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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NORMA MIRANDA,
Plaintiff

v.

NANCY A. BERRYHILL,¹ Acting
Commissioner of Social Security,
Defendant.

Case No. 5:16-cv-01962-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Norma Miranda (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying her application for Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11 and 12] and briefs addressing disputed issues in the case [Dkt. 19 (“Pl. Brief”) and Dkt. 26 (“Def. Brief”)]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be affirmed.

¹ Nancy A. Berryhill, the Acting Commissioner of the Social Security Administration, is substituted as the defendant in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

2 In July 2014, Plaintiff filed an application for SSI, alleging disability as of
3 December 9, 2013. [Dkt. 15, Administrative Record (“AR”) 23, 80-81.] Plaintiff’s
4 application was denied at the initial level of review and on reconsideration. [AR 23,
5 50-53, 55-60.] On November 19, 2015, a hearing was held before Administrative
6 Law Judge Dana E. McDonald (“the ALJ”). [AR 596-625.] On December 10,
7 2015, the ALJ issued an unfavorable decision. [AR 23-29.]

8 The ALJ applied the five-step sequential evaluation process to find Plaintiff
9 not disabled. *See* 20 C.F.R. § 416.920(b)-(g)(1). At step one, the ALJ found that
10 Plaintiff had not engaged in substantial gainful activity since the application date.
11 [AR 25.] At step two, the ALJ found that Plaintiff suffered from the severe
12 impairments of thyroid cancer in remission and status post gastric bypass surgery
13 (December 2013). [*Id.*] At step three, the ALJ determined that Plaintiff did not
14 have an impairment or combination of impairments that meets or medically equals
15 the severity of one of the impairments listed in Appendix I of the Regulations, (“the
16 Listings”). [*Id.*]; *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1. Next, the ALJ found that
17 Plaintiff had the residual functional capacity (“RFC”) to perform the full range of
18 medium work (20 C.F.R. § 416.967(c)). [AR 25.] At step four, the ALJ found that
19 Plaintiff did not have any past relevant work. [AR 28.] At step five, the ALJ found
20 Plaintiff not disabled under Rule 203.25 of the Medical-Vocational Guidelines
21 (“Grids”) 20 C.F.R. Part 404, Subpt. P, App. 2, based on Plaintiff’s RFC, age (30
22 years at time of application), education, and work experience. [AR 28-29.]

23 The Appeals Council denied review of the ALJ’s decision on July 14, 2016.
24 [AR 5-8.] This action followed.

25 **III. GOVERNING STANDARD**

26 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
27 determine if: (1) the Commissioner’s findings are supported by substantial
28 evidence; and (2) the Commissioner used correct legal standards. *Carmickle v.*

1 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*,
2 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is “such relevant
3 evidence as a reasonable mind might accept as adequate to support a conclusion.”
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations
5 omitted); *see also Hoopai*, 499 F.3d at 1074.

6 IV. DISCUSSION

7 Plaintiff contends that the ALJ erred by: (1) failing to adequately consider the
8 severity of Plaintiff’s fibromyalgia; (2) rejecting the opinion of an examining
9 physician; and (3) rejecting Plaintiff’s pain and symptom testimony. [Pl.’s Br. at 4-
10 12.]

11 A. Plaintiff’s Fibromyalgia

12 Plaintiff claims the ALJ failed to properly evaluate her fibromyalgia as a
13 severe impairment. [Pl. Brief at 5-7.]

14 At step two of the sequential analysis, the claimant bears the burden to show
15 the existence of medically determinable impairments that have more than a minimal
16 effect on the ability to perform work-related activities. 20 C.F.R. §
17 416.920(a)(4)(ii); *see also Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996).
18 An impairment or combination of impairments may be found “‘not severe’ only if
19 the evidence establishes a slight abnormality that has ‘no more than a minimal effect
20 on an individual’s ability to work.’” *Smolen*, 80 F.3d at 1290 (quoting Social
21 Security Ruling (“SSR”) 85-28); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.
22 1988).

23 Fibromyalgia “is a complex medical condition characterized primarily by
24 widespread pain in the joints, muscles, tendons, or nearby soft tissues that has
25 persisted for at least 3 months.” SSR 12-2p, 2013 WL 3104869 at *2. As there are
26 no laboratory tests to confirm a diagnosis of fibromyalgia, “[t]he condition is
27 diagnosed ‘entirely on the basis of the patients’ reports of pain and other
28 symptoms.’” *Revels v. Berryhill*, 874 F.3d 648, 656 (9th Cir. 2017) (quoting

1 *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004)).

2 SSR 12-2p directs how claims of fibromyalgia should be evaluated. *See*
3 *Revels*, 874 F.3d at 662 (explaining that in evaluating a claim of fibromyalgia, “the
4 medical evidence must be construed in light of fibromyalgia’s unique symptoms and
5 diagnostic methods, as described in SSR 12-2P and *Benecke*”). To establish that
6 fibromyalgia is a medically determinable impairment, the claimant must show that
7 an acceptable medical source (licensed physician): (1) diagnosed fibromyalgia and
8 (2) provided evidence to satisfy the diagnostic criteria set forth in either the 1990
9 American College of Rheumatology Criteria for the Classification of Fibromyalgia
10 (“1990 Criteria”) or the 2010 American College of Rheumatology Preliminary
11 Diagnostic Criteria (“2010 Criteria”). SSR 12-2p, 2013 WL 3104869 at *2-3
12 (noting that a physician’s diagnosis of fibromyalgia alone is not sufficient; the
13 “evidence must document that the physician reviewed the claimant’s medical history
14 and conducted a physical exam”).

15 Under the 1990 Criteria, the medical evidence must show: 1) “a history of
16 widespread pain . . . that has persisted . . . for at least 3 months;” 2) at least 11
17 positive tender points, found bilaterally and above and below the waist; and 3)
18 evidence that other disorders which could cause the symptoms were excluded. *Id.* at
19 *3 (footnotes omitted).

20 Under the 2010 Criteria, the medical evidence must show: 1) a history of
21 widespread pain; 2) repeated manifestations of six or more fibromyalgia symptoms,
22 signs, or co-occurring conditions, “especially manifestations of fatigue, cognitive or
23 memory problems (‘fibro fog’), waking unrefreshed, depression, anxiety disorder, or
24 irritable bowel syndrome;” and 3) evidence that other disorders which could cause
25 the symptoms were excluded. *Id.* (footnotes omitted).

26 In the decision, the ALJ noted that Plaintiff alleged fibromyalgia as part of
27 her disability claim, but concluded that fibromyalgia was not a severe, medically
28 determinable impairment. [AR 25-26.] Plaintiff argues in her brief that she was

1 diagnosed with fibromyalgia and that the medical evidence satisfies the diagnostic
2 criteria of SSR 12-2p. [Pl. Brief at 6-7; AR 224-25, 228-29.] Plaintiff’s argument,
3 however, is not supported by the record.

4 First, Plaintiff does not cite to a diagnosis of fibromyalgia from a physician or
5 acceptable medical source. SSR 12-2p, 2013 WL 3104869 at *2. Instead, Plaintiff
6 refers to the report of an examining physician, Dr. Khuram Sial, which references
7 Plaintiff’s complaint of fibromyalgia and indicates that Plaintiff was assessed with a
8 widespread pain index (“WPI”) score of 18 and a symptom severity scale (“SS”)
9 score of 6. [Pl. Brief at 6.] But Dr. Sial did not diagnose fibromyalgia. Rather, Dr.
10 Sial diagnosed Plaintiff with myofascial pain syndrome, cervicgia, and lumbago.
11 [AR 223, 227, 232.] There is also no indication in the record that any other
12 physician diagnosed Plaintiff with fibromyalgia.² That fibromyalgia was mentioned
13 in the medical records or reported by Plaintiff does not constitute a diagnosis from a
14 medically acceptable source, as required by SSR 12-2p. *See, e.g., Jordon v.*
15 *Berryhill*, No. 2:16-CV-00322, 2017 WL 6816694, at *9 (E.D. Tenn. Nov. 30,
16 2017) (“Fibromyalgia simply appearing on records without more or Plaintiff
17 reporting she has the condition does not constitute a diagnosis as required by
18 Section I of SSR 12-2p.”).

19 Second, Plaintiff has not provided evidence from an acceptable medical
20 source to satisfy the 1990 Criteria or the 2010 Criteria. While Dr. Sial’s report
21 indicates that the widespread pain requirement of both the 1990 Criteria and the
22 2010 Criteria is satisfied, there is insufficient medical evidence to satisfy all of the
23 remaining criteria. The record contains no indication that a physician conducted a
24 physical examination of tender points or that a physician ruled out other disorders as
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27 ² A medical record from November 2014 shows that Plaintiff reported fibromyalgia
28 during an examination, but the physician diagnosed Plaintiff with diabetes (no
complication Type I or II), generalized weakness, osteoporosis, and unspecified
osteoarthritis. [AR 186.]

1 causing Plaintiff's symptoms, as required by the 1990 Criteria. SSR 12-2p, 2013
2 WL 3104869 at *3. As for the 2010 Criteria, while Dr. Sial's reports indicates that
3 Plaintiff manifests some fibromyalgia symptoms, signs or co-occurring conditions
4 (i.e., fatigue, waking unrefreshed, and various somatic symptoms), there is no
5 indication in the record that disorders that could cause these manifestations were
6 excluded. [AR 229]; see SSR 12-2p, 2013 WL 3104869 at *3. As noted, Dr. Sial
7 diagnosed Plaintiff with myofascial pain syndrome, cervicgia, and lumbago, and
8 not fibromyalgia. [AR 223, 227, 232.]

9 Accordingly, the ALJ's determination that Plaintiff does not have a medically
10 determinable, severe impairment of fibromyalgia is supported by substantial
11 evidence.

12 **B. Examining Physician**

13 Plaintiff contends the ALJ erroneously rejected the opinion of the examining
14 internist, Dr. Bahaa Girgis. [Pl. Brief at 7-9.] Plaintiff argues that the ALJ
15 improperly discounted Dr. Girgis' finding that Plaintiff would need to make
16 "frequent stops" for about "10 minutes per hour" when walking and standing. [AR
17 27, 182.]

18 An ALJ must provide clear and convincing reasons supported by substantial
19 evidence in rejecting the uncontradicted opinion of an examining physician, *Bayliss*
20 *v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005), and specific and legitimate
21 reasons supported by substantial evidence to reject the contradicted opinion of an
22 examining physician, *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).
23 However, an ALJ is not required to accept an opinion of a treating physician, or any
24 other medical source, if it is conclusory, brief, and not supported by clinical
25 findings. See *Tonapetvan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). If the
26 record as a whole does not support the medical source's opinion, the ALJ may reject
27 that opinion. See *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th
28 Cir. 2004).

1 Dr. Girgis conducted an internal medicine evaluation of Plaintiff in October
2 2014. [AR 178-83.] He found that Plaintiff's conditions included: morbid obesity
3 status post gastric bypass surgery; peripheral neuropathy; thyroid cancer status post
4 total thyroidectomy; diabetes mellitus Type II, well controlled; multiple bone pain;
5 and chronic back pain. [AR 182.] Dr. Girgis determined that Plaintiff was able to
6 lift and carry 50 pounds occasionally and 25 pounds frequently, sit 6 hours in an 8-
7 hour workday, and stand and walk 6 hours in an 8-hour workday with "frequent
8 stops about 10 minutes per hour." [AR 182.]

9 The ALJ agreed with Dr. Girgis' opinion to the extent it was consistent with
10 an RFC for medium work, but disagreed with Dr. Girgis' finding that Plaintiff
11 would need frequent stops of 10 minutes per hour while standing and walking. [AR
12 27, 182.] The ALJ reasonably rejected this limitation because it was not well
13 supported by Dr. Girgis's own findings on examination. [AR 27]; *see Bayliss*, 427
14 F.3d at 1216 (finding discrepancy between a physician's notes, recorded
15 observations, and opinions and the physician's assessment of claimant's limited
16 ability to stand and walk was a clear and convincing reason for rejecting the
17 opinion); *see also Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003) (affirming
18 ALJ's rejection of physician's assessment of claimant's functional limitations as
19 unsupported by physician's treatment notes). The ALJ observed that Dr. Girgis
20 found no evidence of joint deformity or effusion or swelling in the lower extremities
21 and reported that Plaintiff had a normal gait and normal coordination. [AR 27, 180-
22 82.] While Plaintiff notes that Dr. Girgis reported decreased sensation to vibration
23 and touch in both Plaintiff's lower extremities which may be associated with
24 peripheral neuropathy [Pl. Brief at 8], Dr. Girgis stated that Plaintiff's sensory exam
25 was otherwise grossly intact and equal bilaterally. [AR 182.] In addition, Dr. Girgis
26 reported that Plaintiff "walks and moves easily," was "able to change position and
27 get on and off the examining table without difficulty," displayed grossly normal
28 range of motion in the bilateral hips, knees, and ankles, and had normal reflexes

1 bilaterally, good tone with good active motion, no atrophy or fasciculation, strength
2 of 5/5 throughout, no focal motor deficits, no tenderness to palpation to the midline
3 and paraspinal areas of the back, negative straight leg raising test at 90 degrees
4 (seated and supine positions), and only a mildly decreased range of motion in the
5 back (flexion to 88 degrees and lateral bending to 30 degrees). [AR 180-82.]
6 Further, Dr. Girgis found that Plaintiff could climb, stoop, kneel, crouch, and crawl
7 without limit. [AR 183.] Thus, the ALJ’s conclusion that Dr. Girgis’ recorded
8 observations and opinions regarding Plaintiff’s capabilities conflict with the
9 assessed limitation that Plaintiff would need frequent breaks of about 10 minutes for
10 every hour of standing and walking is supported by substantial evidence. [AR 180-
11 83.] Such a conflict was a specific and legitimate reason for discounting Dr. Girgis’
12 opinion. *See Bayliss*, 427 F.3d at 1216; *Connett*, 340 F.3d at 875; *see also*
13 *Tonapetvan*, 242 F.3d at 1149; *Batson*, 359 F.3d at 1195. Although Plaintiff
14 disagrees with the ALJ’s conclusion, “the ALJ is the final arbiter with respect to
15 resolving ambiguities in the medical evidence.” *Tommasetti v. Astrue*, 533 F.3d
16 1035, 1041 (9th Cir. 2008); *see Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
17 2002) (“Where the evidence is susceptible to more than one rational interpretation,
18 one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.”).

19 **C. Plaintiff’s Pain and Symptom Testimony**

20 Plaintiff contends that the ALJ failed to provide sufficient reasons for
21 discounting her subjective symptom testimony. [Pl. Brief at 9-12.] For the reasons
22 discussed below, the ALJ did not err.

23 Once a disability claimant produces evidence of an underlying physical or
24 mental impairment that could reasonably be expected to produce the symptoms
25 alleged and there is no affirmative evidence of malingering, the ALJ must offer
26 “specific, clear and convincing reasons” to reject the claimant’s testimony. *Brown-*
27 *Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015); *Smolen*, 80 F.3d at 1284. The
28 ALJ must identify what testimony is not credible and what evidence discredits the

1 testimony. See *Treichler v. Comm’r, Soc. Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th
2 Cir. 2014); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). But if the ALJ’s
3 assessment of the claimant’s testimony is reasonable and is supported by substantial
4 evidence, it is not the Court’s role to “second-guess” it. *Rollins v. Massanari*, 261
5 F.3d 853, 857 (9th Cir. 2001).

6 Plaintiff testified that she was unable to work due to pain throughout her
7 body, headaches, and weakness in her bones. [AR 26, 605-07, 609.] She
8 complained that she “can’t really do anything,” spends her days lying down (about
9 five hours) or sitting, and does not exercise, prepare meals, drive, vacuum, do
10 laundry, shop for groceries, or help her three children get to or from school. [AR
11 26, 608-11, 613-16.] Plaintiff claimed that she has difficulty sleeping and is unable
12 to stand more than 5 minutes, sit more than an hour, lift more than a plastic cup,
13 walk more than “a little bit,” or eat without vomiting. [AR 26, 609, 611, 613, 616-
14 17.]

15 The ALJ found Plaintiff’s medically determinable impairments could
16 reasonably be expected to cause her alleged symptoms, but Plaintiff’s statements
17 concerning intensity, persistence and limiting effects of the symptoms were not
18 entirely credible. [AR 26-28.] The ALJ first indicated that the medical evidence of
19 record did not support the level of limitation alleged by Plaintiff. [AR 27-28.] A
20 lack of supporting objective medical evidence is a factor which may be considered
21 in evaluating a claimant’s credibility, provided it is not the sole factor. *Bunnell v.*
22 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). The ALJ noted there were no
23 documented findings of weakness on a sustained basis, joint swelling, or deformity
24 and Plaintiff had normal motor strength, reflexes, and gait. [AR 27-28, 180-82.]
25 The ALJ also cited a lack of any diffuse muscle atrophy despite Plaintiff’s claim that
26 she leads an inactive lifestyle that consists primarily of lying down or sitting all day.
27 [AR 28, 180-82, 608-11, 615-16.] The ALJ found that while Plaintiff complained
28 that she vomits after eating and is unable to hold down food, she has been described

1 as “well nourished” and has maintained a relatively stable weight since undergoing
2 gastric bypass surgery in 2013. [AR 26-28, 180, 221, 245-46, 252, 254, 256, 261,
3 611.] It was thus appropriate for the ALJ to conclude the objective medical
4 evidence did not support Plaintiff’s allegations of disabling physical limitations.

5 Second, the ALJ cited Plaintiff’s minimal treatment for her musculoskeletal
6 complaints. [AR 28.] The ALJ noted that the record contained no recommendation
7 for surgical intervention and that Dr. Sial actually advised Plaintiff to maintain
8 normal daily activities and avoid prolonged bed rest. [AR 28, 232.] “Evidence of
9 ‘conservative treatment’ is sufficient to discount a claimant’s testimony regarding
10 severity of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007)
11 (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)); *see also Meanel*
12 *v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints
13 where plaintiff’s “claim that she experienced pain approaching the highest level
14 imaginable was inconsistent with the ‘minimal, conservative treatment’ that she
15 received”).

16 Finally, the ALJ found that Plaintiff has a spotty work history, suggesting that
17 her lack of employment is related to her preference not to work, rather than her
18 claimed inability to work. [AR 28, 83-84.] Evidence of a poor work history is a
19 clear and convincing reason to discredit a claimant’s credibility. *Thomas*, 278 F.3d
20 at 958-59 (upholding ALJ’s negative credibility determination because, among other
21 factors, plaintiff’s “work history was spotty, at best” and she “has shown little
22 propensity to work in her lifetime”); *see* 20 C.F.R. § 416.929(c)(3) (an ALJ may
23 consider a claimant’s prior work record when assessing credibility). Plaintiff’s
24 earnings report demonstrates that Plaintiff had no earnings in 2002, 2003, 2004,
25 2006, and 2010, and very limited earnings in 2000, 2001, 2005, 2007, 2008, 2009,
26 and 2012. [AR 83.] Thus, the ALJ properly considered Plaintiff’s work history in
27 discounting her credibility. *See Thomas*, 278 F.3d at 958-59.

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Accordingly, the Court concludes that the ALJ provided specific, clear and convincing reasons, supported by substantial evidence, for finding Plaintiff's testimony less than fully credible.

V. CONCLUSION

For all of the foregoing reasons, **IT IS ORDERED** that the decision of the Commissioner finding Plaintiff not disabled is **AFFIRMED**.

IT IS ORDERED.

DATED: February 14, 2018



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE