

JAN 14 2008

Donathan v. Astrue, No. 05-35986CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GRABER, Circuit Judge, dissenting:

I respectfully dissent.

At step two of the sequential evaluation process, the administrative law judge ("ALJ") found that Claimant's fibromyalgia constitutes a "severe" impairment. At the same time, however, and somewhat inconsistently, at step four the ALJ rejected the opinions of Dr. Rice and Dr. Hudson, two of Claimant's treating physicians, concerning the extent of Claimant's resulting limitations. See 20 C.F.R. § 404.1502 (defining "treating" sources); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (describing a treating physician as one "employed to cure" (internal quotation marks omitted)).

To reject a treating physician's opinion, an ALJ must provide "specific and legitimate" reasons, and a treating physician's medical opinion is entitled to deference and some weight even if it is inconsistent with other substantial evidence in the record. Holohan v. Massanari, 246 F.3d 1195, 1202-03 (9th Cir. 2001) (internal quotation marks omitted). The ALJ provided specific reasons here, but those reasons are not "legitimate" as a matter of law, and the ALJ failed to accord the treating physicians' opinions the weight that our precedent demands.

The ALJ rejected the opinions of Dr. Rice and Dr. Hudson in part because, according to the ALJ, they adopted Dr. Hill's initial preliminary diagnosis without

independent corroboration. That reason is not supported by the record. Both Dr. Rice and Dr. Hudson conducted separate, independent examinations before concluding that Claimant suffers from fibromyalgia. Additionally, after diagnosis, and both before and after the alleged onset date, Drs. Rice and Hudson monitored, examined, and treated Claimant without altering their consistent diagnoses. See 20 C.F.R. § 404.1527(d)(2)(i)-(ii) (providing that the length of the treatment relationship and the consistency of diagnosis should be weighed). Moreover, Dr. Hudson is a rheumatologist—the only such specialist to have examined and treated Claimant—and "[r]heumatology is the relevant specialty for fibromyalgia." Benecke v. Barnhart, 379 F.3d 587, 594 n.4 (9th Cir. 2004). That being so, his specialized knowledge deserved special deference, id., which the ALJ manifestly did not grant.

Having faulted Drs. Rice and Hudson for relying on Dr. Hill's earlier opinion, the ALJ further erred by improperly performing his own medical research, outside the record, and purporting to draw his own medical conclusions to discount Dr. Hill's initial diagnostic opinion. The decision referred repeatedly to the failure of the medical records to contain the "necessary diagnostic verification specified by the American College of Rheumatology," an ironic reference in view of the ALJ's refusal to credit fully the medical opinion of the only rheumatologist who

actually examined and treated Claimant. The ALJ went so far as to assert, without a basis in the record itself, that Claimant's medical records were deficient for failure to show "longitudinal diagnostic criteria identified by the American College of Rheumatology such as a chronic low-grade fever of at least 3 months['] duration." Because an ALJ is not a medical expert, the ALJ may not go "outside the record to medical textbooks for the purpose of making his own exploration and assessment as to claimant's physical condition." Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975). The ALJ here erred by doing just what Day forbids. That error of law is not harmless because the ALJ relied largely on his own impermissible medical fact-finding outside the record to conclude that Dr. Hill's original opinion was unreliable, and then compounded the error by declaring the opinions of Drs. Rice and Hudson to be unreliable because they relied (in part) on Dr. Hill's opinion.

In my view, these errors of law require that we remand the case for reconsideration. The ALJ's obvious suspicion of fibromyalgia as a proper medical diagnosis pervades the decision. Accordingly, I would remand for reconsideration before a different ALJ.