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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSIE BALDWIN,)	Case No. ED CV 09-513-PJW
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security Administration,)	
)	
Defendant.)	

I. INTRODUCTION

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying her application for Disability Insurance benefits ("DIB"). Plaintiff claims that the Administrative Law Judge ("ALJ") erred when he: 1) failed to find that Plaintiff's fibromyalgia was a severe impairment at step two of the sequential disability analysis; and 2) rejected a treating doctor's opinion that she could not work. (Joint Stip. at 3-4, 8-10.) Because the Agency's decision that Plaintiff was not disabled is supported by substantial evidence, it is affirmed.

1 II. SUMMARY OF PROCEEDINGS

2 Plaintiff applied for DIB on March 27, 2006, alleging that she
3 had been unable to work since February 19, 2005, because of
4 fibromyalgia and, more specifically, "increasing stiffness and
5 headaches, hand coordination, trouble sleeping, constant muscle pain
6 and trouble with memory." (Administrative Record ("AR") 25, 51, 72.)
7 The Agency denied the application initially and on reconsideration.
8 (AR 23-30.) Plaintiff then requested and was granted a hearing before
9 an ALJ. (AR 33, 46-50.) Plaintiff appeared with counsel and
10 testified at the hearing on September 12, 2008. (AR 287-315.) On
11 November 13, 2008, the ALJ issued a decision denying benefits. (AR
12 12-21.) Plaintiff appealed to the Appeals Council, which denied
13 review. (AR 5-8, 285.) She then commenced the instant action.

14 III. DISCUSSION

15 1. The ALJ's Failure to Consider Plaintiff's Fibromyalgia at
16 Step Two Was Harmless Error

17 In her first claim of error, Plaintiff contends that the ALJ
18 erred in failing to properly consider her fibromyalgia at step two.
19 Plaintiff argues that the medical record, including a longitudinal
20 history of diagnosis and treatment, demonstrates that she suffers from
21 severe fibromyalgia. (Joint Stip. at 3-4.) For the following
22 reasons, the Court concludes that, even assuming that the ALJ erred in
23 failing to find that Plaintiff's fibromyalgia was a severe impairment
24 at step two, any error was harmless.

25 At step two of the sequential evaluation process, the ALJ is
26 tasked with identifying a claimant's "severe" impairments. 20 C.F.R.
27 § 404.1520(a)(4)(ii). A severe impairment is one that significantly
28 limits an individual's physical or mental ability to do basic work

1 activities. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); 20
2 C.F.R. § 404.1521(a). The governing regulations define "basic work
3 activities" as "the abilities and aptitudes necessary to do most
4 jobs." 20 C.F.R. § 404.1521(b). Under Social Security Ruling ("SSR")
5 85-28, a "determination that an impairment(s) is not severe requires a
6 careful evaluation of the medical findings which describe the
7 impairment(s) and an informed judgment about its (their) limiting
8 effects on the individual's physical and mental ability(ies) to
9 perform basic work activities[.]" A claimant's subjective symptoms
10 must be considered in this evaluation. *Smolen*, 80 F.3d at 1290. The
11 step-two inquiry is intended to be a "de minimis screening device."
12 *Id.* (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)).

13 The ALJ found at step two that Plaintiff's shoulder girdle
14 myositis with tension headache, hypertension, obesity, and depressive
15 disorder, not otherwise specified, were severe impairments. (AR 14.)
16 It is not clear why the ALJ did not include her fibromyalgia, given
17 that he noted that, "[u]pon application, [Plaintiff] cited
18 fibromyalgia as the sole condition preventing her from sustaining
19 substantial gainful activity[.]" and that Plaintiff complained that
20 this condition caused her constant pain and cramping in her legs,
21 back, and chest, difficulty reaching and bending, knots in her back,
22 and pain in her chest. (AR 16.) The ALJ also accepted that
23 Plaintiff's medically determinable impairments could reasonably be
24 expected to cause her alleged symptoms. (AR 17.) Because those
25 symptoms included the symptoms caused by fibromyalgia, (AR 16-17), the
26 ALJ's decision implies that he found that fibromyalgia was a medically
27 determinable impairment. (AR 17.) Further, because the symptoms that
28 Plaintiff complained of, if believed, had a more than minimal effect

1 on her ability to do basic work activities, the ALJ should have found
2 that her fibromyalgia was a severe impairment.¹

3 Nevertheless, assuming that the ALJ erred at step two, any error
4 was harmless because the ALJ accounted for the symptoms and
5 limitations allegedly caused by her fibromyalgia in his residual
6 functional capacity determination at step four. After concluding that
7 Plaintiff's severe impairments, singly or in combination, did not meet
8 or equal a Listed Impairment, the ALJ determined that Plaintiff had
9 the residual functional capacity to do light work.² (AR 14-16.) In
10 making this determination, the ALJ expressly considered the symptoms
11 Plaintiff attributed in whole or in part to her fibromyalgia,
12 including her complaints of constant pain and cramping in her legs,
13 back, and chest; difficulty reaching and bending; stiffness;
14 headaches; hand coordination; trouble sleeping; nausea; dizziness; and
15 exhaustion. (AR 16.) The ALJ concluded that her medically-
16 determinable impairments could reasonably be expected to produce the
17 alleged symptoms, but discounted Plaintiff's testimony to the extent

18
19 ¹ Additionally, the ALJ noted that Plaintiff's treating
20 physician diagnosed her with fibromyalgia, and that her rheumatologist
21 found 12 out of 18 positive tender points. (AR 17.) On the other
22 hand, the ALJ noted that the treating physician alternatively
23 diagnosed chronic fatigue syndrome, and that her rheumatologist did
24 not make the "requisite trigger point identification" or rule out
25 other potential sources of discomfort. (AR 17.) It seems that the
26 ALJ was unwilling to fully embrace the fibromyalgia diagnosis.
27 Nevertheless, as discussed in the text, the ALJ went on to consider
28 the symptoms and limitations allegedly arising from Plaintiff's
29 fibromyalgia.

30 ² The ALJ also found that Plaintiff would be limited to
31 "moderately complex work with three to four steps," involving no more
32 than "occasional non-intense contact with others," and would be
33 precluded from fast-paced work. (AR 16.) Plaintiff has not
34 challenged those findings here.

1 that her description of the intensity and scope of her symptoms was
2 inconsistent with his residual functional capacity assessment. (AR
3 17.) He did so, in part, based on the opinions of the state agency
4 reviewing doctors, who found that Plaintiff could do medium-level
5 work, and on the opinion of consultative neurologist Dr. Woodward, who
6 examined Plaintiff and concluded that her neurological status did not
7 significantly limit her physical abilities. (AR 17.) Dr. Woodward
8 opined that Plaintiff's gait was normal and that her extremities
9 seemed to be in the "normal range with respect to muscular power and
10 coordination," concluding that "it is likely that depression and
11 anxiety are contributing to much of [her] symptomatology" and that she
12 was not significantly limited with respect to her physical activities
13 as a result of her "neurologic status." (AR 283-84.)

14 Because the ALJ considered the limitations arising from
15 Plaintiff's fibromyalgia at step four, any failure on his part to find
16 that fibromyalgia was a severe impairment at step two was harmless
17 error. See *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007)
18 (holding that ALJ's error in finding an impairment non-severe at step
19 two was harmless when ALJ considered limitations resulting from
20 impairment at step four) (citing *Stout v. Comm'r, Soc. Sec. Admin.*,
21 454 F.3d 1050, 1054-55 (9th Cir. 2006)); see also *Cotton v. Astrue*,
22 2010 WL 1258262, at *2 (9th Cir. Apr. 2, 2010) (finding that any error
23 by the ALJ in failing to include fibromyalgia as a severe impairment
24 was harmless where the ALJ concluded that the claimant should be
25 limited to light work due to the possibility that she might have
26 fibromyalgia). For these reasons, this claim does not warrant
27 reversal or remand.

28

1 2. The Treating Doctor's Opinion

2 In her second claim of error, Plaintiff contends that the ALJ
3 erred by failing to provide legitimate reasons for rejecting an April
4 18, 2007 opinion of Dr. Mariclem Lao, Plaintiff's primary treating
5 physician. (Joint Stip. at 8-10.) For the following reasons, this
6 claim does not warrant remand.

7 In general, a treating doctor's opinion is entitled to deference.
8 See *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). This rule does
9 not apply to a treating doctor's opinion regarding the ultimate issue
10 of disability, however. *Batson v. Comm'r of Soc. Sec.*, 359 F.3d 1190,
11 1195 (9th Cir. 2004) (noting that treating physician's opinion is "not
12 binding on an ALJ with respect to the . . . ultimate determination of
13 disability."); 20 C.F.R. § 404.1527(e)(3); see also SSR 96-5p (stating
14 that opinion that claimant is disabled, "even when offered by a
15 treating source, can never be entitled to controlling weight or given
16 special significance").

17 In his decision, the ALJ noted Dr. Lao's opinion, but gave it
18 little weight because she "apparently relied quite heavily on the
19 subjective report of symptoms and limitations provided by" Plaintiff,
20 which the ALJ had found to be unreliable. (AR 18.) Additionally, the
21 ALJ gave "minimal weight" to Dr. Lao's opinion that Plaintiff's
22 inability to tolerate sustained activities and poor concentration
23 would prevent her from engaging in meaningful employment because Dr.
24 Lao was not a mental health specialist and her opinion was not based
25 on clinical evidence, but on Plaintiff's subjective complaints. (AR
26 19.) Instead, the ALJ gave greater weight to the opinions of the
27 consultative neurologist and the state agency reviewing psychiatrists.
28 (AR 19.) The ALJ also rejected Dr. Lao's opinion on the ground that

1 it was conclusory and supported by "very little explanation of the
2 evidence relied on in forming that opinion." (AR 18.)

3 These are all legitimate reasons for discounting a treating
4 physician's opinion. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1041
5 (9th Cir. 2008) ("An ALJ may reject a treating physician's opinion if
6 it is based to a large extent on a claimant's self-reports that have
7 been properly discounted as incredible.") (quotation omitted); *Smolen*,
8 80 F.3d at 1285 ("[T]he opinions of a specialist are given more weight
9 than the opinions of a nonspecialist."); *Batson*, 359 F.3d at 1195
10 (holding treating doctor's opinion that claimant is disabled is not
11 binding on the Agency; further, an opinion that is "conclusory, brief,
12 and unsupported by the record as a whole, or by objective medical
13 findings" is entitled to "minimal evidentiary weight").

14 Further, they are supported by substantial evidence in the
15 record. As to Dr. Lao's opinion that Plaintiff was physically
16 incapable of working, the opinion is conclusory and based in large
17 measure on Plaintiff's claims relating to her symptoms. (AR 226, 227,
18 231-35, 281.) There is very little objective evidence to support
19 Plaintiff's claimed ailments and the ALJ found that Plaintiff was not
20 credible, a finding she does not challenge here. Thus, the ALJ's
21 reasons for rejecting these findings is supported by the record.³

22
23 ³ The Court acknowledges that there are "unique evidentiary
24 difficulties associated with the diagnosis and treatment of
25 fibromyalgia," meaning that objective evidence is relatively less
26 helpful in determining a claimant's limitations. See *Rogers v.*
27 *Comm'r, Soc. Sec. Admin.*, 486 F.3d 234, 245 (6th Cir. 2007); see also
28 *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2d Cir. 2003) (reversing
where "ALJ effectively required 'objective' evidence for a disease
[i.e., fibromyalgia] that eludes such measurement."); *Sarchet v.*
Chater, 78 F.3d 305, 306 (7th Cir. 1996) (noting that fibromyalgia
symptoms are "entirely subjective"). The ALJ did not improperly

1 As to Plaintiff's mental capacity, examining clinical
2 psychologist Dr. Kim Goldman and the state agency reviewing
3 psychiatrists all concluded that Plaintiff would have no more than
4 moderate difficulties in concentration, persistence, and pace. (AR
5 183, 192, 195.) Because these individuals are experts in that field,
6 their opinions are entitled to more weight than Dr. Lao's.⁴

7 IV. CONCLUSION

8 For the foregoing reasons, the Agency's decision is affirmed and
9 the case is dismissed with prejudice.

10 IT IS SO ORDERED.

11 DATED: May 10, 2010.

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PATRICK J. WALSH
15 UNITED STATES MAGISTRATE JUDGE
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22 require objective evidence of Plaintiff's limitations here, however.
23 Rather, he noted that Dr. Lao's opinion was largely based on
24 Plaintiff's own account, and found, in turn, that her account was not
25 credible for various reasons.

26 ⁴ It is not clear why the ALJ concluded that Dr. Lao's "opinion
27 regarding a neurological impairment is given less weight than the
28 Board certified neurologist, Dr. Woodward." (AR 18.) Dr. Lao did not
appear to offer an opinion regarding a neurological impairment in her
April 18, 2007 letter. Nevertheless, in light of the ALJ's other
reasons for rejecting Dr. Lao's opinion, any error committed in this
regard was "inconsequential to the ultimate nondisability decision,"
and, therefore, harmless. *Stout*, 454 F.3d at 1055.