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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RHONDA MOSBY,)	Case No. CV 10-7823-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

Plaintiff Rhonda Mosby seeks judicial review of the Social Security Commissioner's denial of her application for disability insurance benefits ("DIB") and Social Security Disability Insurance ("SSDI") benefits. For the reasons stated below, the decision of the Commissioner is affirmed and the action is dismissed with prejudice.

I. Facts and Procedural Background

Plaintiff was born on November 25, 1961. She completed high school and has work experience as a certified nurse's assistant. (Administrative Record ("AR") 17, 98, 102, 106.) Plaintiff filed her applications for benefits on November 29, 2007, alleging

1 disability beginning December 1, 1996, due to schizophrenia,
2 bipolar disorder, and back, hand and leg pain. (AR 45, 90, 101.)
3 Her application was denied initially on May 30, 2008. (AR 47-51.)
4 An administrative hearing was held on June 24, 2009, before
5 Administrative Law Judge ("ALJ") Maxine R. Benmour. Plaintiff was
6 represented by counsel and testified on her own behalf. (AR 24-37.)
7 ALJ Benmour issued an unfavorable decision on August 11, 2009. (AR
8 12-19.) The ALJ found that Plaintiff suffered from the severe
9 impairments of depression, uterine fibroids, knee pain and obesity.
10 (Id.) However, these severe impairments did not meet the
11 requirements of a listed impairment found in 20 C.F.R. Part 404,
12 Subpart P, Appendix 1. (AR 15.)

13 The ALJ found that Plaintiff retained the residual functional
14 capacity ("RFC") to perform medium work as follows: "The claimant
15 can lift and carry 50 pounds occasionally and 25 pounds frequently.
16 She can sit, stand, and walk for six hours in an eight-hour day
17 with normal breaks. She can occasionally climb, balance, stoop,
18 kneel, crouch, crawl, and squat. She is limited to simple, one-to-
19 two-step job instructions with no production quotas and occasional
20 contact with supervisors, co-workers, and the public." (AR 15.)
21 Although Plaintiff could not perform her past relevant work as a
22 certified nurse's assistant, the ALJ concluded that there were jobs
23 in the national economy which Plaintiff could perform, such as hand
24 packager and sandwich maker, and therefore Plaintiff was not
25 disabled under the Social Security Act. (AR 17, 18.)

26 The Appeals Council denied review on August 20, 2010 (AR 1-4),
27 and Plaintiff commenced this action for judicial review. On June
28 20, 2011, the parties filed a Joint Stipulation ("Joint Stip.") of

1 disputed facts and issues, including the following claims of error:
2 (1) the ALJ failed to properly consider the opinion of Plaintiff's
3 treating psychiatrist; and (2) the ALJ failed to provide clear and
4 convincing reasons for rejecting Plaintiff's subjective complaints.
5 (Joint Stip. 3.) Plaintiff asks the Court to reverse and order an
6 award of benefits, or in the alternative, remand for further
7 administrative proceedings. (Joint Stip. 24.) The Commissioner
8 requests that the ALJ's decision be affirmed. (Joint Stip. 24-25.)
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
13 decision must be upheld unless "the ALJ's findings are based on
14 legal error or are not supported by substantial evidence in the
15 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.
16 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).
17 Substantial evidence means more than a scintilla, but less than a
18 preponderance; it is evidence that a reasonable person might accept
19 as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504
20 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*,
21 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
22 substantial evidence supports a finding, the reviewing court "must
23 review the administrative record as a whole, weighing both the
24 evidence that supports and the evidence that detracts from the
25 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720
26 (9th Cir. 1996). "If the evidence can support either affirming
27 or reversing the ALJ's conclusion," the reviewing court "may not
28 substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d at

1 882.

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3 **III. Discussion**

4 **A. The ALJ Accorded Appropriate Weight to the Opinion of**
5 **Plaintiff's Treating Physician**

6 Plaintiff contends that the ALJ erred in failing to give
7 controlling weight to the opinion of her treating psychiatrist, Dr.
8 Richard King, M.D. (Joint Stip. 4.) On April 9, 2008, Dr. King
9 diagnosed Plaintiff with major depressive disorder with psychotic
10 features. (AR 207.) He prescribed the drugs Geodon and Lexapro.
11 (Id.) Also, in a Mental Residual Functional Capacity Questionnaire,
12 completed on May 7, 2009, Dr. King diagnosed Petitioner with
13 depression and bipolar disorder, with a GAF score of 50 and found
14 that Plaintiff had marked limitations in the ability to perform
15 various work-related functions. (AR 226-231.)

16 An ALJ should generally accord greater probative weight to a
17 treating physician's opinion than to opinions from non-treating
18 sources. See 20 C.F.R. § 404.1527(d)(2). The ALJ must give specific
19 and legitimate reasons for rejecting a treating physician's opinion
20 in favor of a non-treating physician's contradictory opinion. *Orn*
21 *v. Astrue*, 495 F.3d 625 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d
22 821, 830 (9th Cir. 1996). However, the ALJ need not accept the
23 opinion of any medical source, including a treating medical source,
24 "if that opinion is brief, conclusory, and inadequately supported
25 by clinical findings." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th
26 Cir. 2002); accord *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
27 Cir. 2001). The factors to be considered by the adjudicator in
28 determining the weight to give a medical opinion include: "[l]ength

1 of the treatment relationship and the frequency of examination" by
2 the treating physician; and the "nature and extent of the treatment
3 relationship" between the patient and the treating physician. *Orn*,
4 495 F.3d at 631-33; 20 C.F.R. §§ 404.1527(d)(2)(i)-(ii),
5 416.927(d)(2)(i)-(ii).

6 The ALJ provided several legitimate reasons for refusing to
7 give Dr. King's opinion controlling weight, each of which was
8 supported by substantial evidence in the record. First, the ALJ
9 found that the May 7, 2009 Mental Residual Functional Capacity
10 Report completed by Dr. King was not fully credible because there
11 were no medical or other treatment records to support the extreme
12 functional limitations found by Dr. King. (AR 16.) The ALJ noted
13 that there was no evidence in Plaintiff's medical history to
14 support Dr. King's claim that Plaintiff "has an extreme inability
15 to maintain attention and concentration for extended periods or
16 perform activities within a schedule, maintain regular attendance,
17 and be punctual...." (Id.) An ALJ may discredit a treating
18 physician's opinion if it is conclusory, brief, and unsupported by
19 the record as a whole or by objective medical findings. *Batson v.*
20 *Comm'r*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Tonapetyan*, 242 F.3d
21 at 1149. In addition, although the ALJ did not determine whether or
22 not Plaintiff was a malingerer, the ALJ did note that at least one
23 treating source at the West Central Mental Health Clinic, where
24 Plaintiff received mental health treatment, questioned whether
25 Plaintiff was malingering. (AR 16, citing AR 202.)

26 The ALJ also noted that Dr. King's claims of severe mental
27 impairment and limitations was undermined by Plaintiff's failure to
28 follow through with her mental health treatment. For example, the

1 ALJ noted that in December 2005, the West Central Mental Health
2 Clinic closed her case file because she had not had any contact
3 with the clinic for at least 90 days. (AR 219.) The records also
4 showed that she did not return to the clinic until October 2007,
5 almost two years after her file was closed. (AR 142-148.) The ALJ
6 may consider the unexplained failure to seek treatment or follow a
7 prescribed course of treatment. *See Smolen v. Chater*, 80 F.3d 1273,
8 1284 (9th Cir. 1996).

9 In addition, Dr. King's finding of marked limitations in
10 Plaintiff's ability to perform work-related activities was
11 inconsistent with the findings of the consultative examining
12 psychiatrist, Dr. Jason Yang, M.D. Contrary to Dr. King's opinion
13 that Plaintiff was extremely limited in her ability to perform a
14 range of work-related functions, Dr. Yang found that Plaintiff only
15 had mild limitations in her ability to understand, remember and
16 carry out complex job instructions, and was not otherwise
17 significantly limited. (AR 160-164.) If a treating physician's
18 opinion is contradicted by an examining professional's opinion,
19 which is supported by different independent clinical findings, the
20 Commissioner may resolve the conflict by relying on the latter.
21 *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *Orn*,
22 495 F.3d at 632 (ALJ may reject opinion of treating physician in
23 favor of examining physician whose opinion rests on independent
24 clinical findings). Here, the ALJ properly resolved the conflict
25 between Dr. King's finding of extreme functional limitations and
26 Dr. Yang's finding that Plaintiff had only mild restrictions by
27 assessing an RFC that limited Plaintiff to simple instructions and
28 only occasional contact with others. (AR 15.) *See Andrews v.*

1 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1989) (holding that it is the
2 responsibility of the ALJ to resolve conflicts and ambiguities in
3 the medical record and determine the credibility of medical
4 sources). Accordingly, no relief is warranted on this claim of
5 error.

6 **B. The ALJ Properly Discredited Plaintiff's Subjective**
7 **Symptom Testimony**

8 Plaintiff contends that the ALJ failed to provide clear and
9 convincing reasons for discrediting her subjective symptom
10 testimony. (Joint Stip. 16.) Plaintiff testified at the
11 administrative hearing that she suffers from recurrent crying
12 spells two or three times a week that last all day. (AR 27.) She
13 also testified that she hears and responds to her deceased mother's
14 voice on a regular basis. (AR 28.)

15 To determine whether a claimant's testimony about subjective
16 pain or symptoms is credible, an ALJ must engage in a two-step
17 analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)
18 (citing *Lingenfelter* 504 F.3d at 1035-36). First, the ALJ must
19 determine whether the claimant has presented objective medical
20 evidence of an underlying impairment which could reasonably be
21 expected to produce the alleged pain or other symptoms.
22 *Lingenfelter*, 504 F.3d at 1036. "[O]nce the claimant produces
23 objective medical evidence of an underlying impairment, an
24 adjudicator may not reject a claimant's subjective complaints based
25 solely on a lack of objective medical evidence to fully corroborate
26 the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341,
27 345 (9th Cir. 1991) (en banc). To the extent that an individual's
28 claims of functional limitations and restrictions due to alleged

1 pain is reasonably consistent with the objective medical evidence
2 and other evidence in the case, the claimant's allegations will be
3 credited. SSR 96-7p, 1996 WL 374186 at *2 (explaining 20 C.F.R. §§
4 404.1529(c)(4), 416.929(c)(4)).¹

5 Unless there is affirmative evidence showing that the claimant
6 is malingering, the ALJ must provide specific, clear and convincing
7 reasons for discrediting a claimant's complaints. *Robbins*, 466 F.3d
8 at 883. "General findings are insufficient; rather, the ALJ must
9 identify what testimony is not credible and what evidence
10 undermines the claimant's complaints." *Reddick*, 157 F.3d at 722
11 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). The
12 ALJ must consider a claimant's work record, observations of medical
13 providers and third parties with knowledge of the claimant's
14 limitations, aggravating factors, functional restrictions caused
15 by symptoms, effects of medication, and the claimant's daily
16 activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 & n.8 (9th Cir.
17 1996). The ALJ may also consider an unexplained failure to seek
18 treatment or follow a prescribed course of treatment and employ
19 other ordinary techniques of credibility evaluation. *Id.* (citations
20 omitted).

21 Here, the ALJ concluded that Plaintiff's medically
22 determinable impairments "could reasonably be expected to cause the
23 alleged symptoms." (AR 17.) However, the ALJ rejected Plaintiff's
24 description of her symptoms "to the extent they are inconsistent"

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26 ¹ "The Secretary issues Social Security Rulings to clarify the
27 Secretary's regulations and policy Although SSRs are not
28 published 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*, 947 F.2d
at 346 n.3.

1 with the ALJ's assessment that Plaintiff retained the RFC to
2 perform medium work with certain limitations. (Id.) Because there
3 was no evidence of malingering (aside from the single notation in
4 Plaintiff's medical records as noted above), the ALJ was therefore
5 required to provide specific, clear and convincing reasons for
6 rejecting Plaintiff's subjective allegations of pain and functional
7 limitations.

8 The ALJ provided two reasons for rejecting Plaintiff's
9 testimony. The ALJ found that Plaintiff's medication improved her
10 condition and that Plaintiff's ability to perform various
11 activities of daily living was at odds with her claims of disabling
12 depression condition. (AR 17.) The ALJ noted that Plaintiff "is
13 able to take care of her personal and household needs, has
14 activities that she enjoys, has friends, sleeps well with
15 medication, and feels better when she takes her medication." (Id.)
16 Although a claimant "does not need to be 'utterly incapacitated' in
17 order to be disabled," *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
18 Cir. 2001), the ability to perform certain activities of daily life
19 can support a finding that the claimant's reports of his or her
20 impairment are not fully credible. See *Bray v. Comm'r of Soc. Sec.*
21 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009); *Curry v. Sullivan*, 925
22 F.2d 1127, 1130 (9th Cir. 1990) (finding that the claimant's
23 ability to "take care of her personal needs, prepare easy meals, do
24 light housework and shop for some groceries ... may be seen as
25 inconsistent with the presence of a condition which would preclude
26 all work activity") (citing *Fair*, 885 F.2d at 604).

27 The ALJ also noted that Plaintiff's "treatment history does
28 not indicate disabling depression." (AR 17.) The ALJ noted that

1 Plaintiff sees her psychiatrist, Dr. King, only every few months
2 and does not see an individual therapist. (Id.) See *Fair v. Bowen*,
3 885 F.2d 597, 604 (9th Cir. 1989) (finding that claimant's
4 allegations of persistent, severe pain and discomfort belied by
5 "minimal conservative treatment"); see also *Flaten v. Secretary*, 44
6 F.3d 1456, 1464 (9th Cir. 1995) (ALJ permitted to draw rational
7 inferences from treatment history).

8 The ALJ made specific findings articulating clear and
9 convincing reasons for his rejection of Plaintiff's subjective
10 testimony. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). It
11 is the responsibility of the ALJ to determine credibility and
12 resolve conflicts or ambiguities in the evidence. *Magallanes v.*
13 *Brown*, 881 F.2d 747, 750 (9th Cir. 1989). A reviewing court may not
14 second-guess the ALJ's credibility determination when it is
15 supported by substantial evidence in the record, as here. See *Fair*
16 *v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). It was reasonable for
17 the ALJ to rely on the reasons stated above, each of which is fully
18 supported by the record, in rejecting the credibility of
19 Plaintiff's subjective complaints. In sum, the ALJ reasonably and
20 properly discredited Plaintiff's subjective testimony regarding the
21 severity of her symptoms as not being wholly credible.

22 Plaintiff also contends that the ALJ erred by failing to
23 address the written statement of her friend Donald Johnson. (Joint
24 Stip. 18.) In a Function Report - Adult - Third Party, dated March
25 2008, Mr. Johnson reported that Plaintiff is very slow at doing
26 things, that she cries frequently and that she is unable to deal
27 with stress. (AR 116-123.)

28 A lay witness can provide testimony about Plaintiff's symptoms

1 and limitations. See *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th
2 Cir. 1996). "Lay testimony as to a claimant's symptoms is competent
3 evidence that an ALJ must take into account, unless he or she
4 expressly determines to disregard such testimony and gives reasons
5 germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d
6 503, 511 (9th Cir. 2001); see also *Dodrill v. Shalala*, 12 F.3d 915,
7 918-919 (9th Cir. 1993). Appropriate reasons include testimony
8 unsupported by the medical record or other evidence and
9 inconsistent testimony. *Lewis*, 236 F.3d at 512.

10 As a preliminary matter, the Court notes that, unlike lay
11 testimony, there is no controlling precedent requiring an ALJ to
12 explicitly address written statements, such as the Function Report
13 form in this case. Indeed, it is clear that an ALJ is not required
14 to discuss all evidence in the record in detail. *Howard v.*
15 *Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003).

16 Moreover, any possible error by the ALJ in failing to discuss
17 the written report completed by Mr. Johnson was harmless error. See
18 *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th
19 Cir. 2006) (ALJ's failure to properly discuss competent lay
20 testimony favorable to the claimant is harmless error if a court
21 "can confidently conclude that no reasonable ALJ, when fully
22 crediting the testimony, could have reached a different disability
23 determination"). Here, Mr. Johnson's statements regarding
24 Plaintiff's limitations were largely cumulative of Plaintiff's own
25 testimony and written reports. Mr. Johnson did not describe any
26 functional limitations that were different or more serious than
27 those Plaintiff herself alleged. Accordingly, even if the ALJ had
28 fully and properly credited Mr. Johnson's report, the ALJ would not

1 have reached a different disability determination, and therefore,
2 any error was harmless. Accordingly, Plaintiff is not entitled to
3 relief.

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5 **IV. Conclusion**

6 For the reasons stated above, the decision of the Social
7 Security Commissioner is **AFFIRMED** and the action is **DISMISSED** with
8 prejudice.

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10 Dated: June 27, 2011

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14 Marc L. Goldman
15 United States Magistrate Judge
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