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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TERESA PACHECO,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No.: 18-cv-00502-AJB (RNB)

**REPORT AND
RECOMMENDATION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

(ECF Nos. 10, 12)

This Report and Recommendation is submitted to the Honorable Anthony J. Battaglia, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

On March 8, 2018, plaintiff Teresa Pacheco filed a Complaint pursuant to 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social Security denying her application for supplemental security income (“SSI”). (ECF No. 1.)

Now pending before the Court and ready for decision are the parties’ cross-motions for summary judgment.¹ For the reasons set forth herein, the Court **RECOMMENDS** that

¹ Plaintiff styled her motion as a “Motion for Reversal and/or Remand.”

1 plaintiff's motion for summary judgment be **DENIED**, that the Commissioner's cross-
2 motion for summary judgment be **GRANTED**, and that Judgment be entered affirming the
3 decision of the Commissioner and dismissing the action with prejudice.

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5 **PROCEDURAL BACKGROUND**

6 In 2008 and 2012, plaintiff filed applications for a period of disability and disability
7 insurance benefits and SSI under Titles II and XVI, respectively, of the Social Security
8 Act, alleging disability beginning in May 2008. Both sets of applications ultimately were
9 denied following administrative hearings before administrative law judges. (*See* Certified
10 Administrative Record ["AR"] 66-72, 88-98.)

11 On October 28, 2014, plaintiff again filed for SSI, alleging disability beginning May
12 1, 2008. (AR 28, 208-13.) After her application was denied initially and upon
13 reconsideration (AR 31-35, 141-45), plaintiff requested an administrative hearing before
14 an administrative law judge ("ALJ"). (AR 146.) An administrative hearing was held on
15 November 30, 2016. Plaintiff appeared at the hearing with counsel, and testimony was
16 taken from her (with the assistance of a Spanish interpreter) and a vocational expert ("VE").
17 (AR 42-62.) At the hearing, plaintiff amended her alleged onset date to October 28, 2014,
18 to correspond with the protective filing date of her application. (AR 48.)²

19 In a decision issued January 9, 2017, the ALJ found that plaintiff had not been under
20 a disability, as defined in the Social Security Act, since October 28, 2014, the date her
21 application was filed. (AR 28-37.) The ALJ's decision became the final decision of the
22 Commissioner on January 8, 2018, when the Appeals Council denied plaintiff's request for
23 review. (AR 1-4.) This timely civil action followed.

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28 ² SSI is not payable prior to the month following the month in which the application
is filed. *See* 20 C.F.R. § 416.335.

1 physician's opinion depends on whether it is supported by sufficient medical data and is
2 consistent with other evidence in the record. See 20 C.F.R. §§ 404.1527(d)(2),
3 416.927(d)(2). If the treating physician's opinion is uncontroverted by another doctor, it
4 may be rejected only for "clear and convincing" reasons. See *Lester v. Chater*, 81 F.3d
5 821, 830 (9th Cir. 1995); *Baxter v. Sullivan*, 923 F.3d 1391, 1396 (9th Cir. 1991). Where
6 a treating physician's opinion is controverted, it may be rejected only if the ALJ makes
7 findings setting forth specific and legitimate reasons that are based on the substantial
8 evidence of record. See, e.g., *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) ("A
9 treating physician's opinion on disability, even if controverted, can be rejected only with
10 specific and legitimate reasons supported by substantial evidence in the record.");
11 *Magallanes*, 881 F.2d at 751; *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987). Here,
12 Dr. Ferrer's opinion was controverted by the opinions of the State agency psychological
13 consultants that plaintiff was not significantly limited or at most only moderately limited
14 in the various major mental functioning areas, and that she was capable of performing
15 simple, routine tasks. (See AR 112-14, 125-27.)

16 In his decision, the ALJ stated the following with respect to the opinions of the State
17 agency psychological consultants and Dr. Ferrer:

18 "After reviewing the records submitted, the undersigned accords partial
19 weight to the opinions of the State agency psychological consultants and
20 partial weight to Dr. Ferrer's opinions. The claimant's mental status
21 examinations and reports that her mental health symptoms were largely stable
22 do not support the 'marked' limitations suggested by Dr. Ferrer. However,
23 the claimant's below average intellect, signs of poor memory, and intermittent
24 reports of hallucinations would likely result in moderate deficits of
25 concentration, persistence, or pace. They might also limit the claimant's
26 capacity to interact with others. As such, the undersigned finds the claimant
27 would be limited to simple, routine tasks as suggested by the State agency
28 consultants, but she would also require the additional restrictions set forth in
the residual functional capacity above." (AR 35.)

29 The Court's review of the record confirms that plaintiff's mental status examinations
30 and reports during the relevant time period beginning October 28, 2014 did not substantiate

1 the marked limitations to which Dr. Ferrer opined. As the ALJ noted earlier in his decision,
2 in October 2014, a psychiatric evaluation in plaintiff's treatment records showed that
3 plaintiff was fully oriented with good hygiene, normal speech, coherent thought processes,
4 cooperative behavior, normal motor responses, and fair insight and judgment. (*See* AR 34,
5 citing AR 419.) The following month, an exam showed improvement in plaintiff's affect
6 to normal, improvement in her memory to normal, and improvement in her insight and
7 judgment to normal. (*See* AR 34, citing AR 433.) As the ALJ also noted, subsequent
8 treatment records including one dated December 30, 2015 showed that plaintiff's reported
9 symptoms were largely improved. She reported significant improvements with panic
10 attacks, and no significant auditory or visual hallucinations within the past year. (*See* AR
11 34, citing AR 492.) Similarly, Dr. Ferrer's treatment notes from August 2016 reflect that
12 plaintiff reported feeling fine and that, on exam, she was oriented, cooperative, and well
13 dressed with good insight and judgment, a euthymic mood, and normal coherent speech.
14 (*See* AR 34, citing AR 514.)

15 The Court finds that the incongruity between Dr. Ferrer's November 2, 2016 opinion
16 and plaintiff's treatment records during the relevant time period constitutes a legally
17 sufficient reason on which the ALJ could properly rely to accord only partial weight to Dr.
18 Ferrer's opinion. *See, e.g., Valentine v. Comm'r of Social Sec. Admin.*, 574 F.3d 685, 692-
19 93 (9th Cir. 2009) (contradiction between a treating physician's opinion and his treatment
20 notes constitutes a specific and legitimate reason for rejecting that opinion); *Tommasetti v.*
21 *Astrue* 533 F.3d 1035, 1041 (9th Cir. 2008) (incongruity between treating physician's
22 questionnaire responses and the claimant's medical records provided a specific and
23 legitimate reason for rejecting the physician's opinion of the claimant's limitations); *see*
24 *also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) ("The ALJ need not accept the
25 opinion of any physician, including a treating physician, if that opinion is brief, conclusory,
26 and inadequately supported by clinical findings.").

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1 **RECOMMENDATION**

2 The Court therefore **RECOMMENDS** that plaintiff’s motion for summary
3 judgment be **DENIED**, that the Commissioner’s cross-motion for summary judgment be
4 **GRANTED**, and that Judgment be entered affirming the decision of the Commissioner
5 and dismissing this action with prejudice.

6 Any party having objections to the Court’s proposed findings and recommendations
7 shall serve and file specific written objections within 14 days after being served with a
8 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections
9 should be captioned “Objections to Report and Recommendation.” A party may respond
10 to the other party’s objections within 14 days after being served with a copy of the
11 objections. *See* Fed. R. Civ. P. 72(b)(2). *See id.*

12 IT IS SO ORDERED.

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14 Dated: August 27, 2018

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17 **ROBERT N. BLOCK**
18 United States Magistrate Judge
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