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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

JOSETTE NICOLE THIBEAUX,)	No. SA CV 16-00952-AS
)	
Plaintiff,)	MEMORANDUM OPINION
v.)	
)	
NANCY A. BERRYHILL, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
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PROCEEDINGS

On May 24, 2016, Plaintiff Josette Nicole Thibeaux ("Plaintiff") filed a Complaint seeking review of the Commissioner's denial of Plaintiff's application for a period of disability and Disability Insurance Benefits (DIB) and Supplemental Security Income Benefits (SSI). (Docket Entry No 1). On November 30, 2016, Defendant filed an Answer to the Complaint and the Certified

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for Acting Commissioner Carolyn W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Administrative Record ("AR"). (Docket Entry Nos. 18-19). The
2 parties have consented to proceed before a United States Magistrate
3 Judge. (Docket Entry Nos. 13, 15). The parties filed a Joint
4 Stipulation ("Joint Stip.") on February 28, 2017, setting forth
5 their respective positions on Plaintiff's claims. (Docket Entry No.
6 20).

7
8 **SUMMARY OF ADMINISTRATIVE DECISION**
9

10 On February 25, 2014, Plaintiff, formerly employed as an
11 information clerk, salesperson, and hostess, (see AR 366), filed an
12 application for DIB and SSI benefits, alleging disability beginning
13 on May 15, 2009. (AR 255, 262). On October 1, 2013, Administrative
14 Law Judge ("ALJ"), Joseph Lisieski III, deferred a scheduled hearing
15 because Plaintiff was not aware that her attorney had withdrawn as
16 her representative. (AR 96-97). On April 8, 2014, the ALJ examined
17 the record and heard testimony from Plaintiff who was represented by
18 counsel. (AR 32-46). The ALJ continued the second hearing in order
19 to obtain more records from Plaintiff's treating neurologist, Dr.
20 Michael Mahdad, M.D. (AR 43-45). On July 15, 2014, the ALJ
21 examined the record and heard testimony from Plaintiff, vocational
22 expert, Corinne Porter ("VE"), and medical expert, Dr. Irvin S.
23 Belzer, M.D. (AR 47-93). On September 12, 2014, the ALJ denied
24 Plaintiff benefits in a written decision. (AR 11-31).

25
26 The ALJ applied the five-step process in evaluating Plaintiff's
27 case. At step one, the ALJ determined that Plaintiff had not
28 engaged in substantial gainful activity after the alleged onset date

1 of May 15, 2009, and that Plaintiff's date last insured was June 30,
2 2011. (AR 16). At step two, the ALJ found that Plaintiff had the
3 following severe impairments: multiple sclerosis ("MS") with
4 resulting loss of concentration, headaches, and poor vision in the
5 right eye. (AR 16). At step three, the ALJ determined that
6 Plaintiff's impairments did not meet or equal a Listing found in 20
7 C.F.R. Part 404, Subpart P, Appendix 1. (AR 16).

8
9 Before proceeding to step four, the ALJ found that, through the
10 date last insured, Plaintiff had the residual functional capacity
11 ("RFC")² to do less than a full range of sedentary work, including
12 frequent lifting or carrying ten pounds; standing or walking for 2
13 hours and in an 8-hour workday; sitting with no limitations;
14 occasional foot controls; frequent pushing and pulling with the
15 bilateral upper extremity; reaching, handling, and feeling;
16 occasional postural limitations; no climbing, balancing, ropes,
17 ladders, scaffolds, or unprotected heights; no job that requires
18 driving a vehicle; no activities that require depth perception; no
19 working with objects smaller than newspaper print; no frequent
20 moisture and wetness; occasional cold; no concentrated exposure to
21 heat or vibrations; limited to simple tasks with simple work related
22 decisions, object oriented; and no inherently stressful jobs such as
23 taking complaints. (AR 18).

24 The ALJ found Plaintiff's statements regarding the intensity,
25 persistence, and limiting effects of her symptoms not credible
26

27 ² A Residual Functional Capacity is what a claimant can still
28 do despite existing exertional and nonexertional limitations. See
20 C.F.R. § 404.1545(a)(1).

1 because (1) the objective medical record did not support Plaintiff's
2 assertions of debilitating symptoms; (2) Plaintiff made inconsistent
3 statements regarding her ability to work at a low-stress, sedentary
4 job; (3) Plaintiff's condition remained unchanged when she stopped
5 taking her MS medication while pregnant; (4) although Plaintiff was
6 diagnosed with MS in 2000, she has had several jobs and worked after
7 her May 2009 onset date, until August 2009; and (5) Plaintiff's
8 daily activities indicated that she could do more than alleged. (AR
9 19-21).

10
11 After making a credibility finding, the ALJ addressed the
12 opinions of Plaintiff's treating and examining physicians and the
13 non-examining consultants. (See AR 20-23). The ALJ gave partial
14 weight to the opinion of nonexamining, medical expert, Dr. Belzer,
15 who testified at the hearing. (AR 22). After reviewing the medical
16 record, Dr. Belzer testified that Plaintiff had partial blindness in
17 the right eye; took Rebif;³ had headaches, but records did not
18 indicate how severe or frequent; had good exercise habits; and an
19 October 2012 MRI of the brain showed MS and volume loss, which
20 suggests that Plaintiff was developing dementia on an "early basis,"
21 which may have caused memory problems. (AR 54-57).

22 Dr. Belzer opined that Plaintiff could lift or carry 20 pounds
23 occasionally and 10 pounds frequently; had no sitting limitations;
24 could stand or walk for 4 hours in an 8-hour workday but not on a
25 continuous basis and would need breaks every 4 hours for 5 minutes;
26 could frequently push and pull; could occasionally use foot controls

27 ³ Rebif is prescribed to reduce symptoms and episodes
28 associated with relapsing-remitting MS.
<https://medlineplus.gov/druginfo/meds/a604005.html>.

1 with both feet; could occasionally use the stairs but no ladders or
2 scaffolds; could not do activities that required the ability to
3 assess distance with vision or see small objects; no unprotected
4 heights, moving machinery, or motor vehicles, no frequent exposure
5 to wetness, odors, and dust; occasional exposure to cold; infrequent
6 exposure to heat; and occasional exposure to vibrations. (AR 58-
7 59). The ALJ gave partial weight to Dr. Belzer's opinion and gave
8 Plaintiff's assertions "the benefit of the doubt," finding that she
9 had a sedentary RFC. (AR 21). The ALJ found that Dr. Belzer's
10 opinion was based on objective medical evidence. Plaintiff had a
11 significant vision impairment in the right eye, and an October 2012
12 MRI of Plaintiff's brain showed MS and volume loss, which suggested
13 that Plaintiff may be developing dementia, but was not conclusive
14 that Plaintiff had severe MS. (AR 22).

15
16 The ALJ rejected the opinion of examining physician, Dr. Robert
17 A. Moore, M.D., because Dr. Moore did not have an opportunity to
18 review additional relevant medical evidence. (AR 22). The ALJ
19 rejected the opinions of State agency physicians, Dr. Nicolas
20 Tsoulas, M.D., and Dr. Keith Wahl, M.D., because their opinions were
21 not "supported by the cumulative evidence." (AR 23).

22 The ALJ gave no weight to the opinion of Plaintiff's treating
23 neurologist, Dr. Mahdad. (Id.). Dr. Mahdad opined that Plaintiff
24 could sit 6 hours and stand or walk 2 hours in an 8-hour workday;
25 needed breaks every 30 to 45 minutes; could not handle low-stress
26 jobs; could lift or carry less than 10 pounds occasionally and 10
27 pounds rarely; never climb ladders; was limited in grasping,
28 twisting, reaching, and doing fine manipulations; should avoid

1 exposure to extreme heat, humidity, and hazards; and would likely be
2 absent four days per month. (AR 422-27). Dr. Mahdad also opined
3 that because of Plaintiff's gait disturbance, poor coordination,
4 vision and cognitive impairments, and general weakness, Plaintiff
5 was "not employable in any capacity." (AR 463). The ALJ gave no
6 weight to Dr. Mahdad's opinion because (1) while Dr. Mahdad found
7 that Plaintiff could not perform even a low-stress job, Plaintiff's
8 July 2014 hearing testimony that she could perform a sedentary, low-
9 stress job contradicted Dr. Mahdad's opinion; (2) the objective
10 medical record, including Dr. Mahdad's own treatment notes, lacked
11 support for his opinion; and (3) Dr. Mahdad's opinion that Plaintiff
12 was not employable is a decision reserved for the Commissioner
13 alone. (AR 23).

14
15 The ALJ rejected the opinion of Plaintiff's treating primary
16 care physician, Dr. Kenneth Horwitz, M.D. (Id.). Dr. Horwitz
17 opined that Plaintiff could sit for 4 hours and stand or walk less
18 than 2 hours in an 8-hour workday; lift or carry 20 pounds
19 occasionally and 10 pounds frequently; and was incapable of even a
20 low-stress job. (AR 428-33). The ALJ rejected Dr. Horwitz's
21 opinion because Plaintiff's testimony that she could perform a job
22 that required her to sit for 8 hours in an 8-hour workday day
23 contradicted Dr. Horwitz's assessment, and Dr. Horwitz's own
24 examination of Plaintiff did not support "such restrictive
25 limitations." (AR 23).

26 The ALJ rejected the opinion of Plaintiff's former treating
27 physician, Dr. Thuc Tu, M.D., who opined that Plaintiff could not
28

1 work, because such a finding is reserved solely for the
2 Commissioner. (AR 23, 410).

3
4 The ALJ rejected the statements of Harriet Thibeaux,
5 Plaintiff's mother, because (1) her statements discussed Plaintiff's
6 symptoms in relation to her abilities, and Ms. Thibeaux was not a
7 medical professional; (2) Ms. Thibeaux's statements were biased
8 because of her familial relationship with Plaintiff; and (3) the
9 medical evidence did not support her statements. (AR 23-24).

10
11 At step four, the ALJ determined that Plaintiff was not able
12 to perform her past relevant work as a policyholder information
13 clerk. (AR 23). At step five, the ALJ found Plaintiff was able to
14 perform jobs consistent with her age, education, and medical
15 limitations existing in significant numbers in the national economy.
16 The ALJ adopted VE testimony that Plaintiff could perform the jobs
17 of addresser (Dictionary of Occupational Titles ("DOT") 209.587-010)
18 and order clerk (DOT 209.567-014). At the hearing, the ALJ asked
19 the VE whether her testimony conflicted with the DOT description for
20 these jobs. (See AR 91). Accordingly, the ALJ concluded that
21 Plaintiff was not disabled. (AR 26).

22
23 On November 11, 2014, Plaintiff requested that the Appeals
24 Council review the ALJ's Decision, which was denied on March 25,
25 2016. (AR 1-10). The ALJ's Decision then became the final decision
26 of the Commissioner, allowing this Court to review the decision.
27 See 42 U.S.C. §§ 405(g), 1383(c).

1 longer work, such a determination is reserved for the Commissioner
2 alone. (Joint Stip. at 7-13).

3
4 Social Security regulations require the Agency to "evaluate
5 every medical opinion we receive," giving more weight to evidence
6 from a claimant's treating physician. 20 C.F.R. § 404.1527(c).
7 Where a treating or examining physician's opinion is contradicted by
8 another doctor, the "[Commissioner] must determine credibility and
9 resolve the conflict." Valentine v. Comm'r Soc. Sec. Admin., 574
10 F.3d 685, 692 (9th Cir. 2009) (quoting Thomas v. Barnhart, 278 F.3d
11 947, 956-57 (9th Cir. 2002)). "An ALJ may reject the testimony of an
12 examining, but non-treating physician, in favor of a non-examining,
13 non-treating physician when he gives specific, legitimate reasons
14 for doing so, and those reasons are supported by substantial record
15 evidence." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1995), as
16 amended (Apr. 9, 1996) (quoting Roberts v. Shalala, 66 F.3d at 179,
17 184 (9th Cir. 1995)). The opinion of a nonexamining physician
18 cannot by itself constitute substantial evidence that justifies
19 rejecting the opinion of a treating physician. Lester, 81 F.3d at
20 831. The opinions of non-examining physicians may serve as
21 substantial evidence when the opinions are consistent with
22 "independent clinical findings or other evidence in the record."
23 Thomas, 278 F.3d 947 at 957.

24
25 Dr. Belzer's opinion contradicted the opinions of Dr. Mahdad,
26 Dr. Horwitz, and Dr. Tu. Accordingly, the ALJ was required to
27 provide specific and legitimate reasons to reject each doctor's
28 opinion. See Ghanim v. Colvin, 763 F.3d 1154, 1161 (9th Cir. 2014).

1 **1. Dr. Mahdad**

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3 The ALJ properly rejected Dr. Mahdad's opinion because it

4 contradicted Plaintiff's own statements regarding her functional

5 limitations. Magallanes v. Bowen, 881 F.2d 747, 751-52 (9th Cir.

6 1989) (upholding ALJ's rejection of treating physician's opinion

7 that contradicted the claimant's own testimony); Myers v. Barnhart,

8 2006 WL 1663848, at *6 (C.D. Cal. 2006) ("[A] treating physician's

9 assessment of a claimant's restrictions may be rejected to the

10 extent it 'appear[s] to be inconsistent with the level of activity'

11 the claimant maintains, or contradicts Plaintiff's testimony.")

12 (internal citations omitted). Dr. Mahdad opined that Plaintiff was

13 precluded from performing all work and could sit for 6 hours in an

14 8-hour workday. (AR 424-25). However, at the July 2014 hearing,

15 Plaintiff testified that she could perform a sedentary, low-stress

16 job where she sat for 8 hours in an 8-hour workday, which directly

17 contradicts Dr. Mahdad's opinion. (AR 428-33).

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19

20 The ALJ also rejected Dr. Mahdad opinion because it was

21 contradicted by his own treatment notes which indicated somewhat

22 normal findings. (See AR 375-78, 388-98). During a September 13,

23 2012, examination with Dr. Mahdad, Plaintiff had a normal range of

24 motion, no facial weakness, no nystagmus,⁴ no involuntary movements,

25

26

27 ⁴ Nystagmus is a vision condition in which the eyes make

28 repetitive, uncontrolled movements. These movements often result in

reduced vision and depth perception and can affect balance and

coordination. One of the causes of Nystagmus is MS.

1 no focal motor weakness with normal sensation, and a normal stance
2 and gait. (AR 375-77). Subsequent examinations indicated that
3 Plaintiff had no loss of sensation; normal focal motor sensation;
4 and normal attention, concentration, and had an intact short term
5 memory. (AR 390-98, 411-12). During a December 27, 2012,
6 examination Plaintiff had a mild antalgic gait and slight
7 hyperflexion, which were her most severe physical symptoms. (AR
8 386).

9
10 Yet, Plaintiff asserts that the objective medical record
11 supports Dr. Mahdad's opinion because clinical findings showed that
12 Plaintiff suffers from exacerbations, ataxia, forgetfulness, blurred
13 vision, and gait issues. (Joint Stip. at 5). Such generalized
14 symptoms do not correlate to the restrictive lifting, sitting,
15 walking, and mental limitations that Dr. Mahdad opined. During an
16 August 10, 2012, examination with consultative examiner, Dr. Moore,
17 Plaintiff had normal ambulation and motor skills, diminished vision
18 in the right eye, a balance problem, abnormal tingling on her right
19 palm, and no indication that Plaintiff could not sit for extended
20 periods or control her upper extremities. (AR 379-82). An October
21 2012 MRI showed that Plaintiff had early signs of dementia, but
22 there is no medical evidence that this condition limits Plaintiff
23 from holding even a low-stress job. Rather, a February 23, 2013,
24 psychological evaluation of Plaintiff performed by clinical
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27 [http://www.aoa.org/patients-and-public/eye-and-vision-
problems/glossary-of-eye-and-vision-conditions/nystagmus?sso=y](http://www.aoa.org/patients-and-public/eye-and-vision-
28 problems/glossary-of-eye-and-vision-conditions/nystagmus?sso=y).

1 psychologist, Dr. H. McGee, Ph.D., showed that Plaintiff had "mild
2 cognitive limitations in her ability to work, displaying mild
3 deficits in processing, speed," attention, and concentration, but
4 Plaintiff was capable of learning a routine, repetitive skill;
5 reasoning capacities were adequate; and was "able to deal with
6 regular stress in competitive work." (AR 408). Dr. Belzer held the
7 same opinion, (AR 64-68), and the ALJ adopted Dr. Belzer's
8 reasoning, which was proper given the clinical findings.
9 Magallanes, 881 F.2d at 747 (an ALJ properly rejects a treating
10 physician's opinion where the ALJ relies on contrary lab results,
11 examinations findings, and other physicians' opinions).

12
13
14 Moreover, the ALJ made multiple attempts to develop the record.
15 The ALJ continued the second, April 2014, hearing in order to obtain
16 additional medical evidence from Dr. Mahdad. (See AR 44-45). While
17 some new records were submitted, there was still scant evidence to
18 support Dr. Mahdad's opinion, and when the ALJ offered to schedule
19 another consultative examination, Plaintiff's attorney rejected the
20 proposition. (See AR 21, 69-70).

21
22 Lastly, the ALJ appropriately found that Dr. Mahdad's
23 speculation that Plaintiff was "unemployable" carried no probative
24 weight. (AR 23, 463). Whether a claimant can work competitively is
25 an issue reserved specifically to the Commissioner, and a
26 physician's opinion on this issue is not entitled to special
27 significance. 20 C.F.R. § 404.1527(d)(1); Social Security Ruling
28 ("SSR") 96-5p, 1996 WL 374183 (July 2, 1996) (medical source opinion

1 about whether a claimant is unable to work is not entitled to
2 controlling weight or given special significance); Ukolov v.
3 Barnhart, 420 F.3d 1002, 1004 (9th Cir. 2005) ("Although a treating
4 physician's opinion is generally afforded the greatest weight in
5 disability cases, it is not binding on an ALJ with respect to the
6 existence of an impairment or the ultimate determination of
7 disability.") (citation omitted). Non-medical opinions that a
8 plaintiff is disabled or unable to work are not binding on the
9 Commissioner. See Boardman v. Astrue, 286 Fed. Appx. 397, 399 (9th
10 Cir. 2008) ("[The] determination of a claimant's ultimate disability
11 is reserved to the Commissioner . . . a physician's opinion on the
12 matter is not entitled to special significance.").

13
14
15 Accordingly, Plaintiff's own statements regarding her physical
16 limitations which contradicted Dr. Mahdad's opinion, the fact that
17 Dr. Mahdad's own treatment notes failed to support his opinion, and
18 the medical record as a whole which showed mild abnormalities, were
19 all specific and legitimate reasons to reject Dr. Mahdad's opinion.

20 21 **2. Dr. Horwitz**

22
23 The ALJ properly rejected Dr. Horwitz's opinion because it was
24 also contradicted by Plaintiff's own statements. As stated above,
25 an ALJ may reject the opinion of a treating physician where the
26 Plaintiff's statements directly contradict the treating physician's
27 assessment. Magallanes, 881 F.2d at 747 (upholding ALJ's rejection
28 of treating physician's opinion that contradicted the claimant's own

1 testimony); Here, Dr. Horwitz opined that Plaintiff could only sit
2 for 4 hours in an 8-hour workday and that Plaintiff was incapable of
3 working a low-stress job. However, Plaintiff testified that she
4 could do a low-stress job where she sat for 8 hours in an 8-hour
5 workday. (AR 428-33). Accordingly, Plaintiff's own statements
6 regarding her physical limitations contradicted Dr. Horwitz's
7 opinion, which is a legitimate and specific reason to reject his
8 opinion.

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10
11 The ALJ also rejected Dr. Horwitz's opinion because it was not
12 supported by his own examination findings and the objective medical
13 record. Magallanes, 881 F.2d at 747. Although Dr. Horwitz opined
14 that Plaintiff cannot lift more than 20 pounds occasionally and 10
15 pounds frequently, can sit for 4 hours in an 8-hour workday, or
16 stand for 2 hours in an 8-hour workday, Dr. Horwitz's examination
17 findings were minimal. A March 2014 examination of Plaintiff showed
18 normal musculoskeletal system results, normal reflexes, and normal
19 neurological findings, with the exception of loss of sensation in
20 the right thigh and "mild" lack of coordination on the left side.
21 Plaintiff's chief complaint for the visit was headaches. (AR 436-
22 37). Plaintiff attended a follow-up visit with Dr. Horwitz, but
23 treatment notes only list Plaintiff's medications. (AR 478-79).
24 The record does not otherwise contain treatment notes from Dr.
25 Horwitz. Thus, the severe limitations that Dr. Horwitz' found were
26 not supported by the medical record and the mild irregularities that
27 were documented. Accordingly, the ALJ gave specific and legitimate
28 reasons to reject the opinion of Dr. Horwitz.

1 **3. Dr. Tu**

2
3 The ALJ appropriately found Dr. Tu's opinion that Plaintiff
4 cannot work carried no probative weight. (AR 23, 410, 413, 416-20).
5 Whether a claimant can work is an issue reserved specifically for
6 the Commissioner, and a physician's opinion on this issue is not
7 entitled to special significance. 20 C.F.R. § 404.1527(d)(1);
8 Ukolov, 420 F.3d at 1004; Boardman, 286 Fed. Appx. at 399.
9 Accordingly, the ALJ gave a specific and legitimate reason to reject
10 Dr. Tu's opinion where Dr. Tu opined only that Plaintiff could not
11 work.

12
13 **B. The ALJ Properly Found That Plaintiff Could Perform The Job Of**
14 **Addresser**

15
16 Plaintiff contends that the ALJ erred in finding that she could
17 perform the occupations of addresser (DOT 209.587-010) and order
18 clerk (DOT 209.567-014), because Plaintiff's RFC conflicts with the
19 the required level of reasoning for both jobs as described in the
20 DOT. (Joint Stip. at 16-18, 21). Plaintiff's RFC limits her to
21 performing "simple tasks with simple work related decisions," (AR
22 18), which precludes her from performing jobs that require level 2
23 or 3 reasoning skills. (Joint Stip. at 17-18). Because the DOT
24 description for addresser and order clerk require level 2 and 3
25 reasoning skills respectively, Plaintiff could not perform these
26 jobs. (Id.). Plaintiff asserts that because the ALJ did not
27 recognize and then reconcile the conflict between these jobs and
28 Plaintiff's RFC, the ALJ committed reversible error. (Id.).

1 In considering potential occupations that a claimant could
2 perform, the ALJ relies on the DOT and VE testimony. 20 C.F.R. §
3 416.966(e); Zavalin v. Colvin, 778 F.3d 842, 845-46 (9th Cir. 2015);
4 Valentine, 574 F.3d at 689. "When there is an apparent conflict
5 between the [VE's] testimony and the DOT – for example, expert
6 testimony that a claimant can perform an occupation involving DOT
7 requirements that appear to be more than the claimant can handle –
8 the ALJ is required to reconcile the inconsistency." Zavalin, 778
9 F.3d at 846 (citing Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th
10 Cir. 2007)). An ALJ's failure to inquire into an apparent conflict
11 is harmless where there is no actual conflict between the RFC and
12 the DOT. Ranstrom v. Colvin, 622 F. App'x 687, 689 (9th Cir. 2015)
13 (citing Massachi, 486 F.3d at 1154 n. 19).

14
15 Here, the VE testified that Plaintiff could perform the
16 occupations of addresser (DOT 209.587-010) and order clerk (DOT
17 209.567-014), and the ALJ asked whether the VE's testimony
18 conflicted with the DOT. (AR 89-90). The VE responded that her
19 testimony did not conflict with the DOT. (AR 90). The ALJ adopted
20 the VE's testimony. (See AR 25). The DOT description for addresser
21 requires Level 2⁵ Reasoning and the DOT description for order clerk
22 requires Level 3⁶ Reasoning. See ADDRESSER, DOT 209.587-010; ORDER

23
24
25 ⁵ The DOT defines Level 2 Reasoning as "[a]pply[ing] commonsense
26 understanding to carry out detailed but uninvolved written or oral
instructions. Deal with problems involving a few concrete variables
in or from standardized situations." ADDRESSER, DICOT 209.587-010.

27 ⁶ The DOT defines Level 3 Reasoning as "[a]pply[ing] commonsense
28 understanding to carry out instructions furnished in written, oral,
or diagrammatic form. Deal with problems involving several concrete

1 CLERK, FOOD AND BEVERAGE, DOT 209.567-014. The ALJ limited
2 Plaintiff to "simple tasks with simple work related decisions,
3 object oriented and no inherently stressful jobs such as taking
4 complaints." (AR 18).

5
6 Plaintiff relies on Rounds v. Comm'r of Soc. Sec. Admin., 807
7 F.3d 996, 1002 (9th Cir. 2015) to assert that a person who is
8 limited to performing "simple tasks" cannot perform jobs, such as
9 addresser, which require Level 2 reasoning. (Joint Stip. at 17).
10 However, the holding in Rounds is narrower than Plaintiff
11 represents. In Rounds, the plaintiff's RFC limited her to
12 performing "one to two-step tasks," not "simple tasks." Compare
13 Rounds, 807 F.3d at 1001; with (AR 18). The court concluded that
14 "there was an apparent conflict between Round's RFC, which limited
15 her to performing one -and two-step tasks, and the demands of Level
16 [2] reasoning, which requires a person to '[a]pply commonsense
17 understanding to carry out detailed but uninvolved written or oral
18 instructions.'" Rounds, 807 F.3d at 1003 (citing DOT, App. C, § 3,
19 1991 WL 688702). The "obvious similarity" between Round's RFC and
20 Level 1 reasoning, which requires a person to apply "commonsense
21 understanding to carry out simple one - or two-step instructions,"
22 supported the court's finding that Rounds could only perform jobs
23 that require Level 1 reasoning. Id. Here, Plaintiff is able to
24 perform simple tasks, instead of only one and two-step tasks, which

25
26 variables in or from standardized situations." ORDER CLERK, FOOD
27 AND BEVERAGE, DICOT 209.567-014.

1 distinguishes Plaintiff's mental limitations from the claimant in
2 Rounds.

3
4 Moreover, courts have found that a person who is limited to
5 "simple tasks" can perform jobs that require Level 2 reasoning.
6 See, e.g., Hackett v. Barnahart, 395 F.3d 1168, 1176 (10th Cir.
7 2005) ("[L]evel-[2] reasoning appears more consistent with
8 Plaintiff's [residual functional capacity]" to perform "simple and
9 routine work"); Meissl v. Barnhart, 403 F. Supp. 2d 981, 984 (C.D.
10 Cal. 2005) (finding that plaintiff's ability to perform
11 "simple tasks . . . that had some element of repetitiveness to them"
12 indicated a reasoning level of 2); Bowman v. Colvin, ___ F.Supp.3d
13 ___, 2017 WL 66390, at *15 (D. Or. 2017) ("Level [2] allows for the
14 performance of detailed but simple instructions which are not
15 complex . . . when the RFC [limiting someone to simple tasks] is
16 compared to the definitions of both Level [2] and Level [3]
17 reasoning, it is clear that the RFC here aligns with Level [2] and
18 not Level [3]."). Accordingly, because Plaintiff could perform
19 simple tasks, the ALJ properly adopted the VE's testimony that
20 Plaintiff could perform the job of addresser, a Level 2 reasoning
21 occupation.

22
23 The ALJ erred in adopting the VE's testimony that Plaintiff
24 could perform the job of order clerk, a Level 3 reasoning
25 occupation. Zavalin, 778 F.3d at 847 (finding "an apparent conflict
26 between the residual functional capacity to perform simple,
27 repetitive tasks, and the demands of Level 3 Reasoning"). The ALJ
28 failed to resolve this conflict. (See AR 25). However, this error

1 was harmless because the ALJ also identified a Level 2 reasoning job
2 – addresser – that Plaintiff could perform. Stout v. Comm'r of Soc.
3 Sec., 454 F.3d 1050, 1055 (9th Cir. 2006) (ALJ errors are harmless
4 when they are inconsequential to a non-disability finding); Burch v.
5 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (an ALJ's decision will
6 not be reversed for harmless error); Curry v. Sullivan, 925 F.2d
7 1127, 1131 (9th Cir. 1991) (harmless error rule applies to review of
8 ALJ decisions regarding disability).

9
10 **C. The ALJ Articulated Clear And Convincing Reasons To Find**
11 **Plaintiff Not Credible**

12
13 Plaintiff asserts that the ALJ improperly found her not
14 credible for the following reasons: (1) the medical record suggests
15 that Plaintiff has a disabling condition because she had a visiting
16 nurse come to her home; (2) the ALJ exhibited a gender bias in
17 finding that Plaintiff was not credible because she did not take MS
18 medication while pregnant; and (3) the ALJ gave too much weight to
19 Plaintiff's daily activities when compared to other factors
20 supporting Plaintiff's credibility. (Joint Stip. at 22-25, 32-33).

21
22 Defendant contends that the ALJ provided the following clear
23 and convincing reasons to find Plaintiff not credible: (1) the
24 objective record did not support Plaintiff's statements; (2)
25 Plaintiff made inconsistent statements regarding the severity of her
26 condition; (3) Plaintiff's daily activities demonstrated greater
27 physical ability than she claimed; and (4) the ALJ properly
28 considered Plaintiff's failure to take her MS medication while

1 pregnant because an ALJ may consider the medications a claimant
2 takes when making a credibility determination. (Joint Stip. at 25-
3 30).

4
5 A claimant initially must produce objective medical evidence
6 establishing a medical impairment reasonably likely to be the cause
7 of his subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281
8 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
9 1991). Once a claimant produces objective medical evidence of an
10 underlying impairment that could reasonably be expected to produce
11 pain or other symptoms alleged, and there is no evidence of
12 malingering, the ALJ may reject the claimant's testimony regarding
13 the severity of his pain and symptoms only by articulating specific,
14 clear, and convincing reasons for doing so. Brown-Hunter v. Colvin,
15 806 F.3d 487, 492-93 (9th Cir. 2015) (citing Lingenfelter v. Astrue,
16 504 F.3d 1028, 1036 (9th Cir. 2007)). Because there is no evidence
17 of malingering, the "clear and convincing reasons" standard applies.

18
19 In her disability application, Plaintiff asserted that she
20 cannot work because she has MS that causes debilitating symptoms,
21 including seizures, severe migraines, and blurred vision in the
22 right eye. (AR 288). Plaintiff stated in an Updated Work
23 Information form that she needs help showering and bathing; has no
24 energy to clean but can cook easy meals that do not require
25 standing; and either stays at home or walks to the park with her
26 daughter. (AR 325). Plaintiff testified at the third, July 2014,
27 hearing that she suffers from dizzy spells on a daily basis;
28 forgetfulness, and a loss of appetite, which makes her weak and

1 causes headaches; needs help to clean and cook; on a normal day,
2 lays and watches television; and leaves the house once every other
3 day to go to church or the grocery store. (AR 70-72, 75-76).

4

5 The ALJ found Plaintiff not credible for the following reasons:

6 (1) the objective medical record did not support Plaintiff's
7 assertions of debilitating symptoms; (2) Plaintiff made inconsistent
8 statements regarding her ability to work at a low-stress, sedentary
9 job; (3) Plaintiff did not take her MS medication while pregnant and
10 her condition remained unchanged; (4) although Plaintiff was
11 diagnosed with MS in 2000, she had several jobs and worked after her
12 May 2009 onset date, until August 2009; and (5) Plaintiff's daily
13 activities indicated that she had greater abilities than she
14 alleged. (AR 19-21).

15

16 First, the ALJ properly found that the medical evidence did not
17 support Plaintiff's statements. The ALJ noted that "[c]learly, the
18 claimant has MS," but "the record does not show severity . . . "
19 (AR 21). Examinations with Dr. Mahdad, Dr. Moore, and Dr. Horwitz
20 showed largely normal results regarding Plaintiff's motor strength
21 and ability to ambulate. (AR 20). The October 2012 MRI showed
22 "small to large areas of abnormal T2/flair hyper intensities
23 throughout . . . " the brain, "consistent with history of MS and
24 moderate degree of diffuse generalized volume loss, advanced for
25 patient's age," but the MRI did not correlate to the severity of the
26 condition, just its presence. (Id.). Ophthalmologist records
27 indicated that Plaintiff had mild optic neuritis in the left eye and
28 neuritis in the right eye, which left Plaintiff's right eye

1 significantly impaired and left eye normal, and, as Plaintiff
2 asserts, she was seen by a visiting nurse, but "just because one has
3 a visiting nurse, it does not mean one is disabled." (AR 20-21).
4

5 The ALJ's summary of the evidence reflects the record as a
6 whole. A MRI of Plaintiff's brain showed MS and early signs of
7 dementia, but a psychological evaluation concluded that Plaintiff
8 had only mild cognitive limitations and could hold a job with
9 regular stress that requires using a routine, repetitive skill.
10 (See AR 388, 408). As the ALJ noted, Plaintiff has a significant
11 visual impairment in her right eye, which affects her depth
12 perception, but it does not preclude her from all work. (AR 64-65).
13 Moreover, the objective medical evidence, which primarily
14 encompassed examinations conducted by Dr. Horwitz and Dr. Mahdad,
15 had normal findings. Nurse records show that Plaintiff
16 intermittently complained of dizziness and headaches, but not to the
17 constant degree that Plaintiff asserts. (See AR 470-79). The lack
18 of objective medical evidence regarding Plaintiff's disabling
19 physical and mental limitations supports the ALJ's finding that
20 Plaintiff was not credible. Burch, 400 F.3d at 680-81 ("Although
21 lack of objective medical evidence cannot form the sole basis for
22 discounting pain testimony, it is a factor that the ALJ can consider
23 in his credibility analysis.").

24
25 Moreover, the mere fact that Plaintiff was seen by a visiting
26 nurse does not constitute objective medical evidence supporting
27 Plaintiff's allegations. Objective medical evidence includes
28 clinical findings, physical examinations, or tests done by a medical

1 source, which establishes a condition and related symptoms
2 supporting a finding of disability. Without such objective
3 evidence, an ALJ may give no weight to a physician's treatment
4 notes. See Batson v. Comm'r, 359 F.3d 1190, 1195 n. 3 (9th Cir.
5 2004) (treating physician notes did not provide objective medical
6 evidence of alleged limitation); Thomas, 278 F.3d at 957 (ALJ need
7 not accept treating physician's opinion if inadequately supported
8 by clinical findings). Accordingly, the record is not consistent
9 with Plaintiff's statements.

10
11 Second, the ALJ properly found Plaintiff's testimony that she
12 could do a low-stress, sedentary job inconsistent with her
13 allegations of disabling symptoms. Inconsistent statements
14 regarding a Plaintiff's functional limitations provide a clear and
15 convincing reason to find a plaintiff not credible. Smolen, 80 F.3d
16 at 1284; See Thomas, 278 F.3d at 959 (upholding an adverse
17 credibility finding in part due to a claimant's inconsistent
18 statements to her doctors); see also Brown v. Astrue, 405 F. App'x
19 230, 233 (9th Cir. 2010). Plaintiff testified that she could do a
20 sedentary job, "if easy and repetitive, and not stressful." (AR
21 21). Yet, Plaintiff also stated that on a normal day all she can do
22 is lay and watch television because of constant, severe headaches
23 and dizzy spells. (AR 70-72, 75-76, 325). Plaintiff's testimony
24 contradicts her previous statements. Accordingly, the ALJ gave a
25 clear and convincing reason to find Plaintiff's statements not
26 credible where Plaintiff testified that she could hold a sedentary,
27 low-stress job.

1 Third, the ALJ improperly found Plaintiff not credible because
2 she did not take her MS medication, Rebif, while pregnant. (See AR
3 21). It is not clear whether the ALJ provided this reason because
4 (a) Plaintiff failed to follow prescribed treatment, or (b)
5 Plaintiff's condition remained unchanged, indicating that
6 Plaintiff's condition was not as severe as claimed. The Court will
7 address both interpretations.

8
9 It is improper to discount a claimant's credibility on the
10 basis of failure to pursue medical treatment when the claimant "has
11 a good reason for not" doing so. Carmickle v. Commissioner, Social
12 Security Admin., 533 F.3d 1155, 1162 (9th Cir. 2008); see also SSR
13 96-7p, 1996 WL 374186, at *7 (ALJ must not draw inferences about
14 claimant's symptoms and their functional effects from failure to
15 follow prescribed treatment, without first considering any
16 explanations provided or other information in the record that may
17 explain that failure). Here, Dr. Mahdad was aware that Plaintiff
18 stopped taking Rebif while pregnant and did not make any objections
19 in his treatment notes. (See AR 375). Accordingly, Plaintiff's
20 pregnancy was an explanation for Plaintiff to not take Rebif for a
21 period of time.

22
23 Alternatively, the ALJ improperly substituted his judgment for
24 that of the medical evidence in interpreting Plaintiff's physical
25 condition while she was not taking Rebif. An ALJ cannot substitute
26 medical evidence with his own judgment, and such speculation cannot
27 support an inference on which an ALJ's credibility determination
28 depends. Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975)

1 (an ALJ who is not qualified as a medical expert cannot make "his
2 own exploration and assessment as to [the] claimant's physical
3 condition"); see also Rohan v. Chater, 98 F.3d 966, 970-71 (7th Cir.
4 1996) (ALJ may not rely on his own lay opinion regarding medical
5 matters); Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1995)
6 (same); Miller v. Astrue, 695 F. Supp. 2d 1042, 1048 (C.D. Cal.
7 2010) (same); cf. Rudder v. Colvin, 2014 WL 3773565, at *12 (N.D.
8 Ill. 2014) ("The ALJ may be correct that disabling limitations from
9 multiple sclerosis would result in more frequent treatment or need
10 for medication. However, the ALJ must include evidence to support
11 such a conclusion in his opinion because he is not qualified, on his
12 own, to make such determinations").

13

14 Here, the ALJ viewed Plaintiff's apparent stabilized condition
15 while she was pregnant and not taking Rebif as a reason to discredit
16 Plaintiff's MS symptoms. Yet, the medical record does not address
17 whether Plaintiff's condition was stable during this time, or
18 whether Plaintiff's symptoms should have been worse while not on
19 Rebif. Because the ALJ is not a medical expert, he cannot assess
20 the need for such medications or opine on how stable a claimant's
21 condition should be. Accordingly, the ALJ's finding that Plaintiff
22 was not credible because she did not take her MS medication while
23 she was pregnant was not a clear and convincing reason to find
24 Plaintiff not credible.

25 Fourth, the ALJ improperly found that Plaintiff was not
26 credible because she had a failed work attempt after her onset date.
27 (AR 21). A failed work attempt versus the ability to work is
28 distinguished under 42 USC § 422(c); SSR 84-25. A plaintiff's

1 unsuccessful work attempt is not a clear and convincing reason to
2 conclude that her symptoms would not preclude consistent employment.
3 Lingenfelter, 504 F.3d at 1028 (ALJ erred in relying on period of
4 work as proof that a claimant's pain was not disabling).
5 Accordingly, Plaintiff's attempt to work is not a clear and
6 convincing reason to reject Plaintiff's pain testimony.

7
8 Fifth, the ALJ properly found that Plaintiff's daily activities
9 undermined her credibility. Burch, 400 F.3d at 680 (ALJ properly
10 found claimant not credible where her daily activities suggested
11 that she was quite functional). Plaintiff describes having severe
12 fatigue, headaches, dizziness, and lack of coordination. (AR 70-74,
13 76). Yet, during a February 2013 consultative examination,
14 Plaintiff reported reading; cooking; using a computer; sometimes
15 washing dishes; sometimes cleaning; going to church, the grocery
16 store, and the beach; and babysitting her friend's children four
17 times per month. (AR 405). Dr. Horwitz also reported that
18 Plaintiff had good exercise habits and did normal activities of
19 daily living. (AR 436). Accordingly, Plaintiff's daily activities
20 was a clear and convincing reason to find Plaintiff not credible.

21
22 In sum, the ALJ articulated clear and convincing reasons to
23 find Plaintiff not credible: the medical evidence did not support
24 Plaintiff's statements; Plaintiff testified that she could perform a
25 low-stress, sedentary job; and Plaintiff's activities of daily
26 living revealed that Plaintiff had greater abilities than she
27 asserted. The ALJ also provided improper reasons to find Plaintiff
28 not credible in citing Plaintiff's decision to not take Rebif while

1 pregnant and her failed work attempt. However, the Court finds any
2 such error harmless, since the ALJ provided other clear and
3 convincing reasons to find Plaintiff not credible. Carmickle, 533
4 F.3d at 1162.

5
6 **D. The ALJ Properly Found Lay Witness Testimony Not Credible**

7
8 Plaintiff asserts that the ALJ failed to properly consider
9 Plaintiff's mother's testimony. (See Joint Stip. at 24-25, 33).
10 Defendant contends that the ALJ provided germane reasons for
11 rejecting Plaintiff's mother's testimony. (See Joint Stip. at 30-
12 32).

13
14 The ALJ is required to give germane reasons for rejecting lay
15 witness testimony. See Carmickle, 533 F.3d at 1164; Greger v.
16 Barnhart, 464 F.3d 968, 972 (9th Cir. 2006); Lewis v. Apfel, 236
17 F.3d 503, 511 (9th Cir. 2001); Smolen, 80 F.3d at 1288-89.

18
19 Here, the ALJ gave a germane reason for rejecting Plaintiff's
20 mother's testimony because it was inconsistent with the objective
21 medical evidence. See Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th
22 Cir. 2015) (inconsistency with the medical evidence is a germane
23 reason for discrediting the testimony of a lay witness); Lewis, 236
24 F.3d at 511 ("One reason for which an ALJ may discount lay testimony
25 is that it conflicts with medical evidence."); Vincent v. Heckler,
26 739 F.2d 1393, 1395 (9th Cir. 1984) ("The ALJ properly discounted
27 lay witness testimony that conflicted with the available medical
28 evidence.").

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However, the ALJ erred in discrediting Plaintiff's mother's statements because she lacks medical expertise and has familial bias. "[L]ack of medical expertise and family bias are not germane reasons to reject lay witness testimony. Bruce v. Astrue, 557 F.3d 1113, 1116 (9th Cir. 2009) (ALJ cannot reject lay witness testimony because of lack of medical training or family bias). The ALJ's error was harmless because he provided another germane reason to reject Plaintiff's mother's testimony in finding that it was inconsistent with the medical record. Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008) (citation and quotation omitted) ("The court will not reverse an ALJ's decision for harmless error, which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate nondisability determination.").

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\\

1 **CONCLUSION**

2
3 For the foregoing reasons, the decision of the Commissioner is
4 AFFIRMED.

5
6 LET JUDGMENT BE ENTERED ACCORDINGLY.

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8 Dated: May 10, 2017

9
10
11 _____/s/_____
12 ALKA SAGAR
13 UNITED STATES MAGISTRATE JUDGE
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