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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DENISE ANNETTE POOL,
Plaintiff,
v.
CAROLYN W. COLVIN,
Defendant.

Case No. [15-cv-02061-WHO](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 24, 25, 27

INTRODUCTION

Currently before me are the parties’ cross-motions for summary judgment in Denise Annette Pool’s appeal of the partial denial of her claim for disability insurance benefits. Pool argues that the Administrative Law Judge’s (“ALJ”) decision finding that she was not disabled between May 12, 2009 to September 1, 2011 is not based on substantial evidence. I find that the ALJ provided clear and convincing reasons to support the determination that Pool was only disabled as of September 1, 2011. Accordingly, the defendant’s motion for summary judgment is GRANTED and Pool’s motion for summary judgment is DENIED.

BACKGROUND

I. PROCEDURAL HISTORY

On October 26, 2011, Pool applied for Title II Social Security Disability Insurance Benefits (“DIB”), alleging a disability onset date of August 10, 2011, due to mental health and cognitive issues. AR 172–75. She later amended her alleged disability onset date, due to her mental health issues, back to May 12, 2009. AR 611.

Pool’s claim was denied initially on March 1, 2012, and upon reconsideration on November 7, 2012. AR 120–24, 127–31. She filed a written request for a hearing, a hearing before an ALJ was held, and in a decision dated October 24, 2013, the ALJ found that Pool was

1 not disabled. AR 16–38. Pool appealed and, after a suicide attempt in April 2014, submitted new
2 evidence regarding that hospitalization and her subsequent treatment (“new evidence”). AR 8. On
3 March 16, 2015, the Appeals Council declined to review the ALJ’s denial and declined the request
4 to consider the new evidence on the grounds that the new evidence was “about a later time,” and
5 therefore not material to “the decision about whether [Pool was] disabled beginning on or before
6 October 24, 2013.” AR 2.

7 Pool timely sought judicial review in this Court, and on August 16, 2016, I granted her
8 motion for a sentence six remand.¹ Dkt. No. 19. I concluded that her new evidence was material
9 to the existence and severity of her mental impairments at the time of the ALJ’s 2013 decision.
10 Dkt. No. 19.

11 On remand, the ALJ held a second hearing. AR 608–55. On September 1, 2017, the ALJ
12 issued a partially favorable decision. AR 581-97. As discussed in more detail below, the ALJ
13 rejected Pool’s claim of disability starting in May 2009, but concluded there was sufficient
14 evidence to find that she was disabled as of September 1, 2011, when she reinitiated mental health
15 treatment. AR 581–97.

16 Pool now seeks a sentence four remand, appealing solely the ALJ’s finding that she was
17 not disabled from May 12, 2009 – her alleged onset date – to September 1, 2011, the date the ALJ
18 concluded she was disabled.² Dkt. No. 24. Defendant cross-moves for summary judgment,
19 arguing the ALJ’s partial denial is supported by substantial evidence. Dkt. No. 25.³

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¹ “Sentence six remands may be ordered in only two situations: where the Commissioner requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency.” *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002).

² A sentence four remand is appropriate where the District Court determines that “the agency erred in some respect in reaching a decision to deny benefits,” and the case is returned to the agency for rehearing to address the concerns of the District Court. *See Akopyan*, 296 F.3d at 854.

³ In an October 9, 2015 decision, based upon a subsequent application for benefits, Pool was determined to be disabled as of April 2014. AR 586. Therefore, the only period during which Pool argues she was disabled but has not been provided benefits is May 12, 2009 through September 1, 2011.

1 **II. SEPTEMBER 1, 2017 ALJ DECISION**

2 The ALJ utilized the five-step sequential evaluation to determine Pool’s disability claim.
3 AR 587–88; *see* 20 C.F.R. §§ 404.1520(a), 416.920(b). At step one, the ALJ determined that Pool
4 met the insured status requirements of the Social Security Act through March 31, 2015, as Pool
5 had not engaged in any “substantial gainful activity” since her “alleged onset date.” AR 588. At
6 step two, the ALJ found that—since August 10, 2011—Pool had the following severe
7 impairments: (i) anxiety disorder; (ii) major depression; (iii) post-traumatic stress disorder; (iv)
8 seizure disorder; (v) antiphospholipid syndrome; and (vi) migraine headaches. AR 588–89.

9 At step three, the ALJ concluded that Pool’s impairments did not meet or equal the
10 severity required for the listed impairments. AR 589. The ALJ then determined Pool’s residual
11 functional capacity (“RFC”). AR 590–95. The ALJ concluded that, prior to September 1, 2011,
12 Pool had the RFC to perform a full range of work at all exertional levels but with the following
13 non-exertional limitations: no work requiring climbing of ladders, ropes and scaffolds, no work at
14 unprotected heights or with heavy hazardous machinery, and no driving. AR 590–94. The ALJ
15 further found that, for primary duties, Pool could perform routine tasks with minimal changes
16 from day-to-day, with no interaction with the general public and up to occasional interaction with
17 supervisors. *Id.*

18 For the period beginning on September 1, 2011, the ALJ similarly concluded that Pool had
19 the RFC for a full range of work at all exertional levels but with the following non-exertional
20 limitations: no work requiring climbing of ladders, ropes and scaffolds, no work at unprotected
21 heights or with heavy hazardous machinery, and no driving. AR 594–95. For primary duties, the
22 ALJ again concluded Pool could perform routine tasks with minimal changes from day-to-day
23 with no interaction with the general public and up to occasional interaction with supervisors.
24 However, as opposed to the prior period, the ALJ also concluded that, given Pool’s cognitive
25 deterioration and reentry to therapy in August and September 2011, she would require frequent
26 absences of approximately four days per month or more on a regular basis as of September 1,
27 2011. *Id.*

28 At step four, the ALJ found that given her RFC, prior to September 1, 2011, there were

1 jobs that existed in significant numbers in the national economy that Pool could have performed.
2 AR 596. Conversely, the ALJ found that, beginning on September 1, 2011, given the frequency of
3 Pool’s expected absences there were no jobs that exist in significant numbers in the national
4 economy that Pool could have performed. AR 595–97. As a result, the ALJ concluded that prior
5 to September 1, 2011, Pool was not disabled as defined by the Social Security Act, but on that date
6 she became disabled and continues to be disabled through the date of the ALJ’s decision. *Id.*

7 In drawing a significant RFC distinction between the periods prior to and after September
8 1, 2011, the ALJ relied on evidence that showed Pool’s conditions worsening in August 2011.
9 Specifically, the ALJ noted that while Pool had suspended her therapy for six months in 2011, she
10 restarted it in September 2011. According to Dr. Malnekoff’s treatment notes and tests results,
11 Pool showed increased emotional lability and “significant cognitive and memory problems,” in
12 September through November 2011. AR 595.

13 For the period prior to September 1, 2011, the ALJ noted that while Pool had been seeing
14 Dr. Malnekoff from October 2006 through March 2011 (and resuming after a six-month break in
15 September 2011), there was “no record of therapy notes” from 2006 through March 2011 to
16 corroborate Pool’s claim she suffered from significant mental and cognitive impairments during
17 that time.⁴ AR 591-92. The ALJ also relied on the fact that Pool stopped seeing Malnekoff from
18 March 2011 through August 2011 as evidence that Pool’s conditions were not as limiting as she
19 claimed. AR 591. With respect to her antiphospholipid and seizure disorders as well as her
20 history of migraines, the ALJ noted that these disorders and her migraines were being controlled
21 by her medicines during 2010 and 2011. AR 591. Finally, the ALJ found that the medical record
22 did not “corroborate significant mental health symptoms” given the absence of “regular abnormal
23 mental status exams” and no ongoing interventions or need for inpatient treatment. *Id.* at 591-92.

24 The ALJ characterized Pool’s daily life activities during the pre-September 2011 period as
25 a “somewhat normal level and range of daily activities and interaction.” AR 590-92. The ALJ
26 noted that Pool had completed a two-semester long course to become a pharmacy technician in
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28 ⁴ The ALJ noted there were therapy treatment notes from September 2011 on. *Id.*

1 2011 and worked for three weeks in 2011, activities that were inconsistent with “extreme
2 limitations” claimed by Pool. *Id.*

3 The ALJ then addressed various consultative examinations from December 2011, January
4 2012, June 2013, September 2013, January 2017, generally giving those reports little to some
5 weight as to the pre-September 1, 2011 period and some to significant weight for the post-
6 September 1, 2011 period. AR 592-94. The ALJ treated Pool’s husband’s testimony the same
7 way--giving it little weight to support significant limitations in the pre-September 2011 period and
8 great weight to support Pool needing frequent absences from work after September 1, 2011, due to
9 her “worsening conditions.” AR 594.

10 **LEGAL STANDARD**

11 **I. DISABILITY DETERMINATION**

12 A claimant is “disabled” as defined by the Social Security Act if: (1) “he is unable to
13 engage in any substantial gainful activity by reason of any medically determinable physical or
14 mental impairment;” and (2) the impairment is “of such severity that he is not only unable to do
15 his previous work but cannot, considering his age, education, and work experience, engage in any
16 other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 1382c
17 (a)(3)(A)–(B). The ALJ performs a five-step sequential analysis to determine if an individual is
18 disabled within the meaning of the Social Security Act required under 20 C.F.R. § 404.1520
19 (a)(4)(i)–(v). *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012). If at any point within these
20 five-steps, the ALJ determines that the claimant is either disabled or not disabled, the ALJ need
21 not move on to the next step. 20 C.F.R. § 404.1520(a)(4).

22 At the first two steps of the evaluation, the claimant must establish that he: (1) is not
23 performing “substantial gainful activity,” and (2) is under a “medically severe” impairment or
24 combination of impairments. *Id.* at § 416.920 (a)(4)(i)–(ii). Substantial gainful activity is defined
25 as “work activity that involves doing significant physical or mental activities” (20 C.F.R. §
26 404.1572(a)) typically completed for the purpose of payment or profit regardless if profit is
27 realized. 20 C.F.R. § 404.1572(b). For an impairment to be medically severe, it must “ha[ve]
28 lasted or can be expected to last for a continuous period of not less than [12] months” or “can be

1 expected to result in death.” 42 U.S.C. § 1382c (a)(3)(A); 20 C.F.R. §§ 416.909, 404.1509.

2 At the third step, the claimant must establish that his impairment or combination of
3 impairments meets or medically equals a listed impairment provided in Part 404, Subpart P,
4 Appendix 1 of the regulations as described by 20 C.F.R. §§ 404.1525, 404.1526, 416.925, and
5 416.926. *Id.* at § 416.920(a)(4)(iii). If the claimant’s impairment does not meet or equal one of
6 the listed impairments, or does not satisfy the duration of disability requirements, the ALJ is to
7 make a residual functional capacity determination based on all the evidence in the record before
8 proceeding to the fourth step. *Id.* at § 416.920(e). This determination is used to evaluate the
9 claimant’s work capacity for steps four and five. *Id.* Residual functional capacity refers to one’s
10 ability to do physical and mental work activities despite any limitations resulting from
11 impairment. *Id.* at §§ 404.1545(a), 404.1594(a)(4).

12 At step four, the claimant must establish that his impairment prevents him from performing
13 relevant work he or she did in the past (“PRW”). *Id.* at § 416.920(a)(4)(iv). PRW includes: (i)
14 substantially gainful activity; (ii) performed in the past 15 years from the date the disability is
15 established; (iii) which the individual performed long enough to have learned how to do. *Id.* at §§
16 404.1560(b), 404.1565. PRW can be considered “either as the claimant *actually performed* it or as
17 *generally performed* in the national economy.” *Id.* at § 404.1560(b)(2) (emphasis added).

18 The burden to illustrate entitlement to DIB is on the claimant at all times during steps one
19 through four; however, if the claimant demonstrates an inability to perform PRW at step four, the
20 burden shifts at step five. *Andrews v. Shalala*, 53 F.3d 1035, 1040 (9th Cir. 1995). At the fifth
21 step, the ALJ considers the claimant’s residual functional capacity in relation to his age, level of
22 education, and experience in consideration of whether the claimant is able to do other work in the
23 national economy. 20 C.F.R. §§ 416.920(a)(4)(v), 416.960(c)(1)–(2). If it is determined that the
24 claimant is unable to do other work, he is disabled.

25 **II. STANDARD OF REVIEW**

26 Under 42 U.S.C. § 405(g), a district court reviews the final decision denying benefits to
27 determine whether the findings are supported by substantial evidence and free of legal error.
28 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). “Substantial evidence means more than a

1 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
2 might accept as adequate to support a conclusion.” *Shalala*, 53 F.3d at 1039–40. The Court must
3 review the record as a whole and consider adverse as well as supporting evidence. *Robbins v. Soc.*
4 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). Where evidence is susceptible to more than one
5 rational interpretation, the ALJ’s decision must be upheld. *Morgan v. Comm’r of the Soc. Sec.*
6 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). “However, a reviewing court must consider the entire
7 record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting
8 evidence.’” *Robbins*, 466 F.3d at 882 (quoting *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir.
9 1989)).

10 **DISCUSSION**

11 Pool argues, first, that the ALJ wholly failed to determine what (if any) medically
12 determined impairments Pool had as of May 2009 through August 10, 2011 when, as noted, the
13 ALJ determined that Pool was disabled due to her impairments and the amount of work she would
14 miss. Mot. at 6. Relatedly, Pool notes that at certain points in the decision, the ALJ incorrectly
15 reports that Pool’s *alleged* onset date was August 2011, and that error likewise requires remand.
16 Compare AR 586 (noting alleged onset of August 2009) with AR 588 (noting alleged onset as
17 August 10, 2011).

18 However, it appears that the ALJ’s use of “August 10, 2011” in the Step 3 and Step 4
19 headings in the September 1, 2017 Order was a typographical error, and the ALJ was considering
20 Pool’s alleged May 2009 onset date. That determination is supported by two points. First, the
21 “severe impairments” that the ALJ indicated were existing as of August 10, 2011 (AR 588, 589)
22 were consistent throughout Pool’s medical records. The only question was when the symptoms
23 and limitations from those impairments became disabling (which the ALJ concluded occurred as
24 of September 2011). Second, the ALJ clearly reviewed evidence and argument about Pool’s
25 conditions and limitations between 2009 and 2011. *See, e.g.*, AR 590-91 (noting lack of evidence
26 from alleged “onset date to August 2011” and reviewing medical records from 2009 and 2010);
27 Transcript at 611 (ALJ commenting that the relevant evidence was from 2009 through 2014). The
28 typographical errors do not undermine the ALJ’s analysis or opinion and the case will not be

1 remanded on that ground.⁵

2 Pool more substantively asserts that the ALJ erred by failing to properly credit treating
3 physicians' opinions that supported her claim of disability as of May 12, 2009 and continuing
4 through September 1, 2011. Mot. at 6. A treating physician's opinion "is not binding on an ALJ
5 with respect to the existence of an impairment or the ultimate determination of disability."
6 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (citation omitted). That said, in order
7 to properly reject the opinion of a treating or examining doctor when it is uncontradicted by
8 another doctor, the ALJ must state "clear and convincing reasons" for doing so. *Lester v. Chater*,
9 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinion is contradicted
10 by another physician, however, an ALJ may reject the treating or examining physician's opinion if
11 she states "specific and legitimate reasons" that are supported by substantial evidence. *Id.* at 830–
12 31. If a treating physician's opinion is not given "controlling weight," either because it is not
13 "well-supported" or because it is inconsistent with other substantial evidence in the record, factors
14 that determine how much weight the opinion should be given include the "[l]ength of the
15 treatment relationship and the frequency of examination" by the treating physician, and the "nature
16 and extent of the treatment relationship" between the patient and the treating physician. *Orn v.*
17 *Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).

18 Pool contends that the ALJ did not provide clear and convincing or specific and legitimate
19 reasons for not accepting the opinions of her medical sources—Drs. Duncan, Mendius, and
20 Newkirk—that Pool would miss significant amounts of work during the period of May 12, 2009,
21 through September 1, 2011. Mot. at 6–7. Defendant responds that the ALJ's determination is
22 supported by substantial evidence because there is no evidence of a disabling medical condition
23 prior to September 1, 2011. Oppo. at 4–5.

24 _____
25 ⁵ Solely in reply, Pool argues that because the ALJ did not mention in the 2017 Decision some
26 non-severe impairments that were identified in the ALJ's prior Decision, that error requires
27 remand to develop a record from which the ALJ can determine whether those prior-recognized
28 non-severe impairments had deteriorated. Reply at 2-4. I will not address an argument raised for
the first time on reply where Pool identifies *no evidence* that these conditions either were
discussed with the ALJ on remand or would weigh on the question of whether she was disabled
due to symptoms and limitations from her non-severe conditions that could have caused her to
miss more than four days a month of work during the May 2009 through August 2011 time period.

1 In a single medical source statement (“Seizures Residual Functional Capacity”
2 questionnaire) dated June 17, 2013, examining physician Dr. Mendius identified Pool’s numerous
3 mental health problems as well as symptoms from her epilepsy and seizure medications. Mendius
4 estimated that Pool had an average of five to ten migraines a month and opined that Pool would be
5 unable to work more than four days a month due to her migraines and seizures. AR 528. As
6 relied on by Pool for purposes of this motion, in response to the question of “[w]hat is the earliest
7 date that the description of symptoms and limitations in this questionnaire applies?” Mendius
8 indicated “age 15.” AR 528.

9 Pool complains that the ALJ ignored this “date” and erred in giving Mendius’s opinions
10 only “partial weight” for the pre-September 2011 period.⁶ However, Mendius’s opinion, given in
11 2013, that Pool would miss four days of work a month is unanchored to *any* start date. In answer
12 to a separate question, Mendius indicated that Pool exhibited some symptoms and limitations
13 related to her disability since she was 15 years old. Mendius did not specify what the symptoms
14 and limitations were at that time or at what point they became disabling. That opinion did not
15 require that the ALJ infer – absent other evidence – that Pool had since she was 15 years old
16 consistently missed four days of work (or presumably school) given her symptoms and limitations.
17 Instead, the ALJ appropriately looked at the Pool’s treatment records from 2009 through 2011 and
18 Pool’s activities to conclude that only as of September 1, 2011 would absences from work become
19 a problem.⁷

20 Pool also argues that the ALJ disregarded the opinion of Dr. Duncan, a treating
21 neurologist. Like Mendius, in September 2013 Duncan filled out a “Seizures Residual Functional
22 Capacity” questionnaire indicating that, as of that date, Pool suffered from significant mental
23 health and seizure-related symptoms and that she would miss more than four days of work each
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25 ⁶ The ALJ gave only partial weight to Mendius’ opinions for the pre-September 2011 period
26 because there was no evidence of ongoing treatment of Pool by Mendius and the other evidence
showed a worsening of Pool’s health conditions starting in August 2011. AR 593.

27 ⁷ The ALJ points out that Pool received no mental health treatment from March to September
28 2011, during that time Pool was not taking any mental health medications, and in July 2010 Pool’s
doctors reported no recent memory of any epileptic seizures and listed Pool’s migraines as well-
controlled.

1 month. AR 533. In answer to the separate question, Duncan indicated that July 2010 was the
2 “earliest date” that symptoms and limitations related to the disabling condition occurred, without
3 describing what the symptoms and limitations were. *Id.* As with Mendius, the ALJ gave
4 Duncan’s opinions only partial weight up to August 2011 and substantial weight thereafter, when
5 Duncan’s opinions were supported by other medical records. The ALJ did not err with respect to
6 Duncan for the same reasons that the ALJ did not err with respect to Mendius.

7 Finally, Pool faults the ALJ for similarly failing to credit the opinions of Dr. Newkirk, a
8 treating neurologist and signer of another “Seizures Residual Functional Capacity” questionnaire
9 signed in September 2013. In answer to the separate questions, Newkirk opined that Pool’s
10 unspecified symptoms or limitations started in 2002 and that, as of 2013 Pool would miss at least
11 four days of work a month. AR 545. The ALJ did not err with respect to Newkirk for the same
12 reasons stated regarding the opinions of Mendius and Duncan.

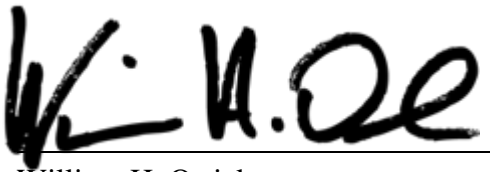
13 In sum, the ALJ identified substantial and undisputed evidence in the record that shows a
14 worsening of Pool’s condition as of August 2011. The vague comments of Drs. Mendius, Duncan,
15 and Newkirk about when symptoms and limitations appeared, without specification of what
16 symptoms or limitations appeared when, do not address (much less contradict) the ALJ’s
17 determination of the date Pool would start to be unable to work for more than four days a month.

18 **CONCLUSION**

19 Because the ALJ’s decision was supported by specific and clear reasons, the government’s
20 motion for summary judgment is GRANTED and the Pool’s motion for summary judgment is
21 DENIED.

22 **IT IS SO ORDERED.**

23 Dated: February 12, 2019

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25
26 William H. Orrick
United States District Judge