

Dockets.Justia.com

BACKGROUND

Plaintiff is a 48 year old female who filed an application for Social Security Disability Insurance benefits and Supplemental Social Security Income benefits on May 23, 2008, alleging disability beginning February 10, 2008. (AR 8.) Plaintiff has not engaged in substantial gainful activity since that date. (AR 10.)

Plaintiff's claims were denied initially on September 12, 2008, and on reconsideration on March 13, 2009. (AR 8.) Plaintiff filed a timely request for hearing, which was held on March 30, 2010, in San Bernardino, California, before Administrative Law Judge ("ALJ") Sharilyn Hopson. (AR 18-54.) Plaintiff appeared and testified at the hearing. (AR 8.) Medical expert Dr. Joseph Malancharuvil and vocational expert ("VE") Corinne J. Porter also appeared and testified at the hearing. (AR 8.) Claimant was represented by counsel. (AR 8.)

The ALJ issued an unfavorable decision on May 6, 2010. (AR 8-17.) The Appeals Council denied review on October 18, 2010. (AR 1-3.)

DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as grounds for reversal and remand:

1. Whether the ALJ has properly considered all of the relevant medical evidence of record including the testimony of the medical expert.
2. Whether the ALJ has properly considered Plaintiff's subjective complaints and properly assessed Plaintiff's credibility as well as those statements made by Plaintiff's boyfriend.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

1 Substantial evidence means “‘more than a mere scintilla’ . . . but less than a
2 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson
3 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S.
5 at 401 (internal quotations and citation omitted).

6 This Court must review the record as a whole and consider adverse as well as
7 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
8 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision
9 must be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However, a
10 reviewing court must consider the entire record as a whole and may not affirm simply by
11 isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting
12 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d
13 625, 630 (9th Cir. 2007).

14 SEQUENTIAL EVALUATION

15 The Social Security Act defines disability as the “inability to engage in any substantial
16 gainful activity by reason of any medically determinable physical or mental impairment which
17 can be expected to result in death or . . . can be expected to last for a continuous period of
18 not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner
19 has established a five-step sequential process to determine whether a claimant is disabled.
20 20 C.F.R. §§ 404.1520, 416.920.

21 The first step is to determine whether the claimant is presently engaging in substantial
22 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is
23 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,
24 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a
25 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is
26 not severe if it does not significantly limit the claimant’s ability to work. Smolen v. Chater, 80
27 F.3d 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is
28 listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the

1 regulations. Parra, 481 F.3d at 746. If the impediment meets or equals one of the listed
2 impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141.
3 Fourth, the ALJ must determine whether the impairment prevents the claimant from doing
4 past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before
5 making the step four determination, the ALJ first must determine the claimant's residual
6 functional capacity ("RFC").¹ 20 C.F.R. § 416.920(e). The RFC must consider all of the
7 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
8 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the claimant cannot perform his or
9 her past relevant work or has no past relevant work, the ALJ proceeds to the fifth step and
10 must determine whether the impairment prevents the claimant from performing any other
11 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

12 The claimant bears the burden of proving steps one through four, consistent with the
13 general rule that at all times the burden is on the claimant to establish his or her entitlement
14 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
15 claimant, the burden shifts to the Commissioner to show that the claimant may perform
16 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To
17 support a finding that a claimant is not disabled at step five, the Commissioner must provide
18 evidence demonstrating that other work exists in significant numbers in the national economy
19 that the claimant can do, given his or her RFC, age, education, and work experience. 20
20 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is
21 disabled and entitled to benefits. Id.

22 THE ALJ DECISION

23 In this case, the ALJ determined at step one of the sequential process that Plaintiff
24 has not engaged in substantial gainful activity since February 10, 2008, the alleged onset
25 date. (AR 10.)

26
27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her]
28 limitations" and represents an assessment "based on all the relevant evidence." 20 C.F.R.
§§ 404.1545(a)(1), 416.945(a)(1).

1 At step two, the ALJ determined that Plaintiff has the following combination of
2 medically determinable severe impairments: fibromyalgia, carpal tunnel syndrome,
3 degenerative disc disease of the neck and back, chronic obstructive pulmonary disease,
4 asthma, affective mood disorder not otherwise specified with bipolar features, anxiety
5 disorder not otherwise specified, and somatoform disorder. (AR 10.)

6 At step three, the ALJ determined that Plaintiff does not have an impairment or
7 combination of impairments that meets or medically equals one of the listed impairments.
8 (AR 11.)

9 The ALJ next found that Plaintiff has the RFC to perform less than a full range of light
10 work, including these limitations:

11 The claimant is able to lift/carry 20 pounds occasionally, 10 pounds
12 frequently; stand and walk for 6 hours in an 8 hour workday; use a cane
13 as needed; no restrictions on sitting; fine and gross manipulation on
14 frequent basis; can climb stairs but cannot climb ropes, ladders or
15 scaffolds; must avoid concentrated exposure to dust, chemicals or fumes,
16 extreme cold or heat, wetness, and humidity; no working around
17 hazardous machinery or heights; is limited to performing moderately
18 complex tasks up to 5 step instructions in a habituated work setting; and
19 cannot perform safety operations.

20 (AR 12.) In determining this RFC, the ALJ made an adverse credibility determination to the
21 extent Plaintiff's symptoms and statements, and the statements of her boyfriend, are
22 inconsistent with the above RFC. (AR 13-14.)

23 At step four, the ALJ determined that Plaintiff is capable of performing her past
24 relevant work as a telemarketer. (AR 16.)

25 Hence, the ALJ concluded that Claimant is not disabled within the meaning of the
26 Social Security Act. (AR 17.)

DISCUSSION

The ALJ did not err in the consideration of Dr. Malancharuvil's testimony; the gaps in the transcript of his testimony were not material to the outcome of the case. The ALJ did not err in discounting Plaintiff's credibility and that of her boyfriend to the extent inconsistent with the RFC. The ALJ decision must be affirmed.

I. THE ALJ PROPERLY CONSIDERED THE MEDICAL EVIDENCE

Plaintiff's first argument is that the ALJ inadequately and incompletely considered the testimony of medical expert Dr. Malancharuvil, Ph.D., a licensed psychologist. (AR 15.) Specifically, Plaintiff asserts that Dr. Malancharuvil testified by telephone and there were gaps in the transcript regarding his testimony about fluctuations in Plaintiff's mental status. This is significant, Plaintiff says, because the vocational expert testified that Plaintiff would not be capable of any work if she were off task 20% of the time or had to miss work three days a month. (AR 52.) Thus, Plaintiff argues that variations in her functioning should or could result in a favorable disability determination.

To be sure, an ALJ may not ignore relevant medical evidence without giving specific, legitimate reasons supported by substantial evidence for doing so. Smolen, 80 F.3d at 1282; Reddick, 157 F.3d at 722-23 (impermissible for ALJ to develop evidentiary basis "by not fully accounting for the context of materials or all parts of the testimony and reports"). Here, however, the ALJ's decision was proper. The ALJ specifically found that the Claimant "reported an increase in her anxiety and panic attacks when off her usual regimen of medications." (AR 14, 299.) She often missed appointments and lab tests, which led to interruptions in her medications, and without her medications her symptoms worsened. (AR 299, 354.) She had good response to medication after a period of non-compliance. (AR 14.) Thus, there is no basis in the medical evidence of record to suggest that Plaintiff's mental symptoms were not controlled by medication.

The gaps in the transcript are not of dispositive significance. Dr. Malancharuvil did not regard Plaintiff to be disabled. Dr. Malancharuvil testified Plaintiff did not meet any listings,

1 had only mild and moderate limitations in functioning, and for her RFC was limited to
2 moderately complex tasks. The ALJ adopted Dr. Malancharuvil's assessment. (AR 28.)
3 Dr. Malancharuvil would not comment on Plaintiff's physical impairments or the pain they
4 cause. (AR 30.) Similarly, consulting psychiatrist Dr. Romualdo Rodriguez indicated minimal
5 limitations in functioning and that Plaintiff was able to carry out detailed and complex
6 instructions, a less restrictive opinion than Dr. Malancharuvil's. (AR 15, 256.)

7 The ALJ also relied heavily on consulting internist Dr. Sean, who found only mild
8 physical limitations that would not preclude light work. (AR 16, 276.) State agency
9 physicians, both medical and psychiatric, found minimal objective evidence of limitations.
10 (AR 258-268, 269-70, 283-88, 289-291, 292-93, 370-72.)

11 The only potentially contrary medical evidence are two conclusory one page notes
12 that the ALJ properly gave little weight. (AR 14.) Dr. Leong, who treated Plaintiff for
13 fibromyalgia, stated that she would be unable to return to work for one month, which in any
14 event would not satisfy the 12 month duration requirement. (AR 14.) Dr. Lee wrote a note
15 diagnosing bipolar and panic disorder and recommended no full-time work for 12 months.
16 (AR 249.) Neither of these conclusory notes are supported by any objective medical
17 evidence. The ALJ properly concluded that these notes do not establish greater limitations
18 than the assessed RFC. (AR 14.) An ALJ may reject a treating physician's opinion if it is
19 brief, conclusory and unsupported by rationale or treatment notes or objective medical
20 evidence. Batson v. Comm'r, 359 F.3d 1190, 1195 n.3 (9th Cir. 2004) (treating physician
21 notes did not provide objective medical evidence of alleged limitations); Crane v. Shalala, 76
22 F.3d 251, 253 (9th Cir. 1996) (ALJ properly rejected check box opinions that did not have
23 any explanation or basis). Plaintiff does not even mention these notes or dispute the ALJ's
24 evaluation of them.

25 Thus, there is no medical evidence, properly considered, that establishes disability.
26 The gaps in the transcript regarding Dr. Malancharuvil's testimony are harmless and
27 inconsequential to the outcome. Stout v. Comm'r, Soc. Sec. Adm, 454 F.3d 1050, 1055 (9th
28

1 Cir. 2006) (any error harmless where “inconsequential to the ultimate nondisability
2 determination”). The ALJ’s RFC is supported by substantial evidence and free of legal error.

3 **II. THE ALJ PROPERLY DISCOUNTED THE CREDIBILITY**
4 **OF PLAINTIFF AND HER BOYFRIEND**

5 The ALJ discounted Plaintiff’s credibility because the objective medical evidence was
6 inconsistent with her claimed limitations, Plaintiff received only conservative treatment,
7 Plaintiff’s claimed medication side effects are unsupported by medical records, Plaintiff made
8 inconsistent statements, and her daily activities were inconsistent with her claimed inability to
9 work. Plaintiff contests the ALJ’s credibility determination but fails to address most of the
10 ALJ’s reasons for discounting Plaintiff’s credibility. The ALJ’s credibility determination is
11 based on clear and convincing reasons supported by substantial evidence.

12 **A. Relevant Law**

13 The test for deciding whether to accept a claimant’s subjective symptom testimony
14 turns on whether the claimant produces medical evidence of an impairment that reasonably
15 could be expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947
16 F.2d 341, 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);
17 Smolen, 80 F.3d at 1281-82 & n.2. The Commissioner may not discredit a claimant’s
18 testimony on the severity of symptoms merely because it is unsupported by objective
19 medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds
20 the claimant’s symptom testimony not credible, the ALJ “must specifically make findings
21 which support this conclusion.” Bunnell, 947 F.2d at 345. These findings must be
22 “sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit
23 [the] claimant’s testimony.” Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002); see also
24 Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46.
25 Unless there is evidence of malingering, the ALJ can reject the claimant’s testimony about
26 the severity of her symptoms only by offering “specific, clear and convincing reasons for
27 doing so.” Smolen, 80 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must
28

1 identify what testimony is not credible and what evidence discredits the testimony. Reddick,
2 157 F.3d at 722; Smolen, 80 F.3d at 1284.

3 **B. Analysis**

4 In determining Plaintiff's RFC, the ALJ concluded that Plaintiff's medically
5 determinable impairments could reasonably be expected to cause her alleged symptoms.
6 (AR 14.) The ALJ, however, found that Plaintiff's statements regarding the intensity,
7 persistence and limiting effects of these symptoms were "not credible to the extent they are
8 inconsistent with the above residual capacity assessment." (AR 14.) Because the ALJ did
9 not make any finding of malingering, she was required to provide clear and convincing
10 reasons supported by substantial evidence to discount Plaintiff's credibility. Smolen, 80 F.3d
11 at 1283–84. The ALJ did so.

12 One reason given by the ALJ for discounting Plaintiff's subjective symptoms is the
13 lack of objective medical evidence. The ALJ stated, "The claimant's mental and physical
14 treatment records do not establish greater limitations than those opined in the residual
15 functional capacity herein." (AR 14.) The ALJ thoroughly discussed the medical evidence
16 (AR 14-16), which supports the ALJ's conclusion. Lack of objective medical evidence cannot
17 be the sole reason for discounting a claimant's subjective symptoms but it nonetheless
18 remains a relevant factor in an ALJ's credibility determination. Bunnell, 947 F.2d at 345.
19 Plaintiff never addresses the inconsistency between the medical evidence and her claimed
20 limitations.

21 Another reason the ALJ cites in support of her adverse credibility determination is
22 Plaintiff's conservative treatment, which is a valid basis for discounting a claimant's
23 credibility. Parra, 481 F.3d at 750-51. Here, the ALJ noted that "[t]he claimant's treatment
24 mostly consisted of medications for pain and her mental impairments and limited talk
25 therapy." (AR 14.) Plaintiff did not dispute this statement.

26 As a third reason supporting her credibility determination, the ALJ noted
27 inconsistencies and a lack of support in the record for Plaintiff's allegations of medication
28

1 side effects. (AR 13-14, 42.) The ALJ also noted that Plaintiff's claim of medication side
2 effects is inconsistent with her testimony that pain medication was helping. (AR 13.) Indeed,
3 on September 10, 2009, she indicated that her medications were working with no side
4 effects. (AR 391.) She also had a good response to medication after a period of non-
5 compliance. (AR 14.) On another occasion, Plaintiff claimed her medications were of little
6 help and needed to be increased. (AR 13, 218, 231-34.) Plaintiff did not address the
7 inconsistencies in her statements regarding medication side effects. There was no clinical
8 evidence to support Plaintiff's claims of medication side effects. Miller v. Heckler, 770 F.2d
9 845, 849 (9th Cir. 1985) (claimant failed to show by clinical evidence that prescription
10 narcotics impaired ability to work); Wilkins v. Astrue, 2010 WL 1407289, at *4 (C.D. Cal. April
11 6, 2010); Santana v. Astrue, 2008 WL 4811402, at *7 (C.D. Cal. Oct. 28, 2008).

12 The ALJ advanced other reasons for discounting Plaintiff's credibility, but the reasons
13 discussed above are undisputed and constitute clear and convincing reasons supported by
14 substantial evidence sufficient by themselves to affirm the ALJ's adverse credibility
15 determination. The ALJ also properly discounted the third party function report of Plaintiff's
16 boyfriend. (AR 13.) The ALJ indicated that the boyfriend only knew Claimant for six months
17 and his report of multiple limitations is not supported by medical records. (AR 13-14, 183-
18 90.) Inconsistency with medical evidence is a germane reason for discounting the testimony
19 of a lay witness. Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005).

20 The ALJ did not err in discounting Plaintiff's subjective symptoms to the extent
21 inconsistent with the assessed RFC.

22 ORDER

23 IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the
24 Commissioner of Social Security and this case be dismissed with prejudice.

25 LET JUDGMENT BE ENTERED ACCORDINGLY.

26 DATED: November 21, 2011

27 /s/ John E. McDermott
28 JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE