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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. TOLLSTAM,

Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant - Appellee.

No. 07-56660

D.C. No. CV-06-00807-RTB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted June 5, 2009
Pasadena, California

Before: W. FLETCHER, CLIFTON and M. SMITH, Circuit Judges.

Plaintiff-Appellant Robert E. Tollstam appeals the district court's grant of summary judgment to Defendant-Appellee Commissioner Michael J. Astrue, affirming Tollstam's denial of disability benefits. We have jurisdiction under 28 U.S.C. § 1291 and we reverse.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Because the parties are familiar with the facts, we do not recite them here except as necessary to explain our decision. We set aside the administrative denial of benefits when it is not supported by substantial evidence or is based on legal error. *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). It is legal error to reject the opinion of a treating physician, when it is contradicted by the opinion of an examining physician, without giving “specific, legitimate reasons for doing so that are based on substantial evidence in the record.” *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). In this case, the ALJ did not set forth specific and legitimate reasons based on substantial record evidence for rejecting Dr. Khoury’s testimony that Tollstam is only capable of functioning “3-4 hours per day.” Moreover, the ALJ did not directly identify any conflicting medical opinions as a reason for rejecting Dr. Khoury’s assessment.

Accordingly, we reverse the district court’s ruling and remand the case for further proceedings consistent with this ruling.

REVERSED and REMANDED.