

O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DARCY LOU SUTHERLAND,)	Case No. CV 08-08610-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Darcy Lou Sutherland seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance ("SSDI") benefits and Supplemental Security Income ("SSI") benefits. For the reasons set forth below, the decision of the Administrative Law Judge ("ALJ") is affirmed.

I. Background

Plaintiff filed her application for SSDI and SSI benefits on March 22, 2006, alleging disability as of August 26, 2005 due to a protruding disc in her lower back. (Administrative Record ("AR") at 8, 134-137, 138-143, 153.) Plaintiff was born on August 24, 1956 and was 50 years

1 old at the time of her application. (AR at 8, 134.) She completed high
2 school, and has been employed as a sales associate, secretary, and
3 ticket seller. (AR at 15, 33, 154.)

4 Plaintiff's application was denied initially on August 4, 2006 and
5 upon reconsideration on January 4, 2007. (AR at 74-78, 80-84.) An
6 administrative hearing was held on June 9, 2008 before ALJ Joseph D.
7 Schloss. (AR at 19-38.) Medical expert Dr. Arthur Laurber (AR at 19-32)
8 and vocational expert ("VE") Sandra Fioretti (AR at 33-37) also
9 testified at the administrative hearing.

10 On August 5, 2008, ALJ Schloss denied Plaintiff's applications for
11 benefits. (AR at 8-16.) The ALJ found that Plaintiff had not engaged in
12 substantial gainful activity since the alleged onset date of August 25,
13 2006. (AR at 10.) The ALJ further found that Plaintiff had the severe
14 impairments of degenerative disc disease of the lumbar and cervical
15 spine and bilateral carpal tunnel syndrome. 20 C.F.R. 416.920(c). (AR at
16 11.) However, the ALJ determined that Plaintiff's impairments did not
17 meet and were not medically equal to, one of the listed impairments in
18 20 C.F.R., Part 404, Subpart P, Appendix 1. (AR at 12.) The ALJ also
19 determined that Plaintiff retained the residual functional capacity
20 ("RFC") to perform light work with the following limitations: Plaintiff
21 "cannot climb ladders, ropes, or scaffolds. She can occasionally climb
22 stairs/ramps, balance and crawl. Because of mild bilateral carpal tunnel
23 syndrome, she can frequently finger and handle. She cannot work around
24 dangerous, moving machinery." (AR at 12.) The ALJ determined that
25 Plaintiff was able to perform her past relevant work as a sales
26 associate, secretary and ticket seller. (AR at 15.) Therefore, the ALJ
27 concluded that Plaintiff was not disabled within the meaning of the
28 Social Security Act. 20 C.F.R. § 416.920(f). (Id.)

1 The Appeals Council denied review (AR at 1-3), and Plaintiff timely
2 commenced this action for judicial review. On September 8, 2009, the
3 parties filed a Joint Stipulation ("Joint Stp.") of disputed facts and
4 issues. Plaintiff contends that the ALJ erred by: (1) failing to
5 properly consider the Plaintiff's RFC; and (2) failing to properly
6 determine whether Plaintiff could perform her past relevant work. (Joint
7 Stp. at 5.) Plaintiff seeks remand for a new administrative hearing.
8 (Joint Stp. at 41-42.)

9
10 **II. Standard of Review**

11 Under 42 U.S.C. § 405(g), a district court may review the
12 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
13 decision must be upheld unless "the ALJ's findings are based on legal
14 error or are not supported by substantial evidence in the record as a
15 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*
16 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
17 such evidence as a reasonable person might accept as adequate to support
18 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
19 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
20 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
21 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
22 evidence supports a finding, the reviewing court "must review the
23 administrative record as a whole, weighing both the evidence that
24 supports and the evidence that detracts from the Commissioner's
25 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
26 the evidence can support either affirming or reversing the ALJ's
27 conclusion," the reviewing court "may not substitute its judgment for
28 that of the ALJ." *Robbins*, 466 F.3d at 882.

1 **III. Discussion**

2 **A. The Residual Functional Capacity Determination Was Supported**
3 **By Substantial Evidence**

4 Plaintiff contends that the ALJ failed to properly formulate her
5 RFC. (Joint Stp. at 6.) More specifically, Plaintiff argues that the ALJ
6 erred in finding that she was able to frequently finger and handle
7 objects. (AR at 12.) Plaintiff contends that, in determining her RFC,
8 the ALJ improperly evaluated the medical evidence and improperly found
9 that she was not fully credible regarding her subjective complaints.
10 (Joint Stp. at 11-13.)

11 A claimant's RFC is what she is capable of doing despite her
12 physical and mental limitations. 20 C.F.R. § 404.1545(a)(1); *Cooper v.*
13 *Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "RFC is an assessment
14 of an individual's ability to do sustained work-related physical and
15 mental activities in a work setting on a regular and continuing basis."
16 SSR 96-8p, 1996 WL 374184, at *1 (S.S.A. July 2, 1996).¹ An RFC
17 assessment is ultimately an administrative finding reserved to the
18 Commissioner. 20 C.F.R. § 404.1527(e)(2). However, an RFC determination
19 is based on all of the relevant evidence, including the diagnoses,
20 treatment, observations, and opinions of medical sources, such as
21 treating and examining physicians. *Id.*

22 The ALJ correctly determined that Plaintiff was able to perform
23 light work and, while minimally limited because of mild bilateral carpal
24

25
26 ¹ "The Secretary issues Social Security Rulings to clarify the
27 Secretary's regulations and policy Although SSRs are not published
28 in the federal register and do not have the force of law, [the Ninth
Circuit] nevertheless give[s] deference to the Secretary's
interpretation of its regulations." *Bunnell v. Sullivan*, 947 F.2d 341,
346 n.3 (9th Cir. 1991) (en banc).

1 tunnel syndrom, that she was able to frequently finger and handle
2 objects. (AR at 12.) In doing so, the ALJ noted that the medical
3 evidence in the record, including the opinions of Plaintiff's treating
4 physicians, showed that Plaintiff had only mild radiculopathy and
5 minimal bilateral carpal tunnel syndrome. (AR at 13, 218, 233.)

6 In making this finding, the ALJ relied on the opinion of the
7 consultative examining physician, who determined that Plaintiff retained
8 the capacity to frequently finger and handle. In an orthopedic
9 consultative examination conducted on June 28, 2006, Dr. Herbert Johnson
10 determined that, based on mild carpal tunnel syndrom in her left hand,
11 Plaintiff's manipulative activities, such as handling and fingering,
12 would be limited in her left hand to frequently. (AR at 14, 197.) It was
13 proper for the ALJ to rely on the opinion of the examining physician in
14 determining Plaintiff's RFC. See *Andrews v. Shalala*, 53 F.3d 1035, 1041
15 (9th Cir. 1995) (holding that the opinion of an examining physician may
16 constitute substantial evidence where it is based on independent
17 clinical findings).

18 The ALJ also properly relied upon the opinion of the testifying
19 medical expert, Dr. Laurber, and the reviewing state agency physicians.
20 (AR at 14.) After hearing Plaintiff's testimony and reviewing the
21 medical record, Dr. Laurber concluded that Plaintiff had only mild
22 radiculopathy and could therefore perform light work. (AR at 14, 21.)
23 The state agency physicians determined that Plaintiff could perform
24 light work, including "frequent handling and fingering with [her] left
25 hand due to probable carpal tunnel syndrome." (AR at 14, 212, 223.) As
26 the ALJ correctly noted, the opinions of the state agency reviewing
27 physicians were consistent with that of the orthopedic consultative
28 examiner, the medical expert, and the medical evidence in the record.

1 (AR at 15.) See *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002)
2 ("The opinions of non-treating or non-examining physicians may also
3 serve as substantial evidence when the opinions are consistent with
4 independent clinical findings or other evidence in the record.").

5 The ALJ also found that Plaintiff was not wholly credible regarding
6 her subjective complaints. This finding was also supported by
7 substantial evidence. At the orthopedic consultative examination, Dr.
8 Johnson found evidence of symptom magnification and exaggerated pain.
9 (AR at 13, 193, 195.) Dr. Johnson also deemed Plaintiff's reliability to
10 be less than average in that she had very poor recall of specific dates
11 and she was very vague as to the onset and nature of her back
12 complaints. (AR at 193.) See *Tonapetyan*, 242 F.3d at 1148 (holding that
13 the ALJ may use "ordinary techniques of credibility evaluation," such as
14 considering any inconsistent statements in a claimant's testimony); see
15 also 20 C.F.R. § 404.1529(c)(4) (providing for consideration of whether
16 there are any conflicts between a claimant's statements and the rest of
17 the evidence).

18 The ALJ also appropriately relied on Plaintiff's conservative
19 treatment and her activities of daily living in discounting her claim of
20 disabling pain. The ALJ noted that Plaintiff only occasionally takes
21 non-prescription medication for pain and is not receiving any other
22 treatment. (AR at 13, 43-44.) It was also noted that Plaintiff's
23 treating physician did not consider surgery necessary. (AR at 13, 219.)
24 See *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989) (finding that the
25 claimant's allegations of persistent, severe pain and discomfort were
26 belied by "minimal conservative treatment"). Finally, he ALJ properly
27 noted that Plaintiff could prepare food, do household chores, and drive.
28 (AR at 12-13, 189.) See *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir.

1 1990) (finding that the claimant's ability to "take care of her personal
2 needs, prepare easy meals, do light housework and shop for some
3 groceries ... may be seen as inconsistent with the presence of a
4 condition which would preclude all work activity") (citing *Fair*, 885
5 F.2d at 604).

6 Accordingly, I find that the ALJ's determination that Plaintiff
7 retained the RFC to perform light work was supported by substantial
8 evidence and that no relief is warranted on this claim of error.

9 **B. The ALJ's Finding that Plaintiff Is Capable of Performing Her**
10 **Past Relevant Work is Supported By the Record**

11 Plaintiff next claims that the ALJ erred in finding that Plaintiff
12 was capable of performing her past relevant work as a sales associate,
13 secretary and ticket seller. (Joint Stp. at 27.) However, this finding
14 is also supported by substantial evidence.

15 Plaintiff "bears the initial burden of establishing disability by
16 showing that a physical or mental impairment prevents [her] from
17 engaging in any of [her] previous occupations." *Allen v. Secretary of*
18 *Health & Human Serv.*, 726 F.2d 1470, 1472 (9th Cir. 1984). It is
19 Plaintiff's burden to prove that she cannot return to her former *type* of
20 work, not just to her former job. *Villa v. Heckler*, 797 F.2d 794, 798
21 (9th Cir. 1986). A claimant is not disabled if she can perform the
22 duties of her past relevant work. See 20 C.F.R. § 404.1520(f).

23 The ALJ's findings under step four of the sequential evaluation
24 process, as well as other evidence in the record, supports the ALJ's
25 determination that Plaintiff is capable of performing her past relevant
26 work. First, the ALJ properly relied on the testimony of the VE in
27 finding that, because she retained the RFC to perform light work,
28 including frequent fingering and handling, Plaintiff was capable of

1 performing her past relevant work as a sales associate, secretary and
2 ticket seller. (AR at 15, 33-34.) The hypothetical that the ALJ posed to
3 the VE incorporated all of the relevant medical evidence in the record
4 as well as the requirements of Plaintiff's past relevant work as a sales
5 clerk, secretary and ticket seller. (AR at 33.) Based on the
6 hypothetical, the VE determined that Plaintiff was capable of performing
7 her past relevant work. (AR at 33-34.) The ALJ was entitled to rely on
8 the vocational expert in reaching his disability determination. See 20
9 C.F.R. § 416.960(b)(2) (ALJ may rely on a vocational expert's "expertise
10 and knowledge concerning the physical and mental demands of a claimant's
11 past relevant work, either as the claimant actually performed it or as
12 generally performed").

13 The ALJ also appropriately relied on the medical evidence, as well
14 as the opinions of the examining consultative physician, the medical
15 expert and the State Agency physicians, in determining that Plaintiff's
16 limitations would not prevent her from performing her past work,
17 including work requiring frequent fingering and handling.

18 Finally, contrary to Plaintiff's contention, the ALJ was not
19 required to provide a Dictionary of Occupational Titles ("DOT") citation
20 for her past relevant work. The regulations provide that the ALJ *may* use
21 the services of a VE or other resources, such as the DOT, but do not
22 require the ALJ to do so. 20 C.F.R. § 404.1560(b)(2).

23 For all of these reasons, I find that the ALJ's conclusion that
24 Plaintiff can perform her past work is supported by substantial evidence
25 in the record.

26 //

27 //

28 //

1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Social Security
3 Commissioner is **AFFIRMED**.

4
5 DATED: September 18, 2009



6
7
8 Marc L. Goldman
United States Magistrate Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28