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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTIN HAWTHORNE,)	No. CV 10-5760-CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability and disability insurance benefits. The court finds that judgment should be granted in favor of defendant, affirming the Commissioner’s decision.

I. BACKGROUND

Plaintiff Kristin Hawthorne was born on June 16, 1980, and was 25-years old at the time of her administrative hearing. [Administrative Record (“AR”) 18, 90.] She has at least a high school education and past relevant work experience as a loan officer, loan

1 processor, and escrow clerk. [AR 18.] She alleges disability as a
2 result of continued pain and limitations stemming from injuries
3 suffered in a 1997 car accident.¹ [AR 26, 107.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged and filed on August 3, 2010. On
6 February 23, 2011, defendant filed an answer and plaintiff's
7 Administrative Record ("AR"). On June 27, 2011, the parties filed
8 their Joint Stipulation ("JS") identifying matters not in dispute,
9 issues in dispute, the positions of the parties, and the relief sought
10 by each party. This matter has been taken under submission without
11 oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for disability and disability insurance
14 benefits under Title II of the Social Security Act on December 12,
15 2007, alleging disability since March 1, 2006. [AR 90.]

16 After the application was denied initially and upon
17 reconsideration, plaintiff requested an administrative hearing, which
18 was held on June 24, 2009, before Administrative Law Judge ("ALJ")
19 David J. Marcus [AR 21-51.] Plaintiff appeared with counsel, and
20 testimony was taken from both plaintiff, [AR 25-23], and vocational
21 expert ("VE") Mr. Leeth [AR 43-48]. The ALJ denied benefits in an

22
23 ¹ Specifically, plaintiff contends she is unable to work due to
the following:

24 Metal bar in left femur, screws in the hip, metal plates and
25 screws in the right arm, three plates I the jaw,
26 arthritis...three surgeries totaling over 10 hours, and 3 blood
27 transplants. Left side broken hip, pelvis, and femur. Right
side a broken ankle and arm. I broke my jaw in three places. My
condition has worsened, I currently have a piece of bone stuck in
between two muscles in my left leg and a piece of my radius is
stuck in my wrist. I have lock jaw, back spasms, arthritis has
taken a turn into serious.

28 [AR 107]

1 administrative decision filed on August 28, 2009. [AR 12-19.] When
2 the Appeals Council denied review on June 19, 2010, the ALJ's decision
3 became the Commissioner's final decision. [AR 1-2.] This action
4 followed.

5 IV. STANDARD OF REVIEW

6 Under 42 U.S.C. § 405(g), a district court may review the
7 Commissioner's decision to deny benefits. The Commissioner's (or
8 ALJ's) findings and decision should be upheld if they are free of
9 legal error and supported by substantial evidence. However, if the
10 court determines that a finding is based on legal error or is not
11 supported by substantial evidence in the record, the court may reject
12 the finding and set aside the decision to deny benefits. See Aukland
13 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
14 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
15 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
16 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
17 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
18 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

19 "Substantial evidence is more than a scintilla, but less than a
20 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
21 which a reasonable person might accept as adequate to support a
22 conclusion." Id. To determine whether substantial evidence supports
23 a finding, a court must review the administrative record as a whole,
24 "weighing both the evidence that supports and the evidence that
25 detracts from the Commissioner's conclusion." Id. "If the evidence
26 can reasonably support either affirming or reversing," the reviewing
27 court "may not substitute its judgment" for that of the Commissioner.
28 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

1 claimants in fully developing the record even if they are represented
2 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
3 1288. If this burden is met, a *prima facie* case of disability is
4 made, and the burden shifts to the Commissioner (at step five) to
5 prove that, considering residual functional capacity ("RFC")², age,
6 education, and work experience, a claimant can perform other work
7 which is available in significant numbers. Tackett, 180 F.3d at 1098,
8 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520.

9 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

10 Here, the ALJ found plaintiff met the insured status requirements
11 of the Social Security Act (the "Act") through December 31, 2011. He
12 found that she had not engaged in substantial gainful activity from
13 her alleged onset date, March 1, 2006 (step one); that she had the
14 "severe" impairments of: status post motor vehicle accident with
15 fractured mandible, fractured left femur, fractured right radius (step
16 two); and that she did not have an impairment or combination of
17 impairments that met or equaled a "listing" (step three). [AR 14-15.]
18 The ALJ found that plaintiff has the RFC to: lift and carry twenty
19 pounds occasionally and ten pounds frequently; stand and walk two
20 hours out of an eight hour workday; sit six hours of an eight hour
21 workday; and occasionally kneel, with a preclusion from squatting
22 (step four) [AR 15.]

23
24 ² Residual functional capacity measures what a claimant can
25 still do despite existing "exertional" (strength-related) and
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
28 work without directly limiting strength, and include mental, sensory,
postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminster v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 The ALJ found that this RFC would permit plaintiff to perform her
2 past relevant work as a loan officer, loan processor and escrow clerk.
3 [AR 18.]

4 The ALJ went on to conclude that, based on plaintiff's RFC,³ age,
5 education and work experience, the Medical-Vocational guidelines
6 support a finding of "not disabled" and that, in the alternative,
7 there are other jobs that exist in significant numbers in the national
8 economy that plaintiff could perform (step five). [AR 18.]

9 Accordingly, plaintiff was found not "not disabled" as defined by
10 the Act. [AR 19.]

11 **C. ISSUES IN DISPUTE**

12 The Joint Stipulation identifies only one disputed issue: whether
13 the ALJ properly rejected plaintiff's testimony. [JS 4.]

14 **D. ISSUE: CREDIBILITY ASSESSMENT**

15 Plaintiff argues the ALJ failed to offer any legally sufficient
16 reason for declining to credit her statements about the severity of
17 her pain and other limitations.

18 If an ALJ chooses to disregard a plaintiff's testimony, he must
19 set forth specific cogent reasons for disbelieving it. Lewin v.
20 Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). In other words, the
21 credibility determination must be made with "'findings sufficiently
22 specific to permit [a reviewing] court to conclude that the ALJ did
23 not arbitrarily discredit claimant's testimony.'" Tommasetti v.
24 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)(quoting Thomas v.
25 Barnhart, 278 F.3d 947, 958 (9th Cir. 2002)).

26 Absent affirmative evidence of malingering, an adverse

27 ³ The ALJ found that the RFC allows her to perform substantially
28 all of the exertional demand of sedentary work. [AR 19.]

1 credibility finding must be based on "clear and convincing reasons."
2 Carmickle v. Comm'r of Social Sec. Admin., 533 F.3d 1155, 1160 (9th
3 Cir. 2008). The ALJ must, furthermore, "specifically identify" the
4 testimony that he concludes is not credible and "explain what evidence
5 undermines the testimony." Holohan v. Massanari, 246 F. 3d 1195, 1208
6 (9th Cir. 2001).

7 Here, the ALJ specifically articulated multiple, legally
8 sufficient reasons for declining to credit plaintiff's statements
9 regarding the extent of her pain and functional limitations.

10 First, the ALJ found that, while plaintiff's 1997 car accident
11 was undoubtably serious and she has suffered from continual pain since
12 [e.g., AR 194, 233], she nonetheless was able to engage in substantial
13 gainful employment from 1999 to 2003, and has offered no medical
14 explanation for an alleged severe increase in pain. [AR 16.] Given
15 that a plaintiff may properly be deemed "not disabled" under the Act
16 when she has worked regularly for years notwithstanding alleged
17 impairments of consistent magnitude, see Bayliss v. Barnhart, 427 F.3d
18 1211, 1216 (9th Cir. 2005), the ALJ did not materially err in finding
19 that the inconsistencies here - between plaintiff's allegations and
20 her work activities - detract from her credibility, see Tonapetyan v.
21 Halter, 242 F.3d at 1148 (ALJ may use "ordinary techniques of
22 credibility evaluation" including considering inconsistent statements
23 and inconsistencies between the record and her statements).

24 Second, the ALJ noted that plaintiff has made inconsistent
25 statements about her employment history, which similarly detracts from
26 her credibility. [AR 17.] At the hearing, plaintiff testified that
27 she stopped working in 2006 "because the pain was too much" and her
28 job was unwilling to allow her to take a six-month leave for

1 treatment. [AR 26.] At a 2008 examination, she told internist Rocely
2 Ella-Tamayo, M.D., that she was fired from the same job. [AR 17, 195.]
3 Although plaintiff's counsel urges that plaintiff's testimony does not
4 conflict with her statement to Dr. Ella-Tamayo, and should be
5 interpreted as meaning she was fired, the ALJ's interpretation of the
6 testimony is reasonable and is based upon substantial evidence. [See,
7 e.g., AR 107.] Thus, this finding is legally sufficient. See Rollins
8 v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citation omitted)
9 (even if plaintiff's testimony is equivocal and ALJ's interpretation
10 is not the only reasonable one, if it is reasonable and supported, it
11 is not the court's role to second-guess it.)

12 Third, the ALJ found plaintiff's allegations of debilitating pain
13 are inconsistent with and unsupported by the objective medical
14 evidence. For example, Dr. Ella-Tamayo opined that plaintiff is able
15 to engage in a light level of work, in contrast to plaintiff's claims
16 that she cannot. [AR 197.] An ALJ may consider physician opinions
17 that plaintiff could work, which contradict plaintiff's assertion to
18 the contrary, in determining credibility. Moncada v. Chater, 60 F.3d
19 521, 524 (9th Cir. 1995). As another example, plaintiff testified that
20 she throws up over the course of several hours every morning [AR 35],
21 whereas the ALJ observed that the medical record shows no evidence of
22 such a problem and reflects only a single trip to the emergency room
23 after vomiting that was due to an allergic reaction to antibiotics
24 from Mexico [AR 327-28]. The ALJ is permitted to consider such
25 apparent inconsistencies in the credibility assessment. See Rollins v.
26 Massanari, 261 F.3d at 857 (citation omitted).

27 While plaintiff is correct that the Commissioner may not decline
28 to credit the degree of pain alleged due solely to a lack of objective

1 support for such an intense level of pain, a conflict with the medical
2 evidence is, nonetheless, a legitimate factor in determining the
3 extent of a plaintiff's pain. E.g., Id. (citing 20 C.F.R. §
4 404.1529(c)(2)).

5 Fourth, the ALJ noted that during her application interview
6 plaintiff did not appear to have any functional problems with sitting,
7 standing, walking or using her hands, which also conflicts with her
8 claims that she cannot sit for more than fifteen minutes and is
9 otherwise functionally impaired. [AR 16, 104.] In assessing a
10 plaintiff's credibility, the ALJ may consider such inconsistencies
11 between her actions and statements. See Tonapetyan v. Halter, 242
12 F.3d at 1148 (ALJ properly cited inconsistent behavior and statements
13 at the hearing and to consultative examiners in finding plaintiff not
14 to be credible).

15 Fifth, the ALJ observed that there is no indication that
16 plaintiff receives regular pain management treatment, which he
17 inferred suggests she is not in pain as severe as is alleged. [AR 17.]
18 This is a proper consideration. Fair v. Bowen, 885 F.2d 597, 603 (9th
19 Cir. 1989) (finding that unexplained, or inadequately explained,
20 failure to seek treatment or follow a prescribed cause of treatment
21 may be sufficient to discredit an allegation of disabling pain). While
22 plaintiff is correct that benefits may not be denied when the
23 plaintiff failed to obtain treatment due to lack of funds, Orn v.
24 Astrue, 495 F.3d 625, 639 (9th Cir. 2007)(citation omitted), arguing
25 that this is the reason she failed to do so, the record contradicts
26 this contention and establishes that she did, in fact, obtain medical
27 treatment regularly from 2001 to 2009. [E.g., AR 719.]

28 Finally, the ALJ found plaintiff's testimony regarding her daily

1 activities was inconsistent with and belied her testimony regarding
2 debilitating pain. [AR 16]. The ALJ noted, for example, that
3 plaintiff contends she can sit for only ten to fifteen minutes at a
4 stretch, often cannot walk, cannot focus due to her medications,
5 cannot do chores, and has nausea, problems with toileting and is
6 regularly fatigued. [AR 16, 30-34.] At the same time, she testified
7 she regularly drives her children to and from school, looks over their
8 homework with them, and does light exercise. [AR 35-37.] A finding
9 that plaintiff has thus made inconsistent statements about her daily
10 activities is a proper basis for a credibility finding. See Bray v.
11 Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009) (citing
12 Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997) (in
13 weighing a plaintiff's credibility, the ALJ may consider
14 inconsistencies between her testimony and her conduct and between her
15 testimony and daily activities.)

16 In any event, an error by the ALJ with respect to one or more
17 factors in a credibility determination is harmless when there "remains
18 substantial evidence supporting the ALJ's conclusions" with respect to
19 plaintiff's credibility. Carmickle v. Comm'r, 533 F.3d 1155, 1162,
20 1163 (9th Cir. 2008) (citations omitted). Because the credibility
21 finding in this case is ultimately sufficiently supported to permit
22 this court to determine that it was not arbitrary and was based
23 legally sufficient reasons, any error with respect to one aspect of
24 the evaluation would be harmless.

25 Remand is not warranted.

26 VI. ORDERS

27 Accordingly, **IT IS ORDERED** that:

- 28 1. The decision of the Commissioner is **AFFIRMED**.

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2. This action is **DISMISSED WITH PREJUDICE**.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: June 13, 2011



CARLA M. WOHRLE
United States Magistrate Judge