

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SARA A. MALMSTEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 13-CV-0028-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment (ECF Nos. 12 and 13). Plaintiff is represented by Lora Lee Stover. Defendant is represented by Franco L. Becia. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means
10 relevant evidence that “a reasonable mind might accept as adequate to support a
11 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to “more than a mere scintilla[,] but less than a
13 preponderance.” *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record “is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ’s findings if they are supported by inferences reasonably drawn from the
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant’s ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant’s
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past (“past relevant work”). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant’s
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant’s age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on September 10, 2010, alleging a disability
10 onset date of November 15, 1982.¹ Tr. 221-37. These applications were denied
11 initially and upon reconsideration, and Plaintiff requested a hearing. Tr. 170-76,
12 184-87, 192-93. A hearing was held before an Administrative Law Judge on
13 August 16, 2011. Tr. 41-88. The ALJ rendered a decision denying Plaintiff
14 benefits on October 14, 2011. Tr. 23-34.

15 The ALJ found that Plaintiff met the insured status requirements of Title II
16 of the Social Security Act through March 31, 2010. Tr. 25. At step one, the ALJ

17
18 ¹ Plaintiff also filed an application for child disability benefits on the same date.

19 The Commissioner’s disposition of that application is not at issue here. Plaintiff’s
20 alleged onset date was subsequently amended to November 15, 2000.

1 found that Plaintiff had not engaged in substantial gainful activity since November
2 15, 2000, the amended alleged onset date. Tr. 26. At step two, the ALJ found that
3 Plaintiff had severe impairments consisting of (1) disorders of the spine involving
4 thoracolumbar scoliosis (status post thoracic fusion) and multi-level lumbar
5 spondylosis; (2) history of cerebral palsy; (3) reactive airway disease (asthma); (4)
6 visual disturbance involving left exotropia with visual field constriction; and (5)
7 learning/math disorder. Tr. 26. At step three, the ALJ found that Plaintiff's severe
8 impairments did not meet or medically equal a listed impairment. Tr. 26. The ALJ
9 then determined that Plaintiff had the residual functional capacity to:

10 Perform a wide range of sedentary work as defined in 20 CFR
11 404.1567(a) and 416.967(a). She would be able to perform work that
12 does not involve lifting and/or carrying more than a maximum of 10
13 pounds at a time; lifting and/or carrying articles such as docket files,
14 ledgers, or small tools more than occasionally; any pushing or pulling
15 in excess of lifting restrictions; standing and/or walking for more than
16 a total of two hours in an eight-hour workday; any climbing of
ladders, ropes, or scaffolds; climbing of ramps or stairs more than
occasionally; balancing, stooping, crouching, kneeling, or crawling
more than occasionally; any concentrated exposure to unprotected
heights or use of moving machinery; or more than simple, routine, and
repetitive tasks.

17 Tr. 28-32. At step four, the ALJ found that Plaintiff had no past relevant work. Tr.
18 32. At step five, the ALJ found that Plaintiff could perform the representative
19 occupations of hand packager, telephone solicitor and cashier, and that such
20 occupations existed in significant numbers in the national economy. Tr. 33. In

1 light of this step five finding, the ALJ concluded that Plaintiff was not disabled
2 under the Social Security Act and denied her claims on that basis. Tr. 33-34.

3 The Appeals Council denied Plaintiff's request for review on November 30,
4 2012, making the ALJ's decision the Commissioner's final decision for purposes
5 of judicial review. Tr. 1-6; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

6 ISSUES

7 Plaintiff raises three issues for review:

- 8 1. Whether the ALJ erred in rejecting Plaintiff's subjective complaints of
9 disabling pain;
- 10 2. Whether the ALJ properly considered the opinions of two examining
11 physicians; and
- 12 3. Whether the ALJ erred at step five.

12 ECF No. 12 at 8-15.

13 DISCUSSION

14 **A. Adverse Credibility Determination**

15 In social security proceedings, a claimant must prove the existence of
16 physical or mental impairment with "medical evidence consisting of signs,
17 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A
18 claimant's statements about his or her symptoms alone will not suffice. 20 C.F.R.
19 §§ 416.908; 416.927. Once an impairment has been proven to exist, the claimant
20 need not offer further medical evidence to substantiate the alleged severity of his or

1 her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).

2 As long as the impairment “could reasonably be expected to produce [the]
3 symptoms,” the claimant may offer a subjective evaluation as to the severity of the
4 impairment. *Id.* This rule recognizes that the severity of a claimant’s symptoms
5 “cannot be objectively verified or measured.” *Id.* at 347 (quotation and citation
6 omitted).

7 If an ALJ finds the claimant’s subjective assessment unreliable, “the ALJ
8 must make a credibility determination with findings sufficiently specific to permit
9 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant’s
10 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In making
11 this determination, the ALJ may consider, *inter alia*: (1) the claimant’s reputation
12 for truthfulness; (2) inconsistencies in the claimant’s testimony or between his
13 testimony and his conduct; (3) the claimant’s daily living activities; (4) the
14 claimant’s work record; and (5) testimony from physicians or third parties
15 concerning the nature, severity, and effect of the claimant’s condition. *Id.* If there
16 is no evidence of malingering, the ALJ’s reasons for discrediting the claimant’s
17 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d
18 661, 672 (9th Cir. 2012) (quotation and citation omitted). The ALJ “must
19 specifically identify the testimony she or he finds not to be credible and must
20

1 explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246
2 F.3d 1195, 1208 (9th Cir. 2001).

3 Plaintiff contends that the ALJ failed to provide clear and convincing
4 reasons supported by substantial evidence for discrediting her statements about the
5 severity of her back impairment. ECF No. 12 at 12-13. The Court disagrees. The
6 ALJ provided at least three clear and convincing reasons for rejecting Plaintiff’s
7 statements. First, the ALJ noted that Plaintiff’s treatment history did not support
8 her claims of total disability. Specifically, the ALJ observed that, despite
9 undergoing corrective back surgery in 1991, Plaintiff’s medical records reflected
10 only “episodic complaints of back pain due to activity related injuries” sustained
11 while playing basketball and running cross-country in high school. Tr. 29. The
12 ALJ also found it significant that (1) Plaintiff’s spondylolisthesis remained
13 unchanged over the course of four routine follow-up evaluations from 2000 to
14 2002; and (2) Plaintiff did not seek any treatment for back pain during the next
15 three years. Tr. 30. These observations, when taken in conjunction with the
16 additional clear and convincing reasons discussed below, are sufficient to support
17 the ALJ’s adverse credibility determination. *See Burch v. Barnhart*, 400 F.3d 676,
18 680 (9th Cir. 2005) (although an ALJ “may not reject a claimant’s subjective
19 complaints based solely upon a lack of objective medical evidence to fully
20 corroborate the alleged severity of pain,” he or she may consider an absence of

1 objective medical evidence in conjunction with other factors when making an
2 adverse credibility determination).

3 Second, and in a related vein, the ALJ noted that Plaintiff had not been
4 treated for back pain in the four years preceding her application for disability
5 benefits (from February 2006 to September 2010). Tr. 30. This was also a
6 permissible basis for discounting Plaintiff's credibility. *See Tommasetti v. Astrue*,
7 533 F.3d 1035, 1040 (9th Cir. 2008) (ALJ may consider claimant's failure to
8 pursue "an aggressive treatment program [or] an alternative or more tailored
9 treatment program" in response to allegedly disabling pain as a reason for
10 discounting the claimant's credibility). The record does not support Plaintiff's
11 apparent assertion that she was unable to pursue treatment due to a lack of health
12 insurance. *See* ECF No. 12 at 12. At the hearing, Plaintiff expressly conceded that
13 she had health insurance during this period. Tr. 53-54.

14 Third, the ALJ noted that Plaintiff's activities of daily living were
15 inconsistent with her claims of disabling back pain. Specifically, the ALJ wrote
16 that Plaintiff "reported no problems with personal care or hygiene; preparing her
17 own meals daily; daily and weekly chores around the home; and managing her own
18 money." Tr. 27. The ALJ further noted that Plaintiff was able to run cross country
19 and play basketball while in high school and had more recently been employed as
20 an assistant cross country coach at her former high school. Tr. 29-30. The ALJ

1 did not err in relying upon Plaintiff's reported activities of daily living as a reason
2 for discounting her credibility.

3 Plaintiff has also challenged the ALJ's rejection of lay witness statements
4 concerning the severity of her impairments. ECF No. 12 at 12-13. As Plaintiff
5 acknowledges, the ALJ rejected these statements on the ground that they were
6 based in large part upon Plaintiff's subjective complaints. Tr. 32. Because the
7 ALJ properly rejected Plaintiff's subjective complaints, there was no error in his
8 rejection of the lay witness statements. *See Valentine v. Comm'r of Soc. Sec.*
9 *Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) ("In light of our conclusion that the ALJ
10 provided clear and convincing reasons for rejecting [the claimant's] own subjective
11 complaints, and because [the lay witness's] testimony was similar to such
12 complaints, it follows that the ALJ also gave germane reasons for rejecting her
13 testimony.").

14 **B. Opinions of Dr. Quackenbush and Dr. Wylie**

15 Plaintiff asserts that the ALJ failed to fully incorporate the opinions of Dr.
16 Quackenbush and Dr. Wylie into the residual functional capacity assessment. This
17 assertion is belied by the ALJ's opinion. The ALJ afforded "great weight" to the
18 opinions of both doctors. Dr. Quackenbush performed a psychological evaluation
19 of Plaintiff in November 2010. In his examination report, Dr. Quackenbush noted:

20 The prognosis for Claimant appears good, although she will likely
require some accommodations in the workforce due to physical

1 limitations (e.g., fatigue and pain impeding pace and persistence) and
2 mild learning disabilities (i.e., slow reading speed and limited writing
3 facility). Cognitively, Claimant exhibits generally average abilities.
4 She can understand and follow simple to detailed instructions, and her
5 reasoning and abstraction skills appeared near average as well.
6 Socially, Claimant was pleasant and friendly, albeit some hesitance to
7 engage with others was noted (possibly due to difficult developmental
8 experiences as a child and adolescent).

9 Tr. 413. As Defendant correctly notes, the ALJ properly accounted for this
10 opinion by limiting Plaintiff to “simple, routine, and repetitive tasks.” Tr. 28.

11 Dr. Wylie administered a visual performance evaluation of Plaintiff in
12 March 2010. Dr. Wylie diagnosed Plaintiff with left exotropia (an outward turning
13 of the eye), significant visual field constriction, and visual disturbances. Tr. 409.

14 With regard to work-related limitations, Dr. Wylie concluded:

15 [Plaintiff] has no visual acuity related limitations. With her reduction
16 in peripheral awareness it would not be wise having doing [sic] a job
17 with lots of driving or around heavy equipment. With the reduced
18 peripheral awareness it would also be decrease [sic] a person’s
19 efficiency and increase fatigue. If she was allowed a 5 to 10 minute
20 break every two hours of work that would give great assistance to her.

Tr. 409. The ALJ properly accounted for this opinion by limiting Plaintiff to work
that (1) does not involve climbing of ladders, ropes or scaffolds; (2) involves only
occasional climbing of ramps or stairs; (3) requires only occasional balancing,
stooping, crouching, kneeling or crawling; and (4) does not involve concentrated
exposure to unprotected heights or the use of moving machinery. Tr. 28.

1 Plaintiff appears to suggest that the ALJ should have included a requirement
2 that Plaintiff be allowed a 5 to 10 minute break every two hours as suggested by
3 Dr. Wylie. ECF No. 12 at 11. As Defendant correctly notes, however, there was
4 no need for the ALJ to include such a requirement in the RFC because employees
5 are typically granted breaks of this duration and frequency as a matter of course in
6 most workplaces. The vocational expert specifically addressed this issue at the
7 hearing:

8 Q: If you were to consider a hypothetical worker, in general, that
9 would require a break after two hours of work up to at least ten
10 minutes, does that speak to the issue of sustainability of employment?

11 A: Well, in general, most employers offer at least a ten minute break
12 every hour. In fact in some states, it's regulation that that happen. So
13 a ten-minute break every two hours is not at all out of the norm.

14 Tr. 84. The ALJ did not err in declining to include a greater rest break restriction
15 in Plaintiff's RFC.

16 **C. Step Five Challenge**

17 Plaintiff argues that the ALJ erred in finding that she was capable of
18 performing other work at step five of the sequential evaluation process. ECF No.
19 12 at 13. While Plaintiff has styled her argument as a challenge to the adequacy of
20 the hypothetical question posed to the vocational expert, her analysis focuses on
the ALJ's omission of the same limitations discussed above from Plaintiff's RFC.

1 This argument fails for the same reasons discussed above. Defendant is entitled to
2 summary judgment.

3 **IT IS HEREBY ORDERED:**

4 1. Defendant's Motion for Summary Judgment (ECF No. 13) is

5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment (ECF No. 12) is **DENIED.**

7 The District Court Executive is hereby directed to file this Order, enter
8 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

9 **DATED** November 27, 2013.



12
13
14
15
16
17
18
19
20

Thomas O. Rice
THOMAS O. RICE
United States District Judge