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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

YVONNE COWAN,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. CV 07-7191-JTL

MEMORANDUM OPINION AND ORDER

PROCEEDINGS

On November 9, 2007, Yvonne Cowan (“plaintiff”) filed a Complaint seeking review of the Social Security Administration’s denial of her application for Disability Insurance Benefits. On December 19, 2007, Michael J. Astrue, Commissioner of Social Security (“defendant”), filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. On December 27, 2007 plaintiff filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on June 12, 2008, defendant filed an Answer to the Complaint. On August 11, 2008, the parties filed their Joint Stipulation.

The matter is now ready for decision.

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1 **BACKGROUND**

2 On March 3, 2005, plaintiff filed an application for Disability Insurance Benefits alleging
3 an onset date of November 13, 2003.¹ (Administrative Record ["AR"] at 70-72). The
4 Commissioner denied plaintiff's application for benefits both initially and upon reconsideration.
5 (AR at 51-55, 59-63). Thereafter, plaintiff requested a hearing before an Administrative Law
6 Judge ("ALJ"). (AR at 64).

7 On August 9, 2006, the ALJ conducted a hearing in Long Beach, California. (See AR
8 at 311-44). Plaintiff appeared at the hearing with counsel and testified. (AR at 315-28). Randi
9 Langford-Hetrick, a vocational expert, also testified at the hearing. (AR at 329-42). On August
10 21, 2006, the ALJ issued his decision denying benefits to plaintiff. (AR at 17-22). The ALJ
11 determined that plaintiff had uncontrolled diabetes mellitus and depression, but that she did not
12 have an impairment or combination of impairments that meets or equals any of the impairments
13 listed in Appendix 1 of the regulations. (AR at 21). The ALJ discredited plaintiff's subjective
14 complaints of severe functional limitations and concluded that plaintiff retained the residual
15 functional capacity to perform basic unskilled work with mild difficulty in rapid fingering; mild
16 difficulties in maintaining concentration persistence or pace; mild difficulties in understanding,
17 remembering and carrying out detailed work instructions and in maintaining attention and
18 concentration for extended periods of time. (Id.). While the ALJ determined that plaintiff could
19 not return to her past relevant work as an outreach worker, administrative assistant or
20 receptionist, the ALJ concluded that there are a significant number of jobs existing in the
21 national economy that plaintiff can perform. (Id.). Accordingly, the ALJ concluded that plaintiff
22 was not disabled through the date of the decision. (Id.). The Appeals Council denied plaintiff's
23 timely request for review of the ALJ's decision. (AR at 6-8).

24 Thereafter, plaintiff appealed to the United States District Court.

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26 _____
27 ¹ Plaintiff previously filed an application for Disability Insurance Benefits on May 18, 2004, which
28 was denied at the initial level. (AR at 27). Plaintiff's previous application was consolidated with
plaintiff's March 3, 2005 application. (See AR at 17).

1 **PLAINTIFF'S CONTENTION**

2 The ALJ's decision is not supported by substantial evidence and a finding of disability
3 is required pursuant to Social Security Ruling 82-59.
4

5 **STANDARD OF REVIEW**

6 Under 42 U.S.C. Section 405(g), this Court reviews the ALJ's decision to determine
7 whether the ALJ's findings are supported by substantial evidence and whether the proper legal
8 standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial
9 evidence means "more than a mere scintilla" but less than a preponderance. Richardson v.
10 Perales, 402 U.S. 389, 401 (1971); Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996).

11 Substantial evidence is "such relevant evidence as a reasonable mind might accept as
12 adequate to support a conclusion." Richardson, 402 U.S. at 401. This Court must review the
13 record as a whole and consider adverse as well as supporting evidence. Morgan v. Comm'r,
14 169 F.3d 595, 599 (9th Cir. 1999). Where evidence is susceptible to more than one rational
15 interpretation, the ALJ's decision must be upheld. Robbins v. Soc. Sec. Admin., 466 F.3d 880,
16 882 (9th Cir. 2006).
17

18 **DISCUSSION**

19 **A. The Sequential Evaluation**

20 A claimant is disabled under Title II of the Social Security Act if he or she is unable "to
21 engage in any substantial gainful activity by reason of any medically determinable physical or
22 mental impairment which can be expected to result in death or . . . can be expected to last for
23 a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner
24 has established a five-step sequential process to determine whether a claimant is disabled. 20
25 C.F.R. §§ 404.1520, 416.920.

26 The first step is to determine whether the claimant is presently engaging in substantially
27 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
28 in substantially gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S.

1 137, 141 (1987). Second, the ALJ must determine whether the claimant has a severe
2 impairment. Parra, 481 F.3d at 746. Third, the ALJ must determine whether the impairment
3 is listed, or equivalent to an impairment listed, in Appendix I of the regulations. Id. If the
4 impediment meets or equals one of the listed impairments, the claimant is presumptively
5 disabled. Bowen, 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment
6 prevents the claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45
7 (9th Cir. 2001). If the claimant cannot perform his or her past relevant work, the ALJ proceeds
8 to the fifth step and must determine whether the impairment prevents the claimant from
9 performing any other substantially gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.
10 2000).

11 The claimant bears the burden of proving steps one through four, consistent with the
12 general rule that at all times, the burden is on the claimant to establish his or her entitlement
13 to disability insurance benefits. Parra, 481 F.3d at 746. Once this prima facie case is
14 established by the claimant, the burden shifts to the Commissioner to show that the claimant
15 may perform other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir.
16 2006).

17 **B. The Evidence in the Record**

18 Plaintiff alleges that the ALJ's decision is not supported by substantial evidence. Plaintiff
19 argues that even if she was fully compliant with the treatment prescribed for her diabetes,² she
20 would still be entitled to benefits under Social Security Ruling ("SSR")³ 82-59. (Joint Stipulation
21 at 4).

22 ///

24 ² Plaintiff does not dispute the ALJ's findings that her diabetes is not controlled due to her failure
25 to take insulin five times a day, as directed, due to her fear of needles. (Joint Stipulation at 4).

26 ³ Social Security Rulings are issued by the Commissioner to clarify the Commissioner's
27 regulations and policies. Bunnell v. Sullivan, 947 F.2d 341, 346 n.3 (9th Cir. 1991). Although they
28 do not have the force of law, they are nevertheless given deference "unless they are plainly
erroneous or inconsistent with the Act or regulations." Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir.
1989).

1 On review, an ALJ's findings are entitled to deference if they are supported by
2 substantial evidence in the record and are sufficiently specific for the reviewing court to assess
3 whether the decision was impermissibly arbitrary. Bunnell v. Sullivan, 947 F.2d 341, 345-56
4 (9th Cir. 1991). The ALJ is charged with determining a claimant's residual functional capacity
5 based on an evaluation of the evidence as a whole. See 20 C.F.R. §§ 404.1546, 416.945;
6 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). An ALJ's residual functional capacity
7 finding will be affirmed if the ALJ applied the proper legal standard and his or her decision is
8 supported by substantial evidence. Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005).
9 Substantial evidence is "such relevant evidence as a reasonable mind might accept as
10 adequate to support a conclusion." Richardson, 402 U.S. at 401.

11 Plaintiff argues that the severity of her diabetes, even when she is fully compliant with
12 the prescribed treatment, requires a finding of disability. The ALJ's decision that plaintiff was
13 not disabled despite her failure to comply with her diabetes treatment, however, is supported
14 by substantial evidence in the record. (AR at 18-20). In the decision, the ALJ noted that
15 plaintiff was diagnosed with Type I diabetes mellitus in 2000 and had difficulty controlling her
16 blood sugar. (AR at 18; see AR at 292, 298). The ALJ cited to treatment notes in the record
17 and noted that these difficulties were, in part, the result of plaintiff's poor compliance with her
18 treatment due to her fear of injecting herself with insulin. (AR at 18; see AR at 205, 298, 316-
19 17). The ALJ then discussed the medical evidence and found that plaintiff's "diabetes mellitus
20 [had] not caused any end organ damage, despite poor control," and concluded that plaintiff was
21 not disabled despite her failure to comply with treatment. (AR at 18; see also AR at 205).
22 Thus, the ALJ's non-disability decision was not based upon plaintiff's failure to follow prescribed
23 treatment, as plaintiff contends. (See Joint Stip. at 4).

24 Moreover, the ALJ specifically discredited plaintiff's allegations of greater functional
25 limitations based on her failure to comply with her treatment, inconsistent statements and the
26 extent of her daily activities. (AR at 19-20). An ALJ is not "required to believe every allegation
27 of disabling pain" or other non-exertional impairment. See Fair v. Bowen, 885 F.2d 597, 603
28 (9th Cir.1989). In order to discredit a claimant's testimony when a medical impairment has

1 | been established, the ALJ must provide "specific, cogent reasons for the disbelief." Morgan,
2 | 169 F.3d at 599 (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996)). An ALJ must
3 | "cit[e] the reasons why the [claimant's] testimony is unpersuasive." Morgan, 169 F.3d at 599.
4 | An ALJ may consider many factors in weighing a claimant's credibility, including "(1) ordinary
5 | techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent
6 | statements concerning the symptoms, and other testimony by the claimant that appears less
7 | than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a
8 | prescribed course of treatment; and (3) the claimant's daily activities." Smolen v. Chater, 80
9 | F.3d 1273, 1284 (9th Cir. 1996); see Orn v. Astrue, 495 F.3d 625, 637-39 (9th Cir. 2007).

10 | Here, the ALJ noted that plaintiff's "diabetes is uncontrolled due to her non-compliance
11 | with treatment; her fear of injecting herself with insulin." (AR at 19). The ALJ further noted that
12 | "[a]t the hearing, [plaintiff] testified that she needed five injections a day but admitted that she
13 | would not do it herself, alleging that she had a neighbor inject her." (AR at 19; see AR at 205,
14 | 298, 316-17, 396). Given plaintiff's allegations of pain and severe functional limitations,
15 | plaintiff's asserted reluctance to inject herself with insulin does not constitute a sufficient reason
16 | that justifies her failure to comply with her prescribed treatment. Accordingly, the ALJ properly
17 | considered plaintiff's treatment regimen when evaluating plaintiff's credibility. See Fair, 885
18 | F.2d at 604.

19 | The ALJ also cites to inconsistencies in plaintiff's statements regarding her
20 | methamphetamine addiction, and in plaintiff's testimony regarding her functional limitations and
21 | daily activities, in support of his decision to discredit plaintiff's testimony. (AR at 19-20). The
22 | ALJ noted that plaintiff admitted to a history of methamphetamine addiction to Nathan Lavid,
23 | M.D., on May 18, 2005, but at the hearing denied any addiction and testified that her abuse of
24 | methamphetamine was a one time event. (AR at 19; see AR at 171, 227, 264-67, 326). The
25 | ALJ further noted that on August 13, 2004, when plaintiff saw Suzanne Dupee, M.D., a board
26 | certified psychiatrist, plaintiff reported that she had not used methamphetamine for eight years.
27 | (AR at 19; see AR at 169). Plaintiff also testified that she had difficulty using her fingers, but
28 | that she also engaged in daily activities that required rapid fingering, such as using her

1 computer to go on the internet or play games. (AR at 19-20; see AR at 322, 327).

2 The ALJ properly relied on the inconsistencies in plaintiff's testimony regarding her use
3 of methamphetamine to evaluate plaintiff's credibility. See Smolen, 80 F.3d at 1284; Fair, 885
4 F.2d at 604 n.5 (conflicts in a claimant's statements or testimony support a finding that the
5 claimant lacks credibility). The inconsistencies in plaintiff's statements regarding the functional
6 capacity of her hands and fingers, as well as the extent of her reported daily activities, also
7 support the ALJ's finding that plaintiff lacks credibility.

8 Finally, the ALJ cites to plaintiff's daily activities in support of his decision to discredit
9 plaintiff's testimony. In evaluating a claimant's credibility, an ALJ must consider the factors set
10 forth in SSR 95-5p, including a claimant's daily activities. The Ninth Circuit has held that a
11 specific finding that a claimant is able to spend a substantial part of her day engaged in pursuits
12 involving the performance of physical functions that are transferable to a work setting may be
13 sufficient to discredit a claimant's allegations of pain. Vertigan v. Halter, 260 F.3d 1044, 1049
14 (9th Cir. 2001). However, the Ninth Circuit has cautioned that "many home activities are not
15 easily transferable to what may be the more grueling environment of the workplace, where it
16 might be impossible to periodically rest or take medication." Fair, 885 F.2d at 603. Activities
17 such as grocery shopping, driving a car, or limited walking for exercise do not "in any way
18 detract from [a claimant's] credibility as to [his or her] overall disability." Vertigan, 260 F.3d at
19 1050. The Ninth Circuit has repeatedly stated that a claimant need not be utterly incapacitated
20 in order to be disabled under the Social Security Act. See Fair, 885 F.2d at 603; Vertigan, 260
21 F.3d at 1050.

22 Here, the ALJ found that plaintiff "leads a fairly normal lifestyle" and reported that she
23 "talked on the telephone, played with her cats, drove her car, did household chores, watched
24 television, shopped by computer/store and ate out in restaurants." (AR at 20; see AR at 94-
25 101, 130-32). The ALJ properly cited to plaintiff's ability to interact with others, drive, shop and
26 her other activities as a factor when evaluating plaintiff's credibility regarding her allegations of
27 disability. See SSR 95-5p. Taken as a whole, the ALJ's reasons for rejecting plaintiff's
28 credibility are sufficiently specific, and the decision to reject plaintiff's testimony regarding her

1 pain and functional limitations is supported by substantial evidence in the record. See Morgan,
2 169 F.3d at 599; Orn, 495 F.3d at 635.

3 Plaintiff also alleges that the vocational expert's testimony at the hearing supports a
4 finding of disability. (Joint Stipulation at 4; see AR at 334-35). Plaintiff's argues that a finding
5 of disability is required based on the vocational expert's testimony that a person who needs to
6 take unscheduled breaks for as long as 10 minutes, two or three times a week to take insulin
7 or eat would not be employable. The hypothetical that the vocational expert responded to,
8 however, included a number of limitations in excess of plaintiff's limitations as assessed by the
9 ALJ. These limitations included unscheduled ten minute breaks two to three times per week;
10 moderate limitations in punctuality and customary tolerances; and limitations in memory,
11 concentration, interacting with the public and vision. (AR at 330-35). The ALJ is not bound to
12 accept as true the restrictions set forth in the hypothetical question or the vocational expert's
13 testimony in response because the hypothetical did not accurately reflect plaintiff's limitations
14 and restrictions. Osenbrock v. Apfel, 240 F.3d 1157, 1165 (9th Cir. 2001) ("An ALJ is free to
15 accept or reject restrictions in a hypothetical question that are not supported by substantial
16 evidence."). Thus, the ALJ did not err in rejecting the vocational expert's testimony that was
17 based on a hypothetical that included limitations that were more restrictive than those that the
18 ALJ determined plaintiff had.

19 The ALJ properly relied on the vocational expert's response to the third hypothetical in
20 support of his findings at step five of the sequential evaluation. See Andrews v. Shalala, 53
21 F.3d 1035, 1044 (9th Cir. 1995); Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995) (a
22 vocational expert's testimony constitutes substantial evidence when the ALJ presents the
23 vocational expert with a hypothetical that is based on medical assumptions supported by
24 substantial evidence in the record that reflects each of the claimant's limitations). The
25 hypothetical included all of plaintiff's limitations, and a few limitations beyond plaintiff's
26 assessed capacity. The vocational expert testified that, even with the more restrictive residual
27 functional capacity, such a person could work as a cleaner/housekeeping (DOT No. 323.687-
28 014) or laundry aide (DOT No. 302.685-010). (AR at 334). The vocational expert testified that

1 each job exists in significant numbers in the regional and national economies. (AR at 334).
2 Because the hypothetical presented to the vocational expert included all of plaintiff's limitations,
3 the ALJ properly relied on this testimony in making the step five determination. Accordingly,
4 the ALJ's step five determination is based on substantial evidence.

5 Finally, plaintiff argues that SSR 82-59 entitles her to benefits. Plaintiff alleges that the
6 ALJ erred in concluding plaintiff is not disabled based upon her non-compliance with the
7 treatment prescribed for her diabetes. (Joint Stipulation at 4-5). SSR 82-59 delineates the
8 circumstances in which benefits can be denied based on the claimant's failure to follow
9 prescribed treatment. However, SSR 82-59 applies only to "[i]ndividuals with a disabling
10 impairment which is amenable to treatment that could be expected to restore their ability to
11 work[.]" (emphasis in original). As discussed above, the ALJ's determination that plaintiff's
12 diabetes was not a disabling impairment is supported by substantial evidence. Because SSR
13 82-59 applies only to claimants who would otherwise be disabled within the meaning of the Act,
14 the ALJ did not err in failing to follow the analysis set forth in SSR 82-59.

15
16 **ORDER**

17 After careful consideration of all documents filed in this matter, this Court finds that the
18 decision of the Commissioner is supported by substantial evidence and that the Commissioner
19 applied the proper legal standards. The Court, therefore, **AFFIRMS** the decision of the
20 Commissioner of Social Security Administration.

21
22 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

23 DATED: September 19, 2008

24 /s/ Jennifer T. Lum
25 JENNIFER T. LUM
26 UNITED STATES MAGISTRATE JUDGE
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28