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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EILEEN M. MORENO,)	Case No. EDCV 12-0747 RNB
Plaintiff,)	
vs.)	ORDER AFFIRMING DECISION OF
)	COMMISSIONER
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security, ¹)	
Defendant.)	

The Court now rules as follows with respect to the two disputed issues listed in the Joint Stipulation.²

¹ The Acting Commissioner is hereby substituted as the defendant pursuant to Fed. R. Civ. P. 25(d). No further action is needed to continue this case by reason of the last sentence of 42 U.S.C. § 405(g).

² As the Court advised the parties in its Case Management Order, the decision in this case is being made on the basis of the pleadings, the administrative record ("AR"), and the Joint Stipulation ("Jt Stip") filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

1 **A. Reversal is not warranted based on the ALJ's alleged failure to make a**
2 **proper adverse credibility determination (Disputed Issue No 2).**

3 Disputed Issue No. 2 is directed to the ALJ's adverse credibility determination.
4 (See Jt Stip at 15-19.)

5 An ALJ's assessment of pain severity and claimant credibility is entitled to
6 "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.
7 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the "Cotton test," where the
8 claimant has produced objective medical evidence of an impairment which could
9 reasonably be expected to produce some degree of pain and/or other symptoms, and
10 the record is devoid of any affirmative evidence of malingering, the ALJ may reject
11 the claimant's testimony regarding the severity of the claimant's pain and/or other
12 symptoms only if the ALJ makes specific findings stating clear and convincing
13 reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see
14 also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12
15 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991)
16 (en banc).

17 Here, plaintiff testified that she was unable to work because of pain in her legs
18 and arms, lack of energy, difficulty with focusing, and an inability to stand or sit for
19 a long period of time. (See AR 64.) The ALJ determined that although plaintiff's
20 medically determinable impairments could reasonably be expected to cause the
21 alleged symptoms, plaintiff's symptoms concerning the intensity, persistence, and
22 limiting effects of these symptoms were not credible to the extent they were
23 inconsistent with the ALJ's assessment of plaintiff's residual functional capacity
24 ("RFC"). (See AR 46.)

25 In support of this adverse credibility determination, the ALJ proffered multiple
26 reasons. For example, the ALJ noted that no objective medical findings supported
27 the degree of limitation alleged and cited several inconsistencies between plaintiff's
28 subjective symptom testimony and the objective medical findings. (See AR 46-49.)

1 Specifically, the ALJ noted that although plaintiff had tested positive for hepatitis C
2 in May 2008, she had done well on treatment, and the virus had cleared by May 2009.
3 (See AR 46-47; see also AR 348, 605-06.) The ALJ also noted that during a
4 rheumatological evaluation in March 2008, the treating physician found no evidence
5 of inflammatory arthritis or inflammatory myelopathy but simply assessed generalized
6 pain of unclear etiology. (See AR 47; see also AR 500-01.) The ALJ also noted that
7 during an examination in May 2008, the treating physician concluded that plaintiff's
8 pain was not characteristic of any neurologic disease, but that the examination was
9 difficult due to inconsistencies and giveaway weakness. (See AR 47; see also AR
10 485.) The ALJ also noted that x-rays of plaintiff's lumbar spine, sacrum, and coccyx
11 revealed no abnormalities. (See AR 48; see also AR 654, 747.) The ALJ also noted
12 that during a consultative examination in June 2009, plaintiff complained of back
13 pain and joint pain, but the examining physician's clinical findings were "normal" or
14 "negative." (See AR 48; see also AR 575-77.) The ALJ also noted that plaintiff
15 reported a history of fibromyalgia, but two physicians found no discrete tender points
16 during separate examinations, and the medical expert saw no clinical evidence to
17 support a diagnosis of fibromyalgia. (See AR 48; see also AR 76, 500, 576-77.) The
18 ALJ also noted that during a psychiatric evaluation in May 2009, the examining
19 psychiatrist (1) diagnosed a depressive disorder, not otherwise specified, with mild
20 to moderate stressors, and (2) assigned a Global Assessment of Functioning ("GAF")
21 score of 70, which indicated that plaintiff had only mild symptoms and was generally
22 functioning "pretty well."³ (See AR 48-49; see also AR 570.) Relatedly, the ALJ
23 noted that plaintiff's daily activities, which were severely restricted, appeared to have
24 been self limited and not commensurate with functional limitations imposed by her

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26 ³ A GAF score of 61-70 indicates "some mild symptoms . . . but generally
27 functioning pretty well." See American Psychiatric Association, Diagnostic and
28 Statistical Manual of Mental Disorders, 32 (4th ed.).

1 medically determinable impairments. (See AR 49.) The Court finds that this
2 constituted a clear and convincing reason for not crediting plaintiff's subjective
3 symptom testimony. See Chaudhry v. Astrue, 688 F.3d 661, 672 (9th Cir. 2012) (ALJ
4 may properly rely on lack of objective support for complaints of depression); Morgan
5 v. Commissioner of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may
6 properly consider conflict between claimant's testimony of subjective complaints and
7 objective medical evidence in the record); Tidwell v. Apfel, 161 F.3d 599, 602 (9th
8 Cir. 1998) (ALJ may properly rely on weak objective support for the claimant's
9 subjective complaints); Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (ALJ may
10 properly rely on lack of objective evidence to support claimant's subjective
11 complaints); Nyman, 779 F.2d at 531 (noting that "a claimant's self-serving
12 statements may be disregarded to the extent they are unsupported by objective
13 findings").

14 The ALJ also noted that, although plaintiff testified that she was unable to
15 obtain mental health treatment because of insurance problems, there was evidence
16 that she had not been compliant with her treating psychiatrist's recommendation that
17 she attend group therapy. (See AR 49; see also AR 345, 484.) The Court finds that
18 this constituted a clear and convincing reason for not crediting plaintiff's subjective
19 symptom testimony. See Bunnell, 947 F.2d at 346 (ALJ may properly rely on
20 plaintiff's unexplained or inadequately explained failure to seek treatment or follow
21 prescribed course of treatment); Fair v. Bowen, 885 F.2d 597, 603-04 (9th Cir. 1989)
22 (same); see also Molina v. Astrue, 674 F.3d 1104, 1114 (9th Cir. 2012) (ALJ may
23 properly rely on claimant's failure to pursue mental health treatment where resistance
24 was attributable not to a mental impairment, but to claimant's own personal
25 preference).

26 The ALJ also noted that plaintiff's medical treatment had been conservative in
27 nature and not commensurate with the degree of limitation alleged, and that the
28 medical records had not reflected debilitating side effects from medical treatment that

1 lasted or were expected to last 12 continuous months. (See AR 49.) The Court finds
2 that this constituted a clear and convincing reason for not crediting plaintiff's
3 subjective symptom testimony. See Parra v. Astrue, 481 F.3d 742, 751 (9th Cir.
4 2007) (evidence of conservative treatment is sufficient to discount a claimant's
5 testimony regarding severity of an impairment); Johnson v. Shalala, 60 F.3d 1428,
6 1434 (9th Cir. 1995) (ALJ may properly rely on the fact that only conservative
7 treatment had been prescribed); Orteza, 50 F.3d at 750 (ALJ may properly rely on
8 lack of side effects from prescribed medications).

9 The ALJ also noted that plaintiff had made inconsistent statements regarding
10 why she left her last job: although plaintiff testified that she stopped working due to
11 pain, she reported to one of her doctors that she had experienced an altercation at
12 work, after which she stopped working, and that she had a pending sexual harassment
13 lawsuit against another employee. (See AR 49; see also AR 63, 483.) The Court
14 finds that this constituted a clear and convincing reason for not crediting plaintiff's
15 subjective symptom testimony. See Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th
16 Cir. 2001) (ALJ properly discredited claimant's testimony because of her inconsistent
17 statements); Smolen, 80 F.3d at 1283-84 (ALJ may consider claimant's inconsistent
18 statements in evaluating credibility).

19 The Court therefore finds and concludes that reversal is not warranted based
20 on the ALJ's alleged failure to make a proper adverse credibility determination.

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22 **B. Reversal is not warranted based on the ALJ's consideration of the medical**
23 **evidence in determining plaintiff's residual functional capacity (Disputed**
24 **Issue No 1).**

25 Disputed Issue No. 1 is directed to the ALJ's determination that plaintiff had
26 an RFC for light work, based on the opinions of Dr. Nafsoosi, Dr. To, and Dr. Han.
27 (See Jt Stip at 5-9.) Specifically, plaintiff contends that the ALJ's reliance on these
28 opinions was improper because (1) Dr. Nafsoosi, the medical expert, had allowed his

1 board certification in internal medicine to expire in 2007, but the ALJ represented
2 that it was current; (2) Dr. To, the examining physician, had no opportunity to review
3 plaintiff's medical records as part of the examination and rendered an opinion that
4 was inconsistent with the records; and (3) Dr. Han, the state agency physician,
5 rendered an opinion that relied on the defective opinion of Dr. To. (See id.)

6 The Court disagrees. First, with respect to Dr. Nafsoosi, there was no evidence
7 that his expired board certification played a significant role in the ALJ's evaluation
8 of the medical evidence. Although a physician's board certification or specialization
9 may be a basis to accord additional weight to that physician's opinion, see 20 C.F.R.
10 §§ 404.1527(c)(5), 416.927(c)(5), it did not appear that the ALJ accorded any
11 deference to Dr. Nafsoosi's opinion on that basis. Specifically, the ALJ made only a
12 passing reference to Dr. Nafsoosi's board certification status (see AR 43) and did not
13 cite Dr. Nafsoosi's credentials as a basis for evaluating his opinion or the medical
14 evidence on the whole. Instead, the ALJ exhaustively detailed Dr. Nafsoosi's
15 testimony (see AR 43) and explained that Dr. Nafsoosi's opinion was being accorded
16 considerable weight for the independent reason that it was "well supported by the
17 objective medical evidence of record" (see AR 49). Accordingly, since there was no
18 evidence that the ALJ accorded any undue weight to his mistaken belief about Dr.
19 Nafsoosi's board certification status, the Court finds that the error was harmless. See
20 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006)
21 (ALJ's error is harmless when it is "inconsequential to the ultimate nondisability
22 determination").⁴

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24 ⁴ The Court notes that another court in this district has reached a different
25 conclusion on this issue. In Bogosian v. Astrue, 2012 WL 1956861, at *2-*3 (C.D.
26 Cal. May 31, 2012), the court found that Dr. Nafsoosi's "sin of omission" about his
27 lapsed board certification was a basis for reversal after agreeing with the claimant that
28 it was "an important factor in the weight given to Dr. Nafsoosi's opinion." Here, the
reasoning of Bogosian does not apply because the ALJ's mistaken belief about Dr.

1 Second, with respect to Dr. To, the Court rejects plaintiff's contention that the
2 ALJ was not entitled to accord considerable weight to his opinion because Dr. To did
3 not have an opportunity to review plaintiff's medical records during the consultative
4 examination. Although the Commissioner generally should provide examining
5 physicians the necessary background information about a claimant's condition, see
6 20 C.F.R. §§ 404.1517, 416.917, the Court finds that reversal is not warranted on that
7 basis in light of the circumstances here. Dr. To conducted a thorough examination
8 resulting in independent clinical findings and reached an opinion about plaintiff's
9 functional limitations that was generally consistent with plaintiff's medical record.
10 Dr. To's opinion also was consistent with that of a state agency physician, who did
11 have an opportunity to review the entire record. See, e.g., Debbs v. Astrue, 2012 WL
12 5544077, at *7 (E.D. Cal. Nov. 14, 2012) (examining physician's lack of opportunity
13 to review claimant's record was not basis for reversal where his opinion was
14 supported by a thorough examination resulting in independent clinical findings and
15 was generally consistent with other evidence and opinions in the record); Pearson v.
16 Astrue, 2010 WL 3036005, at *3 (E.D. Cal. Aug. 2, 2010) (failure to provide
17 pertinent objective evidence to examining physician was not reversible error where
18 another reviewing physician who did have access to the evidence came to the same
19 conclusion as the examining physician). Moreover, to the extent that plaintiff
20 contends that Dr. To's opinion was inconsistent with the medical record (see It Stip
21 at 9), the Court notes that plaintiff purports to support her contention with portions
22 of the medical record that only documented her subjective symptom complaints,
23 which the ALJ properly rejected.

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27 Nafosi's board certification status was not an important factor in the weight given
28 to his opinion; rather, the ALJ accorded considerable weight to Dr. Nafosi's opinion
because it was well supported by the objective medical evidence of record.

1 Third, with respect to Dr. Han, the Court rejects plaintiff's contention that Dr.
2 Han's opinion could not constitute substantial evidence because it was based on Dr.
3 To's opinion. (See Jt Stip at 15.) Rather, the Court finds that Dr. Han's opinion
4 constituted substantial evidence because it was consistent with other evidence in the
5 medical record, which was not limited to the opinion of Dr. To. See Thomas v.
6 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) ("The opinions of non-treating or
7 non-examining physicians may also serve as substantial evidence when the opinions
8 are consistent with independent clinical findings or other evidence in the record.").

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10 IT THEREFORE IS ORDERED that Judgment be entered affirming the
11 decision of the Commissioner and dismissing this action with prejudice.

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13 DATED: April 16, 2013



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15 ROBERT N. BLOCK
16 UNITED STATES MAGISTRATE JUDGE
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