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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. 2:16-CV-01790 (VEB)

MILDRED S. LOMBERA,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In June of 2012, Plaintiff Mildred S. Lombera applied for Disability Insurance benefits and Supplemental Security Income (“SSI”) benefits under the Social Security Act. The Commissioner of Social Security denied the applications.

Plaintiff, by and through her attorney, Joel D. Leidner, Esq. commenced this action seeking judicial review of the Commissioner’s denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

1 The parties consented to the jurisdiction of a United States Magistrate Judge.
2 (Docket No. 11, 12). On September 7, 2016, this case was referred to the
3 undersigned pursuant to General Order 05-07. (Docket No. 22).

4 5 **II. BACKGROUND**

6 Plaintiff applied for disability insurance benefits on June 1, 2012, and SSI
7 benefits on June 15, 2012, alleging disability beginning on May 20, 2007. (T at 16).¹
8 The applications were denied initially and on reconsideration. Plaintiff requested a
9 hearing before an Administrative Law Judge (“ALJ”).

10 On July 14, 2014, a hearing was held before ALJ David G. Marcus. (T at 38).
11 Plaintiff appeared with her attorney and testified. (T at 43-54). The ALJ also
12 received testimony from a vocational expert. (T at 55-57).

13 On August 29, 2014, the ALJ issued a written decision denying the
14 applications for benefits. (T at 10-27). The ALJ’s decision became the
15 Commissioner’s final decision on February 22, 2016, when the Appeals Council
16 denied Plaintiff’s request for review. (T at 1-6).

17 On March 16, 2016, Plaintiff, acting by and through her counsel, filed this
18 action seeking judicial review of the Commissioner’s denial of benefits. (Docket No.

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¹ Citations to (“T”) refer to the administrative record at Docket No. 15.

1) The Commissioner interposed an Answer on May 23, 2016. (Docket No. 14). Plaintiff filed a motion for summary judgment with supporting memorandum of law on June 20, 2016. (Docket No. 16). The Commissioner filed a motion for summary judgment with supporting memorandum of law on August 17, 2016. (Docket No. 20). Plaintiff filed an opposing memorandum of law on August 22, 2016. (Docket No. 21).

After reviewing the pleadings, memoranda of law, and administrative record, this Court finds that the Commissioner’s decision must be affirmed and this case be dismissed.

III. DISCUSSION

A. Sequential Evaluation Process

The Social Security Act (“the Act”) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if any impairments are of such severity that he or she is not only unable to do previous work but cannot, considering his or her age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),

1 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
5 one determines if the person is engaged in substantial gainful activities. If so,
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
7 decision maker proceeds to step two, which determines whether the claimant has a
8 medically severe impairment or combination of impairments. 20 C.F.R. §§
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

10 If the claimant does not have a severe impairment or combination of
11 impairments, the disability claim is denied. If the impairment is severe, the
12 evaluation proceeds to the third step, which compares the claimant's impairment(s)
13 with a number of listed impairments acknowledged by the Commissioner to be so
14 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
15 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
16 equals one of the listed impairments, the claimant is conclusively presumed to be
17 disabled. If the impairment is not one conclusively presumed to be disabling, the
18 evaluation proceeds to the fourth step, which determines whether the impairment
19 prevents the claimant from performing work which was performed in the past. If the
20 claimant is able to perform previous work, he or she is deemed not disabled. 20

1 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant’s residual
2 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
3 work, the fifth and final step in the process determines whether he or she is able to
4 perform other work in the national economy in view of his or her residual functional
5 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
6 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon the claimant to establish a *prima facie*
8 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
9 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
10 is met once the claimant establishes that a mental or physical impairment prevents
11 the performance of previous work. The burden then shifts, at step five, to the
12 Commissioner to show that (1) plaintiff can perform other substantial gainful
13 activity and (2) a “significant number of jobs exist in the national economy” that the
14 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

15 **B. Standard of Review**

16 Congress has provided a limited scope of judicial review of a Commissioner’s
17 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,
18 made through an ALJ, when the determination is not based on legal error and is
19 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
20 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

1 “The [Commissioner’s] determination that a plaintiff is not disabled will be
2 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
3 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
4 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
5 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
6 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
7 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
8 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
9 conclusions as the [Commissioner] may reasonably draw from the evidence” will
10 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
11 the Court considers the record as a whole, not just the evidence supporting the
12 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
13 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

14 It is the role of the Commissioner, not this Court, to resolve conflicts in
15 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
16 interpretation, the Court may not substitute its judgment for that of the
17 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
18 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
19 set aside if the proper legal standards were not applied in weighing the evidence and
20 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d

1 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
2 administrative findings, or if there is conflicting evidence that will support a finding
3 of either disability or non-disability, the finding of the Commissioner is conclusive.
4 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

5 **C. Commissioner’s Decision**

6 The ALJ determined that Plaintiff had not engaged in substantial gainful
7 activity since May 20, 2007, the alleged onset date, and met the insured status
8 requirements of the Social Security Act through December 31, 2015 (the “date last
9 insured”). (T at 18).

10 The ALJ found that Plaintiff’s pulmonary fibrosis and history of asthma;
11 degenerative changes of the lumbosacral spine; disc protrusion of the thoracic spine;
12 and degenerative changes of the cervical spine were “severe” impairments under the
13 Act. (Tr. 18).

14 However, the ALJ concluded that Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled one of the impairments
16 set forth in the Listings. (T at 19).

17 The ALJ determined that Plaintiff retained the residual functional capacity
18 (“RFC”) to lift/carry 20 pounds occasionally and 10 pounds frequently; stand/walk
19 for 2 hours in an 8-hour workday and sit for 6 hours; and could occasionally bend,
20

1 stoop, and twist; but was precluded from working around pulmonary irritants and
2 was precluded for exposure to conditions of extreme heat or cold. (T at 19).

3 The ALJ found that Plaintiff could not perform her past relevant work as a fast
4 food manager. (T at 21). Considering Plaintiff's age (38 years old on the alleged
5 onset date), education (limited), work experience, and residual functional capacity,
6 the ALJ concluded that jobs exist in significant numbers in the national economy
7 that Plaintiff can perform. (T at 21).

8 Accordingly, the ALJ determined that Plaintiff was not disabled within the
9 meaning of the Social Security Act between May 20, 2007 (the alleged onset date)
10 and August 29, 2014 (the date of the decision) and was therefore not entitled to
11 benefits. (T at 22-23). As noted above, the ALJ's decision became the
12 Commissioner's final decision when the Appeals Council denied Plaintiff's request
13 for review. (T at 1-6).

14 15 **IV. ANALYSIS**

16 Plaintiff offers a single argument in support of her request for reversal of the
17 denial of benefits. Plaintiff challenges the ALJ's credibility determination, asserting
18 that the ALJ improperly discounted her complaints of constant coughing.

19 A claimant's subjective complaints concerning his or her limitations are an
20 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d

1 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ’s findings with regard to the
2 claimant’s credibility must be supported by specific cogent reasons. *Rashad v.*
3 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
4 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear
5 and convincing.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General
6 findings are insufficient: rather the ALJ must identify what testimony is not credible
7 and what evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834;
8 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

9 However, subjective symptomatology by itself cannot be the basis for a
10 finding of disability. A claimant must present medical evidence or findings that the
11 existence of an underlying condition could reasonably be expected to produce the
12 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
13 § 404.1529(b), 416.929; SSR 96-7p.

14 In this case, Plaintiff testified, in pertinent part, that she coughs when in the
15 presence of carpeting, extremes of temperature, smoke, “aroma,” and when she
16 walks. (T at 47). She also experiences coughing when she does household chores,
17 walks, or stands up “for a long time.” (T at 48-49). Coughing sometimes interferes
18 with her concentration. (T at 50). She coughs “all the time.” (T at 50). A rescue
19 inhaler provides some relief, but Plaintiff sometimes needs to lie down. (T at 51).
20 The constant coughing prevents her from working. (T at 53).

1 The ALJ concluded that Plaintiff’s medically determinable impairments could
2 reasonably be expected to cause the alleged symptoms, but that her statements
3 regarding the intensity, persistence, and limiting effects of the symptoms were not
4 fully credible. (T at 20).

5 The ALJ recognized Plaintiff’s respiratory impairments, but concluded that
6 she could nevertheless perform work consistent with the RFC determination, which
7 included a finding that Plaintiff was precluded from working around pulmonary
8 irritants and conditions of extreme cold or heat. (T at 19-20). Plaintiff argues that
9 this finding was insufficient and that the ALJ should have credited her testimony and
10 found her constant coughing disabling.

11 For the reasons that follow, this Court finds the ALJ’s decision consistent with
12 applicable law and supported by substantial evidence. The ALJ carefully reviewed
13 the evidence, which supports the RFC determination and decision to discount
14 Plaintiff’s credibility.

15 For example, in December of 2011, Dr. B.N. Chabra, a treating physician,
16 opined that Plaintiff could return to modified work, including her previous
17 occupation as an assistant manager. (T at 527). Dr. Concepcion Enriquez performed
18 a consultative examination in September of 2012. Dr. Enriquez opined that Plaintiff
19 could occasionally lift/carry 20 pounds and frequently lift/carry 10 pounds;
20 stand/walk with normal breaks for 2 hours in an 8-hour work day; and sit with

1 normal breaks in an 8-hour workday. (T 397). Dr. Enriquez concluded that Plaintiff
2 needed to avoid exposure to extreme temperatures and irritants such as dust,
3 chemicals, and fumes. (T at 397).

4 In October of 2012, Dr. G. Taylor-Holmes, a non-examining State Agency
5 review physician, concluded that Plaintiff was not disabled and essentially adopted
6 Dr. Enriquez's findings. (T at 63-66). In May of 2013, Dr. J. Berry, another State
7 Agency review physician, reviewed the medical record and affirmed Dr. Taylor-
8 Holmes's findings. (T at 86-89).

9 Although lack of supporting medical evidence cannot form the sole basis for
10 discounting pain testimony, it is a factor the ALJ may consider when analyzing
11 credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). In other words, an
12 ALJ may properly discount subjective complaints where, as here, they are
13 contradicted by medical records. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d
14 1155, 1161 (9th Cir. 2008); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
15 2002).

16 The ALJ also noted that Plaintiff made inconsistent statements, which
17 detracted from her credibility. Plaintiff testified that she was able to care for her
18 three children, drive, attend to light cleaning, prepare foods, and do the laundry. (T
19 at 52). Plaintiff is able to complete these tasks, despite her coughing, albeit at a

1 slower pace. (T at 52). Treatment notes described Plaintiff as exercising three to
2 four times per week at a moderate activity level. (T at 21, 275, 293, 298).

3 When assessing a claimant’s credibility, the ALJ may employ “ordinary
4 techniques of credibility evaluation.” *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217,
5 1224 n.3 (9th Cir. 2010)(quoting *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
6 1996)). Activities of daily living are a relevant consideration in assessing a
7 claimant’s credibility. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).
8 Although the claimant does not need to “vegetate in a dark room” to be considered
9 disabled, *Cooper v. Brown*, 815 F.2d 557, 561 (9th Cir. 1987), the ALJ may discount
10 a claimant’s testimony to the extent his or her activities of daily living “contradict
11 claims of a totally debilitating impairment.” *Molina v. Astrue*, 674 F.3d 1104, 1112-
12 13 (9th Cir. 2011).

13 For the reasons outlined above, this Court finds no reversible error with regard
14 to the ALJ’s credibility determination, which is supported by substantial evidence.
15 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008)(“If the ALJ’s
16 credibility finding is supported by substantial evidence, the court may not engage in
17 second-guessing.”).

18 V. CONCLUSION

19 After carefully reviewing the administrative record, this Court finds
20 substantial evidence supports the Commissioner’s decision, including the objective

1 medical evidence and supported medical opinions. It is clear that the ALJ thoroughly
2 examined the record, afforded appropriate weight to the medical evidence, including
3 the assessments of the treating and examining medical providers and medical
4 experts, and afforded the subjective claims of symptoms and limitations an
5 appropriate weight when rendering a decision that Plaintiff is not disabled. This
6 Court finds no reversible error and because substantial evidence supports the
7 Commissioner's decision, the Commissioner is GRANTED summary judgment and
8 that Plaintiff's motion for judgment summary judgment is DENIED.

9 **VI. ORDERS**

10 IT IS THEREFORE ORDERED that:

11 Judgment be entered AFFIRMING the Commissioner's decision and
12 DISMISSING this action, and it is further ORDERED that

13 The Clerk of the Court file this Decision and Order and serve copies upon
14 counsel for the parties.

15 DATED this 21th day of November, 2016

16
17 /s/Victor E. Bianchini
18 VICTOR E. BIANCHINI
19 UNITED STATES MAGISTRATE JUDGE
20