UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FAWNDA M. ROBERTS MURPHY, Plaintiff, v. NANCY A. BERRYHILL, Acting Commissioner of Social Security,[1] Defendant.	Case No. EDCV 16-2384 JC MEMORANDUM OPINION

I. SUMMARY

On November 18, 2016, Fawnda M. Roberts Murphy ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; November 22, 2016 Case Management Order ¶ 5.

[1]Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is hereby substituted for Carolyn W. Colvin as the defendant in this action.

Based on the record as a whole and the applicable law, the decision of the Commissioner is AFFIRMED. The findings of the Administrative Law Judge ("ALJ") are supported by substantial evidence and are free from material error.

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On April 27, 2011, plaintiff filed an application for Disability Insurance Benefits alleging disability beginning on November 15, 2010, due to severe depression, extreme fatigue, and memory loss. (Administrative Record ("AR") 98, 252, 284). The ALJ examined the medical record and heard testimony from plaintiff (who was not represented by counsel) and vocational and medical experts on January 24, 2013. (AR 27-47).

On January 28, 2013, the ALJ determined that plaintiff was not disabled through May 31, 2011, the date last insured[2] ("Pre-Remand Decision"). (AR 98-107).

On July 17, 2014, the Appeals Council granted review, vacated the Pre-Remand Decision, and remanded the matter for further administrative proceedings. (AR 112-14).

On November 25, 2014, the ALJ again examined the medical record and also heard testimony from plaintiff (who was represented by counsel), and vocational and medical experts ("Post-Remand Hearing"). (AR 48-69).

On December 4, 2014, the ALJ determined that plaintiff was not disabled through the date of the decision ("Post-Remand Decision").[3] (AR 9-21). Specifically, the ALJ found: (1) plaintiff suffered from the following severe

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[2]The ALJ subsequently determined that plaintiff was actually insured "through September 30, 2017." (AR 10).

[3]The ALJ stated that the Pre-Remand Decision was, in pertinent respects, incorporated by reference into, and thus supplemented by, the Post-Remand Decision. (AR 15, 16).

impairments: fatigue, depression, memory loss, back strain, and obesity (AR 12); (2) plaintiff's impairments, considered singly or in combination, did not meet or medically equal a listed impairment (AR 13-14); (3) plaintiff retained the residual functional capacity to perform light work (20 C.F.R. § 404.1567(b)), with additional limitations[4] (AR 14); (4) plaintiff was capable of performing past relevant work as a dealer compliance representative (AR 19); (5) alternatively, there are jobs that exist in significant numbers in the national economy that plaintiff could perform, specifically office helper, mail clerk, and routing clerk (AR 19-20); and (6) plaintiff's statements regarding the intensity, persistence, and limiting effects of subjective symptoms were not credible to the extent they were inconsistent with the ALJ's residual functional capacity assessment (AR 15).

On September 28, 2016, the Appeals Council denied plaintiff's application for review. (AR 1).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that the claimant is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The impairment must render the claimant incapable of performing the work the claimant previously performed and incapable of performing any other substantial

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[4]The ALJ determined that plaintiff: (i) could lift 20 pounds occasionally and 10 pounds frequently; (ii) could stand and walk for six hours out of an eight-hour work day with regular breaks; (iii) could sit for six hours in an eight-hour work day with regular breaks; (iv) needed to avoid working around unprotected machinery and at unprotected heights; (v) was limited to tasks not requiring hypervigilance; (vi) was precluded from fast-paced work; and (vii) was limited to occasional contact with the public. (AR 14).

gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is required to use the following five-step sequential evaluation process:

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

(2) Is the claimant's alleged impairment sufficiently severe to limit the claimant's ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform claimant's past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow the claimant to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citations omitted); see also 20 C.F.R. § 404.1520(a)(4) (explaining five-step sequential evaluation process).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citation omitted).

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B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted).

"Overall, the standard of review is 'highly deferential.'" Rounds v. Commissioner of Social Security Administration, 807 F.3d 996, 1002 (9th Cir. 2015) (citation omitted). Hence, an ALJ's decision to deny benefits must be upheld if the evidence could reasonably support either affirming or reversing the decision. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457). Even when an ALJ's decision contains error, it must be affirmed if the error was harmless. Treichler v. Commissioner of Social Security Administration, 775 F.3d 1090, 1099 (9th Cir. 2014). An ALJ's error is harmless if (1) it was inconsequential to the ultimate nondisability determination; or (2) despite the error, the ALJ's path may reasonably be discerned, even if the ALJ's decision was drafted with less than ideal clarity. Id. (citation and quotation marks omitted). The claimant has the burden to establish that an ALJ's error was not harmless. See Molina, 674 F.3d at 1111 (citing Shinseki v. Sanders, 556 U.S. 396, 409 (2009)).

While an ALJ's decision need not discuss every piece of evidence or be drafted with "ideal clarity," at a minimum it must explain the ALJ's reasoning with sufficient specificity and clarity to "allow[] for meaningful review." Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015) (citations and internal quotation marks omitted); Hiler v. Astrue, 687 F.3d 1208, 1212 (9th Cir. 2012) (citation and quotation marks omitted).

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IV. DISCUSSION

A. The ALJ Properly Evaluated the Opinions of the Internal Medicine Consultative Examiner

1. Pertinent Law

In Social Security cases, the amount of weight given to medical opinions generally varies depending on the type of medical professional who provided the opinions, namely "treating physicians," "examining physicians," and "nonexamining physicians" (*e.g.*, "State agency medical or psychological consultant[s]"). 20 C.F.R. §§ 404.1527(c)(1)-(2) & (e), 404.1502, 404.1513(a); Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014) (citation and quotation marks omitted). A treating physician's opinion is generally given the most weight, and may be "controlling" if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record[.]" 20 C.F.R. § 404.1527(c)(2); Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007) (citations and quotation marks omitted). In turn, an examining, but non-treating physician's opinion is entitled to less weight than a treating physician's opinion, but more weight than a nonexamining physician's opinion. Garrison, 759 F.3d at 1012 (citation omitted).

An ALJ may reject the uncontroverted opinion of an examining physician by providing "clear and convincing reasons that are supported by substantial evidence" for doing so. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (citation omitted). Where an examining physician's opinion is contradicted by another doctor's opinion, an ALJ may reject such opinion only "by providing specific and legitimate reasons that are supported by substantial evidence." Garrison, 759 F.3d at 1012 (citation and footnote omitted).

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2. Analysis

Plaintiff contends that the ALJ improperly rejected certain medical opinions expressed in a July 19, 2011 Complete Internal Medicine Evaluation by Dr. Nizar Salek, a state agency consultative examining physician – specifically that plaintiff was limited to frequent reaching in all directions, frequent gross manipulation, and occasional fine manipulation (collectively "Dr. Salek's Manipulation Limitations"). (Plaintiff's Motion at 4-6) (citing AR 348). Plaintiff argues that a remand or reversal is warranted because the foregoing error ran afoul of the Appeals Council's remand instructions. (Plaintiff's Motion at 6). The Court disagrees because the ALJ properly rejected Dr. Salek's Manipulation Limitations for clear and convincing, specific and legitimate reasons supported by substantial evidence.

First, the ALJ properly rejected Dr. Salek's Manipulation Limitations because, as the ALJ noted, they were not supported by the physician's own clinical findings or the objective medical evidence in the record as a whole. See Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003) (ALJ properly rejected treating physician's opinion where "treatment notes provide[d] no basis for the functional restrictions [physician] opined should be imposed on [claimant]"); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings."). For example, as the ALJ noted, Dr. Anthony Francis, a board-certified orthopedist who testified as a medical expert at the Post-Remand Hearing, essentially stated that "[u]pon his review of the consultative examination report and the entire medical record, Dr. Francis [found] . . . no objective diagnostic or clinical findings to support a diagnosis of radiculopathy or carpal tunnel syndrome" and also found nothing "within the four corners of Dr. Salek's consultative examination report that supported his diagnosis of radiculopathy or carpal tunnel syndrome." (AR 16-

17; see AR 54-56). To the extent plaintiff suggests that the medical evidence actually supports such diagnoses and/or Dr. Salek's Manipulation Limitations (Plaintiff's Motion at 6), this Court will not second guess the ALJ's reasonable determination to the contrary, even if such evidence could give rise to inferences more favorable to plaintiff. See Robbins, 466 F.3d at 882 (citation omitted).

Second, the ALJ also properly rejected Dr. Salek's Manipulation Limitations to the extent they were based solely on plaintiff's subjective complaints, which complaints the ALJ found less credible for clear and convincing reasons (a determination plaintiff has not challenged). (AR 15-17, 103-04); see, e.g., Ghanim v. Colvin, 763 F.3d 1154, 1162 (9th Cir. 2014) (ALJ may discount medical opinion based "to a large extent" on a claimant's "self-reports" that the ALJ found "not credible") (internal quotation marks and citations omitted). The ALJ properly based this finding, in part, on the testimony provided by Dr. Francis. (AR 16-18); see Morgan v. Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir. 1999) (testifying medical expert opinions may serve as substantial evidence when "they are supported by other evidence in the record and are consistent with it"); Sportsman v. Colvin, 637 Fed. Appx. 992, (9th Cir. 2016) (noting "ALJ did not err in assigning substantial weight to the state agency medical consultant, whose opinion relied on and was consistent with the medical evidence of record") (citing Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)).

Accordingly, a remand or reversal on this basis is not warranted.

B. The ALJ Did Not Fail Adequately to Develop the Record

Plaintiff appears to contend that the ALJ failed adequately to develop the record of plaintiff's physical impairments and limitations essentially because (1) the record did not contain any medical evidence documenting plaintiff's alleged foot condition (*i.e.*, treatment and surgery referral for "deep ulcerated sores that ha[d] to be removed"); (2) the medical record is "blatantly incomplete" (*i.e.*,

the record "contains fewer than 30 pages of medical evidence and has no treatment records whatsoever for the years of 2010, 2011, 2012, 2013, and 2015"); and (3) the ALJ should have, *sua sponte*, ordered an updated internal medicine consultative examination ("CE") of plaintiff since the internal medicine CE currently in the record was performed more than three years before the Post-Remand Hearing. (Plaintiff's Motion at 2-4). A remand or reversal is not warranted on any of the above grounds.

1. Pertinent Law

Although a claimant bears the ultimate burden of proving disability, an ALJ still has an "independent duty" to help each claimant "fully and fairly develop the record" at every step of the sequential evaluation process. Tonapetyan, 242 F.3d at 1150 (citations and internal quotation marks omitted). An ALJ's duty to develop the record further is triggered only when the existing record contains "ambiguous evidence" or is "inadequate to allow for proper evaluation of the evidence." Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (citation omitted). A specific finding by the ALJ of ambiguity or inadequacy is not necessary to trigger the ALJ's duty. McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011) (citation omitted). Nonetheless, an ALJ is not obliged to investigate every conceivable condition or impairment a claimant might assert. An ALJ must "conduct an appropriate inquiry" only when the record contains "some objective [medical] evidence" which plausibly suggests the existence of a medically determinable impairment that could have a "material impact" on the ALJ's decision. See generally id. (citations omitted); Mayes, 276 F.3d at 459-61; Breen v. Callahan, 1998 WL 272998, at *3 (N.D. Cal. May 22, 1998) (citing Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); Wainwright v. Secretary of Health and Human Services, 939 F.2d 680, 682 (9th Cir. 1991)).

An ALJ may satisfy the duty to develop the record, in part, by ordering a consultative examination. See 20 C.F.R. §§ 404.1519 et seq.; Reed v. Massanari,

270 F.3d 838, 841 (9th Cir. 2001) (citing, in part, 20 C.F.R. § 404.1519); Pederson v. Colvin, 31 F. Supp. 3d 1234, 1244 (E.D. Wash. 2014) (citation omitted). An ALJ has "broad latitude" to decide whether or not to order a consultative examination in a particular case. Reed, 270 F.3d at 842 (citation and internal quotation marks omitted).

2. Analysis

First, plaintiff has presented no *medical* evidence which documents her alleged foot condition or any limitations related thereto. Plaintiff's Post-Remand Hearing testimony regarding such impairment, without more, was insufficient to trigger the ALJ's duty to develop the record further. See, e.g., Mayes, 276 F.3d at 459-61 (ALJ had no duty to develop record regarding physical impairment where claimant presented no *medical* evidence that such an impairment existed during the relevant time period); Breen, 1998 WL 272998, *3 (N.D. Cal. May 22, 1998) (noting that, in the Ninth Circuit, the ALJ's obligation to develop the record is triggered by "the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision") (citations omitted). Moreover, plaintiff's testimony in response to the ALJ's questions at the Post-Remand Hearing, in part, suggested that the foot surgery for which plaintiff allegedly was referred would have only involved "a simple in-and-out procedure" by a podiatrist lasting no more than a few days. (AR 66). Hence, it would have been reasonable to infer (as the ALJ apparently did) (AR 15, 66) that any medical evidence related to plaintiff's alleged foot condition that could have been discovered on further inquiry would not have been material to the ALJ's ultimate disability decision. See generally Magallanes v. Bowen, 881 F.2d 747, 755 (9th Cir. 1989) (court may draw specific and legitimate inferences from ALJ's opinion). Even assuming the ALJ should have inquired further about plaintiff's foot condition, plaintiff has not shown that any such error was anything other than harmless. For example, plaintiff fails to demonstrate that her foot

impairment caused any additional functional limitation that was not already accounted for in the ALJ's physical residual functional capacity assessment. See, e.g., Sawyer v. Astrue, 303 Fed. Appx. 453, 455 (9th Cir. 2008) (noting court may affirm non-disability decision where ALJ's failure properly to consider medical opinion evidence is harmless – *i.e.*, "where the mistake was nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion. . . .") (citing Stout, 454 F.3d at 1055) (quotation marks omitted).

Second, the ALJ did not find, nor does the record otherwise reflect, that the existing medical evidence was ambiguous or insufficient as a whole to permit the ALJ properly to assess plaintiff's physical residual functional capacity or to make a final disability determination. Plaintiff's conclusory assertions that the medical record was "blatantly incomplete" and the ALJ failed properly to "ensure that [certain] missing relevant medical evidence was obtained and incorporated into [the] record" (Plaintiff's Motion at 3-4) do not persuade the Court to so conclude. For instance, although plaintiff complains that the record "currently . . . has no treatment records whatsoever for the years of 2010, 2011, 2012, 2013, and 2015[]" (Plaintiff's Motion at 3), she does not say when (or even if) she received any medical treatment during such years that necessarily would have generated any material medical records that could have been discovered on further inquiry. Cf., e.g., McLeod, 640 F.3d at 885-86 ("inadequate" evidence triggered ALJ's duty to develop the record further where plaintiff's testimony suggested "likelihood" that other significant probative evidence existed which "might very well matter" to evaluation of Social Security disability claim) (citations omitted). Even so, plaintiff has not identified any particular treatment records among the purportedly "missing" medical evidence which reflect a medically determinable impairment or related functional limitation that was not already accounted for in the ALJ's residual functional capacity assessment. Cf. Carmickle v. Commissioner, Social Security Administration, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (courts

"ordinarily will not consider matters on appeal that are not specifically and distinctly argued in an appellant's opening brief") (citation and internal quotation marks omitted).

Finally, plaintiff's current speculation that her impairments *could have* become worse and/or "new impairments" *could have* developed over time (Plaintiff's Motion at 3) is insufficient to trigger a duty to order a second internal medicine CE of plaintiff at government expense. See, e.g., Breen, 1998 WL 272998, at *4 ("[A]n ALJ is not required to order a consultative examination solely on the basis of a plaintiff's allegations unsupported by objective medical evidence. . . .") (citing 42 U.S.C. § 423(d)(5)(A)); see also Reed, 270 F.3d at 842 ("The government is not required to bear the expense of [a consultative] examination for every claimant.") (citing 20 C.F.R. §§ 404.1517-1519t).

Accordingly, a remand or reversal on this basis is not warranted.

V. CONCLUSION

For the foregoing reasons, the decision of the Commissioner of Social Security is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 4, 2017

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE