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

CORINNA DUNLAP,

Plaintiff,

No. CIV S-09-3446 EFB

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 her application for Social Security Disability Insurance Benefits (“DIB”) under Title XVI of the Social Security Act. For the reasons discussed below, plaintiff’s motion is granted, defendant’s motion is denied, and the case is remanded for proceedings under sentence four of 42 U.S.C. § 405(g).

I. BACKGROUND

Plaintiff, born September 9, 1968, formally applied for DIB on June 14, 2006. Administrative Record (“AR”) 83. Plaintiff’s application alleged that she had been disabled since June 17, 2005. *Id.* at 7. Her application was denied initially and upon reconsideration, and plaintiff requested an administrative hearing. *Id.* On July 24, 2008, a hearing was held before administrative law judge (“ALJ”) Peter Belli. *Id.* at 28. Plaintiff was represented by counsel and

1 testified at the hearing, along with vocational expert Jim Vaneck. *Id.*

2 The ALJ issued a decision on July 24, 2008, finding that plaintiff was not disabled.<sup>1</sup> *Id.* at

3 7-17. The ALJ made the following specific findings:

4 1. The claimant meets the insured status requirements of the Social  
5 Security Act through December 31, 2010.

6 2. The claimant has not engaged in substantial gainful activity  
7 since June 17, 2005, the alleged onset date (20 CFR 404.1520(b)  
8 and 404.1571 *et seq.*)

9 ...

10 3. The claimant has the following severe impairments: Status post  
11 surgery for Thoracic outlet syndrome in her left side (shoulder, arm  
12 and hand), Cervical degenerative disc disease, and depression (20  
13 CFR 404.1520(c)).

14 ...

15 4. The claimant does not have an impairment or combination of  
16 impairments that meets or medically equals one of the listed

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17 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
18 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income is paid to  
19 disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Both provisions define disability,  
20 in part, as an “inability to engage in any substantial gainful activity” due to “a medically  
21 determinable physical or mental impairment. . . .” 42 U.S.C. § 1382c(a)(3)(A). A five-step  
22 sequential evaluation governs eligibility for benefits under both programs. *See* 20 C.F.R.  
23 §§ 404.1520, 404.1571-76, 416.920 and 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42  
24 (1987). The following summarizes the sequential evaluation:

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

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

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

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

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

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

The claimant bears the burden of proof in the first four steps of the sequential evaluation  
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 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR  
2 404.1520(d), 404.1525 and 404.1526). No treating or examining  
3 physician has mentioned findings equivalent in severity to the  
4 criteria of any listed impairment.

...

5 5. After careful consideration of the entire record, the undersigned  
6 finds that the claimant has the residual functional capacity to  
7 perform the full range of light work as defined in 20 CFR  
8 404.1567(b). She can lift, carry, push, and/or pull 20 pounds  
9 occasionally with her right upper extremity and 10 pounds with her  
10 left upper extremity. She is able to use her left hand as a helper  
11 hand. She can sit, stand and walk 8 hours out of an 8-hour day with  
12 normal breaks. She can do no work above the shoulder with the left  
13 upper extremity. She is limited to occasional reaching in the  
14 remaining directions with the left upper extremity. She is able to  
15 frequently twist her head and neck. She is not able to climb  
16 ladders, ropes, or scaffolds. She is not able to crawl. She is not  
17 limited in her ability to receive, remember, understand and carry out  
18 short, simple instructions. She is not limited in her ability to  
19 interact appropriately with the public, supervisors, and co-workers.

...

20 5.(sic) The claimant is capable of performing her past relevant  
21 work as a Customer Service Representative. This work does not  
22 require the performance of work-related activities precluded by the  
23 claimant's residual functional capacity (20 CFR 404.1565).

...

24 6. The claimant has not been under a disability, as defined in the  
25 Social Security Act, from June 17, 2005 through the date of this  
26 decision (20 CFR 404.1520(f)).

*Id.*

Plaintiff requested that the Appeals Council review the ALJ's decision. However, on October 15, 2009, the Appeals Council denied review, leaving the ALJ's decision as the "final decision of the Commissioner of Social Security." *Id.* at 1-3.

## II. LEGAL STANDARDS

The Commissioner's decision that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence in the record and the proper legal standards were applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);

1 *Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,  
2 180 F.3d 1094, 1097 (9th Cir. 1999).

3 The findings of the Commissioner as to any fact, if supported by substantial evidence, are  
4 conclusive. See *Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
5 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521 (9th  
6 Cir. 1996). “It means such evidence as a reasonable mind might accept as adequate to support a  
7 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v.*  
8 *N.L.R.B.*, 305 U.S. 197, 229 (1938)).

9 “The ALJ is responsible for determining credibility, resolving conflicts in medical  
10 testimony, and resolving ambiguities.” *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
11 2001) (citations omitted). “Where the evidence is susceptible to more than one rational  
12 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.”  
13 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

### 14 III. ANALYSIS

15 Plaintiff argues that the ALJ rejected Dr. Sommer’s opinion without a legitimate reason  
16 for doing so, and mischaracterized Dr. Roux’s opinion.<sup>2</sup> The weight given to medical opinions  
17 depends in part on whether they are proffered by treating, examining, or non-examining  
18 professionals. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Ordinarily, more weight is  
19 given to the opinion of a treating professional, who has a greater opportunity to know and observe  
20 the patient as an individual. *Id.* To evaluate whether an ALJ properly rejected a medical opinion,  
21 in addition to considering its source, the court considers whether (1) contradictory opinions are in  
22 the record; and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted  
23 opinion of a treating or examining medical professional only for “clear and convincing” reasons.

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25 <sup>2</sup> Plaintiff also argues that the ALJ failed to credit her testimony and third party  
26 statements without providing legitimate reasons for doing so, and erred in assessing her RFC and  
questioning the vocational expert (VE). Dckt. No. 22 at 31-32. As the case must be remanded  
for further proceedings, the court does not address these arguments.

1 *Lester*, 81 F.3d at 831. In contrast, a contradicted opinion of a treating or examining professional  
2 may be rejected for “specific and legitimate” reasons, that are supported by substantial evidence.  
3 *Id.* at 830.

4 In connection with plaintiff’s workers’ compensation claim, Dr. Sommer examined  
5 plaintiff twice and prepared three reports. *See* AR 599-622. His reports were nine, six, and eight  
6 pages long and detailed her social history, work history, current symptoms, and physical exam  
7 findings, summarized her previous medical records, and discussed future treatment and diagnostic  
8 options. In each of the reports, Dr. Sommer opined that plaintiff was temporarily totally disabled  
9 for the purposes of workers’ compensation.

10 In his June 2006 report, Dr. Sommer diagnosed plaintiff with chronic painful cervical  
11 degenerative disc disease with ongoing left upper radiculitis without definite radiculopathy from  
12 the neck, and noted that she had residual radiculopathy from her thoracic outlet syndrome  
13 surgery, in which a rib had been removed. *Id.* at 605. Dr. Sommer wrote “not only is the patient  
14 not really better, but now she has more significant neurologic findings, at least as I understand it  
15 from the present exam.” *Id.* at 606. He stated that “[h]er disability from [her last day of work] to  
16 now and treatment has been appropriate insofar as the time off of work.” *Id.* He provided a  
17 supplemental report in December 2006, in which he stated, “The recommendations for continuing  
18 care and necessarily continued temporary total disability status made in my last report remain in  
19 place.” AR 612. Finally, in March 2008, Sommer noted that “Her biceps reflex on the  
20 left is very nearly gone, in other words just barely present, while all other reflexes in both upper  
21 limbs are present and brisk/normal. There are positive Phalen’s and Tinel’s signs on the left (that  
22 was not true when I first saw her).” *Id.* at 617. He noted that plaintiff now had “findings  
23 consistent with a left carpal tunnel syndrome,” and opined that plaintiff remained in a “status of  
24 temporary total disability.” *Id.* at 619-20. Dr. Sommer recommended that plaintiff have a  
25 neurological consult, a cervical MRI, and a surgical consult. *Id.* at 618.

26 ///

1 The ALJ's opinion only mentioned one of Dr. Sommer's reports. The ALJ did not  
2 mention Dr. Sommer's opinion that plaintiff was temporarily totally disabled. He did not state  
3 what weight he was giving to Dr. Sommer's opinions. The ALJ wrote only the following:

4 On March 24, 2008, the claimant underwent an orthopedic examination performed  
5 by Michael A. Somer, (sic) M.D. He diagnosed her with chronic painful cervical  
6 degenerative disc disease with ongoing left upper extremity radiculitis without  
7 definite radiculopathy from the neck; status post major operative intervention for  
8 thoracic outlet syndrome with residual radiculopathy from the surgery (Exhibit  
9 21F/1-5).

10 *Id.* at 11.

11 Defendant argues that the ALJ was not required to discuss Sommer's opinion that plaintiff  
12 was temporarily totally disabled, as workers' compensation medical reports address different  
13 standards and concerns from Social Security disability, and are not directly applicable to Social  
14 Security disability cases. *See* Def.'s Br. at 11. It is true that the terminology used in workers'  
15 compensation disability proceedings is not the same as Social Security disability terminology.  
16 *Desrosiers v. Sec. of Health & Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). "[T]here are  
17 different statutory tests for disability under worker's compensation statutes and under the Social  
18 Security Act." *Coria v. Heckler*, 750 F.2d 245, 247 (3rd Cir. 1984). It is not true that the ALJ  
19 may disregard without analysis the evidence presented by the treating doctor's descriptions and  
20 comments as to plaintiff's medical conditions and limitations. Even though the rating schemes of  
21 the two programs are different, an ALJ may not ignore a doctor's medical opinion merely because  
22 it was issued in the context of workers' compensation proceeding. *See id.* (holding that ALJ erred  
23 in failing to consider medical reports submitted in state workers' compensation proceeding). An  
24 ALJ must evaluate medical opinions, even if couched in state workers' compensation  
25 terminology, just as he or she would evaluate any other medical opinion. *See, e.g., Booth v.*  
26 *Barnhart*, 181 F. Supp.2d 1099, 1105-06 (C.D. Cal. 2002).

Here, Dr. Sommer opined in three separate reports that plaintiff was temporarily totally  
disabled from at least June 2006 until March 2008. Thus, Dr. Sommer found that plaintiff was

1 incapable work (including performing her former job) for over a twelve-month period. In  
2 contrast, the ALJ found that plaintiff was able to perform her former job as a customer service  
3 representative, and, without further analysis or discussion of Dr. Sommer’s contrary opinion, that  
4 she had not been disabled at any time relevant to the decision. *See* AR 16-17. This was error. If  
5 the ALJ intended to discredit Dr. Sommer’s opinion, the ALJ was required to set forth a specific  
6 finding in that regard and state clearly the reasons for discrediting the opinion. If the ALJ  
7 intended to fully credited Dr. Sommer’s opinion, he likely would not have found that plaintiff was  
8 capable of performing her former job and would have had to engage in further analysis to  
9 determine whether plaintiff could perform any other work.

10         The failure to address Dr. Sommer’s report may also have affected the assessment of  
11 plaintiff’s testimony. The court does not mean to imply that Dr. Sommer’s report shows that  
12 plaintiff is disabled by social security standards—that is, unable to perform any work at all.<sup>3</sup>  
13 However, Dr. Sommer’s report does lend support to plaintiff’s testimony at the hearing that her  
14 symptoms were worsening after her surgery rather than improving. *See* AR 603 (“Asked whether  
15 things seem to be improving still over the last several weeks or few months, Ms. Dunlap says she  
16 does not think so; she still holds out some hope because Dr. Avery has told her it may take up to a  
17 couple of years for the nerve irritation caused by the surgery to resolve”); 606 (“not only is the  
18 patient not really better, but now she has more significant neurologic findings, at least as I  
19 understand it from the present exam and speaking with the patient, than before surgery. I may be  
20 mistaken, however, on that, as I do not have the full record set.”); 617 (“her biceps reflex on the  
21 left is very nearly gone . . . There are positive Phalen’s and Tinel’s signs on the left (that was not  
22 true when I first saw her”); 618 (“Dunlap . . . indicates she has more in the way of neck and  
23 upper left quadrant symptoms than when she and I first met . . . her prescription list is skewed  
24 more heavily toward opiates”); 619 (“I am curious as to how much of this patient’s increased

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25                     <sup>3</sup> That determination must still be made by an ALJ with an appropriate RFC assessment  
26 in light of all of the medical evidence, including Dr. Sommer’s report.

1 trouble, over and above when she and I first met a year and a half ago, could possibly be from the  
2 interval trip and fall event”). The ALJ discredited plaintiff’s testimony regarding her symptoms  
3 in part because her symptoms suspiciously appeared to worsen after she filed her application for  
4 disability benefits. He wrote that in May 2006, plaintiff was “functioning with the attitude that  
5 she might be able to return to work . . . However, when she filed this claim in June 2006, she  
6 reported that she could not do anything without it irritating and hurting her left shoulder . . . .”  
7 AR 14. While Dr. Sommer’s statements regarding worsening symptoms seem to be partially  
8 based on plaintiff’s complaints to him, they also seem to be based on some objective medical  
9 findings. Therefore, fully crediting Dr. Sommer’s statements would invalidate a major reason  
10 that the ALJ discredited plaintiff’s testimony regarding her pain and dysfunction. Accepting  
11 plaintiff’s testimony as true might then lead to a determination that she was disabled. Therefore,  
12 the court cannot say that the ALJ’s error in failing to discuss and either accept or provide specific  
13 and legitimate reasons for rejecting Dr. Sommer’s reports was harmless.

14         Moreover, the ALJ also erred in mischaracterizing Dr. Roux’s opinion, and in failing to  
15 either include her assessed limitations in plaintiff’s RFC or provide specific and legitimate  
16 reasons for rejecting her opinion. Dr. Roux examined plaintiff in September 2006 and completed  
17 a psychiatric evaluation report. *See* AR 524-34. Dr. Roux diagnosed plaintiff with “major  
18 depression (with anxiety features), recurrent–currently moderate.” *Id.* at 532. She opined that  
19 plaintiff “continues to experience a number of depression/ anxiety symptoms, which–especially  
20 when combined with her chronic pain (and other stressors)–would likely have some negative  
21 impact on her ability to obtain or maintain gainful employment.” *Id.* Dr. Roux opined that  
22 plaintiff was:

- 23         1. Able to understand, remember, and carry out simple one or two-step job  
24         instructions and activities.
- 25         2. Moderately impaired in her ability to understand, remember, and carry out  
26         detailed and complex job instructions and activities.
3. Able to mildly impaired in her ability to relate and interact with supervisors,  
       coworkers, and the public.
4. Moderately impaired in her ability to maintain concentration and attention,



1 persistence, and pace.

2 5. Moderately impaired in her ability to associate with day-to-day work activity,  
3 including attendance and safety.

4 6. Mildly impaired in her ability to adapt to the stresses common to a normal work  
5 environment.

6 7. Mildly to moderately impaired in her ability to maintain regular attendance in  
7 the work place and perform work activities on a consistent basis.

8 8. Mildly to moderately impaired in her ability to perform work activities without  
9 special or additional supervision.

10 *Id.* at 533 (underscore in original). The ALJ inaccurately summarized Roux’s opinions as  
11 follows:

12 Joanne Roux, M.D., evaluated the claimant and found her to be mentally impaired  
13 secondary to subjective complaints of chronic pain. Dr. Roux completed a mental  
14 residual functional capacity assessment of the claimant. She was not limited in her  
15 ability to receive, remember, understand, and carry out short, simple instructions.  
16 She was moderately limited in her ability to receive, remember, understand, and  
17 carry out detailed instructions. She was not limited in her ability to make  
18 judgements on both simple and detailed work-related decisions.<sup>4</sup> She was not  
19 limited in her ability to interact appropriately with the public, supervisors, and co-  
20 workers.<sup>5</sup> She was slightly limited in her ability to respond appropriately to work  
21 pressures in the usual work setting. She was also slightly limited in her ability to  
22 respond appropriately to changes in a routine setting.<sup>6</sup>

23 *Id.* at 12. Thus, the ALJ omitted Dr. Roux’s opinions that plaintiff was moderately limited in her  
24 ability to maintain concentration, attention, persistence, and pace, and her ability to associate with  
25 day-to-day work activity, including attendance and safety; and mildly to moderately impaired in  
26 her ability to maintain attendance and perform work activities on a consistent basis and without  
special or additional supervision. In addition, as noted in footnotes four and six, the ALJ  
attributed statements to Dr. Roux that she did not make.

The ALJ did not explain what weight he assigned Dr. Roux’s opinion. He did not discuss  
any other medical opinions in the record regarding plaintiff’s alleged mental impairments. But to  
determine whether plaintiff could perform her former work, the ALJ posed a hypothetical

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<sup>4</sup> Dr. Roux’s opinion does not contain this statement.

<sup>5</sup> Dr. Roux found that plaintiff was “able to mildly impaired” in this category.

<sup>6</sup> Dr. Roux’s opinion does not contain this statement.

1 question to the VE that included the limitations that the ALJ attributed to Dr. Roux above.<sup>7</sup> As  
2 explained above, this hypothetical did not contain the limitations that Dr. Roux actually  
3 expressed. This was clear error. This court cannot determine how the VE would have responded  
4 if he had been given a hypothetical containing Dr. Roux’s actual opinion. Therefore, this court  
5 cannot determine that the error was harmless.

6 The ALJ also made the following findings regarding plaintiff’s mental impairments,  
7 which do not appear to be based on any medical opinions in the record:

8 Based upon the evidence of record the undersigned finds that the claimant is not  
9 mentally restricted in her activities of daily living. She is not limited in her ability  
10 to maintain social functioning, and mildly limited in her ability to maintain  
concentration, persistence, or pace.

11 *Id.* at 13. These findings are not drawn from Dr. Roux’s opinion. They are contrary to those of  
12 consulting physician Dr. Hurwitz, who wrote that plaintiff was mildly limited in her activities of  
13 daily living and maintaining social functioning, and had moderate difficulties in maintaining  
14 concentration, persistence and pace. *See* AR 558. The ALJ did not even mention Dr. Hurwitz’s  
15 opinions. It is unclear what evidence, if any, on which the ALJ based his conclusion.

16 Although he provided a more restrictive RFC to the VE, the ALJ ultimately included only  
17 the following mental limitations in his bolded RFC findings in his written opinion: “She is not  
18 limited in her ability to receive, remember, understand, and carry out short, simple instructions.  
19 She is not limited in her ability to interact appropriately with the public, supervisors, and  
20 coworkers.” *Id.* at 13. Thus, by stating only that plaintiff was “not limited” in certain areas, the  
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22 <sup>7</sup> *See* AR 55 (“there are no limitations on this hypothetical individual to receive,  
23 understand, remember and carry out short, simple instructions. The ability to receive,  
24 understand, remember and carry out detailed instructions is moderately limited. By moderate  
25 there is greater than mild but less than marked limitation in this area. But the individual is able  
26 to perform satisfactorily. There are no limitations on the ability to interact appropriately with the  
public, with supervisors and co-workers. The ability to respond appropriately to work pressures  
in the usual work setting is slightly limited. And the ability to respond appropriately to changes  
in a routine work setting is slightly limited. Can this hypothetical individual in your opinion  
perform any of the past work performed by the claimant?”)

1 ALJ found that plaintiff had no mental impairments at all. Curiously, this is inconsistent with the  
2 limitations he provided to the VE.

3 VI. CONCLUSION

4 This court's function is merely to determine whether the ALJ's decision was based on  
5 substantial evidence and the proper legal standards. The ALJ clearly erred in failing to either  
6 accept or provide specific legitimate reasons for rejecting these doctors' opinions, and therefore  
7 the case must be remanded for further proceedings. By remanding the case for further  
8 proceedings, the court does not imply that plaintiff is entitled to disability benefits. However, the  
9 court's role is limited to reviewing the Commissioner's decision; it may not re-weigh the medical  
10 evidence or make findings the ALJ failed to make, or to state reasons for accepting or rejecting  
11 medical opinions that the ALJ failed to address. As detailed above, this court cannot conclude  
12 that the ALJ's errors were harmless.

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's motion for summary judgment or remand is granted;
- 15 2. The Commissioner's cross-motion for summary judgment is denied;
- 16 3. The case is remanded for further proceedings pursuant to sentence four of 42 U.S.C.  
17 § 405(g); and
- 18 4. The Clerk is directed to enter judgment for plaintiff.

19 DATED: March 25, 2011.

20   
21 EDMUND F. BRENNAN  
22 UNITED STATES MAGISTRATE JUDGE  
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