WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Monica Inez Pilgreen,

Plaintiff,

v.

Acting Commissioner of Social Security

Defendant.

No. CV-16-01447-PHX-ESW

ORDER

Pending before the Court is Plaintiff Monica Inez Pilgreen's ("Plaintiff") appeal of the Social Security Administration's ("Social Security") denial of her claims for disability insurance benefits and supplemental security income. The Court has jurisdiction to decide Plaintiff's appeal pursuant to 42 U.S.C. § 405(g), 1383(c). Under 42 U.S.C. § 405(g), the Court has the power to enter, based upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing. Both parties have consented to the exercise of U.S. Magistrate Judge jurisdiction. (Doc. 19).

After reviewing the Administrative Record ("A.R.") and the parties' briefing (Docs. 29, 30, 31, 32), the Court finds that the Administrative Law Judge's ("ALJ") decision is supported by substantial evidence and is free of harmful legal error. The decision is therefore affirmed.

I. LEGAL STANDARDS

A. Disability Analysis: Five-Step Evaluation

The Social Security Act (the "Act") provides for disability insurance benefits to those who have contributed to the Social Security program and who suffer from a physical or mental disability. 42 U.S.C. § 423(a)(1). The Act also provides for supplemental security income to certain individuals who are aged 65 or older, blind, or disabled and have limited income. 42 U.S.C. § 1382. To be eligible for benefits based on an alleged disability, the claimant must show that he or she suffers from a medically determinable physical or mental impairment that prohibits him or her from engaging in any substantial gainful activity. 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(A)(3)(A). The claimant must also show that the impairment is expected to cause death or last for a continuous period of at least 12 months. *Id.*

To decide if a claimant is entitled to Social Security benefits, an ALJ conducts an analysis consisting of five questions, which are considered in sequential steps. 20 C.F.R. §§ 404.1520(a), 416.920(a). The claimant has the burden of proof regarding the first four steps:[1]

> **Step One**: Is the claimant engaged in "substantial gainful activity"? If so, the analysis ends and disability benefits are denied. Otherwise, the ALJ proceeds to Step Two.
>
> **Step Two:** Does the claimant have a medically severe impairment or combination of impairments? A severe impairment is one which significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does not have a severe impairment or combination of impairments, disability benefits are denied at this step. Otherwise, the ALJ proceeds to Step Three.
>
> **Step Three:** Is the impairment equivalent to one of a number of listed impairments that the Commissioner acknowledges

[1] *Parra v. Astrue*, 481 F.3d 742,746 (9th Cir. 2007).

> are so severe as to preclude substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d). If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one that is presumed to be disabling, the ALJ proceeds to the fourth step of the analysis.
>
> **Step Four:** Does the impairment prevent the claimant from performing work which the claimant performed in the past? If not, the claimant is "not disabled" and disability benefits are denied without continuing the analysis. 20 C.F.R. §§ 404.1520(f), 416.920(f). Otherwise, the ALJ proceeds to the last step.

If the analysis proceeds to the final question, the burden of proof shifts to the Commissioner:[2]

> **Step Five:** Can the claimant perform other work in the national economy in light of his or her age, education, and work experience? The claimant is entitled to disability benefits only if he or she is unable to perform other work. 20 C.F.R. §§ 404.1520(g), 416.920(g). Social Security is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the claimant's residual functional capacity, age, education, and work experience. *Id*.

B. Standard of Review Applicable to ALJ's Determination

The Court must affirm an ALJ's decision if it is supported by substantial evidence and is based on correct legal standards. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). Although "substantial evidence" is less than a preponderance, it is more than a "mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938)). It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*.

---

[2] *Parra*, 481 F.3d at 746.

In determining whether substantial evidence supports the ALJ's decision, the Court considers the record as a whole, weighing both the evidence that supports and detracts from the ALJ's conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). If there is sufficient evidence to support the ALJ's determination, the Court cannot substitute its own determination. *See Morgan v. Comm'r of the Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld."); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). This is because the ALJ, not the Court, is responsible for resolving conflicts, ambiguity, and determining credibility. *Magallanes*, 881 F.2d at 750; *see also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court must also consider the harmless error doctrine when reviewing an ALJ's decision. This doctrine provides that an ALJ's decision need not be remanded or reversed if it is clear from the record that the error is "inconsequential to the ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations omitted); *Molina*, 674 F.3d at 1115 (an error is harmless so long as there remains substantial evidence supporting the ALJ's decision and the error "does not negate the validity of the ALJ's ultimate conclusion") (citations omitted).

II. Plaintiff's Appeal

A. Procedural Background

Plaintiff, who was born in 1969, has worked as a file clerk, small product assembler, storage facility manager, and as an assistant manager and manager at apartment complexes. (A.R. 72, 83-84). In 2015, Plaintiff filed applications for disability insurance benefits and supplemental security income. (A.R. 243-44, 247-57). Plaintiff's applications alleged that on January 27, 2015, Plaintiff became unable to work due to depression, anxiety, panic attacks, fibromyalgia, "[b]ack, arthritis, scoleosis [sic]," "knee, recovery from surgery," chronic pain, and learning disability. (A.R. 116, 130). Social Security denied the applications on May 11, 2015. (A.R. 182-89). In June 2015,

upon Plaintiff's request for reconsideration, Social Security affirmed the denial of benefits. (A.R. 190-97). Plaintiff sought further review by an ALJ, who conducted a hearing in January 2016. (A.R. 68-90).

In his March 2, 2016 decision, the ALJ found that Plaintiff is not disabled within the meaning of the Social Security Act. (A.R. 18-35). The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Social Security Commissioner. (A.R. 1-6, 14). On May 11, 2016, Plaintiff filed a Complaint (Doc. 1) pursuant to 42 U.S.C. § 405(g) requesting judicial review and reversal of the ALJ's decision.

B. The ALJ's Application of the Five-Step Disability Analysis

1. Step One: Engagement in "Substantial Gainful Activity"

The ALJ determined that Plaintiff has not engaged in substantial gainful activity since the alleged onset date of January 27, 2015. (A.R. 22). Neither party disputes this determination.

2. Step Two: Presence of Medically Severe Impairment/Combination of Impairments

The ALJ found that Plaintiff has the following three impairments: (i) obesity; (ii) fibromyalgia; (iii) degenerative disc disease of the lumbar spine; (iv) degenerative joint disease of the right knee; (v) major depressive disorder; (vi) panic disorder; (vii) agoraphobia; and (viii) post-traumatic stress disorder ("PTSD"). (A.R. 22). Plaintiff argues that the ALJ erred by not including Plaintiff's alleged pituitary tumor in the list of severe impairments. (Doc. 29 at 11-12).

3. Step Three: Presence of Listed Impairment(s)

The ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 of the Social Security regulations. (A.R. 24-25). Plaintiff disputes this finding. (Doc. 29 at 12).

4. Step Four: Capacity to Perform Past Relevant Work

The ALJ found that Plaintiff retained the residual functional capacity ("RFC") to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), except that

> [Plaintiff] cannot climb ladders, ropes, or scaffolds. She can occasionally climb ramps or stairs, balance, and stoop but never kneel, crouch, or crawl. In addition to normal breaks and lunch, she must have the opportunity to alternate positions between sitting and standing every hour without a break in service. Mentally, the claimant retains the ability to understand, remember, and carryout simple instructions and tasks. She cannot interact with the public and can occasionally interact with coworkers and supervisors.

(A.R. 25).

Based on the RFC, the ALJ determined that Plaintiff is able to perform her past relevant work as it was generally performed. (A.R. 33). In her appeal, Plaintiff challenges the ALJ's RFC assessment by arguing that the ALJ improperly weighed the opinions of a consulting psychologist who evaluated Plaintiff. (Doc. 29 at 19-20).

5. Step Five: Capacity to Perform Other Work

Even though the ALJ determined at Step Four that Plaintiff is able to perform her past relevant work as generally performed, the ALJ made alternative findings at Step Five. (A.R. 33-34).

At the administrative hearing, a vocational expert ("VE") testified that based on Plaintiff's RFC, Plaintiff would be able to perform the requirements of representative occupations such as a sorter or machine tender. (A.R. 85). The ALJ found that the VE's testimony was consistent with the information in the Dictionary of Occupational Titles and that the jobs identified by the VE existed in significant numbers in the national economy. (A.R. 34). After considering the VE's testimony, Plaintiff's age, education, work experience, and RFC, the ALJ determined that Plaintiff can make a successful adjustment to other work and is therefore not disabled. (*Id.*). Plaintiff asserts that due to restrictions not accounted for in the ALJ's RFC assessments, she is unable to engage in any work. (Doc. 29 at 20-21).

C. Plaintiff's Challenge to the ALJ's Decision To Not Reopen Plaintiff's Prior Disability Application

Plaintiff previously filed an application for disability insurance benefits, which the ALJ denied on January 26, 2015. (A.R. 94-105). The Appeals Council denied Plaintiff's request for review on February 11, 2015. (A.R. 110-14). In his decision denying Plaintiff's current applications for disability insurance benefits and supplemental security income, the ALJ "expressly decline[d] to reopen the prior application." (A.R. 18). Plaintiff argues that the ALJ erred by not reopening her prior application.[3] (Doc. 29 at 9-10).

Under the Social Security Act, district courts have jurisdiction to review "any final decision . . . made after a hearing." 42 U.S.C. § 405(g). An Appeals Council's denial of a request for review or a denial of a request to reopen a claim is a discretionary decision and is generally not subject to judicial review except in "a case in which a claimant raises a colorable constitutional challenge to the Secretary's decision." *Panages v. Bowen*, 871 F.2d 91, 93 (9th Cir. 1989); *see also Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008) ("Because a denial of a motion to reopen is a discretionary decision, it is not final and, thus, is not generally reviewable by a district court."). Such a constitutional challenge "must relate to the manner or means by which the Secretary decided not to reopen the prior decision, rather than to the merits of the prior decision or the means by which that decision was reached." *Id*. Further, a "mere allegation of a due process violation" is insufficient to raise a colorable constitutional claim. *Anderson v.*

[3] In her Reply, Plaintiff takes an alternative position by asserting that there was a "de facto reopening of the previous application." (Doc. 32 at 5). It is improper to raise new issues in a reply brief. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D. Cal. 1999) ("It is well accepted that raising of new issues and submission of new facts in [a] reply brief is improper.") (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)). Further, Plaintiff's argument is without merit. *See Oberg v. Astrue*, 472 F. App'x 488, 490 (9th Cir. 2012) ("The mere fact that the ALJ did consider the record of the prior decision is of no import; plainly he had to do so in order to determine whether there had been a substantial change in Oberg's condition since that time.") (citing *Krumpelman v. Heckler*, 767 F.2d 586, 589 (9th Cir. 1985)).

Babbitt, 230 F.3d 1158, 1163 (9th Cir. 2000) (citing *Hoye v. Sullivan*, 985 F.2d 990, 992 (9th Cir. 1993)). The claim must be supported by "facts sufficient to state a violation of substantive or procedural due process." *Id.* (quoting *Hoye*, 985 F.2d at 992).

Plaintiff's Complaint (Doc. 1) does not plead a constitutional claim. Nor does Plaintiff's Opening Brief (Doc. 29). However, in response to Defendant's assertion that the ALJ's decision not to reopen the prior disability application is not reviewable, Plaintiff argues in her Reply that the ALJ violated her due process rights. (Doc. 32 at 4-5). It is improper to raise new claims in a reply brief. *See Schwartz*, 183 F.R.D. at 682. Regardless, there is no indication that Plaintiff's due process or other constitutional rights were violated. Plaintiff's first challenge to the ALJ's decision is without merit.

The Court finds that Plaintiff has failed to raise a colorable constitutional challenge to the ALJ's decision not to reopen Plaintiff's prior disability application. The Court therefore concludes that it lacks subject matter jurisdiction to review that decision. Thus, the relevant period of review for purposes of this action is January 27, 2015 (the alleged disability onset date) to March 2, 2016 (the date of the ALJ's decision).[4]

D. Plaintiff's Challenge to the ALJ's Analysis at Step Two

At Step Two of the disability analysis, the claimant must show that his or her medically determinable impairments are severe. "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Id.* (quoting Social Security Ruling (SSR) 85–28).

In his decision, the ALJ correctly noted that Plaintiff was diagnosed with a pituitary tumor in October 2015, which was operated on in December 2015. (A.R. 23, 786, 795-96). The ALJ recounted Plaintiff's testimony that she had vision problems and

[4] The ALJ found that Plaintiff has not been under a disability from January 27, 2015 through the date of the March 2, 2016 decision. (A.R. 34).

experienced frequent headaches that started around the time of her tumor diagnosis. (A.R. 23). The ALJ found it "reasonable to conclude that the headaches will likely resolve as she continues to recover from the surgery." (*Id.*). The ALJ did not include the pituitary tumor in the list of severe impairments, finding that "the residual symptoms will likely resolve before the 12-month period required to establish a severe impairment." (*Id.*).

Plaintiff challenges the ALJ's decision to not include the pituitary tumor in the list of severe impairments. (Doc. 29 at 10-12). To support this argument, Plaintiff asserts that "there is no evidence which states the tumor existed for (a) less than 12 months or (b) there was no residual effects of the tumor or operation." (*Id.* at 12). However, it was Plaintiff's burden to produce evidence showing that the pituitary tumor caused more than a minimal interference in her ability to work and was expected to last for a continuous period of twelve months or longer. *See Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (claimant carries burden to present "complete and detailed objective medical reports" of his or her condition from licensed medical professionals); *see also Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (impairment must be expected to result in death or for a continuous period of not less than twelve months to establish basis for disability under Social Security Act). Plaintiff has not produced any such evidence. Substantial evidence supports the ALJ's determination that the pituitary tumor is non-severe. For example, although Plaintiff reported that the tumor caused vision problems, the ALJ correctly noted that Plaintiff is able to drive. (A.R. 26).

Further, where a disability claimant argues that an ALJ has erred, the claimant must also show that the asserted error resulted in actual harm. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) ("The burden is on the party claiming error to demonstrate not only the error, but also that it affected his 'substantial rights,' which is to say, not merely his procedural rights.") (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-09 (2009)). The Court looks at the "record as a whole to determine [if] the error alters the outcome of the case." *Molina*, 674 F.3d at 1115. Plaintiff has not set forth, and there is

no evidence in the record, of any functional limitations caused by the pituitary tumor that the ALJ failed to consider. Plaintiff has thus failed to show that finding the pituitary tumor severe at Step Two would have any effect on the ultimate disability determination. Accordingly, even if the ALJ erred by finding the pituitary tumor non-severe, the error is harmless.

E. Plaintiff's Challenge to the ALJ's Analysis at Step Three

At Step Three of the disability analysis, an ALJ considers whether a claimant's impairment or combination of impairments meets or equals a listed impairment under 20 C.F.R. Part 404, Subpart P, Appendix 1 (the "Listings"). The Listings are divided into categories of impairments that relate to various "body systems" (e.g. musculoskeletal system, respiratory system, etc.). 20 C.F.R. § 404.1525(a). The impairments described within each category are those that Social Security considers to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience. *Id*. If a claimant's impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987). The Listings thus "streamlin[e] the decision process by identifying those claimants whose medical impairments are so severe that it is likely they would be found disabled regardless of their vocational background." *Id.* at 153.

1. Listings 12.04 (Depressive, Bipolar and Related Disorders) and 12.06 (Anxiety and Obsessive-Compulsive Disorders)

The ALJ analyzed whether the severity of Plaintiff's mental impairments, considered singly and in combination, meet or medically equal the criteria of Listings 12.04 (Depressive, Bipolar and Related Disorders) and 12.06 (Anxiety and Obsessive-Compulsive Disorders). (A.R. 24-25).

For allegations regarding mental impairments, an ALJ must use the special review technique set forth in 20 C.F.R. § 404.1520a. After determining whether an applicant has a medically determinable mental impairment, the ALJ must rate the degree of functional limitation in four areas: (i) activities of daily living, (ii) social functioning, (iii) concentration, persistence or pace, and (iv) episodes of decompensation. *Id*. at §

404.1520a(c)(3). Next, the ALJ must determine the severity of the mental impairment. *Id*. at § 404.1520a(d). If the degree of limitation in the first three functional areas is "none" or "mild" and "none" in the fourth area, it is generally concluded that the impairment is not severe unless the evidence otherwise indicates that there is more than a minimal limitation in the ability to do basic work activities. *Id*. at § 404.1520a(d)(1).

The ALJ found that Plaintiff had medically determinable mental impairments of anxiety, depression, attention or concentration deficit, and PTSD. (A.R. 23). Applying the special review technique, the ALJ rated the degree of functional limitation in the four relevant areas as follows.

i. Activities of Daily Living

In concluding that Plaintiff has moderate restriction in activities of daily living, the ALJ stated that Plaintiff "acknowledged at the psychological consulting examination [by Dr. Betty Eitel] that she drove, managed her money, cooked, scheduled and kept appointments, did some housework, and performed her self-care tasks independently (Exhibit B13F/2)." (A.R. 24-25). Although Plaintiff does not dispute that Dr. Eitel's report reflects such an acknowledgment, Plaintiff argues that the ALJ took that portion of the report out of context as Dr. Eitel opined that Plaintiff cannot sustain concentration and persist in work-related activity at a reasonable pace, cannot maintain effective social interaction on a consistent and independent basis with supervisors, co-workers, and the public, and cannot deal with normal pressures in a competitive work setting. (Doc. 29 at 14 (citing A.R. 722)). However, as explained in Section II(F)(3) below, the ALJ provided valid reasons for rejecting Dr. Eitel's assessment. The Court does not find that the ALJ erred by concluding that Plaintiff has moderate restriction in activities of daily living.

ii. Social Functioning

In explaining his rationale for finding that Plaintiff has moderate difficulties in social functioning, the ALJ stated that Plaintiff "informed [Dr. Eitel] that she rarely left the home and that she had a few friends with whom she socialized (Exhibit B13F/2)."

(A.R. 25). Citing to medical evidence that predates the alleged disability onset date of January 27, 2015, Plaintiff argues that the ALJ should have instead found "marked limitations in social functioning." (Doc. 29 at 16). Although Plaintiff cites an August 2014 medical record (A.R. 774) that indicates that Plaintiff was diagnosed with agoraphobia, "the critical date is the date of *onset* of disability, *not* the date of diagnosis" in evaluating a claim for Social Security disability benefits. *Swanson v. Secretary of Health and Human Services*, 763 F.2d 1061, 1065 (9th Cir. 1985) (emphasis in original); *see also Morgan v. Sullivan***,** 945 F.2d 1079, 1081 (9th Cir. 1991) ("The significant date for disability compensation is the date of onset of the disability rather than the date of diagnosis."); *Carmickle v. Comm'r, Social Sec. Admin.*, 533 F.3d 1155, 1164-65 (9th Cir. 2008) (an ALJ did not err in classifying a claimant's carpal tunnel syndrome as a "non-severe" impairment at Step Two of the analysis where the only medical evidence addressing such impairment was a letter dated well before the claimant's alleged onset of disability). It was Plaintiff's responsibility to produce current medical evidence supporting her allegation that she has marked limitations in social functioning. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995) (claimant seeking social security benefits bears burden of establishing prima facie case of disability). Plaintiff does not dispute that she informed Dr. Eitel that she has friends with whom she socializes. The Court finds that the ALJ's finding that Plaintiff has moderate limitations in social functioning is supported by substantial evidence.

iii. Concentration, Persistence, or Pace

With respect to concentration, persistence, or pace, the ALJ cited Dr. Eitel's report that explained that Plaintiff "recalled 2 of 4 words after a 5-minute delay, repeated 3 digits forward and 4 backward, performed serial 2s but not 3s or 7s, and spelled 'world' backward (Exhibit B13F/4)." (A.R. 25). Plaintiff reiterates her argument that the ALJ took Dr. Eitel's report out of context. (Doc. 29 at 16). This argument is without merit for the reasons discussed above.

iv. Episodes of Decompensation

As to the fourth functional area, the ALJ found that there was no evidence of "episodes of decompensation, which had extended duration." (A.R. 25). Plaintiff's briefing does not challenge this finding.

The ALJ included major depressive disorder, panic disorder, agoraphobia, and PTSD in the list of serve impairments at Step Two. (A.R. 22). Based on the foregoing discussion, the Court does not find that the ALJ erred in concluding that Plaintiff's mental impairments do not meet or medically equal the criteria of Listings 12.04 and 12.06.

2. Listing 9.00 (Endocrine Disorder)

Plaintiff appears to argue that she should be found disabled at Step Three, asserting that she meets or equals Listing 9.00 (Endocrine Disorders). (Doc. 29 at 12). "An endocrine disorder is a medical condition that causes a hormonal imbalance." 20 C.F.R. Pt. 404, Subpt. P, App 1, § 9.00(A). Listing 9.00, which includes "pituitary gland disorders" as an endocrine disorder, explains that "[p]ituitary gland disorders can disrupt hormone production and normal functioning in other endocrine glands and in many body systems." *Id.* at § 900(B)(1). Social Security "evaluate[s] impairments that result from endocrine disorders under the listings for other body systems." *Id.* at § 900(B). For example, "when pituitary hypofunction affects water and electrolyte balance in the kidney and leads to diabetes insipidus, [Social Security] evaluate[s] the effects of recurrent dehydration under 6.00." *Id.* at § 900(B)(1).

Plaintiff has not produced any evidence that shows that the alleged pituitary tumor has disrupted hormone production or impacted normal functioning in other endocrine glands or body systems. Plaintiff therefore has failed to show that the ALJ committed harmful error at Step Three in not finding that Plaintiff meets or equals Listing 9.00.

3. Combined Effect of Plaintiff's Physical and Mental Impairments

Plaintiff argues that the ALJ failed to consider the combined effects of Plaintiff's physical and mental impairments in determining whether Plaintiff should be found disabled at Step Three. (Doc. 29 at 12-13). The Ninth Circuit has explained that a

claimant "bears the burden of proving that . . . she has an impairment that meets or equals the criteria of an impairment listed in Appendix 1 of the Commissioner's regulations." *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). "An ALJ is not required to discuss the combined effects of a claimant's impairments or compare them to any listing in an equivalency determination, unless the claimant presents evidence in an effort to establish equivalence." *Id.; see also Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) (rejecting claimant's argument that the ALJ failed to adequately explain his finding that his impairments did not equal a listing, in part, because claimant failed to proffer a theory as to how the impairments equaled a listing).

Aside from referencing Listing 9.00, Plaintiff has not specified which listing she purportedly meets or equals, nor has Plaintiff proffered a theory of how she equals a listing based on the combination of her impairments. *See Burch*, 400 F.3d at 683 ("Even on appeal, Burch has not pointed to any evidence of functional limitations due to obesity which would have impacted the ALJ's analysis. . . . We therefore conclude that the ALJ did not commit reversible error by failing to consider Burch's obesity in determining whether she met or equaled the requirements of a listed impairment."). Because the ALJ provided legally sufficient reasons supported by substantial evidence on the record to support his findings, the Court concludes that the ALJ did not err at Step Three.

F. Plaintiff's Challenge to the ALJ's RFC Assessment and Step Four Determination

1. The ALJ Properly Considered Plaintiff's Fibromyalgia

Although the ALJ found that Plaintiff's fibromyalgia is a severe impairment at Step Two, Plaintiff argues that the ALJ did not properly evaluate Plaintiff's fibromyalgia in assessing Plaintiff's RFC. (Doc. 29 at 13). On July 25, 2012, Social Security issued a ruling pertaining to the evaluation of fibromyalgia. SSR 12-2p, 2012 WL 3104869. The first part of the ruling discusses the development of evidence to establish that a person

has a medically determinable impairment of fibromyalgia. The second part of the ruling explains how fibromyalgia fits into the five-step disability analysis.

SSR 12-2p explains that at Step One, a claimant with fibromyalgia will not be found to be disabled if the claimant is engaged in substantial gainful activity. At Step Two, Social Security will find that a claimant's fibromyalgia impairment is severe if it causes a limitation or restriction that has more than a minimal effect on the ability to perform basic work activities. Regarding Step Three, SSR 12-2p explains that because fibromyalgia is not a listed impairment, a claimant cannot be found conclusively disabled due solely to the claimant's fibromyalgia impairment. With respect to determining a claimant's RFC at Step Four, Social Security "will consider a longitudinal record whenever possible because the symptoms of [fibromyalgia] can wax and wane so that a person may have 'bad days and good days.'" With respect to Steps Four and Five, SSR 12-2p explains that the "usual vocational considerations apply," but notes that:

> 1. Widespread pain and other symptoms associated with [fibromyalgia], such as fatigue, may result in exertional limitations that prevent a person from doing the full range of unskilled work in one or more of the exertional categories in appendix 2 of subpart P of part 404 (appendix 2). People with [fibromyalgia] may also have nonexertional physical or mental limitations because of their pain or other symptoms. Some may have environmental restrictions, which are also nonexertional.
>
> 2. Adjudicators must be alert to the possibility that there may be exertional or nonexertional (for example, postural or environmental) limitations that erode a person's occupational base sufficiently to preclude the use of a rule in appendix 2 to direct a decision. In such cases, adjudicators must use the rules in appendix 2 as a framework for decision-making and may need to consult a vocational resource.

SSR 12-2p, 2012 WL 3104869, at *6.

In determining Plaintiff's RFC at Step Four, the ALJ considered Plaintiff's testimony that she suffers from chronic pain due to her fibromyalgia and other

impairments. (A.R. 26). The ALJ also considered the longitudinal evidence regarding Plaintiff's fibromyalgia and Plaintiff's reports that "her impairments interfere with her ability to remember, concentrate, complete tasks, and follow instructions." (A.R. 26, 28). Plaintiff has failed to show that the ALJ failed to comply with SSR 12-2p or otherwise failed to properly consider Plaintiff's fibromyalgia in determining Plaintiff's RFC.

2. Plaintiff's Challenge to the ALJ's Credibility Determination of Plaintiff's Symptom Testimony

When evaluating the credibility of a plaintiff's testimony regarding subjective pain or symptoms, the ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). In the first step, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment "which could reasonably be expected to produce the pain or other symptoms alleged." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The plaintiff does not have to show that the impairment could reasonably be expected to cause the severity of the symptoms. Rather, a plaintiff must only show that it could have caused some degree of the symptoms. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996).

If a plaintiff meets the first step, and there is no evidence of malingering, the ALJ can only reject a plaintiff's testimony about the severity of his or her symptoms by offering specific, clear, and convincing reasons. *Lingenfelter*, 504 F.3d at 1036. The ALJ cannot rely on general findings. The ALJ must identify specifically what testimony is not credible and what evidence undermines the plaintiff's complaints. *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010). In weighing a plaintiff's credibility, the ALJ can consider many factors including: a plaintiff's reputation for truthfulness, prior inconsistent statements concerning the symptoms, unexplained or inadequately explained failure to seek treatment, and the plaintiff's daily activities. *Smolen*, 80 F.3d at 1284; *see also* 20 C.F.R. § 404.1529(c)(4) (Social Security must consider whether there are conflicts between a claimant's statements and the rest of the evidence). In addition, although the lack of medical evidence cannot form the sole basis for discounting pain

testimony, it is a factor that the ALJ can consider in his or her credibility analysis. *See* 20 C.F.R. § 404.1529(c)(2); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005).

On March 16, 2016, the Social Security Administration issued Social Security Ruling 16-3p, 2016 WL 1119029 (March 16, 2016) ("SSR 16-3p"), which provides new guidance for ALJs to follow when evaluating a disability claimant's statements regarding the intensity, persistence, and limiting effects of symptoms. SSR 16-3p replaces Social Security Ruling 96-7p, 1996 WL 374186 (July 2, 1996) ("SSR 96-7p"). SSR 16-3p eliminates the term "credibility" used in SSR 96-7p in order to "clarify that subjective symptom evaluation is not an examination of the individual's character." SSR 16-3p, 2016 WL 1119029, at *1. That is, "[t]he change in wording is meant to clarify that administrative law judges aren't in the business of impeaching claimants' character," but "obviously administrative law judges will continue to assess the credibility of pain *assertions* by applicants, especially as such assertions often cannot be either credited or rejected on the basis of medical evidence." *Cole v. Colvin*, 831 F.3d 411, 412 (7th Cir. 2016) (emphasis in original).

Although SSR 16-3p was issued after the ALJ's March 2, 2016 decision, it is consistent with Social Security's prior policies and with prior Ninth Circuit case law. *Compare* SSR 16-3p with SSR 96-7p (both policies set forth a two-step process to be followed in evaluating a claimant's testimony and contain the same factors to be considered in determining the intensity and persistence of a claimant's symptoms). Because 16-3p clarifies rather than changes existing law,[5] the Court will consider the ALJ's evaluation of Plaintiff's subjective complaints in light of SSR 16-3p.

---

[5]Administrative rules will not have retroactive effect unless (i) Congress expressly authorized the administrative agency to enact retroactive rules and (ii) the new agency rule states that it is retroactive. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). A clarification of a regulation, however, does not raise issues about retroactivity. *See Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (stating that a clarifying rule "can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand," and does not raise issues of retroactivity); *see also Smolen*, 80 F.3d at 1281 n.1 ("We need not decide the issue of retroactivity [as to revised

Plaintiff argues that the ALJ erred in discrediting Plaintiff's testimony regarding her subjective symptoms. The ALJ's reasons for discounting Plaintiff's testimony include the following:

1. The ALJ correctly recounted Plaintiff's testimony that she stopped working in 2012 due to interpersonal problems with her supervisor, who is her brother-in-law. (A.R. 27, 72). An ALJ may consider a claimant's admission that the claimant left his or her job for reasons other than his alleged impairment. *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (an ALJ properly considered claimant's testimony that he left his job because he was laid off rather than because he was injured); *see also Drouin v. Sullivan*, 966 F.2d 1255, 1259 (9th Cir. 1992) (the ALJ properly considered that the plaintiff stopped working for reasons other than her alleged pain).

2. The ALJ observed that Plaintiff "submitted no evidence of back or knee complaints after the alleged onset date, including her brief impatient [sic] stay for treatment of her pituitary tumor. This suggests that the claimant's ongoing back and knee symptoms are well controlled with over-the-counter medications and self-care treatments." (A.R. 27). This is a valid consideration supported by substantial evidence. *See Warre v. Comm'r,* 439 F.3d 1001, 1006 (9th Cir. 2006) (impairments that can be controlled with medication are not disabling for Social Security purposes); 20 C.F.R. § 404.1529(c)(3)(iv).

3. Regarding Plaintiff's testimony that she has daily suicidal thoughts, the ALJ noted that the record reflects otherwise. (A.R. 27). For instance, the ALJ discussed an August 2014 psychosocial assessment that stated that Plaintiff had not experienced suicidal thoughts for months before the encounter.[6] (A.R. 27, 548).

---

regulations] because the new regulations are consistent with the Commissioner's prior policies and with prior Ninth Circuit case law . . . .").

[6] The ALJ's decision states that the August 2014 assessment indicates that Plaintiff last experienced suicidal thoughts 4 months before the encounter. (A.R. 27). The report, however, indicates that Plaintiff stated that "it has probably been a couple months" since she last thought about suicide. (A.R. 548). The Court finds that the error is inconsequential to the ultimate nondisability determination and is therefore harmless. *See Tommasetti,* 533 F.3d at 1038.

4. The ALJ correctly stated that the record contains minimal evidence of treatment for pain or mental impairment issues. (A.R. 27). *See Tommasetti*, 533 F.3d at 1039-40 (an ALJ may infer that pain is not disabling if a claimant seeks only minimal conservative treatment).

The ALJ's credibility finding in this case is unlike the brief and conclusory credibility findings that the Ninth Circuit Court of Appeals has deemed insufficient in other cases. For example, in *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th Cir. 2014), an ALJ stated in a single sentence that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment." The Court of Appeals held that stopping after this introductory remark "falls short of meeting the ALJ's responsibility to provide a discussion of the evidence and the reason or reasons upon which his adverse determination is based." *Id*. at 1103 (internal quotation marks omitted); *see also* 42 U.S.C. § 405(b)(1). The Court further stated that an ALJ's "vague allegation that a claimant's testimony is not consistent with the objective medical evidence, without any specific findings in support of that conclusion is insufficient for our review." *Id*. (quoting *Vasquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2009).

In *Robbins v. Astrue*, 466 F.3d 880, 883-84 (9th Cir. 2006), the Court of Appeals found the ALJ's "fleeting credibility finding" insufficient. In *Robbins*, the ALJ simply stated that (i) the claimant's testimony was "not consistent with or supported by the overall medical evidence of record" and (ii) "[claimant's] testimony regarding his alcohol dependence and abuse problem remains equivocal." *Id*. In discussing why the ALJ's finding was insufficient, the Court explained that the ALJ did not provide a "narrative discussion" containing "specific reasons for the finding . . .supported by the evidence in the record." *Id*. at 884-85.

Similarly, in *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995), an ALJ simply concluded that the claimant's complaints were "not credible" and "exaggerated." The

Court held that the finding was insufficient as the ALJ did not provide any specific reasons for disbelieving the claimant other than a lack of objective evidence. *Id*. at 834.

Here, unlike in *Treichler*, *Robbins*, and *Lester*, the ALJ goes beyond making a "fleeting" and conclusory remark that Plaintiff's testimony is not credible. The ALJ discusses the evidence and explains the inconsistencies in the record that he finds discredit Plaintiff's testimony. The ALJ's conclusion is supported by substantial evidence in the record.

It is possible that a different ALJ would find Plaintiff's symptom testimony credible. But it is not the Court's role to second guess an ALJ's decision to disbelieve a Plaintiff's allegations if the ALJ has articulated specific, clear, and convincing reasons that are supported by substantial evidence in the record. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) ("An ALJ cannot be required to believe every allegation of disabling pain, or else disability benefits would be available for the asking. . . ."). The Court finds that the reasons provided by the ALJ for discrediting Plaintiff's testimony are specific, clear, convincing, and are supported by substantial evidence in the record. The Court therefore finds that the ALJ did not err in discrediting Plaintiff's subjective testimony.

3. Plaintiff's Challenge Regarding Weight Given to Medical Source Opinions

In weighing medical source opinions in Social Security cases, there are three categories of doctors: (i) treating doctors, who actually treat the claimant; (ii) examining doctors, who examine but do not treat the claimant; and (iii) non-examining doctors, who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ must provide clear and convincing reasons that are supported by substantial evidence for rejecting the uncontradicted opinion of a treating or examining doctor. *Id*. at 830-31; *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). An ALJ cannot reject a treating or examining doctor's opinion in favor of another doctor's opinion without first providing specific and legitimate reasons that are supported by substantial evidence, such as finding that the doctor's opinion is inconsistent with and not

supported by the record as a whole. *Bayliss*, 427 F.3d at 1216; 20 C.F.R. § 404.1527(c)(4) (an ALJ must consider whether an opinion is consistent with the record as a whole); *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tommasetti*, 533 F.3d at 1041 (finding it not improper for an ALJ to reject a treating physician's opinion that is inconsistent with the record).

i. Opinions of Consulting Psychologist Betty Eitel, Ph.D.

On April 24, 2015, consulting psychologist Betty Eitel, Ph.D. evaluated Plaintiff. (A.R. 718-22). Dr. Eitel opined that Plaintiff "cannot sustain concentration and persist in work-related activity at a reasonable pace. She cannot maintain effective social interaction on a consistent basis with supervisors, co-workers, and the public, or deal with normal pressures in a competitive work setting." (A.R. 722). As Dr. Eitel's opinions are contradicted,[7] the Court must determine whether the ALJ offered specific and legitimate reasons for discounting Dr. Eitel's assessment.

The ALJ gave Dr. Eitel's opinions little weight. (A.R. 28). First, the ALJ found that Dr. Eitel's conclusions are "not fully supported by her own findings, for example, in assessing concentration and abstraction, Eitel found some level of impairment but only based on a couple of questions and claimant's responses did not appear to reveal marked limitations in these areas." (A.R. 29). In her report, Dr. Eitel concluded that Plaintiff's "ability to encode and retain material appears slightly impaired." (A.R. 721). Dr. Eitel's report indicates that Plaintiff was able to repeat four words immediately after hearing them, could recall her address and social security number, and was able to repeat three

[7] Dr. Eitel's opinions are contradicted by the opinions of the non-examining State agency psychologists. (A.R. 122-23, 125-27, 136-38, 155-56, 158-60); *see Moore v. Comm'r of Soc. Sec.*, 278 F.3d 920, 924 (9th Cir. 2002) ("The ALJ could reject the opinions of Moore's examining physicians, contradicted by a nonexamining physician, only for "specific and legitimate reasons that are supported by substantial evidence in the record."); *Mendoza v. Astrue*, 371 F. App'x 829, 831 (9th Cir. 2010) ("An ALJ may reject an opinion of an examining physician, if contradicted by a non-examining physician, as long as the ALJ gives 'specific and legitimate reasons that are supported by substantial evidence in the record.'").

digits forward and four backward without error. (*Id.*). While the report indicates that Plaintiff could only remember two out of four words after a five minute delay without prompts, the report indicates that Plaintiff remembered the other two words when given the categories to which the words belonged. (*Id.*). The report also indicates that Plaintiff knew the current president and could recall the previous presidents, although not in the correct order. (*Id.*). It is well-settled that an ALJ, not the Court, is responsible for resolving conflicts and ambiguity in the evidence. *Magallanes*, 881 F.2d at 750; *see also Andrews*, 53 F.3d at 1039. The Court finds that the ALJ's first reason for discounting Dr. Eitel's opinion is specific and legitimate and is supported by substantial evidence in the record.

As a second reason for giving Dr. Eitel's opinion little weight, the ALJ stated that her "assessment appears to be based largely, if not solely, on the claimant's subjective reports, which I found unreliable for the reasons previously discussed." (A.R. 29). Dr. Eitel wrote numerous statements that reflect Plaintiff's own account of her symptoms, such as Plaintiff "reported she experiences 'panic attacks' several time per week" and Plaintiff "reported that she often has difficulty completing tasks." (A.R. 718-19). Although Dr. Eitel's report also conveys observations, such as Plaintiff's "response time to my questions was slow" and Plaintiff's "mood was anxious; affect range was congruent, and her facial expression was tensed" (A.R. 719-20), to reiterate, an ALJ is responsible for resolving conflicts and ambiguity in the evidence. *Magallanes*, 881 F.2d at 750; *see also Andrews*, 53 F.3d at 1039.

An ALJ may reject a medical source's opinion if the opinion is based "to a large extent on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti*, 533 F.3d at 1041 (internal quotation marks and citation omitted); *Morgan*, 169 F.3d at 601; *see also Tonapetyan*, 242 F.3d at 1149. As explained in the preceding section, the ALJ did not improperly discount Plaintiff's testimony. The Court finds that the ALJ's conclusion that Dr. Eitel's opinion are largely premised on Plaintiff's

subjective complaints is supported by substantial evidence and is a specific and legitimate reason for giving the opinion little weight.

For the above reasons, the Court finds that the ALJ did not improperly discount Dr. Eitel's opinion.

ii. Non-Examining State Agency Physicians

The ALJ gave "considerable weight" to the opinions of the non-examining state agency consulting psychologists who reviewed Plaintiff's medical records. (A.R. 28). The opinion of a non-examining source cannot alone constitute substantial evidence that justifies rejecting the opinion of either an examining or a treating source. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (citing *Magallanes*, 881 F.2d at 752). However, the opinion of a non-examining source may constitute substantial evidence when it is consistent with other independent evidence in the record. *Id.* (citing *Magallanes*, 881 F.2d at 752). Since the opinions of the state agency psychologists are consistent with other evidence in the record, the ALJ did not err in giving the opinions considerable weight. *Thomas*, 278 F.3d at 957 ("The opinions of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are consistent with independent clinical findings or other evidence in the record."); *Magallanes*, 881 F.2d at 753 (upholding an ALJ's reliance on the opinion of a non-examining physician where the opinion was supported by objective medical evidence).

G. Plaintiff's Challenge to the ALJ's Decision at Step Five

The final issue raised by Plaintiff presents a challenge to the ALJ's Step Five finding. (Doc. 29 at 20-21; Doc. 32 at 10). As the Court has found that the ALJ did not commit harmful error in finding Plaintiff not disabled at Step Four, any error in the ALJ's alternative finding at Step Five that Plaintiff is able to perform other work existing in significant numbers in the national economy is harmless.

III. CONCLUSION

The Court has reviewed the record and finds the ALJ's decision is supported by substantial evidence and is free from reversible error. Based on the foregoing discussion, the decision of the Commissioner of Social Security is affirmed.

IT IS THEREFORE ORDERED affirming the decision of the Commissioner of Social Security. The Clerk of Court shall enter judgment accordingly.

Dated this 26th day of July, 2017.

Eileen S. Willett
United States Magistrate Judge