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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
8

9 MARY B. COSIO,

10 Plaintiff,

11 v.

12 CAROLYN W. COLVIN, Acting
13 Commissioner of Social Security,

14 Defendant.
15

Case No. 1:13-cv-00631-SMS

ORDER AFFIRMING AGENCY'S DENIAL
OF BENEFITS AND ORDERING
JUDGMENT FOR COMMISSIONER

16 Plaintiff Mary B. Cosio ("Plaintiff"), by attorney Kelsey Mackenzie Brown, seeks review of
17 the final decision of the Commissioner of Social Security ("Commissioner" or "Defendant")
18 denying her application for disability insurance benefits (DIB) under Title II and supplemental
19 security income (SSI) under Title XVI of the Social Security Act. The Court finds the decision of
20 the Administrative Law Judge ("ALJ") to be supported by substantial evidence in the record as a
21 whole and based upon proper legal standards, and affirms.

22 **I. Procedural History**

23 Plaintiff applied for benefits in October 2009, claiming disability as of that month.¹ The
24 state agency denied her applications initially on February 16, 2010 and on redetermination on
25 September 16, 2010. After a hearing on November 17, 2011, ALJ Michael Blume denied her
26

27 ¹ DIB is paid to disabled persons who have contributed to the Social Security program. 42 U.S.C. § 401 *et seq.* SSI is paid
28 to disabled persons with low income. 42 U.S.C. § 1382 *et seq.* Only DIB is paid retroactively, up to twelve months from
the application date. 20 C.F.R. §§ 404.621(a)(1), 416.335. Where the applicable DIB and SSI regulations are virtually
identical, this opinion will identify only one of these.

1 applications in a decision dated December 20, 2011. The Appeals Council denied review on March
2 8, 2013. Plaintiff filed her complaint in this Court on May 1, 2013. *See* 42 USC § 405(b)(1). The
3 parties consented to magistrate jurisdiction and have submitted their cross-briefs without oral
4 argument.

5 **II. Scope of Review**

6 Congress has provided a limited scope of review of a decision to deny benefits. First, this
7 Court reviews only the Commissioner’s “final decision.” 42 U.S.C. § 405(g). Here, because the
8 Appeals Council denied review, that is the ALJ’s decision. *Sims v. Apfel*, 530 U.S. 103, 106 (2000);
9 *cf. Brewes v. Comm’r*, 682 F.3d 1157, 1161-62 (9th Cir. 2012) (describing limited consideration of
10 Appeals Council’s decision “as a practical matter”). Furthermore, this Court reviews only whether
11 this decision applied proper legal standards and made findings supported by substantial evidence.
12 *Bray v. Comm’r*, 554 F.3d 1219, 1222 (9th Cir. 2009). Substantial evidence is more than a scintilla
13 but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as
14 adequate to support a conclusion. *Id.* Where the record as a whole can support either grant or
15 denial, the Court may not substitute its judgment. *Id.*

16 **III. Disability Standard**

17 To be disabled, a claimant must have impairments which foreclose all meaningful
18 employment for at least twelve months. 42 U.S.C. § 1382c(a)(3). To make the disability
19 determination more uniform and efficient, ALJs follow a five-step “sequential evaluation process,”
20 stopping once they reach a dispositive finding. 20 C.F.R. §§ 404.1520, 1594(b)(5).

21 The sequential process begins with a “*de minimis* screening device to dispose of groundless
22 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.1996). At steps one and two, the claimant
23 must verify that he is not meaningfully employed and in fact has severe impairments. Once the
24 claimant passes this screening, the remaining steps examine whether he is disabled.

25 The claimant may prove this in two ways. One way—considered at step three—is to have a
26 condition that is disabling by definition. *See* 20 C.F.R. Pt. 4, Subpt. P, App. 1 (the “listings”).
27 Failing this, he must present evidence of his residual functional capacity (“RFC,” the most he can
28 do despite his limitations). The ALJ determines this RFC, then at steps four and five applies this to

1 the world of work. If the claimant's RFC forecloses his past work, and if the Commissioner cannot
2 satisfy her burden to identify a significant number of other jobs that the claimant could learn, then
3 the claimant is disabled.

4 **IV. Evidence of Record**

5 Plaintiff applied for benefits in October 2009. AR 155. She claimed disability due to a back
6 injury, stomach aches, and vaginal bleeding, and was unable to walk or stand for more than fifteen
7 minutes or carry objects or move easily. AR 174. In a pain questionnaire dated November 2009, she
8 stated that her pain, including back pain and headaches, started in the early 1980s. AR 180.

9 On January 17, 2010, James Nowlan, Jr., M.D., performed an internal medicine evaluation
10 of Plaintiff. AR 211-14. Plaintiff said her headaches were "occasionally" shooting pains but were
11 otherwise characterized by "pressure" and were relatively mild. Dr. Nowlan noted that Plaintiff
12 reported activities of daily living including walking, cleaning her house, cooking, and shopping.
13 AR 211. Plaintiff was not taking any medications. AR 211. Based on his examination, Dr. Nowlan
14 opined that Plaintiff could stand/walk for 6 hours in an 8-hour day, lift/carry 10 pounds frequently
15 and 20 pounds occasionally, and noted that Plaintiff was limited by her age and physical
16 deconditioning. AR 213.

17 On January 18, 2010, Daniel Hightower, M.D., reviewed an x-ray of Plaintiff's lumbosacral
18 spine. AR 210. Dr. Hightower noted that the x-ray showed no evidence for significant degenerative
19 disc disease of the lumbar spine, distal fracture, subluxation, or expansile bony change. AR 210. The
20 sacroiliac joints and hips demonstrated only mild degenerative changes, appropriate for Plaintiff's
21 age. AR 210.

22 On February 12, 2010, State agency medical consultant, F. Kalmar, M.D., reviewed the
23 medical evidence of record. AR 215-20. Based on the medical evidence, Dr. Kalmar opined that
24 Plaintiff could lift/carry 50 pounds occasionally and 25 pounds frequently, stand/walk for 6 hours
25 in an 8-hour day, and sit for 6 hours in an 8-hour day. AR 216. Dr. Kalmar further opined that
26 Plaintiff's only additional limitations would be occasional climbing of ladders, ropes and scaffolds,
27 and should avoid concentrated exposure to extreme cold, vibration, and hazards. AR 218.

1 On February 16, 2010, the state agency denied Plaintiff's claims initially. AR 99. On April
2 2, 2010, Plaintiff filed a request for reconsideration. AR 106.

3 In a function report from June 17, 2010 Plaintiff indicated that she had been fired from a job
4 with Sierra Mini Mart because "they said I took money or shorted my register" (AR 200); the ALJ
5 noted this in his opinion because it contradicted her testimony at the hearing that she stopped
6 working to care for a sick brother in Arizona. AR 23.

7 On June 23, 2010, Dr. Nowlan performed another internal medicine evaluation. Dr. Nowlan
8 noted that now Plaintiff complained of cervical cancer, poor vision, left hand numbness extending
9 to her face, right knee pain, and poor balance. AR 227. Her pressure headaches were daily. Dr.
10 Nowlan noted Plaintiff's medical records included an x-ray of her lumbosacral spine, which was
11 normal, and his own exam from January, which he stated included only "slight limits." AR 227. Dr.
12 Nowlan noted generally normal findings upon examination. AR 228-30. Dr. Nowlan diagnosed
13 Plaintiff with pain in the right knee, but noted that Plaintiff elicited no findings suggestive of back
14 pain, and had no loss of sensation in her left hand. AR 230. Dr. Nowlan opined that Plaintiff could
15 stand/walk for 6 hours in an 8-hour day, limited only by pain in her right knee, and could sit
16 without limitation and did not require an assistive device. AR 230. Dr. Nowlan further opined that
17 Plaintiff would be able to lift/carry 25 pounds frequently and 50 pounds occasionally, but due to
18 complaints of pain in her right knee, he limited Plaintiff to lift/carry 10 pounds frequently and 20
19 pounds occasionally. AR 231.

20 On July 22, 2010, Plaintiff was seen after experiencing numbness in her left hand for
21 several days. AR 237. Sometimes this numbness would radiate to her face. AR 237. The
22 Physician's Assistant diagnosed radiculopathy or carpal tunnel syndrome, but accompanied this by
23 a question mark. AR 237.

24 On July 27, 2010, T. Divakaran, M.D., reviewed an x-ray of Plaintiff's right knee. AR 232.
25 Dr. Divakaran stated that the x-ray showed periarticular osteopenia, but otherwise normal findings.
26 AR 232.

27 On August 10, 2010, Roger Izzi, M.D., performed a psychological evaluation. AR 243-47.
28 Dr. Izzi noted that Plaintiff reported her problems as "My left hand quit functioning on me . . . Pain

1 in my knees . . . Pain in back . . . I feel trapped.” AR 243. Dr. Izzi noted that Plaintiff reported
2 suicidal ideation without a specific plan, experienced occasional auditory hallucinations, but did not
3 know whether she experienced visual hallucinations. AR 244. He did not observe any auditory or
4 visual hallucinations. AR 244. In his functional assessment, Dr. Izzi noted that pain was a
5 “predominant feature.” AR 246. Dr. Izzi opined that Plaintiff did not have problems with basic
6 hygiene, and could perform simple repetitive tasks on a consistent basis over an 8-hour period. AR
7 246. He diagnosed tension headaches, AR 244, and an unspecified depressive disorder. AR 246. Dr.
8 Izzi opined that Plaintiff’s deficit in short-term memory would limit her ability to perform a
9 complex task on a consistent basis, but was psychologically capable of responding to usual work
10 situations regarding attendance and safety issues and changes in a routine work setting. AR 246.

11 Plaintiff was seen again for her left hand numbness and back pain on August 17, 2010. AR
12 288. Plaintiff was referred for an EMG. AR 288.

13 On August 27, 2010, a reviewing physician, L. Kiger, M.D., reviewed the medical evidence
14 in Plaintiff’s file. AR 250-52. Dr. Kiger noted that Plaintiff alleged back injury, stomach aches, and
15 vaginal bleeding. AR 250. Dr. Kiger noted that Plaintiff was only marginally credible because she
16 reported worsening symptoms despite minimal findings, and she further noted that Plaintiff alleged
17 memory problems on reconsideration but was not on any psychiatric treatment. AR 251-52. Dr.
18 Kiger opined that Plaintiff’s alleged impairments were “non-severe.” AR 252.

19 On September 16, 2010, the state agency denied Plaintiff’s request for reconsideration. AR
20 100. On October 28, 2010, she requested an ALJ hearing. AR 114.

21 Plaintiff underwent a hysterectomy for possible cancer in May 2011. *See* AR 299-593.

22 The ALJ hearing occurred on November 17, 2011. Plaintiff testified that the last time she
23 worked was in 2004. AR 64. She had previously worked as a cashier at two different jobs. AR 64-
24 65. Plaintiff testified that her left hand did not work well, was numb all of the time, as well as weak.
25 AR 65. However, doctors had not told her anything about what was happening with her left hand
26 other than that it was not from a stroke. AR 66. Plaintiff stated that she had difficulty even holding
27 up her left hand, and could not lift anything with it. AR 66-67. Plaintiff testified that she had
28 arthritis in her back, for which she was taking vicodin. AR 68. She stated that her back felt like it

1 would break if she “straighten[ed] up.” AR 69. Plaintiff testified that she had problems with her
2 knees, and experienced shooting pains. AR 70. Plaintiff also testified that she experienced
3 headaches and stomach pain, and was unable to sit or stand for long periods of time. AR 71.
4 Plaintiff stated that her back hurt if she tried to lift more than 25 pounds, and she could only walk a
5 block. AR 71.

6 **Testimony of Vocational Expert**

7 At the hearing, Jo Ann Yoshioka, a vocational expert, described how various mental and
8 physical limitations would impact Plaintiff’s ability to work. *See* 20 C.F.R. §404.1560. First, she
9 considered whether a person with these limitations and Plaintiff’s work experience could return to
10 that past work. If not, she further considered whether that person, given Plaintiff’s age and
11 education, could adjust to new work. In making this analysis, she characterized Plaintiff’s past
12 work as cashier/checker (light, 3—medium as performed).²

13 The parties asked Ms. Yoshioka to consider two hypothetical sets of limitations. The ALJ’s
14 first hypothetical described a person who could perform medium level lifting and could
15 occasionally climb scaffolds, ropes, and ladders, with no concentrated exposure to hazards, cold, or
16 vibration. Ms. Yoshioka stated that the person could perform Plaintiff’s past work.

17 The ALJ’s second hypothetical added limitations to lifting 20 pounds occasionally with a
18 sit-stand option and occasional walking. Ms. Yoshioka stated that the person could perform
19 Plaintiff’s past work at a light level, and that this included the representative category of parking lot
20 cashiers, of which there were 7,600 positions in Fresno County.

21 **V. The ALJ’s Decision**

22 The ALJ followed the five-step sequential evaluation process outlined above and found
23 Plaintiff not disabled at step two: Although Plaintiff had a number of impairments which were
24 “medically determinable”—specifically, “mild degenerative changes of the hips, minimal
25 parietal osteopenia in the right knee, and depressive disorder not otherwise specified (NOS)” —
26 none of these was medically severe, either individually or in combination.

27 ² In the parenthetical, the strength rating captures how much exertion the job requires and whether this is occasional (up to
28 a third of a day), frequent (two thirds), or constant. The Specific Vocational Preparation number ranks, from one to nine,
how long it takes to learn the job. Dictionary of Occupational Titles (4th ed.1991) Appendix C.

1 On appeal, Plaintiff argues that the ALJ erred at step two. She does not identify a specific
2 impairment, but argues generally “that Plaintiff had severe physical and mental impairments that, in
3 combination, had more than a minimal effect on Plaintiff’s ability to work,” particularly when
4 Plaintiff’s obesity was taken into account.

5 **VI. Discussion**

6 “[A]n ALJ may find that a claimant lacks a medically severe impairment or combination of
7 impairments only when his conclusion is ‘clearly established by medical evidence.’” *Webb v.*
8 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (citing SSR 85-28). An impairment is severe within
9 the meaning of the regulations if it significantly limits an individual’s ability to perform basic work
10 activities. 20 C.F.R. § 416.975. Plaintiff argues that this standard is met by evidence that Plaintiff’s
11 impairments would impose “some limitations” on Plaintiff’s work activities.” POB at 7:6-7:7.
12 However, this misstates the standard; an impairment that imposes some limitation on work
13 activities can still be nonsevere, so long as the impact is no more than “minimal” or does not
14 impinge upon “basic” work activities. SSR 96-3p.

15 Plaintiff’s allegations of pain and depression largely rely on her subjective statements and
16 complaints. The ALJ found that “most of the [consultative examiner] conclusions depend on her
17 subjective representations, many of which are either untrue or contradictory to the point of being
18 utterly unreliable.” AR 28. He found her to be “not credible,” and it is significant that Plaintiff does
19 not challenge the ALJ’s adverse credibility finding. In finding Plaintiff not credible, the ALJ
20 appropriately considered, among other factors, that Plaintiff made multiple inconsistent allegations
21 about her alleged impairments. In January 2010, Plaintiff did not report numbness in her left hand,
22 and she had full motor strength in all her extremities. AR 211-13. However, in June 2010 she
23 reported that the numbness extended from her left hand to her face, claiming it began in 2008. AR
24 227-28. In August 2010, Plaintiff claimed that her “left hand quit functioning.” AR 243. Then, in
25 May 2011, Plaintiff alleged numbness only in her left thumb and index finger. AR 25, 361, 404.

26 Objective medical evidence also contradicted Plaintiff’s subjective complaints and
27 supported the ALJ’s finding that Plaintiff did not have a severe impairment. AR 22, 24-28. Plaintiff
28 alleged that she experienced back pain through the date of the hearing. AR 24, 68-69. However, the

1 mild objective findings of record contradicted Plaintiff's allegations. As the ALJ noted, an x-ray of
2 Plaintiff's lumbosacral spine from January 2010 showed "no evidence" of significant abnormalities.
3 AR 24, 210. The objective medical evidence showed only "mild degenerative changes, appropriate
4 for age." AR 210. As to Plaintiff's alleged knee pain, an xray from July 2010 showed periarticular
5 osteopenia, but otherwise normal findings. AR 232. In August 2010, a reviewing physician, L.
6 Kiger, M.D., reviewed all the evidence in Plaintiff's file. AR 250-52. Based on his review, Dr.
7 Kiger noted that Plaintiff reported worsening symptoms despite minimal findings, concluding that
8 Plaintiff's alleged impairments were "nonsevere." AR 252.

9 Plaintiff also argues that the ALJ failed to consider the impact of her obesity. In discussing
10 the state agency physician Dr. Kalmar's opinion, the ALJ acknowledged Plaintiff's "obesity" as an
11 objective finding. AR 26. In fact, the word Dr. Kalmar had used was "overweight." The numbers
12 that both Dr. Kalmar and Dr. Kiger relied upon were that Plaintiff was five feet tall and 142
13 pounds, which in fact corresponds to a BMI of less than 28 ("overweight"). Plaintiff claims that the
14 ALJ failed to account for her obesity, but she identifies no relevant evidence either in medical
15 records or in expert opinions, and this Court can identify none.

16 In alleging error with the ALJ's step two finding, Plaintiff relies on the reports from Drs.
17 Nowlan and Izzi. POB at 7:7-7:9, 8:12-8:15. However, these reports failed to support Plaintiff's
18 allegation of severe impairment. As the ALJ correctly noted, Dr. Nowlan examined Plaintiff in
19 January and June 2010. AR 26, 211-14, 227-31. In the January examination, Plaintiff reported
20 vaginal bleeding, low back pain, and headaches. AR 211. Despite her alleged symptoms, Plaintiff
21 reported that she walked, cleaned her house, cooked and shopped, and did not take any
22 medications. AR 211. The physical examination showed essentially normal findings. AR 211-13.
23 Based on Plaintiff's subjective complaints, and notwithstanding the lack of significant examination
24 findings, Dr. Nowlan diagnosed tension headaches and "[b]ack pain with no objective evidence."
25 AR 213. The following month a State agency medical consultant, Dr. Kalmar, questioned Dr.
26 Nowlan's findings, noting that there was no objective evidence of impairment as the examination
27 was essentially normal. AR 219. Based on Dr. Kalmar's review of the evidence, he opined that
28

1 Plaintiff could lift and carry 50 pounds occasionally and 25 pounds frequently, stand for 6 hours
2 and sit for 6 hours in an 8-hour day, and would have minimal postural limitations. AR 215-18.

3 In his June 2010 examination, Dr. Nowlan noted that now Plaintiff complained of cervical
4 cancer, poor vision, left hand numbness extending to her face, right knee pain, and poor balance.
5 AR 227. Dr. Nowlan noted that he reviewed Plaintiff's records, including an x-ray of her
6 lumbosacral spine, which was normal, and his own exam from January, which he stated included
7 only "slight limits." AR 227. The examination findings were again normal, except for Plaintiff's
8 complaints of pain in her right knee. AR 228-30. As the ALJ noted, Dr. Nowlan's functional
9 assessment remained essentially unchanged, but this time based his limitations on Plaintiff's
10 alleged knee pain instead of alleged back pain. AR 26, 231.

11 Dr. Izzi examined Plaintiff in August 2010. AR 243-47. The ALJ assigned "great weight" to
12 Dr. Izzi's opinion. AR 27. As the ALJ correctly noted, based on his examination, Dr. Izzi opined
13 that Plaintiff's intellectual functioning was in the borderline to low average range, she had deficits
14 in short-term visual and auditory memory, but had good perceptual motor integration functioning.
15 AR 27, 245-46. Dr. Izzi's only diagnosis was depressive disorder. AR 246. Dr. Kiger, to whose
16 opinion the ALJ assigned "great weight," questioned Plaintiff's credibility in this regard, noting
17 that she lacked a history of treatment or of complaints of depression. AR 27, 252.

18 As Plaintiff failed to meet burden at step two, and substantial evidence supports the ALJ's
19 step two finding, the Court affirms the decision.

20 **VII. Conclusion**

21 The ALJ applied appropriate legal standards and substantial credible evidence supported the
22 ALJ's determination that Plaintiff was not disabled. Accordingly, the Court hereby AFFIRMS the
23 agency's denial of benefits. The Clerk of Court is directed to enter judgment for Defendant Carolyn
24 W. Colvin, Acting Commissioner of Social Security.
25 IT IS SO ORDERED.

26 Dated: **February 27, 2014**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE