UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TONI L THOMPSON,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,[1]

Defendant.

CASE NO. 2:16-CV-01447-DWC

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff Toni L. Thompson filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of her applications for supplemental security income ("SSI") and disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 6.

[1] Nancy A. Berryhill became the Acting Commissioner of Social Security on January 23, 2017, and is substituted as Defendant for former Acting Commissioner Carolyn W. Colvin. 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d)(1).

After considering the record, the Court concludes the Administrative Law Judge ("ALJ") erred when she failed to adequately explain how the residual functional capacity ("RFC") accounted for all the functional limitations opined to by state agency consultative psychologist Dr. Dan Donahoe, Ph.D. The Court also finds the ALJ erred by failing to discuss significant, probative evidence contained in the opinions of examining psychologists Dr. Holly Petaja, Ph.D. and Dr. Carl Epp, Ph.D. Had the ALJ properly considered these three doctors' opinions, the RFC may have included additional limitations. The ALJ's errors are therefore not harmless, and this matter is reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this Order.

FACTUAL AND PROCEDURAL HISTORY

On September 11, 2013, Plaintiff filed applications for DIB and SSI, alleging disability as of September 1, 2012. *See* Dkt. 9, Administrative Record ("AR") 11. The applications were denied upon initial administrative review and on reconsideration. *See* AR 11. A hearing was held before ALJ Kimberly Boyce on November 5, 2014. *See* AR 27-61. In a decision dated March 5, 2015, the ALJ determined Plaintiff to be not disabled. *See* AR 11-21. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council, making the ALJ's decision the final decision of the Commissioner. *See* AR 1-6; 20 C.F.R. § 404.981, § 416.1481.

In Plaintiff's Opening Brief, Plaintiff maintains the ALJ committed harmful error by failing to properly: (1) evaluate the opinions of (A) Dr. Dan Donahoe, Ph.D., and (B) Drs. Holly Petaja, Ph.D. and Carl Epp, Ph.D.; and (2) determine if Plaintiff was capable of performing other jobs in the economy at Step 5. *See* Dkt. 11, pp. 1-2.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ properly weighed the medical opinion evidence.

Plaintiff contends the ALJ erred in her evaluation of the medical opinion evidence of Dr. Dan Donahoe, Ph.D., Dr. Holly Petaja, Ph.D., and Dr. Carl Epp, Ph.D. Dkt. 11, pp. 3-10.

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (*citing Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician's opinion is contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (*citing Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

The ALJ "may reject the opinion of a non-examining physician by reference to specific evidence in the medical record." *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998) (*citing Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996)); *Andrews*, 53 F.3d at 1041). However, all of the determinative findings by the ALJ must be supported by substantial evidence. *See Bayliss*,

427 F.3d at 1214 n.1 (*citing Tidwell*, 161 F.3d at 601); *see also Magallanes*, 881 F.2d at 750 ("Substantial evidence" is more than a scintilla, less than a preponderance, and is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

A. Dr. Donahoe

Plaintiff first contends the ALJ erred when she gave significant weight to Dr. Dan Donahoe's opinion, but did not include all the opined functional limitations in the RFC determination. Dkt. 11, pp. 6-7.

Dr. Donahoe, a state agency consultative psychologist, completed a mental RFC assessment of Plaintiff on March 10, 2014. AR 103-05. He opined, in relevant part, Plaintiff was able to persist at simple, repetitive tasks in at least two hour intervals in an eight-hour workday. AR 104. He found Plaintiff may have intermittent interruptions in her ability to complete a normal workday/workweek, "but should be able to do so a majority of the time." AR 104. The ALJ gave Dr. Donahoe's opinion significant weight, including Plaintiff's inability to complete a normal workday/workweek without intermittent interruptions, and stated the limitations in Dr. Donahoe's opinion were included in Plaintiff's RFC. AR 17-18.

In the RFC determination, the ALJ found Plaintiff can perform a full range of work at all exertional levels. AR 15. She found, "[i]n order to meet ordinary and reasonable employer expectations regarding attendance, production, and work place behavior," Plaintiff

> can understand, remember and carry-out unskilled, routine and repetitive work. She can cope with occasional work setting changes and occasional interaction with supervisors. She can work in proximity to coworkers, but not in a team or cooperative effort. She can perform work in a setting to which the general public is not admitted.

AR 15-16.

It is unclear from the RFC if the ALJ adequately accounted for Dr. Donahoe's opinion that Plaintiff would be able to complete a normal workday/workwork without intermittent interruptions only a majority of the time. *See* AR 15-16. While the ALJ stated she accounted for Dr. Donahoe's opined limitations, she does not explain how the RFC accounts for the opinion regarding intermittent interruptions. *See* AR 17-18. Additionally, the RFC does not expressly contain limitations concerning Plaintiff's inability to complete a normal workday/workweek without intermittent interruptions. *See* AR 15-16. As the Court cannot determine if the ALJ properly included all of Dr. Donahoe's limitations in the RFC or simply ignored the limitations, the Court finds ALJ erred. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) ("We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."); *Provencio v. Astrue*, 2012 WL 2344072, *9 (D. Ariz., June 20, 2012) (finding the ALJ erred by giving "great weight" to a consultative examiner's opinion, yet ignoring parts of the opinion).

"[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v. Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The determination as to whether an error is harmless requires a "case-specific application of judgment" by the reviewing court, based on an examination of the record made "'without regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

Had the ALJ included all of Dr. Donahoe's limitations in the RFC, Plaintiff may have been limited, for example, in her ability to remain on-task or attend work during a normal

workday/workweek. Therefore, if all the limitations opined to by Dr. Donahoe were included in the RFC and in the hypothetical questions posed to the vocational expert, Steve Duchesne, the ultimate disability determination may have changed. Accordingly, ALJ's error is not harmless and requires reversal.

B. Drs. Petaja and Epp

Plaintiff next asserts the ALJ erred by failing to properly consider the opinions of examining psychologists Drs. Holly Petaja, Ph.D. and Carl Epp, Ph.D. Dkt. 11, pp. 7-10.

Dr. Petaja competed a psychological/psychiatric evaluation of Plaintiff on September 13, 2012. AR 331-40. Dr. Petaja reviewed portions of Plaintiff's medical records, conducted a clinical interview of Plaintiff, observed Plaintiff, and conducted a mental status examination ("MSE") of Plaintiff. AR 331-35. She opined Plaintiff had mild or no limitations in her ability to understand, remember and persist in tasks by following very short and simple instructions, but had moderate to marked limitations in her ability to perform all other basic work activities. AR 333. She found Plaintiff had a global assessment functioning ("GAF") score of 50. AR 333.

On June 18, 2013, Dr. Epp completed a psychological/psychiatric evaluation of Plaintiff. AR 474-79. During the evaluation, Dr. Epp conducted a clinical interview, observed Plaintiff, and conducted an MSE of Plaintiff. AR 474-78. Dr. Epp opined Plaintiff had moderate limitations in understanding, remembering and persisting in tasks by following detailed instructions, performing activities within a schedule, maintaining regular attendance, being punctual within customary tolerances without special supervision, being aware of normal hazards and taking appropriate precautions, communicating and performing effectively in a work setting, and completing a normal workday and workweek without interruptions from psychologically based symptoms. AR 476. Dr. Epp found Plaintiff had marked limitations in maintaining

appropriate behavior in a work setting and setting realistic goals and planning independently. AR 476. He found Plaintiff had mild or no limitations in the remaining areas of basic work activities. AR 476. Dr. Epp determined Plaintiff had a GAF score of 48. AR 475.

Regarding the opinions of Drs. Petaja and Epp, the ALJ stated:

> Although significant weight is given to the objective test results and observations from Dr. Petaja as they comport with the overall record and claimant's daily activities as discussed at Finding 3, little weight is assigned to the GAF score of 50. I give little weight to this GAF score because as mentioned above, the claimant was not candid with her during the examination regarding why she stopped working at Walmart. Additionally, Dr. Petaja considered non-medical factors into this GAF score, such as unemployment and financial problems. The creditability of Dr. Petaja's opinion is further reduced because she relied heavily on the claimant's subjective report of symptoms as evidenced by repeated use of the phrase, "she reports." That Dr. Petaja relied heavily on the claimant's report is problematic, because as discussed her reports of severity are less than fully credible.
>
> I make a similar finding for the consultative opinion from Carl C. Epp, Ph.D., who completed a more recent exam in June 2013, because the GAF score of 48 does not comport with the longitudinal record as stated. The claimant did not tell Dr. Epp that she lost her job at Walmart and was convicted of theft in the third degree. That the claimant did not disclose this information is important, for like Dr. Petaja, Dr. Epp appears to have accepted her statements. Additionally, Dr. Epp considered non-medical factors such as occupational, educational and economic in rating the GAF score. Dr. Epp also indicated that vocational training would not be helpful, contrary to the opinions as noted that she should become more active, not less.

AR 18 (internal citations omitted).

Here, the ALJ discussed the weight given to the GAF scores contained in the opinions of Drs. Petaja and Epp, but failed to discuss the doctors' opinions regarding Plaintiff's functional limitations. *See* AR 18. The ALJ "need not discuss all evidence presented." *Vincent ex rel. Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984). However, the ALJ "may not reject 'significant probative evidence' without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (*quoting Vincent*, 739 F.2d at 1395). The "ALJ's written decision must state

reasons for disregarding [such] evidence." *Flores*, 49 F.3d at 571. Drs. Petaja's and Epp's opinions as to Plaintiff's limitations in her ability to perform basic work activities are related to her ability to be employed, and this evidence is therefore significant and probative. The ALJ discussed the GAF scores and, in a conclusory manner, gave significant weight to Dr. Petaja's objective test results and observations. The ALJ did not, however, discuss the functional limitations opined to by Drs. Petaja and Epp. Further, the ALJ did not include all the opined limitations in the RFC. As the ALJ's decision is silent regarding Drs. Petaja's and Epp's opinions as to Plaintiff's functional limitations, the Court cannot determine if the ALJ properly considered the opined limitations or simply ignored the evidence.

Defendant asserts the ALJ properly discounted the opinions of Drs. Petaja and Epp because the opinions were based on Plaintiff's subjective complaints, which were discredited. Dkt. 12, pp. 3-4. In discussing Dr. Petaja's opinion, the ALJ stated Dr. Petaja's opinion was "further reduced because she relied heavily on claimant's subjective report of symptoms[.]" AR 18. The ALJ does not adequately explain if she is giving less weight Drs. Petaja's opinion regarding Plaintiff's functional limitations or Plaintiff's GAF score. The ALJ also gave little weight to Dr. Epp's opinion regarding Plaintiff's GAF score, in part, because he relied on Plaintiff's statements. AR 18.

The Court cannot "affirm the decision of an agency on a ground the agency did not invoke in making its decision." *Stout v. Comm'r of Soc. Sec. Admin*, 454 F.3d 1050, 1054 (9th Cir. 2006). Further, courts "require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that [the courts] may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes*, 331 F.3d at 569. The ALJ gave less weight to the GAF scores because she found the GAF scores were based on Plaintiff's self-reports. It is not clear the ALJ

gave little weight to Drs. Petaja's and Epp's opinions as to Plaintiff's functional limitations because the opinions were based on Plaintiff's subjective complaints. As the ALJ did not clearly articulate the doctors' reliance on Plaintiff's self-reports as a reason for giving little weight to the opinions, the Court is not persuaded by Defendant's argument.

Regardless, the Court finds the opinions of Drs. Petaja and Epp were not based more heavily on Plaintiff's self-reports and, as such, this is not a specific and legitimate reason supported by substantial evidence for giving little weight to the opinions. An ALJ may reject a physician's opinion "if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (*quoting Morgan v. Comm'r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999)). This situation is distinguishable from one in which the doctor provides his own observations in support of his assessments and opinions. *See Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) ("an ALJ does not provide clear and convincing reasons for rejecting an examining physician's opinion by questioning the credibility of the patient's complaints where the doctor does not discredit those complaints and supports his ultimate opinion with his own observations"); *see also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001). "[W]hen an opinion is not more heavily based on a patient's self-reports than on clinical observations, there is no evidentiary basis for rejecting the opinion." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (*citing Ryan*, 528 F.3d at 1199-1200).

In reaching their opinions, Drs. Petaja and Epp relied on their own observations, documented results of the MSEs, and Plaintiff's self-reports regarding her mental health conditions. AR 331-40, 474-78. Dr. Petaja also reviewed portions of Plaintiff's medical records. *See* AR 331. The two doctors did not discredit Plaintiff's subjective reports, and supported their

ultimate opinions with the MSE results, personal observations, and clinical interviews. The Court finds the opinions of Drs. Petaja and Epp were not more heavily based on Plaintiff's self-reports. Therefore, this is not a specific and legitimate reason supported by substantial evidence for giving little weight to the two doctors' opinions.[2]

The Court concludes the ALJ did not discuss significant, probative evidence contained in Dr. Petaja's and Epp's opinions. Without an adequate explanation, the Court cannot determine if the ALJ properly disregarded the functional limitations included in these two opinions. Accordingly, the ALJ erred. *See Flores*, 49 F.3d at 571 (an "ALJ's written decision must state reasons for disregarding significant, probative evidence"); *Blakes*, 331 F.3d at 569.

As discussed above, "harmless error principles apply in the Social Security context." *Molina*, 674 F.3d at 1115. An ALJ's failure to discuss a medical opinion is not harmless error. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012). When the ALJ ignores significant and probative evidence in the record favorable to a claimant's position, the ALJ "thereby provide[s] an incomplete [RFC] determination." *Id.* at 1161.

The ALJ's failure to discuss portions of the opinions submitted by Drs. Petaja and Epp resulted in an incomplete RFC. For example, Dr. Petaja opined Plaintiff was markedly limited in her ability to communicate and perform effectively in the work setting, complete a normal workday/workweek without interruptions, and maintain appropriate behavior in the work setting. AR 333. These limitations were not accounted for in the RFC. *See* AR 15-16. Had the ALJ

---

[2] Defendant also asserts the ALJ discounted the opinions of Drs. Petaja and Epp because the opinions were inconsistent with the record as a whole. Dkt. 12, p. 3. The ALJ noted Dr. Epp's opinion as to Plaintiff's GAF score was inconsistent with the longitudinal record. AR 18. The ALJ did not find Dr. Epp's opinion as to Plaintiff's functional limitations was inconsistent with the longitudinal record. *See* AR 18. As the ALJ did not find the doctors' opinions were inconsistent with the record, the Court cannot rely on this reason to find the ALJ properly discounted the opinions of Drs. Petaja and Epp. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) ("We review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.").

properly considered functional limitations opined to by Drs. Petaja and Epp, she may have included additional limitations in the RFC and in the hypothetical questions posed to the vocational expert. As the ultimate disability determination may change, the ALJ's failure to discuss Drs. Petaja's and Epp's entire opinions is not harmless and requires reversal.

II. Whether the ALJ erred in finding Plaintiff not disabled at Step 5.

Plaintiff contends the ALJ erred in finding her not disabled at Step 5 of the sequential evaluation process because the RFC and hypothetical questions did not contain all Plaintiff's functional limitations. Dkt. 11, p. 10. The Court concludes the ALJ committed harmful error when she failed to properly consider the opinions of Drs. Donahoe, Petaja, and Epp. *See* Section I, *supra*. The ALJ must therefore reassess the RFC on remand. *See* Social Security Ruling 96-8p ("The RFC assessment must always consider and address medical source opinions."); *Valentine v. Commissioner Social Sec. Admin.*, 574 F.3d 685, 690 ("an RFC that fails to take into account a claimant's limitations is defective"). As the ALJ must reassess Plaintiff's RFC on remand, she must also re-evaluate the findings at Step 5 to determine if there are jobs existing in significant numbers in the national economy Plaintiff can perform in light of the RFC. *See Watson v. Astrue*, 2010 WL 4269545, *5 (C.D. Cal. Oct. 22, 2010) (finding the ALJ's RFC determination and hypothetical questions posed to the vocational expert defective when the ALJ did not properly consider a doctor's findings).

Dated this 7th day of March, 2017.

David W. Christel
United States Magistrate Judge