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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Melissa Bernice Lee,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Acting Commissioner
of Social Security,

13 Defendant.

No. CV-13-00152-PHX-DGC

ORDER

14
15 Plaintiff Melissa Bernice Lee filed an application for Social Security disability
16 insurance benefits in June 2009, alleging a disability onset date of October 2008. Her
17 claim was denied initially and upon reconsideration, and she requested a hearing before
18 an Administrative Law Judge (“ALJ”). The hearing was held in June 2011, and the ALJ
19 denied Plaintiff’s application. The Appeals Council denied Plaintiff’s request for review,
20 making the ALJ’s decision final. Tr. at 1-4.

21 Plaintiff now appeals the Commissioner’s denial of her application for benefits.
22 Doc. 19. For the reasons that follow, the Court will deny Plaintiff’s appeal.

23 **I. Legal Standard.**

24 Defendant’s decision to deny benefits will be vacated “only if it is not supported
25 by substantial evidence or is based on legal error.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d
26 880, 882 (9th Cir. 2006). “‘Substantial evidence’ means more than a mere scintilla, but
27 less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept
28 as adequate to support a conclusion.” *Id.* In determining whether the decision is
supported by substantial evidence, the Court must consider the record as a whole,

1 weighing both the evidence that supports the decision and the evidence that detracts from
2 it. *Reddick v. Charter*, 157 F.3d 715, 720 (9th Cir. 1998). If there is sufficient evidence
3 to support the Commissioner’s determination, the Court cannot substitute its own
4 determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

5 **II. Analysis.**

6 For purposes of Social Security benefits determinations, a disability is

7 the inability to do any substantial gainful activity by reason of
8 any medically determinable physical or mental impairment
9 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 12 months.

10 20 C.F.R. § 404.1505.

11 Determining whether a claimant is disabled involves a five-step evaluation. The
12 claimant must show (1) she is not currently engaged in substantial gainful employment,
13 (2) she has a severe physical or mental impairment, and (3) the impairment meets or
14 equals a listed impairment or (4) her residual functional capacity (“RFC”) precludes her
15 from performing her past work. If at any step the Commission determines that a claimant
16 is or is not disabled, the analysis ends; otherwise it proceeds to the next step. If the
17 claimant establishes her burden through step four, the Commissioner bears the burden at
18 step five of showing that the claimant has the RFC to perform other work that exists in
19 substantial numbers in the national economy. *See* 20 C.F.R. § 404.1520(a)(4)(i)-(v).

20 The ALJ found that Plaintiff has not engaged in substantial gainful employment
21 since the disability onset date of October 29, 2008, and that she suffers from the severe
22 impairments of degenerative disc disease of the cervical and lumbar spine, obesity, and
23 chronic obstructive pulmonary disease (“COPD”). Tr. at 29. The ALJ found that
24 Plaintiff’s depression, fibromyalgia, and peripheral vascular disease were not severe
25 because they did not result in more than minimal limitations in functioning. Tr. at 30. At
26 step three, the ALJ concluded that Plaintiff does not have an impairment or combination
27 of impairments that meets or equals the severity of one of the impairments listed in the
28 regulations. Tr. at 31. The ALJ then considered the record and found that Plaintiff has

1 the RFC to “perform medium work as defined in 20 CFR 404.1567(c).” Tr. at 31. The
2 ALJ concluded that Plaintiff’s RFC included “lifting and carrying 50 pounds occasionally
3 and 25 pounds frequently, standing and walking 6 to 7 hours per day, and sitting 6 to 8
4 hours per day.” Tr. at 31. The RFC included no visual limitations and allowed
5 occasional climbing of ladders, ropes, and scaffolds, crawling, and frequent climbing
6 ramps and stairs. Tr. at 31. Finally, the ALJ determined that Plaintiff did not need any
7 manipulative limitations, but there was a need to avoid unprotected heights, moving
8 machinery, dust, fumes, and gases. Tr. at 31. At step five, the ALJ concluded that
9 Plaintiff was capable of her performing past relevant work as a cashier checker, cashier
10 supervisor, car hop, server, payroll clerk, receptionist, inventory clerk, and human
11 resources assistant. Tr. at 35. Accordingly, the ALJ concluded that Plaintiff was not
12 disabled within the meaning of the Social Security Act. Tr. at 35.

13 Plaintiff’s brief raises three challenges to the ALJ’s findings. First, she argues that
14 the ALJ erred at step two when he determined that Plaintiff’s depression, fibromyalgia,
15 and peripheral vascular disease were not severe. Second, she contends that the ALJ erred
16 by rejecting Plaintiff’s symptom testimony without clear and convincing reasons
17 supported by substantial evidence in the record. Third, Plaintiff argues that the ALJ
18 erroneously determined Plaintiff’s work capacities without support by substantial
19 evidence in the record.

20 **A. Step Two Severity Listings.**

21 Step two is “a de minimis screening device [used] to dispose of groundless
22 claims,” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an ALJ may find that
23 a claimant lacks a medically severe impairment or combination of impairments only
24 when his conclusion is “clearly established by medical evidence.” S.S.R. 85–28 (1985).
25 Impairments are considered “not severe” when “the evidence establishes a slight
26 abnormality that has no more than a minimal effect on an individual’s ability to work.”
27 *Smolen*, 80 F.3d at 1290. The ALJ determined at step two that Plaintiff’s “depression,
28 fibromyalgia, [and] peripheral vascular disease are not severe impairments, because they

1 do not result in more than minimal limitations in functioning.” The ALJ explained in
2 some detail why he did not consider Plaintiff’s depression to be a severe impairment.
3 Tr. at 30. In that explanation, the ALJ relies partly on GAF scores which both parties
4 acknowledge are not part of the record in this case. With respect to the other two non-
5 severe ailments, fibromyalgia and peripheral vascular disease, the ALJ provides nothing
6 more than the conclusory statement above to explain why they were not considered
7 severe.

8 The Court finds that the ALJ failed to show that his conclusion was clearly
9 established by medical evidence. Error at this step may be harmless, however, if the ALJ
10 goes on to discuss the ailments that he deemed non-severe when formulating the RFC.
11 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). Because the ALJ proceeded to
12 analyze the effects of Plaintiff’s depression, fibromyalgia, and peripheral vascular disease
13 during the RFC assessment, the Court concludes that the error at step two was harmless.

14 **B. Plaintiff’s Symptom Testimony.**

15 Plaintiff claimed that she has neck and back pain, lower extremity pain, pains
16 associated with fibromyalgia, breathing problems, shoulder pain, depression, and anxiety.
17 She claimed that her conditions limited her to walking for one hour and sitting for no
18 longer than twenty minutes before she must stand. She experiences muscle spasms, takes
19 naps for three to four hours a day, and spends most of her time sitting with her feet
20 elevated.

21 The ALJ must engage in a two-step analysis to evaluate the credibility of a
22 claimant’s testimony. “First, the ALJ must determine whether the claimant has presented
23 objective medical evidence of an underlying impairment ‘which could reasonably be
24 expected to produce the pain or other symptoms alleged.’” *Lingenfelter v. Astrue*, 504
25 F.3d 1028, 1036 (9th Cir.2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th
26 Cir.1991) (en banc)). If the claimant meets this first test, and there is no evidence of
27 malingering, the ALJ “can reject the claimant’s testimony about the severity of her
28 symptoms only by offering specific, clear and convincing reasons for doing so.” *Smolen*,

1 80 F.3d at 1282. The ALJ may consider at least the following factors when weighing the
2 claimant's credibility: the claimant's reputation for truthfulness, inconsistencies either in
3 the claimant's testimony or between her testimony and her conduct, the claimant's daily
4 activities, her work record, and testimony from physicians and third parties concerning
5 the nature, severity, and effect of the symptoms of which claimant complains. *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 958–59 (9th Cir.2002) (citing *Light v. Soc. Sec. Admin.*, 119
7 F.3d 789,792 (9th Cir.1997)).

8 The ALJ considered the symptom testimony and determined that Plaintiff's
9 medically determinable impairments could reasonably be expected to cause the alleged
10 symptoms. Tr. at 32. He then concluded that that Plaintiff's statements concerning the
11 intensity, persistence, and limiting effects of the symptoms were not credible.

12 The ALJ noted several reasons for discounting Plaintiff's subjective testimony.
13 He cited objective medical evidence, including MRI results that revealed "only mild
14 spondylosis," that undermine Plaintiff's assertion that back pain is her most disabling
15 problem. Tr. at 32 (citing Tr. at 750). He also cited a residual functional capacity
16 evaluation completed by Julie Ziegelmeyer, a physical therapist, which found Plaintiff
17 was "able to work on a full-time basis." Tr. at 32 (citing Tr. at 729). The ALJ noted that
18 despite "medical issues involving peripheral vascular disease," one treatment note stated
19 that Plaintiff was "stable from a vascular standpoint." Tr. at 32 (citing Tr. at 426). The
20 ALJ also cited Doppler ultrasound results that revealed no deep vein thrombosis. Tr. at
21 417-418.¹ The ALJ noted that progress notes dated November 24, 2008, showed that
22 Plaintiff underwent successful stenting of the right common iliac artery and that the
23 surgery resulted in a resolution of Plaintiff's symptoms. Tr. at 426. The ALJ also noted
24 that the results from a stress test performed in January 2009 found Plaintiff to have no
25 additional cardiovascular issues. Tr. at 33 (citing Tr. at 424). The ALJ noted that
26 Plaintiff takes only sleeping pills to treat her fibromyalgia and is not currently taking any

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28 ¹ The ALJ cited to Exhibit 3F at page 28 (corresponding with Tr. at 418), but that
page contains a laboratory report from Sonora Quest Laboratories. Tr. at 418. The ALJ
appears to have intended to cite the previous page, Exhibit 3F at page 27. Tr. at 417.

1 pain medication. Tr. at 33.

2 The ALJ cited other nonmedical evidence to support his conclusion that Plaintiff's
3 symptoms were not credible: Plaintiff appeared healthy at her hearing (Tr. at 33);
4 Plaintiff was fired for reasons unrelated to her disability (Tr. at 32); after her termination,
5 Plaintiff continued to collect unemployment benefits for two years, which required her to
6 assert that she was actively looking for work (Tr. at 32); Plaintiff cares for two children
7 ages three and fifteen, and takes her son to school, vacuums, does dishes, folds laundry,
8 makes simple meals, surfs the internet, pays bills, solves crossword puzzles, and has
9 babysat her grandson at least once (Tr. at 33).

10 Plaintiff argues that the ALJ's reasons fall short of the clear and convincing
11 standard necessary to reject her subjective testimony. She argues that the ALJ
12 improperly relied on her appearance at the hearing and gave too much weight to her
13 continued smoking. She also argues that her firing in April 2008 for nonmedical reasons
14 (Tr. at 52) should have no bearing on her credibility because her disability onset date is in
15 October 2008 (Tr. at 27). She contends that the ALJ drew an improper inference from
16 her receipt of unemployment benefits and failed to show how her activities of daily living
17 demonstrate that she is not disabled. Finally, Plaintiff argues that the note regarding
18 resolution of vascular symptoms (Tr. at 426) was created in November 2008, and that
19 other notes in the record show continued problems, including an additional surgery in
20 2009 (Tr. at 423, 539-40, 578-79).

21 Despite Plaintiff's objections, the Court finds that the ALJ based his conclusion on
22 substantial evidence in the record. His reasons were also specific, clear, and convincing.
23 Where, as here, there is sufficient evidence to support the Commissioner's determination,
24 the Court cannot substitute its own determination. *See Young*, 911 F.2d at 184. The ALJ
25 relied upon a functional capacity evaluation by a physical therapist (Tr. at 729), the fact
26 that Plaintiff did not take pain medication, testimony that Plaintiff may be "invested" in
27 her disabilities (Tr. at 752), and MRI results (Tr. at 750). None of the Plaintiff's
28 objections significantly undermine the validity of that evidence.

1 In light of this substantial evidence, the Court finds the ALJ's partial reliance on
2 other irrelevant or less valuable evidence to be harmless. For instance, the Ninth Circuit
3 has held that "the fact that a claimant does not exhibit physical manifestations of
4 prolonged pain at the hearing provides little, if any support for the ALJ's ultimate
5 conclusion that the claimant is not disabled or that his allegations of constant pain are not
6 credible." *Gallant v. Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984) (citation omitted).
7 But the Ninth Circuit has also stated that "the inclusion of the ALJ's personal
8 observations does not render the decision improper." *Verduzco v. Apfel*, 188 F.3d 1087,
9 1090 (9th Cir. 1999) (citations and internal quotation marks omitted).

10 Similarly, the timing of Plaintiff's the nonmedical termination several months
11 before the disability onset date may detract from the inference that Plaintiff has not been
12 truthful, but inclusion of this evidence does not render the ALJ's conclusion baseless.

13 Plaintiff's contention that the ALJ should not rely on the receipt of unemployment
14 benefits because the ALJ "did not inquire what work [Plaintiff] might try to do" (Doc. 19
15 at 26) does not invalidate the ALJ's point that Plaintiff claimed disability while affirming
16 that she was looking for work. *See Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir.
17 1988) (listing the receipt of unemployment insurance benefits as a reason for discounting
18 a claimant's pain testimony).

19 Finally, while the ALJ cites a treatment note that predates evidence of continued
20 vascular problems, he also cites cardiovascular follow up notes from August 13, 2009,
21 and the results of a January 2009 stress test. Tr. at 33. These citations demonstrate that
22 the ALJ considered later evidence of vascular disease as well.

23 **C. Residual Functional Capacity.**

24 **1. Medical Evidence.**

25 Plaintiff contends that the ALJ erred by determining her work capacity without
26 support by substantial evidence in the record. Plaintiff finds the RFC finding that she is
27 capable of medium work to be objectionable because the ALJ gave "full consideration"
28 to the opinion of a physical therapist who stated that Plaintiff should be limited to light

1 work. Tr. at 34 (citing Exhibits 26F and 28F); see Tr. at 703, 729. Plaintiff argues that
2 the ALJ articulated no basis for finding that Plaintiff was capable of medium work.
3 Doc. 19 at 29.

4 There is no requirement that the RFC be based entirely on the residual functional
5 capacity assessment of a physician. Instead, 20 C.F.R. § 404.1545(a)(3) requires that the
6 ALJ form the RFC based on all relevant medical evidence and other evidence in the
7 record. The ALJ considered the residual functional capacity assessment completed by
8 the physical therapist and the evaluations of the state agency's reviewing physicians.
9 Tr. 34-35. All of those opinions found Plaintiff could perform a range of light work. *See*
10 Tr. at 703-706, 512-519, 582-589. The ALJ found that in light of the other record
11 evidence, the opinions of these physicians were too limiting, and that Plaintiff was
12 actually capable of medium work.

13 The ALJ also considered the opinion of Dr. Steingard, who performed a mental
14 evaluation and opined that Plaintiff's depression led to defects in concentration, but that
15 Plaintiff had "no more than mild mental limitations." Tr. at 33 (citing Exhibit 17F).

16 By finding that Plaintiff needed fewer restrictions than the examining physicians
17 opined, the ALJ at least partially rejected their opinions. To reject the opinion of
18 examining medical experts, the ALJ must give clear and convincing reasons. *Regennitter*
19 *v. Comm'r of the Soc. Sec. Admin.*, 166 F.3d 1294, 1298-99 (9th Cir. 1999) (citing *Lester*
20 *v. Chater*, 81 F. 3d 821, 830 (9th Cir. 1995)). The ALJ fails to explain its reasons for
21 discounting the medical opinions beyond stating that "their opinions were not entirely
22 consistent with the greater objective record." Tr. at 35. This explanation is not sufficient
23 to satisfy Ninth Circuit standards.

24 The Commissioner argues that the ALJ's failure to explain his rational is
25 ameliorated by his reliance on the opinion of Dr. Fruchtman. Doc. 20 at 18. This
26 argument is unavailing because Dr. Fruchtman is not mentioned in the ALJ's opinion,
27 and the Court is precluded from relying on "*post hoc* rationalizations that attempt to intuit
28 what the adjudicator may have been thinking." *Bray v. Comm'r of Soc. Sec. Admin.*, 554

1 F.3d 1219, 1225 (9th Cir. 2009).

2 **2. Harmless Error.**

3 Despite the ALJ's improper decision to discount the opinions of medical experts,
4 the Commissioner argues that the error was harmless. The Court agrees. Had the ALJ
5 credited the most restrictive medical opinions in the record, it would have resulted in an
6 RFC that restricted Plaintiff to light work. The vocational expert testified that Plaintiff's
7 past jobs as a cashier, lead supervisor cashier, carhop, and server all qualified as light
8 work. Tr. at 70-71. The opinions of the medical professionals would not have prevented
9 Plaintiff from performing these light work jobs. The Court accordingly finds that a
10 proper consideration of those opinions would still have led the ALJ to conclude that
11 Plaintiff is not disabled.

12 **IT IS ORDERED** that Plaintiff's appeal of the Social Security Commissioner's
13 denial of her application for benefits (Doc. 19) is **denied**.

14 Dated this 11th day of September, 2013.

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19 David G. Campbell
20 United States District Judge
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