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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERIKA HAUPT KREBS,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:16-cv-0942 DB

ORDER

This social security action was submitted to the court without oral argument for ruling on plaintiff’s motion for summary judgment and defendant’s cross-motion for summary judgment.¹ Plaintiff’s motion argues that the Administrative Law Judge erred at step two of the sequential evaluation and by rejecting plaintiff’s subjective testimony. For the reasons explained below, plaintiff’s motion is denied, defendant’s cross-motion is granted, and the decision of the Commissioner of Social Security (“Commissioner”) is affirmed.

PROCEDURAL BACKGROUND

In April of 2012, plaintiff filed an application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“the Act”) alleging disability beginning on February 15,

¹ Both parties have previously consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c). (See ECF Nos. 9 & 10.)

1 2007. (Transcript (“Tr.”) at 10, 135-43.) Plaintiff’s application was denied initially, (id. at 89-
2 93), and upon reconsideration. (Id. at 98-102.)

3 Thereafter, plaintiff requested a hearing which was held before an Administrative Law
4 Judge (“ALJ”) on April 24, 2014. (Id. at 32-55.) Plaintiff was represented by an attorney and
5 testified at the administrative hearing. (Id. at 33-35.) In a decision issued on October 24, 2014,
6 the ALJ found that plaintiff was not disabled. (Id. at 22.) The ALJ entered the following
7 findings:

- 8 1. The claimant last met the insured status requirements of the
9 Social Security Act on December 31, 2012.
- 10 2. The claimant did not engage in substantial gainful activity
11 during the period from her alleged onset date of February 15, 2007
12 through her date last insured of December 31, 2012 (20 CFR
13 404.1571 *et seq.*).
- 14 3. Through the date last insured, the claimant had the following
15 severe impairment: rheumatoid arthritis (RA) (20 CFR
16 404.1520(c)).
- 17 4. Through the date last insured, the claimant did not have an
18 impairment or combination of impairments that met or medically
19 equaled the severity of one of the listed impairments in 20 CFR Part
20 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and
21 404.1526).
- 22 5. After careful consideration of the entire record, the undersigned
23 finds that, through the date last insured, the claimant had the
24 residual functional capacity to perform light work as defined in 20
25 CFR 404.1567(b), except the claimant could lift and/or carry ten
26 pounds frequently, twenty pounds occasionally; she could sit, stand
27 and/or walk for six hours out of an eight-hour workday; she could
28 occasionally climb, kneel, crouch and crawl; and she could
frequently balance and stoop.
6. Through the date last insured, the claimant was capable of
performing past relevant work as a web page editor. This work did
not require the performance of work-related activities precluded by
the claimant’s residual functional capacity (20 CFR 404.1565).
7. The claimant was not under a disability, as defined in the Social
Security Act, at any time from February 15, 2007, the alleged onset
date, through December 31, 2012, the date last insured (20 CFR
404.1520(f)).

(Id. at 12-22.)

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1 On March 1, 2016, the Appeals Council denied plaintiff's request for review of the ALJ's
2 October 24, 2014 decision. (Id. at 1-3.) Plaintiff sought judicial review pursuant to 42 U.S.C. §
3 405(g) by filing the complaint in this action on May 3, 2016. (ECF No. 1.)

4 LEGAL STANDARD

5 "The district court reviews the Commissioner's final decision for substantial evidence,
6 and the Commissioner's decision will be disturbed only if it is not supported by substantial
7 evidence or is based on legal error." Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012).
8 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
9 support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgate v.
10 Chater, 108 F.3d 978, 980 (9th Cir. 1997).

11 "[A] reviewing court must consider the entire record as a whole and may not affirm
12 simply by isolating a 'specific quantum of supporting evidence.'" Robbins v. Soc. Sec. Admin.,
13 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
14 1989)). If, however, "the record considered as a whole can reasonably support either affirming or
15 reversing the Commissioner's decision, we must affirm." McCartey v. Massanari, 298 F.3d
16 1072, 1075 (9th Cir. 2002).

17 A five-step evaluation process is used to determine whether a claimant is disabled. 20
18 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step
19 process has been summarized as follows:

20 Step one: Is the claimant engaging in substantial gainful activity?
21 If so, the claimant is found not disabled. If not, proceed to step
two.

22 Step two: Does the claimant have a "severe" impairment? If so,
23 proceed to step three. If not, then a finding of not disabled is
appropriate.

24 Step three: Does the claimant's impairment or combination of
25 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
26 404, Subpt. P, App. 1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

27 Step four: Is the claimant capable of performing his past work? If
28 so, the claimant is not disabled. If not, proceed to step five.

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1 Step five: Does the claimant have the residual functional capacity
2 to perform any other work? If so, the claimant is not disabled. If
not, the claimant is disabled.

3 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

4 The claimant bears the burden of proof in the first four steps of the sequential evaluation
5 process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden
6 if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094,
7 1098 (9th Cir. 1999).

8 APPLICATION

9 Plaintiff's pending motion asserts the following two principal claims: (1) the ALJ erred at
10 step two of the sequential evaluation; and (2) the ALJ's treatment of plaintiff's subjective
11 testimony constituted error. (Pl.'s MSJ (ECF No. 18) at 6-16.²)

12 **I. Step Two Error**

13 At step two of the sequential evaluation, the ALJ must determine if the claimant has a
14 medically severe impairment or combination of impairments. Smolen v. Chater, 80 F.3d 1273,
15 1289-90 (9th Cir. 1996) (citing Yuckert, 482 U.S. at 140-41). The Commissioner's regulations
16 provide that "[a]n impairment or combination of impairments is not severe if it does not
17 significantly limit [the claimant's] physical or mental ability to do basic work activities." 20
18 C.F.R. §§ 404.1521(a) & 416.921(a). Basic work activities are "the abilities and aptitudes
19 necessary to do most jobs," and those abilities and aptitudes include: (1) physical functions such
20 as walking, standing, sitting, lifting, and carrying; (2) capacities for seeing, hearing, and speaking;
21 (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5)
22 responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing
23 with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b) & 416.921(b).

24 The Supreme Court has recognized that the Commissioner's "severity regulation increases
25 the efficiency and reliability of the evaluation process by identifying at an early stage those
26 claimants whose medical impairments are so slight that it is unlikely they would be found to be

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28 ² Page number citations such as this one are to the page number reflected on the court's CM/ECF
system and not to page numbers assigned by the parties.

1 disabled even if their age, education, and experience were taken into account.” Yuckert, 482 U.S.
2 at 153. However, the regulation must not be used to prematurely disqualify a claimant. Id. at 158
3 (O’Connor, J., concurring). “An impairment or combination of impairments can be found not
4 severe only if the evidence establishes a slight abnormality that has no more than a minimal effect
5 on an individual[’]s ability to work.” Smolen, 80 F.3d at 1290 (internal quotation marks and
6 citation omitted).

7 “[A]n ALJ may find that a claimant lacks a medically severe impairment or combination
8 of impairments only when his conclusion is ‘clearly established by medical evidence.’” Webb v.
9 Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting Social Security Ruling (“SSR”) 85-28); see
10 also Ukolov v. Barnhart, 420 F.3d 1002, 1006 (9th Cir. 2005) (claimant failed to satisfy step two
11 burden where “none of the medical opinions included a finding of impairment, a diagnosis, or
12 objective test results”). “Step two, then, is ‘a de minimis screening device [used] to dispose of
13 groundless claims[.]’” Webb, 433 F.3d at 687 (quoting Smolen, 80 F.3d at 1290); see also
14 Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir. 2001) (discussing this “de minimis
15 standard”); Tomasek v. Astrue, No. C-06-07805 JCS, 2008 WL 361129, at *13 (N.D. Cal.
16 Feb.11, 2008) (describing claimant’s burden at step two as “low”).

17 Here, plaintiff argues that the ALJ erred at step two of the sequential evaluation by finding
18 that plaintiff’s medically determinable mental impairment was not severe. (Pl.’s MSJ (ECF No.
19 18) at 6-12.) If the ALJ determines that a claimant has a medically determinable mental
20 impairment, the ALJ then rates the degree of the claimant’s functional limitations in four areas,
21 known as the “Paragraph B Criteria”: (1) activities of daily living; (2) social functioning; (3)
22 concentration, persistence, or pace; and (4) episodes of decompensation. 20 C.F.R. §
23 404.1520a(b)-(c); see also Pt. 404, Subpt. P, App. 1, 12.00 Mental Disorders. In the first three
24 areas, the ALJ rates the limitations as either none, mild, moderate, marked, or extreme. The
25 fourth functional area, episodes of decompensation, is rated on a four point scale of none, one or
26 two, three, and four or more. 20 C.F.R. 404.1520a(c)(3) and (4).

27 Where the claimant’s degree of limitation is rated as “none” or “mild,” the ALJ will
28 generally find the impairment “‘not severe’, unless the evidence otherwise indicates that there is

1 more than a minimal limitation in [the claimant’s] ability to do basic work activities.” 20 C.F.R.
2 § 404.1520a(d)(1). If a severe impairment exists, all medically determinable impairments must
3 be considered in the remaining steps of the sequential analysis. 20 C.F.R. § 404.1523. The ALJ
4 “must consider the combined effect of all of the claimant’s impairments on her ability to function,
5 without regard to whether each alone [i]s sufficiently severe.” Smolen, 80 F.3d at 1290; 20
6 C.F.R. § 404.1523.

7 Here, the ALJ rated plaintiff’s degree of functional limitations in the four Paragraph B
8 areas. (Tr. at 13-14.) In this regard, the ALJ found that plaintiff was only mildly limited in her
9 activities of daily living, social functioning, and in her concentration, persistence or pace. (Id. at
10 13-14.) Moreover, the ALJ found that plaintiff had not experienced an episode of
11 decompensation. (Id. at 14.) Although plaintiff clearly disagrees with the ALJ’s findings with
12 respect to the severity of plaintiff’s functional limitations, plaintiff fails to establish that the ALJ’s
13 findings are erroneous.

14 For example, plaintiff argues that ALJ erroneously relied on “the opinion of consultative
15 examiner, Dr. Richard Palmer, Ph.D.,” an examining physician who “opined that [plaintiff] had
16 no mental impairments.” (Pl.’s MSJ (ECF No. 18) at 11.) Plaintiff’s motion for summary
17 judgment, however, fails to challenge the ALJ’s treatment of the medical opinion evidence. See
18 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (an examining physician’s opinion
19 based on his or her own independent examination of the claimant constitutes substantial
20 evidence).

21 Moreover, much of plaintiff’s argument relies on plaintiff’s difficulty dealing with the
22 passing of her mother, repeated miscarriages, and an incident of “a fit of anger” involving an ex-
23 boyfriend. (Id. at 8.) Although these events likely were difficult for plaintiff, plaintiff has still
24 failed to establish that the ALJ’s severity ratings were erroneous. And the severity of plaintiff’s
25 symptoms relies largely on her subjective testimony which, as noted below, the ALJ permissibly
26 rejected.

27 Nonetheless, even assuming arguendo that the ALJ’s finding at step two of the sequential
28 evaluation was erroneous with respect to plaintiff’s mental impairment, that error would be

1 harmless. In this regard, although the ALJ found that plaintiff's medically determinable mental
2 impairment was not severe, the ALJ considered plaintiff's mental impairment in assessing
3 plaintiff's residual functional capacity. (Tr. at 18-19.) See Lewis v. Astrue, 498 F.3d 909, 911
4 (9th Cir. 2007) ("The decision reflects that the ALJ considered any limitations posed by the
5 bursitis at Step 4. As such, any error that the ALJ made in failing to include the bursitis at Step 2
6 was harmless.").

7 Accordingly, the court finds that plaintiff is not entitled to summary judgment on the
8 claim that the ALJ erred at step two of the sequential evaluation by finding that plaintiff's mental
9 impairment was not severe.

10 **II. Subjective Testimony**

11 Plaintiff argues that the ALJ's treatment of plaintiff's subjective testimony constituted
12 error. (Pl.'s MSJ (ECF No. 18) at 12-16.) The Ninth Circuit has summarized the ALJ's task with
13 respect to assessing a claimant's credibility as follows:

14 To determine whether a claimant's testimony regarding subjective
15 pain or symptoms is credible, an ALJ must engage in a two-step
16 analysis. First, the ALJ must determine whether the claimant has
17 presented objective medical evidence of an underlying impairment
18 which could reasonably be expected to produce the pain or other
19 symptoms alleged. The claimant, however, need not show that her
20 impairment could reasonably be expected to cause the severity of
21 the symptom she has alleged; she need only show that it could
22 reasonably have caused some degree of the symptom. Thus, the
23 ALJ may not reject subjective symptom testimony . . . simply
24 because there is no showing that the impairment can reasonably
25 produce the degree of symptom alleged.

26 Second, if the claimant meets this first test, and there is no evidence
27 of malingering, the ALJ can reject the claimant's testimony about
28 the severity of her symptoms only by offering specific, clear and
convincing reasons for doing so

23 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks
24 omitted). "The clear and convincing standard is the most demanding required in Social Security
25 cases." Moore v. Commissioner of Social Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002). "At
26 the same time, the ALJ is not required to believe every allegation of disabling pain, or else
27 disability benefits would be available for the asking" Molina, 674 F.3d at 1112.

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1 “The ALJ must specifically identify what testimony is credible and what testimony
2 undermines the claimant’s complaints.” Valentine v. Commissioner Social Sec. Admin., 574
3 F.3d 685, 693 (9th Cir. 2009) (quoting Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595,
4 599 (9th Cir. 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other
5 things, the “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s]
6 testimony or between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work
7 record, and testimony from physicians and third parties concerning the nature, severity, and effect
8 of the symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958-59
9 (9th Cir. 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792
10 (9th Cir. 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the
11 record, the court “may not engage in second-guessing.” Id.

12 Here, the ALJ found that plaintiff’s medically determinable impairments could reasonably
13 be expected to cause some of the alleged symptoms, but that plaintiff’s statements concerning the
14 intensity, persistence, and limiting effects of those symptoms were not entirely credible. (Tr. at
15 16.) In this regard, the ALJ found that

16 [t]he balance of the evidence does not support the severity of the
17 claimant’s allegations of her impairments. The majority of her
18 examinations show that her impairments are resolving, she has few
19 clinical symptoms and she does not fully follow medical treatment.
20 The claimant has not generally received the type of medical
21 treatment one would expect for a totally disabled individual and the
claimant’s alleged loss of function is not supported by objective
medical findings. The treatment records reveal the claimant
received routine, conservative and non-emergency treatment since
the alleged onset date.

22 (Id.) (citations omitted).

23 “[E]vidence of ‘conservative treatment’ is sufficient to discount a claimant’s testimony
24 regarding severity of an impairment.” Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007). An
25 ALJ may also discount a claimant’s testimony due to “an unexplained, or inadequately explained,
26 failure to seek treatment or follow a prescribed course of treatment.” Fair v. Bowen, 885 F.2d
27 597, 603 (9th Cir. 1989). Moreover, “[a]lthough lack of medical evidence cannot form the sole
28 basis for discounting pain testimony, it is a factor that the ALJ can consider in his credibility

1 analysis.” Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

2 In this regard, the ALJ offered clear and convincing reasons for rejecting plaintiff’s
3 testimony. Moreover, the ALJ’s reasons were supported by substantial evidence in the record.

4 As the ALJ’s decision noted,

5 [claimant] admitted on May 11, 2011 she had not completed the
6 stool studies she was given. She denied an orthopedic referral on
7 December 7, 2011 as she is trying her own remedy for complaints
8 of elbow pain. The claimant declined an orthopedic referral as her
9 elbow was getting better.

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11 She explained that she was recommended for an ultrasound . . . but
12 she declined since they never produce any results. Her exams only
13 showed abdominal pain and some diffuse tenderness.

14 On March 28, 2012 she was taking her medication intermittently for
15 fear of side effects. She did not take two medications she was
16 prescribed, and stated she wanted to find a natural way of treating
17 her joint pains; and it was noted she is allergic to wheat and is still
18 eating wheat. She was assessed with noncompliance with
19 medications, treatment, and recommendations.

20 (Tr. at 17) (citations omitted).

21 Moreover, on August 17, 2012, Dr. Carolyn Dennehey, examined plaintiff for treatment
22 and noted that she “is generally noncompliant with treatment,” but that plaintiff “[c]linically,
23 looked pretty good.” (Id. at 629.) On August 14, 2013, Dr. Dennehey noted that plaintiff’s
24 “[j]oints actually look really pretty good,” and that plaintiff “did not do” x-rays of her hand, feet,
25 wrist, and ankle that had been previously ordered. (Id. at 905.)

26 On September 10, 2012, plaintiff was examined by Dr. Richard Palmer, PhD. (Id. at 662.)
27 Plaintiff reported that she was not depressed, was “generally happy and upbeat . . . is not feeling
28 unusually sad, gloomy, discouraged, helpless or hopeless.” (Id.) Dr. Palmer found no
29 psychological diagnosis. (Id. at 665.)

30 Accordingly, the ALJ provided clear and convincing reasons, supported by substantial
31 evidence in the record, for discrediting plaintiff’s testimony. Plaintiff, therefore, is not entitled to
32 summary judgment on the claim that the ALJ’s treatment of plaintiff’s subjective testimony
33 constituted error.

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CONCLUSION

The court finds that plaintiff is not entitled to summary judgment with respect to either of the arguments advanced in the pending motion.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 18) is denied;
2. Defendant's cross-motion for summary judgment (ECF No. 21) is granted; and
3. The decision of the Commissioner of Social Security is affirmed.

Dated: September 14, 2017



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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