UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRINA PENA, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	Case No. EDCV 09-772 JC MEMORANDUM OPINION

I. SUMMARY

On April 27, 2009, plaintiff Alejandrina Pena ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; May 1, 2009 Case Management Order ¶ 5.

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Based on the record as a whole and the applicable law, the decision of the Commissioner is AFFIRMED. The findings of the Administrative Law Judge ("ALJ") are supported by substantial evidence and are free from material error.[1]

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On December 8, 2005, and February 1, 2006, plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income benefits. (Administrative Record ("AR") 12, 94-104). Plaintiff asserted that she became disabled on July 1, 2005, due to inflamed spinal disks. (AR 129). The ALJ examined the medical record and heard testimony from plaintiff, who was represented by counsel, on January 23, 2008. (AR 19-36).

On May 27, 2008, the ALJ determined that plaintiff was not disabled through the date of the decision. (AR 12-18). Specifically, the ALJ found that the objective medical evidence failed to establish the existence of a medically determinable impairment that could reasonably be expected to produce the claimant's symptoms. (AR 14).

The Appeals Council denied plaintiff's application for review. (AR 1-3).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that she is unable to engage in any substantial gainful activity by reason of a 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 at least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.

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[1]The harmless error rule applies to the review of administrative decisions regarding disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of application of harmless error standard in social security cases).

§ 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work she previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

(2) Is the claimant's alleged impairment sufficiently severe to limit her ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform her past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow her to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal

error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ's conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

IV. DISCUSSION

A. Step Two Determination

Plaintiff argues that the ALJ committed reversible error in finding that plaintiff does not have a severe impairment. (Plaintiff's Motion at 7-9). The Court disagrees.

1. Pertinent Law

At step two of the sequential evaluation process, an impairment or a combination of impairments may be found not medically severe only if evidence clearly establishes slight abnormality that has no more than a minimal effect on an individual's ability to work. Webb v. Barnhart, 433 F. 3d 683, 687 (9th Cir. 2005). To determine whether or not an impairment is severe, the ALJ must determine whether a claimant's impairment or combination of impairments significantly limits her physical or mental ability to do "basic work activities." See id.; see also 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work activities are

the "abilities and aptitudes necessary to do most jobs," such as (1) physical functions like walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, and handling; (2) the capacity for seeing, hearing, speaking, understanding, carrying out, and remembering simple instructions; (3) the use of judgment; and (4) the ability to respond appropriately to supervision, co-workers, and usual work situations. 20 C.F.R. §§ 404.1521(b), 416.921(b).

The ALJ must properly evaluate the medical evidence in making a step two determination. See Social Security Ruling ("SSR") 85-28[2] (ALJ's finding that a claimant lacks a severe impairment must be "clearly established by medical evidence"). In Social Security cases, courts employ a hierarchy of deference to medical opinions depending on the nature of the services provided. Courts distinguish among the opinions of three types of physicians: those who treat the claimant ("treating physicians") and two categories of "nontreating physicians," namely those who examine but do not treat the claimant ("examining physicians") and those who neither examine nor treat the claimant ("nonexamining physicians"). Lester v. Chater, 81 F.3d 821, 830 (9th Cir.), as amended (1996) (footnote reference omitted). A treating physician's opinion is entitled to more weight than an examining physician's opinion, and an examining physician's opinion is entitled to more weight than a nonexamining physician's opinion. See id. In general, the opinion of a treating physician is entitled to greater weight than that of a non-treating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." Morgan v. Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir. 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

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[2]Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social Security Administration and are entitled to some deference as long as they are consistent with the Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir. 2007) (citing SSR 00-4p).

A treating physician's opinion is not, however, necessarily conclusive as to either a physical condition or the ultimate issue of disability. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal quotations omitted). An ALJ can reject the opinion of a treating physician in favor of a conflicting opinion of another examining physician if the ALJ makes findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. Id. (citation and internal quotations omitted). "The ALJ must do more than offer his conclusions." Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). "He must set forth his own interpretations and explain why they, rather than the [physician's], are correct." Id.; see Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out detailed and thorough summary of facts and conflicting clinical evidence, stating his interpretation thereof, and making findings) (citations and quotations omitted). "Broad and vague" reasons for rejecting a treating physician's opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir.1989).

When they are properly supported, the opinions of physicians other than treating physicians, such as examining physicians and nonexamining medical experts, may constitute substantial evidence upon which an ALJ may rely. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative examiner's opinion on its own constituted substantial evidence, because it rested on independent examination of claimant); Morgan, 169 F.3d at 600 (testifying medical expert opinions may serve as substantial evidence when "they are supported by other evidence in the record and are consistent with it").

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2. Analysis

In this case, the ALJ rejected the opinion of plaintiff's treating physician, Dr. Khalid Ahmed. (AR 16-17). Dr. Ahmed began treating plaintiff in October 2004 for an injury sustained at work in March 2004. (AR 209-17). He initially diagnosed plaintiff with "lumbar strain disk lesion lumbar spine with radiculitis" and "possible bilateral spondylolysis at L5-S1 with possible 0 to 1 degree spondylolisthesis." (AR 216). Electrodiagnostic testing in October 2004 was normal. (AR 188-91). An MRI in December 2004 showed a 1-2 mm posterior disk protrusion with disk dessication at the L1-L2 disk level, a 2 mm posterior disk protrusion with disk dessication and moderate hypertrophic facet changes at the L3-L4 disk level, a 2 to 3 mm posterior disk protrusion with disk dessication and moderate hypertrophic facet changes at the L4-L5 disk level, and a 2 to 3 mm central disk protrusion with disk dessication at the L5-S1 disk level. (AR 200-02). Results of a CT scan were similar. (See AR 197-99). Dr. Ahmed continued to see plaintiff, and on June 24, 2005, he opined that she had reached permanent and stationary status. (AR 161-70). He described plaintiff's condition as follows:

> Lumbar spine, the discomfort is best described as constant, slight, intermittent, moderate to severe level with 30 minutes to 35 minutes of standing, 30 minutes to 35 minutes of walking, 30 minutes [to] 35 minutes of sitting, and any attempted bending, stooping, and lifting. Objectively restricted the lumbar mobility by 30% with tenderness, tightness, spasms, with a positive straight leg raising on the left with MRI evidence [of] disk herniation at the L5-S1 and disk protrusion at the L4-L5 and L3-L4.

(AR 168). On February 21, 2006, Dr. Ahmed examined plaintiff and reported multiple findings, including a restricted range of spinal motion and positive straight leg raising tests. (AR 203-06).

Dr. Thomas Dorsey, an orthopedist, performed a consultative examination of plaintiff three days after Dr. Ahmed's February 2006 examination. (AR 222-25). Dr. Dorsey reported generally normal findings, including negative straight leg raising tests. (AR 223-25). In contrast to Dr. Ahmed, Dr. Dorsey opined that plaintiff "has no impairment-related physical limitations," and wrote under "Diagnosis" that plaintiff had "[m]ultiple somatic complaints, without evidence of significant orthopaedic pathology."[3] (AR 225).

At the hearing, non-examining medical expert Dr. William Debolt generally concurred with Dr. Dorsey's findings. Dr. Debolt testified that the MRI results "do[] not support Dr. Ahmed," and, in light of the normal electrodiagnostic testing, concluded that "the consultative examiner and the other doctor are more correct in their findings than Dr. Ahmed." (AR 29-30).

Because Dr. Ahmed's opinion was contradicted by other physicians, to reject it the ALJ was required to provide specific, legitimate reasons supported by substantial evidence. The ALJ did so. He noted "the inconsistency of Dr. Ahmed's February 2006 abnormal findings and conclusions with the essentially normal February 2006 orthopedic findings of Dr. Dorsey," and, relying on Dr. Debolt's testimony and Dr. Dorsey's report, concluded that "Dr. Ahmed's assessments lack any objective medical basis." (AR 16-17). Although the ALJ may have overstated the case in opining that "Dr. Ahmed's assessments lack any objective medical basis," "[t]he contrary opinions of [the examining and nonexamining physicians] serve as . . . specific and legitimate reasons for rejecting the opinion[ ] of [plaintiff's treating physician]." See Tonapetyan, 242 F.3d at 1149.

Thus, substantial evidence supports the ALJ's finding that plaintiff does not have a severe impairment. A remand or reversal is not warranted on this basis.

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[3]Dr. Dorsey reviewed plaintiff's MRI report. (AR 222).

B. Side Effects of Medication

The Court rejects plaintiff's contention that the ALJ erred by failing to consider the side effects of plaintiff's medication. (Plaintiff's Motion at 3-4). A claimant bears the burden of demonstrating that her use of medications caused a disabling impairment. See Miller v. Heckler, 770 F.2d 845, 849 (9th Cir. 1985) (claimant failed to meet burden of proving medication impaired his ability to work because he produced no clinical evidence). The only evidence plaintiff points to in support of her contention are cursory references in a disability report form that she experiences nausea from two of her medications, and a physician's recommendation that she continue taking her prescription medications. (Plaintiff's Motion at 3-4 (citing AR 157, 204)). Plaintiff offers no objective evidence that her medications affected her in the way she claims, let alone that they interfered with her ability to work. See Osenbrock v. Apfel, 240 F.3d 1157, 1164 (9th Cir. 2001) ("There were passing mentions of the side effects of [plaintiff's] medication in some of the medical records, but there was no evidence of side effects severe enough to interfere with [his] ability to work."). The ALJ did not err.[4]

C. Duty to Develop the Record

Plaintiff asserts that the ALJ erred by failing to develop the record concerning plaintiff's alleged depression. (Plaintiff's Motion at 4-6). The Court disagrees.

1. Pertinent Law

Although plaintiff bears the burden of proving disability, the ALJ has an affirmative duty to assist the claimant in developing the record "when there is ambiguous evidence or when the record is inadequate to allow for proper

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[4]Plaintiff appears to suggest that the ALJ erred by failing to consider all possible side effects related to plaintiff's medication. (Plaintiff's Motion at 3-4). Plaintiff's argument has no merit. The ALJ was not required to address undocumented medication side effects. See Miller, 770 F.2d at 849 (ALJ properly rejected allegations of impairment from medication side effects where plaintiff produced no clinical evidence that narcotics use impaired his ability to work); Osenbrock, 240 F.3d at 1164.

evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted); Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001); see also Webb, 433 F.3d at 687 (ALJ has special duty fully and fairly to develop record and to assure that claimant's interests are considered). Where it is necessary to enable the ALJ to resolve an issue of disability, the duty to develop the record may require consulting a medical expert or ordering a consultative examination. See 20 C.F.R. §§ 404.1519a, 416.919a; see, e.g., Armstrong v. Commissioner of Social Security Administration, 160 F.3d 587, 590 (9th Cir. 1998) (where there were diagnoses of mental disorders prior to the date of disability found by the ALJ, and evidence of those disorders even prior to the diagnoses, the ALJ was required to call a medical expert to assist in determining when the plaintiff's impairments became disabling).

The ALJ is not obliged to undertake the independent exploration of every conceivable condition or impairment a claimant might assert. Therefore, an ALJ does not fail in his duty to develop the record by not seeking evidence or ordering further examination or consultation regarding a physical or mental impairment if no medical evidence indicates that such an impairment exists. See Breen v. Callahan, 1998 WL 272998, at *3 (N.D. Cal. May 22, 1998) (noting that, in the Ninth Circuit, the ALJ's obligation to develop the record is triggered by "the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision") (citing Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Wainwright v. Secretary of Health and Human Services, 939 F.2d 680, 682 (9th Cir. 1991)).

2. Analysis

Here, the record lacks objective evidence of a mental impairment sufficient to trigger the ALJ's duty to inquire further. Although plaintiff once wrote that she "get[s] depressed" (AR 158) and there is evidence that she has been prescribed Xanax (AR 204), the record contains no objective assessment of plaintiff's mental

health, much less any diagnosis of a mental impairment. Plaintiff carries the initial burden of proving disability. Burch, 400 F.3d at 679. Under these circumstances, the ALJ had no duty to develop the record by diagnosing plaintiff's alleged mental impairment. See Mayes, 276 F.3d at 459-60 (ALJ "had no duty to develop the record by diagnosing [claimant's] herniated discs" where claimant "did not provide the ALJ with any medical evidence indicating that she had herniated discs until after the ALJ hearing"); Thornton v. Astrue, 2010 WL 1904661, at *6 (E.D. Wash. May 12, 2010) (plaintiff's "unsupported testimony" insufficient to trigger ALJ's duty to develop record regarding alleged mental impairment where "acceptable medical sources made no mental health diagnoses" and medical record did not reveal "depression symptoms or complaints"). The ALJ did not err.

D. Consideration of Mental Impairment

The Court rejects plaintiff's argument that the ALJ erred by failing to evaluate the functional limitations stemming from plaintiff's alleged mental impairment. (Plaintiff's Motion at 6-7). Plaintiff is correct that, for a claimant with a mental impairment, an ALJ must follow a "special technique" and rate and document the claimant's degree of limitation in four functional areas. See 20 C.F.R. §§ 404.1520a, 416.920a. But this procedure is only required for claimants with "a medically determinable mental impairment." Id. §§ 404.1520a(b), 416.920a(b). In this case, the ALJ properly found that plaintiff did not have a mental impairment, as discussed above. The ALJ therefore did not err by failing to follow the "special technique" for assessing mental impairments.

E. Lack of Vocational Expert Testimony

Finally, the Court rejects plaintiff's contention that the ALJ erred by failing to obtain vocational expert testimony at step five. (Plaintiff's Motion at 10). As discussed above, the ALJ properly concluded his analysis at step two by determining that plaintiff does not have a severe impairment. The ALJ therefore was not required to conduct a step five inquiry.

V. CONCLUSION

For the foregoing reasons, the decision of the Commissioner of Social Security is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 2, 2010

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE