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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

KELLI LINN DUARTE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

1:16-cv-1315-GSA

**ORDER DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF DEFENDANT
NANCY A. BERRYHILL AND AGAINST
PLAINTIFF KELLI LINN DUARTE**

I. INTRODUCTION

Plaintiff Kelli Linn Duarte (“Plaintiff”) seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for supplemental security income (“SSI”) benefits pursuant to Title XVI of the Social Security Act. (Doc. 1, 15). The Commissioner filed an opposition. (Doc. 16). Plaintiff filed a reply. (Doc. 17). The matter is currently before the Court on the parties’ briefs which were submitted without oral argument to the Honorable Gary S. Austin, United States Magistrate Judge. ² After reviewing the administrative record and the pleadings, the Court finds the ALJ applied the correct legal

¹ Pursuant to Fed. R. Civ. Pro. 25(d), Nancy A. Berryhill shall be substituted in for Carolyn W. Colvin, as Nancy A. Berryhill is now the acting Commissioner of Social Security.

² The parties consented to the jurisdiction of the magistrate judge. (Docs. 7 and 9)

1 standards and the decision is supported by substantial evidence. Accordingly, Plaintiff's appeal is
2 DENIED.

3 **II. BACKGROUND AND PRIOR PROCEEDINGS³**

4 On June 19, 2012, Plaintiff filed an SSI application claiming disability beginning
5 December 14, 2009, due to fibromyalgia, hip and back pain, high blood pressure, asthma, and a
6 sleeping disorder.⁴ AR 15; 228; 243-2346; 289. The parties agree that the Plaintiff properly
7 exhausted her administrative remedies and that the Appeals Council denied Plaintiff's appeal.
8 (Doc. 15, pgs. 3; Doc. 16, pg. 1). Therefore, this appeal is a review of Administrative Law Judge
9 Sharon Madson's ("ALJ") decision issued on April 10, 2015, which is considered the
10 Commissioner's final order. *See*, 42 U.S.C. §§ 405(g), 1383(c)(3). AR 12-28.

11 **III. ISSUES FOR JUDICIAL REVIEW**

12 Plaintiff is challenging the ALJ's non-disability findings and credibility determination.
13 Specifically, she argues that the ALJ only relied on a lack of medical evidence to reject Plaintiff's
14 subjective pain testimony, which is improper. She requests that the case be remanded for an
15 award of benefits, or alternatively, that the case be remanded for further proceedings. Defendant
16 contends that the ALJ's credibility determination is supported by substantial evidence and as
17 such, the decision should be affirmed.

18 **IV. THE MEDICAL RECORD**

19 The Court has reviewed the entire medical record. The relevant portions will be referenced
20 in the discussion as needed. AR 313-487.

21 **V. PLAINTIFF'S TESTIMONY**

22 Plaintiff lives with her husband who works driving a taxi. AR 35; 55. She has a high school
23 education plus some college. AR 35-36. She previously worked as a reservations clerk. She
24 recently had her left knee replaced, however, prior to that surgery, she had been going to physical

25 _____
26 ³ References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

27 ⁴ Plaintiff had also previously applied for SSI and that application was denied by ALJ Tamia Gordon on April 18,
28 2012. AR 100-110. ALJ Madson determined that Plaintiff had overcome the presumption of non-disability under
Chavez v. Brown, 844 F. 2d 691 (9th Cir. 1988) because there was evidence of additional impairments and greater
limitations since her prior application. AR 19-20.

1 therapy at the gym, swimming and exercising. AR 39-40.

2 After her knee replacement, she still suffers from pain that comes and goes. AR 39-40. She
3 also experiences very severe right hip pain and she has plans to get her right hip replaced. AR 40.
4 Walking, sitting, and standing make the knee and hip pain worse; standing more than five minutes
5 makes her almost "feel like crying sometimes." AR 40. She lies down to alleviate this pain. AR
6 41. She is able to sit for twenty minutes, lift five pounds (due to her carpal tunnel), and walk less
7 than one block. AR 44; 49; 50. She also drops things a lot. She has used a walker since September
8 14, 2014, and before that, she used a cane. AR 46. She also suffers from pain in her lower back
9 including muscle spasms. AR 46. Her fibromyalgia affects her whole body and some days are
10 worse than others. AR 42. She has very low energy. AR 47. She uses a nebulizer daily for asthma.
11 AR 43; 47.

12 In addition, her hands are severely damaged - her right one is worse than the left. AR 45.
13 She uses wrist braces during the day and night. AR 45. She needs surgery on her hand and
14 believes that her doctor will perform that operation after everything else is done. AR 45.

15 She takes pain medication, but the medication only dulls the pain. AR 42. She needs help
16 getting in and out of the shower and dressing. She also needs assistance when performing
17 household chores. AR 36. She does not sweep or vacuum, but she does a little cooking, folds
18 some clothes, and shops a little. AR 36-37. In total, she does chores for approximately five to six
19 hours, once or twice a week. AR 54. During the day, she reads, watches TV, and takes naps. AR
20 37. She also has a hard time concentrating which makes it difficult to help her granddaughter with
21 her kindergarten work. AR 54.

22 **VI. THE DISABILITY DETERMINATION PROCESS**

23 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or she
24 is unable to engage in substantial gainful activity due to a medically determinable physical or
25 mental impairment that has lasted or can be expected to last for a continuous period of not less
26 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a
27 disability only if:

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1 . . . his physical or mental impairment or impairments are of such severity that he is not only
2 unable to do his previous work, but cannot, considering his age, education, and work
3 experience, engage in any other kind of substantial gainful work which exists in the national
4 economy, regardless of whether such work exists in the immediate area in which he lives, or
5 whether a specific job vacancy exists for him, or whether he would be hired if he applied for
6 work.

42 U.S.C. § 1382c(a)(3)(B).

5 To achieve uniformity in the decision-making process, the Commissioner has established a
6 sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. § 416.920(a)-
7 (f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the
8 claimant is or is not disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The ALJ must consider
9 objective medical evidence and opinion testimony. 20 C.F.R. §, 404.1529, 416.927, 416.929.

10 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in substantial
11 gainful activity during the period of alleged disability, (2) whether the claimant had medically-
12 determinable "severe" impairments, (3) whether these impairments meet or are medically
13 equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1,
14 (4) whether the claimant retained the residual functional capacity ("RFC") to perform his past
15 relevant work, and (5) whether the claimant had the ability to perform other jobs existing in
16 significant numbers at the regional and national level. 20 C.F.R. § 416.920(a)-(f).

17 **VII. SUMMARY OF THE ALJ'S FINDINGS**

18 Using the Social Security Administration's five-step sequential evaluation process, the
19 ALJ determined that Plaintiff did not meet the disability standard. AR 15-24. At step one, she
20 found that Plaintiff had not engaged in substantial gainful activity since June 19, 2012, the
21 application date. AR 17. At step two, the ALJ identified morbid obesity, lumbago, right knee
22 degenerative disc disease status-post replacement, right foot calcaneal spur, carpal tunnel
23 syndrome, fibromyalgia, and asthma as severe impairments. However, she found that Plaintiff's
24 hypertension, hyperlipidemia, sleep apnea, and restless leg syndrome were all non-severe
25 impairments. AR 17. At step three, the ALJ determined that the severity of Plaintiff's
26 impairments did not meet or exceed any of the listed impairments. AR 17-18.

27 Based on a review of the record, the ALJ determined that Plaintiff's testimony was not
28 credible and that she had the RFC to perform sedentary work pursuant to 20 C.F.R. § 416.967,

1 with some modifications. AR 18-23. Specifically, the ALJ found Plaintiff could: lift and carry
2 ten pounds occasionally or frequently; stand and walk for two hours in an eight-hour day; sit for
3 six to eight hours in an eight-hour day; and occasionally kneel, stoop, crouch, crawl, and climb
4 ramps and stairs. She could not climb ladders, ropes or scaffolds; she must avoid concentrated
5 exposure to pulmonary irritants such as dust, fumes, gases, and odors; and she could occasionally
6 grip or grasp forcefully. AR 18-23. Given these limitations, the ALJ determined that Plaintiff
7 could perform her past work as a reservations clerk, and she was not disabled under Social
8 Security Act. AR 23.

9 **VII. STANDARD OF REVIEW**

10 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
11 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.
12 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
13 1071, 1074 (9th Cir. 2007).

14 “Substantial evidence means more than a scintilla but less than a preponderance.”
15 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which,
16 considering the record as a whole, a reasonable person might accept as adequate to support a
17 conclusion.” *Id.* “Where the evidence is susceptible to more than one rational interpretation, one
18 of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

19 **VIII. DISCUSSION**

20 **A. The ALJ Properly Discredited Plaintiff's Subjective Complaints.**

21 Plaintiff contends that that ALJ's assessment of Plaintiff's credibility is flawed because she
22 did not provide clear and convincing reasons to reject Plaintiff's pain testimony. Specifically, she
23 argues the ALJ's sole reason for rejecting her testimony was citing to the medical evidence.
24 Moreover, the ALJ never points to the evidence that undermines Plaintiff's testimony that she can
25 only sit for ten minutes, is limited in her standing and walking, or that she has knee, hip, and hand
26 pain. (Doc. 15, pgs. 7-15; Doc. 17, pgs. 4-6). In opposition, Defendant argues that the ALJ's
27 decision is proper because in addition to reliance on the medical evidence, the ALJ noted that
28 Plaintiff only received conservative treatment, and she never followed up with specialists as

1 recommended by her doctor. (Doc. 16, pgs. 8-13).

2 A review of the record reveals that the ALJ provided several reasons for rejecting Plaintiff's
3 testimony in addition to the lack of medical evidence. As a result, the rejection of Plaintiff's pain
4 testimony is supported by substantial evidence.

5 1. *Legal Standard*

6 A two-step analysis applies at the administrative level when considering a claimant's
7 credibility. *Treichler v. Comm. of Soc. Sec.*, 775 F. 3d 1090, 1098 (9th Cir. 2014). First, the
8 claimant must produce objective medical evidence that his or her impairment could reasonably
9 be expected to produce some degree of the symptom or pain alleged. *Id.* If the claimant satisfies
10 the first step and there is no evidence of malingering, the ALJ may reject the claimant's testimony
11 regarding the severity of his or her symptoms only if he or she makes specific findings and
12 provides clear and convincing reasons for doing so. *Id.*; *Brown-Hunter v. Colvin*, 806 F.3d 487,
13 493 (9th Cir. 2015); SSR 96-7p (ALJ's decision "must be sufficiently specific to make clear to
14 the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's
15 statements and reasons for that weight.").⁵ Factors an ALJ may consider include: 1) the
16 applicant's reputation for truthfulness, prior inconsistent statements or other inconsistent
17 testimony; (2) inconsistencies either in the claimant's testimony or between the claimant's
18 testimony and her conduct; (3) the claimant's daily activities; (4) the claimant's work record; and

19 ⁵ Social Security Ruling 96-7p was superseded by Ruling 16-3p, effective March 28, 2016. See 2016 WL
20 1020935, *1 (March 16, 2016) and 2016 WL 1131509, *1 (March 24, 2016) (correcting SSR 16-3p effective date to
21 read March 28, 2016). Although the second step has previously been termed a credibility determination, recently the
22 Social Security Administration ("SSA") announced that it would no longer assess the "credibility" of an applicant's
23 statements, but would instead focus on determining the "intensity and persistence of [the applicant's] symptoms."
24 See SSR 16-3p, 2016 WL 1020935 at *1 ("We are eliminating the use of the term 'credibility' from our sub-
25 regulatory policy, as our regulations do not use this term. In doing so, we clarify that subjective symptom evaluation
26 is not an examination of an individual's character."). Although Social Security Rulings "do not carry the force of
27 law," they "are binding on all components of the [SSA]" and are entitled to deference if they are "consistent with the
28 Social Security Act and regulations." 20 C.F.R. § 402.35(b)(1); *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
1224 (9th Cir. 2009) (citations and quotation marks omitted).

24 As the Ninth Circuit recently acknowledged, SSR 16-3p "makes clear what our precedent already required:
25 that assessments of an individual's testimony by an ALJ are designed to 'evaluate the intensity and persistence of
26 symptoms after [the ALJ] find[s] that the individual has a medically determinable impairment(s) that could
27 reasonably be expected to produce those symptoms,' and not to delve into wide-ranging scrutiny of the claimant's
28 character and apparent truthfulness." *Trevizo, v. Berryhill*, 862 F. 3d 987, 995 n.5 (9th Cir. 2017) see also *Cole v.*
Colvin, 831 F.3d 411, 412 (7th Cir. 2016). SSR 16-3p became effective after the issuance of the ALJ's decision and
the Appeals Council denied review in the instant case. It is unclear whether SSR 16-3 applies retroactively. However,
the applicability of SSR 16-3p need not be resolved here since the ALJ's evaluation of Plaintiff's subjective
complaints in this case meets the guidelines set forth in both SSR 16-3p and its predecessor, SSR 96-7p.

1 (5) testimony from physicians and third parties concerning the nature, severity, and effect of the
2 symptoms of which the claimant complains. *See Thomas*, 278 F. 3d at 958-959; *Light v. Social*
3 *Security Administration*, 119 F. 3d 789, 792 (9th Cir. 1997), *see also* 20 C.F.R. §§ 404.1529(c),
4 416.929(c).

5 Because the ALJ did not find that Plaintiff was malingering, she was required to provide
6 clear and convincing reasons for rejecting Plaintiff's testimony. *Brown-Hunter*, 806 F. 3d at 493;
7 *Smolen*, 80 F.3d at 1283-84; *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).⁶ When there is
8 evidence of an underlying medical impairment, the ALJ may not discredit the claimant's
9 testimony regarding the severity of his or her symptoms solely because they are unsupported by
10 medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991); SSR 96-7. Moreover,
11 general findings are insufficient; rather, the ALJ must identify what testimony is not credible and
12 what evidence undermines the claimant's complaints. *Brown-Hunter*, 806 F. 3d at 493.

13 When assessing the Plaintiff's testimony, the ALJ found that Plaintiff's medically
14 determinable impairments could reasonably be expected to cause the alleged symptoms, however,
15 Plaintiff's "statements concerning the intensity, persistence, and limiting effects of these
16 symptoms were not credible for the following reasons." AR 20. The ALJ provided a thorough
17 summary of the medical record and noted that although records from Tulare Community Health
18 documented complaints of back pain, most of the treatment notes indicated that her physician
19 simply refilled her medications for these conditions. AR 20-23; 349-354; 313-34; 370-400; 403-
20 457. Moreover, the medications helped the pain. AR 349-350; 423-426. These are valid factors
21 an ALJ may consider when evaluating credibility. *Warre v. Comm'r of Soc. Sec.*, 439 F.3d 1001,
22 1006 (9th Cir. 2006) ("Impairments that can be controlled effectively with medication are not
23 disabling for the purpose of determining eligibility for SSI benefits"), citing *Odle v. Heckler*, 707
24 F.2d 439, 440 (9th Cir. 1983) (affirming a denial of benefits and noting that the claimant's
25 impairments were responsive to medication); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.
26 1995) (no medical treatment or a conservative level of medical treatment has been found to
27 suggest a lower level of pain and functional limitations); *Bunnell v Sullivan*, 947 F.2d 341, 346-
28 347 (9th Cir. 1991) (factors to evaluate credibility include medication effectiveness).

⁶ Although the Commissioner argues that clear and convincing reasons are not required to reject a claimant's testimony, the Ninth Circuit's legal precedent is clear that this is the required standard in this circuit.

1 The ALJ also noted that Plaintiff requested a referral to a rheumatologist for an evaluation
2 of her fibromyalgia, bilateral mild osteoarthritis in the hands, and knee tenderness, but there was
3 no record that she saw the specialist. AR 20; 373-375. Her doctors also referred her to a
4 neurologist and a pulmonologist, but there was no evidence that Plaintiff returned for continued
5 treatment. AR 20; 343. Finally, the ALJ noted that Plaintiff was diagnosed with carpal tunnel
6 syndrome and release surgery was recommended, but there was no evidence that Plaintiff ever
7 underwent the procedure. AR 20; 429-430. Although Plaintiff argues that the ALJ never
8 identified specific reasons for rejecting her testimony regarding her hip or hand pain, or her
9 inability to sit, stand, or walk, her failure to follow a prescribed treatment while allegedly
10 experiencing severe pain is a valid factor an ALJ may rely on to reject Plaintiff's complaints.
11 *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (An ALJ may consider an unexplained or
12 inadequately explained failure to seek treatment or to follow a prescribed course of treatment);
13 *Fair v. Bowen*, 885 F.2d at 597; 603-604 (9th Cir. 1989) (failure to follow prescribed treatment
14 can be considered in determining credibility).

15 Finally, after citing to these factors, the ALJ also noted that none of Plaintiff's treating
16 physicians had given a functional analysis of her abilities. AR 21. To support the RFC, the ALJ
17 relied on three doctor's opinions (Dr. Wong, Dr. Pong, and Dr. Fabella) when formulating the
18 RFC. Specifically, she gave the greatest weight to Dr. Wong and Dr. Pong's opinions (two state
19 agency doctors) who opined that Plaintiff could perform light work coupled with other exertional
20 limitations. Specifically, these doctors found Plaintiff could carry twenty pounds occasionally
21 and ten pounds frequently; she could sit for six hours, stand and/or walk for six hours in an eight
22 hour day; she could occasionally climb ramps or stairs, but never climb ropes, ladders, or
23 scaffolds; and she could occasionally balance, stoop, kneel, crouch, and crawl. AR 23; 118-122.

24 She also gave some weight to Dr. Fabella's consultative examination. Dr. Fabella found
25 that Plaintiff suffered from low back pain and an impaired gait, and therefore she could only lift
26 and carry ten pounds occasionally and less than ten pounds frequently. He also opined that
27 Plaintiff could walk and stand less than four hours out of an eight-hour day; that she required
28 breaks from sitting every thirty minutes or so; that she needed to use a cane when ambulating at
all times; that she is unable to walk on uneven terrain, climb ladders, or work on heights due to
an impaired gait, low back pain and knee pain. He further opined that Plaintiff should avoid

1 extreme cold due to degenerative disc disease, but that she did not possess any definite fine or
2 gross impairments in her hands. AR 22; 347-348.

3 After considering all of the medical evidence, the ALJ accepted Dr. Fabella's more
4 conservative assessment of Plaintiff's exertional impairments, and the state agency doctors'
5 assessments of Plaintiff's postural limitations. In doing so, the ALJ noted that she received
6 additional documentation at the hearing that the state agency doctors had not considered with
7 regard to Plaintiff's carpal tunnel syndrome, knee replacement, and asthma, and she devised
8 additional limitations to address those areas. AR 23. She also noted that Dr. Fabella had assessed
9 a significant loss of grip strength which the doctor had not incorporated into his limitation, so she
10 limited Plaintiff to occasional gripping. AR 23; SSR 96-7p available at 1996 WL 374186, at *2
11 (Subjective complaints will only be accepted to the extent they "can reasonably be accepted as
12 consistent with the objective medical evidence and other evidence in the case record"); *see also*
13 *Rollins v. Massanari*, 261 F.3d 853, 857(9th Cir. 2001) ("While subjective pain testimony cannot
14 be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the
15 medical evidence is still a relevant factor in determining the severity of the claimant's pain and its
16 disabling effects.").

16 Given the above, the ALJ provided clear and convincing reasons to conclude Plaintiff's
17 subjective symptom testimony was not credible. If the ALJ's finding is supported by substantial
18 evidence as it is here, the Court "may not engage in second-guessing." *Thomas*, 278 F.3d at 959.
19 Notably, Plaintiff has not argued that the ALJ improperly rejected any doctors' opinions. It is
20 Plaintiff's burden to establish disability. *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999); 20
21 C.F.R. § 404.1512. She has not done so here. She simply argues she is entitled to benefits because
22 the ALJ's sole reason for finding her not credible was because of a lack of medical evidence.
23 (Doc. 15, pgs. 7-15; Doc. 17, pgs.3-6). However, as outlined above, the ALJ relied on other
24 factors (namely Plaintiff's failure to obtain treatment and improvement on medications) as
25 reasons to reject her testimony. Accordingly, the ALJ's credibility determination was proper.

25 **X. CONCLUSION**

26 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial
27 evidence and is not based on proper legal standards. Accordingly, this Court DENIES Plaintiff's
28 appeal against the Commissioner of Social Security. The Clerk of this Court shall enter judgment

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in favor of Defendant, Nancy A. Berryhill, Acting Commissioner of Social Security and against Plaintiff, Kelli Linn Duarte. The Clerk of the Court is directed to close this action.

IT IS SO ORDERED.

Dated: December 1, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE