

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 18, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAWN M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00231-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14, 15. Attorney Cory Brandt represents Dawn M. (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits on April 25, 2014, alleging disability since August 27, 2013, due to back conditions, headaches, blurred vision, Tourette Syndrome, and a neck injury. Tr. 169-70, 232. The application was denied initially and upon reconsideration. Tr. 104-06, 114-16. Administrative Law Judge (ALJ) Marie Palachuk held a hearing on February 22, 2017, Tr. 36-63, and issued an unfavorable decision on April 5, 2017, Tr. 16-29. The Appeals Council denied Plaintiff's request for review on May 23, 2018. Tr. 1-

1 4. The ALJ's April 2017 decision thus became the final decision of the
2 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
3 405(g). Plaintiff filed this action for judicial review on July 23, 2018. ECF No. 1,
4 4.

5 **STATEMENT OF FACTS**

6 Plaintiff was born on August 5, 1967 and was 46 years old on the alleged
7 onset date, August 27, 2013, and 47 years old as of the date last insured. Tr. 76.
8 She has a high school education and work history as a cashier, dealer, and pit boss
9 in a casino, and in-home caretaker for disabled adults. Tr. 56, 207. She
10 experienced an on-the-job injury in August 2013 when she intervened in an
11 altercation between two residents at her place of employment. Tr. 51. She
12 returned to work at a lighter duty position in November 2013, but the position was
13 not available after December 2013. Tr. 51-52.

14 In her application, Plaintiff alleged disability due to an inability to use the
15 right side of her body without extreme pain, weakness, and numbing. Tr. 192. She
16 was able to engage in some household chores and to care for her child and pets,
17 though she stated she needed assistance from her husband. Tr. 192-95. She further
18 indicated that she was unable to concentrate for extended periods of time due to
19 pain. Tr. 199-204.

20 At the hearing, Plaintiff testified her neck pain caused the greatest
21 difficulties, and that since leaving her job, her functional abilities had progressively
22 worsened, resulting in difficulty standing and functioning around the home. Tr.
23 52-53. She testified she had been using a cane, walker, or wheelchair since shortly
24 after her August 2013 injury. Tr. 49-50.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28

1 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
2 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
3 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
4 only if it is not supported by substantial evidence or if it is based on legal error.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
6 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
7 1098. Put another way, substantial evidence is such relevant evidence as a
8 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
9 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
10 rational interpretation, the Court may not substitute its judgment for that of the
11 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
12 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
13 administrative findings, or if conflicting evidence supports a finding of either
14 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
15 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
16 supported by substantial evidence will be set aside if the proper legal standards
17 were not applied in weighing the evidence and making the decision. *Brawner v.*
18 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 **SEQUENTIAL EVALUATION PROCESS**

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*
22 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
23 proof rests upon the claimant to establish a prima facie case of entitlement to
24 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
25 claimant establishes that a physical or mental impairment prevents the claimant
26 from engaging in past relevant work. 20 C.F.R. § 404.1520(a)(4). If the claimant
27 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
28 shifts to the Commissioner to show that (1) the claimant can make an adjustment to

1 other work, and (2) the claimant can perform specific jobs which are available in
2 the national economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190,
3 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment to other work in
4 the national economy, a finding of “disabled” is made. 20 C.F.R. §
5 404.1520(a)(4)(v).

6 **ADMINISTRATIVE DECISION**

7 On April 5, 2017, the ALJ issued a decision finding Plaintiff was not
8 disabled as defined in the Social Security Act.

9 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
10 activity since August 27, 2013, the alleged onset date. Tr. 18.

11 At step two, the ALJ determined Plaintiff had the following severe
12 impairment: degenerative disc disease of the spine, causing chronic neck and back
13 pain. Tr. 18.

14 At step three, the ALJ found Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled the severity of one of
16 the listed impairments. Tr. 19.

17 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and found
18 Plaintiff could perform sedentary exertion level work with the following additional
19 limitations:

20 she could not operate right side foot controls, and could only
21 occasionally operate left side foot controls. She could occasionally
22 perform any postural activity, except that she could never climb
23 ladders, ropes, or scaffolds. She could occasionally reach overhead
bilaterally. She needed to avoid concentrated exposure to extreme
temperatures, heavy vibration, respiratory irritants, and all hazards.

24 Tr. 20.

25 At step four, the ALJ found Plaintiff was able to perform her past relevant
26 work as a gambling cashier, cashier I, order clerk, and checker II. Tr. 27.

1 The ALJ thus concluded Plaintiff was not under a disability within the
2 meaning of the Social Security Act at any time from August 27, 2013, the alleged
3 onset date, through the date last insured, December 31, 2014. Tr. 28.

4 ISSUES

5 The question presented is whether substantial evidence supports the ALJ's
6 decision denying benefits and, if so, whether that decision is based on proper legal
7 standards. Plaintiff contends the ALJ erred by (1) failing to adequately develop the
8 record; (2) improperly rejecting a medical opinion; and (3) making insufficient step
9 four findings.

10 DISCUSSION¹

11 1. Development of the Record

12 Plaintiff alleges the ALJ erred by failing to further develop the record with a
13 consultative psychological exam to investigate the nature of Plaintiff's mental
14 health. ECF No. 14 at 11.

15 An ALJ has a duty to ensure that the administrative record is fully and fairly
16 developed. 20 C.F.R. § 404.1512(b); *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th
17 Cir. 1996). Under certain circumstances, an ALJ may order a consultative exam,
18 such as when a medical source cannot or will not provide sufficient medical
19 evidence about a claimant's condition. 20 C.F.R. § 404.1517. However, the
20 obligation to develop the record is not unlimited, and "is triggered only when there
21

22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 is ambiguous evidence or when the record is inadequate to allow for proper
2 evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir.
3 2001).

4 The evidence in this case was not ambiguous or inadequate to the point of
5 triggering the ALJ’s duty to obtain an additional exam.

6 In her initial application materials, Plaintiff did not allege any mental health
7 impairments as the basis for her disability. Tr. 232. Though she reported
8 difficulties with concentration and memory, she attributed these problems to her
9 physical pain, and not a psychological condition. Tr. 203. She received no mental
10 health treatment during the relevant period. A depression questionnaire
11 administered by John Begley, PA-C, in October 2013, revealed few mental health
12 symptoms, and Plaintiff reported that the symptoms she did experience did not
13 make it difficult at all for her to engage in regular activities or get along with other
14 people. Tr. 402-03. Upon initial assessment of the application by Social Security,
15 the reviewing doctor, Myles Friedland, Ph.D., noted psychological issues did not
16 warrant development as there did not appear to be any mental work-related
17 limitations. Tr. 68.

18 The single note from Dr. Moise suggesting that Plaintiff’s EMG testing
19 results could possibly be due to a conversion disorder does not generate enough
20 ambiguity in the record to trigger the ALJ’s duty to order additional testing. Dr.
21 Moise stated the testing results were “due to either conversion disorder or sub
22 maximal effort, rather than nerve or muscle abnormality.” Tr. 479. A conversion
23 disorder was simply one possible explanation. Multiple other providers offered
24 conclusions that Plaintiff was not engaged in full effort on exam, or that she
25 exhibited significant pain behavior or symptom magnification. Tr. 308-09, 360,
26 367. No other providers mentioned the possibility of a conversion disorder.
27 Therefore, the record is not ambiguous or inadequate, and the ALJ did not err in
28 failing to order additional psychological testing.

1 **2. Medical Opinion Evidence**

2 Plaintiff contends the ALJ erred by improperly rejecting the opinion of
3 consultative examiner Dr. Kevin Weeks. ECF No. 14 at 11-13.

4 When an examining physician’s opinion is not contradicted by another
5 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
6 and when an examining physician’s opinion is contradicted by another physician,
7 the ALJ is only required to provide “specific and legitimate reasons” to reject the
8 opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific and
9 legitimate standard can be met by the ALJ setting out a detailed and thorough
10 summary of the facts and conflicting clinical evidence, stating his interpretation
11 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
12 1989). The ALJ is required to do more than offer his conclusions, he “must set
13 forth his interpretations and explain why they, rather than the doctors’, are
14 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

15 Dr. Weeks’ opinion is contradicted by other opinions in the record. Tr. 45-
16 46, 80-81, 95-96, 301-09. Therefore, the ALJ was required to give specific and
17 legitimate reasons for the rejection.

18 Dr. Weeks performed a consultative physical exam on September 27, 2014.
19 Tr. 480-85. He reviewed available medical records, including imaging, and
20 performed a physical examination. *Id.* He concluded Plaintiff was capable of
21 standing and walking for less than two hours, could sit about two or three hours in
22 an eight hour workday, and could lift and carry less than ten pounds. Tr. 484. He
23 also assessed postural, manipulative, and environmental limitations, and stated that
24 Plaintiff’s use of a cane appeared medically necessary. Tr. 484-85.

25 The ALJ gave this opinion little weight because it was based on a one-time
26 exam, it was inconsistent with other objective evidence in the record, the doctor
27 failed to explain apparent inconsistencies between the mild records reviewed and
28 the severe findings in his opinion, he did not review some relevant objective

1 testing, and he appeared to have accepted Plaintiff's presentation despite other
2 evidence documenting inconsistent and nonphysiological presentations. Tr. 24-25.

3 An ALJ may reject an examining physician's opinion when it is inconsistent
4 with the majority of the objective evidence. *Batson v. Comm'r of Soc. Sec.*, 359
5 F.3d 1190, 1195 (9th Cir. 2004). The record contains numerous objective findings
6 that showed no more than mild impairment, or no impairment at all, demonstrating
7 inconsistency with Dr. Weeks' conclusions. Tr. 463-64 (no more than mild
8 findings on cervical MRI); Tr. 466 (essentially normal lumbar MRI); Tr. 468-70
9 (no significant findings on cervical, thoracic, and lumbar imaging). The medical
10 expert at the hearing testified that EMG testing done in August 2014 (which was
11 not available to Dr. Weeks), indicated that no manipulative limitations were
12 warranted. Tr. 46-47. The ALJ's interpretation of the inconsistency between Dr.
13 Weeks' findings and the objective imaging is supported by the explanations from
14 the state agency reviewing doctors. Tr. 67, 82, 92, 97, 101. Therefore, this was a
15 specific and legitimate basis for the ALJ to reject Dr. Weeks' opinion.

16 A doctor's opinion may also be discounted if it is "based to a large extent on
17 a claimant's self-reports that have been properly discounted as incredible."
18 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). The ALJ concluded
19 that Dr. Weeks "appears to have accepted claimant's presentation carte blanche,
20 even though the record is replete with references by multiple examiners (including
21 claimant's treating physician) that her presentations are inconsistent and non-
22 physiological at examinations." Tr. 25. Elsewhere in the decision the ALJ found
23 Plaintiff's subjective symptom reports to be inconsistent with the medical evidence
24 and other evidence in the record, Tr. 21, a finding Plaintiff has not challenged.
25 ECF No. 14. In conjunction with the ALJ's discussion of the objective medical
26 evidence that is inconsistent with Dr. Weeks' opinion, the ALJ's conclusion that
27 the opinion was based largely on Plaintiff's unreliable reports is supported by
28 substantial evidence.

1 While Plaintiff encourages an alternative interpretation of the record in
2 support of Dr. Weeks' conclusions, the ALJ's interpretation is rational and
3 supported by substantial evidence. *Burch v. Barnhardt*, 400 F.3d 676, 679 (9th
4 Cir. 2005) ("Where evidence is susceptible to more than one rational interpretation,
5 it is the ALJ's conclusion that must be upheld.").

6 **3. Step Four**

7 Plaintiff argues the ALJ failed to conduct a proper step four assessment.
8 ECF No. 14 at 13-15. To the extent Plaintiff alleges error based on the ALJ's
9 rejection of Dr. Weeks' opinion, the Court finds no error for the reasons discussed
10 above. Plaintiff additionally asserts the ALJ failed to make the requisite findings
11 in determining Plaintiff was capable of performing her past relevant work.

12 A claimant has the burden of showing that she can no longer perform her
13 past relevant work. See 20 C.F.R. §§ 404.1512(a), 404.1520(f). Although the
14 claimant has the burden of proof at step four, an ALJ must still make "the requisite
15 factual findings" to support her conclusions. *Pinto v. Massinari*, 249 F.3d 840,
16 844 (9th Cir. 2001). An ALJ's determination at step four "must be developed and
17 explained fully" and contain the following specific findings of fact: (1) the
18 claimant's residual functional capacity; (2) the physical and mental demands of the
19 past relevant job/occupation; and (3) that the claimant's residual functional
20 capacity would permit a return to her past job or occupation. See Social Security
21 Ruling (S.S.R.) 82-62.

22 The ALJ made all required findings. The ALJ obtained a description of the
23 past relevant work from the vocational expert. Tr. 59-60. She then posed a
24 hypothetical scenario to the vocational expert that matched the eventual RFC
25 finding. Tr. 60-61. The vocational expert testified that such a person could
26 perform some of Plaintiff's past relevant work as it was described in the Dictionary
27 of Occupational Titles. Tr. 61. All necessary findings appear in the ALJ's
28 decision. Tr. 27.

1 Plaintiff asserts the ALJ's decision parallels the facts of *Pinto v. Massinari*,
2 in which the Ninth Circuit found flaws in the ALJ's step four findings. However,
3 the facts of *Pinto* are distinct. In that case, the ALJ failed to indicate whether
4 Plaintiff was capable of performing her past relevant work as she actually
5 performed it or as it was generally performed. *Pinto*, 249 F.3d at 845. The past
6 work as actually and generally performed was facially inconsistent with the RFC
7 findings, and the ALJ failed to resolve the inconsistency. *Id.* at 845-47. Without
8 specific findings in the decision as to how the ALJ reached the conclusion that the
9 claimant was capable of performing her past work given these discrepancies, the
10 Ninth Circuit found the ALJ's decision difficult to review and ultimately
11 unsupported by the administrative record. *Id.* at 847-48.

12 Here, Plaintiff makes no such assertions of inconsistencies with the RFC, or
13 that the ALJ's ultimate step four findings were incorrect. As the ALJ made all
14 necessary findings to support the step four decision, the Court finds no error.

15 CONCLUSION

16 Having reviewed the record and the ALJ's findings, the Court finds the
17 ALJ's decision should be affirmed. Therefore, **IT IS HEREBY ORDERED:**

18 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
19 **GRANTED.**

20 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

21 The District Court Executive is directed to file this Order and provide a copy
22 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
23 and the file shall be **CLOSED.**

24 **IT IS SO ORDERED.**

25 DATED April 18, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE