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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

Case No. 1:14-CV-00286-JPH

STEPHANIE SUZANNE MININGER,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14, 19. Attorney David Lybbert represents plaintiff (Mininger). Special Assistant United States Attorney Jeffrey McClain represents defendant (Commissioner). The parties consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **grants**

ORDER ~ 1

1 defendant's motion for summary judgment, ECF No. 19.

2 **JURISDICTION**

3 Mininger protectively applied for supplemental security income disability
4 benefits (SSI) on May 10, 2010, alleging onset on April 27, 2008 (Tr. 133-36). The
5 claim was denied initially and on reconsideration (Tr. 78-85, 89-93). Administrative
6 Law Judge (ALJ) James W. Sherry held a hearing April 19, 2013. Mininger,
7 represented by counsel, and a vocational expert testified (Tr. 41-75). On May 16,
8 2013, the ALJ issued an unfavorable decision (Tr. 20-34). The Appeals Council
9 denied review July 29, 2014 (Tr. 1-6), making the ALJ's decision final. On August
10 29, 2014 Mininger filed this appeal pursuant to 42 U.S.C. §§ 405(g). ECF No. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing transcript, the
13 ALJ's decision and the parties' briefs. They are only briefly summarized here and
14 throughout this order as necessary to explain the Court's decision.

15 Mininger was 37 years old when she applied for benefits and 40 at the
16 hearing. She stopped school in the eighth grade but earned a GED. Mininger has
17 worked as a cashier, cocktail waitress, housekeeper/cleaner, inventory counter and
18 warehouse worker. She last worked in 2009 and lives with a friend. Mininger
19 alleges physical and mental limitations (Tr. 33, 46, 48-49, 52-54, 65-67, 146-47).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff’s age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments,

1 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
2 the third step, which compares plaintiff's impairment with a number of listed
3 impairments acknowledged by the Commissioner to be so severe as to preclude
4 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20
5 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
6 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
7 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
8 step, which determines whether the impairment prevents plaintiff from performing
9 work which was performed in the past. If a plaintiff is able to perform previous work
10 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
11 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
12 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
13 the process determines whether plaintiff is able to perform other work in the national
14 economy in view of plaintiff's residual functional capacity, age, education and past
15 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
16 *Yuckert*, 482 U.S. 137 (1987).

17 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
18 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
19 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
20 met once plaintiff establishes that a mental or physical impairment prevents the

1 performance of previous work. The burden then shifts, at step five, to the
2 Commissioner to show that (1) plaintiff can perform other substantial gainful
3 activity and (2) a “significant number of jobs exist in the national economy” which
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

5 **STANDARD OF REVIEW**

6 Congress has provided a limited scope of judicial review of a Commissioner’s
7 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
8 made through an ALJ, when the determination is not based on legal error and is
9 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
10 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). “The [Commissioner’s]
11 determination that a plaintiff is not disabled will be upheld if the findings of fact are
12 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
13 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
14 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a
15 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
16 Substantial evidence “means such evidence as a reasonable mind might accept as
17 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
18 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]
19 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,
20 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a

1 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*
2 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
3 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.
5 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
6 interpretation, the Court may not substitute its judgment for that of the
7 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
8 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
9 set aside if the proper legal standards were not applied in weighing the evidence and
10 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
11 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
12 administrative findings, or if there is conflicting evidence that will support a finding
13 of either disability or nondisability, the finding of the Commissioner is conclusive.
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

15 **ALJ'S FINDINGS**

16 At step one the ALJ found Mininger did not work at SGA levels after she
17 applied for benefits (Tr. 22). At steps two and three, he found Mininger suffers
18 from depressive disorder/dysthymia with anxiety and endometriosis/pelvic
19 adhesions, impairments that are severe but do not meet or medically equal a Listed
20 impairment (Tr. 22). The ALJ found Mininger less than credible (Tr. 29). He found

1 Mininger is able to perform a range of light work (Tr. 32-33). At step four, relying
2 on a vocational expert, ALJ Sherry found Mininger is able to perform her past
3 relevant work as a cashier II and housekeeper/cleaner (Tr. 33, 69). Alternatively, at
4 step five, the ALJ found Mininger can perform other jobs, such as cashier,
5 production inspector and hand packager (Tr. 34, 69-71). Accordingly, the ALJ
6 found Mininger is not disabled as defined by the Act (Tr. 34).

7 **ISSUES**

8 Mininger alleges the ALJ erred when he evaluated the medical evidence and
9 credibility, and at step five. ECF No. 14 at 10. The Commissioner responds that the
10 ALJ's findings are factually supported and free of harmful legal error. She asks the
11 court to affirm. ECF No. 19 at 2.

12 **DISCUSSION**

13 *A. Credibility*

14 Mininger alleges the ALJ's credibility assessment is not properly supported.
15 ECF No. 14 at 10, 16-19.

16 When presented with conflicting medical opinions, the ALJ must determine
17 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
18 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's credibility findings must be
19 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
20 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for

1 rejecting the claimant’s testimony must be “clear and convincing.” *Lester v. Chater*,
2 81 F.3d 821, 834 (9th Cir. 1995). “General findings are insufficient: rather the ALJ
3 must identify what testimony is not credible and what evidence undermines the
4 claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918
5 (9th Cir. 1993).

6 The ALJ’s finding is fully supported.

7 Treating and examining sources note noncompliance with taking prescribed
8 estrogen (Tr. 27, referring to Tr. 272; *see also* Tr. 340). Mininger “discharged
9 herself” from the hospital against medical advice (Tr. 27, 266). Daily activities
10 suggest greater functional capacity than Mininger’s testimony describes. The ALJ
11 notes Mininger does laundry, vacuums, shops, loads the dishwasher, uses a
12 computer, drives and prepares simple meals (Tr. 30-31, 169-70, 173, 177). This is
13 inconsistent with the degree of limitation alleged.

14 There are several unexplained gaps in treatment, suggesting limitations were
15 not as severe as alleged (Tr. 28, citing 284-89: treatment notes January and February
16 2013, and 344-51: treatment notes April and May 2012). Treatment has largely
17 consisted of physical therapy and other conservative measures (Tr. 29-30, citing Tr.
18 214, 234, 275, 287-88, 295, 302, 313, 340-41, 344-45, 363-370).

19 Although lack of supporting medical evidence cannot form the sole basis for
20 discounting pain testimony, it is a factor the ALJ can consider when analyzing

1 credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Subjective
2 complaints contradicted by medical records and by daily activities are properly
3 considered. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir.
4 2008); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). An ALJ may
5 consider unexplained or inadequately explained failure to seek treatment or to follow
6 a prescribed course of treatment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th
7 Cir. 2008)(citation omitted). Evidence of conservative treatment is sufficient to
8 discount a claimant’s testimony regarding the severity of an impairment. *Parra v.*
9 *Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007).

10 The ALJ’s credibility assessment is supported by the evidence and free of
11 harmful error.

12 *B. Medical evidence*

13 Next, Mininger alleges the ALJ failed to properly credit the opinions of some
14 treating and examining professionals. ECF No. 14 at 12-16. She points to the
15 opinions of Austen Stasiak, M.D., Aaron Burdge, Ph.D., and Susan Harp, ARNP.
16 The Commissioner responds that, to the extent he rejected the first two opinions, the
17 ALJ gave specific and legitimate reasons for rejecting the first two opinions, and
18 germane reasons for rejecting Ms. Harp’s, contradicted opinions. ECF No. 19 at 8-
19 13.

20 The ALJ reasons are proper and supported by substantial evidence.

1 Notably, Dr. Stasiak's first record is in 2013, while onset is alleged in April
2 2008 (Tr. 287). In March 2013 he opined Mininger can perform light work. He
3 recommended physical, occupational and behavioral therapy (Tr. 369). The ALJ
4 accepted his RFC for light work because it was consistent with the overall weight of
5 the evidence (Tr. 31, 355).

6 The ALJ is correct. In May 2010 treating doctor Krishna Chand, M.D., notes
7 Mininger is doing very well on medications prescribed for GERD. After Mininger
8 undergoes a diagnostic EGD/colonoscopy, Dr. Chand reviews the results and advises
9 dietary and lifestyle modifications for GERD symptoms (Tr. 213). Mininger's
10 regular physician, Leonel Zolessi, M.D., notes tests show no colonic disease and no
11 colonic endometriosis, only a hiatal hernia (Tr. 230). When Mininger sees Dr.
12 Zolessi in March 2010, she takes advil for pain (Tr. 234). Following surgery to
13 remove adhesions in July 2010, treating doctor Zolessi notes "significant
14 improvement in symptoms" (Tr. 261, 265). By September 2010 Dr. Zolessi states
15 Mininger is noncompliant with taking prescribed estrogen (Tr. 272). In 2013 Dr.
16 Stasiak observes Mininger is well appearing, well-nourished, in no apparent distress
17 and well groomed (Tr. 284-85).

18 The ALJ did not err when he weighed Dr. Stasiak's opinion.

19 The ALJ rejected Dr. Burdge's opinion because it is contradicted by other
20 evidence, including the opinion of another examining psychologist, Mark Duris,

1 Ph.D. (Tr. 31-32; Tr. 340-43, 372-76). In April 2012 Dr. Duris opined testing
2 showed depression was not at sufficiently high enough levels and/or did not present
3 the type of depressive symptoms that would likely prevent work or the ability to
4 sustain work. Mininger took no medications (Tr. 340-42).

5 About a year later, Dr. Burdge assessed several marked and a severe
6 limitation, yet some of his own testing showed moderate depression and normal
7 anxiety; moreover, the PAI results were invalid (Tr. 32, 373-80).

8 The ALJ's reasons are specific, legitimate and supported by the record. An
9 ALJ may properly reject any opinion that is brief, conclusory and inadequately
10 supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.
11 2005). Opinions that are internally inconsistent may properly be given less weight.
12 *See Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 603 (9th Cir.
13 1999). To the extent the ALJ erred in considering that the purpose of the exam was
14 public assistance eligibility, any error is clearly harmless because the remaining
15 reasons are specific, legitimate and supported by substantial evidence. *See*
16 *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008);
17 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

18 The ALJ gave Ms. Harp's December 2010 opinion little weight in part
19 because it is inconsistent with her own examination results and appears based on
20 Mininger's unreliable self-report (Tr. 32, 276-77, 338-39). As a non-acceptable

1 medical source, Ms. Harp's opinion need only be rejected by germane reasons.
2 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Here, the ALJ's reasons are at
3 least germane. Harp's exam notes the examination is normal, Mininger is well
4 developed and well nourished. Mininger was instructed to use fiber laxatives daily
5 to prevent constipation (Tr. 277). Although Harp opines Mininger is limited in
6 sitting, standing and lifting, the ALJ is correct that her notes do not show any
7 objective evidence finding Plaintiff is so limited (Tr. 32, 276-77, 338-39). Moreover,
8 Harp opines such limitations are of "unknown" duration (Tr. 338). Although the
9 ALJ again relied in part on the purpose of the exam (evaluation for public assistance
10 eligibility) (Tr. 32), any error is clearly harmless since the ALJ's other reasons are at
11 least germane.

12 *C. Step five*

13 Mininger alleges the ALJ erred at step five by presenting an incomplete
14 hypothetical. ECF 14 at 19-20. However, step five was an *alternate finding*. The
15 ALJ found at step four Mininger is able to perform her past work as a cashier (Tr.
16 33). There was no error in this finding. *Tommasetti v. Astrue*, 533 F.3d 1035, 1044
17 (9th Cir. 2008).

18 Moreover, as the Commissioner correctly points out, one does not establish
19 error at step five by rearguing that the ALJ erroneously weighed the medical
20 evidence. ECF No. 19 at 14. Mininger alleges the ALJ should have included marked

1 and moderate limitations assessed by Dr. Burge. And she cites Ms. Harp's opinion
2 that frequent bathroom breaks are needed, as limitations the ALJ improperly omitted
3 (Tr. 339). These are the same arguments that the ALJ failed to properly weigh Dr.
4 Burge's and Ms. Harp's opinions.

5 Because the ALJ appropriately included the limitations supported by the
6 record, there was no harmful error.

7 Mininger alleges the ALJ should have weighed the evidence differently, but
8 the ALJ is responsible for reviewing the evidence and resolving conflicts or
9 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It
10 is the role of the trier of fact, not this court, to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
12 interpretation, the Court may not substitute its judgment for that of the
13 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
14 1984). If there is substantial evidence to support the administrative findings, or if
15 there is conflicting evidence that will support a finding of either disability or
16 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812
17 F.2d 1226, 1229-30 (9th Cir. 1987).

18 The ALJ's determinations are supported by the record and free of harmful
19 legal error.

1 **CONCLUSION**

2 After review the Court finds the ALJ's decision is supported by substantial
3 evidence and free of harmful legal error.

4 **IT IS ORDERED:**

5 Defendant's motion for summary judgment, **ECF No. 19**, is **granted**.

6 Plaintiff's motion for summary judgment, ECF No. 14, is denied.

7 The District Court Executive is directed to file this Order, provide copies to
8 counsel, enter judgment in favor of defendant and **CLOSE** the file.

9 DATED this 18th day of June, 2015.

10 *S/ James P. Hutton*

11 JAMES P. HUTTON
12 UNITED STATES MAGISTRATE JUDGE
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