

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

CAROLINA C.,¹

Plaintiff,

v.

ANDREW M. SAUL, Commissioner of
Social Security,

Defendant.

Case No. ED CV 20-01177 RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Carolina C. (“Plaintiff”) challenges the denial by the Commissioner of Social Security (“Defendant”) of her applications for disability insurance (“DI”) and supplemental security income (“SSI”). She contends that the Administrative Law Judge (“ALJ”) erred in determining that she would be able to perform work existing in the national economy. For the reasons stated below, the decision of the Commissioner is reversed and the matter is remanded for further proceedings.

\\
\\

¹ Partially redacted in compliance with Federal Rule of Civil Procedure 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 **II. SUMMARY OF PROCEEDINGS**

2 On September 27, 2017, Plaintiff constructively filed a Title II application for
3 DI and a Title XVI application for SSI, alleging that she had been disabled since
4 September 13, 2017. (Administrative Record (“AR”) 196, 206, 234.) Her
5 applications were denied initially and upon reconsideration, and she requested and
6 was granted a hearing before an ALJ. (AR 128.) Following a hearing on May 23,
7 2019, at which Plaintiff appeared with counsel, the ALJ found that Plaintiff had not
8 been disabled at any time from her alleged onset date through June 17, 2019, the date
9 of decision. (AR 16-29, 34-64.) The ALJ’s decision became the Commissioner’s
10 final decision when the Appeals Council denied Plaintiff’s request for review. (AR
11 1-5.) This action followed.

12 **III. DISCUSSION**

13 Plaintiff contends that the ALJ erred in finding that she could perform medium
14 work and in discounting her testimony regarding her physical and mental limitations.
15 (JS at 4-12, 21-26.)

16 The ALJ followed the five-step sequential evaluation process set forth by
17 regulation to assess whether Plaintiff was disabled under the Social Security Act. *See*
18 *Lester v. Chater*, 81 F.3d 821, 828 n.5 (9th Cir. 1995). The ALJ found that Plaintiff’s
19 osteoarthritis, chronic low back pain, post-traumatic stress disorder (“PTSD”), and
20 depression were severe impairments but did not find that Plaintiff’s fibromyalgia was
21 a severe impairment. (AR 22.) The ALJ determined that Plaintiff had the residual
22 functional capacity to perform medium work, except that she could perform “detailed
23 but not complex tasks.” (AR 24.) In reaching this finding, the ALJ rejected
24 Plaintiff’s testimony that, among other things, she was constantly in pain, could not
25 get out of bed several days a week, and could not concentrate. (AR 24-25.) After
26 finding that Plaintiff could not perform any of her past relevant work, the ALJ
27 adopted the testimony of a vocational expert, who opined that an individual of
28 Plaintiff’s age, work experience, and a residual functional capacity allowing her to

1 do medium work but not complex tasks would be able to perform the work of a
2 warehouse worker or a laundry worker. (AR 27-29.) Accordingly, the ALJ found
3 that Plaintiff was not disabled at any time through the date of decision. (AR 29.)

4 **A. The ALJ's Residual Functional Capacity Determination**

5 Plaintiff first contends that the ALJ erred in determining that she could perform
6 medium work.² (JS at 5-9.) She argues primarily that the ALJ erred in not finding
7 that her fibromyalgia is a severe impairment and further argues that the medical
8 record establishes that she suffers from joint pain and fatigue, has a decreased range
9 of motion in her lumbar spine, and has weakness in her right (dominant) hand. For
10 the following reasons, the Court concludes that the ALJ did not err in declining to
11 include additional physical limitations in the residual functional capacity assessment.

12 The ALJ is responsible for assessing a claimant's residual functional capacity
13 "based on all of the relevant medical and other evidence." 20 C.F.R.
14 §§ 404.1545(a)(3), 404.1546(c); *see Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883
15 (9th Cir. 2006) (citing SSR 96-8p, 1996 WL 374184, at *5). In doing so, the ALJ
16 may consider any statements provided by medical sources, including statements that
17 are not based on formal medical examinations. *See* 20 C.F.R. §§ 404.1513(a),
18 404.1545(a)(3). An ALJ's determination of a claimant's RFC must be affirmed "if
19 the ALJ applied the proper legal standard and his decision is supported by substantial
20 evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *accord Morgan*
21 *v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

22 Plaintiff points to a September 27, 2017 examination by Dr. Thomas Chen
23 that found "over [eight] tender points in [Fibromyalgia] areas" (AR 407), as well as
24 to a February 20, 2019 examination by the same doctor that reported "14/18" tender
25 points (AR 817). Plaintiff further notes that the record evidences numerous

26 ² "Medium work involves lifting no more than 50 pounds at a time with frequent
27 lifting or carrying of objects weighing up to 25 pounds. If someone can do medium
28 work, we determine that he or she can also do sedentary and light work." 20 C.F.R.
§ 404.1567(c).

1 complaints of joint pain, fatigue, and dizziness as well as medical findings of
2 swelling and tenderness in her hands, elbows, and knees. (JS at 6-8.) Plaintiff
3 points to a March 28, 2018 physical therapy note reporting that she could not stand
4 or walk for more than 15 minutes. (AR 646.) Additionally, Plaintiff notes that a
5 February 1, 2019 blood test indicated a rheumatological disorder (AR 784) and that
6 on March 11, 2019, Dr. Anthony Lin diagnosed “an undifferentiated connective
7 tissue disorder,” osteoarthritis, and fibromyalgia. (AR 835.)

8 The ALJ concluded that Plaintiff had not demonstrated that her fibromyalgia
9 was a severe impairment, pointing out that Dr. Chen’s September 2017 exam found
10 only eight tender points and that his February 2019 exam did not establish that
11 Plaintiff had 11 tender points “present in all quadrants, including the upper and
12 lower body.” (AR 22.)³ The Court defers to the ALJ’s reasonable interpretation
13 that the September 2017 examination, while noting “over” eight tender points, did
14 not expressly find 11 tender points. *See Ryan v. Comm’r of Soc. Sec.*, 528 F.3d
15 1194, 1198 (9th Cir. 2008) (“Where evidence is susceptible to more than one
16 rational interpretation, the ALJ’s decision should be upheld.”) (citation omitted).
17 As to the February 19 exam, the Court finds that the ALJ was at least rational in
18 concluding that tender points were not found in all four quadrants of the body. (*See*
19 *Social Security Ruling 12-2p*, noting nine tender point sites on each of the left and
20 right sides of the body, of which 12 are above the waist and six below.)⁴ Thus, the

22 ³ Under the “first set of criteria” set forth in Social Security Ruling 12-2p, “a person
23 suffers from fibromyalgia if: (1) she has widespread pain that has lasted at least three
24 months (although the pain may ‘fluctuate in intensity and may not always be
25 present’); (2) she has tenderness in at least eleven of eighteen specified points on her
26 body; and (3) there is evidence that other disorders are not accounting for the pain.”
Revels v. Berryhill, 874 F.3d 648, 656–657 (9th Cir. 2017). The parties have not

27 ⁴ Plaintiff argues that an examination by Dr. Kanchana Keerthipala on February 1,
28 2019, which revealed tenderness in both hands and both knees (AR 777-78), rebuts
this finding. (JS at 8.) The Court disagrees. Dr. Keerthipala’s examination did not

1 ALJ's determination that the medical record did not establish that Plaintiff's
2 fibromyalgia was a severe impairment is supported by substantial evidence.

3 Even if the ALJ erred in not finding that Plaintiff's fibromyalgia was a severe
4 impairment, however, any such error was harmless because the ALJ considered
5 Plaintiff's claimed physical limitations in determining her residual functional
6 capacity. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding any error
7 in failing to find an impairment is severe is harmless where ALJ considered
8 limitations allegedly posed by that impairment).

9 The ALJ addressed Plaintiff's allegations of joint and back pain, diminished
10 range of motion in her back, tenderness, and weakness. (AR 25-26.) Despite pain
11 and a reduced range of motion upon examination in July 2017, Plaintiff was found
12 to have normal range of motion and full strength in September 2017. (AR 394,
13 407.) Although her physical therapist noted in March 2018 that Plaintiff was in
14 pain and could not sustain prolonged standing or walking, on April 4, 2018,
15 Plaintiff told Dr. Gerald Goodlow that she was doing better and going to
16 acupuncture and physical therapy. (AR 646, 661.) On April 12, 2018, after several
17 sessions, her physical therapist noted that Plaintiff demonstrated "competence" with
18 her home exercise program and reported feeling happier and more able to walk and
19 do chores. (AR 646, 672.) Despite this apparent improvement, on May 31, 2018,
20 Plaintiff was discharged from physical therapy after three sessions because of her
21 unexplained failure to follow up. (AR 669.)

22 Additionally, the ALJ noted that a lumbar spine MRI taken on March 22,
23 2018 revealed only "mild degenerative changes of the lumbar spine without any
24 significant spinal stenosis or acute abnormality" and an x-ray of the right knee in
25 December 2018 was unremarkable, showing no significant joint disease or soft
26 tissue abnormality. (AR 544-45, 735-36.) Similarly, bilateral hand x-rays taken in

27 _____
28 establish the presence of at least 11 tender points. Thus, there is no single
examination in the record that satisfies the criteria for establishing fibromyalgia.

1 February 2019 were largely unremarkable. (AR 781-82.) Further, the ALJ pointed
2 out that Dr. Bryan Liou conducted an examination of Plaintiff on March 25, 2019
3 and found that she had full strength, extension, and coordination in her arms, wrists,
4 knees, and hips, and normal gait. (AR 1763.)

5 Although Plaintiff objects that her condition would “undoubtedly restrict her
6 to less than medium work activity” (JS at 9), she fails to point to any medical
7 records that would impose greater limitations than those found by the ALJ. For all
8 of the above reasons, the ALJ’s finding that Plaintiff could perform medium level
9 work is reasonable and supported by substantial evidence and will not be disturbed.

10 Plaintiff next contends that the ALJ erred in failing to include additional
11 limitations based on her mental impairments. Specifically, Plaintiff argues that the
12 ALJ failed to incorporate the limitations assessed by Dr. R. Waranch, a state agency
13 psychologist who reviewed the medical records after Plaintiff sought
14 reconsideration of the agency’s denial of her claims. (JS at 9-12.) For the
15 following reasons, the Court agrees that the ALJ erred and finds this issue must be
16 revisited on remand.

17 On December 27, 2017, Dr. Waranch completed an assessment of Plaintiff’s
18 mental functional capacity based on her healthcare provider’s records from
19 September to December 2017. (AR 91.) In a mental residual functional capacity
20 assessment form, Dr. Waranch indicated that Plaintiff would have moderate
21 limitations in her ability to perform sustained work activity in her ability to carry
22 out detailed instructions; maintain attention and concentration for extended periods;
23 perform activities within a schedule; maintain regular attendance; be punctual
24 within customary tolerances; work in coordination with or in proximity to others
25 without being distracted by them; complete a normal workday and workweek
26 without interruptions from psychologically based symptoms; perform at a
27 consistent pace without an unreasonable number and length of rest periods; interact
28 appropriately with the general public; accept instructions and respond appropriately

1 to criticism from supervisors; get along with coworkers or peers without distracting
2 them or exhibiting behavioral extremes; and respond appropriately to changes in the
3 work setting. (AR 94-96.) Dr. Waranch noted that Plaintiff would “have difficulty
4 with more detailed and complex instructions.” (AR 95.) Dr. Waranch further
5 explained that Plaintiff would be able to interact with others in the workplace if
6 contact were “intermittent and not prolonged” but would be able to complete a
7 workday/workweek without interruption and at a consistent pace and would be
8 capable of adapting to changes in the workplace “related to performing simple
9 tasks.” (AR 96.)

10 The ALJ noted that Dr. Waranch’s opinion was “persuasive” and found it
11 consistent with Plaintiff’s activities of daily living, her limited and conservative
12 treatment, and “the lack of evidence of significant symptomatology despite
13 noncompliance with treatment.” (AR 27.) Notwithstanding the ALJ’s apparent
14 acceptance of Dr. Waranch’s opinion, the ALJ included only one mental limitation
15 in Plaintiff’s residual functional capacity, namely, that she could perform “detailed
16 but not complex tasks.” (AR 24.)

17 At the administrative hearing, the vocational expert testified, in response to a
18 hypothetical question regarding an individual who could work at the *light* level and
19 perform detailed but not complex tasks, that such an individual could not perform
20 Plaintiff’s prior work. (AR 59.)⁵ The vocational expert thereafter testified that
21 work existed in the national economy for, first, an individual who could work at the
22 light level and would be restricted to detailed tasks and no more than superficial
23 contact with the public; and, second, an individual who could work at the light level
24 on no more than simple, routine, and repetitive tasks with only superficial contact

25 ⁵ Notably, the ALJ did not pose a hypothetical question that actually encapsulated
26 the residual functional capacity determination that was set forth in the decision, i.e.,
27 medium level work with a restriction to detailed but not complex tasks. (See AR 59-
28 61.) The Court need not and does not decide whether that error alone would require
remand.

1 with the public. (AR 59-61.) In response to Plaintiff’s counsel’s questions, the
2 vocational expert testified that no work would be available for an individual who
3 would be “off task” for ten minutes each hour or who could work at only 70% of
4 the rate of other employees. (AR 61-63.)

5 “The hypothetical an ALJ poses to a vocational expert, which derives from
6 the [residual functional capacity], must set out *all* the limitations and restrictions of
7 the particular claimant. Thus, a [residual functional capacity] that fails to take into
8 account a claimant's limitations is defective.” *Valentine v. Commissioner Social*
9 *Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) (citation omitted). Here, the ALJ
10 purported to accept Dr. Waranch’s opinion with its assessed limitations but did not
11 include those limitations in the residual functional capacity nor in the hypothetical
12 question to the vocational expert. That was error under *Valentine*.

13 Defendant contends, nevertheless, that the ALJ “properly interpreted [Dr.
14 Waranch’s] limitations as consistent with work,” in light of the ALJ’s findings
15 regarding Plaintiff’s testimony. (JS at 18.) Furthermore, Defendant devotes a great
16 deal of its argument to the import of the new regulations regarding the evaluation of
17 medical evidence. (JS at 14-17.) Defendant’s position, it appears, is that the
18 regulations allow the ALJ to indicate acceptance of Dr. Waranch’s opinion in spirit
19 but then to disregard the opinion in practice. The Court rejects this argument. The
20 revised regulations provide that the ALJ must focus “on the persuasiveness of the
21 medical opinion[s]” based on factors such as supportability, consistency, and so on,
22 and must then explain how persuasive she finds that opinion. (JS at 15.) Here, the
23 ALJ explicitly noted that Dr. Waranch’s opinion was persuasive, without
24 qualification, but failed to include any of the limitations found by Dr. Waranch.⁶

25 ⁶ Moreover, the Court notes that the single mental limitation that the ALJ
26 incorporated in the residual functional capacity, - that Plaintiff could perform
27 “detailed but not complex tasks,” – itself is not consistent with Dr. Waranch’s opinion
28 finding that Plaintiff would have difficulty with “more detailed and complex
instructions.” (AR 95.)

1 Because the ALJ did not provide a rational explanation for this failure, remand is
2 warranted on this issue.

3 **B. Plaintiff's Subjective Symptom Testimony**

4 Plaintiff contends that the ALJ erred in rejecting her testimony that she could
5 not work due to pain, insomnia, depression, anxiety, and PTSD. (JS at 21-26 .) For
6 the following reasons, the Court concludes that the ALJ did not err.

7 Where, as here, the claimant has presented evidence of an underlying
8 impairment and the ALJ did not make a finding of malingering (*see* AR 24-25), the
9 ALJ must “evaluate the intensity and persistence of [the] individual’s symptoms . . .
10 and determine the extent to which [those] symptoms limit [his] . . . ability to perform
11 work-related activities.” Soc. Sec. Ruling (“SSR”) 16-3p, 2017 WL 5180304, at *4.
12 In assessing the intensity and persistence of symptoms, the ALJ “examine[s] the
13 entire case record, including the objective medical evidence; an individual’s
14 statements . . . ; statements and other information provided by medical sources and
15 other persons; and any other relevant evidence in the individual’s case record.” *Id.*
16 at *4. The ALJ must provide specific, clear and convincing reasons for rejecting the
17 claimant’s statements. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017)
18 (citation omitted). The ALJ must identify what testimony was found not credible and
19 explain what evidence undermines that testimony. *Holohan v. Massanari*, 246 F.3d
20 1195, 1208 (9th Cir. 2001). “General findings are insufficient.” *Lester*, 81 F.3d at
21 834.

22 Plaintiff testified that she was fired in December 2018 from her last job as a
23 referral coordinator for medical equipment because she has really poor concentration,
24 worked slowly, and made a lot of mistakes such as giving out the wrong information.
25 (AR 39, 41, 48.) Plaintiff testified that she was also fired from her previous job
26 because of her problems with concentrating and making mistakes. (AR 50.)

27 At the May 2019 hearing, Plaintiff testified that she cannot work due to “lower-
28 back pain, headaches, insomnia, depression, numbness, my hands, my feet,

1 stiffness.” (AR 42.) She testified that she is in pain “24/7” and that her whole body
2 aches. (AR 42.) She testified that she takes Gabapentin for nerve pain,
3 Cyclobenzaprine for muscle spasms and stiffness, Hydroxychloroquine for lupus and
4 arthritis, Cymbalta for anxiety and chronic pain, and Ibuprofen as needed for severe
5 pain. (AR 43.) She testified that she is able to drive, which she does once a week.
6 (AR 44.) She testified that she gets in social groups but that her former coworkers
7 would complain that she wasn’t doing what she was supposed to be doing. (AR 45,
8 46.) Plaintiff testified that she is very forgetful, has very poor concentration, and
9 finds it very hard to focus. (AR 46.) She testified that her medications do not appear
10 to help and in fact cause headaches and constipation. (AR 46.) She testified that she
11 can no longer complete tasks easily because she has no energy. (AR 48.) She
12 testified that she suffers from chronic pain in her lower back that “shoots” to her legs.
13 (AR 50.) She estimated that she spends 18 hours laying down in a typical day
14 because she is “very tired, no energy, no desire, no interest, in pain,” and that three
15 or four days per week she cannot get out of bed at all. (AR 51.) She testified that
16 she has three or four “good days” each month and that she walks for exercise on those
17 days. (AR 51.) She testified that her hands are very weak and she can no longer
18 open jars, cut things, or tie her shoes. (AR 52.) She testified that she could not lift a
19 full gallon container because she lacks the strength. (AR 53-54.) She testified that
20 her adult daughter helps wash and dress her because she is no longer able to do so.
21 (AR 54.) Plaintiff testified that she suffers from nightmares and flashbacks that she
22 believes are symptoms of PTSD from when she suffered domestic violence. (AR
23 56.)

24 The ALJ found that Plaintiff’s testimony was not entirely consistent with the
25 medical and other evidence in the record. (AR 25.) The ALJ rejected Plaintiff’s
26 account of her limitations because: (1) it conflicted with the objective evidence; (2)
27 her treatment was generally conservative; (3) she was not compliant with treatment

28 \\\

1 recommendations; and (4) there was a gap in the mental health treatment records.
2 (AR 26-27.)

3 Generally speaking, these are legitimate reasons for discounting a claimant's
4 credibility. *See, e.g., Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40 (9th Cir. 2008)
5 (explaining ALJ may consider fact that claimant was receiving conservative
6 treatment and failure to follow a course of treatment in making adverse credibility
7 determination); *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (holding
8 "unexplained, or inadequately explained, failure to seek treatment" may be basis for
9 an adverse credibility finding); *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007)
10 (holding inconsistencies between subjective complaints and specific medical
11 evidence constitute "significant and substantial reasons" for finding a claimant's
12 testimony less than credible). Furthermore, as follows, the reasons given by the
13 ALJ are supported by substantial evidence in the record.

14 The ALJ noted that although some of the medical records supported Plaintiff's
15 claims of tenderness, muscle spasms, and some range of motion limitations, such
16 findings were not consistent and, at other times, Plaintiff was found to retain full
17 muscle strength, a normal gait, and the ability to perform home exercises. (AR 26-
18 27, 407, 1763.) The ALJ pointed to medical records that showed Plaintiff was
19 discharged from her physical therapy program because of her failure to appear. (AR
20 25, 669.) As for her mental health, the ALJ noted that in September 2017, Plaintiff
21 complained of depression, anxiety, and some PTSD symptoms but was not
22 undergoing counseling or taking medication at that time. (AR 26.) Subsequently she
23 was prescribed Cymbalta but it was noted that she was not taking it as directed. (AR
24 26, 420.) In October 2017, Plaintiff was offered intensive outpatient treatment but
25 did not appear for it until two weeks after her referral and then "could not promise"
26 to attend per the group schedule. (AR 438.)

27 The ALJ noted that the records evidenced a "significant gap in mental health
28 treatment," with March 13, 2019 medical notes reflecting that she had not been

1 evaluated in a year. (AR 26, 1546.) Plaintiff was again offered intensive outpatient
2 treatment but had difficulties with her schedule and demonstrated an inability to
3 commit to a program. (AR 1634, 1672, 1711.) On March 22, 2019, the provider
4 noted that Plaintiff's referral was being reevaluated in light of her lack of compliance
5 and commitment. (AR 1748.)

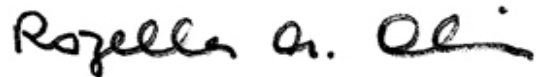
6 Because the ALJ's credibility finding is based on clear and convincing reasons
7 and supported by substantial evidence, the Court will not engage in second-guessing.
8 *Tommasetti*, 533 F.3d at 1039. As such, remand is not warranted on this ground.

9 **IV. CONCLUSION**

10 IT IS ORDERED that Judgment shall be entered REVERSING the decision of
11 the Commissioner denying benefits and REMANDING the matter for further
12 proceedings consistent with this Order.

13 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
14 Order and the Judgment on counsel for both parties.

15
16 DATED: April 19, 2021



17 ROZELLA A. OLIVER
18 UNITED STATES MAGISTRATE JUDGE

19 **NOTICE**

20 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,
21 LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**