

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

9
10 AUDREY GRACE WARE,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
Commissioner of the Social Security
Administration,¹

14
15 Defendant.

CASE NO. 2:16-cv-01475 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

16
17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
18 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
19 Magistrate Judge and Consent Form, Dkt. 7; Consent to Proceed Before a United States
20 Magistrate Judge, Dkt. 8). This matter has been fully briefed. *See* Dkts. 13, 14.

21
22 ¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to
23 Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is substituted for Acting
24 Commissioner Carolyn W. Colvin as the defendant in this suit. No further action needs to be
taken, pursuant to the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §
405(g).

1 After considering and reviewing the record, the Court concludes that the ALJ
2 erred when evaluating the medical opinion from one of plaintiff's treating physicians.
3 The ALJ appears to have misinterpreted the record, as the ALJ found that Dr. Hatcher
4 "did not perform any of the requisite testing [regarding the diagnosis of fibromyalgia]"
5 AR. 25. However, Dr. Hatcher's treatment record indicates that she examined plaintiff
6 and conducted palpation testing which yielded a positive result for reproduction of
7 alleged symptoms. *See* AR. 425. This same treatment record also reveals that on testing,
8 Dr. Hatcher observed "significant tenderness to palpitation throughout posterior
9 musculature with trigger points consistent with fibromyalgia diagnosis." *Id.* Therefore,
10 the ALJ's reliance on a lack of requisite testing is not based on substantial evidence in the
11 record as a whole.

13 The ALJ also relied on a finding that Dr. Hatcher relied more on plaintiff's
14 subjective reports than on the objective evidence; however, this finding, too, is not based
15 on substantial evidence in the record as a whole.

16 Therefore, this matter shall be reversed and remanded pursuant to sentence four of
17 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with
18 this order.

19 BACKGROUND

20 Plaintiff, AUDREY GRACE WARE, was born in 1962 and was 51 years old on
21 the alleged date of disability onset of September 1, 2013. *See* AR. 204-12. Plaintiff
22 completed high school. AR. 36. Plaintiff has work history working in restaurants and
23 food service. AR. 52-55.
24

1 According to the ALJ, plaintiff has at least the severe impairments of
2 “osteoarthritis; asthma; sleep-related disorder; obesity; affective disorder; anxiety
3 disorder; [and] substance addiction disorder (20 CFR 416.920(c)).” AR. 18.

4 At the time of the hearing, plaintiff was living in Section 8 housing. AR. 84.

5 PROCEDURAL HISTORY

6 Plaintiff’s application for Supplemental Security Income (“SSI”) benefits pursuant
7 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
8 following reconsideration. *See* AR. 109, 125. Plaintiff’s requested hearing was held
9 before Administrative Law Judge Tom L. Morris (“the ALJ”) on December 30, 2014. *See*
10 AR. 33-108. On March 27, 2015, the ALJ issued a written decision in which the ALJ
11 concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 13-
12 32.

13
14 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) The ALJ’s
15 residual functional capacity finding is unsupported by substantial evidence and the
16 product of legal error in that the ALJ failed to provide specific and legitimate reasons for
17 discounting several medical opinions; and (2) The ALJ failed to meet his burden at Step 5
18 in that his colloquy with the VE failed to account for plaintiff’s medically required cane.
19 *See* Dkt. 13, p. 1.

20 STANDARD OF REVIEW

21 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
22 denial of social security benefits if the ALJ's findings are based on legal error or not
23 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
24

1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 **(1) The ALJ’s residual functional capacity finding is unsupported by**
5 **substantial evidence and the product of legal error in that the ALJ**
6 **failed to provide specific and legitimate reasons for discounting several**
7 **medical opinions.**

8 When an opinion from an examining or treating doctor is contradicted by other
9 medical opinions, the treating or examining doctor’s opinion can be rejected only “for
10 specific and legitimate reasons that are supported by substantial evidence in the record.”
11 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (*citing Andrews v. Shalala*, 53 F.3d
12 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see*
13 *also* 20 C.F.R. §§ 404.1527(a)(2).

14 Plaintiff contends, among other things, that the ALJ erred when failing to credit
15 fully the opinion from one of plaintiff’s treating physicians, Dr. Marylou Hatcher M.D.
16 *See, e.g.*, AR. 517-19. Defendant contends that the ALJ’s rejection of Dr. Hatcher’s
17 opinion is appropriate because Dr. Hatcher provided opinions regarding plaintiff’s
18 functional limitations on a check box form and because “Dr. Hatcher’s opinion was
19 based, at least in part, on [plaintiff’s] discounted subjective reports” Dkt. 14.

20 Discrediting a doctor’s opinion simply because she used a check box form is not
21 valid unless that opinion is inconsistent with the underlying clinical records. *See*
22 *Garrison v. Colvin*, 759 F.3d 995, 1014 n.17 (“the ALJ was [not] entitled to reject
23 [medical] opinions on the ground that they were reflected in mere check-box forms”
24

1 where the “check-box forms did not stand alone” but instead “reflected and were entirely
2 consistent with the hundreds of pages of treatment notes”); *see also Neff v. Colvin*, 639 F.
3 App’x 459 (9th Cir. 2016) (unpublished); *Esparza v. Colvin*, 631 F. App’x 460, 462 (9th
4 Cir. 2015) (unpublished). Here, the check box forms did not stand alone and were
5 accompanied with multiple treatment records over time, including the doctor’s review of
6 plaintiff’s X-rays (*see* AR. 426). *See also, e.g.*, AR. 318, 417-19, 430-32, 445-47. The
7 record includes reports of multiple examinations of plaintiff by Dr. Hatcher. *See, e.g.*,
8 AR. 431. For example, on one of these occasions during which Dr. Hatcher performed a
9 physical examination of plaintiff, Dr. Hatcher noted that plaintiff “appears in pain,” and
10 that plaintiff’s gait “is slow and labored.” *Id.* Plaintiff’s record includes multiple
11 examinations of plaintiff by Dr. Hatcher, and Dr. Hatcher noted in 2014 that she had
12 treated plaintiff since 2006. AR. 519; *see also* AR. 320, 418-19, 429-31, 445-48. Dr.
13 Hatcher also reviewed plaintiff’s x-rays (AR. 426), as well as multiple lab results from
14 tests performed on plaintiff. *See, e.g.*, 433-37, 449-50. Therefore, although it is true that
15 Dr. Hatcher provided the residual functional capacity determination on a checkbox form,
16 Dr. Hatcher's opinion also is supported by x-rays, lab results, and multiple examinations
17 occurring over a long-term treatment history. *See* AR. 517-20.

18
19 In addition, the ALJ has not specified any inconsistency between Dr. Hatcher’s
20 opinion and the underlying treatment records. Thus, the ALJ committed legal error to the
21 extent he discounted Dr. Hatcher’s opinion because she used a check box form,
22 particularly where, as here, Dr. Hatcher’s opinion is accompanied by multiple clinical
23 interviews and examinations, as well as review of testing such as X-rays.
24

1 In addition, the ALJ appears to have misread the treatment record from Dr.
2 Hatcher. The ALJ found that “Dr. Hatcher did not perform any of the requisite testing in
3 SSR 12-2p to support fibromyalgia as medically determinable for Social Security
4 disability purposes.” AR. 25. However, elsewhere in the written decision, the ALJ
5 acknowledges that Dr. Hatcher reported in her clinical assessment that plaintiff
6 demonstrated “significant tenderness to palpitation throughout posterior musculature with
7 trigger points consistent with fibromyalgia diagnosis.” *See* AR. 18-19, 425. Dr. Hatcher
8 also specifically indicated in her treatment record that plaintiff’s alleged symptoms were
9 reproduced upon palpitation, which directly contradicts the ALJ’s finding that “Dr.
10 Hatcher did not perform any of the requisite testing” regarding the fibromyalgia
11 diagnosis. AR. 425. Furthermore Dr. Hatcher specifically assessed that the tenderness to
12 palpitation was demonstrated by plaintiff at the “trigger points consistent with
13 fibromyalgia diagnosis.” *Id.* The fact that the ALJ implied that Dr. Hatcher may not even
14 have conducted any testing or observed any specific results is directly contrary to the
15 treatment record including the reported observations of Dr. Hatcher, and her clinical
16 assessment. *See* AR. 19, 425 (“palpitation: symptoms reproduced – yes”). The Court
17 concludes that the ALJ’s reliance on a lack of testing by Dr. Hatcher does not entail
18 specific and legitimate rationale supported by substantial evidence in the record as a
19 whole for the failure to credit fully Dr. Hatcher’s medical opinion. *See* AR. 25. However,
20 the Court acknowledges that although Dr. Hatcher appears to have completed the
21 requisite trigger points examination and testing, she does not appear to have included all
22 of the specific individual results that she observed during the examination, such as
23
24

1 exactly where the trigger points yielded a positive result, and exactly how many “trigger
2 points consistent with fibromyalgia diagnosis” were observed. *See* AR. 425; *see also* AR.
3 18-19 (reference by the ALJ to the findings necessary for the establishment of a diagnosis
4 of fibromyalgia for purposes of Social Security Disability, which can be demonstrated, in
5 part by “at least 11 positive tender points on physical examination with digital palpation
6 with an approximate force of nine pounds, bilaterally both above and below the waist . .
7 . .”). Therefore, although this treatment record supports Dr. Hatcher’s opinion, it appears
8 that Dr. Hatcher’s treatment record is ambiguous or inadequate to determine specifically
9 the diagnosis for fibromyalgia for purposes of Social Security Disability. Although this
10 does not entail an appropriate rationale for failing to credit fully this medical opinion, it
11 does implicate the ALJ’s duty to develop the record on this issue. *See Mayes v.*
12 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (the ALJ’s duty to supplement the
13 record is triggered if there is ambiguous evidence or if the record is inadequate to allow
14 for proper evaluation of the evidence); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th
15 Cir. 2001) (citing *Smolen, supra*, 80 F.3d at 1288 (other citation omitted)).

17 Finally, although defendant contends that an ALJ may reject a treating physician’s
18 opinion if it is “based, at least in part,” on a claimant’s self-report, this contention is
19 incorrect, as the doctor’s opinion must be based “to a large extent” on such self-report, or
20 must be “more heavily based on a patient’s self-reports than on clinical observations” in
21 order for the opinion to be rejected properly on this basis.

23 According to the Ninth Circuit, “[an] ALJ may reject a treating physician’s
24 opinion if it is based ‘to a large extent’ on a claimant self-reports that have been properly

1 | discounted as incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008)
2 | (quoting *Morgan v. Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing
3 | *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989))). This situation is distinguishable from
4 | one in which the doctor provides her own observations in support of her assessments and
5 | opinions. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir.
6 | 2008) (“an ALJ does not provide clear and convincing reasons for rejecting an examining
7 | physician’s opinion by questioning the credibility of the patient’s complaints where the
8 | doctor does not discredit those complaints and supports his ultimate opinion with his own
9 | observations”); *see also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001).

11 | The ALJ does not cite adequate support for the finding that Dr. Hatcher relied
12 | heavily on plaintiff’s self-reports. As noted by the ALJ, Dr. Hatcher noted objective
13 | finding regarding plaintiff’s deconditioning, which she apparently observed over her
14 | various examinations of plaintiff. Dr. Hatcher also noted, for example, that plaintiff
15 | demonstrated “guarding with pressure on lateral condyle of elbow,” and that plaintiff’s
16 | “shoulders have decreased [internal] ROT and [she] can barely get her hand to low back.”
17 | *See, e.g., AR. 431*. Of course, when possible, all doctors elicit from patients their report
18 | of symptoms, including here, reports of “pain all over.” *AR. 517*. However, this common
19 | practice of doctors does not evidence heavy reliance: the “subjective” portion of an
20 | examination is a standard part of the “SOAP” format for medical encounters, and is
21 | accompanied by the “objective” portion, as well the “assessment” and “plan” portions.
22 | An ALJ may not rely on speculation when finding that a medical opinion is more heavily
23 | based on the subjective portion of the examination as opposed to the objective portion of
24 |

1 the examination, and there must be substantial evidence in support of an ALJ's findings.
2 See SSR 86-8, 1986 SSR LEXIS 15 at *22 (an ALJ may not speculate).

3 According to the Ninth Circuit, "when an opinion is not more heavily based on a
4 patient's self-reports than on clinical observations, there is no evidentiary basis for
5 rejecting the opinion." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (citing
6 *Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008)). As the
7 record does not demonstrate that Dr. Hatcher's opinion is heavily based on plaintiff's
8 subjective reports, and it includes indications of multiple physical examinations of
9 plaintiff by Dr. Hatcher, see, e.g., AR. 431, this rationale does not provide a legitimate
10 reason based on substantial evidence in the record as a whole for the rejection of Dr.
11 Hatcher's medical opinion. See *id.*

13 For the reasons stated, the Court concludes that the ALJ erred when evaluating the
14 medical opinion of Dr. Hatcher. The Court also concludes that the error is not harmless.

15 The Ninth Circuit has "recognized that harmless error principles apply in the
16 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
17 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
18 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
19 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the
20 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]
21 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
22 crediting the testimony, could have reached a different disability determination.'" *Marsh*
23 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In
24

1 *Marsh*, even though “the district court gave persuasive reasons to determine
2 harmless,” the Ninth Circuit reversed and remanded for further administrative
3 proceedings, noting that “the decision on disability rests with the ALJ and the
4 Commissioner of the Social Security Administration in the first instance, not with a
5 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

6 Here, Dr. Hatcher opined that plaintiff only could sit for fifteen minutes at a time;
7 only could stand/walk for five minutes at a time; only could sit for a total of two hours in
8 an eight hour workday; and only could stand/walk for two hours in an eight hour
9 workday. AR. 517. She also opined that plaintiff required a job which permits shifting
10 positions at will from sitting, standing or walking, and that plaintiff would require
11 unscheduled breaks, although she did not specify how often this would occur. *See id.* She
12 also opined that plaintiff has limitations in doing repetitive reaching, handling, and
13 fingering, but again failed to specify the percentage of time during an eight hour workday
14 during which plaintiff can conduct these activities. AR. 518. Dr. Hatcher also provided
15 her conclusion that plaintiff is not capable of working eight hour day, five days a week
16 employment on a sustained basis. *Id.* Dr. Hatcher indicated that although she had been
17 treating plaintiff since 2006, she opined limitations existed since October 12, 2011. AR.
18 519.

19 The ALJ rejected these opinions, for example, finding that plaintiff “can stand
20 and/or walk with normal breaks for total of about four hours in an eight hour workday
21 [and] can sit with normal breaks for total of about six hours in an eight hour workday.”
22 AR. 22. It is likely that crediting Dr. Hatcher’s opinions fully would lead to a finding of
23
24

1 disability. Therefore, the Court cannot conclude with confidence ““that no reasonable
2 ALJ, when fully crediting the testimony, could have reached a different disability
3 determination.”” *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at 1055-56).

4 However, although the ALJ did not provide adequate rationale for failing to credit
5 fully Dr. Hatcher’s opinions, further administrative proceedings would be useful in this
6 matter. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014)
7 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) (“we generally remand for
8 an award of benefits only in the ‘rare circumstances,’ *Moisa*, 367, F.3d at 886, ‘where no
9 useful purpose would be served by further administrative proceedings and the record has
10 been thoroughly developed”). As noted previously, although it appears that Dr. Hatcher
11 performed the requisite testing to support fibromyalgia as a medically determinable
12 impairment for Social Security disability purposes, she does not appear to have provided
13 a detailed accounting of the results from such testing. Therefore, it is unclear whether or
14 not plaintiff suffers from fibromyalgia for purposes of Social Security disability, and the
15 ALJ found that it is not a severe impairment. *See* AR. 18-19. Further development of the
16 record on this issue likely would serve a useful purpose.

17
18 The Court also notes plaintiff’s argument that the ALJ did not appear to afford
19 appropriate weight to the fact that Dr. Hatcher was a treating physician and failed “to
20 engage in the proper multi-factor analysis called for by the regulations resulting in plain
21 error.” Dkt. 13, p. 15 (citing 20 C.F.R. § 416.927 (c)); *see also* 20 C.F.R. § 416.927 (c)
22 (“Unless we give a treating source’s opinion controlling weight we consider all
23 of the following factors in deciding the weight we give to any medical opinion,”
24

1 including treating relationship (including the length of the treatment relationship and the
2 frequency of examination, as well as the nature and extent of the treatment relationship);
3 supportability; consistency; specialization; and other factors). The ALJ's written decision
4 does not reflect that the ALJ considered all of these factors, which likely would be useful
5 following remand of this matter.

6 The Court also notes that the ALJ gave partial weight to Dr. Hatcher's December
7 2014 statement that a cane is medically necessary, but it is not clear whether the
8 limitations assigned in the residual functional capacity determination adequately capture
9 the limitations resulting from plaintiff's potential medical necessity to use a cane. *See*
10 Dkt. 13, pp. 17-18 ("the Commissioner's rulings require the ALJ inquire about the use of
11 such an assistive device during the VE testimony") (citing SSR 96-9p). Further
12 development of this issue also may serve a useful purpose.

13 Finally, in the context of remanding this case for further Administrative
14 proceedings as opposed to remanding with a direction to award benefits, the Court notes
15 that plaintiff does not challenge the ALJ's failure to credit fully all of plaintiff's
16 allegations and testimony. Therefore, the ALJ's assessment and evaluation of the medical
17 evidence is especially important in this matter and there is disagreement among the
18 medical sources regarding the extent of plaintiff's limitations. Following remand of this
19 matter, the ALJ should afford proper weight to the opinions from plaintiff's treating
20 physician. *See Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App.
21 LEXIS 17960 at *14 (9th Cir. 2001) (citing SSR 96-2p, 1996 SSR LEXIS 9) ("A treating
22 physician's medical opinion as to the nature and severity of an individual's impairment
23
24

1 must be given controlling weight if that opinion is well-supported and not inconsistent
2 with the other substantial evidence in the case record”); *see also Lester, supra*, 81 F.3d at
3 830 (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)) (more weight is given to
4 a treating medical source’s opinion than to the opinions of those who do not treat the
5 claimant).

6 **(2) The ALJ failed to meet his burden at Step 5 in that his colloquy with**
7 **the VE failed to account for plaintiff’s medically required cane.**

8 The Court already has concluded that the ALJ erred when evaluating the medical
9 opinion of Dr. Hatcher, *see supra*, section 1. The Court also has concluded already that
10 further development of the issue of plaintiff’s use of a cane would serve a useful purpose.
11 Therefore, this issue need not be discussed further.

12 CONCLUSION

13 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
14 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
15 405(g) to the Acting Commissioner for further consideration consistent with this order.

16 **JUDGMENT** should be for plaintiff and the case should be closed.

17 Dated this 20th day of April, 2017.

18
19 

20 J. Richard Creatura
21 United States Magistrate Judge
22
23
24