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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

JUDY F., ¹)	Case No. 5:19-cv-02225-JDE
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	ORDER
v.)	
)	
ANDREW M. SAUL,)	
Commissioner of Social Security,)	
)	
Defendant.)	

Plaintiff Judy F. (“Plaintiff”) filed a Complaint on November 20, 2019, seeking review of the Commissioner’s denial of her application for disability insurance benefits (“DIB”). The parties filed a Joint Submission (“Jt. Stip.”) regarding the issue in dispute on July 13, 2020. The matter now is ready for decision.

¹ Plaintiff’s name has been partially redacted in accordance with Fed. R. Civ. P. 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 I.

2 BACKGROUND

3 Plaintiff protectively filed for DIB on April 7, 2016, alleging disability
4 commencing August 15, 2015. AR 29, 59-60, 170-71. On July 19, 2018, after
5 her applications were denied initially (AR 74) and on reconsideration (AR 82),
6 Plaintiff, represented by counsel, testified via video hearing in Moreno Valley,
7 California, before an Administrative Law Judge (“ALJ”) presiding in
8 Albuquerque, New Mexico. AR 29, 48-62. A vocational expert (“VE”) also
9 testified telephonically. AR 48-49, 62-67.

10 On September 24, 2018, the ALJ issued a decision concluding Plaintiff
11 was not disabled. AR 29-40. The ALJ found that Plaintiff had not engaged in
12 substantial gainful activity since the alleged onset date. AR 32. The ALJ found
13 Plaintiff had severe impairments of: “fibromyalgia/myalgia/polyneuropathy
14 with diffuse pain”; chronic fatigue syndrome; plantar fasciitis bilateral feet; and
15 obesity. AR 32-34. The ALJ also found Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled a listed impairment
17 (AR 34-35), and she had the residual functional capacity (“RFC”) to perform
18 light work as defined in 20 C.F.R. § 404.1567(b) ²:

19 [E]xcept [Plaintiff] is able to lift, carry, push, and pull up to twenty
20 pound occasionally and ten pounds frequently [Plaintiff] can
21

22 ² “Light work” is defined as
23 lifting no more than 20 pounds at a time with frequent lifting or
24 carrying of objects weighing up to 10 pounds. Even though the weight
25 lifted may be very little, a job is in this category when it requires a good
26 deal of walking or standing, or when it involves sitting most of the time
27 with some pushing and pulling of arm or leg controls. To be considered
28 capable of performing a full or wide range of light work, you must have
the ability to do substantially all of these activities.
20 C.F.R. § 404.1567(b); see also Rendon G. v. Berryhill, 2019 WL 2006688, at *3
n.6 (C.D. Cal. May 7, 2019).

1 stand and/or walk four hours in an eight-hour day. [Plaintiff] can
2 sit six hours in an eight-hour day. [Plaintiff] requires a sit/stand
3 option at 30 to 45[-]minute intervals, for 3 to 5 minutes at a time,
4 during which period she may remain on task. [Plaintiff] may
5 occasionally climb ramps and stairs, stoop, kneel, crouch, and
6 crawl. [Plaintiff] may never climb ladders, ropes and scaffolds.
7 [Plaintiff] may occasionally reach and work overhead with the
8 upper extremities. [Plaintiff] must avoid more than occasional
9 exposure to extreme cold, extreme heat, and vibration. [Plaintiff]
10 should avoid all exposure to hazards such as dangerous moving
11 machinery and unsecured heights. [AR 35-36.]

12 Considering Plaintiff's age, education, work history, RFC, and the VE's
13 testimony, the ALJ found she was capable of performing her past relevant work
14 as claims examiner (Dictionary of Occupational Titles 241.267-018). AR 39-40.
15 Thus, the ALJ concluded Plaintiff was not under a "disability," as defined in
16 the Social Security Act, from August 15, 2015, through the date of the decision.
17 AR 40. Plaintiff's request for review by the Appeals Council was denied,
18 making the ALJ's decision the agency's final decision. AR 1-6.

19 II.

20 LEGAL STANDARDS

21 A. Standard of Review

22 Under 42 U.S.C. § 405(g), this court may review the Commissioner's
23 decision to deny benefits. The ALJ's findings and decision should be upheld if
24 they are free from legal error and supported by substantial evidence based on
25 the record as a whole. Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir.
26 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007).
27 Substantial evidence means such relevant evidence as a reasonable person
28 might accept as adequate to support a conclusion. Lingenfelter v. Astrue, 504

1 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a
2 preponderance. Id. To determine whether substantial evidence supports a
3 finding, the reviewing court “must review the administrative record as a whole,
4 weighing both the evidence that supports and the evidence that detracts from
5 the Commissioner’s conclusion.” Reddick v. Chater, 157 F.3d 715, 720 (9th
6 Cir. 1998). “If the evidence can reasonably support either affirming or
7 reversing,” the reviewing court “may not substitute its judgment” for that of
8 the Commissioner. Id. at 720-21; see also Molina v. Astrue, 674 F.3d 1104,
9 1111 (9th Cir. 2012) (“Even when the evidence is susceptible to more than one
10 rational interpretation, [the court] must uphold the ALJ’s findings if they are
11 supported by inferences reasonably drawn from the record.”), superseded by
12 regulation on other grounds.

13 Lastly, even if an ALJ errs, the decision will be affirmed where such
14 error is harmless (Molina, 674 F.3d at 1115), that is, if it is “inconsequential to
15 the ultimate nondisability determination,” or if “the agency’s path may
16 reasonably be discerned, even if the agency explains its decision with less than
17 ideal clarity.” Brown-Hunter, 806 F.3d at 492 (citation omitted).

18 **B. The Five-Step Sequential Evaluation**

19 When the claimant’s case has proceeded to consideration by an ALJ, the
20 ALJ conducts a five-step sequential evaluation to determine at each step if the
21 claimant is or is not disabled. See Ford v. Saul, 950 F.3d 1141, 1148-49 (9th
22 2020); Molina, 674 F.3d at 1110.

23 First, the ALJ considers whether the claimant currently works at a job
24 that meets the criteria for “substantial gainful activity.” Molina, 674 F.3d at
25 1110. If not, the ALJ proceeds to a second step to determine whether the
26 claimant has a “severe” medically determinable physical or mental impairment
27 or combination of impairments that has lasted for more than twelve months.
28 Id. If so, the ALJ proceeds to a third step to determine whether the claimant’s

1 **DISCUSSION**

2 The parties present one disputed issue: whether the ALJ properly rejected
3 Plaintiff’s testimony concerning pain, symptoms, and limitations. Jt. Stip. at 4.

4 **A. Applicable Law**

5 Where a claimant produces objective medical evidence of an impairment
6 that could reasonably be expected to produce the pain or other symptoms
7 alleged, absent evidence of malingering, the ALJ must provide ““specific, clear
8 and convincing reasons for’ rejecting the claimant’s testimony regarding the
9 severity” of the symptoms. Treichler v. Comm’r Soc. Sec. Admin., 775 F.3d
10 1090, 1102 (9th Cir. 2014) (citation omitted); Moisa v. Barnhart, 367 F.3d 882,
11 885 (9th Cir. 2004). The ALJ’s findings “must be sufficiently specific to allow a
12 reviewing court to conclude that the [ALJ] rejected [the] claimant’s testimony
13 on permissible grounds and did not arbitrarily discredit the claimant’s
14 testimony.” Id. at 885 (citation omitted). But if the ALJ’s assessment of the
15 claimant’s testimony is reasonable and is supported by substantial evidence, it
16 is not the Court’s role to “second-guess” it. See Rollins v. Massanari, 261 F.3d
17 853, 857 (9th Cir. 2001). Finally, the ALJ’s finding may be upheld even if not
18 all the ALJ’s reasons for rejecting the claimant’s testimony are upheld. See
19 Batson v. Comm’r Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004).

20 **B. Subjective Symptom Evidence**

21 1. Written Submissions

22 To support her application for benefits, Plaintiff submitted disability
23 reports, function reports, and a third-party function reports from her husband.
24 AR 198-204, 210-17, 220-28, 232-39, 243-58, 262-68.

25 2. July 2018 Hearing Testimony

26 Plaintiff’s testimony at the July 2018 hearing is summarized as follows.
27 She worked as a state disability claims examiner for 23 years. AR 52. She
28 stopped in August 2015 because her job involved typing, which caused her

1 neck and shoulder muscles to tighten on the left side, triggering migraines
2 requiring medication; she also took Gabapentin, which would cause her to fall
3 asleep at her desk. Id. When she became drowsy, she would hide in a stall in
4 the ladies room, once having been caught in the stall snoring. AR 52.

5 Plaintiff described pain caused in part by fibromyalgia and in part by
6 arthritis. AR 53. She was first diagnosed with fibromyalgia in 2008 or 2011, a
7 condition that causes muscle and generalized fatigue, muscle soreness, and
8 some joint pain. Id. She also experiences allodynia, which she explained as “if
9 I’m having a flare up of my fibromyalgia and somebody goes to put their hand
10 on my arm or shoulder or any place it causes pain.” Id. The condition flares at
11 least once a month, sometimes more depending on her activity around the
12 house, but less frequently than when she worked. AR 54-55. When the
13 condition is not flaring, her pain level can be three. AR 55. With a flare, it can
14 range from eight to ten and may last one to two days. Id. She can experience
15 pain anywhere in her body, but mostly primarily in her extremities. AR 53-54.

16 Since she stopped working, she no longer has migraines from typing, but
17 still has migraines about once a month, with level-eight pain. AR 55. She also
18 experiences chronic fatigue, sleeping some days for almost the entire day
19 without a reason for being tired. Id. She normally sleeps six to eight hours. AR
20 56. Certain activities fatigue her: gardening, vacuuming, extensive dusting,
21 dish washing, and laundry. Id. She used to walk her dogs for exercise, but it
22 became too difficult. AR 60. Her plantar fasciitis will cause tiredness and pain
23 in her feet if she stands long. AR 56. She has to sit before she can continue on
24 her feet. AR 56. Occasionally she will also have pain when she sits, such as
25 when she sits in a firm office chair. AR 56.

26 Sometimes she feels defeated because she is unable do things and “go[es]
27 off into like another world” and will just sit there. AR 57. She has been taking
28 Sertraline for depression for about three years. AR 57. She would like to take

1 part in therapy, but each time she has tried it in the past, she became frustrated
2 and discontinued it. AR 57.

3 She takes medication for blood pressure and that symptom is under
4 control, but her doctor recently had to increase her dosage. AR 57.

5 On an average day, she can be on her feet for 30 to 45 minutes before she
6 must sit, lie down, or change position. AR 58. She cannot sit for longer than
7 two hours. AR 58. She can lift a gallon of milk from the refrigerator and pour
8 it, but only about three times a day. AR 58-59.

9 Her doctor has treated her fibromyalgia with Cymbalta, Lyrica, and
10 Savella. AR 54. Cymbalta made her nauseous and affected her focus, Lyrica
11 gave her an anxiety attack, and Savella elevated her blood pressure, so those
12 were discontinued. AR 54. She currently takes Gabapentin. AR 54, 56.

13 She has not worked since August 2015, when she had used all her
14 vacation time, her state disability was about to expire, and she realized she
15 could not go back to work. AR 60.

16 **C. Analysis**

17 The ALJ reviewed Plaintiff's hearing testimony and function reports. AR
18 36. The ALJ found her medically determinable impairments could reasonably
19 be expected to cause the alleged symptoms, but her statements "concerning the
20 intensity, persistence[,] and limiting effects of [the] symptoms" were not
21 entirely consistent with the medical evidence and other evidence in the record.
22 AR 37. Specifically, the ALJ found: (1) Plaintiff's testimony was inconsistent
23 with the record as a whole; (2) there was a lack of noteworthy mental status
24 deficits; (3) the record was devoid of ongoing formal mental health treatment;
25 (4) there was a lack of noteworthy physical deficits; (5) her pain was
26 controlled; and (6) she worked for many years despite having fibromyalgia
27 since 2008 or 2011. AR 37-38.

28 Preliminarily, the Court notes that Plaintiff did not give the Agency an

1 opportunity to correct the error alleged here. Plaintiff's brief before the Appeals
2 Council does not present any argument regarding the ALJ's assessment of
3 Plaintiff's testimony, instead focusing on the ALJ's analysis of a medical
4 opinion. AR 310-11; see, e.g., Steward v. Astrue, 2012 WL 4210624, at *4 (D.
5 Or. Sept. 19, 2012) (claimant waived argument not raised before Appeals
6 Council). Nonetheless, the Court declines to find a waiver and addresses
7 Plaintiff's contentions.

8 The Court also notes the ALJ did not reject Plaintiff's testimony in full.
9 Rather, the ALJ found it "not entirely" consistent with the record and found
10 Plaintiff was limited to less than the full range of light work, which necessarily
11 credited much of Plaintiff's subjective complaints. AR 35-37. However, as
12 explained below, to the extent the ALJ did not further credit aspects of
13 Plaintiff's testimony, he provided legally sufficient reasons for doing so.

14 First, the ALJ found that the record lacked noteworthy physical deficits.
15 AR 37. "Although lack of medical evidence cannot form the sole basis for
16 discounting pain testimony, it is a factor that the ALJ can consider in [her]
17 credibility analysis." Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); see
18 also Rollins, 261 F.3d at 857. For example, (1) in the year before the alleged
19 onset, a series of x-rays of Plaintiff's back, knees, and elbows showed "mild"
20 and "normal" findings, including "mild narrowing of the medial knee
21 compartment," mild cervical disc narrowing, "mild spondylosis" in her lumbar
22 spine, and "mild scoliosis" in her thoracic spine (AR 340-45); (2) the day
23 before her alleged onset date, and about a month into the relevant period,
24 Plaintiff had two physical examinations that showed entirely "normal"
25 findings (AR 371-73); (3) July, August, and December 2016 examinations were
26 also unremarkable (AR 389-90, 391-94); (4) an examination in September 2016
27 stated Plaintiff's "[p]ast podiatric history is unremarkable," and revealed only
28 tenderness in Plaintiff's left foot (AR 383-84); and (5) a May 2018 examination

1 also recorded entirely normal findings (AR 397-98). As these are supported by
2 the record, the ALJ properly considered the inconsistency between Plaintiff's
3 subjective symptom complaints and the lack of supporting noteworthy
4 objective findings as one of at least two valid factors supporting the decision.
5 See Burch, 400 F.3d at 681.

6 A second reason discussed by the ALJ is control of her symptoms. AR
7 37-38; see Warre v. Comm'r Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th Cir.
8 2006) ("Impairments that can be controlled effectively with medication are not
9 disabling."); see also Lindquist v. Colvin, 588 F. App'x 544, 547 (9th Cir. 2014)
10 (ALJ properly discounted claimant's testimony in part because symptoms were
11 controlled by medication). This is also supported by the record. Plaintiff's
12 podiatrist stated that he did not consider her foot condition "permanent" as it
13 "respon[ds] well to treatment." AR 38, 384. Additionally, the ALJ noted
14 Plaintiff's various reports of pain to her physicians, which were generally mild,
15 including pain level "4/10" in September 2015 (AR 373), "1/10" in July 2016
16 (AR 389), "3/10" in December 2016 (AR 393), and although she had bilateral
17 foot swelling in December 2017, she said it "resolves moderately as [the] day
18 progresses," reported pain level "0/10," and specifically "denie[d] any
19 paresthesia[], pain, and any other [signs and symptoms]" (AR 395). The ALJ
20 also noted Plaintiff's testimony that she has flare-ups once a month, and she
21 also conceded they are less frequent now. AR 54-55. See Ghanim v. Colvin,
22 763 F.3d 1154, 1163 (9th Cir. 2014) (an ALJ may consider a variety of factors
23 in weighing a claimant's believability, including ordinary techniques of
24 credibility evaluation, prior inconsistent statements, and testimony by the
25 claimant that "appears less than candid"); Colter v. Colvin, 554 F. App'x 594,
26 596 (9th Cir. 2014) (ALJ properly discounted claimant's credibility in part
27 because her testimony was undermined by her own admissions).

28 Plaintiff's argument here largely focuses the ALJ's stated reasons that the

1 record contains a lack of “noteworthy mental status deficits” and ongoing
2 formal mental health treatment, which Plaintiff contends are invalid as her
3 testimony primarily focused on physical pain. Jt. Stip. at 8-9. However, the
4 Commissioner does not defend these reasons, or the reason that Plaintiff was
5 able to work in 2008 or 2011 with fibromyalgia, a time period well before the
6 alleged onset date. See Kinley v. Astrue, 2013 WL 494122, at *3 (S.D. Ind.
7 Feb. 8, 2013) (“The Commissioner does not respond to this [aspect of
8 claimant’s] argument, and it is unclear whether this is a tacit admission by the
9 Commissioner that the ALJ erred or whether it was an oversight. Either way,
10 the Commissioner has waived any response.”); see also Townsend v. Monster
11 Beverage Corp., 303 F. Supp. 3d 1010, 1036 (C.D. Cal. 2018) (“The Court’s
12 role is not to make or develop arguments on behalf of the parties . . .”).

13 The Court need not decide whether these additional reasons were
14 proper. Even assuming, without deciding, the ALJ may have erred in his
15 remaining reasoning, any error would be harmless considering the other valid
16 reasons for rejecting the testimony. See Reyes v. Berryhill, 716 F. App’x 714,
17 714 (9th Cir. 2018) (where ALJ provided valid reasons for finding claimant’s
18 testimony not entirely credible, “[a]ny error in other reasons provided by the
19 ALJ was harmless”); Batson, 359 F.3d at 1197; Williams v. Comm’r, Soc. Sec.
20 Admin., 2018 WL 1709505, at *3 (D. Or. Apr. 9, 2018) (“Because the ALJ is
21 only required to provide a single valid reason for rejecting a claimant’s pain
22 complaints, any one of the ALJ’s reasons would be sufficient to affirm the
23 overall credibility determination.”).

24 The Court finds the ALJ provided sufficiently specific, clear, and
25 convincing reasons for discounting Plaintiff’s symptom testimony, that is, its
26 inconsistency with the medical evidence and Plaintiff’s response to treatment.
27 Those grounds are sufficient to affirm the ALJ’s decision on the issue.


28 Accordingly, reversal is not warranted.

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IV.
ORDER

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

Dated: August 28, 2020



JOHN D. EARLY
United States Magistrate Judge