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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|-----------------------------------|---|---------------------------|
| TRACY LYNNE LAMBERT, |) | No. EDCV 14-2631 FFM |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION |
| v. |) | |
| |) | |
| CAROLYN W. COLVIN, |) | |
| Acting Commissioner of the Social |) | |
| Security Administration, |) | |
| |) | |
| Defendant. |) | |

I. INTRODUCTION

Plaintiff Tracy Lynne Lambert (“Plaintiff”) brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration denying her applications for Disability Insurance Benefits and Supplement Security Income. Pursuant to 28 U.S.C. § 636(c), the parties consented to the jurisdiction of the undersigned United States Magistrate Judge. (Dkt. Nos. 11, 13). Pursuant to the January 7, 2015, Case Management Order, (Dkt. No. 8), on October 13, 2015, the parties filed a Joint Stipulation (“Joint Stip.”) detailing each party’s arguments and authorities, (Dkt. No. 19). The Court has reviewed the Joint Stipulation and the administrative

1 record (“A.R.”), filed by defendant on August 10, 2015, (Dkt. No. 17). For the reasons
2 stated below, the decision of the Commissioner is affirmed.

3 4 **II. PRIOR PROCEEDINGS**

5
6 On November 8, 2011, Plaintiff applied for Disability Insurance Benefits and
7 Supplemental Security Income based on alleged physical and mental impairments and
8 asserting disability since August 20, 2011. (A.R. 166–190). Plaintiff alleged the
9 following disabling impairments: para-aortic lymphadenopathy, sigmoid colon
10 thickening, hiatal hernia, migraine headaches, asthma, burning sensation in left foot.
11 (A.R. 185). The Administrative Law Judge (“ALJ”), James P. Nguyen, examined the
12 records and heard testimony from Plaintiff and a vocational expert (“VE”), on March 7,
13 2013. (A.R. at 34–57).

14 At the hearing, Plaintiff testified that the primary reason she cannot work is her
15 “intestinal disease.” (A.R. 41). According to Plaintiff, she suffers from ulcerative
16 colitis which causes diarrhea and forces her to use the bathroom every ten minutes,
17 daily. (Id.) Plaintiff claimed that such episodes last for around two months at a time
18 during the summer. (A.R. 44). Plaintiff further alleged that, during the winter, the
19 symptoms occur about once a month and are less severe, (A.R. 42), though she also later
20 alleged that the episodes last anywhere from one week to two months, (A.R. 43).
21 Plaintiff averred that she has suffered from ulcerative colitis since August 20, 2011.
22 (A.R. 41). Plaintiff’s admitted daily activities include walking the dogs, doing her
23 dishes, cleaning, and using the computer. (A.R. 47). Additionally, Plaintiff alleged that
24 she suffers from migraines lasting several days which she treats with over-the-counter
25 Excedrin. (A.R. 44–45). Finally, Plaintiff testified that a 2007 injury to her left foot
26 continues to cause pain. (A.R. 46–47)

27 The ALJ asked the VE, David Rinehart, what work Plaintiff could perform if she
28 were limited to: light work; occasional climbing ramps and stairs; never climbing

1 ladders, ropes, and scaffolds; occasional balancing, stooping, kneeling, crouching, and
2 crawling; occasional use of the left lower extremity for pushing and pulling in the
3 operation of foot controls; and avoiding work around heavy machinery, heights, uneven
4 terrain, and concentrated exposure to extreme cold, fumes, odors, dust, gases, and poor
5 ventilation. (A.R. 54). Based on this hypothetical, the VE testified that Plaintiff would
6 be able to work as a retail salesperson, garment sorter, or an office helper. (A.R. 55).
7 The VE further testified that no work would be available to Plaintiff if she required
8 “unscheduled bathroom breaks of varying duration and frequency during an eight-hour
9 day.” (Id.)

10 On May 3, 2013, the ALJ denied Plaintiff benefits in a written decision. (A.R. 17–
11 28). The ALJ determined that Plaintiff suffered from numerous severe impairments,
12 including ulcerative colitis, Crohn’s disease, migraine headaches, and asthma. However,
13 the ALJ found that none of Plaintiff’s impairments met or equaled a listing found in 20
14 C.F.R. § 404, subpt. P, app. 1. (A.R. 23–24). The ALJ further found that Plaintiff
15 possessed the residual functional capacity (“RFC”) to:

16
17 perform light work . . . [with] occasional climbing of stairs or ramps,
18 balancing, stooping, kneeling, crouching, and crawling . . . occasional
19 pushing, pulling, and operation of foot controls with the left leg . . .
20 precluded from climbing ladders, ropes, and scaffolds . . . avoid
21 concentration exposure to extreme cold, fumes, odors, dust, gases, and poor
22 ventilation . . . avoid working around heavy machinery, unprotected heights,
23 and uneven terrain . . . can communicate over the telephone only
24 occasionally . . . can only work in an environment with a moderate noise
25 level.

26 (A.R. 24). In making this finding, the ALJ determined that Plaintiff’s statements
27 regarding the intensity, persistence, and limiting effects of her impairments were not
28 fully credible. (A.R. 24–26). Moreover, the ALJ rejected the findings of Plaintiff’s
treating physician, Dr. Febbis Balinos, who opined that Plaintiff could perform neither
part-time nor full-time work. (A.R. 23).

On October 8 and November 26, 2014, the Appeals Council denied review of the

1 ALJ's decision. (A.R. 1–7). Plaintiff initiated the instant proceedings on December 29,
2 2014. (Dkt. No. 1).

3 4 **III. STANDARD OF REVIEW**

5
6 Under 42 U.S.C. § 405(g), this court reviews the Administration's decisions to
7 determine if: (1) the Administration's findings are supported by substantial evidence; and
8 (2) the Administration used proper legal standards. *Smolen v. Chater*, 80 F.3d 1273,
9 1279 (9th Cir. 1996) (citations omitted). "Substantial evidence is more than a scintilla,
10 but less than a preponderance." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998)
11 (citation omitted). To determine whether substantial evidence supports a finding, "a
12 court must consider the record as a whole, weighing both evidence that supports and
13 evidence that detracts from the [Commissioner's] conclusion." *Auckland v. Massanari*,
14 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation marks omitted).

15 If the evidence can reasonably support either affirming or reversing the ALJ's
16 conclusion, the Court may not substitute its judgment for that of the ALJ. *Robbins v. Soc.*
17 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citing *Flatten v. Sec'y of Health &*
18 *Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). However, even if substantial
19 evidence exists in the record to support the Commissioner's decision, the decision must
20 be reversed if the proper legal standard was not applied. *Howard ex rel. Wolff v.*
21 *Barnhart*, 341 F.3d 1006, 1014–15 (9th Cir. 2003); see also *Smolen*, 80 F.3d at 1279.

22 23 **IV. PLAINTIFF'S CONTENTIONS**

24
25 Plaintiff raises the following issues:

- 26
27 1. Whether the ALJ's RFC determination is supported by substantial evidence;
28 and

1 2. The ALJ’s Rejection

2 In his written decision, the ALJ rejected Dr. Balinos’ opinion that claimant cannot
3 perform any part-time or full time work. (A.R. 23). The ALJ based this rejection on his
4 findings that the opinion came in the form of a “brief, single page report that does not
5 include any treatment records or any significant discussion of clinical findings.” (Id.)
6 The ALJ further noted that the letter was “not supported by the few treatment records
7 from Dr. Balinos that are included in the record.” (Id.) Lastly, the ALJ found that Dr.
8 Balinos’ opinion was “unsupported by the weight of the medical evidence.” (Id.)

9 3. Analysis

10 Ordinarily, a treating physician’s opinion is entitled to great weight. *Lester v.*
11 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995); see also 20 C.F.R. § 404.1527. “However, the
12 opinion of the treating physician is not necessarily conclusive as to either the physical
13 condition or the ultimate issue of disability.” *Morgan v. Comm’r of Soc. Sec. Admin.*,
14 169 F.3d 595, 600 (9th Cir. 1999) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
15 Cir. 1989)). An ALJ may reject the contradicted opinion of a treating physician by
16 “providing ‘specific and legitimate reasons’ supported by substantial evidence in the
17 record for doing so.” *Lester*, 81 F.3d at 830 (quoting *Murray v. Heckler*, 722 F.2d 499,
18 502 (9th Cir. 1983)).

19 Here, the opinion of Dr. Balinos was contradicted by the opinions of Drs. Eriks,
20 Saeid, and Han, none of whom opined that Plaintiff was unable to perform any work.
21 (A.R. 396, 274, 398–402). Accordingly the ALJ was required to provide “specific and
22 legitimate reasons, supported by substantial evidence in the record,” to justify his
23 rejection of Dr. Balinos’ opinion. *Lester*, 81 F.3d at 830 (internal quotation marks
24 omitted).

25 i. Brief, Conclusory, and Unsupported by Clinical Findings

26 An ALJ may reject a treating physician’s opinion that is “conclusory and brief and
27 unsupported by clinical findings.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
28 2001) (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). Here, the ALJ

1 accurately described Dr. Balinos’ opinion as a “brief, single page report.” (A.R. 23,
2 509). Moreover, aside from noting various diagnoses, Dr. Balinos’ report did not point
3 to any objective medical evidence supporting the conclusion that Plaintiff’s symptoms
4 are so severe as to preclude all work activities. Indeed, much of Dr. Balinos’ opinion,
5 including the frequency of Plaintiff’s bathroom usage and the effect it has on her
6 concentration, appear to be the reported by Plaintiff, rather than medically determined.
7 As a result, the ALJ permissibly rejected Dr. Balinos’ report because the record supports
8 the ALJ’s finding that Dr. Balinos’ “brief, single page report . . . [did] not include any
9 treatment records or any significant discussion of clinical findings.” (A.R. 23).

10 Plaintiff presents two arguments, both unpersuasive, urging the Court to find that
11 the ALJ impermissibly failed to inquire of Dr. Balinos about her conclusions. First,
12 Plaintiff asserts that “if the ALJ had any concerns regarding this [report] or the
13 limitations expressed, the ALJ should have recontacted Dr. Balinos for clarification.”
14 (Joint Stip. 7). However, ALJs are only required to conduct their own inquiries when
15 the record contains “[a]mbiguous evidence, or . . . is inadequate to allow for proper
16 evaluation of the evidence.” *Tonapetyan*, 242 F.3d at 1150. Dr. Balinos’ report was not
17 ambiguous – it unequivocally stated her opinion that Plaintiff was unable to perform any
18 work. (A.R. 509). The report was simply inconsistent with Dr. Balinos’ own treatment
19 records. (Compare A.R. 509 with A.R. 501–02). Nor does it appear that the record was
20 “inadequate to allow for proper evaluation” of Dr. Balinos’ report. The ALJ ostensibly
21 obtained and reviewed all of Dr. Balinos’ treatment records. Accordingly, the ALJ had
22 no duty to further develop the record beyond what was before him. See *McLeod v.*
23 *Astrue*, 640 F.3d 881, 884–85 (9th Cir. 2010) (finding no duty to conduct further inquiry
24 where the ALJ rejected the opinions of treating physicians after reviewing “substantially
25 all of their medical records throughout the time they treated [claimant]”); cf. *Roe v.*
26 *Comm’r of Soc. Sec. Admin.*, 559 F. App’x 651, 652 (9th Cir. 2015) (finding that the
27 proper course for the ALJ was to hold the record open until treating physician had
28 opined on claimant’s ability to work).

1 Second, Plaintiff argues that the ALJ was not permitted to find Dr. Balinos' report
2 too brief or unsupported by evidence because he "got what he asked for," because he
3 requested a "summary" from Plaintiff's treating physicians. (Joint Stip. 18). This
4 argument fails because it was, in fact, Plaintiff who contacted Dr. Balinos to retrieve the
5 letter. (A.R. 46). The ALJ explicitly left the record open so that Plaintiff could file
6 "anything else" she wished to submit. (A.R. 55). As a result, Plaintiff and her attorney
7 had every opportunity to shape their request to Dr. Balinos and to ask for any
8 supplemental information they wished the ALJ to consider. Plaintiff's subsequent
9 failure to ask Dr. Balinos to reconcile her opinion with her prior treatment notes or to
10 include clinical findings with her summary cannot be construed as a fault of the ALJ.

11 ii. Inconsistent *with Dr. Balinos' Treatment Records*

12 "A conflict between treatment notes and a treating provider's opinions may
13 constitute an adequate reason to discredit the opinions of a treating physician or another
14 treating provider." See *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (citation
15 omitted). Here, as the ALJ pointed out, Dr. Balinos' limited treatment records state that
16 Plaintiff was "doing well on current treatment." (A.R. 502). Additionally, Dr. Balinos
17 described Plaintiff's symptoms as "mild" and "intermittent." (Id.) These findings are
18 inconsistent with the March 21, 2013, letter in which Dr. Balinos describes Plaintiff's
19 "constant need for frequent bathroom access." (A.R. 509). Moreover, Dr. Balinos'
20 letter stated that Plaintiff suffers from bloody stools. (Id.) This is directly contradicted
21 by her treatment reports, in which she notes that Plaintiff denied bloody stools. (A.R.
22 502). Accordingly, the inconsistencies between Dr. Balinos' treatment records and
23 March 21 report were a permissible basis, supported by the record, for the ALJ to reject
24 her opinion. See *Molina v. Astrue*, 674 F.3d 1104, 1111–12 (9th Cir. 2012) (affirming
25 rejection of treating physician's opinion that claimant could not work where the treating
26 physician's treatment notes describes claimant's anxiety attacks only as "intermittent").

27 iii. Unsupported by the Weight of the Medical Evidence

28 ALJs may reject the opinions of treating physicians that are "inconsistent with the

1 medical records.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); accord
2 *De La Rosa v. Astrue*, 231 F. App’x 582, 583 (9th Cir. 2007) (citing *Thomas v.*
3 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002); *Magallanes v. Bowen*, 881 F.2d 747, 751
4 (9th Cir. 1989)). Ordinarily, the ALJ must specifically state which evidence he relied on
5 to support a determination that the opinion of a treating physician is unsupported by the
6 objective medical findings. *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988).
7 However, the Court is “not deprived of [its] faculties for drawing specific and legitimate
8 inferences from the ALJ’s opinion.” *Magallanes*, 881 F.2d at 755.

9 Here, the ALJ summarized the medical record immediately preceding his rejection
10 of Dr. Balinos’ opinion and set forth the ways in which Dr. Balinos’ letter was
11 inconsistent with her own findings of “mild” or “intermittent” symptoms. (A.R. 20–23).
12 Accordingly, the Court may infer that the ALJ rejected the letter because the weight of
13 the medical evidence supported a finding that Plaintiff’s symptoms were “mild,”
14 “intermittent,” or otherwise non-disabling. Therefore, the only issue that remains is
15 whether the ALJ’s rejection on this basis was supported by evidence in the record.
16 While it appears that Plaintiff’s gastrointestinal issues may have been untreated for a
17 period of time, multiple reports indicate that by late 2012 the condition was controlled
18 by treatment. (A.R. 454, 459, 461, 466–67, 502). By that time, Plaintiff generally
19 experienced fewer bouts of diarrhea, abdominal pain, and she no longer complained of
20 blood in her stools. (A.R. 502, 506). These findings outweigh those that would
21 ostensibly preclude all work, as Dr. Balinos found.¹ (A.R. 240–41, 265–67, 288–90).
22 Because the record reasonably supports the ALJ’s interpretation of the evidence, the
23 Court concludes that the ALJ rationally and permissibly found that Dr. Balinos’ opinion
24 was unsupported by the objective medical evidence.

25
26 ¹ Indeed, even the records that mention Plaintiff’s ulcerative colitis corroborate
27 neither Plaintiff’s reported symptomology nor Dr. Balinos’ limitations. Therefore, the
28 ALJ’s finding that Dr. Balinos’ report is unsupported by the weight of the objective
medical findings rests upon substantial evidence.

1 B. The ALJ Properly Assessed Plaintiff’s Credibility

2 Once a claimant produces medical evidence of an underlying impairment that is
3 reasonably likely to cause the alleged symptoms, medical findings are not required to
4 support their claimed severity. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
5 However, an ALJ may reject a claimant’s allegations upon: (1) finding affirmative
6 evidence of malingering; or (2) providing clear and convincing reasons for so doing.
7 *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003).

8 1. ALJ’s Decision

9 The ALJ found that “Plaintiff’s testimony at the hearing was generally credible,
10 but not to the extent that she alleged an inability to perform any work.” (A.R. 24). In
11 support of this decision, the ALJ cited the opinions of Dr. Linda Smith, a psychiatric
12 consultative examiner, who opined that Plaintiff was not credible and exaggerated her
13 symptoms. (A.R. 384–86, 388–90). The ALJ determined that this was evidence of
14 malingering that “undercut” Plaintiff’s credibility. (A.R. 26). Additionally, the ALJ
15 asserted that Plaintiff’s credibility was further damaged because she: (1) treated her
16 migraine headaches with over-the-counter Excedrin and had not sought any further
17 treatment for the pain caused by her migraines or any other impairment; (2) possessed a
18 “poor work history;” (3) failed to seek out mental health care; (4) controlled her
19 gastrointestinal impairments with medication; (5) participated in a “huge array” of daily
20 activities; and (5) continued to search for employment. (Id.)

21 2. Analysis

22 i. Malingering

23 Evidence of malingering is sufficient by itself to undermine a claimant’s
24 credibility. See, e.g., *Benton*, 331 F.3d at 1040; *Barrientez v. Colvin*, 517 F. App’x 602,
25 603 (9th Cir. 2013) (affirming ALJ’s credibility determination where the ALJ found
26 “some evidence of malingering”); *Gardner v. Barnhart*, 73 F. App’x 193, 195 (9th Cir.
27 2003). In this case, Dr. Linda Smith, a consultative psychiatric examiner, found that
28 Plaintiff was not credible, exaggerated her symptoms, and did not suffer from a severe

1 mental disorder. (A.R. 395–98). Exaggerating the severity of an illness in order to
2 avoid work is malingering. See Merriam-Webster’s Collegiate Dictionary 703 (10th ed.
3 2001) (defining “malinger” as “to pretend incapacity (as illness) so as to avoid doing
4 duty or work”). Accordingly, the ALJ’s interpretation of Dr. Smith’s findings is rational
5 and, therefore, the Court may not disturb his reasoning that this evidence was deleterious
6 to Plaintiff’s credibility. Morgan, 169 F.3d at 599 (“Where the evidence is susceptible
7 to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.”).
8 However, since the amount of evidence required to discredit a claimant’s testimony on
9 this basis has not been decided by this circuit, the Court examines the remainder of the
10 ALJ’s credibility determination. See Ghanim, 763 F.3d at 1163 n.9 (affirmatively
11 declining to discuss the standard of evidence required to find malingering).

12 ii. Conservative Treatment and Failure to Seek Treatment

13 “[E]vidence of ‘conservative treatment’ is sufficient to discount a claimant’s
14 testimony regarding severity of an impairment.” Parra v. Astrue, 481 F.3d 742, 751 (9th
15 Cir. 2007) (claimant’s treatment of impairments solely with over-the-counter pain
16 medications undermined her credibility). Likewise, an “unexplained . . . failure to seek
17 treatment” is a permissible basis on which an ALJ may discredit a claimant’s subjective
18 symptom testimony. See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff
19 stated that she treats her migraine headaches with over-the-counter medications. (A.R.
20 44, 271). Furthermore, the record lacks any indication that Plaintiff sought more than
21 routine care for her foot and ankle pain, which she testified limit her ability to stand and
22 walk. Likewise, the ALJ properly discerned that, despite various complaints of pain
23 from these two impairments, Plaintiff never sought treatment for pain management. As
24 a result, that Plaintiff treated her impairments conservatively, or not at all, serves as a
25 clear and convincing reason to discredit Plaintiff’s testimony.

26 iii. Poor Work History

27 A finding that a claimant possesses a poor work history is a permissible reason to
28 discount the claimant’s credibility. See Thomas, 278 F.3d at 959 (affirming the ALJ’s

1 adverse credibility determination where the claimant’s work history was “spotty, at
2 best”). Here, the ALJ’s determination that Plaintiff had a poor work history is supported
3 by substantial evidence in the record. Since 1988, Plaintiff has only been employed, in
4 any capacity, for twelve years out of her twenty-year work history. (A.R. 178).
5 Furthermore, Plaintiff’s earning reports suggest that employment during much of this
6 time was part-time or short term. (Id.) Accordingly, Plaintiff’s work history ostensibly
7 shows that Plaintiff “has shown little propensity to work in her lifetime,” thus providing
8 a clear and convincing reason to discredit Plaintiff’s testimony.² Thomas, 278 F.3d at
9 959.

10 C. The ALJ’s Errors Were Harmless

11 “[H]armless error principles apply in the Social Security . . . context.” *Molina v.*
12 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v. Comm’r Soc. Sec. Admin.*,
13 454 F.3d 1050, 1054 (9th Cir. 2006)). An ALJ’s error is harmless only when it is “clear
14 from the record that [the] ALJ’s error was ‘inconsequential to the ultimate nondisability
15 determination.’” *Robbins*, 466 F.3d at 885 (quoting *Stout*, 454 F.3d at 1055–56). Here,
16 the ALJ improperly found that Plaintiff’s admitted daily activities undermined her
17 credibility. See *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) (reiterating that
18 daily activities undermine a claimant’s credibility only when they are “inconsistent with
19 [a claimant’s] claimed limitations” (alterations in original) (internal quotation marks
20 omitted)). Likewise, the ALJ’s decision to discredit Plaintiff because of her lack of
21 mental health treatment was also impermissible. See *Nguyen v. Chater*, 100 F.3d 1462,

22 ² The ALJ also cited Plaintiff’s search for employment as a reason to discount her
23 credibility. (A.R. 26). Ordinarily, this would be a permissible reason to discredit
24 Plaintiff’s testimony. See *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th
25 Cir.2009). (“In reaching a credibility determination, an ALJ may weigh inconsistencies
26 between the claimant’s testimony and his or her conduct, daily activities, and work
27 record, among other factors.”). However, because the only references to Plaintiff’s job
28 search appear before the alleged onset of her ulcerative colitis, (A.R. 330), the Court
declines to consider this factor in the ALJ’s determination. To the extent that it was
error, that error was harmless for the reasons stated, *supra*.

