UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CYNTHIA CURRY, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner, Social Security Administration, Defendant.	No. CV 09-4415 CW DECISION AND ORDER

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned magistrate judge. Plaintiff seeks review of the denial of disability benefits. The court finds that judgment should be granted in favor of defendant, affirming the Commissioner's decision.

I. BACKGROUND

Plaintiff Cynthia Curry was born on May 20, 1956, and was fifty-two years old at the time of her administrative hearing. [Administrative Record ("AR") 84.] She has a high school education with some college education, and past relevant work as a school bus

driver and in-home caretaker. [AR 104, 394, 440.] Plaintiff alleges disability on the basis of emphysema, chronic obstructive pulmonary disease ("COPD"), chronic tendinitis, and high blood pressure. [AR 95.]

II. PROCEEDINGS IN THIS COURT

Plaintiff's complaint was lodged on June 19, 2009, and filed on June 24, 2009. On December 2, 2009, Defendant filed an Answer and Plaintiff's Administrative Record. On May 4, 2010, the parties filed their Joint Stipulation ("JS") identifying matters not in dispute, issues in dispute, the positions of the parties, and the relief sought by each party. This matter has been taken under submission without oral argument.

III. PRIOR ADMINISTRATIVE PROCEEDINGS

Plaintiff applied for a period of disability and disability insurance benefits ("DIB") on May 15, 2001, alleging disability since April 26, 2001. [AR 84.] Plaintiff was insured for DIB purposes until September 1, 2004; accordingly, she must establish disability on or before this date. After Plaintiff's application was denied initially and on reconsideration, Plaintiff requested an administrative hearing, which was held on April 12, 2002, before Administrative Law Judge James Paisley ("ALJ Paisley") (the "2002 Hearing"). [AR 62-65, 390-423.] Plaintiff appeared with counsel and gave testimony. [AR 390-423.] ALJ Paisley denied benefits in a decision issued on September 16, 2002 (the "2002 Decision"). [AR 327-32.] Plaintiff requested review of the decision by the Appeals Council, which remanded the case to an administrative law judge on March 18, 2004. [AR 348-49.] The Appeals Council ordered the administrative law judge to further consider Plaintiff's residual

functional capacity and if warranted, obtain supplemental evidence from a vocational expert. [AR 349.]

On October 12, 2005, a second administrative hearing was held before Administrative Law Judge Edward Schneeberger ("ALJ") (the "2005 Hearing"). [AR 424-69.] Plaintiff appeared with counsel and testified. [Id.] The ALJ denied benefits in a decision issued on February 9, 2006 (the "2006 Decision"). [AR 21-26.] When the Appeals Council denied review on August 17, 2006, the ALJ's decision became the Commissioner's final decision. [AR 7-9.] On October 18, 2006, Plaintiff filed a complaint in the United States District Court, Central District of California (Case No. CV 06-6543 CW), appealing the 2006 Decision denying benefits. [AR 487.] During the pendency of her appeal, Plaintiff filed a duplicate application on February 7, 2007. [AR 497.] On September 11, 2007, this Court issued a Decision and Order finding that specific and legitimate reasons were not provided to discount treating medical evidence and remanding the matter for further administrative proceedings (the "2007 Remand Order"). [AR 485-94.] On September 27, 2007, the Appeals Council issued an order remanding the matter to an administrative law judge for further proceedings consistent with the 2007 Remand Order. [AR 497-98.] The Appeals Council also directed the administrative law judge to associate both of Plaintiff's claim files and issue a new decision on the associated claims. [Id.]

On September 23, 2008, a third administrative hearing was held before the ALJ. [AR 539-65.] Plaintiff appeared with counsel and testified. [Id.] On March 19, 2009, the ALJ denied benefits. [AR 473-83.] The Appeals Council denied review and the ALJ's decision became the Commissioner's final decision.

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The Commissioner's (or ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21; see also Osenbrock, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the

claimant from engaging in substantial gainful activity and which is expected to result in death or to last for a continuous period of at least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

Disability claims are evaluated using a five-step test:

> Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
> Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.
> Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.
> Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.
> Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20 C.F.R. §§ 404.1520, 416.920. If a claimant is found "disabled" or "not disabled" at any step, there is no need to complete further steps. Tackett, 180 F.3d 1098; 20 C.F.R. §§ 404.1520, 416.920.

Claimants have the burden of proof at steps one through four, subject to the presumption that Social Security hearings are non-adversarial, and to the Commissioner's affirmative duty to assist claimants in fully developing the record even if they are represented by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at 1288. If this burden is met, a prima facie case of disability is made, and the burden shifts to the Commissioner (at step five) to

prove that, considering residual functional capacity ("RFC")[1], age, education, and work experience, a claimant can perform other work which is available in significant numbers. Tackett, 180 F.3d at 1099-1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520, 416.920.

B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE

Here, the ALJ found that Plaintiff had not engaged in substantial gainful activity from April 26, 2001, the filing date of Plaintiff's application, through September 1, 2004, the date last insured (step one); that Plaintiff had the "severe" impairments of asthma and sleep apnea (step two); and that Plaintiff did not have an impairment or combination of impairments that met or equaled a "listing" (step three). [AR 475-76.] The ALJ determined that Plaintiff had an RFC enabling her to lift, carry, push or pull no more than ten pounds frequently and twenty pounds occasionally, stand or walk for up to two hours in an eight-hour workday, and sit for up to six hours in an eight-hour workday. [AR 476.] Plaintiff was restricted from more than occasional climbing, stooping, bending, crouching, and crawling and needed to avoid even moderate exposure to fumes, odors, dust, gases, and poor ventilation. [Id.] Plaintiff was unable to perform her past relevant work (step four). [AR 481.] Based on testimony from the vocational expert, it was determined that Plaintiff could perform certain jobs existing in significant numbers in the national economy, including telephone quote clerk, charge account clerk, and

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[1] Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1156 n.7; 20 C.F.R. § 404.1569a(c).

call out operator (step five). [AR 481-82.] Accordingly, Plaintiff was found not "disabled" as defined by the Social Security Act. [AR 482.]

C. ISSUES IN DISPUTE

The parties' Joint Stipulation identifies the following disputed issues:

1. Whether the ALJ properly considered the opinion of treating physician, Dr. Brian Korotzer; and
2. Whether the ALJ properly considered Plaintiff's testimony.

[JS 3-4.]

D. ISSUE ONE: TREATING PHYSICIAN'S OPINION PERTAINING TO RESIDUAL FUNCTIONAL CAPACITY

Background

Dr. Brian Korotzer, a pulmonologist, was one of Plaintiff's treating physicians during the period relevant for her disability claim. [See, e.g., AR 200, 302.] Dr. Korotzer treated Plaintiff since June 2001. [AR 373.]

Dr. Korotzer did not submit an opinion for consideration by ALJ Paisley prior to the 2002 Decision. Despite not submitting a formal opinion, the opinion of Dr. Cohenzadeh, a State Agency review physician, strongly suggests that it incorporated Dr. Korotzer's opinion. On September 7, 2001, Dr. Cohenzadeh completed a Physical Residual Functional Capacity Assessment. [AR 288-95.] Dr. Cohenzadeh opined that Plaintiff could occasionally lift and/or carry twenty pounds, frequently lift and/or carry ten pounds, stand or walk for at least two hours in an eight-hour workday, and sit for six hours in an eight-hour workday. [AR 289.] As support for his conclusions, Dr. Cohenzadeh indicated that he reached this RFC "after discussion with"

Dr. Korotzer and that he gave the opinion of Dr. Korotzer greater weight than that of the consultative examiner. [AR 289, 294.]

On September 20, 2005, Dr. Korotzer completed a Pulmonary Residual Functional Capacity Questionnaire ("2005 Opinion"), which Plaintiff submitted to the ALJ upon remand of the 2002 Decision. [AR 373-77.] Dr. Korotzer opined that Plaintiff could sit for at least six hours in an eight-hour workday, stand or walk for less than two hours in an eight-hour work day, and rarely lift more than ten pounds. [AR 375.] Dr. Korotzer wrote that Plaintiff had three to four asthma attacks a year, each of which would incapacitate her for several weeks on average. [AR 374.] Dr. Korotzer indicated that he did not know whether Plaintiff would need unscheduled breaks or how many days Plaintiff would likely be absent from work each month due to her impairments. [AR 375-76.] In the 2006 Decision, the ALJ adopted Dr. Cohenzadeh's opinion and rejected Dr. Korotzer's 2005 Opinion. [AR 24.]

After remand of the 2006 Decision, Plaintiff submitted another opinion by Dr. Korotzer, dated October 15, 2002[2] (the "2002 Opinion"). [525-28.] Dr. Korotzer opined that Plaintiff could sit for at least six hours in an eight-hour work day, stand or walk for less than two hours out of an eight-hour workday, occasionally lift no more than ten pounds, and would require several unscheduled breaks. [AR 527.] Dr.

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[2] There is dispute as to the date of this opinion. Although the date next to the signature appears to be October 15, **2002**, Plaintiff argues that it was actually written on October 15, **2007**, based on comparisons with other samples of Dr. Korotzer's writing and his "admittedly sloppy" penmanship. [JS 7, n.1.] However, Plaintiff's counsel stated during the latest administrative hearing that the opinion was completed in 2002. [AR 543 (citing Exhibit B19F (AR 525-28)).] In the administrative decision, the ALJ evaluated the opinion as if it was completed in 2002. [AR 480.]

Korotzer estimated that Plaintiff would likely be absent more than three times a month due to her impairments.[3] [AR 528.]

The Commissioner's Findings

In his decision, the ALJ noted the opinions of both Dr. Cohenzadeh and Dr. Korotzer. The ALJ accepted Dr. Cohenzadeh's RFC and rejected Dr. Korotzer's more restrictive limitations. [AR 479-80.] In the first claim, Plaintiff asserts that the ALJ did not properly consider the opinion of Plaintiff's treating physician, Dr. Korotzer. [JS 4-12.] Specifically, Plaintiff argues that the ALJ "simply regurgitated" his previous decision and failed to articulate specific and legitimate reasons for discounting the opinion of Dr. Korotzer. [JS 4.]

Discussion

Under the Commissioner's regulations, state agency medical physicians and other program physicians are considered highly qualified experts in the area of Social Security disability evaluations, and their evaluations must be considered by the Commissioner as opinion evidence except for the ultimate determination of disability. 20 C.F.R. §§ 404.1527(f)(2)(I), 416.927(f)(2)(I). However, the opinion of a non-examining physician is normally entitled to less deference than that of an examining and treating physician

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[3] Plaintiff has attached a third opinion from Dr. Korotzer, dated July 16, 2008, and asserts that the ALJ failed to consider it. [JS 7, n.2; see "Exhibit 1".] Upon review of the evidence, however, it appears that the 2008 evaluation is almost identical to the 2002 and 2005 evaluations, and posits no greater limitations. [Compare JS Exhibit 1 and AR 374-75 and AR 525-28.] Accordingly, the ALJ's failure, if any, to consider this opinion was harmless error. See Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006)("We have . . . affirmed under the rubric of harmless error where the mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion").

precisely because of a lack of opportunity to conduct an independent examination and lack of a treatment relationship with the claimant. Benecke v. Barnhart, 379 F.3d 587, 592 (9th Cir. 2004); Andrews v. Shalala, 53 F.3d 1035, 1040-1041 (9th Cir. 1995) (explaining greater weight given to opinions of treating and examining physicians because they have a greater opportunity to know and observe the patient as an individual). Standing alone, the opinion of a non-examining physician cannot constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician. Widmark v. Barnhart, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); Morgan v. Comm'r, 169 F.3d 595, 602 (9th Cir. 1999); see also Erickson v. Shalala, 9 F.3d 813, 818 n. 7 (9th Cir. 1993) ("'[T]he non-examining physicians' conclusion, with nothing more, does not constitute substantial evidence, particularly in view of the conflicting observations, opinions, and conclusions of an examining physician.'")(quoting Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)).

Here, the Commissioner's decision to reject both Dr. Korotzer's 2005 Opinion and 2002 Opinion, specifically the lifting and carrying restriction, was supported by substantial evidence.

The 2005 Opinion

The ALJ provided several specific and legitimate reasons for rejecting the 2005 Opinion and relying on Dr. Cohenzadeh's opinion instead. The ALJ acknowledged that Dr. Korotzer opined greater functional restrictions in his 2005 Opinion than in his discussion

with Dr. Cohenzadeh in 2001[4], but determined that the medical record did not indicate a worsening of Plaintiff's impairment from 2001-2005 that would support the increased lifting restrictions opined by Dr. Korotzer in 2005.[5] [AR 479.]

First, the ALJ noted that Plaintiff's medical history was inconsistent with Dr. Korotzer's opinion. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (finding that inconsistency between an opinion and treatment notes is a specific and legitimate reason for rejection of the opinion). Dr. Korotzer claimed that Plaintiff had three to four asthma attacks a year that would incapacitate her for several weeks at a time. [AR 374, 479.] The ALJ observed, however, that this claim was inconsistent with the medical evidence. The ALJ reasonably noted that were Plaintiff to have had such debilitating attacks, the medical records should indicate increased care and medical attention. [AR 479.] To the contrary, during the relevant period of claimed disability, Plaintiff's medical records indicate that she had two documented overnight hospital stays, two emergency room visits,[6] and otherwise routine care for her asthma. [AR 202, 220, 369, 384, 479.] The second emergency room visit in 2004

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[4] There is no dispute that Dr. Cohenzadeh spoke with Dr. Korotzer and relied on his opinion to formulate his RFC.

[5] Although not mentioned by the ALJ, the Court notes that Plaintiff testified at the 2002 Hearing that she can and does lift fifteen pounds. [AR 397.] This statement is inconsistent with Dr. Korotzer's 2005 Opinion.

[6] Plaintiff inaccurately asserts that "she required emergency care July 16, 2004 due to increase[d] shortness of breath." (JS at 10.) The record indicates, however, that she was directed to the emergency room after a "routine visit to check asthma" with Dr. Korotzer showed that she had an elevated blood pressure. [AR 384-85.] In fact, the record indicates that she had no shortness of breath. [AR at 384.]

was unrelated to Plaintiff's asthma. [AR 384, 479.] Thus, the ALJ reasonably concluded that this level of care was inconsistent with the frequency and duration of asthma attacks proffered by Dr. Korotzer.

Second, the ALJ noted that Plaintiff received primarily routine care for her asthma. [AR 479.] Plaintiff visited Dr. Korotzer approximately ten times over a four-year period, with decreasing frequency in 2003 and 2004. [AR 200, 302, 308-09, 312, 378, 382, 384-85.] During two routine visits in 2003, Dr. Korotzer noted that Plaintiff's asthma was "fairly well-controlled" and "stable." [AR 382-83.] See Bayliss, 427 F.3d at 1216; see also Lusardi v. Astrue, 350 Fed. Appx. 169, 172 (9th Cir. 2009) ("Rejecting an opinion on the basis that it is not supported by the doctor's own treatment notes or by clinical findings is permissible."). Indeed, in 2003, Plaintiff only sought non-routine treatment for her asthma on two occasions. [AR 379, 381.] Further, in 2004, Plaintiff only made one routine visit to Dr. Korotzer regarding her asthma. [AR 385.] The ALJ reasonably determined that there are no other documented medical visits, whether urgent or routine, concerning Plaintiff's asthma that would suggest a need to increase restrictions from those Dr. Korotzer relayed to Dr. Cohenzadeh in 2001. See Reddick, 157 F.3d at 720-21 (requiring the Court to defer to the Commissioner when evidence can reasonably support either affirming or reversing).

Finally, the ALJ also relied on Dr. Cohenzadeh's opinion in formulating his RFC. The ALJ determined that Dr. Cohenzadeh's RFC was based on a review of Plaintiff's medical records and a discussion with Dr. Korotzer. [AR 479.] By all indications, Dr. Cohenzadeh adopted Dr. Korotzer's functional limitations, which were supported by the medical evidence. Contrary to Plaintiff's assertion, however, the ALJ

did not characterize Dr. Cohenzadeh's opinion as Dr. Korotzer's opinion. Rather, the ALJ specifically noted that Dr. Cohenzadeh adopted only the functional limitations opined by Dr. Korotzer and offered his own additional restrictions, including restricting Plaintiff from even moderate exposure to pulmonary irritants. [AR 479.]

2002 Opinion

The ALJ's reasons for rejecting the 2005 Opinion are equally applicable to the 2002 Opinion, as these opinions are nearly identical.[7] The medical evidence for the relevant period of claimed disability remains the same. Moreover, the ALJ reasonably determined that Dr. Korotzer's opinion failed to account for the ALJ's finding that Plaintiff was limited to a reduced range of sedentary work and precluded from any of her past work, based on her significant breathing condition. In the absence of any indication that Dr. Korotzer's opinion accounted for Plaintiff's RFC and less restrictive work demands, the ALJ reasonably discounted it.

Accordingly, this claim does not merit reversal of the Commissioner's decision finding that Plaintiff is not disabled.

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[7] Contrary to Plaintiff's assertion, the ALJ's focus on the fact that the 2002 Opinion was written in 2002 and submitted in 2007 was not an attempt by the "ALJ [] to manufacture a 'gotcha' moment." [JS 7, n.1.] A reasonable person looking at the opinion could have assumed it was dated October 15, **2002**. Moreover, Plaintiff's counsel presented the opinion as having been written in 2002. [AR 543.]

Plaintiff has offered a plausible explanation for the purported misunderstanding, but the explanation is not conclusive. Even assuming that the 2002 Opinion was written in 2007, Plaintiff's date last insured is September 1, 2004. Dr. Korotzer fails to indicate the applicable time period for his opinion. Moreover, had the 2002 Opinion been Dr. Korotzer's Opinion as of 2007, then it is inconsistent with his own treatment notes, which the ALJ found were indicative of only mild pulmonary function tests. [AR 480, 535.]

E. ISSUE TWO: CREDIBILITY

During the hearings, Plaintiff testified that she stopped working because of her asthma. [AR 431.] Plaintiff said that she experienced extensive shortness of breath and consequently was exhausted. [AR 432, 438.] As a result of her asthma, Plaintiff has to be treated with nebulizers twice a day and bronchial dialtors, and since 2001, she continues to have good and days. [AR 444.] The bad days can last for weeks. [AR 556.]

The ALJ found Plaintiff's testimony concerning the "intensity, persistence and limiting effects of" her symptoms to be "not credible to the extent they are inconsistent with" his RFC assessment because the medical record did not support Plaintiff's claims that she was unable to sustain the activities delineated in her RFC. [AR 477.] First, the ALJ noted that Plaintiff had not required any respiratory related emergency care since December 2002 and that three different pulmonary function tests showed that she responded well to an inhaled bronchodilator and had no acute respiratory illness. [AR 169, 318, 322-23, 477.] Second, the ALJ found that despite Plaintiff's claims of shortness of breath at rest and upon minimal exertion, a cardio-pulmonary exercise and a cardiologist's recommendations indicated otherwise. [AR 477.] During a cardio-pulmonary exercise test in October 2001, Plaintiff terminated the test after four minutes due to pain in her legs. [AR 310.] The doctor noted that Plaintiff only had "slight" shortness of breath and no apparent difficulties. [Id.] Moreover, in January 2003, Plaintiff's cardiologist, with knowledge of Plaintiff's asthma, recommended that she increase her exercise in order to improve her blood pressure. [AR 380.] Plaintiff asserts

that the ALJ's "paucity of reasons" fails to meet the standard of clear and convincing. [JS 19-20.]

Questions of credibility and resolution of conflicts in the testimony are functions solely for the ALJ. Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (citing Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982)). To determine whether a claimant's subjective symptom testimony is credible, the ALJ must engage in a two-step analysis. Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment "'which could reasonably be expected to produce the pain or other symptoms alleged.'" Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991)). Second, if the claimant meets this first test, and there is no evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." Id. at 1036 (quoting Smolen, 80 F.3d at 1281); see also Parra, 481 F.3d at 750; Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001). An ALJ must "specifically identify" the testimony found not credible, the ALJ must explain what evidence undermines the testimony, and the evidence on which the ALJ relies must be "substantial." Parra, 481 F.3d at 750; Tonapetyan, 242 F.3d at 1148 ("The ALJ must give specific, convincing reasons for rejecting the claimant's subjective statements."); Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997).

Plaintiff argues that the "ALJ does not offer a single legally sufficient reason to reject" her testimony but neither directly addresses any of the specific reasons provided by the ALJ to discount

her testimony nor provides any argument for the assertion that the ALJ's credibility evaluation was not legally sufficient. [JS 18.]

Contrary to Plaintiff's argument, a review of the record indicates that the ALJ provided clear and convincing reasons under the Ninth Circuit standard. An ALJ "may rely on ordinary techniques of credibility evaluation," including a plaintiff's reputation for truthfulness and inconsistencies between a plaintiff's testimony and conduct. See Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). First, the ALJ noted that the objective medical evidence did not support the level of disability alleged by Plaintiff. Although the lack of objective medicine cannot be the sole basis for rejecting a plaintiff's credibility, "it is a factor that the ALJ can consider in his credibility analysis." Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005). Here, the ALJ provided concrete examples of inconsistencies between Plaintiff's claims and her doctors' findings. Several doctors disagreed that Plaintiff was completely incapacitated and indeed, one recommended exercise. [AR 380.] Her treatment was also conservative in nature. Parra, 481 F.3d at 751 (noting that conservative treatment is a clear and convincing reason for finding a plaintiff not credible). The ALJ also noted that Plaintiff gave "unsatisfactory" effort during one of her tests. [AR 169, 477.] See Thomas, 278 F.3d at 959 (finding that plaintiff's failure to give maximum effort at a physical evaluation supported the ALJ's finding that plaintiff was not credible). Accordingly, this issue does not warrant reversal of the Commissioner's decision.

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V. ORDERS

Accordingly, **IT IS ORDERED** that:

1. The decision of the Commissioner is **AFFIRMED**.

2. This action is **DISMISSED WITH PREJUDICE**.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: October 26, 2010

CARLA M. WOEHRLE
United States Magistrate Judge