

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARILYN N. RUSSO,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security
Administration,

Defendant.

Case No. CV 12-792-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On January 30, 2012, plaintiff Marilyn N. Russo filed a complaint against defendant Michael J. Astrue, seeking a review of a denial of a period of disability and disability insurance benefits ("DIB"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents a single issue: whether the ALJ properly discounted her

1 credibility. Memorandum in Support of Plaintiff's Complaint ("Pl. Mem.") at 4-
2 14; Defendant's Memorandum in Support of Answer ("D. Mem.") at 2-7. Having
3 carefully studied, inter alia, the parties' moving papers, the Administrative Record
4 ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein,
5 the ALJ properly discounted plaintiff's credibility. Therefore, the court affirms
6 the Commissioner's decision denying benefits.

7 II.

8 FACTUAL AND PROCEDURAL BACKGROUND

9 Plaintiff, who was forty-two years old on the date of her June 9, 2010
10 administrative hearing, completed two years of college. AR at 29, 36. Her past
11 relevant work was as a back office medical assistant, job development specialist,
12 and administrative clerk. *Id.* at 54-55.

13 On June 1, 2009, plaintiff filed an application for a period of DIB due to a
14 right ankle injury and depression. *Id.* at 66, 109. The Commissioner denied
15 plaintiff's application, after which plaintiff filed a request for a hearing. *Id.* at 66-
16 71.

17 On June 9, 2010, plaintiff, having waived representation, appeared and
18 testified at a hearing before the ALJ. *Id.* at 32, 34-53. The ALJ also heard
19 testimony from Howard Goldfarb, a vocational expert. *Id.* at 53-60. On July 8,
20 2010, the ALJ denied plaintiff's claim for benefits (the "2010 Decision"). *Id.* at 8-
21 25.

22 Applying the well-known five-step sequential evaluation process, the ALJ
23 found, at step one, that plaintiff did not engage in substantial gainful activity since
24 her alleged onset date of disability, November 29, 2007. *Id.* at 13-14.

25 At step two, the ALJ found that plaintiff suffered from the following severe
26 impairments: chronic right ankle ligament and nerve impairment and status
27 post-multiple right ankle surgeries, and obesity. *Id.* at 14.

1 At step three, the ALJ found that plaintiff's impairments, whether
2 individually or in combination, did not meet or medically equal one of the listed
3 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the
4 "Listings"). *Id.* at 15.

5 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),¹
6 determining that she had the RFC to perform sedentary work; could lift/carry ten
7 pounds occasionally and less than ten pounds frequently; and in an eight-hour
8 workday with normal breaks, could stand/walk at least two hours and sit for six
9 hours. *Id.* at 15-16. The ALJ also assessed the following additional limitations:
10 plaintiff should avoid pushing and pulling activities with her right lower
11 extremity; should never climb ladders, ropes, or scaffolds, and should not climb
12 ramps or stairs more than occasionally; should no more than occasionally balance,
13 stoop, kneel, crouch, or crawl; should avoid even moderate exposure to hazards
14 such as dangerous machinery and unprotected heights; and should avoid walking
15 over uneven terrain. *Id.* at 16.

16 The ALJ found, at step four, that plaintiff was capable of performing her
17 past relevant work as a job development specialist. *Id.* at 20. Consequently, the
18 ALJ concluded that plaintiff did not suffer from a disability as defined by the
19 Social Security Act. *Id.* at 22.

20 Plaintiff filed a timely request for review of the ALJ's decision, which was
21 denied by the Appeals Council. *Id.* at 1-7. The ALJ's decision stands as the final
22 decision of the Commissioner.

23
24
25 ¹ Residual functional capacity is what a claimant can do despite existing
26 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
27 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step
28 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

1 IV.

2 DISCUSSION

3 Plaintiff argues that the ALJ failed to make a proper credibility
4 determination. Pl. Mem. at 4-14. Specifically, plaintiff contends that the ALJ did
5 not provide clear and convincing reasons that are supported by substantial
6 evidence for discounting plaintiff's credibility. *Id.* Although this court agrees that
7 one of the reasons provided was not clear and convincing, the court finds that the
8 ALJ gave other, legally sufficient grounds to support his conclusion concerning
9 plaintiff's credibility.

10 An ALJ must make specific credibility findings, supported by the record.
11 Social Security Ruling 96-7p. To determine whether testimony concerning
12 symptoms is credible, an ALJ engages in a two-step analysis. *Lingenfelter v.*
13 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, an ALJ must determine
14 whether a claimant produced objective medical evidence of an underlying
15 impairment ““which could reasonably be expected to produce the pain or other
16 symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344
17 (9th Cir. 1991) (en banc)). Second, if there is no evidence of malingering, an
18 “ALJ can reject the claimant’s testimony about the severity of her symptoms only
19 by offering specific, clear and convincing reasons for doing so.” *Smolen v.*
20 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Benton v. Barnhart*, 331 F.3d 1030,
21 1040 (9th Cir. 2003). An ALJ may consider several factors in weighing a
22 claimant’s credibility, including: (1) ordinary techniques of credibility evaluation
23 such as a claimant’s reputation for lying; (2) the failure to seek treatment or follow
24 a prescribed course of treatment; and (3) a claimant’s daily activities. *Tommasetti*
25 *v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

26 At the first step, the ALJ found that plaintiff’s medically determinable
27 impairments could reasonably be expected to cause the symptoms alleged. AR at
28

1 17. At the second step, because the ALJ did not find any evidence of malingering,
2 the ALJ was required to provide clear and convincing reasons for discounting
3 plaintiff's credibility.

4 Here, the ALJ found plaintiff's statements generally credible, but did not
5 find her claims of disabling impairment fully credible. AR at 18. The ALJ
6 provided four reasons for discounting plaintiff's credibility: (1) the objective
7 medical evidence failed to fully support her claims; (2) plaintiff's overall treatment
8 history failed to support her claims; (3) "inconsistent statements and actions," and
9 (4) that plaintiff's claims were inconsistent with her daily activities. *Id.* at 18.
10 Reasons one and three are clear, convincing and supported by substantial
11 evidence.

12 First, the ALJ noted that the objective medical evidence did not fully
13 support plaintiff's claims. *Id.* at 17; *see also Rollins v. Massanari*, 261 F.3d 853,
14 856-57 (9th Cir. 2001) (lack of objective medicine supporting symptoms is one
15 factor in evaluating credibility). With respect to the physical symptoms and
16 limitations, the ALJ correctly found the reports of plaintiff's treating orthopedist,
17 Dr. Carol Frey, brief and repetitive, opining that plaintiff was "temporarily totally
18 disabled" without significant elaboration or sufficient objective support. *See id.* at
19 17, 318-452, 474-514. The ALJ also rightly noted that although the medical
20 record reflected a re-injury to plaintiff's ankle in September 2009 (*see, e.g., id.* at
21 479), "the medical record – including Dr. Frey's reports – is silent as to objective
22 data that might possibly support greater limitations than those assessed by the
23 State Agency." *Id.* at 17. The ALJ's reason is supported by substantial evidence.
24 A lack of medical evidence supporting plaintiff's alleged symptoms cannot be the
25 sole reason for rejecting her testimony; however, it can be one of several factors
26 used in evaluating the credibility of her subjective complaints. *See Rollins* at 856-
27 57.

1 The ALJ also found that plaintiff's overall treatment history undercut her
2 credibility. AR at 18. In discussing plaintiff's treatment history, the ALJ simply
3 revisited the objective medical evidence. *See id.* For example, he asserts that the
4 record "indicates that the claimant has generally responded well to treatment," and
5 that doctors notes refer to her "doing well" post-operatively in 2008 and 2009. *Id.*
6 The ALJ concluded that plaintiff's conditions "are not as severe as she alleges."
7 *Id.* Defendant seems to suggest plaintiff's treatment history was a basis separate
8 from the objective medical evidence for discounting plaintiff's credibility. *See D.*
9 *Mem.* at 4-5. It was not. "Using a doctor's description of a claimant in treatment
10 notes to discredit the claimant's subjective testimony . . . is merely a specific
11 application of a lack of objective medical evidence." *Palmer v. Astrue*, No.
12 11-CV-942 JLS (BLM), 2012 WL 3779046, at *5 (S.D. Cal. Aug. 30, 2012).
13 Indeed, the ALJ himself lumps together his assessment of the objective medical
14 evidence and treatment history in discussing plaintiff's credibility. *See AR* at 18.
15 Thus, while this is a valid reason to discount plaintiff's credibility, again, the
16 objective medical evidence and treatment history cannot be the only reason cited.
17 And it was not.

18 The ALJ further cited "[i]nconsistent statements and actions, such as those
19 noted" as a reason he found plaintiff's testimony not credible. *Id.* The court
20 understands this as a reference to the ALJ's earlier analysis of plaintiff's testimony
21 concerning her limitations. *See id.* at 16.

22 Plaintiff testified that she suffered from constant "radiating, sharp, burning
23 pain" in her ankle that worsened if anything, like a sock or shoe, touched the area.
24 *Id.* at 40-41. She has had three surgeries on her ankle and explained that her
25 doctor has recommended removal of a nerve to alleviate her pain. *Id.* at 39-40.
26 When the ALJ asked plaintiff: "And the first [surgery], you got some benefit and
27 then you hurt your leg again?" plaintiff answered: "Correct" *Id.* at 39. But
28

1 plaintiff said that she was not doing well after the second surgery, on January 12,
2 2009. *Id.* at 40. Plaintiff testified that she gets some temporary relief from nerve
3 stimulation and injections. *Id.* at 41. She has a prescription for pain medication
4 and takes Ibuprofen but tries to limit her intake of both; she also uses local pain
5 relievers and ice. *Id.* at 41-42. Plaintiff did not testify to whether the pain
6 medication, local pain relievers or ice alleviate her discomfort. *Id.* She is most
7 comfortable on the couch with her foot up. *Id.* at 50.

8 Plaintiff's condition has resulted in reduced socializing. *Id.* at 46.
9 Additionally, her activities at home are limited. She does not cook and is able to
10 do only minimal house work. She has had to hire a person to assist with
11 housecleaning. *Id.* at 46. Plaintiff said that she is able to walk the length of ten
12 houses, stand for "[p]robably an hour, shifting my weight to my left hip," sit with
13 her foot down for two hours and with her foot up for three hours. *Id.* at 50-51.
14 Plaintiff testified that she would not be able to do a sit-down job, in part because
15 of the pain she experiences and because of the limitations on her driving. *Id.* at
16 52.

17 The portion of plaintiff's testimony that the ALJ appears to have found
18 inconsistent and thus lacking credibility concerns her assessment of her physical
19 abilities. *See id.* at 16. "Despite testifying to being able to walk the length of 10
20 houses, stand for one hour while shifting weight, and sit for two hours with her
21 feet down and three hours with them elevated," wrote the ALJ, "she stated that she
22 feels unable to return to work, even a sit-down job, due to pain and other
23 symptoms." *Id.* at 16. The court finds the ALJ's reasoning here clear and
24 convincing and supported by substantial evidence.

25 Finally, the ALJ found that plaintiff's daily activities were inconsistent with
26 her symptoms. AR at 18; *see Morgan*, 169 F.3d at 599 (a plaintiff's ability "to
27 spend a substantial part of [her] day engaged in pursuits involving the
28

1 performance of physical functions that are transferable to a work setting” may be
2 sufficient to discredit her). Plaintiff testified that she was “okay” with self-care,
3 such as dressing and bathing, and on her function report marked that she had “no
4 problem” with personal care. *Id.* at 46, 152. She cannot cook or do housecleaning
5 except for light chores, such as putting clean dishes in the dishwasher away. *Id.*
6 Plaintiff explained that she could no longer socialize as she had previously
7 because she cannot drive herself any significant distance. *Id.* at 46. She does,
8 however, drive her children approximately one half mile to school. *Id.* at 46-47.
9 Plaintiff described driving as a “huge” problem for her because of the limitations
10 of her right foot. She uses her left foot to accelerate and limits her driving to back
11 roads to avoid stop-and-go traffic. *Id.* at 47. Plaintiff no longer engages in any of
12 her prior hobbies such as snowboarding, skiing, roller skating, softball, or
13 coaching her children’s baseball games. *Id.* at 48. Plaintiff testified that she
14 attends church on Sundays and fellowship class after the service. *Id.* at 49.
15 Plaintiff’s husband also weighed in on her functionality. *Id.* at 143-150. He
16 reported that plaintiff assists with caring for her sons, including several hours of
17 school work, and that she does very light housework. *Id.* at 143. Additionally, he
18 said that plaintiff swims. *Id.* His sole comment concerning plaintiff’s self-care is
19 that plaintiff “is less motivated to care for herself” now. *Id.* at 144.

20 The ALJ acknowledged plaintiff’s testimony that she could not perform
21 most activities without pain or other symptoms. *Id.* at 18. He wrote that plaintiff
22 attested and her husband confirmed “that she has no difficulty tending to her
23 personal care needs.” *Id.* at 18. In his decision, the ALJ noted that plaintiff
24 attends church services weekly and assists her children with their schoolwork.
25 The ALJ concluded that these were “activities that one likely would not expect a
26 person with the claimant’s alleged disabling symptoms to be able to perform.” *Id.*
27 But the ALJ’s analysis does not support this conclusion. He does not explain how
28

1 her self-described ability to carry on quite limited daily activities is inconsistent
2 with her claimed pain and limitations. *See Reddick*, 157 F.3d at 722 (only if a
3 plaintiff's level of activity is inconsistent with her alleged limitations will these
4 activities have any bearing on claimant's credibility); *see also Vertigan v. Halter*,
5 260 F.3d 1044, 1050 (9th Cir. 2001) ("the mere fact that a plaintiff has carried on
6 certain daily activities, such as grocery shopping, driving a car, or limited walking
7 for exercise, does not in any way detract from her credibility as to her overall
8 disability"). Plaintiff's ability to perform a few, limited daily activities does not
9 support the ALJ's finding that she lacked credibility.

10 Although the ALJ's reference to plaintiff's daily activities was not a clear
11 and convincing reason for discounting her credibility, this error was harmless,
12 given the other clear and convincing reasons he cited. *See Batson v. Comm'r*, 359
13 F.3d 1190, 1197 (9th Cir. 2004) (ALJ's error in relying on one of several reasons
14 in support of an adverse credibility determination was harmless because ALJ's
15 remaining reasons and ultimate credibility determination were supported by
16 substantial evidence). In particular, the ALJ provided two legally sufficient
17 reasons for discounting plaintiff's credibility. Accordingly, the court finds that the
18 ALJ provided clear and convincing reasons, supported by substantial evidence, for
19 discounting plaintiff's subjective complaints of pain and limitation.

20 //

V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered
AFFIRMING the decision of the Commissioner denying benefits, and dismissing
this action with prejudice.

DATED: December 10, 2012



SHERI PYM
United States Magistrate Judge