claimant is automatically
22 determined disabled. If not, proceed to step four.

21 Step four: Is the claimant capable of performing his past
22 work? If so, the claimant is not disabled. If not, proceed to step
23 five.

22 Step five: Does the claimant have the residual functional
23 capacity to perform any other work? If so, the claimant is not
24 disabled. If not, the claimant is disabled.

24 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

25 The claimant bears the burden of proof in the first four steps of the sequential evaluation
26 process. Bowen, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. Id.

1 Medical-Vocational Guidelines rule 202.21, plaintiff is not disabled. Administrative Transcript
2 (“AT”) 18-27. Plaintiff contends the ALJ improperly rejected the opinion of her treating
3 physicians, improperly discredited her testimony, and the residual functional capacity finding
4 was not based on substantial evidence. Plaintiff’s first contention is dispositive of this matter.

5 II. Standard of Review

6 The court reviews the Commissioner’s decision to determine whether (1) it is
7 based on proper legal standards under 42 U.S.C. § 405(g), and (2) substantial evidence in the
8 record as a whole supports it. Copeland v. Bowen, 861 F.2d 536, 538 (9th Cir. 1988) (citing
9 Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573, 575-76 (9th Cir. 1988)).
10 Substantial evidence means more than a mere scintilla of evidence, but less than a
11 preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorenson v.
12 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). “It means such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402
14 U.S. 389, 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.
15 197, 229, 59 S. Ct. 206 (1938)). The record as a whole must be considered, Howard v. Heckler,
16 782 F.2d 1484, 1487 (9th Cir. 1986), and both the evidence that supports and the evidence that
17 detracts from the ALJ’s conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir.
18 1985). The court may not affirm the ALJ’s decision simply by isolating a specific quantum of
19 supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If
20 substantial evidence supports the administrative findings, or if there is conflicting evidence
21 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see
22 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an
23 improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d
24 1335, 1338 (9th Cir. 1988).

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1 III. Analysis

2 Plaintiff, who alleges onset of disability in October 2003, contends the ALJ
3 improperly rejected the opinion of her treating physicians.² The weight given to medical
4 opinions depends in part on whether they are proffered by treating, examining, or non-examining
5 professionals. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Ordinarily, more weight is
6 given to the opinion of a treating professional, who has a greater opportunity to know and
7 observe the patient as an individual. Id.; Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).

8 To evaluate whether an ALJ properly rejected a medical opinion, in addition to
9 considering its source, the court considers whether (1) contradictory opinions are in the record,
10 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a
11 treating or examining medical professional only for “clear and convincing” reasons. Lester, 81
12 F.3d at 831. In contrast, a contradicted opinion of a treating or examining professional may be
13 rejected for “specific and legitimate” reasons, that are supported by substantial evidence. Id. at
14 830. While a treating professional’s opinion generally is accorded superior weight, if it is
15 contradicted by a supported examining professional’s opinion (e.g., supported by different
16 independent clinical findings), the ALJ may resolve the conflict. Andrews v. Shalala, 53 F.3d
17 1035, 1041 (9th Cir. 1995) (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). In
18 any event, the ALJ need not give weight to conclusory opinions supported by minimal clinical
19 findings. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.1999) (treating physician’s conclusory,
20 minimally supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a
21 non-examining professional, without other evidence, is insufficient to reject the opinion of a
22 treating or examining professional. Lester, 81 F.3d at 831.

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24 ² The ALJ rejected the opinions of Drs. Nagel, Altman and Terran. The court finds no
25 basis for reversal in the weight the ALJ accorded to the opinion of Dr. Nagel, who opined
26 plaintiff was disabled from her occupation as a certified nurse’s assistant. AT 274, 304-305.
The ALJ appropriately relied on the state agency physician opinions and other medical record
evidence in concluding plaintiff was not disabled from all occupations, at least to the date of the
state agency opinions. AT 259-266, 280-287.

1 In a physical residual functional capacity evaluation, dated November 7, 2007,
2 plaintiff's treating physician, Dr. Altman, opined that plaintiff could sit or stand/walk for one
3 hour, plaintiff's attendance at work would be inconsistent due to reasonably expected
4 exacerbation of her condition, and that plaintiff could never lift in excess of ten pounds. AT 217-
5 219. Dr. Altman noted plaintiff has severe pain in her neck and back and suffered severe
6 emotional distress and depression due to her father's killing her mother and then himself.
7 AT 217. Dr. Altman cited X-rays and MRI results in support of the limitations. Id. Dr. Altman
8 did not opine as to an onset date of disability.

9 The ALJ accorded no evidentiary weight to Dr. Altman's opinion on the basis that
10 plaintiff saw Dr. Altman only sporadically between March 2004 and October 2007, and because
11 there were no significant findings in Dr. Altman's records and he did not make a referral to a
12 specialist. AT 22-23. The ALJ accorded significant weight instead to the opinions of the state
13 agency physicians issued in April 2006 and September 2005. AT 23, 259-266, 280-287. After
14 review of the entire record, the court finds the ALJ's reasons for according no evidentiary weight
15 to Dr. Altman's opinion are not specific and legitimate reasons supported by substantial
16 evidence.

17 Specifically, the ALJ's conclusion that plaintiff saw Dr. Altman only sporadically
18 is not supported by substantial evidence. Plaintiff was seen initially by Dr. Altman in 2004 for
19 two visits at which she received prescriptions and injections for back pain; thereafter, she was
20 seen by Dr. Nagel. AT 226, 236-237, 267, 270-277. She then began treating with Dr. Altman on
21 a regular basis beginning in September 2006 to October 3, 2007, with at least fifteen visits, albeit
22 with a gap in treatment between January 25, 2007 and May 30, 2007. AT 228-235. However, in
23 characterizing plaintiff's treatment as "sporadic," the ALJ appears not to have given
24 consideration to the severe emotional shock plaintiff suffered in March 2007 when her father
25 killed her mother and then himself. See, e.g., AT 209. Also, although the ALJ is correct that Dr.
26 Altman did not make a referral to a specialist, the ALJ's conclusion that plaintiff's symptoms

1 were not deemed of sufficient severity to require referral to a specialist is undermined by the
2 referral made by Dr. Garrison to pain specialist Dr. Cullen, in late 2003. AT 430-434. Contrary
3 to the ALJ's conclusion that there were no significant findings, the medical record includes
4 significant findings in the 2003 MRI and the significant finding in May 2006 that no reflexes
5 could be elicited bilaterally and there was positive leg raise sign to the level of mid thigh. AT
6 226, 377-378.

7 The ALJ's reliance on the opinions of the state agency physicians in finding
8 plaintiff was not disabled for some time prior to the date of Dr. Altman's opinion was
9 appropriate. However, while the ALJ references plaintiff's mental health treatment in late 2007,
10 the ALJ failed to consider the significance of the timing of the various medical record opinions.
11 Given the apparent deteriorating condition of plaintiff's physical and psychiatric condition, the
12 ALJ erred in rejecting Dr. Altman's later opinion in favor of the state agency physicians who
13 rendered their opinions on much earlier dates and who did not have available for review the later
14 medical records. Similarly, the ALJ's reliance on the consultative opinion of examining
15 psychiatrist Dr. Azevedo, who examined plaintiff in December 2006, as a basis for rejecting the
16 opinion of Dr. Terran, who rendered her November 2007 opinion after plaintiff experienced
17 severe emotional trauma in March 2007, cannot be sustained. AT 220-224, 254-258. The ALJ
18 also erred in failing to consider a later onset date³ and in failing to obtain a consultative physical
19 examination⁴ and further consultative psychiatric examination to determine whether a later onset
20 date was appropriate.

21 For the foregoing reasons, this matter will be remanded under sentence four of 42
22 U.S.C. § 405(g) for further development of the record and further findings addressing the
23 deficiencies noted above.

24 ³ Plaintiff's date of last insured is September 30, 2008. AT 413.

25 ⁴ Given the cryptic nature of Dr. Altman's notes, contacting the provider for a further
26 explanation of the basis of Dr. Altman's assessment would also be appropriate.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment is denied;
2. The Commissioner's cross-motion for summary judgment is denied; and
3. This matter is remanded for further proceedings consistent with this order.

DATED: March 29, 2010.



U.S. MAGISTRATE JUDGE

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