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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALICE M. GUNTER,)	No. CV 16-07527-AS
)	
Plaintiff,)	MEMORANDUM OPINION
v.)	
)	
NANCY A. BERRYHILL, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

PROCEEDINGS

On October 7, 2016, Plaintiff Alice M. Gunter ("Plaintiff") filed a Complaint seeking review of the Commissioner's denial of Plaintiff's application for Social Security period of disability, Disability Insurance Benefits and Supplemental Security Income disability benefits. (Docket Entry No. 1). On February 28, 2017,

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 Defendant filed an Answer to the Complaint along with the Certified
2 Administrative Record ("AR"). (Docket Entry Nos. 15-16). The
3 parties have consented to proceed before a United States Magistrate
4 Judge. (Docket Entry Nos. 11, 12). The parties filed a Joint
5 Stipulation ("Joint Stip.") on July 5, 2017, setting forth their
6 respective positions on Plaintiff's claims. (Docket Entry No. 19).

7
8 **SUMMARY OF ADMINISTRATIVE DECISION**
9

10 On October 22, 2012, Plaintiff, formerly employed as a retail
11 sales clerk, security guard, bank teller, assistant manager, and
12 waitress, (AR 61-64, 235), filed an application for Social Security
13 Disability benefits, alleging disability beginning on December 1,
14 2009. (AR 78-79). On January 23, 2015, Administrative Law Judge
15 ("ALJ") Sally Reason held a hearing. (AR 18). However, in order to
16 obtain additional evidence as well as expert witness testimony, the
17 hearing was postponed. (Id.). On May 11, 2015, the ALJ held a re-
18 scheduled hearing, at which she heard testimony from Plaintiff,
19 medical expert ("ME") Dr. Herbert Tanenhaus, and vocational expert
20 ("VE") Gail Maron. (AR 41-76). At the administrative hearing,
21 Plaintiff, through counsel, amended the alleged onset date to
22 January 1, 2012. (AR 58). On May 26, 2015, the ALJ denied
23 Plaintiff's application. (AR 15-36).

24
25 The ALJ applied the five-step process in evaluating Plaintiff's
26 case. At step one, the ALJ found that Plaintiff met the insured
27 status requirements of the Act on December 31, 2014 and had not
28 engaged in substantial gainful activity from the amended onset date

1 of January 1, 2012 through her date last insured of December 31,
2 2014. (AR 20). At step two, the ALJ found that Plaintiff had the
3 following severe impairments: Post Traumatic Stress Disorder
4 (PTSD)²; anxiety; depression; right knee osteoarthritis; and
5 obesity. (AR 21). At step three, the ALJ determined that
6 Plaintiff's impairments did not meet or equal a Listing found in 20
7 C.F.R. Part 404, Subpart P, Appendix 1. (AR 23).

8
9 The ALJ then found that Plaintiff had the residual functional
10 capacity ("RFC") to perform medium work as defined in 20 CFR
11 404.1567(c) except she can sustain posturals frequently (but not
12 constantly); and she can tolerate occasional interaction with the
13 public, co-workers, and supervisors. (AR 25).

14
15 In arriving at her conclusion, the ALJ found that Plaintiff's
16 medically determinable impairments could reasonably be expected to
17 cause the alleged symptoms; however, Plaintiff's statements
18 concerning the intensity, persistence and limiting effects of these
19 symptoms are not entirely credible. (AR 27).

20
21 At step four, the ALJ determined that Plaintiff could not
22 perform any past relevant work. (AR 34). At step five, the ALJ
23 found that through the date last insured, considering Plaintiff's
24 age, education, work experience, and RFC, there were jobs that

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26
27 ² The ALJ noted that Plaintiff's history "was significant for
28 military sexual trauma, of being raped at Navy boot camp in 1998."
(AR 32).

1 existed in significant numbers in the national economy that
2 Plaintiff could perform. (AR 35).

3
4 **STANDARD OF REVIEW**

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6 This court reviews the Administration's decision to determine
7 if it is free of legal error and supported by substantial evidence.
8 See Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1161 (9th
9 Cir. 2012). "Substantial evidence" is more than a mere scintilla,
10 but less than a preponderance. Garrison v. Colvin, 759 F.3d 995,
11 1009 (9th Cir. 2014). To determine whether substantial evidence
12 supports a finding, "a court must consider the record as a whole,
13 weighing both evidence that supports and evidence that detracts from
14 the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d
15 1033, 1035 (9th Cir. 2001). As a result, "[i]f the evidence can
16 reasonably support either affirming or reversing the ALJ's
17 conclusion, [a court] may not substitute [its] judgment for that of
18 the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
19 2006).

20
21 **PLAINTIFF'S CONTENTIONS**

22
23 Plaintiff alleges that the ALJ (1) failed to fully and fairly
24 develop the record; and (2) erred in holding that Plaintiff's
25 limited activities of daily living demonstrate that her symptoms are
26 not severe enough to be considered disabling. (Joint Stip. at 3,
27 12-14).

1 2003); see also Garcia v. Comm'r of Soc. Sec., 768 F3d 925, 931 (9th
2 Cir. 2014) (finding that ALJ's duty to develop the record included
3 ordering a complete set of IQ scores for claimant with intellectual
4 disability); but see McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir.
5 2011) (even if ALJ failed to develop record, claimant must still
6 show prejudice).

7
8 Plaintiff contends that the ALJ "explicitly acknowledged that
9 Plaintiff's VA disability determination - a vital document that
10 would have been accorded 'great weight' [] - was missing from the
11 record at the time of the decision." (Joint Stip. at 5). Despite
12 this, Plaintiff argues, the "ALJ's decision gives no indication that
13 she made any efforts whatsoever to obtain these highly probative
14 records." (Joint Stip. at 5).

15
16 Defendant counters that the ALJ fulfilled her duty to develop
17 the record when she indicated to Plaintiff's counsel that she wanted
18 more information regarding the VA rating decision and then offered
19 Plaintiff's counsel the opportunity to submit such evidence. (Joint
20 Stip. at 8). Defendant points out that "Plaintiff's counsel
21 neglected to timely obtain evidence from the VA, and also neglected
22 to inform the ALJ if they needed more time to pursue this evidence.
23 The ALJ, by contrast, made no error by closing the record." (Id.).
24 Defendant also contends that, considering the record as a whole, the
25 new evidence that Plaintiff ultimately submitted to the Appeals
26 Council (which the ALJ determined was duplicative of material
27 already in the record) does not undermine the substantial evidence
28

1 supporting the ALJ's decision.⁵ (Joint Stip. at 9). The Court
2 agrees.

3
4 The ALJ recognized the need to consider any VA disability
5 rating and did so. While the ALJ must consider the VA's finding and
6 must ordinarily give great weight to the VA's determination of
7 disability, "[t]hat is not to say that the VA rating is conclusive.
8 [The Ninth Circuit has] commented that 'because the VA and SSA
9 criteria for determining disability are not identical,' [] the
10 record may establish adequate reason for giving the VA rating less
11 weight. In some circumstances, the VA may assign a partial rather
12 than a total disability rating to a veteran, [] and a partial
13 disability rating might cut against rather than in favor of an SSA
14 determination that the individual could not perform remunerative
15 work of any kind." McLeod, 640 F.3d at 886. (internal citations
16 omitted). Moreover, the ALJ was unable to consider the VA rating
17 because no information was provided regarding what the rating was
18 based upon. The ALJ stated that the document submitted "does not
19 explain the evidence considered [] in the VA's determination of the
20 claimant's disability award. The undersigned therefore cannot

21
22 ⁵ The ALJ stated that "subsequent to the claimant's May 11,
23 2015 hearing, the claimant was afforded the opportunity to obtain
24 and submit a complete copy of the VA disability determination [].
25 The documents received, however, did not include the requested
26 complete VA determination, only a summary of the findings
27 (essentially duplicative of documentation already in evidence): it
28 indicates the claimant continues to receive an 80% service-connected
disability benefit from the VA, in the amount of \$3,015.22. She
receives a higher monthly amount because she is considered
unemployable. She is considered totally and permanently disabled,
as a result of her service-connected disability." (AR 28).

1 establish whether the same medical and other medical evidence, used
2 by the VA, is in evidence in the current disability determination
3 exhibit file." (AR 28).

4

5 As Defendant correctly points out, the VA's determination of
6 Plaintiff's partial disability was based on records through May
7 2012. (Joint Stip. at 10, AR 617). At the May 11, 2015 hearing,
8 Plaintiff alleged disability beginning on January 1, 2012. (AR 58).
9 In evaluating Plaintiff's claim, however, the ALJ considered
10 significant evidence to which the VA did not have access, including
11 Plaintiff's statements to SSA and her testimony at the hearing in
12 May 2015 (AR 26-27), treatment evidence from 2010 through 2015 (AR
13 21-23), opinions from three different consultative examinations (AR
14 30-33), and the testimony of a medical expert in 2015. (AR 33-34).
15 Since the VA's determination regarding Plaintiff's disability relied
16 on limited evidence -- all dated prior to May 2012 -- the ALJ's
17 decision to give less weight to the VA rating was reasonable, given
18 the substantial evidence in the record that supported the ALJ's
19 decision to deny Plaintiff's application for SSA benefits.
20 Therefore, even if the ALJ kept the record open until this evidence
21 was submitted, it would not have altered her ultimate decision to
22 deny benefits. The ALJ'S error, if any, in closing the record prior
23 to obtaining the VA disability determination was harmless.

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1 **B. The ALJ Properly Evaluated Plaintiff's Activities Of Daily**
2 **Living**

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4 Plaintiff contends that the ALJ erred in holding that her
5 limited activities of daily living demonstrate that her symptoms are
6 not severe enough to be considered disabling. (Joint Stip. at 12-
7 14). Defendant counters that the ALJ properly evaluated Plaintiff's
8 activities of daily living. (Joint Stip. at 14-16). The Court
9 agrees.

10
11 The ALJ found that Plaintiff has mild restrictions in her
12 activities of daily living. (AR 24). In so finding, the ALJ
13 evaluated the entire record and determined that Plaintiff's level of
14 activity was inconsistent with her allegations regarding her
15 functional limitations. (AR 28-29). The ALJ stated:

16
17 [d]espite the [plaintiff's] repeated reports that she does
18 'no' household chores, to the consulting sources, she
19 reported driving by herself to the exams, shopping, running
20 errands, cooking, and doing other daily tasks without
21 assistance. As discussed below, with regard to her
22 credibility, to her providers at the VA, the [plaintiff]
23 has admitted working at the Renaissance Fair, going to
24 Disneyland, and attending cosmetology school. In this
25 domain, she is therefore assessed a mild limitation.

26 (AR 24).

27
28 As the ALJ noted, Plaintiff admitted, in her reports to the
State Agency, that she was able to leave the house by herself, as
well as drive, and socialize with others about every two weeks. (AR

1 28). However, Plaintiff also complained that she needed to be
2 accompanied when she left the house. (Id.). In January 2013,
3 Plaintiff reported that she could not be around people, complained
4 of panic attacks, and spent most of her day at home. (AR 29).
5 However, Plaintiff had reported to her VA provider in March 2012
6 that she would be "working" at the Renaissance Fair throughout May,
7 (id.), and VA records from September 2012 indicate that Plaintiff
8 attended cosmetology classes and had gone to Disneyland the day
9 before her office visit. (Id.). The ALJ also noted that, in April
10 2014, Plaintiff again admitted to working at the Renaissance Fair,
11 (id.), and in October 2014, Plaintiff admitted to going to
12 Disneyland once a week. (Id.).
13

14 The ALJ stated that:

15
16 [w]hile, as a matter of law, it is not necessary for an
17 individual to prove she is 'bedridden' to establish
18 eligibility for benefits, in the present case, the
19 [plaintiff] has repeatedly alleged she has 'no social
20 life,' she cannot be around people, she cannot control her
21 anger, she virtually never leaves her home, and she is
22 isolative and vegetative. In 2014, she alleged her
23 condition worsened significantly - that she only got out of
24 bed to take her daughter to/from school. These allegations
25 are not consistent with her admissions to her treating
26 sources at the VA. To date, there has been an insufficient
27 offer of proof to clarify these inconsistencies; and for
28 these reasons, the [plaintiff] is less than entirely
credible.

(AR 29-30).

1 Plaintiff asserts that the ALJ contravened "established legal
2 precedent by penalizing Plaintiff for her attempts to lead as normal
3 a life as possible in the face of her numerous severe impairments."
4 (Joint Stip. at 13). The Court disagrees. The ALJ appropriately
5 found that Plaintiff's inconsistent accounts undermined her
6 credibility and that the record demonstrated that she was capable of
7 doing more than she alleged. The ALJ properly concluded, based on a
8 thorough review of the entire record, that Plaintiff has only mild
9 restrictions in activities of daily living.

10
11 The Ninth Circuit has made clear that when a plaintiff's
12 reports about her activities of daily living are subject to more
13 than one interpretation, the ALJ's interpretation is entitled to
14 deference as long as it is reasonable. See, e.g., Rollins v.
15 Massinari, 261 F.3d 853, 857 (9th Cir. 2001)("It is true that [the
16 plaintiff's] testimony was somewhat equivocal about how regularly
17 she was able to keep up with all of these activities, and the ALJ's
18 interpretation of her testimony may not be the only reasonable one.
19 But it is still a reasonable interpretation and is supported by
20 substantial evidence; thus, it is not our role to second-guess
21 it.").

22
23 On this record, the Court finds the ALJ's interpretation of
24 Plaintiff's activities of daily living was reasonable and supported
25 by the evidence. Therefore, the Court finds that the ALJ did not
26 improperly evaluate Plaintiff's activities of daily living.

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1 Accordingly, the ALJ's findings are free of legal error and
2 will not be disturbed.

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CONCLUSION

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6 For the foregoing reasons, the decision of the Commissioner is
7 AFFIRMED.

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LET JUDGMENT BE ENTERED ACCORDINGLY.

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11 Dated: August 21, 2017

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_____/s/_____
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

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