

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

REGINA A., ¹	}	Case No. 2:18-cv-04064-JDE
Plaintiff,	}	MEMORANDUM OPINION AND
v.	}	ORDER
NANCY A. BERRYHILL, Acting Commissioner of Social Security,	}	
Defendant.	}	

Plaintiff Regina A. (“Plaintiff”) filed a Complaint on May 15, 2018 seeking review of the Commissioner’s denial of her applications for disability insurance benefits (“DIB”) and supplemental security income (“SSI”). On January 3, 2019, the parties filed a Joint Submission (“Jt. Stip.”) regarding the issues in dispute. The matter now is ready for decision.

¹ Plaintiff’s name has been partially redacted in accordance with Fed. R. Civ. P. 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 I.

2 BACKGROUND

3 Plaintiff filed an application for DIB on January 29, 2014 and an
4 application for SSI on October 21, 2015, both alleging disability commencing
5 on June 30, 2012. Administrative Record (“AR”) 170-71, 172-77. After her
6 applications were denied initially and on reconsideration (AR 92-96, 99-103,
7 121-22), Plaintiff requested an administrative hearing (AR 124-25), which was
8 held on February 22, 2017. AR 31-59. Plaintiff, represented by an attorney,
9 appeared and testified before an Administrative Law Judge (“ALJ”).

10 On March 10, 2017, the ALJ issued a written decision finding Plaintiff
11 was not disabled. AR 12-27. The ALJ found Plaintiff had not engaged in
12 substantial gainful employment since June 30, 2012 and suffered from the
13 severe impairments of carpal tunnel syndrome, asthma, sciatica, obesity,
14 cardiomegaly, leg edema, degenerative disc disease, hypertension, and
15 degenerative joint disease. AR 17. The ALJ found Plaintiff did not have an
16 impairment or combination of impairments that met or medically equaled a
17 listed impairment. AR 19. The ALJ also found Plaintiff had the residual
18 functional capacity (“RFC”) to perform the demands of light work as defined
19 in 20 C.F.R. § 404.1567(b) and 416.967(b) with the following limitations: “no
20 more than occasional postural activities; no more than frequent bilateral
21 handling and fingering; must avoid even moderate exposure to fumes, odors,
22 dusts, gases, poor ventilation, and pulmonary irritants; and must avoid
23 unprotected heights, moving mechanical parts, and other similar workplace
24 hazards.” AR 20.

25 The ALJ determined Plaintiff could perform her past relevant work as a
26 teacher’s aide. AR 22. Accordingly, the ALJ concluded Plaintiff was not under
27 a “disability,” as defined in the Social Security Act, from June 30, 2012
28 through the date of the ALJ’s decision. AR 22.

1 On March 14, 2018, the Appeals Council denied Plaintiff's request for
2 review, making the ALJ's decision the Commissioner's final decision. AR 1-6.

3 II.

4 LEGAL STANDARDS

5 A. Standard of Review

6 Under 42 U.S.C. § 405(g), a district court may review the
7 Commissioner's decision to deny benefits. The ALJ's findings and decision
8 should be upheld if they are free from legal error and supported by substantial
9 evidence based on the record as a whole. Brown-Hunter v. Colvin, 806 F.3d
10 487, 492 (9th Cir. 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th
11 Cir. 2007). Substantial evidence means such relevant evidence as a reasonable
12 person might accept as adequate to support a conclusion. Lingenfelter v.
13 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less
14 than a preponderance. Id. To determine whether substantial evidence supports
15 a finding, the reviewing court "must review the administrative record as a
16 whole, weighing both the evidence that supports and the evidence that detracts
17 from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720
18 (9th Cir. 1998). "If the evidence can reasonably support either affirming or
19 reversing," the reviewing court "may not substitute its judgment" for that of
20 the Commissioner. Id. at 720-21; see also Molina v. Astrue, 674 F.3d 1104,
21 1111 (9th Cir. 2012) ("Even when the evidence is susceptible to more than one
22 rational interpretation, [the court] must uphold the ALJ's findings if they are
23 supported by inferences reasonably drawn from the record.").

24 Lastly, even if an ALJ errs, the decision will be affirmed where such
25 error is harmless (Molina, 674 F.3d at 1115), that is, if it is "inconsequential to
26 the ultimate nondisability determination," or if "the agency's path may
27 reasonably be discerned, even if the agency explains its decision with less than
28 ideal clarity." Brown-Hunter, 806 F.3d at 492 (citation omitted).

1 **B. Standard for Determining Disability Benefits**

2 When the claimant’s case has proceeded to consideration by an ALJ, the
3 ALJ conducts a five-step sequential evaluation to determine at each step if the
4 claimant is or is not disabled. See Molina, 674 F.3d at 1110.

5 First, the ALJ considers whether the claimant currently works at a job
6 that meets the criteria for “substantial gainful activity.” Id. If not, the ALJ
7 proceeds to a second step to determine whether the claimant has a “severe”
8 medically determinable physical or mental impairment or combination of
9 impairments that has lasted for more than twelve months. Id. If so, the ALJ
10 proceeds to a third step to determine whether the claimant’s impairments
11 render the claimant disabled because they “meet or equal” any of the “listed
12 impairments” set forth in the Social Security regulations at 20 C.F.R. Part 404,
13 Subpart P, Appendix 1. See Rounds v. Comm’r Soc. Sec. Admin., 807 F.3d
14 996, 1001 (9th Cir. 2015). If the claimant’s impairments do not meet or equal a
15 “listed impairment,” before proceeding to the fourth step the ALJ assesses the
16 claimant’s RFC, that is, what the claimant can do on a sustained basis despite
17 the limitations from his impairments. See 20 C.F.R. §§ 404.1520(a)(4),
18 416.920(a)(4); Social Security Ruling (“SSR”) 96-8p.

19 After determining the claimant’s RFC, the ALJ proceeds to the fourth
20 step and determines whether the claimant has the RFC to perform his past
21 relevant work, either as he “actually” performed it when he worked in the past,
22 or as that same job is “generally” performed in the national economy. See
23 Stacy v. Colvin, 825 F.3d 563, 569 (9th Cir. 2016).

24 If the claimant cannot perform his past relevant work, the ALJ proceeds
25 to a fifth and final step to determine whether there is any other work, in light of
26 the claimant’s RFC, age, education, and work experience, that the claimant
27 can perform and that exists in “significant numbers” in either the national or
28 regional economies. See Tackett v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir.

1 1999). If the claimant can do other work, he is not disabled; but if the claimant
2 cannot do other work and meets the duration requirement, the claimant is
3 disabled. See Id. at 1099.

4 The claimant generally bears the burden at each of steps one through
5 four to show he is disabled, or he meets the requirements to proceed to the
6 next step; and the claimant bears the ultimate burden to show he is disabled.
7 See, e.g., Molina, 674 F.3d at 1110; Johnson v. Shalala, 60 F.3d 1428, 1432
8 (9th Cir. 1995). However, at Step Five, the ALJ has a “limited” burden of
9 production to identify representative jobs that the claimant can perform and
10 that exist in “significant” numbers in the economy. See Hill v. Astrue, 698
11 F.3d 1153, 1161 (9th Cir. 2012); Tackett, 180 F.3d at 1100.

12 III.

13 DISCUSSION

14 The parties present one disputed issue: Did the ALJ did not properly
15 evaluate Plaintiff’s testimony. Jt. Stip. at 4.

16 A. Applicable Law

17 Where a disability claimant produces objective medical evidence of an
18 underlying impairment that could reasonably be expected to produce the pain
19 or other symptoms alleged, absent evidence of malingering, the ALJ must
20 provide “specific, clear and convincing reasons for rejecting the claimant’s
21 testimony regarding the severity of the claimant’s symptoms.” Treichler v.
22 Comm’r Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (citation
23 omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also 20
24 C.F.R. § 416.929. The ALJ’s findings “must be sufficiently specific to allow a
25 reviewing court to conclude that the [ALJ] rejected [the] claimant’s testimony
26 on permissible grounds and did not arbitrarily discredit the claimant’s
27 testimony.” Moisa, 367 F.3d at 885 (citation omitted). Furthermore, a “lack of
28 medical evidence cannot form the sole basis for discounting pain testimony.”

1 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); see also Rollins v.
2 Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

3 However, if the ALJ's assessment of the claimant's testimony is
4 reasonable and is supported by substantial evidence, it is not the Court's role to
5 "second-guess" it. See Rollins, 261 F.3d at 857. Finally, the ALJ's credibility
6 finding may be upheld even if not all of the ALJ's reasons for rejecting the
7 claimant's testimony are upheld. See Batson v. Comm'r Soc. Sec. Admin, 359
8 F.3d 1190, 1197 (9th Cir. 2004).

9 **B. Analysis**

10 Here, Plaintiff testified she has been unable to work based on her
11 medical impairments such as sleep apnea; sciatic nerve damage; high blood
12 pressure; asthma; diabetes; joint pain in the fingers, legs, and feet; and
13 depression. AR 40-45. In terms of functioning, Plaintiff estimated she could
14 stand about seven to eight minutes. AR 41. She reported difficulty with
15 prolonged sitting and could walk as far as "down the street" or about twenty
16 steps before needing to pause. AR 41, 47. Plaintiff testified her legs swell and
17 must be elevated. AR 53-54. Her doctor advised her to keep her legs elevated
18 above chest level, but she reported difficulty breathing in that position. AR 54.

19 Plaintiff also testified she is sensitive to dust and scents. AR 43. She
20 reported becoming easily fatigued due to poor sleep and she falls asleep during
21 the day when sitting. AR 46. She described pain in her hands and difficulty
22 writing. AR 51. Plaintiff asserted she tries to perform household chores, but "a
23 lot of times," she gets help from others. AR 52. In a function report, Plaintiff
24 also estimated she can only lift two to three pounds. AR 210.

25 The ALJ found Plaintiff's medically determinable impairments could
26 reasonably be expected to cause some of the alleged symptoms, but his
27 statements "concerning the intensity, persistence[,] and limiting effect of these
28 symptoms [were] not entirely consistent with the medical evidence and other

1 evidence.” AR 20. The ALJ stated that the findings of a non-examining
2 physician, Sohail Afra, M.D., “did not support the degree of limitation
3 [Plaintiff] alleges; nor do they suggest the presence of any impairment that is
4 more limiting that is more than found in this decision.” The ALJ reasoned that
5 “also inconsistent with [Plaintiff’s] allegations in this case, and fully consistent
6 with the [RFC] found in this decision is the medical opinion of record. It is
7 emphasized that no treating doctor has indicated [Plaintiff] is disabled or even
8 that she is more limited than found in this decision.” AR 21.

9 Plaintiff contends the ALJ erred in rejecting her testimony by relying
10 solely on lack of support from the objective medical evidence. Jt. Stip. at 7. In
11 opposition, the Commissioner argues the ALJ’s decision did not solely rely on
12 lack of support from the objective medical evidence because the ALJ also
13 considered: (1) Plaintiff’s history of smoking despite her asthma and (2) the
14 report of Kent Jordan, M.D. (“Dr. Jordan”), that Plaintiff embellished or
15 fabricated psychotic symptoms. Jt. Stip. at 11.

16 The Court finds the ALJ erred by using lack of support from the
17 objective medical evidence as the only stated basis to discount Plaintiff’s
18 subjective symptom testimony. See Burch, 400 F.3d at 681; Rollins, 261 F.3d
19 at 857; 20 C.F.R. § 404.1529(c)(2).

20 First, the Commissioner argues the ALJ did not solely rely on the
21 objective medical evidence because the ALJ “considered” Plaintiff’s history of
22 smoking despite her asthma. Jt. Stip. at 11. However, the ALJ did not raise
23 this basis to support the discounting of Plaintiff’s subjective testimony. Instead,
24 the ALJ mentioned Plaintiff’s smoking in the decision once, summarizing,
25 “[Plaintiff] also has a long history of smoking with residual asthma, for which
26 she has an inhaler and a nebulizer at home.” AR 21. The Court cannot
27 consider reasoning for discounting Plaintiff’s subjective symptoms that the
28 ALJ never gave. See Bray v. Comm’r of Soc. Sec., 554 F.3d 1219, 1225 (9th

1 Cir. 2009) (“long-standing principles of administrative law require us to review
2 the ALJ’s decision based on the reasoning and factual findings offered by the
3 ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator
4 may have been thinking”); see also SEC v. Chenery Corp., 332 U.S. 194, 196
5 (1947). Moreover, even if the ALJ had discounted Plaintiff’s testimony based
6 on continued smoking, “it is unclear whether a failure to stop smoking can
7 ever form the basis for an adverse credibility finding.” Steiger v. Colvin, 2013
8 WL 1010453, at *3 (C.D. Cal. Mar. 13, 2013) (citing Bray, 554 F.3d at 1227).

9 Second, the Commissioner argues the ALJ also “considered” Dr.
10 Jordan’s report that Plaintiff embellished or fabricated psychotic symptoms. Jt.
11 Stip. at 11. However, the ALJ did not raise the fabrication issue to discount
12 Plaintiff’s subjective testimony; rather, the ALJ considered Dr. Jordan’s report
13 in determining whether Plaintiff had a severe mental impairment at Step Two.
14 AR 18. Further, nothing in the record suggests Plaintiff embellished any
15 physical symptoms. As set forth above, the Court cannot consider reasoning
16 for discounting Plaintiff’s subjective symptoms that the ALJ never gave. See
17 Bray, 554 F.3d at 1225.

18 In sum, as inconsistency with the objective medical evidence cannot be
19 the only basis to discount Plaintiff’s subjective symptom testimony, the ALJ
20 erred. See Burch, 400 F.3d at 681; Rollins, 261 F.3d at 857; 20 C.F.R. §
21 404.1529(c)(2).

22 **C. Remand is appropriate.**

23 The decision whether to remand for further proceedings is within this
24 Court’s discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000)
25 (as amended). Where no useful purpose would be served by further
26 administrative proceedings, or where the record has been fully developed, it is
27 appropriate to exercise this discretion to direct an immediate award of benefits.
28 See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman, 211 F.3d

1 at 1179 (noting that “the decision of whether to remand for further proceedings
2 turns upon the likely utility of such proceedings”).

3 Here, remand is required because the ALJ failed to properly consider
4 Plaintiff’s subjective symptom testimony. On remand, the ALJ shall reconsider
5 Plaintiff’s subjective complaints and either credit her testimony or provide
6 sufficient, clear and convincing reasons supported by substantial evidence for
7 rejecting it, and thereafter conduct such further proceedings as is warranted by
8 such reconsideration.

9 **IV.**

10 **ORDER**

11 IT THEREFORE IS ORDERED that Judgment be entered reversing the
12 decision of the Commissioner of Social Security and remanding this matter for
13 further administrative proceedings consistent with this Order.

14
15 Dated: February 21, 2019

16
17 
18 JOHN D. EARLY
19 United States Magistrate Judge
20
21
22
23
24
25
26
27
28