

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MELISSA A. CHICK,

Plaintiff,

V.

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

Defendant.

CASE NO. 3:16-CV-05967-JRC

ORDER ON PLAINTIFF'S COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and

Local Magistrate Judge Rule MJR 13 (see also Notice of Initial Assignment to a U.S.

Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States

Magistrate Judge, Dkt. 7). This matter has been fully briefed. *See* Dkt. 14, 15, 16.

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walking. In September, 2013, an MRI of plaintiff's lumbar spine revealed "a large left

1 herniated disc at L5-S1 with severe central canal stenosis and disc protrusions at L3-L4
2 and L4-L5." AR. 28 (citation omitted). In October, 2013, plaintiff underwent surgery on
3 her lower back, consisting of a laminectomy. *See id.* As acknowledged by the ALJ,
4 consistent with plaintiff's allegations, "post-operative MRI images in February, 2014 and
5 January, 2015 showed, among other things, that the herniated disc at L5-S1 appeared
6 larger than it did preoperatively, and [plaintiff] still had severe central canal stenosis and
7 other disc protrusions in her lumbar spine." *Id.* (citations omitted).

8
9 The ALJ rejected plaintiff's allegations of limitations in sustained sitting, standing
10 and walking based, in part, on a finding of inconsistency with plaintiff's activities of
11 daily living. However, the activities of daily living noted by the ALJ, such as performing
12 light household chores, watching television, going shopping in stores, and using the
13 computer, are not inconsistent with plaintiff's allegations of limitations in sustained
14 sitting, standing and walking. Furthermore, while appearing to rely heavily on plaintiff's
15 dramatic presentation, the ALJ failed to acknowledge significant probative evidence
16 regarding observations of plaintiff's treating physician and examination findings such as
17 positive left straight leg raising, absent left ankle jerk and inability to sit still.

18 Therefore, the Court concludes that this matter requires further administrative
19 development and is reversed and remanded pursuant to sentence four of 42 U.S.C. §
20 405(g) to the Acting Commissioner for further consideration consistent with this order.
21 Following remand of this matter, the ALJ should be sure to evaluate functional
22 assessments from plaintiff's treating providers with respect to the period of time both
23 before and after her 2013 surgery.

BACKGROUND

Plaintiff, MELISSA A. CHICK, was born in 1978 and was 32 years old on the alleged date of disability onset of February 15, 2011. *See* AR. 259-60, 261-69. Plaintiff has at least a 12th grade education. AR. 49.

According to the ALJ, plaintiff has at least the severe impairments of “lumbar stenosis and herniation, status post laminectomy; neck strain, status post C-6 fracture; polysubstance abuse; post-traumatic stress disorder (PTSD); anxiety disorder; and depressive disorder (20 CFR 404.1520(c) and 416.920(c)).” AR. 22.

At the time of the hearing, plaintiff was living with her parents in their home. AR. 48-49.

PROCEDURAL HISTORY

Plaintiff's applications for disability insurance benefits ("DIB") pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and following reconsideration. *See* AR. 20. Plaintiff's requested hearing was held before Administrative Law Judge Joanne E. Dantonio ("the ALJ") on November 19, 2014. *See* AR. 41-106. On April 28, 2015, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 17-40.

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ err by rejecting all of the opinions about plaintiff's ability to perform the sitting and standing required for sedentary work, and then substituting her opinion for that of a

1 doctor and formulating a RFC which lacks the support of physicians or other experts; and
2 (2) Did the ALJ err by failing to develop the record when she rejected all of the medical
3 opinions in evidence about plaintiff's back impairments. *See* Dkt. 14, p. 1.

4 STANDARD OF REVIEW

5 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
6 denial of social security benefits if the ALJ's findings are based on legal error or not
7 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
8 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
9 1999)).

10 DISCUSSION

11 (1) **Did the ALJ err by rejecting all of the opinions about plaintiff's ability
12 to perform the sitting and standing required for sedentary work, and
13 then substituting her opinion for that of a doctor and formulating a
14 RFC which lacks the support of physicians or other experts?**

15 Plaintiff contends that "the ALJ ignored the nature of plaintiff's back impairment,"
16 citing medical literature indicating that cervical or lumbar radiculopathy may result in the
17 inability to sit for prolonged periods of time. *See* Dkt. 14, p. 6 (citations omitted). Among
18 other arguments, plaintiff indicates that the "assignments of error in this case pertain to
19 plaintiff's abilities to perform the sitting, standing and walking for sedentary work." Dkt.
20 16, p. 3. Plaintiff contends that "the ALJ ignored the opinion of treating Dr. Geere that
21 plaintiff is unable to sit still with severe back and leg pain," and failed to note objective
22 findings in support of plaintiff's limitations with respect to sitting, standing, and walking,
23 including plaintiff's limited left straight leg raising and absent left ankle jerk. Dkt. 14, pp.
24

1 5, 10 (citing AR. 636). Defendant responds that ALJs are not required to discuss every
2 functional limitation within a medical opinion and provide rationale for failing to reject
3 such limitation, further noting that even if the ALJ must consider the evidence, she does
4 not necessarily need to mention it in her decision. Dkt. 15, p. 5.

5 The Commissioner “may not reject ‘significant probative evidence’ without
6 explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent v.*
7 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700,
8 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for disregarding
9 [such] evidence.” *Flores, supra*, 49 F.3d at 571. For example, “an ALJ cannot in its
10 decision totally ignore a treating doctor and his or her notes, without even mentioning
11 them.” *Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015) (citing *Garrison v.*
12 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)).

14 Here, although the ALJ in her decision did not totally ignore the notes from
15 treating physician Dr. Geere, the ALJ did fail to mention aspects of Dr. Geere’s opinion
16 pertaining to plaintiff’s physical impairments, including observations and limitations that
17 support the doctor’s opinion. *See AR. 31-32.* Dr. Linda Geere, M.D., plaintiff’s treating
18 physician since December, 2012, indicated that her opinion regarding plaintiff’s
19 limitations was based on plaintiff’s interactions with the staff, as well as plaintiff’s
20 inability to sit still. *See AR. 636.* She also indicated that her assessment was supported by
21 plaintiff’s limited left straight leg raising, absent left ankle jerk and extreme fidgeting, in
22 addition to plaintiff’s anxiety. *See id.*

1 When failing to credit fully the treating physician's opinion, the ALJ did not
2 mention the treating physician's opinion regarding plaintiff's inability to sit still, or that
3 her assessment was supported by plaintiff's limited left straight leg raising, absent left
4 ankle jerk and extreme fidgeting. *See AR. 31-32.* Defendant contends that the ALJ did
5 not need to reference these observations of the treating physician because they were not
6 significant probative evidence that needed to be discussed, because the observations of
7 difficulties with left straight leg raising, absent left ankle jerk and extreme fidgeting, and
8 the physician's opinion that plaintiff cannot sit still "were not sufficiently probative to
9 merit discussion in the ALJ's decision." Dkt. 15, p. 6.

10
11 Defendant appears to imply that these observations and opinion from the treating
12 physician are not sufficiently probative because they are listed in a mental questionnaire
13 form. *See id.* Although it is true that context is relevant when determining whether or not
14 particular evidence is significant and probative, this determination must be made in the
15 context of the decision and the record as a whole. The context here concludes the ALJ's
16 rejection of the opinion of the occupational therapist that plaintiff suffered from a
17 "decreased tolerance for sustained sitting, standing or walking." *See AR. 921.* The
18 occupational therapist performed extensive testing of plaintiff's abilities, noting that
19 plaintiff "did not demonstrate the ability to perform work activities for more than two
20 hours in an eight hour day." *See AR. 919-21.*

21
22 The ALJ completely rejected the opinions of the occupational therapist, Julie
23 Milasich, OTR/L, CHT, in large part based on plaintiff's use of hyperbole when
24 discussing her pain. *See AR. 30* (e.g., noting that plaintiff reported "constant" and

1 “terrible” pain, and being “in agony”). In doing so, the ALJ relied on purported
2 inconsistencies in plaintiff’s presentation that are not supported by substantial evidence in
3 the record as a whole. For example, the ALJ indicates that “Ms. Milasich herself noted
4 that the claimant’s performance [on] the Jamar dynamometer grip test indicated ‘less than
5 full effort,’” but fails to recognize that Ms. Milasich indicated that although no “bell-
6 shape curve was seen, indicating less than full effort, [] a less than stable sitting posture
7 (due to pain) may have affected client’s performance.” AR. 30, 920; *see also* AR. 30, 906
8 (the ALJ noted that plaintiff “reported that she can exercise without pain,” when plaintiff
9 actually indicated “that sometimes she can exercise without pain, but has not exercised in
10 a week”).

12 When failing to credit fully the opinions of the occupational therapist, the ALJ
13 also relied on plaintiff’s daily living activities. *See* AR. 30. However, Ms. Milasich
14 opined that plaintiff suffered from “decreased tolerance for sustained sitting, standing or
15 walking,” and the activities of daily living noted by the ALJ, such as performing light
16 household chores, preparing simple meals, watching television, going shopping in stores,
17 and regularly using the computer, easily can be performed intermittently with breaks, and
18 do not require sustained sitting, standing or walking. *See* AR. 29. Therefore, the ALJ’s
19 finding of an inconsistency is not based on substantial evidence in the record as a whole.
20 The opinions of Ms. Milasich, and her detailed evaluation of plaintiff, should be
21 evaluated further following remand of this matter.

23 Importantly, when rejecting the opinions of Ms. Milasich, the ALJ implies that
24 Ms. Milasich relied heavily on plaintiff’s subjective reporting. However, the ALJ engages

1 in little discussion of Ms. Milasich's extensive testing of plaintiff, including testing of
2 plaintiff's range of motion, muscle strength, grip strength, lifting ability, carrying ability,
3 pushing/pulling ability, and positional testing. *See* AR. 30, 919-21. Although a key issue
4 in this case is plaintiff's ability to sit, stand, or walk, and to sustain these positions, the
5 ALJ did not note relevant observations of Ms. Milasich such as that during "the intake
6 interview, [plaintiff] consistently sat with minimal to no weight through her left hip [and]
7 sat for approximately 10 minutes at a time, and alternated several times between sitting
8 and standing or shifted positions while sitting;" and that plaintiff stood during the
9 evaluation "for approximately five minutes, with frequent shifts and posture, and using
10 her upper extremities for weight-bearing." AR. 920-21; *see also* AR. 30.
11

12 In light of the ALJ's failure to discuss Ms. Milasich's observations, the additional
13 failure by the ALJ to mention the substantiation of Ms. Milasich's opinions and
14 observations provided by plaintiff's treating physician is problematic and suggests that
15 the record needs more development. For the reasons stated and based on the record as a
16 whole, the Court concludes that the ALJ erred by failing to discuss significant probative
17 evidence. *See Flores, supra*, 49 F.3d at 571. This finding is buttressed by the
18 observations of plaintiff's primary care doctor following her surgery that plaintiff's "very
19 large L5-S1 left-sided disc herniation causing severe lateral recess stenosis [] appears
20 even larger than her preoperative disc," and presented as "an acute herniation on the
21 MRI." AR. 882.
22

23 Like the observations of Dr. Geere, plaintiff's treating physician, Dr. Tarun
24 Tandon, M.D., who saw plaintiff based on a referral from her primary care physician,

1 similarly observed positive straight leg raise on the left with dermatome distribution in
2 the lower leg and an absent ankle reflex on the left. *See AR. 933.* He also observed
3 plaintiff's antalgic gate favoring her left leg, and her abnormal sensation to touch and
4 pinprick, reduced in the left L4, and increased in the S1 distribution. *See id.* Dr. Tandon
5 assessed plaintiff with post laminectomy syndrome, with recurrent L5-S1 herniated disc,
6 among other impairments. *See id.* Dr. Tandon's observations are substantially similar to
7 the observations from plaintiff's treating physician that were not noted by the ALJ and
8 demonstrate that the observations from plaintiff's treating physician are significant
9 probative evidence that need to be addressed by the ALJ. These additional medical
10 records also demonstrate that further evaluation of plaintiff's physical impairments is
11 required.

13 The Court also concludes that the error by the ALJ in failing to discuss significant
14 probative evidence 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
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1 *Marsh*, even though “the district court gave persuasive reasons to determine
2 harmlessness,” 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, the ALJ failed to take note of the observations of plaintiff’s treating
7 physician regarding plaintiff’s physical impairments, including examination findings of
8 positive left straight leg raise, absent ankle reflex, extreme fidgeting and inability to sit.
9 Fully crediting these observations likely would result in increased weight being given by
10 a reasonable ALJ to the opinion by occupational therapist, Ms. Milasich, that plaintiff
11 suffered from decreased tolerance for sustained sitting, standing or walking. This would
12 affect plaintiff’s residual functional capacity (“RFC”) and could lead to a finding of
13 disability. Therefore, the Court cannot conclude with confidence ““that no reasonable
14 ALJ, when fully crediting the [ignored evidence], could have reached a different
15 disability determination.”” *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at 1055-56).

17 (2) **Did the ALJ err by failing to develop the record when she rejected all
18 of the medical opinions in evidence about plaintiff’s back
19 impairments?**

20 The Court already has concluded that the ALJ erred when evaluating the medical
21 evidence, specifically as it relates to plaintiff’s sitting, standing and walking abilities, as
22 well as her back impairments *see supra*, section 1. All of the significant probative
23 evidence in the record should be discussed by the ALJ following remand of this matter.
24 The ALJ should take care to assess, or acquire if necessary, specific functional

1 assessments from plaintiff's treating providers regarding the period of time both before
2 and after her 2013 surgery.

3 CONCLUSION

4 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
5 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
6 405(g) to the Acting Commissioner for further consideration consistent with this order.

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

8 Dated this 25th day of July, 2017.

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12 J. Richard Creatura
13 United States Magistrate Judge
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