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

PHYLLIS ELAINE COLLINS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social
Security,

Defendant.

Case No. EDCV 15-0149 (SS)

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Plaintiff Phyllis Elaine Collins ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying her application for Disability Insurance Benefits. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is AFFIRMED.

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II.

PROCEDURAL HISTORY

Plaintiff filed an application for Title II Disability Insurance Benefits ("DIB") on May 12, 2012. (Administrative Record ("AR") 22). In the application, Plaintiff alleged a disability onset date of March 15, 2010. (Id.). The agency denied Plaintiff's application initially on October 5, 2012, and upon reconsideration on March 5, 2013. (Id.). On April 8, 2013, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (Id.). Plaintiff testified before the ALJ, Jay E. Levine, on October 3, 2013. (Id. at 22, 28). On October 31, 2013, the ALJ issued a decision denying Plaintiff benefits. (AR 19, 28). Plaintiff timely requested review of the ALJ's decision, which the Appeals Council denied on December 2, 2014. (Complaint at 2). Plaintiff then filed an action in this Court on January 23, 2015. (Case No. 15-0149 SS).

III.

FACTUAL BACKGROUND

Plaintiff was born on July 5, 1954. (AR 59). Plaintiff was fifty-five years old at the time of her alleged disability onset date, (AR 59), and fifty-nine years old at the time of her hearing before the ALJ. (AR 35). Plaintiff did not graduate from high school and has no job or vocational training other than on-the-job-training. (AR 35-36). Plaintiff worked for twenty-

1 five years at a cord factory making electrical cords.¹ (AR 36).
2 Plaintiff's job required a significant amount of standing and
3 lifting of objects weighing ten pounds or more. (AR 36, 44,
4 178). Plaintiff stopped working in 2005 after the cord factory
5 went out of business. (AR 37, 176). Plaintiff was unemployed
6 from 2006 to 2008 and then briefly operated "a little day care"
7 in her home in 2009, but she stopped operating the day care after
8 having difficulty standing and being able to walk children to and
9 from school. (AR 37). Plaintiff alleges an onset of disability
10 due to pain in her knees, hips, shoulders and elbows, arthritis,
11 hypertension, headaches, depression and anxiety. (AR 39-44). In
12 the Disability Report accompanying the Disability Insurance
13 Benefits Application, Plaintiff lists "uncontrolled high blood
14 pressure" and pain in "both knees" as physical conditions
15 limiting her ability to work. (AR 59).

16
17 **A. Medical History**

18
19 **1. Arrowhead Regional Medical Center**

20
21 On January 23, 2010, Plaintiff went to the emergency room
22 due to severe pain in both knees. (AR 219). The emergency room
23 physician prescribed "Norco," a pain medication. (AR 220). The
24 physician's final impression was "left hip/knee" pain and

25 ¹ The vocational expert elicited testimony that Plaintiff took
26 orders from customers, read blueprints, and made coils. (AR 38).
27 Plaintiff also intermittently worked as a lead worker and
28 supervised five people when the lead worker went on vacation; in
that role, coordinating shipping, tracking and payments were
among Plaintiff's responsibilities. (Id.).

1 degenerative joint disease. (AR 221). During a June 27, 2011,
2 doctor's visit, Plaintiff also complained of knee pain. (AR
3 247).

4
5 From February 2010 to March 2013, Plaintiff's primary care
6 physician, Dr. Joachim M. Brown, D.O., ordered Arrowhead's
7 Radiology and Pathology departments to conduct a number of
8 laboratory tests on Plaintiff, including MRIs and mammograms.
9 (AR 262-275). On May 23, 2012, an MRI of Plaintiff's bilateral
10 standing knees found "mild tibial spine osteophyte." (AR 272).
11 On June 6, 2012, an MRI of Plaintiff's bilateral knees found
12 "mild osteoarthritis" of the knees. (AR 271). An outpatient
13 note dated June 21, 2012, noted knee pain and osteoarthritis.
14 (AR 243). Another examination of Plaintiff's knees found
15 positive crepitus and a decreased range of motion. (AR 244).
16 The physician noted that throbbing in the knees increased with
17 walking and stair climbing. (Id.). On February 8, 2013, an
18 examination of Plaintiff's right shoulder found mild
19 osteoarthritis. (AR 266).

20
21 **2. Vincente R. Bernabe, D.O.**

22
23 At the request of the Department of Social Services,
24 Plaintiff visited Dr. Bernabe for an orthopedic examination and
25 consultation in September 2012. (AR 222). Plaintiff complained
26 of chronic left knee pain and left hip pain. (Id.). Dr. Bernabe
27 noted that Plaintiff's pain started in 2010 and had progressed
28 from an intermittent pain she felt twice a month to constant

1 "throbbing" and "burning." (Id.). An examination revealed that
2 Plaintiff's range of motion of her upper extremities was within
3 normal limits.² (AR 224). However, examination of Plaintiff's
4 hips revealed "tenderness to palpation at the greater trochanter
5 bursa of the left hip." (Id.). Dr. Bernabe also found "grinding
6 and crepitus in the patellofemoral joint of the left knee, with
7 popping [and] tenderness at the insertion of the patellar tendon
8 into the proximal tibia." (AR 225). Dr. Bernabe determined
9 Plaintiff should be able to lift and carry with no restrictions,
10 be able to stand and walk up to six hours of an eight-hour day,
11 and have no problems sitting. (AR 226).

12
13 **B. Non-Examining Physicians' Opinions**

14
15 On October 5, 2012, Disability Determination Service ("DDS")
16 medical consultants determined that there was insufficient
17 evidence to evaluate Plaintiff's claim, i.e. there was
18 insufficient evidence to establish a severe impairment prior to
19 the date last insured. (AR 63-64). The doctor concluded that
20 Plaintiff's statements about the intensity, persistence and
21 functionally limiting effects of the symptoms were not
22 substantiated by the objective medical evidence alone. (Id. at
23 63). The doctor also noted that Plaintiff's statements regarding
24 her symptoms were only partially credible. (Id.). The ALJ
25 assigned "great" weight to the DDS consultants' opinion. (AR
26 27).

27 _____
28 ² Dr. Bernabe examined Plaintiff's shoulders, elbows, wrists,
hands and fingers. (AR 224).

1 On March 5, 2013, a DDS physician reviewed the case on
2 reconsideration and affirmed that Plaintiff was not disabled.
3 (AR 71). The physician concluded that Plaintiff had "non-severe"
4 hypertension. (AR 70). The DDS physician found Plaintiff's
5 individual statements regarding her symptoms only partially
6 credible. (AR 71). The physician observed that Plaintiff
7 stopped working because she was laid off, not because of the
8 medical problems she alleged. (Id.).

9
10 **B. Vocational Expert Testimony**

11
12 Vocational Expert ("VE") Sandra Fioretti testified at the
13 ALJ hearing regarding Plaintiff's past work and the existence of
14 jobs that Plaintiff could perform given her functional
15 limitations. (AR 53-57). The VE identified Plaintiff's past
16 work as "electronic assembler, developmental," with a Dictionary
17 of Occupational Titles ("DOT") listing of 726.261-010. (AR 53).
18 The VE opined that the occupation constituted "light" and
19 "semiskilled" work. (AR 54).

20
21 The ALJ posed three hypotheticals to the vocational expert.
22 First, the ALJ asked whether an individual who was Plaintiff's
23 age, had the same education and work experience, and was
24 restricted to a "medium" range of work could perform Plaintiff's
25 past work.³ (AR 54). The VE opined that such a person would be

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³ The hypothetical individual also could not climb ladders but
28 could handle frequent stairs, ramps, stooping or bending. (AR
54).

1 able to perform Plaintiff's past work. (AR 54-55). The ALJ then
2 asked the VE whether such an individual could perform Plaintiff's
3 past work if the individual: could lift or carry fifty pounds
4 occasionally and twenty-five pounds frequently; be limited to
5 standing or walking four hours out of an eight hour day; could
6 sit without problems; and could use stairs and ramps occasionally
7 and bend and stoop occasionally. (AR 55). The VE concluded the
8 individual could not perform Plaintiff's past work. (Id.).
9 However, the VE testified that such an individual could perform
10 limited work as a hand packager, with 20,000 jobs nationally and
11 1,500 locally, or as a machine feeder, with 10,000 jobs
12 nationally and 1,600 locally.⁴ (AR 55-56).

13
14 Finally, the ALJ further limited the hypothetical individual
15 to "light" work, i.e., lifting or carrying twenty pounds
16 occasionally and ten pounds frequently, and asked whether
17 Plaintiff possessed any skills that would transfer to any work
18 within the third hypothetical. (AR 56). The VE found that
19 Plaintiff did not possess any skills that would enable her to
20 perform as the individual in hypothetical three would. (Id.).

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25 ⁴ The VE emphasized that because of the hypothetical individual's
26 standing/walking limitation, she had to lower the number of
27 positions available. (AR 55). She further testified that the
28 limitation on standing and walking was not fully consistent with
the medium DOT category of full ability to stand and walk, so her
testimony and the reduced number of available positions was based
on her own training and experience. (AR 56).

1 **C. Plaintiff's Testimony**

2
3 In regards to her work history, Plaintiff testified that she
4 worked at a "cord factory" for twenty-five years until the
5 factory closed in 2005. (AR 36-37). She did babysitting and ran
6 a day care center in her home for some period of time after that.
7 (AR 37).

8
9 Plaintiff testified that beginning in March 2010, she
10 started having "problems with [her] knees and shoulders." (AR
11 39). Plaintiff was examined by a doctor who informed her that
12 she had arthritis. (Id.). Plaintiff continued to feel pain in
13 her right knee, but also began feeling pain in her hip. (Id.).
14 She went to the emergency room due to her hip pain, "but they
15 [were] so concerned about [her] blood pressure because [she] was
16 at stroke level . . . [so] they didn't even do anything about the
17 hip." (Id.). While Plaintiff suffered from pain in her hip,
18 she used her husband's cane to assist her in walking around the
19 house. (AR 48). Plaintiff testified that, although the pain
20 began in her right knee, she eventually starting feeling pain in
21 both knees and, even while testifying before the ALJ, stated,
22 "they're burning." (AR 40).

23
24 Plaintiff further testified that sometime around March 2011,
25 when her insured status lapsed, she had "uncontrollable"
26 hypertension and swelling of the feet, which interfered with her
27 ability to work. (AR 41). As a result of her hypertension,
28 Plaintiff also suffered from "bad headaches." (Id.). Sometimes

1 while walking, Plaintiff's knees would suddenly "pop" and "a leg
2 would give out."⁵ (AR 42). Plaintiff was once prescribed a pain
3 killer "other than Ibuprofen," but she only took it once because
4 she did not like how it made her feel.⁶ (AR 50).

5
6 At the time of the hearing, Plaintiff alleged that her knees
7 continued to "burn constantly."⁷ (AR 42). Plaintiff also
8 testified that she suffer[ed] from pain in the shoulders⁸, and
9 elbow. (AR 43-44). Due to the pain in her shoulders, Plaintiff
10 could not cook, blow dry her hair, or lift items she could lift
11 prior to the pain onset. (AR 45). Plaintiff opined that she
12 could no longer perform a job similar to her cord factory job as
13 that would require her constantly being on her feet. (AR 47-48).
14 She also stated that she had not had any surgeries or worn a
15 brace on her knees, shoulder or hips. (AR 49-50).

16
17
18 ⁵ Initially, the pain in her knee and leg was intermittent, but
19 by the time of the hearing, she was constantly in pain. (AR 42).

20 ⁶ Plaintiff started taking Ibuprofen the year before the ALJ
21 hearing. (AR 50).

22 ⁷ The pain in her knee also limits the length of time Plaintiff
23 can be on her feet. (AR 46). For example, Plaintiff testified
24 that she could not stand on her feet for two straight hours
25 preparing a Thanksgiving meal without taking a break to sit down.
(Id.). She can only be on her feet for about forty-five minutes
at a time, whereas in the past, Plaintiff could stand for two to
three hours at a time. (AR 46-47).

26 ⁸ Plaintiff testified that this is due to the "constant use of
27 doing the same thing every day" when she worked at the cord
28 factory, which involved loading and lifting blades weighing fifty
pounds or more into heavy molds with cords. Plaintiff did not
file a Worker's Compensation Claim for this injury. (AR 43-44).

1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3
4 To qualify for disability benefits, a claimant must
5 demonstrate a medically determinable physical or mental
6 impairment that prevents her from engaging in substantial gainful
7 activity and that is expected to result in death or to last for a
8 continuous period of at least twelve months. Reddick v. Chater,
9 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C.
10 § 423(d)(1)(A)). The impairment must render the claimant
11 incapable of performing the work she previously performed and
12 incapable of performing any other substantial gainful employment
13 that exists in the national economy. Tackett v. Apfel, 180 F.3d
14 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).
15

16 To decide if a claimant is entitled to benefits, an ALJ
17 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
18 The steps are:

19
20 (1) Is the claimant presently engaged in substantial
21 gainful activity? If so, the claimant is found not
22 disabled. If not, proceed to step two.

23 (2) Is the claimant's impairment severe? If not, the
24 claimant is found not disabled. If so, proceed to step
25 three.

26 (3) Does the claimant's impairment meet or equal one of the
27 specific impairments described in 20 C.F.R. Part 404,
28

1 Subpart P, Appendix 1? If so, the claimant is found
2 disabled. If not, proceed to step four.

3 (4) Is the claimant capable of performing his past work?
4 If so, the claimant is found not disabled. If not,
5 proceed to step five.

6 (5) Is the claimant able to do any other work? If not, the
7 claimant is found disabled. If so, the claimant is
8 found not disabled.

9
10 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
11 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-
12 (g) (1) & 416.920(b)-(g) (1).

13
14 The claimant has the burden of proof at steps one through
15 four and the Commissioner has the burden of proof at step five.
16 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
17 affirmative duty to assist the claimant in developing the record
18 at every step of the inquiry. Id. at 954. If, at step four, the
19 claimant meets her burden of establishing an inability to perform
20 past work, the Commissioner must show that the claimant can
21 perform some other work that exists in "significant numbers" in
22 the national economy, taking into account the claimant's RFC,
23 age, education, and work experience. Tackett, 180 F.3d at 1098,
24 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g) (1),
25 416.920(g) (1). The Commissioner may do so by the testimony of a
26 vocational expert or by reference to the Medical-Vocational
27 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
28 (commonly known as "the grids"). Osenbrock v. Apfel, 240 F.3d

1 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
2 (strength-related) and non-exertional limitations, the Grids are
3 inapplicable and the ALJ must take the testimony of a vocational
4 expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000)
5 (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).
6

7 **V.**

8 **THE ALJ'S DECISION**

9
10 The ALJ employed the five-step sequential evaluation process
11 and concluded that Plaintiff was not disabled within the meaning
12 of the Social Security Act. (AR 27-28). At step one, the ALJ
13 found that Plaintiff had not engaged in substantial gainful
14 activity during the period from her alleged onset date of March
15 15, 2010 through her date last insured of March 31, 2011. (AR
16 24). At step two, the ALJ found that Plaintiff's only medically
17 determinable impairment was "osteoarthritis of the bilateral
18 knees and right shoulder." (AR 24). However, the ALJ reasoned
19 that Plaintiff's osteoarthritis, while medically determinable,
20 did not establish a "severe" impairment or combination of
21 impairments.⁹ (AR 24).
22

23 ⁹ A physical or mental impairment is considered "severe" if it
24 "significantly limits [the claimant's] physical or mental ability
25 to do basic work activities." 20 C.F.R. § 404.1520(c). The ALJ
26 wrote that "basic work activities" are the abilities and
27 aptitudes necessary to do most jobs, including physical functions
28 such as walking, standing, lifting, pushing, pulling, reaching,
carrying, handling, or sitting; capacities for seeing, hearing
and speaking; understanding, carrying out and remembering simple
instructions; use of judgment; responding appropriately to
supervision, co-workers and usual work situations; and dealing
with changes in a routine work setting. (AR 24-25).

1 The ALJ concluded that although Plaintiff's medically
2 determinable impairments could have been reasonably expected to
3 produce the alleged symptoms, Plaintiff's statements concerning
4 the intensity, persistence and limiting effects of the alleged
5 symptoms were not entirely credible. (AR 25). For example,
6 although Plaintiff reported on a Disability Report and during the
7 hearing that she suffered from debilitating headaches, she
8 repeatedly denied headaches to her treating physicians. (AR 25,
9 230 (note indicates no "HA" or headache), 246 (same)). Moreover,
10 Plaintiff alleged that amputation of her right arm was "a
11 consideration," but there is no mention of such a drastic medical
12 procedure in the file nor is there evidence of a condition
13 requiring amputation of a limb. (AR 25). Plaintiff also failed
14 to comply with her prescribed medications¹⁰ and failed to adhere
15 to her suggested diet. (AR 26). These inconsistencies lead the
16 ALJ to reject Plaintiff's subjective testimony.

17
18 In reaching his conclusion, the ALJ gave "significant
19 weight" to Dr. Bernabe's opinion because Dr. Bernabe "ha[d] the
20 expertise to evaluate and assess [Plaintiff's] condition . . .
21 [and] Dr. Bernabe physically examined and objectively tested
22 [Plaintiff]." (AR 27). The ALJ opined that Dr. Bernabe's

23
24 ¹⁰ Plaintiff was prescribed narcotic pain medication, which she
25 only used once (three years before the ALJ hearing) because she
26 did not like the way it made her feel. (AR 26, 50). Plaintiff
27 took Ibuprofen instead. (AR 49-50). There is no indication that
28 she requested a different kind of narcotic pain medication. (AR
26). Additionally, no aggressive treatment was recommended or
anticipated for Plaintiff's osteoarthritis or hypertension.
(Id.). Thus, the ALJ concluded that Plaintiff's symptoms were
not as severe as alleged.

1 opinion was "consistent and reasonable in light of the record as
2 a whole." (Id.). The ALJ also considered the opinions of two
3 State agency physicians, giving those opinions "great" weight.
4 (Id.). The ALJ held that the State agency physicians'
5 assessments regarding Plaintiff's functional limitations are
6 "highly credible because they are supported by objective medical
7 evidence, which shows [Plaintiff] received only conservative
8 treatment for her conditions." (Id.).

9
10 The ALJ concluded that Plaintiff failed to establish
11 disability on or before the date last insured, March 21, 2011.
12 (AR 26). Before March 31, 2011, Plaintiff sought treatment for
13 hypertension, but denied chest pain, shortness of breath, edema,
14 headaches and weakness.¹¹ (Id.). Although Plaintiff's
15 hypertension remained uncontrolled, her pain could have been
16 minimized by performing strengthening exercises, wearing better
17 shoes and taking prescribed medications. (Id.). As Plaintiff
18 did not adhere to the medical advice provided, the ALJ discounted
19 the severity of her symptoms. (Id.).

20
21 In sum, the ALJ found that Plaintiff's physical impairments,
22 considered singly and in combination, did not significantly limit
23 Plaintiff's ability to perform basic work activities. (AR 27).
24 Accordingly, Plaintiff was not under a disability as defined by
25 20 C.F.R. §404.1520(c). (AR 27).

26 _____
27 ¹¹ The ALJ also considered Plaintiff's history of obesity as a
28 contributing factor to her co-existing impairments, but found
there was no specific or quantifiable impact on pulmonary,
musculoskeletal, endocrine, or cardiac functioning. (AR 26).

1 VI.

2 STANDARD OF REVIEW

3
4 Under 42 U.S.C. § 405(g), a district court may review the
5 Commissioner's decision to deny benefits. "[The] court may set
6 aside the Commissioner's denial of benefits when the ALJ's
7 findings are based on legal error or are not supported by
8 substantial evidence in the record as a whole." Aukland v.
9 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett,
10 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir.
11 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).
12

13 "Substantial evidence is more than a scintilla, but less
14 than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson
15 v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
16 evidence which a reasonable person might accept as adequate to
17 support a conclusion." (Id.). To determine whether substantial
18 evidence supports a finding, the court must "'consider the record
19 as a whole, weighing both evidence that supports and evidence
20 that detracts from the [Commissioner's] conclusion.'" Aukland,
21 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
22 Cir. 1993)). If the evidence can reasonably support either
23 affirming or reversing that conclusion, the court may not
24 substitute its judgment for that of the Commissioner. Reddick,
25 157 F.3d at 720-21 (citing Flaten v. Sec'y of Health & Human
26 Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

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28 \\

1 for rejecting Plaintiff's subjective testimony about her pain or
2 objective evidence of her mental health status. Accordingly, for
3 the reasons discussed below, the ALJ's Decision is AFFIRMED.

4
5 **A. Substantial Evidence Supports The ALJ's Finding of Non-**
6 **Severity**

7
8 At step two of the sequential evaluation, the ALJ must
9 determine whether the claimant has a severe impairment or
10 combination of impairments significantly limiting her from
11 performing basic work activities. MSC at 3; see Bowen v.
12 Yuckert, 482 U.S. 137, 141 (1987) (plaintiff bears burden of
13 proving she suffers from any impairment or combination of
14 impairments which significantly limits her physical or mental
15 ability to do basic work activities). The step two inquiry is a
16 de minimis screening device to dispose of groundless claims.
17 Smolen, 80 F.3d at 1290. An impairment or combination of
18 impairments can be found "not severe" only if the evidence
19 establishes a slight abnormality that has "no more than a minimal
20 effect on an individual's ability to work." (Id.); see also SSR
21 85-28, 1985 WL 56856, at *3 (1985). The Ninth Circuit has
22 affirmed a non-severity finding where none of the claimant's
23 treating or examining doctors ever state that the claimant is
24 disabled, even if the claimant suffers some apparent or
25 determinable symptoms. Verduzco v. Apfel, 188 F.3d 1087, 1089
26 (9th Cir. 1999) (finding no evidence to support a claim that
27 impairments were "severe" where appellant's treating and
28 examining physicians never indicated that appellant was disabled,

1 even though he clearly suffered from diabetes, high blood
2 pressure and arthritis). A finding of "no disability at step
3 two" may be affirmed where there is a "total absence of objective
4 evidence of severe medical impairment." Webb v. Barnhart, 433
5 F.3d 683, 686-87 (9th Cir. 2005). A mere diagnosis alone is
6 insufficient for finding a "severe" impairment. Febach v.
7 Colvin, 580 F. App'x 530, 531 (9th Cir. 2014).

8
9 While it appears that doctors prescribed "Norco" for pain
10 after Plaintiff's January 23, 2010 emergency room visit, (AR
11 220), Plaintiff generally took only Ibuprofen for pain. (AR 49-
12 51). Plaintiff refused to take stronger prescribed pain medicine
13 because she "did not like how it made [her] feel."¹² (AR 49-50).
14 Moreover, Plaintiff's doctors suggested strengthening exercises
15 and wearing better shoes as treatment for her condition. (AR
16 243). The conservative treatment and use of non-steroidal anti-
17 inflammatory drugs suggest that Plaintiff's symptoms are not as
18 severe as alleged. (AR 26).

19
20 Furthermore, no aggressive treatment was recommended or
21 anticipated for Plaintiff's osteoarthritis or her hypertension.
22 There is no objective evidence that these conditions more than
23 minimally impacted Plaintiff's ability to physically perform
24 basic work activities before or after the date last insured.

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27 _____
28 ¹² Plaintiff admits she does not like medication and "take[s] the
pain as long as [she] can." (AR 51).

1 The ALJ gave "significant" weight to the opinion of
2 consultative examiner Dr. Bernabe. (AR 27). Dr. Bernabe
3 determined that Plaintiff should be able to lift and carry with
4 no restrictions, be able to stand and walk up to six hours of an
5 eight-hour day and have no problems sitting. (AR 226).
6 Furthermore, she did not require assistive devices.¹³ (AR 27, 48-
7 49, 226). The ALJ also considered the opinions of two State
8 agency physicians and gave those opinions "great" weight. (AR
9 27). The State agency physicians reviewed the medical evidence
10 and concluded that there was no evidence of Plaintiff's having a
11 severe impairment. (AR 27, 65, 73).¹⁴ Reports by physicians that
12 an impairment is "not severe" may supply a basis for an ALJ to
13 similarly conclude that an impairment is not severe. Febach, 580
14 F. App'x. at 531 (affirming ALJ's reliance on three doctors'
15 conclusions that claimant's depression was not severe).

16
17 The total absence of objective evidence of a severe medical
18 impairment supported the ALJ's step two determination that
19 Plaintiff's impairments were not severe. Webb, 433 F.3d at 646.
20 However, even if the ALJ's determination at step two was
21 erroneous, the error was harmless, as discussed more fully below.

22 \\

23 \\

24 _____
25 ¹³ Plaintiff testified that she used her husband's cane for only
one day in 2013. (AR 48-49).

26 ¹⁴ The Disability Determination and Transmittal Forms identify a
27 "Reg-Basis Code" of F2 (AR 65, 73), which stands for a nonsevere
impairment. See POMS DI 26510.045(a), available at
28 <https://secure.ssa.gov/apps10/poms.nsf/lrx/0426510045>

1 **To The Extent The ALJ Erred In Assessing Plaintiff's**
2 **Physical Impairments, Any Error Was Harmless**

3
4 Even if the ALJ erred in finding Plaintiff's impairments
5 non-severe at step two, any error would be harmless. "The burden
6 is on the party claiming error to demonstrate not only the error,
7 but also that it affected his 'substantial rights,' which is to
8 say, not merely his procedural rights." Ludwig v. Astrue, 681
9 F.3d 1047, 1054 (9th Cir. 2012). Therefore, in deciding whether
10 to remand for error, a reviewing court must consider "an
11 estimation of the likelihood that the result would have been
12 different." Id. at 1055.

13
14 The evaluation of impairments at step two is a de minimis
15 test intended to eliminate the most minor of impairments. See
16 Webb, 433 F.3d at 687 (step two is a "de minimis threshold").
17 ALJ errors in social security cases are harmless if they are
18 "inconsequential to the ultimate nondisability determination."
19 Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015)
20 (quoting Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
21 1098 (9th Cir. 2014)).

22
23 The court will set aside a denial of social security
24 benefits "only if the denial is unsupported by substantial
25 evidence in the administrative record or is based on legal
26 error." Marsh v. Colvin, 792 F.3d 1170, 1172 (9th Cir. 2015).
27 Even where the ALJ reaches a nondisability finding for invalid
28 reasons, the court will not reverse the ALJ's decision if the

1 error was harmless. See Carmickle v. Comm'r Soc. Sec. Admin.,
2 533 F.3d 1155, 1162 (9th Cir. 2008) (reviewing adverse
3 credibility finding for harmless error, citing Batson v. Comm'r,
4 359 F.3d 1190, 1195-97 (9th Cir. 2004)). "[T]he relevant inquiry
5 in this context is not whether the ALJ would have made a
6 different decision absent any error[;] . . . it is whether the
7 ALJ's decision remains legally valid, despite such error." Id.;
8 see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012)
9 (court "must uphold the ALJ's findings if they are supported by
10 inferences reasonably drawn from the record"). Moreover, even
11 though courts apply the harmless error doctrine cautiously in
12 social security cases, no "rigid rule" applies to the degree of
13 certainty required to conclude that an ALJ's error was harmless.
14 Marsh, 792 F.3d at 1173. Although remand is appropriate where
15 "the circumstances of the case show a substantial likelihood of
16 prejudice" from the error, remand is not appropriate where the
17 error's harmlessness is clear. McLeod v. Astrue, 640 F.3d 881,
18 888 (9th Cir. 2011).

19
20 Here, even if the ALJ had found Plaintiff's condition to be
21 severe at step two, the ultimate result would not have been
22 different. At the ALJ hearing, the VE testified that a
23 hypothetical person with Plaintiff's age, education and prior
24 work experience who was restricted to a medium range of work and
25 some postural restrictions could still perform Plaintiff's past
26 work as an electronic assembler. (AR 53-55). The VE further
27 testified that a hypothetical person with even greater
28 restrictions could perform other work existing in significant

1 numbers in the regional and national economy. (AR 55-56) (30,000
2 other jobs existing in the national economy); See Gutierrez v.
3 Comm'r of Soc. Sec. Admin., 740 F.3d 519, 527-29 (9th Cir. 2014)
4 (25,000 jobs nationally is a significant number). As noted
5 above, the only doctor who found that Plaintiff had any
6 functional limitations at all was Dr. Bernabe, who determined
7 that Plaintiff could lift and carry with no restrictions, could
8 stand and walk up to 6 hours of an 8 hour day, and had no
9 restriction on sitting. Dr. Bernabe found no other significant
10 exertional or non-exertional limitations. (AR 226).

11
12 Accordingly, even if the ALJ had found Plaintiff's
13 hypertension or knee pain to be "severe" impairments, based only
14 upon Plaintiff's testimony, he still would have found her not
15 disabled based upon a combination of subjective testimony and
16 medical evidence.¹⁵ (AR 226). In the second hypothetical posed
17 to the VE, the ALJ asked the VE if an individual with Plaintiff's
18 age, education, prior work experience, limited to a medium range
19 of work, no ladders, occasional stairs, occasional stooping or
20 bending, who could lift or carry 50 pounds occasionally, 25
21 pounds frequently, but limited to standing or walking only four
22 hours out an eight hour day, could perform other work. The VE
23 testified that such an individual could work as a hand packager

24
25 _____
26 ¹⁵ The regulations define medium work as lifting no more than 50
27 pounds at a time with frequent lifting or carrying of objects
28 weighing up to 25 pounds. A full range of medium work requires
standing or walking, off and on, for a total of approximately 6
hours in an 8-hour workday." Social Security Ruling (SSR) 83-10,
1983 SSR LEXIS 30.

1 (20,000 jobs nationally) or a machine feeder (10,000 jobs
2 nationally). (AR 53-56).

3
4 Had the ALJ reached steps five of the disability analysis,
5 the VE's testimony would have constituted substantial evidence
6 supporting a non-disability finding. See Osenbrock, 240 F.3d at
7 1163 (VE testimony constitutes substantial evidence to support
8 ALJ's vocational findings). Because the ALJ's decision "remains
9 legally valid," regardless of any alleged step two error, the
10 ALJ's decision must be affirmed. Carmickle, 533 F.3d at 1162.

11
12 **C. The ALJ Provided Clear And Convincing Reasons For Rejecting**
13 **Plaintiff's Subjective Testimony**

14
15 When assessing a claimant's credibility, the ALJ must engage
16 in a two-step analysis. Molina, 674 F.3d at 1112 (citing Vasquez
17 v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009)). First, the ALJ
18 must determine if there is objective medical evidence of an
19 impairment that could reasonably produce the symptoms alleged.
20 (Id.). If there is such evidence, to reject the claimant's
21 testimony, the ALJ must give clear and convincing reasons.
22 (Id.). If claimant produces objective medical evidence of
23 impairment, the ALJ may not discredit a claimant's testimony on
24 the severity of her pain because the degree of pain alleged is
25 not supported by objective medical evidence. Burch v. Barnhart,
26 400 F.3d 676, 680 (9th Cir. 2005); Bunnell v. Sullivan, 947 F.2d
27 341, 346-47 (9th Cir. 1991). An ALJ must provide "specific,
28

1 cogent reasons for the disbelief.” Rashid v. Sullivan, 903 F.2d
2 1229, 1231 (9th Cir. 1990).

3
4 In assessing the claimant’s testimony, the ALJ may consider:

- 5
6 (1) Ordinary techniques of credibility evaluation,
7 such as the claimant’s reputation for lying, prior
8 inconsistent statements concerning the symptoms,
9 and other testimony by the claimant that appears
10 less than candid;
11 (2) Unexplained or inadequately explained failure to
12 seek treatment or to follow a prescribed course of
13 treatment; and
14 (3) The claimant’s daily activities.

15
16 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014).

17
18 Here, the ALJ found that Plaintiff’s medically determinable
19 impairments could have been reasonably expected to produce the
20 alleged symptoms. (AR 25). However, the ALJ found that
21 Plaintiff’s statements concerning the severity and persistence of
22 the symptoms are not entirely credible. (Id.). The ALJ provided
23 clear and convincing reasons for rejecting Plaintiff’s testimony:
24 (1) Plaintiff’s inconsistent statements concerning her symptoms
25 or statements contradicted by the medical evidence; and
26 (2) repeated noncompliance in following a prescribed course of
27 treatment. (AR 25-27).

28 \\

1 **1. Conflicting Statements Regarding Plaintiff's Symptoms**

2
3 First, the ALJ stated that discrepancies in Plaintiff's
4 statements regarding her symptoms diminished the persuasiveness
5 of her testimony. (AR 25). For instance, the ALJ observed that
6 Plaintiff reported on a Disability Report and during the ALJ
7 hearing that she suffered from debilitating headaches, but
8 repeatedly denied headaches to her treating physicians. (AR 230,
9 238, 246, 251, 254); see Greger v. Barnhart, 464 F.3d 968, 970,
10 972 (9th Cir. 2006) (ALJ properly rejected plaintiff's subjective
11 testimony because plaintiff failed to report shortness of breath
12 or chest pain to his doctors).

13
14 Furthermore, Plaintiff alleged that "they want to amputate
15 my right arm," in her disability application, but there is no
16 mention of an amputation procedure in her medical files, nor is
17 there evidence of a condition that would require amputation of a
18 limb. (AR 206). The ALJ noted that the record contained no
19 mention of such a drastic medical procedure. (AR 25). The
20 extreme nature of this statement was a reasonable ground for the
21 ALJ to rely upon in rejecting Plaintiff's credibility.

22
23 **2. Failure To Follow Prescribed Course of Treatment**

24
25 Second, the ALJ noted that Plaintiff's repeated failure to
26 take prescribed medicines and treatments further undermined the
27 credibility of her subjective complaints. (AR 25). For example,
28

1 Plaintiff failed to comply with her prescribed medications and
2 failed to adhere to her suggested diet. (AR 239, 240, 242, 247).

3
4 To treat Plaintiff's pain, she was told to perform
5 strengthening exercises and to obtain better shoes. (AR 243).
6 She was prescribed narcotic pain medication. (AR 26, 50-51).
7 However, she had not taken the medication for several years
8 because she did not like how it made her feel. (Id.). Instead,
9 Plaintiff opted to take non-steroidal anti-inflammatory drugs.
10 (AR 50). There is no indication that Plaintiff requested a
11 different kind of narcotic pain medication, thereby indicating a
12 possible unwillingness to do what was necessary to improve her
13 condition. (AR 26). See Tommasetti v. Astrue, 533 F.3d 1035,
14 1039 (9th Cir. 2008) (ALJ properly "inferred that [the
15 claimant's] pain was not as all-disabling as he reported
16 [because] he did not seek an aggressive treatment program and did
17 not seek an alternative or more-tailored treatment program after
18 he stopped taking an effective medication due to mild side
19 effects."); Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007)
20 ("[I]f a claimant complains about disabling pain but fails to
21 seek treatment, or fails to follow prescribed treatment, for the
22 pain, an ALJ may use such failure as a basis for finding the
23 complaint unjustified or exaggerated."). Accordingly, the ALJ
24 provided clear and convincing reasons to reject Plaintiff's
25 subjective pain testimony.

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