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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LIDIA A. FREGOSO,)	Case No. CV 11-9497 JC
Plaintiff,)	
v.)	MEMORANDUM OPINION
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
Defendant.)	

I. SUMMARY

On November 17, 2011, plaintiff Lidia A. Fregoso (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; November 22, 2011 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On August 16, 2007, plaintiff filed an application for Supplemental Security
7 Income (“SSI”) benefits. (Administrative Record (“AR”) 121). Plaintiff asserted
8 that she became disabled on April 1, 2002, due to diabetes, hypertension, morbid
9 obesity, arthritis, respiratory problems, congestive heart failure, heel spur on right
10 foot, depression, and anxiety. (AR 137-38). The ALJ examined the medical
11 record and heard testimony from plaintiff (who was represented by counsel) and a
12 vocational expert on September 23, 2009. (AR 28-46).

13 On November 6, 2009, the ALJ determined that plaintiff was not disabled
14 through the date of the decision. (AR 11-22). Specifically, the ALJ found:
15 (1) plaintiff suffered from the following severe impairments: morbid obesity,
16 degenerative disc disease of the lumbar spine, edema of the lower extremities, and
17 history of bronchitis (AR 13); (2) plaintiff’s impairments, considered singly or in
18 combination, did not meet or medically equal a listed impairment (AR 13);
19 (3) plaintiff retained the residual functional capacity to perform light work (20
20 C.F.R. § 416.967(b)) with certain additional exertional limitations² (AR 13);

21
22 ¹The harmless error rule applies to the review of administrative decisions regarding
23 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
24 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
25 Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
application of harmless error standard in social security cases).

26 ²The ALJ determined that plaintiff could perform light exertion work with (1) standing/
27 walking two hours in an eight-hour workday with the need to alternate standing and sitting every
28 two hours for at least 5-10 minutes; (2) sitting six hours in an eight-hour workday with the need
to alternate sitting and standing every two hours for at least 5-10 minutes; (3) occasional
climbing, balancing, stooping, kneeling, crouching and crawling; (4) no exposure to

(continued...)

1 (4) plaintiff has no past relevant work (AR 20); (5) there are jobs that exist in
2 significant numbers in the national economy that plaintiff could perform,
3 specifically cashier (AR 21); and (6) plaintiff's allegations regarding her
4 limitations were not credible to the extent they were inconsistent with the ALJ's
5 residual functional capacity assessment (AR 19).

6 The Appeals Council denied plaintiff's application for review. (AR 1).

7 **III. APPLICABLE LEGAL STANDARDS**

8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that the claimant is
10 unable to engage in any substantial gainful activity by reason of a medically
11 determinable physical or mental impairment which can be expected to result in
12 death or which has lasted or can be expected to last for a continuous period of at
13 least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing
14 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of
15 performing the work claimant previously performed and incapable of performing
16 any other substantial gainful employment that exists in the national economy.
17 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
18 § 423(d)(2)(A)).

19 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
20 sequential evaluation process:

- 21 (1) Is the claimant presently engaged in substantial gainful activity? If
22 so, the claimant is not disabled. If not, proceed to step two.
- 23 (2) Is the claimant's alleged impairment sufficiently severe to limit
24 the claimant's ability to work? If not, the claimant is not
25 disabled. If so, proceed to step three.

26
27 ²(...continued)

28 concentration of smokes, fumes, or other pollutants; and (5) no working at unprotected heights or
operating dangerous machinery. (AR 13).

- 1 (3) Does the claimant’s impairment, or combination of
2 impairments, meet or equal an impairment listed in 20 C.F.R.
3 Part 404, Subpart P, Appendix 1? If so, the claimant is
4 disabled. If not, proceed to step four.
- 5 (4) Does the claimant possess the residual functional capacity to
6 perform claimant’s past relevant work? If so, the claimant is
7 not disabled. If not, proceed to step five.
- 8 (5) Does the claimant’s residual functional capacity, when
9 considered with the claimant’s age, education, and work
10 experience, allow the claimant to adjust to other work that
11 exists in significant numbers in the national economy? If so,
12 the claimant is not disabled. If not, the claimant is disabled.

13 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
14 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

15 The claimant has the burden of proof at steps one through four, and the
16 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
17 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also
18 Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

19 **B. Standard of Review**

20 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
21 benefits only if it is not supported by substantial evidence or if it is based on legal
22 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
23 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
24 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
25 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
26 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
27 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
28 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

1 To determine whether substantial evidence supports a finding, a court must
2 “consider the record as a whole, weighing both evidence that supports and
3 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
4 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
5 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
6 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
7 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

8 **IV. DISCUSSION**

9 **A. The ALJ Properly Evaluated Plaintiff’s Credibility**

10 **1. Pertinent Law**

11 Questions of credibility and resolutions of conflicts in the testimony are
12 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th
13 Cir. 2006). If the ALJ’s interpretation of the claimant’s testimony is reasonable
14 and is supported by substantial evidence, it is not the court’s role to “second-
15 guess” it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

16 An ALJ is not required to believe every allegation of disabling pain or other
17 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)
18 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes
19 the existence of a medically determinable impairment that could reasonably give
20 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as
21 to the credibility of the claimant’s statements about the symptoms and their
22 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the
23 record includes objective medical evidence that the claimant suffers from an
24 impairment that could reasonably produce the symptoms of which the claimant
25 complains, an adverse credibility finding must be based on clear and convincing
26 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d
27 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does
28 not apply is when there is affirmative evidence of malingering. Id. The ALJ’s

1 credibility findings “must be sufficiently specific to allow a reviewing court to
2 conclude the ALJ rejected the claimant’s testimony on permissible grounds and
3 did not arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367
4 F.3d 882, 885 (9th Cir. 2004).

5 To find the claimant not credible, an ALJ must rely either on reasons
6 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty, internal
7 contradictions in the testimony, or conflicts between the claimant’s testimony and
8 the claimant’s conduct (*e.g.*, daily activities, work record, unexplained or
9 inadequately explained failure to seek treatment or to follow prescribed course of
10 treatment)). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at
11 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant’s
12 testimony solely because it is not substantiated affirmatively by objective medical
13 evidence, the lack of medical evidence is a factor that the ALJ can consider in his
14 credibility assessment. Burch, 400 F.3d at 681.

15 **2. Analysis**

16 Plaintiff contends that the ALJ inadequately evaluated the credibility of her
17 subjective complaints. (Plaintiff’s Motion at 4). The Court disagrees.

18 First, an ALJ may properly discount a plaintiff’s credibility based on an
19 unexplained failure to seek treatment consistent with the alleged severity of
20 subjective complaints. See Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991)
21 (en banc) (in assessing credibility, ALJ may properly rely on plaintiff’s
22 unexplained failure to request treatment consistent with alleged severity of
23 symptoms); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (in assessing
24 credibility, ALJ properly considered doctor’s failure to prescribe and claimant’s
25 failure to request any serious medical treatment for supposedly excruciating pain);
26 Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir. 1999) (lack of treatment and reliance
27 upon nonprescription pain medication “clear and convincing reasons for partially
28 rejecting [claimant’s] pain testimony”); Fair, 885 F.2d at 604 (ALJ permissibly

1 considered discrepancies between the claimant’s allegations of “persistent and
2 increasingly severe pain” and the nature and extent of treatment obtained). Here,
3 as the ALJ noted, the medical evidence reflects that despite plaintiff’s complaints
4 of disabling limitations, as of April 29, 2008 (*i.e.*, over eight months *after* plaintiff
5 applied for SSI benefits) plaintiff had not seen any doctor for regular or ongoing
6 follow up care for over two years. (AR 20) (citing Exhibit 27 F at 33 [AR 753]).
7 Thereafter, plaintiff only sought treatment for her physical complaints through
8 “routine office visits” with Dr. Rubin, her general practitioner. (AR 20) (see AR
9 722-54, 799-811). In addition, as the ALJ noted, during an October 26, 2007
10 Comprehensive Psychiatric Evaluation plaintiff stated that she had never received
11 any kind of psychiatric treatment apart from a prescription for Xanax from her
12 general practitioner to help her sleep. (AR 20) (citing Exhibits 19E at 2 [AR 239],
13 9F at 2 [AR 486]). As the ALJ also noted, the record does not reflect that plaintiff
14 sought treatment from an orthopedist or other specialist, nor did plaintiff seek or
15 receive physical therapy or epidural injections for her arthritis. (AR 20). Plaintiff
16 fails to demonstrate that she was proscribed or even requested any more
17 aggressive medical treatment or, as plaintiff alleges (without any citation to the
18 record) (Plaintiff’s Motion at 9), that non-conservative treatment options did not
19 exist for plaintiff’s impairments.

20 Second, an ALJ may discount a plaintiff’s subjective complaints due to
21 internal conflicts within the plaintiff’s own statements and testimony. See
22 Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir.), as amended
23 (1997) (in weighing plaintiff’s credibility, ALJ may consider “inconsistencies
24 either in [plaintiff’s] testimony or between his testimony and his conduct”); see
25 also Fair, 885 F.2d at 604 n.5 (ALJ can reject pain testimony based on
26 contradictions in plaintiff’s testimony). Here, as the ALJ reasonably noted,
27 plaintiff’s testimony at the hearing that she had been looking for work was

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1 inconsistent with plaintiff's assertions that she suffers from disabling impairments
2 which preclude her from working at all.

3 Finally, the ALJ properly discounted plaintiff's statements in part because
4 plaintiff's subjective symptom allegations were not fully corroborated by the
5 objective medical evidence. See Rollins, 261 F.3d at 857 ("While subjective pain
6 testimony cannot be rejected on the sole ground that it is not fully corroborated by
7 objective medical evidence, the medical evidence is still a relevant factor in
8 determining the severity of the claimant's pain and its disabling effects.") (citation
9 omitted). For example, as the ALJ noted, the report of a Complete Internal
10 Medicine Evaluation from November 2, 2007 reflects physical and neurological
11 examinations of plaintiff that were within normal limits, and only minimal
12 limitations related to plaintiff's massive obesity. (AR 14) (citing Exhibit 10F [AR
13 492-505]). The ALJ also noted that the medical records do not contain evidence
14 of disuse muscle atrophy that would be expected given plaintiff's alleged level of
15 inactivity. (AR 20); see Meanel, 172 F.3d at 1114 (ALJ properly discredited
16 plaintiff's testimony where there was no evidence of muscular atrophy or other
17 physical sign usually seen in an "inactive, totally incapacitated individual").

18 Accordingly, a remand or reversal is not warranted.

19 **V. CONCLUSION**

20 For the foregoing reasons, the decision of the Commissioner of Social
21 Security is affirmed.

22 LET JUDGMENT BE ENTERED ACCORDINGLY.

23 DATED: June 14, 2012

24 _____
/s/

25 Honorable Jacqueline Chooljian
26 UNITED STATES MAGISTRATE JUDGE
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