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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANA MARGARITA LEMUS,  
Plaintiff,  
v.  
NANCY A. BERRYHILL,  
Acting Commissioner of Social Security,  
Defendant.

Case No. 16-cv-06163-RS

**ORDER GRANTING PLAINTIFF’S  
ALTERNATIVE MOTION TO  
REMAND AND DENYING  
DEFENDANT’S CROSS-MOTION FOR  
SUMMARY JUDGMENT**

**I. INTRODUCTION**

Plaintiff Ana Margarita Lemus appeals the decision of the Commissioner of Social Security (“the Commissioner”) to withdraw Supplemental Security Income (“SSI”) and Disability Insurance Benefits (“DIB”) pursuant to Titles II and XVI of the Social Security Act (“SSA”), 42 U.S.C. §§ 416, 423, 1382c. An Administrative Law Judge (“ALJ”) determined that she was no longer disabled and therefore not eligible for continued benefits. For the reasons that follow, the decision of the ALJ is vacated, and the matter is remanded for further proceedings consistent with this opinion.

**II. BACKGROUND<sup>1</sup>**

In 2005 the Commissioner determined Lemus was disabled because of her metastatic

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<sup>1</sup> This synopsis is based on the certified administrative record (“AR”).

1 breast carcinoma. In May 2013, based on evidence that the cancer had been in remission since  
2 before 2011, the Commissioner informed Lemus that her benefits would be terminated because her  
3 disability had ended. Lemus challenged this decision, and an ALJ reviewed her case in 2015. The  
4 ALJ found that the impairment caused by Lemus's cancer was reduced in severity, such that as of  
5 July 1, 2013, she was no longer disabled and thus not entitled to benefits.

6 Now, Lemus argues that a more recent impairment in her shoulders qualifies her for  
7 continuing SSI and DIB under a different Listing from the one originally qualifying her for  
8 benefits. The record indicates she also has problems with her knees and lower back. Lemus  
9 sought treatment for pain in both shoulders in 2014, and underwent surgery on the right shoulder  
10 on March 14, 2015, one month before the ALJ's decision. Lemus submitted evidence from Dr.  
11 Bonilla, her primary care physician, and from Dr. Khan, the surgeon who operated on her  
12 shoulder. Dr. Khan submitted a check box form given to him by Lemus's counsel, MRI data, and  
13 a physical therapy order.

14 In his decision, the ALJ gave very limited weight to Dr. Khan's submissions, which Lemus  
15 contends was an improper application of law, such that the ALJ did not base his decision on  
16 substantial evidence. The ALJ determined Lemus's shoulder pain would not last 12 months, and it  
17 was not severe enough to maintain the SSI and DIB from her initial impairment. Lemus requested  
18 the Appeals Council review her case later in 2015. In support of her request, she submitted  
19 treatment notes from Dr. Khan's orthopedic office ranging from November 2014 to July 2015.  
20 The Council denied the request for review in August 2016. On October 25, 2016, Lemus brought  
21 this suit, seeking reversal of the ALJ's decision and a finding that she is entitled to reinstatement  
22 of her benefits, or in the alternative, remand to the ALJ for another hearing to reexamine the  
23 evidence in support of her claim. Lemus argues that the ALJ's failure to give proper weight to a  
24 treating physician's opinion was legal error, and that the ALJ's decision was not supported by  
25 substantial evidence. The Commissioner filed a cross-motion for summary judgment, asking the  
26 court to affirm the ALJ's decision.

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1 **III. STANDARD OF REVIEW**

2 This court has the right to review the Commissioner’s final decision pursuant to 42 U.S.C.  
3 § 405(g). The ALJ’s decision shall not be overturned unless it was not supported by substantial  
4 evidence, or if it was made based on legal error. *Beltran v. Astrue*, 700 F.3d 386, 388 (9th Cir.  
5 2012). Substantial evidence is defined as “more than a mere scintilla but less than a  
6 preponderance — it is such relevant evidence that a reasonable mind might accept as adequate to  
7 support the conclusion.” *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam). In  
8 determining whether substantial evidence supports a decision, the court must examine the  
9 administrative record as a whole, considering all the facts. *Drouin v. Sullivan*, 966 F.2d 1255,  
10 1257 (9th Cir. 1992). If the evidence supports more than one rational interpretation, the court  
11 must defer to the ALJ’s decision. *Id.* at 1258. However, the court should set aside the decision if  
12 it is not supported by substantial evidence or if “the ALJ’s findings are based on legal error.”  
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

14 Functioning as an appellate court reviewing the Commissioner’s decision, a district court  
15 applies the laws, regulations, and policy rulings as they were in effect at the time of the final  
16 decision. “When the Appeals Council declines review, ‘the ALJ’s decision becomes the final  
17 decision of the Commissioner.’” *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161-62  
18 (9th Cir. 2012), (quoting *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th  
19 Cir.2011)). When a district court reviews the Commissioner’s decision for substantial evidence, it  
20 shall consider all evidence in the record, including evidence added after the ALJ’s decision, but  
21 accepted by the Appeals Council before the Council denied review. *Brewes*, 682 F.3d at 1159-60.

22 **IV. DISCUSSION**

23 As is relevant here, a person is “disabled” for the purposes of receiving SSI and DIB if she  
24 is unable “to engage in any substantial gainful activity by reason of any medically determinable  
25 physical or mental impairment which can be expected to result in death or which has lasted or can  
26 be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).  
27 In evaluating whether a claimant’s disability has ended, the ALJ must follow an eight-step

1 process. The first step is only required for DIB, but the remaining seven steps apply to both SSI  
2 and DIB. The steps are summarized as follows: (1) if the claimant is engaging in substantial  
3 gainful activity, she is no longer disabled; (2) if she has an impairment meeting the requirements  
4 set forth in the regulation, she continues to be disabled; (3) if she does not have such an  
5 impairment, the ALJ will determine if there has been improvement from her initial qualifying  
6 impairment; (4) if her impairment has improved, the ALJ will determine whether it is such that the  
7 claimant may work; (5) if there has been no improvement, the disability will be found to continue,  
8 unless the ALJ determines an exception applies; (6) if there has been medical improvement, the  
9 ALJ will determine whether the impairment continues to be severe, based on whether the  
10 claimant's improvements enable her to do basic work activities; (7) if the impairment continues to  
11 be severe, the ALJ will assess the claimant's residual functional capacity ("RFC") to continue  
12 doing the work she has done in the past, and if her RFC is sufficient that she can do such work,  
13 she is no longer disabled; (8) if her RFC does not allow her to do her past work, the ALJ will  
14 determine if she can do other work, but if she cannot, she continues to be disabled. 20 C.F.R. §§  
15 404.1594(f), 416.994(b)(5).

16 In this case, the ALJ went through all the proper steps. He found that as of July 2013,  
17 Lemus's medical impairments were "right shoulder pain with tendinopathy and partial rotator tear  
18 and impingement with recent corrective surgery on March 14, 2015, remote history of resolved  
19 metastatic cancer to the breast, and adjustment disorder with depressed mood." AR 30. The ALJ  
20 concluded, however, these impairments did not meet the requisite severity to prevent Lemus from  
21 working, particularly because he expected her shoulder to heal within a few months. AR 38.  
22 Despite these impairments, the ALJ found that Lemus's RFC was such that she could either  
23 continue her previous work as a housekeeper, housekeeping supervisor, or telemarketer, or find  
24 alternative work as a cashier or assembler. AR 40.

25 Lemus first argues the ALJ erred by not giving proper weight to Dr. Khan's evidence. The  
26 record, however, does not support this conclusion. Treating and examining physicians' opinions  
27 are generally given more weight than those of an expert who has not interacted with the patient.

1 20 C.F.R. § 404.1527(c). The ALJ takes into account the length of the physician-patient  
2 relationship, as well as the nature and extent of the treatment. *Id.* To balance the evidence  
3 properly, the ALJ gives more weight to a physician’s opinion in correlation with the amount of  
4 evidence he or she provides to support the opinion. *Id.* Therefore if a physician provides no  
5 evidence to support his opinion, the ALJ does not have to give weight to that physician’s opinion.  
6 *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th Cir. 2012).

7 In this case, Dr. Khan initially offered little evidence to the ALJ. He submitted a form on  
8 which he checked a box indicating Lemus met the qualifications for Listing 1.02B, which requires  
9 impairment of both right and left upper extremities. AR 630; 20 C.F.R. Pt. 404, Subpt. P, App. 1  
10 Listing of Impairments. As evidence of Lemus’s impairment, he submitted the MRI data  
11 indicating Lemus’s need for surgery on her right shoulder. AR 617-27. On the form, when asked  
12 whether Lemus had problems with her range of motion, he marked “yes” and wrote some  
13 abbreviations. AR 630. While Dr. Khan performed the surgery a month prior to the ALJ’s  
14 decision, he did not submit any evidence indicating what he thought would be the result of that  
15 surgery. He gave no recovery timeline, nor did he show whether or not Lemus would continue to  
16 be disabled such that she would meet the Listing requirement after she recovered from the surgery.  
17 As her surgeon, this is information that he could have provided to the ALJ.

18 The ALJ may reject a treating physician’s opinion if it is contradicted by “clear and  
19 convincing” evidence from another physician, and as long as the ALJ gives “specific and  
20 legitimate reasons” for doing so. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Dr. Sherman  
21 was the Commissioner’s expert witness who reviewed Lemus’s medical records. Dr. Sherman  
22 testified, based on the evidence in the record, that Lemus’s right shoulder would heal in four  
23 months and that there was no evidence her left shoulder, knees, and back issues were related to  
24 anything but age. AR 37. The ALJ rejected Dr. Khan’s opinion because it was directly  
25 contradicted by Dr. Sherman’s more detailed testimony, which is a specific and legitimate reason  
26 for the rejection. Given the limited information before the ALJ, the ALJ did not commit clear  
27 error in finding Dr. Sherman’s opinion more persuasive.

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1           Because there was no legal error, the next question is whether the ALJ’s decision was  
2 supported by substantial evidence. *Beltran*, 700 F.3d at 388. Lemus asserts that Social Security  
3 Ruling (“SSR”) 16-3p should govern this court’s evaluation of the ALJ’s reasoning. SSR 16-3p is  
4 a policy ruling interpreting how the Commissioner assesses a claimant’s symptoms when they are  
5 unsubstantiated by objective medical evidence. SSR 16-3p was published in 2016, and then  
6 clarified in 2017. SSR 16-3p explicitly states, “[w]hen a Federal court reviews our final decision  
7 in a claim . . . we expect the court to review the final decision using the **rules** that were in effect at  
8 the time we issued the decision under review” (emphasis in the original). The final decision was  
9 made by the ALJ, not the Appeals Council as Lemus contends, because the Appeals Council  
10 denied review. Therefore, because SSR 96-7p was in effect at the time the ALJ made his decision,  
11 SSR 96-7p governs this analysis.

12           The ALJ properly applied SSR 96-7p to Lemus’s case. According to the ruling’s  
13 instructions, “whenever the individual’s statements about the intensity, persistence, or functionally  
14 limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the  
15 adjudicator must make a finding on the credibility of the individual’s statements based on a  
16 consideration of the entire case record.” SSR 96-7p (1996). Lemus contends she was disabled  
17 because of pain in her shoulders, lower back, and knees. AR 34-36. In regards to her shoulders,  
18 the ALJ determined that the surgery should have corrected the problem (because Dr. Khan  
19 originally provided no prognosis), which would not make her disability last the requisite 12  
20 months. AR 37. Furthermore, the ALJ did not find her claims about her left shoulder, knees, and  
21 back credible based on his assessment of the record, because the Commissioner’s expert testified  
22 that there should not have been anything wrong. AR 37.

23           Based on the additions to the record after the case was heard by the ALJ, however, there is  
24 now objective medical evidence supporting Lemus’s claims. The additional evidence includes an  
25 MRI revealing that she had a torn meniscus in her left knee, lumbar degeneration, and possibly  
26 other problems. AR 670, 678. The supplemented records also shows that Lemus received a  
27 cortisone injection to her left knee, something which presumably would not be done without

