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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELENA LOPEZ,)	Case No. EDCV 11-1001 JC
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

I. SUMMARY

On July 7, 2011, plaintiff Elena Lopez (“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; July 12, 2011 Case Management Order ¶ 5.

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

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On June 24, 2008, plaintiff filed applications for Supplemental Security
7 Income and Disability Insurance Benefits. (Administrative Record (“AR”) 20).
8 Plaintiff asserted that she became disabled on July 1, 2007, due to diabetes, high
9 cholesterol, and leg pain due to diabetic neuropathy. (AR 115). The ALJ
10 examined the medical record and heard testimony from plaintiff (who was
11 represented by counsel) and a vocational expert on April 9, 2010. (AR 30-54).

12 On May 13, 2010, the ALJ determined that plaintiff was not disabled
13 through the date of the decision. (AR 20). Specifically, the ALJ found:
14 (1) plaintiff suffered from the following severe impairments: insulin dependent
15 diabetes mellitus with peripheral neuropathy, and degenerative disc disease of the
16 low back (AR 22); (2) plaintiff’s impairments, considered singly or in
17 combination, did not meet or medically equal a listed impairment (AR 23);
18 (3) plaintiff retained the residual functional capacity to perform light work (20
19 C.F.R. §§ 404.1567(b), 416.967(b)) with certain additional limitations² (AR 23);
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22 ¹The harmless error rule applies to the review of administrative decisions regarding
23 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
24 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
25 Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
26 application of harmless error standard in social security cases).

27 ²The ALJ determined that plaintiff: (i) could lift or carry 20 pounds occasionally and 10
28 pounds frequently; (ii) could sit without restrictions but with appropriate breaks, such as every
two hours; (iii) could stand and/or walk for up to six hours in an eight-hour workday with
appropriate breaks, such as every two hours; (iv) was limited to occasional postural activities;
and (v) could not work at unprotected heights, do work that requires balancing, or work with
dangerous or fast moving machinery. (AR 23).

1 (4) plaintiff could perform her past relevant work as a collections clerk (AR 25);
2 and (5) plaintiff's allegations regarding her limitations were not credible to the
3 extent they were inconsistent with the ALJ's residual functional capacity
4 assessment (AR 24).

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

6 **III. APPLICABLE LEGAL STANDARDS**

7 **A. Sequential Evaluation Process**

8 To qualify for disability benefits, a claimant must show that the claimant is
9 unable to engage in any substantial gainful activity by reason of a medically
10 determinable physical or mental impairment which can be expected to result in
11 death or which has lasted or can be expected to last for a continuous period of at
12 least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing
13 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of
14 performing the work claimant previously performed and incapable of performing
15 any other substantial gainful employment that exists in the national economy.
16 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.
17 § 423(d)(2)(A)).

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

- 20 (1) Is the claimant presently engaged in substantial gainful activity? If
21 so, the claimant is not disabled. If not, proceed to step two.
- 22 (2) Is the claimant's alleged impairment sufficiently severe to limit
23 the claimant's ability to work? If not, the claimant is not
24 disabled. If so, proceed to step three.
- 25 (3) Does the claimant's impairment, or combination of
26 impairments, meet or equal an impairment listed in 20 C.F.R.
27 Part 404, Subpart P, Appendix 1? If so, the claimant is
28 disabled. If not, proceed to step four.

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

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

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

11 The claimant has the burden of proof at steps one through four, and the
12 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
13 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also
14 Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

15 **B. Standard of Review**

16 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
17 benefits only if it is not supported by substantial evidence or if it is based on legal
18 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
19 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
20 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
21 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
22 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
23 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
24 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

25 To determine whether substantial evidence supports a finding, a court must
26 “consider the record as a whole, weighing both evidence that supports and
27 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
28 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d

1 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
2 or reversing the ALJ's conclusion, a court may not substitute its judgment for that
3 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

4 **IV. DISCUSSION**

5 Plaintiff contends that the ALJ inadequately evaluated the credibility of her
6 subjective complaints. (Plaintiff's Motion at 3-14). The Court disagrees.

7 **1. Pertinent Law**

8 Questions of credibility and resolutions of conflicts in the testimony are
9 functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th
10 Cir. 2006). If the ALJ's interpretation of the claimant's testimony is reasonable
11 and is supported by substantial evidence, it is not the court's role to "second-
12 guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

13 An ALJ is not required to believe every allegation of disabling pain or other
14 non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007)
15 (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes
16 the existence of a medically determinable impairment that could reasonably give
17 rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as
18 to the credibility of the claimant's statements about the symptoms and their
19 functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the
20 record includes objective medical evidence that the claimant suffers from an
21 impairment that could reasonably produce the symptoms of which the claimant
22 complains, an adverse credibility finding must be based on clear and convincing
23 reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d
24 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does
25 not apply is when there is affirmative evidence of malingering. Id. The ALJ's
26 credibility findings "must be sufficiently specific to allow a reviewing court to
27 conclude the ALJ rejected the claimant's testimony on permissible grounds and

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1 did not arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367
2 F.3d 882, 885 (9th Cir. 2004).

3 To find the claimant not credible, an ALJ must rely either on reasons
4 unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal
5 contradictions in the testimony, or conflicts between the claimant’s testimony and
6 the claimant’s conduct (*e.g.*, daily activities, work record, unexplained or
7 inadequately explained failure to seek treatment or to follow prescribed course of
8 treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at
9 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant’s
10 testimony solely because it is not substantiated affirmatively by objective medical
11 evidence, the lack of medical evidence is a factor that the ALJ can consider in his
12 credibility assessment. Burch, 400 F.3d at 681.

13 2. Analysis

14 First, the ALJ properly discredited plaintiff’s subjective complaints of pain
15 due to internal conflicts within plaintiff’s own statements and testimony. See
16 Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir.), as amended
17 (1997) (in weighing plaintiff’s credibility, ALJ may consider “inconsistencies
18 either in [plaintiff’s] testimony or between his testimony and his conduct”); see
19 also Fair, 885 F.2d at 604 n.5 (9th Cir.1989) (ALJ can reject pain testimony based
20 on contradictions in plaintiff’s testimony). For example, at the hearing plaintiff
21 testified that she (1) was in constant, sometimes severe pain (AR 35, 40); (2) had
22 “a lot of trouble driving,” and usually would have her adult children drive her
23 places or run errands for her (AR 37, 44-45); (3) could not sit for more than 30
24 minutes or stand for more than an hour at a time (AR 37, 47-48); (4) could lift no
25 more than six pounds (AR 42); (5) could grocery shop with assistance for brief
26 periods, but would usually have one of her daughters do grocery shopping for her
27 (AR 45); (6) could cook (AR 45); and (7) could not work at a job that would
28 require sitting for six hours each day, or even a job that involved only light lifting

1 and allowed her the option to sit/stand at will (AR 40, 48). In contrast, the report
2 of a December 20, 2009 Internal Medicine Consultation reflects that plaintiff told
3 Dr. Jagvinder Singh, a consultative examining physician, that “[s]he has no
4 problems with dressing, grooming and bathing herself . . . [and that] [s]he is able
5 to drive, do grocery shopping, cooking, dishes, laundry and take short walks.”
6 (AR 366). In addition, at the hearing plaintiff testified that even though she was
7 prescribed Vicodin to be taken “three times a day as needed,” and she sometimes
8 took it up to “six times a day for the pain,” the medication still did not alleviate her
9 pain (“it doesn’t help me and it doesn’t do nothing for me no more”; “[the pain
10 pills] don’t really do nothing to me no more”) (AR 36, 38). At other points during
11 the hearing, however, plaintiff indicated that her medication had actually helped.
12 For example, plaintiff testified: “if I take a pain pill and I lay down for a little
13 while, then I could get up and I go okay for a little while . . . [a]nd then when the
14 pain starts coming back again, then I have to take more pain pills” (AR 38), and
15 “[the Vicodin] takes away my pain, but I don’t feel like, you know, like some
16 people who take pills and they feel [better] . . . but it doesn’t do that no more to
17 me” (AR 39), and “some days . . . I have to take a pill to even get out of the bed in
18 the morning.” (AR 48).

19 The ALJ properly concluded that the foregoing inconsistencies in plaintiff’s
20 statements and testimony diminished the credibility of plaintiff’s subjective
21 complaints of disabling pain. See Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th
22 Cir. 2001) (“In assessing the claimant’s credibility, the ALJ may use ‘ordinary
23 techniques of credibility evaluation,’ such as considering the claimant’s reputation
24 for truthfulness and any inconsistent statements in her testimony.”). While
25 plaintiff argues that the foregoing evidence does not reflect internal conflicts
26 within plaintiff’s own statements and testimony, this Court will not second-guess

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1 the ALJ’s reasonable interpretation that it does, even if such evidence could give
2 rise to inferences more favorable to plaintiff.³

3 Second, an ALJ may properly consider a plaintiff’s failure to “seek
4 treatment or to follow a prescribed course of treatment” in assessing her
5 credibility. See Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996). Here, as
6 the ALJ noted, treatment records reflect that plaintiff had been non-compliant with
7 recommended treatment. (AR 24) (citing Exhibit 1F at 12 [AR 173]).

8 While an ALJ may not reject symptom testimony where a claimant provides
9 “evidence of a good reason for [the alleged non-compliance],” Smolen, 80 F.3d at
10 1284 (citations omitted), plaintiff has not presented such a sufficient reason.

11 Finally, the ALJ properly discredited plaintiff’s subjective symptom
12 testimony due, in part, to the absence of supporting objective medical evidence.
13 Burch, 400 F.3d at 681; Rollins, 261 F.3d at 857 (“While subjective pain
14 testimony cannot be rejected on the sole ground that it is not fully corroborated by
15 objective medical evidence, the medical evidence is still a relevant factor in
16 determining the severity of the claimant’s pain and its disabling effects.”) (citing
17 20 C.F.R. § 404.1529(c)(2)). For example, as the ALJ noted, Dr. Singh observed
18 that plaintiff (1) “[had] no problems walking from the waiting room to the
19 examination room or in getting on and off the examination table”; (2) had only
20 “slight difficulty in taking off her shoes and putting them back on”; (3) “[sat]

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22 ³Plaintiff argues that the ALJ erred because he “[failed to] provide any analysis in the
23 decision, as she [sic] must, as to how [plaintiff’s] meager activities relate to the ability to perform
24 gainful work activity over a 40 hour, five day work week.” (Plaintiff’s Motion at 11). Plaintiff’s
25 argument is premised on an incorrect reading of the ALJ’s decision, and thus lacks merit. As
26 plaintiff correctly notes, her ability to carry out certain minimal activities of daily living would
27 not “detract from her credibility as to her overall disability” unless the record showed that such
28 activities “consume[d] a substantial part of [plaintiff’s] day.” Vertigan v. Halter, 260 F.3d 1044,
1050 (9th Cir. 2001) (citing Fair, 885 F.2d at 603). Here, however, the ALJ did not base his
credibility determination on plaintiff’s ability to engage in certain daily activities, but instead
discredited plaintiff because, as discussed above, her testimony and statements about such
activities contained several significant inconsistencies. (AR 24).

1 comfortably during the examination”; and (4) had a gait that was “within normal
2 limits.” (AR 367). The ALJ also noted, and plaintiff does not dispute, that the
3 record contains “[n]o treating source [that] delineates any functional limitations.”
4 (AR 25). Therefore, it was reasonable for the ALJ to conclude that the objective
5 medical evidence “do[es] not support the level of limitations alleged by
6 [plaintiff].” (AR 25).

7 Accordingly, a remand or reversal on this basis is not warranted.

8 **V. CONCLUSION**

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

11 LET JUDGMENT BE ENTERED ACCORDINGLY.

12 DATED: March 26, 2012

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/s/

14 Honorable Jacqueline Chooljian
15 UNITED STATES MAGISTRATE JUDGE
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