UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

LAURIE C. EDWARDS, Plaintiff, v. NANCY BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	No. ED CV 15-2090-PLA **MEMORANDUM OPINION AND ORDER**

I.

PROCEEDINGS

Plaintiff filed this action on October 9, 2015, seeking review of the Commissioner's[1] denial of her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on November 10, 2015, and December 7, 2015. Pursuant to the Court's Order, the parties filed a Joint Stipulation (alternatively "JS") on March 23, 2017, that addresses their positions concerning

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy Berryhill, the current Acting Commissioner of Social Security, is hereby substituted as the defendant herein.

the disputed issue in the case. The Court has taken the Joint Stipulation under submission without oral argument.

II.

BACKGROUND

Plaintiff was born on May 29, 1971. [Administrative Record ("AR") at 155, 164, 976.] She has no past relevant work experience. [AR at 436, 976.]

On January 8, 2009, plaintiff filed an application for SSI payments, and on January 14, 2009, she filed an application for a period of disability and DIB, alleging in both that she has been unable to work since January 1, 2001. [AR at 155-61, 164-70.] After her applications were denied initially and upon reconsideration, and after a hearing, an unfavorable decision was issued on September 30, 2010. [AR at 481-87.] Plaintiff filed a complaint in this Court in case number ED CV 12-1672-SH, and on June 25, 2013, the Magistrate Judge assigned to that matter remanded it for further proceedings. [AR at 523-30.] On August 4, 2014, a hearing was held after remand before a different ALJ, at which plaintiff appeared represented by an attorney and testified on her own behalf. [AR at 420-44.] A vocational expert ("VE") also testified. [AR at 436-42.] On October 15, 2014, the ALJ issued a decision concluding that plaintiff was not under a disability from January 1, 2001, the alleged onset date, through October 15, 2014, the date of the decision. [AR at 977.] When the Appeals Council denied plaintiff's request for review on August 21, 2015 [AR at 412-16], the ALJ's decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

III.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

"Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1159 (9th Cir. 2008) (citation and internal quotation marks omitted); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998) (same). When determining whether substantial evidence exists to support the Commissioner's decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (citation omitted); see Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) ("[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence.") (citation and internal quotation marks omitted). "Where evidence is susceptible to more than one rational interpretation, the ALJ's decision should be upheld." Ryan, 528 F.3d at 1198 (citation and internal quotation marks omitted); see Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) ("If the evidence can support either affirming or reversing the ALJ's conclusion, [the reviewing court] may not substitute [its] judgment for that of the ALJ.") (citation omitted).

IV.

THE EVALUATION OF DISABILITY

Persons are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted or is expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. THE FIVE-STEP EVALUATION PROCESS

The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995), as amended April 9, 1996. In the first step, the Commissioner must

determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments significantly limiting her ability to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the claimant's impairment or combination of impairments does not meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient "residual functional capacity" to perform her past work; if so, the claimant is not disabled and the claim is denied. Id. The claimant has the burden of proving that she is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case of disability is established. Id. The Commissioner then bears the burden of establishing that the claimant is not disabled, because she can perform other substantial gainful work available in the national economy. Id. The determination of this issue comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

B. THE ALJ'S APPLICATION OF THE FIVE-STEP PROCESS

At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since January 1, 2001, the alleged onset date.[2] [AR at 969.] At step two, the ALJ concluded that plaintiff has the severe impairments of depression and anxiety. [Id.] At step three, the ALJ determined that plaintiff does not have an impairment or a combination of impairments that meets

[2] The ALJ concluded that plaintiff met the insured status requirements of the Social Security Act through March 31, 2005. [AR at 969.]

or medically equals any of the impairments in the Listing. [Id.] The ALJ further found that plaintiff retained the residual functional capacity ("RFC")[3] to perform a full range of work at all exertional levels but with the following nonexertional limitations:

> [L]imited to unskilled nonpublic work; cannot perform fast paced, production or assembly line type work; cannot work at unprotected heights, around moving machinery or other hazards; can concentrate up to two hour periods of time; should not be in a position that calls for independent decision making; would miss one day of work per month; would be off task 10 percent of the workday or workweek; limited to occasional, non-intense interaction with coworkers and supervisors; and able to carry out short, simple and routine instructions.

[AR at 970-71.] At step four, the ALJ concluded plaintiff did not have past relevant work. [AR at 976.] At step five, based on plaintiff's RFC, vocational factors, and the VE's testimony, the ALJ found that there are jobs existing in significant numbers in the national economy that plaintiff can perform, including work as a "cleaner" (Dictionary of Occupational Titles ("DOT") No. 323.687-014), "addresser" (DOT No. 209.587-010), and "industrial cleaner" (DOT No. 381.687-018). [AR at 436-38, 977.] Accordingly, the ALJ determined that plaintiff was not disabled at any time from the alleged onset date of January 1, 2001, through October 15, 2014, the date of the decision. [AR at 977.]

V.

THE ALJ'S DECISION

Plaintiff contends that the ALJ erred when she determined that plaintiff could perform alternative work at step five of the evaluation process. [JS at 5-9.] As set forth below, the Court respectfully disagrees with plaintiff and affirms the decision of the ALJ.

Plaintiff submits that the ALJ's findings that plaintiff would miss one day of work per month and would be off-task 10 percent of the workday or workweek means that plaintiff "would be absent or not productive in the workplace on average 3 full days per month." [JS at 7-8.] She

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[3] RFC is what a claimant can still do despite existing exertional and nonexertional limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." Massachi v. Astrue, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007) (citation omitted).

arrives at this conclusion by contending that being off-task for 10 percent of the workday or workweek "equates" to 4 hours a week, or 16 hours per month, which, along with missing one eight-hour day of work per month, means that there would be 3 full workdays per month when plaintiff would be absent or off-task, which is "[s]omething employers do not tolerate." [JS at 8-9.] Plaintiff argues that the VE's testimony confirms her analysis because the VE testified that "non-productivity over 10 percent of the time would eliminate all jobs," and the additional full day of work missed every month brings the total amount of time lost to absence or other non-productive time to 6 hours per week -- "[t]wo more hours [per week] than the vocational expert testified would be tolerated." [JS at 9 (citing AR at 440; Soc. Sec. Ruling 95-8p ("work activity means 8 hours a day, 5 days a week")).]

Defendant responds that plaintiff improperly equates productivity with absence. [JS at 9-10.] Moreover, the VE "explicitly considered this combination, finding that it would not preclude all employment." [JS at 10 (citing AR at 437-38).]

Specifically, the following colloquy occurred at the hearing:

> Q. All right. Let me add to hypothetical number one the following limitation. That the individual also would likely miss one day a month. Would that preclude or reduce the numbers of the jobs that you gave me in hypothetical number one?
>
> A. No, it would not.
>
> Q. Let me give you a third hypothetical. In addition to missing one day a month this individual also would like[ly] be off task up to ten percent of the work day or work week, which is about 48 minutes a day or four hours a week, and this could be due to psychological symptoms, side effects of medication. Would that preclude or reduce the numbers of jobs that you gave me in response to hypothetical number one?
>
> A. I don't believe that it would preclude the addresser or the cleaner; however, I would delete the bagger. I would take the position that one cannot be off task more than five percent in a position such as that. And I could offer another position and that would be an industrial cleaner.

[AR at 437-38.] Plaintiff's attorney further questioned the VE about her testimony:

> Q. . . . Well, there's actually ten percent reduction in ability to concentrate or completing tasks, as the Judge put it, [48] minutes in every work day over a cumulative of four hours in a five-day or 40-hour, you know, equivalent. Despite being nearly an hour behind every day or cumulatively four hours a week, are they still going to be able to maintain gainful employment?
>
> A. Yeah. I believe that would -- positions, cleaner positions, positions where an

> individual like an addresser, working relatively by themselves on their own tasks, that's the position I take. The work, the world of work is really not constant, constant, constant. There is some latitude within this.
>
> Q. But essentially someone who works 10 percent slower in any given work day or work week is going to be tolerated?
>
> A. I believe so for those types of positions. I deleted the bagger position which typically has . . . other employees next to them, and I take the position that an individual can be off task no more than five percent. But these other positions there is more latitude.
>
> Q. In those positions, at what percentage does someone stop having ability to maintain that employment? When is it no longer be[ing] tolerated?
>
> A. Anything over ten percent.

[AR at 439-40.]

It is clear from the foregoing that the VE carefully considered the extent to which someone could be off-task 10 percent of the time *and* absent one day a month and still perform the DOT jobs. Additionally, the VE did not equate absenteeism with productivity as evidenced by the fact that she found that an individual who is absent one day per month *and* who is otherwise on-task 90 percent of the time, can still perform the positions of cleaner, addresser, and industrial cleaner. Indeed, the VE even revised the positions the hypothetical individual could perform when the ALJ added the limitation of being off-task 10 percent of the time -- by eliminating the position of bagger -- which the VE testified would be precluded if the 10% limitation were present, as the bagger position requires an individual to be on-task 95 percent of the time.

In short, plaintiff provides no authority that would support her conversion of off-task time into absence under the circumstances here. Neither does the VE's testimony provide a basis for equating off-task time with absence, especially in light of the VE's testimony that certain jobs can still be satisfactorily performed with a 90 percent on-task rate during the time the individual is performing the job, even if that individual is also absent one day per month. [AR at 437-38.] The ALJ was entitled to rely on the testimony of the VE. Bayliss v. Barnhart, 427 F.3d 1211, 1228 (9th Cir. 2005) ("A VE's recognized expertise provides the necessary foundation for his or her testimony . . . no additional foundation is required"); see also Stubbs v. Comm'r of Soc. Sec., 2012 WL 1949346, at *11 (N.D. Ohio May 29, 2012) (rejecting plaintiff's argument that "being off task

is automatically equivalent to being absent from the job," and noting that the VE indicated that "being off task up to 10% per day would not affect productivity and the hypothetical worker in this case would likely maintain his or her job"); Stein v. Astrue, 2011 WL 6057539, at *16 (N.D. Ohio Dec. 6, 2011) (the claimant argued that she would be absent more than twice a month if she were off-task 20% of the workday; the court noted that this argument "while ingenious, is not well-taken for the simple reason that being off task is not equivalent to being absent," and noted that the VE's opinion "was carefully considered, as evidenced by his additional testimony that if someone were off task one-third of the time, that person would be unemployable").

Remand is not warranted on this issue.

VI.

CONCLUSION

IT IS HEREBY ORDERED that: (1) plaintiff's request for remand is **denied**; and (2) the decision of the Commissioner is **affirmed**.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

DATED: April 6, 2017

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE