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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

CATHLEEN SUE NARDICO,)	Case No. ED CV 17-1499-AS
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

PROCEEDINGS

On July 27, 2017, Plaintiff filed a Complaint seeking review of the denial of her application for Supplemental Security Income ("SSI"). (Dkt. No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Dkt. Nos. 11, 16). On December 26, 2017, Defendant filed an Answer along with the Administrative Record ("AR"). (Dkt. Nos. 19, 20). On March 26, 2018, the parties filed a Joint Stipulation ("Joint Stip."), setting forth their respective positions regarding Plaintiff's claims. (Dkt. No. 23).

1 The Court has taken this matter under submission without oral
2 argument. See C.D. Cal. L.R. 7-15.

3
4 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

5
6 On May 22, 2013, Plaintiff, formerly employed as a mail delivery
7 driver, (see AR 150), filed an SSI application alleging an inability
8 to work because of a disability since June 30, 2006. (AR 131-47).
9 On August 6, 2015, an Administrative Law Judge, James D. Goodman
10 ("ALJ"), held a hearing at which Plaintiff's counsel was present, but
11 Plaintiff was not, despite having received notice of the hearing from
12 the Administration and her counsel. (AR 47-51; see also AR 100-05,
13 123 (notices of hearing)). The ALJ gave Plaintiff seven days to move
14 to reopen the proceedings. (AR 50). The ALJ also found that
15 Plaintiff's period of disability began on May 22, 2013, the date of
16 her application. (AR 50). On August 6, 2015, Plaintiff moved to
17 reopen the hearing, (AR 201-03). On August 28, 2015, the ALJ denied
18 the motion. (AR 127).

19
20 On October 14, 2015, the ALJ issued a decision denying
21 Plaintiff's application. (AR 24-42). First, the ALJ found that
22 Plaintiff had constructively waived her right to appear at the
23 hearing. (AR 25-28). The ALJ then proceeded through step four of
24 the five-step sequential process and denied Plaintiff's claim. At
25 step one, the ALJ determined that Plaintiff has not engaged in
26 substantial gainful activity since May 22, 2013, the application
27 date. (AR 31). At step two, the ALJ found that Plaintiff has
28 several "medically determinable conditions of ill-being," including

1 degenerative disc disease and obesity. (Id.). Proceeding to step
2 three, the ALJ found that Plaintiff's impairments do not meet or
3 equal a listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1.
4 (AR 32). After assessing Plaintiff's Residual Functional Capacity,
5 the ALJ determined, at step four, that Plaintiff is capable of
6 performing her past relevant work as a mail delivery driver. (AR 34-
7 40). Accordingly, the ALJ concluded that Plaintiff has not been
8 disabled since May 22, 2013, the application date. (AR 41).

9
10 The Appeals Council denied Plaintiff request for review of
11 the ALJ's decision on May 24, 2017 (AR 1-3, 20, 130). Plaintiff now
12 seeks judicial review of the ALJ's decision, which stands as the
13 final decision of the Commissioner. 42 U.S.C. §§ 405(g), 1383(c).

14 15 **STANDARD OF REVIEW**

16
17 This Court reviews the Administration's decision to determine if
18 it is free of legal error and supported by substantial evidence. See
19 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
20 evidence" is more than a mere scintilla, but less than a
21 preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
22 2014). To determine whether substantial evidence supports a finding,
23 "a court must consider the record as a whole, weighing both evidence
24 that supports and evidence that detracts from the [Commissioner's]
25 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.
26 2001) (internal quotation omitted). As a result, "[i]f the evidence
27 can support either affirming or reversing the ALJ's conclusion, [a
28

1 court] may not substitute [its] judgment for that of the ALJ."
2 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

3
4 **PLAINTIFF'S CONTENTION**

5
6 Plaintiff alleges that the ALJ erred in finding, at step four,
7 that Plaintiff's past work as a mail delivery driver constituted
8 substantial gainful activity ("SGA"). (See Joint Stip. at 9-12, 18).

9
10 **DISCUSSION**

11
12 After considering the record as a whole, the Court finds that
13 the Commissioner's findings are supported by substantial evidence and
14 are free from material legal error. As set forth below, the ALJ did
15 not err in determining that Plaintiff's past work as a mail delivery
16 driver qualified as SGA.

17
18 At step four of the five-step process, the ALJ must determine
19 whether a claimant can return to his or her past relevant work in
20 light of his or her RFC. Past relevant work is "work that [a
21 claimant has] done within the past 15 years, which was substantial
22 gainful activity, and that lasted long enough for [the claimant] to
23 learn to do it." 20 C.F.R. §§ 404.1560(b)(1), 416.960(b)(1).
24 Substantial gainful activity is defined as "work activity that
25 involves doing significant physical or mental activities . . . that
26 [a claimant does] for pay or profit." 20 C.F.R. §§ 404.1572,
27 416.972. A presumption that a person engaged in substantial gainful
28 activity is made if that person's average monthly income attributable

1 to that activity exceeds a certain amount. 20 C.F.R. §§ 404.1574,
2 416.974; Keyes v. Sullivan, 894 F.2d 1053, 1056 (9th Cir. 1990).
3 However, earnings alone are not dispositive and other factors may
4 rebut the presumption, such as "the time spent working, quality of a
5 [claimant's] performance, special working conditions, and the
6 possibility of self-employment." Katz v. Sec'y, 972 F.2d 290, 293
7 (9th Cir. 1992).

8
9 The Agency calculates monthly earnings by "averag[ing] earnings
10 over the entire period of work." 20 C.F.R. §§ 404.1574a(a),
11 416.974a(a); see also Anderson v. Heckler, 726 F.2d 455, 457 (8th
12 Cir. 1984) (monthly earnings are calculated by averaging earnings
13 over months actually worked instead of averaging earnings over the
14 entire year). If a claimant's earnings level or work pattern
15 significantly changes during the period of work, the Agency will
16 average earnings during each period of work separately. 20 C.F.R.
17 §§ 404.1574a(b)-(c), 416.974a(b)-(c).

18
19 Here, the ALJ concluded, at step four, that Plaintiff could
20 perform her past relevant work as a mail delivery driver. (AR 40).
21 The ALJ found that this job qualified as SGA, even while
22 acknowledging that "some of the evidence on this issue is a bit
23 thin." (Id.). The ALJ relied on a disability report filed in
24 support of Plaintiff's SSI application, in which Plaintiff indicated
25 that she worked as a mail delivery driver from January to June 2006 -
26 a six-month period, (id.; see AR 150), and stated that she worked for
27 eight hours a day, five days a week, earning fourteen dollars an
28 hour. (AR 150). Based on the lack of *reported* earnings for 2006,

1 along with other inconsistencies in the record,¹ the ALJ inferred
2 that Plaintiff intended to state that she had worked as a mail
3 delivery driver from January to June 2004, and not 2006. (AR 40).
4 Plaintiff's earnings records indicate that she earned \$5,266.72 from
5 Federal Express in 2004, (AR 144), which amounts to about \$877 per
6 month if averaged over the six-month period from January to June as
7 plaintiff had alleged. The ALJ noted that this amount "does rise to
8 the level generally considered to be [SGA] within the meaning of the
9 regulations in that year." (AR 40-41; see Social Security
10 Administration ("SSA"), Substantial Gainful Activity,
11 <https://www.ssa.gov/oact/cola/sga.html> (\$810 per month qualified as
12 SGA in 2004)). Furthermore, based on Plaintiff's disability report
13 indicating that she worked full-time and earned fourteen dollars an
14 hour, (see AR 150), the ALJ reasoned that the mail delivery driver
15 job "yield[ed] [SGA]-level earnings, whether they were reported to
16 the proper authorities or not" (AR 41) - the implication being that
17 Plaintiff may have underreported her total earnings, in light of the
18 inconsistent records.

19
20 Plaintiff contends that the ALJ "misinterpreted the record, and
21 Plaintiff's work in 2004 did not constitute SGA." (Joint Stip. at
22 10). While Plaintiff acknowledges that the ALJ correctly determined
23 that the 2006 employment stated on the disability report actually
24 occurred in 2004, she contends that the ALJ wrongly inferred that she

25
26 ¹ The ALJ noted that, according to some medical records,
27 Plaintiff apparently stated that she sustained an on-the-job injury
28 show that Plaintiff filed a claim against Federal Express for a 2004
injury. (AR 40 n.3; see AR 793-94, 949, 1050, 1062).

1 worked for six months that year - that is, from January to June.
2 (Id.). Instead, Plaintiff asserts, her work in 2004 spanned eight
3 months, from January to August. (Id.). Plaintiff supports this by
4 pointing to records showing that she injured herself on the job at
5 Federal Express on August 26, 2004. (Id. at 11 (citing AR 208, 216,
6 222)). Plaintiff points out that her 2004 earnings of \$5,266.72, if
7 averaged over an eight-month period, would amount to about \$658 per
8 month, which is less than \$810, the SGA-qualifying monthly earnings
9 minimum for 2004. (Id. at 11; see SSA, Substantial Gainful Activity,
10 <https://www.ssa.gov/oact/cola/sga.html>).

11
12 Plaintiff also disputes the ALJ's finding that Plaintiff's mail
13 delivery driver work yielded SGA-level earnings "whether they were
14 reported to the proper authorities or not." (Joint Stip at 11-12; AR
15 41). Plaintiff contends that this finding was "speculative" because
16 it relied on the disability report's statement that Plaintiff worked
17 full-time at fourteen dollars an hour. Because this information was
18 based on Plaintiff's self-reporting almost ten years after she had
19 stopped working, Plaintiff argues that it is "much less reliable than
20 the detailed earnings query, which shows \$5,266.72 of earnings in
21 2004, \$174.40 of earnings in 2005, and most notably, no earnings in
22 2006." (Joint Stip. at 11 (citing AR 144 (earnings report))).

23
24 Plaintiff's arguments fail to establish error. Although the
25 record contains ambiguities and inconsistencies on this issue, the
26 ALJ properly used his discretion in interpreting the information and
27 concluding that Plaintiff's past employment as a mail delivery driver
28 qualified as SGA. Substantial evidence supports the ALJ's finding

1 that Plaintiff earned more than \$810 a month working as a Federal
2 Express mail delivery driver in 2004. The ALJ reasonably found,
3 based on the disability report, the earnings records, and other
4 evidence, that Plaintiff worked for six months and earned over \$5,200
5 total, or over \$866 a month. The ALJ also reasonably found,
6 alternatively, that Plaintiff's mail delivery driving "yield[ed]
7 [SGA]-level earnings, whether they were reported to the proper
8 authorities or not." (AR 41). This latter finding was not
9 "speculative," given the record's inconsistencies, nor was it
10 unreasonable to rely partly on the information in the disability
11 report, even if Plaintiff provided this information almost ten years
12 after her employment. To the contrary, it seems unlikely that
13 Plaintiff would mistakenly recall having worked eight hours a day,
14 five days a week, (see AR 150), if she actually had worked only
15 enough to earn just "an average of \$658.25 per month," as Plaintiff
16 now contends.² (Joint Stip. at 11).

18 ² Even at minimum wage, which was \$6.75 for California in 2004,
19 Plaintiff would have earned \$658 a month working less than twenty-
20 five hours a week. See Cal. Dep't of Indus. Relations, Minimum Wage
21 History, <https://www.dir.ca.gov/iwc/MinimumWageHistory.htm>. At the
22 hourly wage of \$14 that Plaintiff provided on the disability report,
(AR 150), she would have earned \$658 a month working less than twelve
hours a week.

23 Defendant points to other evidence in the record suggesting that
24 Plaintiff underreported her earnings. (See Joint Stip. at 16). For
25 example, as the ALJ noted, Plaintiff apparently worked part-time
26 doing clerical duties related to a friend's architectural firm around
27 2008, (see AR 39, 267, 631-33), but she admitted that she did not
28 report those earnings for tax purposes, (AR 631-33 (2010 deposition);
see AR 144 (earnings records)). Defendant also points to a 2007
deposition in which Plaintiff stated that before her Federal Express
employment, she worked as a Frito-Lay driver for nine months, (AR
563), though Plaintiff's earnings records reflect just \$715.54 from

