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

8
9 Kaylee Earls,

No. CV-15-08165-PCT-NVW

10 Plaintiff,

ORDER

11 v.

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

14 Defendant.
15

16 Plaintiff Kaylee Earls seeks review under 42 U.S.C. § 405(g) of the final decision
17 of the Commissioner of Social Security (“the Commissioner”), which denied her
18 supplemental security income under section 1614(a)(3)(A) of the Social Security Act.
19 Because the decision of the Administrative Law Judge (“ALJ”) is supported by
20 substantial evidence and is not based on legal error, the Commissioner’s decision will be
21 affirmed.

22 **I. BACKGROUND**

23 Plaintiff was born in November 1990 and applied for Supplemental Security
24 Income benefits when she was 21 years old. She has at least a high school education and
25 is able to communicate in English. When she was 12 years old, she had surgery for
26 lumbar scoliosis, which caused nerve damage. She continues to have leg and back pain
27 for which she takes pain medication. In 2013, she worked two days a week for about
28 three hours a day handling mail for a medical facility. She was able to drive, help with

1 grocery shopping, do laundry, lift a gallon of milk, but not lift her two-year-old son who
2 weighed 28 pounds. She drives three hours to visit her family, but has developed a leg
3 cramp, which required her to stop and walk around for about an hour to relieve the
4 cramp.

5 On May 31, 2012, Plaintiff applied for supplemental security income benefits,
6 alleging disability beginning April 13, 2008. On December 13, 2013, she appeared with
7 her attorney and testified at a video hearing before the ALJ. A vocational expert also
8 testified. On January 30, 2014, the ALJ issued a decision that Plaintiff was not disabled
9 within the meaning of the Social Security Act. The Appeals Council denied Plaintiff's
10 request for review of the hearing decision, making the ALJ's decision the
11 Commissioner's final decision. On August 31, 2015, Plaintiff sought review by this
12 Court.

13 **II. STANDARD OF REVIEW**

14 The district court reviews only those issues raised by the party challenging the
15 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court
16 may set aside the Commissioner's disability determination only if the determination is
17 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d
18 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a
19 preponderance, and relevant evidence that a reasonable person might accept as adequate
20 to support a conclusion considering the record as a whole. *Id.* As a general rule,
21 "[w]here the evidence is susceptible to more than one rational interpretation, one of
22 which supports the ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v.*
23 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted); *accord Molina v. Astrue*,
24 674 F.3d 1104, 1111 (9th Cir. 2012) ("Even when the evidence is susceptible to more
25 than one rational interpretation, we must uphold the ALJ's findings if they are supported
26 by inferences reasonably drawn from the record.").

1 **III. FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

2 To determine whether a claimant is disabled for purposes of the Social Security
3 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears
4 the burden of proof on the first four steps, but the burden shifts to the Commissioner at
5 step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

6 At the first step, the ALJ determines whether the claimant is engaging in
7 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not
8 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant
9 has a severe medically determinable physical or mental impairment. § 404.1520(a)(4)(ii).
10 If not, the claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ
11 considers whether the claimant's impairment or combination of impairments meets or
12 medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.
13 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If
14 not, the ALJ proceeds to step four. At step four, the ALJ assesses the claimant's residual
15 functional capacity and determines whether the claimant is still capable of performing
16 past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the
17 inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where he determines
18 whether the claimant can perform any other work based on the claimant's residual
19 functional capacity, age, education, and work experience. § 404.1520(a)(4)(v). If so, the
20 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

21 At step one, the ALJ found that Plaintiff has not engaged in substantial gainful
22 activity since May 31, 2012, the protective application date. At step two, the ALJ found
23 that Plaintiff has the following severe impairments: status post lumbar scoliosis
24 reduction surgery and fusion (in 2003); degenerative disc disease; nerve damage; and leg
25 pain. At step three, the ALJ determined that Plaintiff does not have an impairment or
26 combination of impairments that meets or medically equals an impairment listed in 20
27 C.F.R. Part 404, Subpart P, Appendix 1.

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1 At step four, the ALJ found that Plaintiff:

2 has the residual functional capacity to perform light work as defined in 20
3 CFR 416.967(b) except: she is limited to occasional postural activities such
4 as climbing, balancing, stooping, kneeling, crouching and crawling; she is
5 precluded from climbing ladders, ropes, or scaffolds; she is to avoid
6 concentrated exposure to extreme cold; and, she is to avoid even moderate
7 exposure to hazards, such as machinery or working at heights.

8 The ALJ further found that Plaintiff has no past relevant work. At step five, the ALJ
9 concluded that, considering Plaintiff's age, education, work experience, and residual
10 functional capacity, there are jobs that exist in significant numbers in the national
11 economy that Plaintiff can perform, such as bagger, cleaner, and ticket seller.

12 **IV. ANALYSIS**

13 **A. The ALJ Provided Clear and Convincing Reasons for Discrediting 14 Plaintiff's Symptom Testimony.**

15 If a claimant's statements about pain or other symptoms are not substantiated by
16 objective medical evidence, the ALJ must consider all of the evidence in the case record,
17 including any statement by the claimant and other persons, concerning the claimant's
18 symptoms. SSR96-7p. Then the ALJ must make a finding on the credibility of the
19 claimant's statements about symptoms and their functional effects. *Id.*

20 In evaluating the credibility of a claimant's testimony regarding subjective pain or
21 other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine
22 whether the claimant presented objective medical evidence of an impairment that could
23 reasonably be expected to produce some degree of the pain or other symptoms alleged;
24 and, if so with no evidence of malingering, (2) reject the claimant's testimony about the
25 severity of the symptoms only by giving specific, clear, and convincing reasons for the
26 rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "This is not an easy
27 requirement to meet: 'The clear and convincing standard is the most demanding required
28 in Social Security cases.'" *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014)
(quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

1 To ensure meaningful review, the ALJ must specifically identify the testimony
2 from a claimant the ALJ finds not to be credible and explain what evidence undermines
3 the testimony. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir.
4 2014). The ALJ must make findings “sufficiently specific to permit the court to conclude
5 that the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas v. Barnhart*, 278
6 F.3d 947, 958 (9th Cir. 2002); *accord Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th
7 Cir. 2008).

8 In making a credibility determination, an ALJ “may not reject a claimant’s
9 subjective complaints based solely on a lack of objective medical evidence to fully
10 corroborate the claimant’s allegations.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
11 1219, 1227 (9th Cir. 2009) (internal quotation marks and citation omitted). But “an ALJ
12 may weigh inconsistencies between the claimant’s testimony and his or her conduct,
13 daily activities, and work record, among other factors.” *Id.* Further, the claimant is not
14 required to produce objective medical evidence of the symptom or its severity. *Garrison*,
15 759 F.3d at 1014. The ALJ must consider all of the evidence presented, including the
16 claimant’s daily activities; the location, duration, frequency, and intensity of the pain or
17 other symptoms; factors that precipitate and aggravate the symptoms; effectiveness and
18 side effects of any medication taken to alleviate pain or other symptoms; treatment other
19 than medication; any measures other than treatment the claimant uses to relieve pain or
20 other symptoms; and any other factors concerning the claimant’s functional limitations
21 and restrictions due to pain or other symptoms. SSR 96-7p.

22 First, the ALJ found that Plaintiff’s “medically determinable impairments could
23 reasonably be expected to cause the alleged symptoms.” Second, the ALJ found
24 Plaintiff’s “statements regarding the intensity, persistence, and limiting effects of the
25 symptoms not entirely credible to the extent they are inconsistent with the residual
26 functional capacity assessment.”

27 Plaintiff testified that she is unable to work full-time because she has too much
28 pain and cannot stay in a single position for very long, like working at an office desk.

1 She said her pain is located in her back and right leg and is constant. She also said that
2 she gets shooting pains from her back down to her right knee, which causes her knee to
3 give out.

4 The ALJ gave the following reasons for finding Plaintiff's subjective symptom
5 testimony less than fully credible: (1) Plaintiff acknowledged being able to drive, do
6 some household chores and grocery shopping, and work for three hours a day, two days a
7 week. (2) The objective evidence showed only mild tenderness on palpitation of her back
8 and full range of motion in all of her extremities. (3) Plaintiff's treatment during the
9 relevant period has been routine and primarily limited to medication management. The
10 ALJ specifically identified the testimony that he found to lack credibility and explained
11 what evidence undermined it. The ALJ gave specific, clear, and convincing reasons for
12 finding Plaintiff's testimony regarding the severity of her symptoms not fully credible.

13 **B. The ALJ Did Not Err in Weighing Medical Source Opinion Evidence.**

14 **1. Legal Standard**

15 Generally, more weight should be given to the opinion of a treating physician than
16 to the opinions of physicians who do not treat the claimant, and the weight afforded a
17 non-examining physician's opinion depends on the extent to which he provides
18 supporting explanations for his opinions. *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th
19 Cir. 2014). Where a treating physician's opinion is not contradicted by another
20 physician, it may be rejected only for "clear and convincing" reasons, and where it is
21 contradicted, it may not be rejected without "specific and legitimate reasons" supported
22 by substantial evidence in the record. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

23 In deciding weight to give any medical opinion, the ALJ considers not only
24 whether the source has a treating or examining relationship with the claimant, but also
25 whether the treatment or examination is related to the alleged disability, the length of the
26 relationship, frequency of examination, supporting evidence provided by the source, and
27 medical specialization of the source. 20 C.F.R. § 404.1527(c). Generally, more weight is
28 given to the opinion of a specialist about medical issues related to his area of specialty

1 than to the opinion of a source who is not a specialist. 20 C.F.R. § 404.1527(c)(5). The
2 ALJ may discount a physician’s opinion that is based only the claimant’s subjective
3 complaints without objective evidence. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
4 1190, 1195 (9th Cir. 2004). The opinion of any physician, including that of a treating
5 physician, need not be accepted “if that opinion is brief, conclusory, and inadequately
6 supported by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219,
7 1228 (9th Cir. 2009).

8 **2. Treating Pain Specialist Sarah Buenviaje-Smith, M.D.**

9 On July 10, 2012, Dr. Buenviaje-Smith began treating Plaintiff for management of
10 chronic low back and leg pain. She saw Plaintiff on August 7 and 21, 2012. On
11 September 11, 2012, Dr. Buenviaje-Smith completed a Residual Functional Capacity
12 Questionnaire and opined that Plaintiff can sit for 30 minutes at one time and stand/walk
13 for 30 minutes at one time. She opined that in an 8-hour workday Plaintiff can sit for a
14 total of one hour and stand/walk for a total of two hours. She further opined that Plaintiff
15 would need to take 5-10 minute breaks every hour. Dr. Buenviaje-Smith said Plaintiff
16 can frequently lift less than 10 pounds and occasionally lift up to 20 pounds. She
17 estimated that Plaintiff would be absent from work 3-4 times a month as a result of her
18 impairments or treatments. She also opined that Plaintiff is not physically capable of
19 working an 8-hour day, 5 days a week, on a sustained basis.

20 The ALJ stated that he “considered, but ultimately gave very little weight to, the
21 Residual Functional Capacity Questionnaire completed by Dr. Buenviaje-Smith” because
22 (1) Dr. Buenviaje-Smith did not list the specific objective medical findings upon which
23 she based her opinion, (2) the opinion was inconsistent with Plaintiff’s admitted activities
24 of daily living, (3) Dr. Buenviaje-Smith’s treating relationship was of short duration, (4)
25 Dr. Buenviaje-Smith’s treatment consisted entirely of medication management, and (5)
26 Dr. Buenviaje-Smith’s opinion appears to have relied heavily on Plaintiff’s subjective
27 complaints without objective evidence. These are clear and convincing reasons,
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1 supported by substantial evidence in the record, for giving Dr. Buenviaje-Smith's opinion
2 little weight.

3 **3. State Agency Medical Consultant D. Rose, M.D.**

4 Dr. Rose reviewed Plaintiff's records at the reconsideration level and concluded
5 she is capable of performing a limited range of light work. The ALJ gave great weight to
6 Dr. Rose's opinion because State agency consultants are highly qualified physicians who
7 are experts in Social Security disability programs, the governing regulations, and
8 evaluation of medical issues in disability claims. The ALJ gave greater weight to Dr.
9 Rose's opinion on reconsideration than to the opinion formed during the initial review,
10 which found fewer limitations, because Dr. Rose was able to review more recent medical
11 evidence.

12 Plaintiff contends that the ALJ erred by giving great weight to Dr. Rose's opinion
13 because the opinion mentioned the symptoms in Plaintiff's right leg only once and these
14 symptoms could affect her ability to walk or stand for six hours as opined by Dr. Rose
15 and concluded by the ALJ. Dr. Rose commented that on August 9, 2012, the treating
16 orthopedist noted Plaintiff complained of low back pain with radiation down her right leg
17 and right leg weakness. Dr. Rose did not note that on July 10, 2012, Dr. Buenviaje-Smith
18 found mild right lower extremity weakness and diminished right lower extremity deep
19 tendon reflexes. Dr. Rose also did not note that on September 20, 2012, November 27,
20 2012, and December 13, 2012, Dr. Buenviaje-Smith found right leg pain within normal
21 limits and no abnormal neurological findings. During examinations on October 30, 2012,
22 and December 27, 2012, Dr. Buenviaje-Smith did not find right leg pain. These
23 omissions do not show that Dr. Rose's opinion was not consistent with the overall
24 medical record.

25 Plaintiff also contends that Dr. Rose did not provide sufficient explanation for her
26 opinion to find that it was supported by substantial evidence. Dr. Rose cited to a lumbar
27 CT from July 27, 2012, but did not state that the CT report said, "There is some atrophy
28 of the lower back paraspinous musculature." Although Dr. Rose did not report every

1 detail described in the CT report’s “Findings” section, Dr. Rose included everything
2 reported in the CT report’s “Impressions” section. Plaintiff contends that “some atrophy”
3 indicates a limited activity level, which is consistent with Plaintiff’s testimony and shows
4 Dr. Rose apparently failed to consider the evidence of muscle atrophy. Mild atrophy may
5 suggest that Plaintiff has not been actively using certain muscles, but Dr. Rose’s failure to
6 comment on mild atrophy does not show that Dr. Rose failed to consider it. Mild atrophy
7 of lower back muscles alone does not indicate Plaintiff’s functionality. Dr. Rose
8 accurately summarized the CT results as showing severe scoliosis in Plaintiff’s lower
9 back, postoperative changes, and no significant bony spinal canal, neural foraminal
10 stenosis, or acute fracture within the lumbar spine.

11 **4. Records Prior to May 31, 2012**

12 In the context of Plaintiff’s credibility regarding the severity of her symptoms and
13 limitations, the ALJ noted that some of the records are for treatment occurring prior to
14 May 31, 2012, and therefore are of limited usefulness. The ALJ stated, “However, in
15 order to view the record in the light most favorable to the claimant, the undersigned has
16 read and considered the entire medical record prior to making a decision on this case.”
17 Contrary to Plaintiff’s assertion, the ALJ did not “essentially ignore” these treatment
18 records. Rather, the ALJ expressly found Plaintiff had severe impairments due to
19 surgeries and nerve damage, but found treatment records before the relevant period to be
20 of limited usefulness in assessing the severity of her current symptoms and limitations.

21 **C. The ALJ Did Not Err by Incomplete Questioning of the Vocational** 22 **Expert.**

23 It was not necessary for the ALJ to present to the vocational expert a hypothetical
24 regarding an individual with limitations not supported by the medical evidence.

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IT IS THEREFORE ORDERED that the final decision of the Commissioner of Social Security is affirmed. The Clerk shall enter judgment accordingly and shall terminate this case.

Dated this 31st day of March, 2016.


Neil V. Wake
United States District Judge