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

SAMANTHA ACEVEDO,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. ED CV 17-00775 AFM

**MEMORANDUM OPINION AND
ORDER AFFIRMING
DECISION OF COMMISSIONER**

Plaintiff seeks review of the Commissioner's final decision denying her applications for disability insurance benefits and supplemental security income. In accordance with the Court's case management order, the parties have filed memorandum briefs addressing the merits of the disputed issue. For the following reasons, the Commissioner's decision is affirmed.

BACKGROUND

In February 2013, Plaintiff applied for disability insurance benefits and supplemental security income, alleging that she became disabled and unable to work on June 1, 2007. Plaintiff's claims were denied initially and on reconsideration. An Administrative Law Judge ("ALJ") conducted a hearing on

1 May 4, 2015, at which Plaintiff, her attorney, and a vocational expert were present.
2 (Administrative Record (“AR”) 115-137.) In a July 14, 2015 written decision that
3 constitutes the Commissioner’s final decision, the ALJ found that Plaintiff suffered
4 from the following severe impairments: morbid obesity; diabetes mellitus;
5 degenerative joint disease; and renal insufficiency. (AR 103.) Nevertheless, the ALJ
6 found that Plaintiff retained the residual functional capacity (“RFC”) to perform a
7 restricted range of sedentary work. After concluding that Plaintiff’s RFC did not
8 preclude her from performing jobs that exist in significant numbers in the national
9 economy, the ALJ found Plaintiff not disabled at any time from June 1, 2007
10 through the date of the ALJ’s decision. (AR 101-110.)

11 **DISPUTED ISSUE**

12 The sole disputed issue is whether the ALJ properly evaluated Plaintiff’s
13 subjective complaints.

14 **STANDARD OF REVIEW**

15 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
16 determine whether the Commissioner’s findings are supported by substantial
17 evidence and whether the proper legal standards were applied. *See Treichler v.*
18 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
19 evidence means “more than a mere scintilla” but less than a preponderance. *See*
20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
21 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
22 reasonable mind might accept as adequate to support a conclusion.” *Richardson*,
23 402 U.S. at 401. Where evidence is susceptible of more than one rational
24 interpretation, the Commissioner’s decision must be upheld. *See Orn v. Astrue*, 495
25 F.3d 625, 630 (9th Cir. 2007).

26 **DISCUSSION**

27 Plaintiff argues that the ALJ failed to provide clear and convincing reasons
28 for discrediting her subjective testimony about her symptoms and limitations. (ECF

1 No. 21 at 4). Plaintiff’s claim is based upon statements included in her March 2013
2 function report as well as her testimony at the hearing.

3 According to Plaintiff’s function report, Plaintiff stayed in her pajamas all
4 day unless she had to go somewhere. Plaintiff bathed once a month for fear of
5 falling; could walk less than a block without needing to rest; was unable to stand
6 “for a long period of time”; and needed reminders to take her medication. (AR 326-
7 328, 331.) Plaintiff reported experiencing difficulty lifting, squatting, bending,
8 reaching, walking, kneeling, stair climbing and completing tasks. (AR 331.)
9 Plaintiff was able to do laundry once a week. (AR 328.) At the time she completed
10 the form (2013), Plaintiff took care of her two grandchildren while her daughter
11 worked. As part of this job, Plaintiff drove one granddaughter to and from
12 preschool. (AR 327.)

13 At the hearing, Plaintiff testified that her days consisted of waking up, going
14 to the living room to watch TV, then going back to sleep. She never walked outside
15 because she was afraid of falling. She spent all day lying down because it was the
16 most comfortable position. (AR 128-130.) Plaintiff was able to dress and groom
17 herself, but it took “a while.” (AR 131.) She was unable to grocery shop or do
18 errands. (AR 129.) Plaintiff testified that she did not drive, but it is not clear
19 whether she attributed this to a physical limitation or to a “financial issue.” (AR
20 131 (Plaintiff’s testimony that she did not renew her driver’s license because she
21 had unpaid tickets).)

22 Where, as here, a claimant has presented evidence of an underlying
23 impairment and the record is devoid of affirmative evidence of malingering, the
24 ALJ’s reasons for rejecting the claimant’s subjective symptom statements must be
25 “specific, clear and convincing.” *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir.
26 2014) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). “General
27 findings [regarding a claimant’s credibility] are insufficient; rather, the ALJ must
28 identify what testimony is not credible and what evidence undermines the

1 claimant's complaints." *Burrell*, 775 F.3d at 1138 (quoting *Lester v. Chater*, 81
2 F.3d 821, 834) (9th Cir. 1995)). The ALJ's findings "must be sufficiently specific
3 to allow a reviewing court to conclude the adjudicator rejected the claimant's
4 testimony on permissible grounds and did not arbitrarily discredit a claimant's
5 testimony regarding pain." *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir.
6 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 345-46 (9th Cir. 1991) (en banc)). An
7 ALJ may consider a variety of factors ordinarily used in assessing credibility,
8 including inconsistencies within the claimant's testimony or between the claimant's
9 testimony and the claimant's conduct, the claimant's work record, and information
10 from physicians, relatives, or friends concerning the nature, severity, and effect of
11 the claimant's symptoms. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
12 2002). *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.1997); *Fair v. Bowen*,
13 885 F.2d 597, 604 n.5 (9th Cir. 1989).

14 Here, the ALJ found that Plaintiff suffered from medically determinable
15 impairments that could reasonably be expected to produce Plaintiff's pain or other
16 alleged symptoms, but determined that Plaintiff's statements concerning the
17 intensity, persistence, and limiting effects of these symptoms were not entirely
18 credible. (AR 107.) Nevertheless, the ALJ partially credited Plaintiff's testimony by
19 finding she was able to perform a limited range of sedentary work precluding her
20 past work, rejecting the medical opinions that Plaintiff could perform light or
21 medium work. (AR 106-109.) The ALJ offered the following reasons for his
22 adverse credibility determination.

23 First, the ALJ found that Plaintiff's subjective testimony was not
24 substantiated by objective medical evidence in the record. (AR 107.) "Although
25 lack of medical evidence cannot form the sole basis for discounting pain testimony,
26 it is a factor that the ALJ can consider in his credibility analysis." *Burch v.*
27 *Barnhart*, 400 F.3d 676, 678 (9th Cir. 2005); *see Morgan, v. Comm'r of Social Sec.*
28 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may properly consider conflict

1 between claimant’s testimony of subjective complaints and objective medical
2 evidence in the record); *see also Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1999)
3 (ALJ may properly rely on weak objective support for claimant’s subjective
4 complaints).

5 Plaintiff contends that the ALJ “simply cites to most of the exhibit in the file
6 without anything more.” (ECF No. 21 at 6.) Contrary to Plaintiff’s contention,
7 however, the ALJ cited and discussed specific medical evidence to support his
8 conclusion.

9 In particular, the ALJ noted that the record contained “little evidence of
10 significant and persistent neurologic deficits” and discussed the results of three
11 different physical examinations – one in February 2013 and two in November 2013.
12 (AR 104.) During her February 2013 exam, Plaintiff had normal gait; normal
13 heel/toe ambulation; no abnormalities of the knee, leg, ankle, or foot; no edema; a
14 full range of motion, intact sensation; negative straight leg raise test; and normal
15 deep tendon reflexes. Plaintiff exhibited tenderness in her back and knees. She
16 reported her back pain as mild and her knee pain as moderate. (AR 490-493.) A
17 complete orthopedic evaluation in November 2013 resulted in similar findings.
18 That is, Plaintiff had normal posture and gait; she did not use an assistive device;
19 she was able to sit comfortably in a chair and to get on and off the exam table
20 without difficulty; she had tenderness, but full range of motion in her spine;
21 negative straight leg raising; her shoulders, elbows, wrists, hips, knees, ankles and
22 feet were all normal and with full range of motion; her knees were stable and
23 without abnormality; her strength was 5/5; and her sensation was intact. Dr. Hoang
24 opined that Plaintiff was able to stand or walk six hours in an eight-hour workday,
25 was able to sit six hours in an eight-hour workday, and did not need an assistive
26 device. (AR 519-522.) Finally, during a November 2013 evaluation performed for
27 purposes of physical therapy, Plaintiff exhibited no gait deviation, no signs of
28 muscle atrophy, and her range of motion was within functional limits. (AR 539.)

1 In addition, the ALJ discussed Plaintiff's two hospitalizations. He noted that
2 Plaintiff was hospitalized for approximately a week in July 2014 for hypovolemic
3 shock, dehydration, and acute renal failure with vomiting and diarrhea. Plaintiff
4 was treated with medications and discharged in stable condition. (AR 653-794.) In
5 November 2014, Plaintiff was hospitalized after complaining of weakness and
6 dizziness. A CT scan of Plaintiff's brain was unremarkable, as was imaging of
7 Plaintiff's chest. (AR 610-611.) Plaintiff was diagnosed with dizziness,
8 hypotension, and mild chronic renal insufficiency. She was stabilized and
9 discharged with directions to follow up with primary care physician. (AR 576-638.)

10 With regard to Plaintiff's mental health, the ALJ correctly noted that Plaintiff
11 neither sought nor received regular and continuing mental health treatment. Other
12 than prescription medication prescribed by her primary care provider, the record
13 contains few clinical findings suggesting that Plaintiff suffered from more than
14 minimal cognitive or psychological limitations. (AR 105-106.) The ALJ reviewed
15 the report of Dr. Rathana-Nakintara, who performed a complete psychiatric
16 consultative evaluation in April 2013. Dr. Rathana-Nakintara reported that Plaintiff
17 was cooperative and responsive; had appropriate affect and goal directed thoughts;
18 exhibited no psychosis; and performed relatively well on formal memory and
19 concentration testing. (AR 502-504.) Plaintiff reported that she took Celexa and it
20 helped her "not feel depressed." (AR 503.) Dr. Rathana-Nakintara opined that
21 Plaintiff had no intellectual or psychological functional limitations. (AR 505-506.)
22 The ALJ also considered the reports of the state agency psychological consultants
23 who found Plaintiff suffered no severe psychological impairment. (AR 105, 138-
24 149, 176-187.)

25 With regard to Plaintiff's pelvic, fibroid and cystitis impairments, the ALJ
26 noted Plaintiff's hysterectomy in 2008, and stated that although the surgery "would
27 normally weigh in [Plaintiff]'s favor, it is offset by the fact that the record reflects
28 that the surgery was generally successful in improving those symptoms." (AR 108.)

1 This conclusion is borne out by the record. (*See* AR 390-411, 496).

2 Finally, the ALJ observed that no treating physician opined that Plaintiff had
3 the severe limitations she alleged; in fact, no physician opined that Plaintiff was
4 disabled or had limitations greater than those determined in the ALJ’s decision.
5 (AR 108.) It was permissible for the ALJ to rely upon the contradiction between
6 Plaintiff’s alleged limitations and the medical opinions regarding those limitations.
7 *See Harris v. Berryhill*, 691 F. App’x 338 (9th Cir. 2017).

8 In support of her argument that the ALJ mischaracterized the medical record,
9 Plaintiff cites two pieces of evidence: a February 2015 X-ray revealing a calcaneal
10 spur and soft tissue swelling in Plaintiff’s knee and a single page from the nearly
11 200-page records from Hemet Valley Medical Center Emergency Department dated
12 August 3, 2014 noting “weak gait; ambulatory aid; and history of falling.”¹ (ECF
13 No. 21 at 7 (citing AR 572, 851).) While these records may constitute evidence that
14 Plaintiff suffered from a medically determinable impairment, they do not
15 undermine the ALJ’s conclusion that the objective medical evidence did not support
16 the severity of Plaintiff’s subjective complaints. The ALJ was not compelled to find
17 that evidence of a weak gait while hospitalized, swelling in the knee, and a
18 calcaneal spur constituted objective medical evidence supporting Plaintiff’s
19 testimony that her impairments were so severe that she was unable to stand, walk,
20 or perform almost all work-related activity. In sum, the ALJ’s assessment of the
21 objective medical evidence was supported by substantial evidence.

22 Second, the ALJ discounted Plaintiff’s credibility based upon his finding that
23 Plaintiff had “not been entirely compliant in following prescribed treatment, which

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25 ¹ The Court notes that records from the same hospital stay include apparently
26 inconsistent findings that Plaintiff ambulated independently, had a steady gait, and
27 no limitations or abnormalities in range of motion or strength. (AR 796, 798.) In
28 addition, as set forth above, the record contains numerous other treatment notes and
assessments recording Plaintiff’s gait as normal. (*See, e.g.*, AR 490-493, 519-522,
635, 1032-1040.)

1 suggests that the symptoms may not have been as limiting as [Plaintiff] alleged.”
2 (AR 104, 107.) Specifically, the cited evidence reflects that Plaintiff failed to
3 complete physical therapy: After failing to appear for multiple appointments,
4 Plaintiff was discharged from physical therapy due to “non-adherence.” (AR 536.)
5 This was an appropriate basis on which to base a credibility determination. *See*
6 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (an unexplained, or
7 inadequately explained, failure to seek treatment may be the basis for finding a
8 complaint unjustified or exaggerated); *Orn*, 495 F.3d at 638 (same); *Fair*, 885 F.2d
9 at 604 (ALJ may rely on the failure to follow a prescribed course of treatment in
10 making adverse credibility finding).

11 Third, the ALJ considered Plaintiff’s work record, stating:

12 [Plaintiff] had a very poor work record long before [she] allegedly
13 became unable to work. In fact, her earnings record shows that she
14 earned less than \$10,000 in 2000 and 2003 through 2006 (Exhibit 8D).
15 Her failure to work for years at her full capacity when she could have
16 done so reflects poorly on her motivation for gainful employment
17 regardless of any alleged limitations.

18 * * *

19 There is evidence that [Plaintiff] stopped working for reasons not
20 related to the allegedly disabling impairments. [Plaintiff] last worked
21 as a mail carrier for a school district in 2007 and then went to jail in
22 2007 and has not worked since (Exhibit 5F/2). Her arrest appears to be
23 the reason she stopped working.

24 (AR 108.)

25 “An ALJ is required to consider work history when assessing credibility.”
26 *Matthews v. Berryhill*, 2017 WL 3383118, at *12 (E.D. Cal. Aug. 7, 2017) (citing
27 20 C.F.R. § 404.1529(c)(3) and Social Security Ruling 96–7p, 1996 SSR LEXIS 4).
28 “Evidence of a poor work history that suggests a claimant is not motivated to work

1 is a proper reason to discredit a claimant's testimony that he is unable to work."
2 *Franz v. Colvin*, 91 F. Supp. 3d 1200, 1209 (D. Or. 2015) (citing *Thomas*, 278 F.3d
3 at 959); *see also Albidrez v. Astrue*, 504 F. Supp. 2d 814, 822 (C.D. Cal. 2007)
4 (ALJ "may properly consider a claimant's poor or nonexistent work history in
5 making a negative credibility determination").

6 Here, Plaintiff's work record reveals that she earned \$5,565 in 2003; \$9,246
7 in 2004; \$6,253 in 2005; and \$5,973 in 2006. (AR 288, 290-293.) The ALJ could
8 properly discount Plaintiff's claim that she was unable to work by citing to
9 evidence suggesting that Plaintiff was generally not motivated to work.

10 Plaintiff argues that the ALJ erred in concluding that she "did not work at her
11 full capacity." (ECF No. 21 at 9.) According to Plaintiff: "Full capacity for a person
12 who was a[n] on-call substitute teacher is not something that is up for the person to
13 decide when she can work [or] not work." (ECF No. 21 at 9.) Plaintiff's argument
14 that her poor work history could be explained by the difficulty obtaining work as an
15 on-call substitute teacher is unavailing. The Court may not second-guess the ALJ's
16 finding merely because the evidence may be susceptible of alternative
17 interpretations. *See Matthews*, 2017 WL 3383118, at *12 ("While it is true that
18 factor(s) other than a lack of propensity to work could account for Plaintiff's low
19 earnings from 1997 to 2007, this Court may not 'second-guess' the ALJ's
20 credibility finding simply because the evidence may have been susceptible of other
21 interpretations more favorable to Plaintiff.").

22 In addition, the ALJ properly considered evidence that Plaintiff lost her
23 previous employment for reasons that were not related to her disability. Plaintiff
24 testified that she worked at a school as a campus supervisor, a position that required
25 her to be on her feet most of the time. She further testified that she stopped working
26 in 2007 because she was arrested and incarcerated. When Plaintiff was released
27 approximately two and a half weeks later, she was unable to resume work because
28 the school "cut" her position. (AR 118-121.) Plaintiff's testimony that she ceased

1 working because her job was no longer available contradicts Plaintiff's claim of
2 disability. Thus, the ALJ properly relied upon Plaintiff's work history in making an
3 adverse credibility finding. *See, e.g., Drouin v. Sullivan*, 966 F.2d 1255, 1258–59
4 (9th Cir. 1992) (ALJ did not err by discounting claimant's credibility because, in
5 part, claimant "did not lose her past two jobs because of pain"); *Caldwell v.*
6 *Comm'r of Soc. Sec.*, 2016 WL 4041331, at *6 (E.D. Cal. July 26, 2016) (ALJ
7 reasonably relied on claimant's work record in discounting her credibility where
8 "there [was] evidence suggesting that plaintiff had stopped working for reasons not
9 related to her impairments"); *Clark v. Colvin*, 2013 WL 6095842, at *3 (W.D.
10 Wash. Nov. 20, 2013) (ALJ did not err in finding claimant's subjective complaints
11 less credible based on claimant's work history where claimant's "job ended for
12 economic reasons instead of impairment-related reasons"). This was an appropriate
13 factor for the ALJ to consider in assessing Plaintiff's credibility. *See Carter v.*
14 *Astrue*, 472 F. App'x 550, 552 (9th Cir. 2012) (the "internal contradiction" in
15 claimant's assertion that he was fired due to racial issues and not due to his inability
16 to perform his work was a legitimate reason to disbelieve his testimony); *Wells v.*
17 *Comm'r of Soc. Sec.*, 2017 WL 3620054, at *8 (E.D. Cal. Aug. 23, 2017) (ALJ
18 reasonably relied on claimant's poor work history where plaintiff argued that his
19 low earnings were not due to a lack of motivation to work but rather were a result
20 of economic factors, because plaintiff's proffered reasons for his lack of gainful
21 employment were not related to his impairments).

22 Fourth, Plaintiff argues that the ALJ erred by relying upon her daily activities
23 to discount her credibility. (ECF No. 21 at 7-8.) The ALJ stated:

24 As mentioned earlier, the record reflects work activity after the alleged
25 onset date. Although that activity did not constitute disqualifying
26 substantial gainful activity, it does indicate that [Plaintiff]'s daily
27 activities have, at least at times, been somewhat greater than [Plaintiff]
28 has generally reported.

1 (AR 108.)

2 Plaintiff contends that the ALJ could not rely upon Plaintiff's childcare
3 activities to discredit her subjective limitations without first developing the record
4 to illuminate exactly what activities that childcare entailed. The ALJ, however,
5 made a finding about Plaintiff's veracity as a result of her working past her alleged
6 onset date. That finding is supported by the record, which confirms that in 2013
7 Plaintiff earned \$9,395 in wages by providing childcare. (AR 128, 293.) In
8 explaining these earnings, Plaintiff testified that she "just watched" her two
9 granddaughters and would "take them and drop them off at school" (AR 128-129.)
10 Plaintiff performed this work for the entire year. (AR 121.) It was not improper for
11 the ALJ to consider evidence that Plaintiff was capable of working past her alleged
12 onset date as a basis for doubting her veracity. *Carter*, 472 F. App'x at 552 ("the
13 fact that Carter continued working past his alleged onset date forms a valid basis for
14 doubting his veracity").

15 Finally, Plaintiff challenges the ALJ's consideration of the course of her
16 treatment. (ECF No. 21 at 8.) The ALJ found that Plaintiff "has not generally
17 received the type of medical treatment one would expect for a totally disabled
18 individual." (AR 108.) In particular, the ALJ noted that Plaintiff received little
19 specialist care for any of her physical impairments and that she "neither sought nor
20 obtained any regular and continuing mental health treatment from either a
21 psychiatrist or psychologist." (AR 108.)

22 Generally, evidence of "conservative treatment" is sufficient to discount a
23 claimant's testimony regarding the severity of an impairment. *Parra v. Astrue*, 481
24 F.3d 742, 751 (9th Cir. 2007). At the same time, an ALJ errs in relying on
25 conservative treatment if "the record does not reflect that more aggressive treatment
26 options are appropriate or available." *Lapeirre-Gutt v. Astrue*, 382 F. App'x 662,
27 664 (9th Cir. 2010); *see also Matamoros v. Colvin*, 2014 WL 1682062, at *4 (C.D.
28 Cal. April 28, 2014) ("The ALJ cannot fault [the claimant] for failing to pursue

1 non-conservative treatment options if none exist.”) (citation omitted). Even
2 assuming the ALJ improperly characterized Plaintiff’s treatment as conservative,
3 any error was harmless in light of the other clear and convincing reasons provided
4 in his decision. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1163
5 (9th Cir. 2008) (ALJ’s error in relying on claimant’s receipt of unemployment
6 benefits and on relatively conservative pain treatment regime was harmless where
7 ALJ provided other specific and legitimate reasons for finding claimant’s testimony
8 incredible).

9 For the foregoing reasons, the Court concludes that the ALJ did not err in
10 evaluating Plaintiff’s subjective testimony.

11 **ORDER**

12 IT THEREFORE IS ORDERED that Judgment be entered affirming the
13 decision of the Commissioner and dismissing this action with prejudice.

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15 DATED: 3/1/2018

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ALEXANDER F. MacKINNON
19 UNITED STATES MAGISTRATE JUDGE
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