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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA DEPAZ,)	Case No. EDCV 11-3361-JEM
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	AFFIRMING DECISION OF
v.)	COMMISSIONER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

On April 26, 2011, Maria Depaz (“Plaintiff or Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Social Security Disability and Disability Insurance benefits. The Commissioner filed an Answer on July 28, 2011. On October 5, 2011, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be affirmed and this action dismissed with prejudice.

1 **BACKGROUND**

2 Plaintiff is a 58 year old female who applied for Social Security Disability and Disability
3 Insurance benefits on November 9, 2008, alleging disability beginning September 20, 1999,
4 due to neck problems, carpal tunnel syndrome, tennis elbow, and anxiety. (AR 18.) Plaintiff
5 has not engaged in substantial gainful activity during the period from her alleged onset date
6 through her date last insured of June 30, 2005. (AR 20.)

7 Plaintiff's claim was denied initially on December 30, 2008, and on reconsideration on
8 March 2, 2009. (AR 18.) Plaintiff filed a timely request for hearing, which was held before
9 Administrative Law Judge ("ALJ") Edward C. Graham on February 3, 2010, in Palmdale,
10 California. (AR 29-49.) Claimant appeared and testified with the assistance of a professional
11 Spanish interpreter. (AR 18.) Vocational expert ("VE") Randy Langford-Hetrick and Claimant's
12 husband, Jose Depaz, also appeared and testified at the hearing. (AR 18.) Plaintiff was
13 represented by counsel. (AR 18.)

14 The ALJ issued an unfavorable decision on February 24, 2010. (AR 18-25.) The
15 Appeals Council denied review on March 2, 2011. (AR 1-7.)

16 **DISPUTED ISSUES**

17 As reflected in the Joint Stipulation, the disputed issues that Plaintiff is raising as
18 grounds for reversal and remand are as follows:

- 19 1. Whether the ALJ properly developed the record.
20 2. Whether the ALJ properly evaluated Plaintiff's mental impairment and resulting
21 functional limitations as required by 20 C.F.R. § 404.1520a.
22 3. Whether the ALJ properly considered the residual functional capacity.
23 4. Whether the ALJ posed a complete hypothetical question to the vocational expert.

24 **STANDARD OF REVIEW**

25 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
26 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
27 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
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1 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
2 based on the proper legal standards).

3 Substantial evidence means "more than a mere scintilla,' but less than a
4 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.
5 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such relevant evidence as a
6 reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at
7 401 (internal quotation marks and citation omitted).

8 This Court must review the record as a whole and consider adverse as well as
9 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
10 evidence is susceptible to more than one rational interpretation, the ALJ's decision must be
11 upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
12 "However, a reviewing court must consider the entire record as a whole and may not affirm
13 simply by isolating a 'specific quantum of supporting evidence.'" Robbins, 466 F.3d at 882
14 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
15 F.3d 625, 630 (9th Cir. 2007).

16 THE SEQUENTIAL EVALUATION

17 The Social Security Act defines disability as the "inability to engage in any substantial
18 gainful activity by reason of any medically determinable physical or mental impairment which
19 can be expected to result in death or . . . can be expected to last for a continuous period of not
20 less than 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has
21 established a five-step sequential process to determine whether a claimant is disabled. 20
22 C.F.R. §§ 404.1520, 416.920.

23 The first step is to determine whether the claimant is presently engaging in substantial
24 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
25 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S.
26 137, 140 (1987). Second, the ALJ must determine whether the claimant has a severe
27 impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is not
28 severe if it does not significantly limit the claimant's ability to work. Smolen v. Chater, 80 F.3d

1 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is listed, or
2 equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the
3 regulations. Parra, 481 F.3d at 746. If the impediment meets or equals one of the listed
4 impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141.
5 Fourth, the ALJ must determine whether the impairment prevents the claimant from doing past
6 relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the
7 step four determination, the ALJ first must determine the claimant's residual functional capacity
8 ("RFC").¹ 20 C.F.R. § 416.920(e). The RFC must consider all of the claimant's impairments,
9 including those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security
10 Ruling ("SSR") 96-8p. If the claimant cannot perform his or her past relevant work or has no
11 past relevant work, the ALJ proceeds to the fifth step and must determine whether the
12 impairment prevents the claimant from performing any other substantial gainful activity. Moore
13 v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

14 The claimant bears the burden of proving steps one through four, consistent with the
15 general rule that at all times the burden is on the claimant to establish his or her entitlement to
16 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant,
17 the burden shifts to the Commissioner to show that the claimant may perform other gainful
18 activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding
19 that a claimant is not disabled at step five, the Commissioner must provide evidence
20 demonstrating that other work exists in significant numbers in the national economy that the
21 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
22 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
23 entitled to benefits. Id.

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27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her] limitations"
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),
416.945(a)(1).

THE ALJ DECISION

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2 In this case, the ALJ determined at step one of the sequential process that Plaintiff has
3 not engaged in substantial gainful activity since September 20, 1999, the alleged onset date,
4 through her date last insured of June 30, 2005. (AR 20.)

5 At step two, the ALJ determined that Plaintiff has the following medically determinable
6 severe impairments: mild bilateral carpal tunnel syndrome and mild right cubital tunnel
7 syndrome. (AR 20.)

8 At step three, the ALJ determined that Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals one of the listed impairments. (AR
10 20.)

11 The ALJ then found that the Plaintiff had the RFC to perform light unskilled occupations,
12 with the following limitations:

13 to lift and carry 20 pounds occasionally and 10 pounds frequently, stand/walk
14 6 hours in an 8-hour workday, sit 6 hours in an 8-hour workday, occasional
15 climbing, balancing, stooping, kneeling, crouching and crawling, and no
16 repetitive fine manipulation with the bilateral upper extremities.

17 (AR 21, 24.) In determining this RFC, the ALJ made an adverse credibility determination to the
18 extent Plaintiff's symptoms are inconsistent with the above RFC. (AR 23.) Significantly,
19 Plaintiff does not challenge the ALJ's adverse credibility determination.

20 At step four, the ALJ found that Plaintiff is unable to perform any of her past relevant
21 work. (AR 23.) The ALJ, however, did find there were other jobs existing in significant
22 numbers in the national economy that Plaintiff can perform, including cleaner, sales attendant,
23 X-ray inspector and shoe packer. (AR 24.)

24 Consequently, the ALJ concluded that Claimant is not disabled within the meaning of
25 the Social Security Act. (AR 25.)
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DISCUSSION

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2 The ALJ decision must be affirmed. All of Plaintiff's claims relate to her alleged anxiety
3 disorder. The ALJ properly determined that there was no evidence of any mental impairment.
4 There was no ambiguity in the record. The ALJ properly omitted any mental limitations from
5 his RFC and from the hypothetical questions posed to the vocational expert.

6 The ALJ's RFC is supported by substantial evidence. The ALJ's non-disability
7 determination is supported by substantial evidence and free of legal error.

8 **I. THE ALJ PROPERLY CONSIDERED PLAINTIFF'S** 9 **ALLEGED MENTAL IMPAIRMENT**

10 Plaintiff Depaz suffered work-related physical impairments to her hands, upper
11 extremities and hands. (AR 236, 250.) She underwent left carpal tunnel surgery in 1999. (AR
12 241, 250.) She underwent right carpal tunnel release in 2000. (AR 21, 255.) Almost all of the
13 medical evidence of record concerns Plaintiff's orthopedic impairments and related pain.

14 In one of Plaintiff's Disability Reports, she mentions "anxiety disorder" as a reason she
15 cannot work (AR 132), but without any explanation or elaboration or submission of any
16 supporting medical evidence. Plaintiff also points to a March 12, 2003, evaluation by Agreed
17 Medical Examiner Dr. Steven Brouman (AR 249-259), prepared for her workmen's
18 compensation claim, that includes conflicting psychiatric reports. (AR 255.) Dr. Brouman's
19 review of medical records indicates a psychiatric evaluation by Dr. Herbert Marshak on May
20 22, 2000. (AR 255.) Dr. Marshak diagnosed Plaintiff "with anxiety disorder, moderate/severe
21 psychosocial stressors, and GAF 50. She was recommended psychotherapy, stress
22 management, behavioral pain reduction and relaxation techniques." (AR 255.) Dr. Brouman
23 also reports a psychiatric evaluation by Dr. Noel Lustig on June 1, 2000. (AR 255.) Dr. Lustig
24 diagnosed Plaintiff "with malingering, no evidence of psychiatric disorder, character disorder;
25 headaches and injuries to the arms and hands, shoulder and back. There was no work
26 function impairment." (AR 255.)
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1 The ALJ found insufficient evidence of a medically determinable mental impairment.
2 (AR 22-23.) Plaintiff challenges this finding on the evidence above. The Court finds no merit
3 in Plaintiff's arguments.

4 **A. The Record Was Not Ambiguous Or Inadequate**

5 Seizing on the stark conflict between the psychiatric evaluations of Dr. Marshak and
6 Dr. Lustig, Plaintiff's first argument is that the record was ambiguous and inadequate to allow
7 for a proper evaluation of Plaintiff's alleged mental impairment. Plaintiff asserts that the ALJ
8 failed in his duty to develop the record properly. The Court disagrees.

9 In Social Security cases, the ALJ has a special, independent duty to develop the record
10 fully and fairly and to assure that the Claimant's interests are considered. Tonapetyan v.
11 Halter, 242 F.3d 1144, 1150 (9th Cir. 2001); Smolen, 80 F.3d at 1288; Brown v. Heckler, 713
12 F.2d at 441, 443 (9th Cir. 1983). Ambiguous evidence or the ALJ's own finding that the record
13 is inadequate to allow for proper evaluation of the evidence triggers the ALJ's duty to conduct
14 an appropriate inquiry. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150. The ALJ
15 may discharge this duty by subpoenaing the claimant's physicians, submitting questions to
16 them, continuing the hearing, or keeping the record open after the hearing to allow
17 supplementation of the record. Smolen, 80 F.3d at 1288; Tonapetyan, 242 F.3d at 1150.

18 The ALJ twice noted that there was no record or evidence of mental health treatment
19 prior to the date last insured. (AR 22, 23.) This finding is supported by substantial evidence.
20 Plaintiff did not indicate in her Disability Report she had sought or received any mental health
21 treatment. (AR 135-136.) She did not indicate that she was taking any medication for the
22 alleged anxiety disorder. (AR 138.) She denied to Dr. Brouman any emotional or psychiatric
23 problems. (AR 252.) She reported that she is able to handle stressful situations and changes
24 in routine. (AR 146.) She did not mention anxiety disorder or mental impairments at the
25 hearing. (AR 29-49.) Two State reviewing physicians, Dr. Mallare and Dr. Brooks, filed
26 Psychiatric Review Technique forms finding insufficient evidence of any mental impairment
27 because of no medical evidence of record regarding anxiety/fear/depression. (AR 324, 336,
28 345, 355.)

1 Plaintiff challenges the ALJ's finding of no record or evidence of mental health treatment
2 as a misrepresentation of the evidence, based on the conflicting evaluations of Dr. Marshak
3 and Dr. Lustig. Yet Dr. Marshak and Dr. Lustig only provided evaluations; Dr. Brouman's
4 notes describing those evaluations do not indicate that either Dr. Marshak or Dr. Lustig
5 provided any mental health treatment to Plaintiff. The ALJ's interpretation of the evidence was
6 reasonable. Rollins, 261 F.3d at 857 (ALJ's interpretation of the evidence should not be
7 second-guessed if it is reasonable). There was no misrepresentation of the evidence.

8 The ALJ also made an adverse credibility determination to the extent Plaintiff's
9 subjective symptoms are inconsistent with the assessed RFC. (AR 23.) Specifically, the ALJ
10 noted Dr. Lustig's opinion that Plaintiff was malingering. (AR 23, 255.) The ALJ additionally
11 noted that Qualified Medical Examiner Dr. Alan Sanders, an orthopedist, found minimal,
12 inconsistent effort, no indication for work restrictions and no further treatment necessary. (AR
13 23, 257.) Dr. Brouman noted that Plaintiff made no effort to grasp with the Jamar
14 Dynamometer. (AR 245.) Significantly, Plaintiff does not challenge the ALJ's negative
15 credibility determination.

16 The record here was not ambiguous or inadequate for the ALJ to make a determination
17 that there was insufficient evidence of a medically determinable mental impairment. Although
18 there was a conflict in the record between Dr. Marshak and Dr. Lustig, the ALJ reasonably
19 relied on the lack of any evidence of mental health treatment and his adverse credibility
20 determination (which Plaintiff does not contest) to arrive at his finding. There is no basis to
21 second-guess the ALJ's determination, and no duty to inquire further.

22 **B. The ALJ Was Not Required To Rate The Severity**
23 **Of Plaintiff's Alleged Mental Impairment**

24 Based on the assumption that Plaintiff had a medically determinable severe mental
25 impairment, she alleges that the ALJ did not follow the "special technique" for evaluating the
26 severity of mental impairments set forth in 20 C.F.R. 404.1520a. Under this regulation, the
27 ALJ must rate the degree of limitation for any mental impairment in three functional areas
28 (activities of daily living, social functioning and concentration, persistence or pace) as none,

1 mild, moderate, marked, or extreme. 20 C.F.R. 404.1520a(c)(4). The regulation further
2 provides that the ALJ will determine if there were episodes of decompensation. Id. Plaintiff
3 alleges that the ALJ's decision does not contain any rating of Plaintiff's functional limitations
4 resulting from her alleged mental impairment.

5 The regulation, however, is inapplicable here. The ALJ determined at step two of the
6 sequential process that there was insufficient evidence of any medically determinable mental
7 impairment, severe or otherwise. (AR 20, 22-23.) Thus, there was no need to rate the severity
8 of Plaintiff's alleged mental impairment of anxiety disorder. Section 1520a(b)(1) plainly states
9 that "we must first evaluate your pertinent symptoms, signs and laboratory findings to
10 determine whether you have a medically determinable mental impairment(s)." Section
11 1520a(b)(2) then says, "We must then rate the degree of functional limitation resulting from the
12 impairment(s) in accordance with Paragraph (c) of this section," which contain the assessment
13 of functional limitations for a mental impairment invoked by Plaintiff here. Because Plaintiff
14 failed to prove a medically determinable mental impairment, the ALJ plainly was not required to
15 rate the severity of an impairment found not to exist. There was no error.

16 **C. The ALJ's RFC Is Supported By Substantial**
17 **Evidence**

18 Plaintiff alleges that the ALJ's RFC is erroneous because it omits any mental limitations.
19 Plaintiff's argument assumes that she has significant mental impairments and that the ALJ
20 failed to develop the record properly as to those mental impairments. Plaintiff specifically
21 invokes SSR 96-8p which requires the ALJ in determining a claimant's RFC to explain how
22 inconsistencies in the medical evidence were resolved. Plaintiff alleges that the ALJ decision
23 fails to resolve the inconsistency between the psychiatric evaluations of Dr. Marshak and Dr.
24 Lustig.

25 Plaintiff's argument, however, fails to consider the entirety of the record. As the Court
26 already has held, the ALJ reasonably relied on the lack of any medical treatment for her
27 alleged anxiety disorder and his adverse credibility determination in determining that Plaintiff
28 had not proven any medically determinable mental impairment. The Court also ruled above

1 that, based on these considerations, the record was neither ambiguous nor inadequate and
2 that the ALJ had no duty to inquire further.

3 Because the ALJ properly found that there was no evidence Plaintiff had a mental
4 impairment, the ALJ had no reason to include mental functional limitations in his RFC for
5 Plaintiff. SSR 96-8p specially provides, “[I]n assessing RFC, the adjudicator must consider
6 only limitations and restrictions attributable to medically determinable impairments.” There
7 was no error.

8 **D. The ALJ Posed A Complete Hypothetical**
9 **Question To The VE**

10 Plaintiff’s last argument is that the ALJ’s hypothetical question to the VE improperly
11 omitted any mental limitations or restrictions. Again, Plaintiff’s argument is premised on her
12 previous contentions that the ALJ failed to develop the record properly and to assess her
13 mental impairments properly. Again, her argument is foreclosed by the Court’s previous
14 rulings.

15 The Ninth Circuit requires that an ALJ’s hypothetical questions to a VE include all of a
16 claimant’s limitations. Embrey v. Bowen, 849 F.2d 418, 423 (9th Cir. 1988). An ALJ’s
17 hypothetical question, however, need not include limitations that are unsubstantiated by
18 objective medical evidence or based on subjective complaints properly discounted. Thomas,
19 278 F.3d 959-60; Osenbrock v. Apfel, 240 F.3d 1157, 1164-65 (9th Cir. 2001.) Here, the ALJ
20 properly found no evidence of a medically determinable mental impairment and thus had no
21 basis for incorporating mental limitations into this RFC for an impairment found not to exist.
22 The ALJ did not err in omitting mental impairments from his RFC.

23 **E. Summary**

24 The ALJ’s RFC is supported by substantial evidence. The ALJ’s non-disability
25 determination is supported by substantial evidence and free of legal error.
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ORDER

IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is
AFFIRMED and this case is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 27, 2011

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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