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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 NIEVEZ FELIX,) No. ED CV 09-01370-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22 _____)
23)
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28)

18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the record before
24 the Commissioner. The parties have filed the Joint Stipulation
25 ("JS"), and the Commissioner has filed the certified Administrative
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

1 considered the lay witness statement;

2 2. Whether the ALJ properly considered the State Agency
3 findings;

4 3. Whether the ALJ properly considered the treating
5 psychiatrist's opinion;

6 4. Whether the ALJ properly considered Plaintiff's residual
7 functional capacity; and

8 5. Whether the ALJ posed a complete hypothetical question to
9 the vocational expert.

10 (JS at 2-3.)
11

12 This Memorandum Opinion will constitute the Court's findings of
13 fact and conclusions of law. After reviewing the matter, the Court
14 concludes that the decision of the Commissioner must be affirmed.
15

16 I

17 **THE ALJ PROPERLY CONSIDERED THE LAY WITNESS STATEMENT**
18 **OF PLAINTIFF'S DAUGHTER**

19 In Plaintiff's first issue, she contends that the ALJ failed to
20 properly address the lay witness testimony of Celena Felix,
21 Plaintiff's daughter.

22 In his decision (AR 24-30), the ALJ addressed a Functional Report
23 Adult Third Party prepared in February 2004 by Plaintiff's daughter.
24 (AR 28, 144-152.) The ALJ noted that this statement "was generally
25 consistent with those of the claimant in that it emphasized the
26 claimant's reduction in capacity since the onset of her medical
27 problems but it also indicated that she was able to she was able to
28 [sic] function in an adequate and independent manner in terms of her

1 basic activities of daily life and social functioning." (AR 28, 144-
2 152.)

3 Plaintiff's complaint seems to be that the ALJ did not address
4 another Function Report Adult Third Party by Mr. Felix prepared later
5 in the year, in September 2004. (AR 185-193.)

6 The Commissioner argues that there is no essential difference
7 between the two statements by Plaintiff's daughter, and that the
8 second statement is essentially cumulative of the first. Plaintiff
9 does not dispute the similarity of the two documents, but instead
10 relies upon a seemingly technical argument that although the second
11 document was cumulative of the first, the ALJ had a duty to discuss
12 it. This contention is provided without any legal support, and
13 indeed, the Court can find none. Clearly, an ALJ must discuss
14 relevant evidence, but he did that. He discussed and indeed accepted
15 the first Report by Plaintiff's daughter. The ALJ is not, however,
16 under any obligation to discuss evidence which is merely cumulative or
17 does not add anything relevant. Since Plaintiff does not contend that
18 the second report does not meet these criteria, the Court fails to
19 understand why it was error for the ALJ to fail to discuss the second
20 Report. Further, the Court notes that Plaintiff's daughter provided
21 an assessment of Plaintiff's functional abilities which exceeded that
22 provided by Plaintiff herself in her pre-hearing statements and
23 testimony at the hearing. For example, the ALJ noted that in certain
24 pre-hearing reports, Plaintiff "indicated that she had problems with
25 household chores, that she had been much more active in the past, that
26 she could not walk more than a block at time, stand more than half an
27 hour, or sit more than thirty to sixty minutes, but she also indicated
28 that she was still able to do her basic household chores as needed,

1 drive to shop and run errands as needed, go to church, and visit with
2 friends." (AR 28, citing exhibits.) In the statement by Plaintiff's
3 daughter, more restrictive or limited functional abilities are not
4 described. Even if this had been the case, however, it would seem
5 clear that Plaintiff would be in the best position to describe her own
6 functional abilities. Finally, it is noted that the ALJ detracted
7 from Plaintiff's credibility (AR 28), a finding which is not
8 challenged by Plaintiff in this lawsuit.

9 For the foregoing reasons, the Court finds no merit in
10 Plaintiff's first issue.

11 12 II

13 THE ALJ DID NOT FAIL TO PROPERLY CONSIDER THE STATE AGENCY 14 FINDINGS AS TO PLAINTIFF'S MENTAL RESIDUAL FUNCTIONAL CAPACITY

15 In her second issue, Plaintiff focuses on conclusions by State
16 Agency psychiatrist Dr. Rivera-Miya that Plaintiff is moderately
17 limited in her ability to maintain attention and concentration for
18 extended periods, and similarly limited in her ability to interact
19 appropriately with the general public. (AR 319-320.)

20 This issue does not merit substantial discussion. First,
21 Plaintiff ignores the conclusions of both Dr. Rivera-Miya, Dr.
22 Carfagni, and Dr. Loomis in a Psychiatric Review Technique Form dated
23 November 4, 2004 that Plaintiff has no severe mental impairment. (AR
24 323.) Of equal importance is the fact that the ALJ noted that
25 Plaintiff did not have severe depression because it did not cause more
26 than minimal limitations in her ability to perform basic mental work
27 activities. (AR 14.) The ALJ also relied upon conclusions reached in
28 the prior decision, which was incorporated by reference, that he

1 placed reliance on the findings of the consultative psychiatric
2 examiner ("CE"), Dr. Abejuela, who on September 24, 2004 completed a
3 complete psychiatric evaluation of Plaintiff. (AR 27, 296-302.) In
4 the first decision, the ALJ specifically discounted the State Agency
5 psychiatrist's conclusion that Plaintiff was moderately limited in the
6 two areas identified above. (Id.)

7 Plaintiff provides no reasons why the ALJ should have accepted
8 the conclusions of a non-examining State Agency psychiatrist as to
9 these moderate limitations as against that of an examining
10 psychiatrist. It is unclear whether there was even a conflict in the
11 evidence because, as noted, the same State Agency psychiatrist found
12 no severe mental impairment. Even if there were, however, the ALJ
13 discharged his responsibility to resolve any conflicts in the
14 evidence. See Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

15 For the foregoing reasons, the Court finds no error as to
16 Plaintiff's second issue.

18 III

19 THE ALJ PROPERLY REJECTED THE TREATING PSYCHIATRIST'S OPINION

20 In Plaintiff's third issue, she asserts that the ALJ failed to
21 properly assess a Work Capacity Evaluation completed on March 25, 2005
22 by Plaintiff's treating psychiatrist. (AR 464-465.)

23 In his 2006 decision, which, as previously noted, was
24 incorporated in the 2009 decision, the ALJ fully discussed and
25 rejected the evaluations contained in this form, finding, in
26 particular, that it was rejected due to its "simplistic nature," the
27 inconsistency of the findings, and the psychiatrist's notation that
28 Plaintiff only had certain "extreme" limitations when in the presence

1 of pain, while the record did not reflect any period of 12 or more
2 months when Plaintiff had such serious pain. (AR 29.)

3 Plaintiff complains that the ALJ failed to explain why he
4 considered the psychiatrist's conclusions to be inconsistent. This
5 would, however, seem to be obvious on the face of the form, in that
6 only one area (the ability to perform activities within a schedule,
7 maintain regular attendance and be punctual within customary
8 tolerances) was assessed with extreme functional limitations, while in
9 every other area of mental functioning, Plaintiff's limitations were
10 assessed to be "slight." Further, the ALJ's rejection of this form
11 because of its simplistic nature is an implicit reference to the fact
12 that such "check-off" forms are disfavored, especially when they are
13 unsupported by objective findings. See Crane v. Shalala, 76 F.3d 251,
14 253 (9th Cir. 1996), citing Murray v. Heckler, 722 F.2d 499, 501 (9th
15 Cir. 1983).

16 For the foregoing reasons, the Court finds no merit in
17 Plaintiff's third issue.

18 19 IV

20 **THE ALJ PROPERLY CONSIDERED PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY**

21 In her fourth issue, Plaintiff asserts that the ALJ failed to
22 correctly assess her residual functional capacity ("RFC"), because he
23 did not account for the limitations set forth by the State Agency
24 Physician, Dr. Rivera-Miya (see Issue No. 2), or the limitations
25 assessed by the treating psychiatrist in his Work Capacity Evaluation
26 (see Issue No. 3).

27 The Court has already addressed Plaintiff's concerns regarding
28 both of these assessments, in its discussion of Issues Nos. 2 and 3.

1 Consequently, Plaintiff's fourth issue must be rejected as without
2 merit, because it relies upon a finding of error as to Issue 2 or
3 Issue 3.

4
5 V

6 THE ALJ DID NOT ERR IN HIS HYPOTHETICAL QUESTION

7 TO THE VOCATIONAL EXPERT

8 At the hearing held on December 17, 2008 (AR 853-866), the ALJ
9 posed a hypothetical question to the vocational expert ("VE") which
10 posited that the individual can stand and walk two hours out of an
11 eight-hour day; can sit six hours; can lift 20 pounds occasionally, 10
12 pounds frequently; can occasionally stoop and bend; can climb stairs
13 but should not climb ladders, ropes or scaffolds nor work at
14 unprotected heights where any balancing is required, and should work
15 in an air conditioned environment. (AR 864.) In response, the VE
16 indicated that this individual could do two of the past jobs performed
17 by Plaintiff, that of fax administrator (customer service), and
18 general clerk. (AR 864-865.)¹

19 Plaintiff contends that the ALJ committed error in several
20 regards. First, by failing to include in the hypothetical the non-
21 exertional limitations concerning reaching, handling, fingering,
22 feeling and pushing assessed by her treating physician, Dr. Gothard,
23 in a September 23, 2008. (AR 823-825.)

24 The ALJ rejected Dr. Gothard's limitations in his decision,
25

26 ¹ In the JS, the Commissioner erroneously calculates that the
27 VE testified as to three jobs (fax administrator, customer service,
28 and general clerk), while in fact, the VE's testimony identified fax
administrator as the customer service representative position. (AR
865.)

1 concluding that,

2 "There is nothing in Dr. Gothard's notes that suggest
3 the doctor was concerned about the [Plaintiff's] allegedly
4 debilitating symptoms, no prescriptions for potent
5 medication and no referral to mental health treatment or a
6 pain clinic. I must therefore discount Dr. Gothard's
7 assessments since they are inconsistent with the objective
8 findings and his own treatment records."

9 (AR 16.)

10
11 Plaintiff makes a non-frivolous challenge to the ALJ's rejection
12 of Dr. Gothard's conclusions, arguing that basing such a rejection on
13 an asserted inconsistency with objective findings and treatment
14 records is conclusory and fails to provide the specific and legitimate
15 reasons, supported by substantial evidence, required by applicable
16 case law. (See JS at 19, citing Connett v. Barnhart, 340 F.3d 871, 874
17 (9th Cir. 2003).)

18
19 While the ALJ's written decision is not a model of precision in
20 this regard, it does go beyond merely rejecting Dr. Gothard's
21 assessment as inconsistent with objective findings and treatment
22 records, without identifying them. That is, the ALJ does note
23 additional factors, such as a lack of prescriptions for pain
24 medication, or referral to mental health treatment, or a pain clinic.
25 The Court has noted that in these treatment records (see AR at 366-
26 369), Plaintiff did make substantial pain complaints; however, Dr.
27 Gothard's diagnosis only included diabetes, depression, and obesity,
28 with severe hypertension. (AR 368.) All in all, the Court cannot find

1 insufficient the ALJ's reasons for rejecting Dr. Gothard's found
2 limitations as to certain exertional functions.

3 With regard to the absence of certain limitations related to
4 Plaintiff's mental functioning, the Court has already addressed these
5 issues, and found, for example, that the treating psychiatrist's Work
6 Capacity Evaluation of March 25, 2005 was not entitled to be accepted
7 as credible, for the reasons already discussed.

8 Finally, concerning the jobs identified by the VE, these were
9 identified as being within Plaintiff's current functional capacity
10 based upon how she actually performed these jobs, not as they are
11 generally performed. This distinction does not create a variance with
12 the Dictionary of Occupational Titles ("DOT"). Plaintiff does not
13 assert (other than her challenge to the omissions in the hypothetical
14 question based upon certain limitations which the ALJ rejected), that
15 she did not actually perform the jobs identified in a manner
16 consistent with the RFC assessed by the ALJ.

17 For the foregoing reasons, the Court finds no error with regard
18 to Issue No. 5.

19 The decision of the ALJ will be affirmed. The Complaint will be
20 dismissed with prejudice.

21 **IT IS SO ORDERED.**

22
23 DATED: February 24, 2011

_____/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE