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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LINDA D. EMMONS,  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

No. 2:14-cv-0488-KJN

ORDER

Plaintiff seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) partially denying plaintiff’s application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).<sup>1</sup> In her motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from plaintiff’s alleged onset date of February 10, 2008, until March 1, 2012, the date on which plaintiff’s disability was determined to have commenced. (ECF No. 15.) The Commissioner filed an opposition to plaintiff’s motion and a cross-motion for summary judgment. (ECF No. 16.) No optional reply brief was filed.

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<sup>1</sup> This action was initially referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 8, 12.)

1 For the reasons discussed below, the court GRANTS IN PART plaintiff's motion for  
2 summary judgment, DENIES the Commissioner's cross-motion for summary judgment, and  
3 remands the action for further administrative proceedings.

4 I. BACKGROUND

5 Plaintiff was born on October 22, 1957, has at least a high school education, is able to  
6 communicate in English, and previously worked primarily as a film/television scout and location  
7 manager.<sup>2</sup> (Administrative Transcript ("AT") 24, 35-36, 52, 56.) On August 31, 2010, plaintiff  
8 applied for DIB, alleging various physical and mental impairments, and indicating that her  
9 disability began on February 10, 2008. (AT 15, 52, 56, 124, 141, 145.) On March 11, 2011, the  
10 Commissioner determined that plaintiff was not disabled. (AT 15, 60-64.) Upon plaintiff's  
11 request for reconsideration, that determination was affirmed on July 27, 2011. (AT 15, 68-74.)  
12 Thereafter, plaintiff requested a hearing before an administrative law judge ("ALJ"), which took  
13 place on June 19, 2012, and at which plaintiff, represented by an attorney, testified. (AT 15, 31-  
14 51.)

15 In a partially favorable decision dated October 9, 2012, the ALJ determined that plaintiff  
16 had not been under a disability, as defined in the Act, from February 10, 2008, plaintiff's alleged  
17 disability onset date, until March 1, 2012, but that plaintiff became disabled on that date, and  
18 continued to be disabled through the date of the ALJ's decision. (AT 15-26.) The ALJ's decision  
19 became the final decision of the Commissioner when the Appeals Council denied plaintiff's  
20 request for review on December 11, 2013. (AT 1-3.) Thereafter, plaintiff filed this action in  
21 federal district court on February 14, 2014, to obtain judicial review of the Commissioner's final  
22 decision. (ECF No. 1.)

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26 <sup>2</sup> Because the parties are familiar with the factual background of this case, including plaintiff's  
27 medical and mental health history, the court does not exhaustively relate those facts in this order.  
28 The facts related to plaintiff's impairments and treatment will be addressed insofar as they are  
relevant to the issues presented by the parties' respective motions.

1 II. ISSUES PRESENTED

2 On appeal, plaintiff raises the following issues: (1) whether the ALJ improperly rejected  
3 the opinion of plaintiff’s treating physician; and (2) whether the ALJ erred in failing to obtain  
4 vocational expert testimony at step five.<sup>3</sup>

5 III. LEGAL STANDARD

6 The court reviews the Commissioner’s decision to determine whether (1) it is based on  
7 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record  
8 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
9 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340  
10 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable  
11 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th  
12 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). “The ALJ is  
13 responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
14 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citation omitted). “The  
15 court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one rational  
16 interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

17 IV. DISCUSSION

18 A. Summary of the ALJ’s Findings

19 The ALJ evaluated plaintiff’s entitlement to DIB pursuant to the Commissioner’s standard  
20 five-step analytical framework.<sup>4</sup> As an initial matter, the ALJ found that plaintiff met the insured

21 <sup>3</sup> Plaintiff’s brief raises these issues in reverse order.

22 <sup>4</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the Social  
23 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled  
24 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, in part, as  
25 an “inability to engage in any substantial gainful activity” due to “a medically determinable  
26 physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A parallel  
27 five-step sequential evaluation governs eligibility for benefits under both programs. See 20  
28 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-  
42 (1987). The following summarizes the sequential evaluation:

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

1 status requirements of the Act through December 31, 2012. (AT 17.) At the first step, the ALJ  
2 concluded that plaintiff had not engaged in substantial gainful activity since February 10, 2008,  
3 plaintiff's alleged disability onset date. (Id.) At step two, the ALJ found that, since February 10,  
4 2008, plaintiff had the following severe impairments: bilateral shoulder impingement with rotator  
5 cuff calcific tendinitis; degenerative disc disease of the cervical and lumbar spine; history of  
6 cholelithiasis and diverticulosis; bipolar disorder; and depressive disorder. (AT 18.) However, at  
7 step three, the ALJ determined that, since February 10, 2008, plaintiff did not have an impairment  
8 or combination of impairments that met or medically equaled the severity of an impairment listed  
9 in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AT 19.)

10 Before proceeding to step four, the ALJ assessed plaintiff's residual functional capacity  
11 ("RFC") prior to March 1, 2012, as follows:

12 After careful consideration of the entire record, the undersigned  
13 finds that prior to March 1, 2012, the claimant had the residual  
14 functional capacity to perform medium work as defined in 20 CFR  
15 404.1567(c) except: she could have lifted and/or carried 50 pounds  
16 occasionally and 25 pounds frequently; she could have frequently  
17 pushed and/or pulled with the bilateral upper extremities; she could  
18 have stood and/or walked for about 6 hours in an 8-hour workday,  
19 with normal breaks; she could have sat for 6 hours in an 8-hour  
20 workday, with normal breaks; she could have occasionally crawled;  
21 she could have never climbed ladders, ropes, or scaffolds; she could

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

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

27 Step four: Is the claimant capable of performing his past relevant work? If so, the  
28 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 have frequently reached above shoulder-level bilaterally; and she  
2 could have performed simple, repetitive tasks involving frequent  
interactions with supervisors, coworkers, and the public.

3 (AT 20.) Additionally, the ALJ determined that, as of March 1, 2012, plaintiff had the following  
4 RFC:

5 After careful consideration of the entire record, the undersigned  
6 finds that since March 1, 2012, the claimant has the residual  
7 functional capacity to perform sedentary work as defined in 20 CFR  
8 404.1567(a) except: she could lift and/or carry less than 10 pounds  
9 frequently and 10 pounds occasionally; she could stand and/or walk  
10 for 1 hour in an 8-hour workday; she could sit for less than 1 hour  
11 at a time, for a total of 4 hours in an 8-hour workday; she could  
12 occasionally perform postural activities, except that she is unable to  
balance, climb, and crawl; she could rarely reach, handle, push  
and/or pull; she must avoid concentrated exposure to heights,  
moving machinery, temperature extremes, humidity, and vibration;  
she could perform simple, repetitive tasks involving frequent  
interactions with supervisors, coworkers, and the public; and she  
would require more than three work absences per month to cope  
with the effects of pain, depression, and anxiety.

13 (AT 23.)

14 At step four, the ALJ found that, since February 10, 2008, plaintiff had been unable to  
15 perform any past relevant work. (AT 24.) Then, at step five, the ALJ determined, in reliance on  
16 the Grids, that, considering plaintiff's age, education, work experience, and RFC, there were jobs  
17 that existed in significant numbers in the national economy that plaintiff could have performed  
18 prior to March 1, 2012. (AT 24-25.) However, the ALJ further determined that, beginning on  
19 March 1, 2012, given plaintiff's changed RFC and vocational profile, there were no jobs that exist  
20 in significant numbers in the national economy that plaintiff could perform. (AT 26.)

21 Accordingly, the ALJ concluded that plaintiff was not disabled prior to March 1, 2012, but  
22 that she became disabled on that date and remained disabled through the date of the ALJ's  
23 decision. (AT 26.)

24 B. Plaintiff's Substantive Challenges to the Commissioner's Determinations

25 (1) Whether the ALJ improperly rejected the opinion of plaintiff's treating  
26 physician

27 In this case, plaintiff's treating primary care physician, Dr. Paul Seites, opined that  
28 plaintiff had been disabled since February of 2008 based on functional limitations related to, *inter*

1 *alia*, lumbar degenerative disc disease and chronic bilateral shoulder tendinitis and bursitis. (AT  
2 1139-44.) As noted above, the ALJ ultimately agreed that plaintiff was disabled, but only as of  
3 March 1, 2012. On appeal, plaintiff contends that the ALJ failed to provide specific and  
4 legitimate reasons for rejecting Dr. Seites' assessed disability onset date of February 2008. That  
5 argument has merit.

6 The ALJ primarily rejected Dr. Seites' opinion concerning the February 2008 onset date  
7 based on certain references in Dr. Seites' pre-March 2012 treatment notes to plaintiff's pain being  
8 "tolerable," "controlled," and/or "stable," which purportedly indicated that plaintiff's condition  
9 was not disabling prior to March 1, 2012. (AT 23.)<sup>5</sup> To be sure, terms like "tolerable,"  
10 "controlled," or "stable" may well in some cases plausibly indicate that an impairment is well  
11 controlled and not disabling, but such terms must always be read and interpreted in context.  
12 Here, the court finds that the ALJ's interpretation of those terms as used in Dr. Seites' notes was  
13 not reasonable when viewed in context.

14 For example, the ALJ referenced a March 25, 2008 treatment record indicating that  
15 plaintiff's back pain was "controlled" with Vicodin. (AT 23, 223.) However, in that same  
16 record, Dr. Seites also noted that plaintiff had painful and reduced lumbosacral range of motion.  
17 (AT 223.) Furthermore, Dr. Seites observed that plaintiff's right shoulder pain had increased to  
18 8/10 and was aggravated by repetitive movement, raising the arm above the head, pushing,  
19 pulling, or reaching, and was not even alleviated with Vicodin. (*Id.*) He found tenderness over  
20 the greater tuberosity, biceps tendon, and AC joint with limited active and passive range of  
21 motion. (*Id.*) Consequently, a steroid injection was performed. (AT 223, 227.)

22 The ALJ also cited an April 9, 2009 treatment record indicating that plaintiff's shoulder  
23 pain was "stable." (AT 23, 453.) But during that visit, which addressed primarily plaintiff's  
24 mental impairments, Dr. Seites simultaneously noted that plaintiff had "ongoing shoulder pain  
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26 <sup>5</sup> The ALJ also noted that "Dr. Seites described the claimant's symptoms of nausea, anorexia, and  
27 difficulties with speech yet he stated that there was an extensive medical workup negative for any  
28 clear organic causes." (AT 23.) However, Dr. Seites did not indicate that nausea, anorexia, or  
speech difficulties rendered plaintiff disabled. Dr. Seites' assessed functional limitations were  
based primarily on plaintiff's back and shoulder impairments.

1 and has long history of shoulder tendonitis. Pain worse in am and improves as she becomes  
2 mobile and with Relafen.” (AT 452.) Moreover, not long thereafter, on June 25, 2009, Dr. Seites  
3 performed a more detailed examination of plaintiff’s shoulders with findings of tenderness over  
4 the greater tuberosity, biceps tendon, and AC joint; limited active and passive range of motion;  
5 and positive impingement signs. (AT 429.) He noted that plaintiff’s shoulder pain, rated at a  
6 level of 7/10, was aggravated by all activities above shoulder level, reaching behind her back, or  
7 lifting/carrying even light objects, and that it had not responded to physical therapy or steroid  
8 injections. (Id.) Dr. Seites further documented plaintiff’s painful and reduced lumbosacral range  
9 of motion and antalgic gait, with a pain level of 8/10. (Id.) He also reviewed MRI exams from  
10 June 17, 2009, which showed an L5-S1 broad-based disc protrusion approaching the left greater  
11 than right S1 nerve root in plaintiff’s lumbar spine, as well as tears and calcific tendinopathy in  
12 plaintiff’s shoulders. (AT 429, 431.)

13 The ALJ further referenced a July 26, 2010 treatment record where Dr. Seites noted that  
14 plaintiff’s shoulder pain was chronic but “tolerable off narcotic analgesics.” (AT 23, 323.)  
15 However, that isolated statement alone, without further evidentiary support, does not constitute  
16 substantial evidence that plaintiff was capable of performing a reduced range of medium work  
17 prior to March 1, 2012, as found by the ALJ.

18 Therefore, when placed in context, the treatment notes cited by the ALJ do not in  
19 themselves contradict Dr. Seites’ opinion concerning plaintiff’s disability onset date.  
20 Additionally, the court notes that the ALJ failed to adequately explain why he assessed a  
21 disability onset date of March 1, 2012. The ALJ reasoned that “[a]s of March 2012, the  
22 claimant’s medication required adjusting, as her shoulder pain was no longer deemed stable (Ex.  
23 15F/13).” (AT 24.) At the referenced March 22, 2012 treatment visit, Dr. Seites prescribed  
24 plaintiff 10mg/325mg of Endocet with instructions to take one tablet/capsule every four hours as  
25 needed for pain. (AT 982.) However, the record indicates that plaintiff had already been  
26 prescribed that same medication and dosage prior to March 2012. (See, e.g., AT 1002.)

27 In sum, the court finds that the ALJ failed to provide specific and legitimate reasons for  
28 rejecting Dr. Seites’ opinion concerning plaintiff’s disability onset date. Nevertheless, the court

1 declines to remand the action for an award of benefits, because the record contains conflicting  
2 evidence as to whether plaintiff was in fact disabled as of February 10, 2008. For example,  
3 during an October 28, 2010 examination performed by a treating neurologist, plaintiff was  
4 assessed as having a normal gait, normal motor tone, normal range of joint motion, and normal  
5 limb coordination. (AT 369, 371, 373.) Also, during a January 17, 2011 psychiatric evaluation,  
6 plaintiff told the consultative examiner that she vacuums, cooks, does laundry, watches television,  
7 does on-line banking, talks on the phone, drives, goes grocery shopping, goes out to dinner with  
8 her mother occasionally, goes to church occasionally, and stays with her mother a few days a  
9 week. (AT 479, 484.) The consultative examiner opined that plaintiff's attitude toward seeking  
10 employment was poor. (AT 485.) Furthermore, the state agency physicians on December 10,  
11 2010, and July 14, 2011, respectively, concluded that plaintiff was capable of performing a  
12 reduced range of medium work. (AT 472-76, 926-31.) See Tonapetyan v. Halter, 242 F.3d 1144,  
13 1149 (9th Cir. 2001) ("Although the contrary opinion of a non-examining medical expert does not  
14 alone constitute a specific, legitimate reason for rejecting a treating or examining physician's  
15 opinion, it may constitute substantial evidence when it is consistent with other independent  
16 evidence in the record.").

17 In light of such conflicting evidence and ambiguities, and the need for the ALJ to resolve  
18 essential factual issues concerning plaintiff's functional capacity prior to March 1, 2012, the court  
19 concludes that a remand for further administrative proceedings is more appropriate. See Treichler  
20 v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1101 (9th Cir. 2014) ("Where there is conflicting  
21 evidence, and not all essential factual issues have been resolved, a remand for an award of  
22 benefits is inappropriate.").

23 On remand, the ALJ shall carefully weigh and consider the medical and other record  
24 evidence prior to March 1, 2012, and if deemed necessary, shall obtain supplemental medical  
25 expert testimony regarding plaintiff's functional limitations prior to March 1, 2012. The ALJ is  
26 also free to develop the record in any other ways deemed appropriate, such as by obtaining  
27 vocational expert testimony.

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