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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 ROSA CARDENAS SALVAS,

12 Plaintiff,

13 v.

14 ANDREW M. SAUL,
15 Commissioner of Social Security,

16 Defendant.
17

) Case No. CV 20-05217-JEM

) MEMORANDUM OPINION AND ORDER
) REVERSING DECISION OF THE
) COMMISSIONER OF SOCIAL SECURITY

18 **PROCEEDINGS**

19 On June 11, 2020, Rosa Cardenas Salvas (“Plaintiff” or “Claimant”) filed a complaint
20 seeking review of the decision by the Commissioner of Social Security (“Commissioner”)
21 denying Plaintiff’s applications for Social Security Disability Insurance benefits and
22 Supplemental Security Income benefits. (Dkt. 1.) The Commissioner filed an Answer on
23 October 9, 2020. (Dkt. 15.) On December 18, 2020, the parties filed a Joint Stipulation (“JS”).
24 (Dkt. 18.) The matter is now ready for decision.

25 Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this
26 Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”),
27 the Court concludes that the Commissioner’s decision must be reversed and this action
28 remanded for further proceedings in accordance with this Memorandum Opinion and Order.

BACKGROUND

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2 Plaintiff is a 57 year-old female who applied for Social Security Disability Insurance
3 benefits and Supplemental Security Income benefits on October 24, 2016, alleging disability
4 beginning February 26, 2015. (AR 21.) The ALJ determined that Plaintiff has not engaged in
5 substantial gainful activity since February 26, 2015, the amended alleged onset date.¹ (AR 24.)

6 Plaintiff's claims were denied initially on February 9, 2017, and on reconsideration on
7 May 18, 2017. (AR 21.) Plaintiff filed a timely request for hearing on June 21, 2017. (AR 21.)
8 On May 20, 2019, Administrative Law Judge ("ALJ") Barry Robinson held a video hearing from
9 Dallas, Texas. (AR 21.) Plaintiff appeared and testified via telephone in Los Angeles with the
10 assistance of a Spanish interpreter and was represented by counsel. (AR 21.) Vocational
11 expert ("VE") Stephanie Malone also appeared at the hearing via telephone. (AR 21.)

12 The ALJ issued an unfavorable decision on July 9, 2019. (AR 21-29.) The Appeals
13 Council denied review on May 1, 2020. (AR 1-8.)

DISPUTED ISSUES

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15 As reflected in the Joint Stipulation, Plaintiff only raises the following disputed issue as
16 ground for reversal and remand:

- 17 1. Whether the ALJ properly considered Plaintiff's subjective symptom testimony.

STANDARD OF REVIEW

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19 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
20 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
21 Chater, 80 F.3d 1273 , 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
22 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
23 based on the proper legal standards).

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26 ¹ At the hearing on May 20, 2019, the Claimant amended her alleged onset date to February
27 26, 2015, due to the decision of an Administrative Law Judge in a previous claim, which
28 adjudicated the period ending February 25, 2015. (AR 22.) The ALJ references the presumption
of continuing nondisability (AR 22), but neither the Commissioner nor the Plaintiff addresses or
discusses the issue in the Joint Statement. The Court, therefore, will not address it either.

1 Substantial evidence means “more than a mere scintilla,’ but less than a
2 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.
3 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at
5 401 (internal quotation marks and citation omitted).

6 This Court must review the record as a whole and consider adverse as well as
7 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where
8 evidence is susceptible to more than one rational interpretation, the ALJ’s decision must be
9 upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
10 “However, a reviewing court must consider the entire record as a whole and may not affirm
11 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882
12 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495
13 F.3d 625, 630 (9th Cir. 2007).

14 THE SEQUENTIAL EVALUATION

15 The Social Security Act defines disability as the “inability to engage in any substantial
16 gainful activity by reason of any medically determinable physical or mental impairment which
17 can be expected to result in death or . . . can be expected to last for a continuous period of not
18 less than 12 months.” 42 U.S.C. § 423(d)(1)(A). The Commissioner has established a five-
19 step sequential process to determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520,
20 416.920.

21 The first step is to determine whether the claimant is presently engaging in substantial
22 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
23 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,
24 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or
25 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not
26 significantly limit the claimant’s ability to work. Smolen, 80 F.3d at 1290. Third, the ALJ must
27 determine whether the impairment is listed, or equivalent to an impairment listed, in 20 C.F.R.
28 Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d at 746. If the impairment

1 meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen,
2 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the
3 claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir.
4 2001). Before making the step four determination, the ALJ first must determine the claimant's
5 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most [one] can
6 still do despite [his or her] limitations" and represents an assessment "based on all the relevant
7 evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the
8 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
9 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

10 If the claimant cannot perform his or her past relevant work or has no past relevant work,
11 the ALJ proceeds to the fifth step and must determine whether the impairment prevents the
12 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864,
13 869 (9th Cir. 2000). The claimant bears the burden of proving steps one through four,
14 consistent with the general rule that at all times the burden is on the claimant to establish his or
15 her entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established
16 by the claimant, the burden shifts to the Commissioner to show that the claimant may perform
17 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support
18 a finding that a claimant is not disabled at step five, the Commissioner must provide evidence
19 demonstrating that other work exists in significant numbers in the national economy that the
20 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
21 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
22 entitled to benefits. Id.

23 THE ALJ DECISION

24 In this case, the ALJ determined at step one of the sequential process that Plaintiff has
25 not engaged in substantial gainful activity since February 26, 2015, the amended alleged onset
26 date. (AR 24.)

27 At step two, the ALJ determined that Plaintiff has the following medically determinable
28 severe impairment: degenerative disc disease of the spine with arthritis. (AR 25.)

1 At step three, the ALJ determined that Plaintiff does not have an impairment or
2 combination of impairments that meets or medically equals the severity of one of the listed
3 impairments. (AR 25.)

4 The ALJ then found that Plaintiff had the RFC to perform medium work as defined in 20
5 CFR §§ 404.1567(c) and 416.967(c) with the following limitations:

6 Claimant can frequently climb ladders but never climb ropes or scaffolds. She
7 can frequently stoop, kneel, and crawl; and occasionally balance.

8 (AR 25-28.) In determining the above RFC, the ALJ made a determination that Plaintiff's
9 subjective symptom allegations were "not entirely consistent" with the medical evidence and
10 other evidence of record. (AR 26.)

11 At step four, the ALJ found that Plaintiff is able to perform past relevant work as a
12 cleaner, housekeeping, and hotel clerk. (AR 28.)

13 Consequently, the ALJ found that Claimant is not disabled within the meaning of the
14 Social Security Act. (AR 28-29.)

15 DISCUSSION

16 The ALJ decision must be reversed. The ALJ's rejection of Plaintiff's subjective
17 symptom allegations is not supported by substantial evidence. The ALJ's RFC is not supported
18 by substantial evidence.

19 A. Relevant Federal Law

20 The ALJ's RFC is not a medical determination but an administrative finding or legal
21 decision reserved to the Commissioner based on consideration of all the relevant evidence,
22 including medical evidence, lay witnesses, and subjective symptoms. See SSR 96-5p; 20
23 C.F.R. § 1527(e). In determining a claimant's RFC, an ALJ must consider all relevant evidence
24 in the record, including medical records, lay evidence, and the effects of symptoms, including
25 pain reasonably attributable to the medical condition. Robbins, 466 F.3d at 883.

26 The test for deciding whether to accept a claimant's subjective symptom testimony turns
27 on whether the claimant produces medical evidence of an impairment that reasonably could be
28 expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341,

1 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Smolen, 80
2 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant’s testimony on the
3 severity of symptoms merely because they are unsupported by objective medical evidence.
4 Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant’s pain
5 testimony not credible, the ALJ “must specifically make findings which support this conclusion.”
6 Bunnell, 947 F.2d at 345. The ALJ must set forth “findings sufficiently specific to permit the
7 court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” Thomas v.
8 Barnhart, 278 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261 F.3d 853, 857
9 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of malingering, the ALJ
10 can reject the claimant’s testimony about the severity of a claimant’s symptoms only by offering
11 “specific, clear and convincing reasons for doing so.” Smolen, 80 F.3d at 1283-84; see also
12 Reddick, 157 F.3d at 722. The ALJ must identify what testimony is not credible and what
13 evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

14 **B. Analysis**

15 Plaintiff Rosa Cardenas Salvias testified that she has back pain which radiates to her
16 right and left legs as well as her left arm and shoulder. (AR 26.) She also claimed she has
17 difficulty bending, carrying and lifting due to her back pain. (AR 26.) The ALJ did find that
18 Plaintiff has the medically determinable severe impairments of degenerative disc disease of the
19 spine with arthritis. (AR 25.) Notwithstanding these impairments, the ALJ assessed Plaintiff
20 with a reduced range medium work RFC. (AR 25-26.) The ALJ determined Plaintiff could
21 perform her past relevant work as a cleaner, housekeeping and hotel clerk. (AR 28.)
22 Consequently, the ALJ concluded that Plaintiff was not disabled from the alleged onset date of
23 February 26, 2015 through the date of the ALJ decision on July 9, 2019. (AR 28-29.)

24 In determining Plaintiff’s RFC, the ALJ concluded that Plaintiff’s medically determinable
25 impairments reasonably could be expected to cause the alleged symptoms. (AR 26.) The ALJ,
26 however, also found that Plaintiff’s statements regarding the intensity, persistence, and limiting
27 effects of these symptoms are “not entirely consistent” with the medical evidence and other
28 evidence of record. (AR 26.) Because the ALJ did not make any finding of malingering, he

1 was required to provide clear and convincing reasons supported by substantial evidence for
2 discounting Plaintiff's subjective symptom allegations. Smolen, 80 F.3d at 1283-84;
3 Tommasetti v. Astrue, 533 F.3d 1035, 1039-40 (9th Cir. 2008). The ALJ failed to do so.

4 First, the ALJ found that Plaintiff's subjective allegations were inconsistent with the
5 objective medical evidence. (AR 26-28.) An ALJ is permitted to consider whether there is a
6 lack of medical evidence to corroborate a claimant's alleged symptoms so long as it is not the
7 only reason for discounting a claimant's credibility. Burch v. Barnhart, 400 F.3d 676, 680-81
8 (9th Cir. 2005) Plaintiff's lumbar spine had reduced range of motion and tenderness to
9 palpation on exam. (AR 26, 27.) She had limited right hip flexion due to lumbar spine pain,
10 and had a positive straight leg test. (AR 26.) Her other exams, however, showed she had
11 normal sensation, 5/5 motor strength, and normal reflexes. (AR 26, 27.) She consistently had
12 a normal gait without the use of an assistive device. (AR 27.) Medical imaging showed Plaintiff
13 had mild disc desiccation. (AR 27.) On some physical examinations, she had full range of
14 motion with no tenderness, spasm, or pain. (AR 27.) On examination she was able to squat,
15 toe walk, and heel walk. (AR 27.) The examiner further noted that Plaintiff had full strength
16 and full range of motion in her bilateral and lower extremities. (AR 27.) Two State agency
17 medical consultants assessed Plaintiff with medium work RFCs. (AR 27.) The ALJ found
18 these assessments consistent with the diagnostic testing showing only mild degenerative
19 changes. (AR 27.) A consulting orthopedist, Dr. Richard Pollis, opined that Plaintiff could
20 perform light work. (AR 27.) The ALJ found this opinion consistent with the evidence of record
21 showing grossly normal musculoskeletal exam findings. (AR 27.) The RFC difference is
22 immaterial because the ALJ found Plaintiff's past relevant work was light. (AR 28.) Plaintiff
23 does not contest the ALJ's summary of the medical evidence.²

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26 ² Also in the medical evidence of record is the opinion of Dr. Rebecca Berlin that Plaintiff could
27 perform only sedentary work with additional exertional, postural, and absenteeism limitations.(AR
28 28.) The ALJ gave little weight to this opinion because it was inconsistent with the medical
evidence of record and too reliant on Plaintiff's subjective report of symptoms. Plaintiff does not
challenge the ALJ's rejection of Dr. Berlin's opinion.

1 Second, the ALJ noted that, despite alleging an inability to work beginning February
2 2015, Plaintiff worked in 2016. (AR 24, 263.) The work did not rise to disqualifying work at
3 step one but nonetheless showed that Plaintiff was capable of more work activity than she
4 alleged for that time period. See Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1227
5 (9th Cir. 2009) (claimant testimony discounted because worked as a caregiver and sought out
6 other employment). Plaintiff attempts to dismiss this evidence because the discussion
7 occurred with respect to the step 2 finding and not in the context of an evaluation of Plaintiff’s
8 testimony. (JS 16.) The Ninth Circuit, however, does not require that evidence be discussed in
9 any particular section of the ALJ decision. Lewis v. Apfel, 236 F.3d 503, 513 (9th Cir. 2001);
10 see also Kruchek v. Barnhart, 125 F. App’x 825, 827 (9th Cir. 2005) (adequately analyzed
11 evidence elsewhere in decision); Harris v. Astrue, 2009 WL 801347, at *7 (N.D. Cal. Mar. 25,
12 2009) (discussion and evaluation of evidence at step four supported ALJ’s step three
13 conclusion; “Lewis does not require that support for the ALJ’s conclusions be placed in a
14 specific section of the report”). Nonetheless, the work occurred only in 2016 and it did not rise
15 to substantial gainful activity. (AR 24.) This factor has no applicability to the remainder of the
16 period in issue (2017-2019) and cannot constitute a clear and convincing reason for rejecting
17 Plaintiff’s subjective symptoms for that latter period.

18 Third, the ALJ found that Plaintiff’s activities of daily living were inconsistent with her
19 subjective symptom allegations (AR 26, 27, 28), which is a legitimate consideration in
20 evaluating those allegations. Bunnell, 947 F.2d at 345-46. Here, Plaintiff testified that she can
21 sit for six hours in an eight hour workday and can stand and walk for about 15 minutes at a
22 time. (AR 27.) Although Plaintiff reported difficulties with walking, bending, standing, and stair
23 climbing, the ALJ found she could perform some cooking and cleaning despite her pain and
24 could carry small objects within her home. (AR 27, 26.) These minimal activities, however, are
25 not sufficient to constitute substantial evidence to support the ALJ’s rejection of Plaintiff’s
26 subjective symptom pain testimony. Indeed, every claimant would be found to have engaged
27 in daily activities inconsistent with disability if evidence this weak were all that was required.
28 The Court recognizes that it is the ALJ’s responsibility to resolve conflicts in the evidence and

1 ambiguities in the record. Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the
2 ALJ's interpretation of the record is reasonable, it should not be second-guessed. Rollins v.
3 Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Here, however, the ALJ's assessment of the
4 record is not reasonable. The ALJ's third reason for discounting Plaintiff's subjective symptom
5 allegations does not constitute a clear and convincing reason for doing so.

6 Consequently, the ALJ failed to present clear and convincing reasons supported by
7 substantial evidence for rejecting Plaintiff's subjective symptoms. The Commissioner only has
8 inconsistency with the medical evidence as a valid, clear, and convincing reason for
9 discounting Plaintiff's subjective symptom allegations. That is not sufficient. Burch, 400 F.3d
10 at 680-81.

11 * * *

12 The ALJ's RFC is not supported by substantial evidence.

13 * * *

14 The ALJ's nondisability determination is not supported by substantial evidence or free of
15 legal error.

16 **ORDER**

17 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the
18 Commissioner of Social Security and remanding this case for further proceedings in
19 accordance with this Memorandum Opinion and Order and with law.

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21 DATED: February 10, 2021

22 /s/ John E. McDermott
23 JOHN E. MCDERMOTT
24 UNITED STATES MAGISTRATE JUDGE
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