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

RENA PEERY,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 16-01203-RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Rena Peery (“Plaintiff”) challenges the Commissioner’s denial of her application for supplemental security income benefits (“SSI”). For the reasons stated below, the decision of the Commissioner is AFFIRMED.

II. PROCEEDINGS BELOW

On November 13, 2012, Plaintiff protectively applied for supplemental security income (“SSI”) under Title XVI of the Social Security Act (the “Act”). In her application, Plaintiff alleged disability beginning on January 10, 1995. (AR 13, 164.) Plaintiff’s claims were initially denied on May 6, 2013, and upon reconsideration on October 31, 2013. (*Id.* at 13, 88-92, 94-99.) Plaintiff then filed

1 a written request for a hearing. A hearing was held on December 9, 2014, in San
2 Bernardino, California, at which Plaintiff testified. (*Id.* 13, 26-62.) An impartial
3 vocational expert (“VE”) also testified at the hearing. (*Id.*) On January 27, 2015,
4 the ALJ found that Plaintiff had not been under a disability, pursuant to the Social
5 Security Act,¹ from November 13, 2012, through the date of the decision. (*Id.* at
6 22.) The ALJ’s decision became the Commissioner’s final decision when the
7 Appeals Council denied Plaintiff’s request for review. (*Id.* at 1-6.) Plaintiff filed
8 this action on June 8, 2016. (Dkt. No. 1.)

9 The ALJ followed a five-step sequential evaluation process to assess whether
10 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,
11 828 n.5 (9th Cir. 1995). At **step one**, the ALJ found that Plaintiff had not engaged
12 in substantial gainful activity since November 13, 2012, the application date. (AR
13 15.) At **step two**, the ALJ found that Plaintiff had the severe impairments of spinal
14 disorder, chronic pulmonary insufficiency, recurrent arrhythmias, headaches, and a
15 gastric disorder. (*Id.*) At **step three**, the ALJ found that Plaintiff “does not have an
16 impairment or combination of impairments that meets or medically equals the
17 severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix
18 1.” (*Id.* at 16.)

19 Before proceeding to step four, the ALJ found that Plaintiff has the residual
20 functional capacity (“RFC”) to:

21 [P]erform light work as defined in 20 CFR 416.967(b). Specifically,
22 she can lift and/or carry 20 pounds occasionally and 10 pounds
23 frequently; she can push and/or pull within those weight limits; she
24 can stand and/or walk six hours in an eight-hour day; she can sit six
25 hours in an eight-hour day; she is limited to frequent handling and
fingering with the bilateral upper extremities; she must avoid

26 ¹ Persons are “disabled” for purposes of receiving Social Security benefits if they
27 are unable to engage in any substantial gainful activity owing to a physical or
28 mental impairment expected to result in death, or which has lasted or is expected to
last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

1 concentrated exposure to extreme cold and extreme heat; she must
2 avoid concentrated exposure to respiratory irritants, such [as] fumes
3 dusts, odors, gases, or poor ventilation; and she must avoid
4 concentrated exposure to work place hazards, such as unprotected
5 heights, operating fast or dangerous machinery, or driving commercial
6 vehicles. In addition, due to her level of education and her complaints
of chronic pain and headaches, she is limited to non-complex tasks
and routine work that is not fast-paced and does not require
hypervigilance.

7 (*Id.* at 16.)

8 At **step four**, the ALJ found that Plaintiff has no past relevant work. (AR
9 20.) At **step five**, the ALJ found that there are jobs that exist in significant numbers
10 in the national economy that Plaintiff can perform. (*Id.* at 23.) Accordingly, the
11 ALJ found that Plaintiff “has not been under a disability . . . since November 13,
12 2012, the date the application was filed.” (*Id.* at 23-24.)

13 **III. STANDARD OF REVIEW**

14 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
15 decision to deny benefits. A court must affirm an ALJ’s findings of fact if they are
16 supported by substantial evidence, and if the proper legal standards were applied.
17 *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). “‘Substantial evidence’
18 means more than a mere scintilla, but less than a preponderance; it is such relevant
19 evidence as a reasonable person might accept as adequate to support a conclusion.”
20 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc.*
21 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can satisfy the substantial
22 evidence requirement “by setting out a detailed and thorough summary of the facts
23 and conflicting clinical evidence, stating his interpretation thereof, and making
24 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).

25 “[T]he Commissioner’s decision cannot be affirmed simply by isolating a
26 specific quantum of supporting evidence. Rather, a court must consider the record
27 as a whole, weighing both evidence that supports and evidence that detracts from
28 the Secretary’s conclusion.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.

1 2001) (citations and internal quotations omitted). ““Where evidence is susceptible
2 to more than one rational interpretation,’ the ALJ’s decision should be upheld.”
3 *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing *Burch v.*
4 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); *see also Robbins*, 466 F.3d at 882
5 (“If the evidence can support either affirming or reversing the ALJ’s conclusion, we
6 may not substitute our judgment for that of the ALJ.”). The Court may review only
7 “the reasons provided by the ALJ in the disability determination and may not affirm
8 the ALJ on a ground upon which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630
9 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

10 **IV. DISCUSSION**

11 Plaintiff raises two issues in her appeal: (1) whether the ALJ’s RFC
12 assessment is supported by substantial evidence; and (2) whether the ALJ properly
13 considered Plaintiff’s subjective complaints and properly assessed her credibility.

14 **A. ALJ’s RFC Assessment**

15 Plaintiff argues that the ALJ “either ignored and/or mischaracterized”
16 evidence regarding postural and environmental limitations, evidence which
17 (Plaintiff contends) would support a significantly more limited RFC than that found
18 by the ALJ in her decision. (Joint Stip. at 4-6.) The Commissioner contends that
19 Plaintiff has failed to preserve the issue on appeal and, alternatively, any error was
20 harmless. (*Id.* at 7-8.)

21 **1. Evidence Regarding Postural and Environmental Limitations**

22 Dr. Concepcion Enriquez, a consultative examiner, examined Plaintiff in
23 April 2013 and assessed, *inter alia*, the following postural and environmental
24 limitations: “The patient should avoid exposure to extreme temperatures, dust,
25 chemicals and fumes. The patient should avoid unprotected heights and operation
26 of dangerous machines. The patient can still do frequent bending, stooping, and
27 twisting.” (AR 238.)

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1 Dr. J. Hartman, a state agency reviewing physician, assessed postural
2 limitations restricting Plaintiff to occasional climbing of ramps, stairs, ladders,
3 ropes, scaffolds and to frequent balancing, stooping, kneeling, crouching, and
4 crawling. (AR 69.) Dr. Hartman also assessed environmental limitations,
5 including among others, “avoid[ing] even moderate exposure” to “fumes, odors,
6 dusts, gases, poor ventilation, etc.” (AR 70.)

7 Dr. D. Rose, another state agency reviewing physician, also assessed
8 postural limitations of occasional climbing ramps, stairs, ladders, ropes, scaffolds;
9 occasional kneeling, crouching and crawling; and frequent balancing and stooping.
10 (AR 81.) With respect to environmental limitations, Dr. Rose opined that Plaintiff
11 should “avoid concentrated exposure” to “fumes, odors, dusts, gases, poor
12 ventilation, etc.” (AR 82.)

13 **2. Discussion**

14 An ALJ is obligated to consider medical opinions of record, resolve conflicts,
15 and analyze evidence. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989); 20
16 C.F.R. § 404.1527(c).

17 Plaintiff is correct that the ALJ did not mention the medical opinions
18 described above in her decision. “Where an ALJ does not explicitly reject a
19 medical opinion or set forth specific, legitimate reasons for crediting one medical
20 opinion over another, he errs.” *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir.
21 2014) (internal citation omitted); *see also Lingenfelter*, 504 F.3d at 1038 n.10 (an
22 ALJ may not “avoid the [] requirements” of providing specific and legitimate
23 reasons for rejecting a doctor’s opinion “simply by not mentioning the treating
24 physician’s opinion.”)

25 The Commissioner argues that Plaintiff has failed to preserve this issue on
26 appeal because Plaintiff, who was represented by counsel at the administrative
27 proceedings, did not object to the hypothetical questions posed to the VE by the
28 ALJ. Alternatively, the Commissioner argues harmless error. With respect to its

1 waiver argument, the Commissioner cites generally to *Meanel v. Apfel*, 172 F.3d
2 1111, 1115 (9th Cir. 1999), but otherwise does not develop this argument.²
3 Because the Court finds any error harmless, it does not resolve the issue of waiver.

4 Based on the hypothetical questions posed, the VE opined that the
5 hypothetical individual with Plaintiff’s education and limitations could perform
6 jobs such as battery inspector, cashier, and small products assembler. (AR 60.)
7 The Commissioner argues that the *Dictionary of Occupational Titles* (DOT)
8 descriptions for the three jobs identified by the VE do not require postural
9 movements or exposure to environmental conditions. (Joint Stip. at 8.) The
10 Court’s review of the DOT job descriptions for the three jobs specified by the VE
11 confirms that these jobs do not implicate the postural or environmental limitations
12 Plaintiff contends should have been included in her RFC. *See* DICOT 727.687-066
13 (battery inspector), 211.462-010 (cashier II), 706.684-022 (small products
14 assembler). “From this it follows that the [VE’s] answer to the hypothetical
15 question would not have been different” even if the postural and environmental
16 limitations “had been included as a part of the question.” *McGarrah v. Colvin*, 650
17 F. App’x 480 (9th Cir. 2016). Plaintiff supplies no argument in opposition to the
18 Commissioner’s harmless error doctrine.

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21 ² In addition to *Meanel*, the Commissioner cites to *Gutierrez v. Colvin*, 740 F.3d
22 519, 527 (9th Cir. 2014), in support of its waiver argument. Neither the Ninth
23 Circuit nor the district court in *Gutierrez* addressed the issue of waiver in their
24 respective decisions, but instead resolved claimant’s claim on the merits. While the
25 appellate court noted “that Gutierrez did not challenge the VE’s testimony
26 regarding the number of jobs available to him in California” and “did not explore
27 with the VE where those jobs were in relation to his domicile,” the Ninth Circuit
28 did not, in fact, discuss the issue of waiver. Similarly, the district court’s order
denying Gutierrez’s appeal did not discuss the issue of waiver, but instead
addressed Gutierrez’s claim on the merits. Accordingly, the Court finds the Ninth
Circuit’s decision in *Gutierrez* is inapposite.

1 Accordingly, because the alleged mistake in the ALJ’s RFC assessment does
2 not “negate the validity of the ALJ’s ultimate conclusion,” any error was harmless.
3 *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012).

4 **B. ALJ’s Evaluation of Plaintiff’s Testimony and Credibility Findings**

5 Plaintiff argues that the ALJ’s findings failed to provide legitimate reasons
6 for rejecting Plaintiff’s consistent complaints of disabling headaches. (Joint Stip. at
7 9-11.) The Commissioner argues that the ALJ’s reasons are supported by
8 substantial evidence. (*Id.* at 12-14.)

9 **1. Plaintiff’s Testimony Regarding Headaches**

10 At the administrative hearing, Plaintiff testified regarding the problems she
11 had with headaches. (AR 45-47.) She described that she had headaches two or
12 three times per week, each lasting no more than an hour. (AR 46). Plaintiff
13 testified that she is nauseated and vomiting during these episodes and that the
14 headaches affect her vision. (*Id.*) Plaintiff described seeking treatment at
15 emergency rooms for her headaches. Plaintiff also stated that she takes Maxalt (10
16 mg) to treat the headaches and that the medication sometimes helps the headaches
17 go away and, at a minimum, helps keep the headaches to under an hour in duration.
18 (AR 46-47.)

19 **2. Applicable Legal Standards**

20 “In assessing the credibility of a claimant’s testimony regarding subjective
21 pain or the intensity of symptoms, the ALJ engages in a two-step
22 analysis.” *Molina*, 674 F.3d at 1112 (citing *Vasquez v. Astrue*, 572, F.3d 586, 591
23 (9th Cir. 2009)). “First, the ALJ must determine whether the claimant has
24 presented objective medical evidence of an underlying impairment which could
25 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*
26 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (2014) (quoting *Lingenfelter*,
27 504 F.3d at 1036) (internal quotation marks omitted). If so, and if the ALJ does not
28 find evidence of malingering, the ALJ must provide specific, clear and convincing

1 reasons for rejecting a claimant’s testimony regarding the severity of his
2 symptoms. *Id.* The ALJ must identify what testimony was found not credible and
3 explain what evidence undermines that testimony. *Holohan v. Massanari*, 246 F.3d
4 1195, 1208 (9th Cir. 2001). “General findings are insufficient.” *Lester*, 81 F.3d at
5 834.

6 **3. Discussion**

7 “After careful consideration of the evidence,” the ALJ found that Plaintiff’s
8 “medically determinable impairments could reasonably be expected to cause the
9 alleged symptoms;” but found that Plaintiff’s “statements concerning the intensity,
10 persistence and limiting effects of these symptoms are not entirely credible for the
11 reasons explained in this decision.” (AR 17.) The ALJ relied on the following
12 reasons: (1) lack of supporting objective evidence; (2) conservative treatment; and
13 (3) inconsistent statements. (*Id.* at 17, 19.) No malingering allegation was made,
14 and therefore, the ALJ’s reasons must be “clear and convincing.”

15 **a. Conservative Treatment**

16 In her decision, the ALJ discounted Plaintiff’s credibility because “the
17 treatment notes documented minimal findings and conservative treatment only.”
18 (AR 17.) An ALJ may discount a claimant’s credibility based on routine and
19 conservative treatment. *See Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007)
20 (evidence of conservative treatment is sufficient to discount a claimant’s testimony
21 regarding severity of an impairment); *see also Meanel*, 172 F.3d at 1114 (rejecting
22 plaintiff’s complaint “that she experienced pain approaching the highest level
23 imaginable” as “inconsistent with the ‘minimal, conservative treatment’ that she
24 received”).

25 In her testimony, Plaintiff testified that her headaches were treated with
26 Maxalt and, while she still gets headaches, she indicated that the Maxalt has been
27 successful in helping reduce the length of the headaches and helps prevent the onset
28 of the headache. The medical records reflect that Plaintiff was given Zofran to help

1 with nausea and vomiting during a November 2013 emergency room visit caused
2 by Plaintiff's headache. (AR 19, 478.) According to Plaintiff's own testimony, the
3 headache medication helps to control the severity of the headaches she experiences.
4 *See Warre v. Comm'r, Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
5 (stating that "[i]mpairments that can be controlled effectively with medication are
6 not disabling for purposes of determining eligibility for SSI benefits.").

7 Based on the record as a whole, substantial evidence supports the ALJ's
8 determination that Plaintiff's treatment was conservative. *Simmons v. Colvin*, 2014
9 WL 2215863, at *5 (C.D. Cal. May 29, 2014) (affirming ALJ's conservative
10 treatment finding where plaintiff took, at various times, no medication, Tylenol
11 Extra Strength, prescription-strength Tylenol, and ibuprofen 800 mg and
12 Gabapentin 300 mg, which took away some of the pain, and used Icy-Hot);
13 *Cusimano v. Astrue*, 2013 WL 178148, at *16 (N.D. Cal. Jan. 16, 2013) ("Plaintiff .
14 . . . received conservative pain treatment, . . . [including] prescriptions for Tylenol,
15 Motrin, acetaminophen, and ibuprofen."). Furthermore, Plaintiff received no
16 specialized treatment for her headaches and did not seek a specialist regarding this
17 medical issue. *See Davis v. Colvin*, 2015 WL 5255353, at *11 (E.D. Cal. Sept. 9,
18 2015) (affirming ALJ's conservative treatment finding where plaintiff had not been
19 referred to a pain specialist, or received specialized treatment to alleviate his pain,
20 and where the record lacked evidence that surgery or any other aggressive treatment
21 had been recommended).

22 The Court finds that this is a clear and convincing reason, supported by
23 substantial evidence, for discounting Plaintiff's credibility.

24 **b. Lack of Supporting Objective Evidence**

25 The ALJ also discounted Plaintiff's credibility because her "allegations are
26 greater than expected in light of the objective evidence of record." (AR 17.)

27 The ALJ noted that Plaintiff's "treatment records mainly documented
28 emergency room visits for exacerbations of her conditions." (AR 17.) The ALJ

1 found that the treatment notes “documented minimal findings and conservative
2 treatment only.” (AR 17.) The Court’s review of the administrative record reveals
3 that the ALJ fairly summarized the objective evidence regarding Plaintiff’s
4 headaches and her treatment for them. In light of the objective evidence in the
5 record, the Court finds that the ALJ’s determination is supported by substantial
6 evidence.

7 The Court finds that this is a clear and convincing reason, supported by
8 substantial evidence, for discounting Plaintiff’s credibility.

9 **c. Plaintiff’s Inconsistent Statements Regarding Drug Use**

10 Finally, the ALJ found that the Plaintiff’s inconsistent statements regarding
11 her drug use “diminish[ed] the claimant’s overall credibility.” (AR 17.)
12 Specifically, the ALJ observed that Plaintiff testified that her last use of
13 methamphetamines was “a couple of years prior to the hearing date [in December
14 2014], but laboratory testing performed on October 23, 2013, was positive for
15 amphetamines (AR 17.) Inconsistent statements in a claimant’s testimony,
16 and between a claimant’s testimony and her conduct can be specific reasons not to
17 find the claimant credible. *Rusten v. Commissioner of Social Sec. Admin.*, 468 F.
18 App’x 717, 719 (9th Cir. 2012) (“Inconsistent or dishonest statements about drug
19 use can be used to infer a lack of veracity in the claimant’s other assertions.”
20 (citation omitted)). The evidence of Plaintiff’s inconsistent statement regarding her
21 drug use compared to the evidence in the record supports the ALJ’s negative
22 conclusions regarding Plaintiff’s credibility. *See Verduzco v. Apfel*, 188 F.3d 1087,
23 1090 (9th Cir. 1999) (relying on inconsistent statements about alcohol use to reject
24 claimant’s testimony); *see also Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.
25 2002) (claimant’s inconsistent statements regarding alcohol and drug use supported
26 ALJ’s inference “that this lack of candor carries over to her description of physical
27 pain.”)

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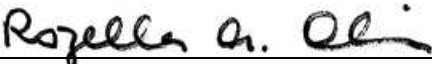
1 The Court finds that this is a clear and convincing reason, supported by
2 substantial evidence, for discounting Plaintiff's credibility.

3 **V. CONCLUSION**

4 IT IS ORDERED that Judgment shall be entered AFFIRMING the decision
5 of the Commissioner denying benefits.

6 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
7 Order and the Judgment on counsel for both parties.

8
9 DATED: March 20, 2017



10 ROZELLA A. OLIVER
11 UNITED STATES MAGISTRATE JUDGE

12
13 **NOTICE**

14 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,**
15 **LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**