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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DENISE ANNE HARRIS,
Plaintiff,

v.

CAROLYN W. COLVIN,
Defendant.

Case No. 14-cv-03938-DMR

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 17, 20

Plaintiff Denise Anne Harris moves for summary judgment to reverse the Commissioner of the Social Security Administration's (the "Commissioner's") final administrative decision, which found Plaintiff not disabled and therefore denied her application for benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. The Commissioner cross-moves to affirm. For the reasons stated below, the court grants each motion in part and remands this action to the Commissioner for further proceedings.

I. PROCEDURAL HISTORY

Plaintiff filed an application for Social Security Disability Insurance ("SSDI") benefits on June 21, 2011, which was initially denied on August 25, 2011 and again on reconsideration on November 22, 2011. Administrative Record ("A.R.") 138-39, 80-84, 88-93. On January 15, 2012, Plaintiff filed a request for a hearing before an Administrative Law Judge ("ALJ"). A.R. 94-95. Plaintiff appeared with a representative at the September 27, 2012 hearing and testified before ALJ Amita B. Tracy. A.R. 32-60. Following the hearing, the ALJ referred Plaintiff for psychological and orthopedic consultative examinations. See A.R. 59.

On January 14, 2013, the ALJ issued a decision finding Plaintiff not disabled. A.R. 13-31. The ALJ determined that Plaintiff has the severe impairments of degenerative disc disease and depression. The ALJ found that Plaintiff retains the residual functional capacity ("RFC") to

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perform light work:

> [Plaintiff] has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b), except that the claimant is limited to standing and walking for two hours and sitting for six hours in an eight-hour workday. She is limited to occasional pushing and pulling with the left lower extremity and needs to take a one to two minute stretch break every hour of sitting. [Plaintiff] is limited to occasional climbing of ramps and stairs but never climbing ladders, ropes or scaffolds. [Plaintiff] is limited to occasional balancing, stooping, kneeling, crouching and crawling. She requires the option of alternating sitting for one hour and standing for 30 minutes. [Plaintiff] is limited to simple, routine, repetitive tasks.

A.R. 20. Relying on the opinion of a vocational expert ("VE") who testified that an individual with such an RFC could perform other jobs existing in the economy, the ALJ concluded that Plaintiff is not disabled. A.R. 25.

The Appeals Council denied Plaintiff's request for review on June 17, 2014. A.R. 3-6. The ALJ's decision therefore became the Commissioner's final decision. *Taylor v. Comm'r of* Soc. Sec. Admin., 659 F.3d 1228, 1231 (9th Cir. 2011). Plaintiff then filed suit in this court pursuant to 42 U.S.C. § 405(g).

II. THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents her from engaging in substantial gainful activity[1] and that is expected to result in death or to last for a continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work she previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. The steps are as follows:

1. At the first step, the ALJ considers the claimant's work activity, if any. If the

[1] Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

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claimant is doing substantial gainful activity, the ALJ will find that the claimant is not disabled.

2. At the second step, the ALJ considers the medical severity of the claimant's impairment(s). If the claimant does not have a severe medically determinable physical or mental impairment that meets the duration requirement in [20 C.F.R.] § 416.909, or a combination of impairments that is severe and meets the duration requirement, the ALJ will find that the claimant is not disabled.

3. At the third step, the ALJ also considers the medical severity of the claimant's impairment(s). If the claimant has an impairment(s) that meets or equals one of the listings in 20 C.F.R., Pt. 404, Subpt. P, App. 1 [the "Listings"] and meets the duration requirement, the ALJ will find that the claimant is disabled.

4. At the fourth step, the ALJ considers an assessment of the claimant's residual functional capacity ("RFC") and the claimant's past relevant work. If the claimant can still do his or her past relevant work, the ALJ will find that the claimant is not disabled.

5. At the fifth and last step, the ALJ considers the assessment of the claimant's RFC and age, education, and work experience to see if the claimant can make an adjustment to other work. If the claimant can make an adjustment to other work, the ALJ will find that the claimant is not disabled. If the claimant cannot make an adjustment to other work, the ALJ will find that the claimant is disabled.

20 C.F.R. § 416.920(a)(4); 20 C.F.R. §§ 404.1520; Tackett, 180 F.3d at 1098-99.

III. FACTUAL BACKGROUND

A. Plaintiff's Testimony

At the hearing before the ALJ, Plaintiff gave the following testimony: Plaintiff was born in 1968. A.R. 40. She lives by herself. A.R. 40. She spent 15 years working as a Certified Nurse Assistant ("CNA") and was injured at work in April 2010 when a resident "pulled [her] hair and yanked [her] backwards," causing lower back pain and neck pain. A.R. 39, 41. She testified that she has not worked at all since August 2010. A.R. 41.

Following her injury, Plaintiff received two back injections which did not improve her condition. A.R. 43. She underwent an L-5 discectomy in May 2011; according to Plaintiff, the

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surgery was not helpful because "part of the herniation is still in [her] back, it was too close to the nerves." A.R. 43. Plaintiff did physical therapy after the discectomy and experienced no improvement. A.R. 43. Plaintiff described her physical pain as "numbness" and "achy" pain located in her lower back and extending down her left leg, and "pins and needles" down both legs to her feet. A.R. 45, 48. She also feels "pins and needles" from her neck down to the fingers in her left arm. A.R. 49. She stated that she is in pain when she sits for long periods of time. A.R. 45. She can sit for about an hour or an hour and a half before needing to reposition herself, and can stand in one place for half an hour. A.R. 45-46. After an hour of sitting, she starts experiencing pain, pins and needles, and numbness, and develops headaches and eyestrain. A.R. 42, 51. Medication relieves the pain, as does lying down. A.R. 45. She testified that she needs a job where she can "sit for a little while, stand. I need to lie down," and that it is difficult to find a job that will allow her to do that. A.R. 42.

Plaintiff goes to the doctor every six weeks, and takes anti-inflammatory medication, pain medication, and anti-depressants. A.R. 42. She testified that she does not experience any side effects from the medications. As to their effectiveness, she has good days and bad days. A.R. 43. Plaintiff testified that she has no memory problems but has some problems with paying attention and concentration. A.R. 46. She testified that she likes to be around people, but that it is "hard for people to be around [her]" because of her pain and depression; "[p]eople can just tell [she's] not in a good mood." A.R. 46. Plaintiff has declined to see a psychiatrist for counseling despite a recommendation that she do so. A.R. 44.

On a typical day, Plaintiff gets up, makes coffee, and "look[s]" at her computer. She sits on a cushion on an office chair with back support. She watches some TV, goes for a "small walk" with a friend, sometimes walking a neighbor's dogs. A.R. 47-51. Plaintiff forces herself to get out of her house and move every day, and is able to walk up to one mile at a time. On a good day she can walk a mile without stopping. On a bad day, she has to take three breaks from walking to sit down on the curb for ten to fifteen minutes at a time due to the pain. A.R. 46, 49, 50.

Plaintiff drives every day. A.R. 41. She makes all of her meals, although she has problems standing and bending over while cooking. A.R. 47. She is able to do household chores,

although it takes her a day to clean and vacuum one room. She wears a back brace while cleaning. A.R. 47. Since the 2010 injury, Plaintiff no longer has any hobbies. A.R. 48.

Plaintiff's doctors have informed her that there is no further treatment they can provide for her back except lumbar injections. Doctors have recommended injections for her neck as well, but she is seeking a second opinion from a neurosurgeon. A.R. 47.

B. Relevant Medical Evidence

1. D. Pong, M.D.

Dr. Pong, a state agency medical consultant, completed a residual functional capacity form in connection with the initial disability determination explanation on August 25, 2011. A.R. 61-68. Dr. Pong diagnosed Plaintiff with a severe spine disorder, and concluded that Plaintiff retains the RFC to perform sedentary work. A.R. 64, 67. Dr. Pong found that Plaintiff has the following exertional limitations: can occasionally lift and/or carry 20 pounds, and frequently lift and/or carry 10 pounds; stand and/or walk for a total of two hours, with normal breaks; and sit with normal breaks for a total of six hours in an eight-hour workday. Plaintiff must periodically alternate sitting and standing to relieve pain and discomfort, and take a 1-2 minute stretch break for every hour of sitting. A.R. 65. Plaintiff can occasionally perform the following actions: climb ramps or stairs; climb ladders/ropes/scaffolds; balance; stoop; kneel, and crouch. A.R. 65-66.

2. Thomas A. Kowalski, OTR/L

Occupational Therapist Thomas A. Kowalski performed a functional capacity evaluation on October 12, 2012.[2] A.R. 675-689. Plaintiff described her pain level as a six, the equivalent of "distressing." A.R. 678, 689. She stated that she is able to sit for two hours, stand for one hour, and walk for one hour. A.R. 679. She reported that she can carry 10 or 15 pounds, and has pain reaching above her head and reaching down. A.R. 679. She stated "I just do my exercises and I walk when I can." A.R. 679.

Plaintiff's upper extremity range of motion was fluid and within normal limits. A.R. 681.

[2] Kowalski's report is designated as Exhibit 16F in the record, and described in the court transcript index as an "Agreed Functional Capacity Evaluation, dated 10/12/2012, from Nicole Chitnis, MD." The reference to Dr. Chitnis appears to be a typo. While Dr. Chitnis is listed on the report as the referring physician, it appears that Kowalski examined Plaintiff and authored the report.

Kowalski rated Plaintiff's bilateral upper extremity manual muscle test as "Good +/Normal." A.R. 682. Plaintiff experienced discomfort with squatting. A.R. 682. Plaintiff reported increasing upper extremity discomfort when performing reaching tasks. A.R. 683-84. She also reported "burning" in her arms when performing the lifting and carrying tests. A.R. 684. Kowalski found no indication of pain migration or magnification, and that Plaintiff's areas of discomfort matched the areas of injury. A.R. 685.

3. Soheila Benrazavi, M.D.

Dr. Soheila Benrazavi performed a complete orthopedic evaluation of Plaintiff and issued a report on November 3, 2012. A.R. 692-702. Dr. Benrazavi noted that Plaintiff was in no acute distress, and that her cervical spine range of motion was normal with no pain. A.R. 693. Plaintiff's range of motion of the upper and lower extremities were all within normal limits. A.R. 694. Plaintiff's power was 5/5 in the bilateral upper and lower extremities, but her left lower extremity knee extensors was 4/5. A.R. 694. Dr. Benrazavi observed that Plaintiff sits and stands with normal posture and was able to get on and off the examining table without difficulty. A.R. 694. Plaintiff's straight leg raising test was negative, but Dr. Benrazavi found evidence of radiculopathy by "reflex discrepancy with the left patellar reflex being diminished in comparison to the right." A.R. 695. Plaintiff's gait was normal. A.R. 695.

Dr. Benrazavi opined that Plaintiff is capable of lifting 11 to 20 pounds occasionally and carrying up to ten pounds frequently. A.R. 697. Dr. Benrazavi found that Plaintiff can sit, stand, and walk for six hours at one time without interruption, and can sit, stand, and walk for six hours total in an eight-hour workday. A.R. 698. Dr. Benrazavi opined that Plaintiff can reach, handle, finger, feel, and push/pull with both hands frequently. A.R. 699. Plaintiff can also operate foot controls, balance, kneel, crouch, and crawl frequently, and can climb stairs, ramps, ladders or scaffolds, and stoop occasionally. A.R. 699-700. According to Dr. Benrazavi, Plaintiff can frequently tolerate exposure to a variety of environmental conditions. A.R. 701.

4. Michael Tran, M.D.

Dr. Michael Tran, Plaintiff's treating physician, is a pain management specialist and sees Plaintiff monthly. He completed a lumbar spine residual functional capacity questionnaire on

November 19, 2012. A.R. 723-727.

Dr. Tran diagnosed cervical and lumbar degenerative disc disease and cervical and lumbar radiculopathy, and opined that Plaintiff's prognosis is fair. A.R. 723. He noted that Plaintiff's pain levels range from five to eight on a ten-point scale, and that rest and medications alleviate her pain. A.R. 723. He opined that Plaintiff's experience of pain or other symptoms would "constantly" be severe enough to interfere with attention and concentration needed to perform even simple tasks. A.R. 724. Dr. Tran opined that Plaintiff can sit for one hour before needing to get up, and stand for thirty minutes before needing to sit down or walk around. A.R. 725. In an eight-hour workday, Dr. Tran opined that Plaintiff can sit for about two hours and stand/walk for less than two hours. Plaintiff would need to walk around for 10-15 minutes every hour during an eight-hour workday. A.R. 725. She would also need to be able to shift positions at will from sitting, standing, or walking, and would need to take unscheduled breaks of 15-20 minutes in duration during an eight-hour work day. A.R. 725. He opined that Plaintiff could lift less than ten pounds rarely, and occasionally stoop and climb stairs, but could never lift more than ten pounds, and never twist, crouch/squat, or climb ladders. A.R. 726.

Dr. Tran opined that Plaintiff's impairments are likely to produce good days and bad days, and that Plaintiff would likely be absent from work three or more days a month. A.R. 726.

5. Kara L. Winter, Ph.D.

Dr. Kara Winter performed a "psychological medical/legal evaluation" of Plaintiff on August 10, 2012. A.R. 646-672.

Dr. Winter administered a full battery of psychological tests as authorized by the Department of Workers Compensation. She also took an extensive personal history of Plaintiff, including a description of her daily activities. Plaintiff reported the following to Dr. Winter: Plaintiff rises between 8:00 a.m. and 10:00 a.m. She walks or plays with the neighbors' dogs with the neighborhood dog walker. Afterwards, she watches television or sits by the swimming pool in her condominium complex. A.R. 654. She does housework with caution to avoid further pain and injury. A.R. 654. She is unable to swim because of her neck injury. A.R. 653. Plaintiff reported that she socializes with residents in her condominium complex because groups of people gather

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around the community pool and talk, and that she therefore has a "built in" social life that she would otherwise not seek. A.R. 650-51. Other than the members of her family, she "keeps people at arm's length" because of her unstable mood. A.R. 653. She enjoys barbequing with her neighbors once per month, cooking, and renting movies. She reads magazines, journals, and searches the internet for recipes. A.R. 653, 654. She goes grocery shopping every day and usually has a doctor or physical therapy appointment, and tries to get out of her home on a daily basis. A.R. 654. She occasionally accompanies a friend shopping. A.R. 654. She goes to bed between 10:00 p.m. and midnight or 1:00 a.m. A.R. 650, 654. Her quality of sleep varies and she feels fatigued most of the time. Sometimes she is up all night because she cannot sleep. A.R. 650.

Plaintiff reported to Dr. Winter that in approximately June 2012 she attempted to work as a housekeeper, but realized "after one attempt that she was unable to perform the duties of the job," because the work "required too much physical strength and flexibility" and increased her pain. A.R. 650, 653. Plaintiff reported that she would like to work and that she misses her work as a CNA, and misses the camaraderie with her colleagues and patients. A.R. 650. Dr. Winter concluded that Plaintiff "showed no history of symptom magnification, exaggeration or attempts to over-dramatize her physical symptoms," and that it was "safe to say that she is motivated to work." A.R. 664.

Plaintiff described difficulties with concentration and recalling information. A.R. 651. However, Dr. Winter noted that Plaintiff was able to complete the psychological testing in a timely and consistent manner. A.R. 662-63. Plaintiff also reported that her mood frequently changes from depressed to angry depending on her pain and stress levels. A.R. 650. Dr. Winter concluded that Plaintiff's overall function is affected by high levels of anxiety and depression, and that she may have difficulties concentrating because of "the obsessive nature of her thoughts." A.R. 660. Dr. Winter diagnosed adjustment disorder with mixed anxiety and chronic depressed mood, and assessed a 63 GAF score. A.R. 661.

Dr. Winter opined that Plaintiff's psychiatric symptoms cause mild impairment in her activities of daily living and social functioning. Plaintiff is also mildly impaired with respect to concentration, persistence, and pace because she is "distracted by pain, . . . cognitively slowed by

pain medications and distracted by intrusive thoughts of fear and anxiety." A.R. 667. According to Dr. Winter, Plaintiff has no impairment in her ability to understand and remember very short and simple instructions. A.R. 670. She also has no impairment in her ability to interact appropriately with the general public, ask simple questions or request assistance, and get along with coworkers or peers without distracting them or exhibiting behavioral extremes. A.R. 671. She is mildly impaired in the ability to accept instructions and respond appropriately to criticism from supervisors. A.R. 671. Dr. Winter opined that Plaintiff's psychiatric functioning has mildly impaired her "adaptation," including the ability to respond appropriately to changes in the work setting. A.R. 667; 670-71.

6. Jonathan Gonick-Hallows, Ph.D.

The record contains a psychological consultative examination report dated November 1, 2012 by Dr. Jonathan Gonick-Hallows. A.R. 705-711. Dr. Gonick-Hallows performed a clinical interview, mental status examination, and complete psychological examination of Plaintiff, and administered several tests. A.R. 705.

Plaintiff's short-term memory for numbers was mildly below average, but her long-term memory appeared adequate. A.R. 706. She appeared to have very good attention but "marked deficits in processing." A.R. 707. Dr. Gonick Hallows diagnosed mixed receptive/expressive language disorder and mixed learning disorder, with academic deficits secondary to auditory dyslexia. A.R. 708. He noted that he has the "sense of a person who would have as much as moderate to marked difficulty in terms of her ability to interact effectively with co-workers, supervisors, and the general public in many work settings." A.R. 708. Cognitively, Plaintiff seemed able to understand and carry out some kinds of simple instructions, but not others. A.R. 708. He noted that Plaintiff struggles to understand the meaning of what is said to her; while she knows the individual words in speech, she often cannot comprehend the actual message, and Dr. Gonick Hallows observed that Plaintiff's response "appears to have been to place herself in settings in which there is little change or variation in her duties." A.R. 708. He opined that Plaintiff "would be expected to have marked difficulty managing stressors in novel environments." A.R. 708.

Dr. Gonick-Hallows opined that Plaintiff is mildly impaired with respect to understanding and remembering simple instructions and carrying out simple instructions. She is moderately impaired in her ability to make judgments on simple work-related decisions. A.R. 709. He opined that she is moderately to markedly impaired with respect to her ability to interact appropriately with supervisors and coworkers and her ability to respond appropriately to usual work situations and to changes in a routine work setting. A.R. 710. She is also moderately impaired in her ability to interact appropriately with the public. A.R. 710.

IV. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court has the authority to review a decision by the Commissioner denying a claimant disability benefits. "This court may set aside the Commissioner's denial of disability insurance benefits when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole." Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the record that could lead a reasonable mind to accept a conclusion regarding disability status. See Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir.1996) (internal citation omitted). When performing this analysis, the court must "consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (citation and quotation marks omitted).

If the evidence reasonably could support two conclusions, the court "may not substitute its judgment for that of the Commissioner" and must affirm the decision. Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). "Finally, the court will not reverse an ALJ's decision for harmless error, which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination." Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations and internal quotation marks omitted).

V. ISSUES PRESENTED

1. Whether the ALJ erred in weighing the medical opinions; and
2. Whether the ALJ erred in rejecting Plaintiff's testimony.

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VI. DISCUSSION

A. The ALJ's Evaluation of the Medical Opinions

Plaintiff argues that the ALJ erred in weighing the medical opinions. She argues that the ALJ erred in ignoring a portion of Dr. Gonick-Hallows's opinion in formulating the mental functioning portion of Plaintiff's RFC. She also argues that the ALJ erred in affording only partial weight to the opinion of treating physician Dr. Tran with respect to Plaintiff's exertional limitations.

1. Legal Standard

Courts employ a hierarchy of deference to medical opinions based on the relation of the doctor to the patient. Namely, courts distinguish between three types of physicians: those who treat the claimant ("treating physicians") and two categories of "nontreating physicians," those who examine but do not treat the claimant ("examining physicians") and those who neither examine nor treat the claimant ("non-examining physicians"). See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion is entitled to more weight than an examining physician's opinion, and an examining physician's opinion is entitled to more weight than a non-examining physician's opinion. Id.

The Social Security Act tasks the ALJ with determining credibility of medical testimony and resolving conflicting evidence and ambiguities. Reddick, 157 F.3d at 722. A treating physician's opinion, while entitled to more weight, is not necessarily conclusive. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). To reject the opinion of an uncontradicted treating physician, an ALJ must provide "clear and convincing reasons." Lester, 81 F.3d at 830; see, e.g., Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995) (affirming rejection of examining psychologist's functional assessment which conflicted with his own written report and test results); see also 20 C.F.R. § 416.927(d)(2); SSR 96-2p, 1996 WL 374188. If another doctor contradicts a treating physician, the ALJ must provide "specific and legitimate reasons" supported by substantial evidence to discount the treating physician's opinion. Lester, 81 F.3d at 830. The ALJ meets this burden "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Reddick,

157 F.3d at 725 (citation omitted). "[B]road and vague" reasons do not suffice. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). This same standard applies to the rejection of an examining physician's opinion as well. Lester, 81 F.3d at 830-31. A non-examining physician's opinion alone cannot constitute substantial evidence to reject the opinion of an examining or treating physician, Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984), though a non-examining physician's opinion may be persuasive when supported by other factors. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (noting that opinion by "non-examining medical expert . . . may constitute substantial evidence when it is consistent with other independent evidence in the record"); Magallanes, 881 F.2d at 751-55 (upholding rejection of treating physician's opinion given contradictory laboratory test results, reports from examining physicians, and testimony from claimant). An opinion that is more consistent with the record as a whole generally carries more persuasiveness. See 20 C.F.R. § 416.927(c)(4).

2. Analysis

a. Dr. Gonick-Hallows's Opinion

In November 2012, Dr. Gonick-Hallows performed a psychological examination of Plaintiff. He opined that Plaintiff was only mildly impaired with respect to understanding and remembering simple instructions, but was markedly impaired in her ability to understand, remember, and carry out complex instructions. A.R. 709. He also opined that Plaintiff has moderate to marked impairments in her ability to interact appropriately with supervisors and coworkers and to respond appropriately to usual work situations and changes in a routine work setting, and has moderate impairments in her ability to interact appropriately with the public. A.R. 710.

In formulating the mental portion of Plaintiff's RFC, the ALJ limited Plaintiff to "simple, routine, repetitive tasks," consistent with Dr. Gonick-Hallow's opinion about Plaintiff's ability to perform only work involving simple instructions. A.R. 20. The ALJ noted that her determination of Plaintiff's RFC was supported by the assessments of, inter alia, Dr. Gonick-Hallows and Dr. Winter. A.R. 24. However, while specifically acknowledging the portion of Dr. Gonick-Hallow's

opinion about Plaintiff's limitations in interacting with supervisors and coworkers and responding appropriately to work situations and changes in a work setting, the ALJ did not explain her reasons for excluding or ignoring this portion of his opinion. A.R. 23.

Ignoring portions of a physician's opinion is considered an implicit rejection of those opinions and failure to offer reasons for so doing is legal error. Smolen v. Chater, 80 F.3d 1273, 1286. (9th Cir. 1996). While an ALJ is not required to adopt all of an examining physician's assessment, Magallanes, 881 F.2d at 753, an ALJ is required to explain the reasons for rejecting those portions of an examining physician's assessment that the ALJ chooses not to adopt. Lingenfelter v. Astrue, 504 F.3d 1028, 1038 n.10 (9th Cir. 2007). When an examining physician's assessment is uncontradicted, the ALJ should provide "clear and convincing" reasons for rejecting that opinion. See Lester, 81 F.3d at 830; see also 20 C.F.R. § 416.927(d)(2). Here, the ALJ's decision did not address whether Dr. Gonick-Hallows's assessment of Plaintiff's ability to interact with supervisors and coworkers and to respond appropriately to work situations and changes in a work setting was uncontradicted or not. However, this court will treat Dr. Gonick-Hallow's opinion as contradicted by Dr. Winter, who opined in August 2012 that Plaintiff was only mildly impaired with respect to the ability to respond appropriately to changes in the work setting, and had no limitations in her ability to interact with coworkers. Accordingly, the ALJ was required to provide "specific and legitimate reasons that are supported by substantial evidence in the record" to reject Dr. Gonick-Hallows's assessment. See Lester, 81 F.3d at 830-31 (citation omitted). The ALJ failed to do so. Instead, after summarizing Dr. Gonick-Hallows's opinion, the ALJ made the odd statement that she afforded only "partial weight" to his opinion even though she assessed the opinion "as generally consistent with the medical record as a whole." A.R. 23. It is not clear why the ALJ concluded that Dr. Gonick-Hallows's opinion was generally consistent with the medical record but nonetheless rejected part of his opinion,[3] because consistency with the record is a reason to adopt an opinion, not to reject it. Therefore, the ALJ failed to provide a "specific and

[3] It is, of course, possible that this was a typographical error, and that the ALJ intended to state that Dr. Gonick-Hallow's opinion was inconsistent with the medical record. However, this is simply speculation since the ALJ provided no detail to support the statement.

legitimate" reason that is supported by substantial evidence for rejecting part of Dr. Gonick-Hallows's opinion.

The Commissioner argues that even if the ALJ erred in not including a limitation in social functioning, any such error was harmless. An ALJ's error is harmless when it is "irrelevant to the ALJ's ultimate disability conclusion." *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). The ALJ relied on the VE's testimony to determine that Plaintiff could make a successful adjustment to work that exists in significant numbers in the national economy, but in questioning the VE, the ALJ did not include Dr. Gonick-Hallow's opinion about limitations in Plaintiff's ability to interact with supervisors and coworkers and to respond appropriately to work situations and changes in a work setting. "The hypothetical an ALJ poses to a vocational expert, which derives from the RFC, must set out all the limitations and restrictions of a particular claimant." *Valentine v. Comm'r of Soc. Sec. Admin.,* 574 F.3d 685, 690 (9th Cir. 2009) (citation omitted). "If a vocational expert's hypothetical does not reflect all of the claimant's limitations, then the expert's testimony has no evidentiary value to support a finding that the claimant can perform jobs in the national economy." Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993) (citation omitted). The VE's testimony could have changed with the inclusion of Dr. Gonick-Hallows's opinion about limits on Plaintiff's ability to interact with supervisors and coworkers and to respond appropriately to work situations and changes in a work setting.

Social Security Ruling (SSR) 85-15, 1985 WL 56857 (S.S.A. 1985), further demonstrates why the ALJ's failure to address all parts of Dr. Gonick-Hallows's opinion was not harmless error. SSR 85-15 discusses the evaluation of mental impairments in the sequential evaluation process where the impairment(s) do not meet or equal a Listing. 1985 WL 56857, at *4. It provides that

> [t]he basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base.

Id. SSR 85-15 illustrates this with the following example:

> A person whose vocational factors of age, education, and work experience would ordinarily be considered favorable (i.e., very young age, university education, and highly skilled work experience) would have a severely limited occupational base if he or she has a mental impairment which causes a substantial loss of ability to respond appropriately to supervision, coworkers, and usual work situations. A finding of disability would be appropriate.

Id. SSR 85-15 does not define "substantial loss of ability to respond appropriately to supervision, coworkers, and usual work situations." However, it is possible that a "moderate to marked" impairment in this area, as assessed by Dr. Gonick-Hallows, could constitute a "substantial loss" of the ability to respond appropriately to supervision, coworkers, and usual work situations, thus rendering appropriate a finding of disability. The court thus cannot find that the ALJ's error was harmless to the final determination of Plaintiff's disability.

b. Dr. Chan's Opinion

Plaintiff next challenges the ALJ's decision to afford only partial weight to the opinion of treating physician Dr. Chan.

In his November 2012 assessment, Dr. Tran opined in relevant part that Plaintiff's experience of pain or other symptoms would "constantly" be severe enough to interfere with attention and concentration needed to perform even simple tasks, and that in an eight-hour workday, Plaintiff can only sit for about two hours and stand/walk for less than two hours. Dr. Tran also opined that Plaintiff would need to take unscheduled breaks of 15-20 minutes in duration every hour during an eight-hour work day in order to walk around, and that Plaintiff would likely be absent from work three or more days a month. The ALJ gave partial weight to Dr. Tran's assessment, noting that "the limitation to essentially sedentary work" was "consistent with the findings herein, including [Plaintiff's] testimony," but that the "limitation of less than two hours of standing and walking is not supported by the evidence of record, including Dr. Tran's own examination findings showing full strength, decreased pain, and no acute distress." A.R. 23. The ALJ also noted that Plaintiff had testified that she does not experience side effects from her medication. A.R. 23.

The ALJ gave specific and legitimate reasons supported by substantial evidence for discounting Dr. Tran's opinions. As the ALJ noted, Dr. Tran's own treatment records frequently

note Plaintiff's full strength in the bilateral lower extremities and that Plaintiff was in no acute distress. A.R. 256, 632-33, 634-35, 636-37, 638-39. Further, Dr. Tran's treatment records and progress notes indicate that Plaintiff's pain decreased over time after her May 2011 surgery, and Dr. Tran consistently observed that pain medications were "beneficial" and "tend to help her ameliorate the pain." See, e.g., 624, 626. For example, in progress notes dated June 2011, August 2011, September 2011, October 2011, and November 2011, Dr. Tran noted that Plaintiff reported her pain as eight to nine on a ten point scale. A.R. 256, 632-639. Starting in February 2012, Dr. Tran noted that Plaintiff's pain had "improve[d]," with Plaintiff describing her pain as five to six out of ten in February 2012, five out of ten in March 2012, and three to six out of ten in April 2012. A.R. 624-29. In March 2012, Plaintiff informed Dr. Tran that her pain interfered "some" with her mood, and "some" to "a lot" with her overall functioning. A.R. 626. The next month, April 2012, she reported that her pain interfered only "some" with her "work/concentration," mood, sleep patterns, and overall functioning. A.R. 628. In April 2012, Dr. Tran recommended that Plaintiff continue conservative treatment, including exercising, stretching, and applying ice and heat, with no changes in her medications. A.R. 625. There are no other treatment records by Dr. Tran between April 2012 and his November 19, 2012 assessment.[4] As to the ALJ's statement about side effects of medications, Dr. Tran opined that Vicodin could cause drowsiness "that may have implications for working." A.R. 724. Yet Plaintiff testified that she has no side effects from her medications. A.R. 43.

Additionally, the ALJ's decision was supported by the opinions of reviewing physician Dr. Pong, who opined that Plaintiff could perform sedentary work with some modifications, and examining physician Dr. Benrazavi, who concluded that Plaintiff was capable of light work with some postural limitations. This court concludes that the record contains substantial evidence that

[4] There are two additional treatment records by Dr. Tran which post-date the November 19, 2012 assessment. On November 21, 2012, Dr. Tran wrote that Plaintiff's "low back pain and left leg pain with numbness and dysesthesia is stable," but that Plaintiff recently "had exacerbation of her neck pain," which "continues to be severely affecting her function, quality of life and activities of daily living." A.R. 733. He also noted that Plaintiff "seems to need more pain medication at this time because her pain is exacerbated." A.R. 733. On December 19, 2012, Plaintiff reported that her pain had worsened with "cold weather," but that Vicodin decreases the pain and intensity. A.R. 731.

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could lead a reasonable mind to agree with the ALJ's conclusion that Dr. Tran's opinion about Plaintiff's sitting and standing/walking limitations was not supported by the record evidence, including Dr. Tran's own examination findings.

Plaintiff argues that the ALJ erred in assessing Dr. Tran's opinion, pointing out that despite Dr. Tran's observations about Plaintiff's full strength, improvement with pain medications, and lack of acute distress, Plaintiff still necessitated back surgery to address her condition. However, Plaintiff's argument is solely focused on Dr. Tran's pre-surgery observations; she does not address any of Dr. Tran's post-surgery progress notes and treatment records, which indicate some improvement in Plaintiff's symptoms, as discussed above. The court concludes that the ALJ offered specific, legitimate reasons for discounting Dr. Tran's opinion. Since the evidence reasonably could support the ALJ's conclusions, this court may not substitute its judgment for that of the Commissioner, and must affirm this finding.

B. The ALJ's Credibility Determination

Finally, Plaintiff challenges the ALJ's determination that she was not fully credible.

1. Legal Standard

In general, credibility determinations are the province of the ALJ. "It is the ALJ's role to resolve evidentiary conflicts. If there is more than one rational interpretation of the evidence, the ALJ's conclusion must be upheld." *Allen v. Sec'y of Health & Human Servs*., 726 F.2d 1470, 1473 (9th Cir. 1984) (citations omitted). An ALJ is not "required to believe every allegation of disabling pain" or other nonexertional impairment. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.1989) (citing 42 U.S.C. § 423(d)(5)(A)). Nevertheless, the ALJ's credibility determinations "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 722 (citation omitted). If an ALJ discredits a claimant's subjective symptom testimony, the ALJ must articulate specific reasons for doing so. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). In evaluating a claimant's credibility, the ALJ cannot rely on general findings, but "must specifically identify what testimony is credible and what evidence undermines the claimant's complaints." Id. at 972 (quotations omitted); see also Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002) (ALJ must articulate reasons that are "sufficiently specific to permit the court to conclude that the ALJ did not

arbitrarily discredit claimant's testimony."). The ALJ may consider "ordinary techniques of credibility evaluation," including the claimant's reputation for truthfulness and inconsistencies in testimony, and may also consider a claimant's daily activities, and "unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment." Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996).

The determination of whether or not to accept a claimant's testimony regarding subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; Smolen, 80 F.3d at 1281 (citations omitted). First, the ALJ must determine whether or not there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); Smolen, 80 F.3d at 1281-82. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms "based solely on a lack of objective medical evidence to fully corroborate the alleged severity of" the symptoms. Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en banc) (citation omitted). Absent affirmative evidence that the claimant is malingering,[5] the ALJ must provide "specific, clear and convincing" reasons for rejecting the claimant's testimony. Burrell v. Colvin, 775 F.3d 1133, 1136 (9th Cir. 2014).

2. Analysis

Plaintiff testified that after an hour of sitting, she starts experiencing pain, pins and needles, and numbness, and develops headaches and eyestrain. She has to reposition herself after sitting for no longer than an hour and a half. She can stand for half an hour. She is able to relieve her pain with medication and lying down, and she testified that she needs a job where she can "sit for a little while, stand . . . [and] lie down." A.R. 42.

The ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that Plaintiff's statements about the intensity, persistence, and limiting effects of these symptoms were not entirely credible. A.R. 21. Since there was no evidence that Plaintiff was malingering, the ALJ was required to provide specific

[5] The ALJ did not conclude that Plaintiff is a malingerer.

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"clear and convincing" reasons for rejecting her testimony. Smolen, 80 F.3d at 1283-84. The sole reason the ALJ gave for finding Plaintiff "partially credible" is that although Plaintiff reported that she had not worked since August 2010, the record contains evidence that Plaintiff "briefly attempted to return to work as a housekeeper." A.R. 21; see A.R. 650, 653.

The court finds that this reason does not constitute a "clear and convincing" reason sufficient to reject Plaintiff's testimony. The only evidence of Plaintiff's "attempt[] to return to work as a housekeeper" is in Dr. Winter's report. In August 2012, Dr. Winter wrote the following:

> [Plaintiff] attempted to work as a housekeeper one or two months ago; however the job was too strenuous and increased her pain. She decided, after one assignment, that she was unable to fulfill the job requirements such as lifting, bending, crouching, and squatting. [Plaintiff] realized returning to similar work is impossible at this time.

A.R. 653; see also A.R. 650 (Plaintiff "realized after one attempt that she was unable to perform the duties of the job."). There are no other details about the "assignment," such as what tasks it entailed or its duration, but it is reasonable to conclude that it was fairly brief, and Plaintiff's earnings record does not reflect any income received from employment in 2012. A.R. 169. While Plaintiff's failed attempt to work as a housekeeper is somewhat inconsistent with Plaintiff's testimony that she had not worked since August 2010, the inconsistency is minimal. More importantly, the ALJ did not explain how the inconsistency rendered her only partially credible with respect to her testimony about her pain symptoms and capacity to work. Notably, Dr. Winter noted that Plaintiff "showed no history of symptom magnification, exaggeration or attempts to over-dramatize her physical symptoms," A.R. 664, and Occupational Therapist Kowalski found no indication of pain migration or magnification. A.R. 685. The court concludes that the ALJ failed to provide a clear and convincing reason to find Plaintiff only partially credible as to the severity of her impairments.

C. Remand for Further Development of the Record

A court may remand a disability case for further proceedings "if enhancement of the record would be useful." It may only remand for benefits, on the other hand, "where the record has been fully developed and further administrative proceedings would serve no useful purpose." Benecke

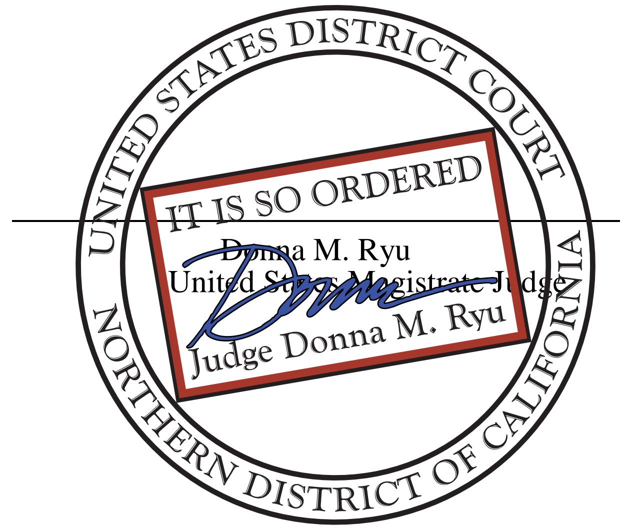
v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). The court concludes that further development of the record would be useful with respect to Dr. Gonick-Hallows's opinion about Plaintiff's ability to interact with supervisors and coworkers and to respond appropriately to work situations and changes in a work setting. Accordingly, remand is appropriate.

VII. CONCLUSION

For the foregoing reasons, the court grants in part and denies in part Plaintiff's motion for summary judgment, grants in part and denies in part Defendant's motion for summary judgment, and remands this matter for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated: February 29, 2016



Donna M. Ryu
United States Magistrate Judge

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