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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TERRY SHARLENE JOSEPH-STEWART,

No. 2:16-CV-0975-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

_____ /

Plaintiff, who is proceeding with retained counsel, brings this action under 42 U.S.C. § 405(g) for judicial review of a final decision of the Commissioner of Social Security. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are plaintiff’s motion for summary judgment (Doc. 16) and defendant’s cross-motion for summary judgment (Doc. 21).

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I. PROCEDURAL HISTORY

Plaintiff applied for social security benefits on April 5, 2012. In the application, plaintiff claims that disability began on November 3, 2011. Plaintiff's claim was initially denied. Following denial of reconsideration, plaintiff requested an administrative hearing, which was held on April 1, 2014, before Administrative Law Judge ("ALJ") Amita B. Tracy. In a July 24, 2014, decision, the ALJ concluded that plaintiff is not disabled based on the following relevant findings:

1. The claimant has the following severe impairment(s): diabetes, type 2; peripheral neuropathy; lumbar degenerative disc disease (DDD); high blood pressure (HBP); anxiety; depression; asthma with chronic obstructive pulmonary disease (COPD); irritable bowel syndrome (IBS); and sleep apnea;
2. The claimant does not have an impairment or combination of impairments that meets or medically equals an impairment listed in the regulations;
3. The claimant has the following residual functional capacity: the claimant can perform light work; she can stand/walk for four hours in an eight-hour workday; she can perform simple repetitive tasks; she needs to use a cane for ambulation; and
4. Considering the claimant's age, education, work experience, residual functional capacity, and vocational expert testimony, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

18 After the Appeals Council declined review on March 4, 2016, this appeal followed.

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II. STANDARD OF REVIEW

21 The court reviews the Commissioner's final decision to determine whether it is:
22 (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a
23 whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is
24 more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521
25 (9th Cir. 1996). It is "... such evidence as a reasonable mind might accept as adequate to
26 support a conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,

1 including both the evidence that supports and detracts from the Commissioner's conclusion, must
2 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones
3 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner's
4 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.
5 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative
6 findings, or if there is conflicting evidence supporting a particular finding, the finding of the
7 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).
8 Therefore, where the evidence is susceptible to more than one rational interpretation, one of
9 which supports the Commissioner's decision, the decision must be affirmed, see Thomas v.
10 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal
11 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th
12 Cir. 1988).

14 III. DISCUSSION

15 Plaintiff argues: (1) the ALJ failed to provide sufficient reasons for rejecting the
16 opinions of treating physician, Dr. Cabayan; (2) the ALJ failed to provide sufficient reasons for
17 rejecting plaintiff's testimony as not credible; (3) the ALJ failed to provide sufficient reasons for
18 rejecting lay testimony; and (4) the Appeals Council failed to properly consider additional
19 evidence.

20 A. Evaluation of Medical Opinions

21 The weight given to medical opinions depends in part on whether they are
22 proffered by treating, examining, or non-examining professionals. See Lester v. Chater, 81 F.3d
23 821, 830-31 (9th Cir. 1995). Ordinarily, more weight is given to the opinion of a treating
24 professional, who has a greater opportunity to know and observe the patient as an individual,
25 than the opinion of a non-treating professional. See id.; Smolen v. Chater, 80 F.3d 1273, 1285
26 (9th Cir. 1996); Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987). The least weight is given

1 to the opinion of a non-examining professional. See Pitzer v. Sullivan, 908 F.2d 502, 506 & n.4
2 (9th Cir. 1990).

3 In addition to considering its source, to evaluate whether the Commissioner
4 properly rejected a medical opinion the court considers whether: (1) contradictory opinions are
5 in the record; and (2) clinical findings support the opinions. The Commissioner may reject an
6 uncontradicted opinion of a treating or examining medical professional only for “clear and
7 convincing” reasons supported by substantial evidence in the record. See Lester, 81 F.3d at 831.
8 While a treating professional’s opinion generally is accorded superior weight, if it is contradicted
9 by an examining professional’s opinion which is supported by different independent clinical
10 findings, the Commissioner may resolve the conflict. See Andrews v. Shalala, 53 F.3d 1035,
11 1041 (9th Cir. 1995). A contradicted opinion of a treating or examining professional may be
12 rejected only for “specific and legitimate” reasons supported by substantial evidence. See Lester,
13 81 F.3d at 830. This test is met if the Commissioner sets out a detailed and thorough summary of
14 the facts and conflicting clinical evidence, states her interpretation of the evidence, and makes a
15 finding. See Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989). Absent specific and
16 legitimate reasons, the Commissioner must defer to the opinion of a treating or examining
17 professional. See Lester, 81 F.3d at 830-31. The opinion of a non-examining professional,
18 without other evidence, is insufficient to reject the opinion of a treating or examining
19 professional. See id. at 831. In any event, the Commissioner need not give weight to any
20 conclusory opinion supported by minimal clinical findings. See Meanel v. Apfel, 172 F.3d 1111,
21 1113 (9th Cir. 1999) (rejecting treating physician’s conclusory, minimally supported opinion);
22 see also Magallanes, 881 F.2d at 751.

23 As to Dr. Cabayan, the ALJ stated:

24 On January 31, 2014, Qualified Medical Examiner (QME), Dr. Vatche
25 Cabayan, stated that claimant had persistent low back pain (Exhibit 6F/2).
26 Claimant was walking with a cane and was taking Norco to be functional.
An MRI of the lumbar spine dated December 6, 2013, showed early disc
degeneration at L2-L3 and L4-L5 with diffuse disc protrusion. The

1 diagnosis was discogenic lumbar condition with radicular component
2 down the lower extremities and negative EMGs; weight gain of 30 pounds,
3 present weight: 200 pounds; depression; and headaches related to the pain.
4 She was seeing Dr. Bokarius for counseling and was receiving Buspar,
5 Effexor, and Trazodone from his office. She requested refills and received
6 prescriptions for Norco for moderate-to-severe pain as well as Topiramate
7 for neuropathic pain and headaches, naproxen sodium for inflammation,
8 Protonix for upset stomach, and LidoPro lotion and Terocin patches for
9 topical relief. She will continue with back brace and TENS unit. Also,
10 she will continue with ice, heat, and home exercising, stretching and
11 strengthening as tolerated. She was referred to a pain specialist for
12 possible injection. Dr. Cabayan stated that she should avoid repetitive
13 bending, twisting, stairs, hills, inclines, and squatting (Exhibit 6F/3).

14 According to plaintiff, the ALJ failed to address Dr. Cabayan's opinion that plaintiff required a
15 sit/stand option (specifically Dr. Cabayan's opinions expressed in March and December 2013
16 that plaintiff could perform intermittent sitting, standing, and walking activities "as tolerated,"
17 and the doctor's April 2013 opinion that plaintiff should avoid prolonged sitting, standing, and
18 walking).

19 The court finds no error. To the extent Dr. Cabayan opined that plaintiff requires
20 a sit/stand option, the ALJ accepted that limitation in finding that plaintiff can perform light
21 work. See Social Security Ruling 83-10 ("light work" requires standing or walking *off and on*
22 and sitting may occur *intermittently*) (emphasis added).

23 **B. Credibility Assessment**

24 The Commissioner determines whether a disability applicant is credible, and the
25 court defers to the Commissioner's discretion if the Commissioner used the proper process and
26 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit
credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903
F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d
821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible
and what evidence undermines the testimony. See id. Moreover, unless there is affirmative
evidence in the record of malingering, the Commissioner's reasons for rejecting testimony as not
credible must be "clear and convincing." See id.; see also Carmickle v. Commissioner, 533 F.3d

1 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),
2 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

3 If there is objective medical evidence of an underlying impairment, the
4 Commissioner may not discredit a claimant’s testimony as to the severity of symptoms merely
5 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d
6 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

7 The claimant need not produce objective medical evidence of the
8 [symptom] itself, or the severity thereof. Nor must the claimant produce
9 objective medical evidence of the causal relationship between the
10 medically determinable impairment and the symptom. By requiring that
11 the medical impairment “could reasonably be expected to produce” pain or
12 another symptom, the Cotton test requires only that the causal relationship
13 be a reasonable inference, not a medically proven phenomenon.

14 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in
15 Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)).

16 The Commissioner may, however, consider the nature of the symptoms alleged,
17 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,
18 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the
19 claimant’s reputation for truthfulness, prior inconsistent statements, or other inconsistent
20 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a
21 prescribed course of treatment; (3) the claimant’s daily activities; (4) work records; and (5)
22 physician and third-party testimony about the nature, severity, and effect of symptoms. See
23 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the
24 claimant cooperated during physical examinations or provided conflicting statements concerning
25 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the
26 claimant testifies as to symptoms greater than would normally be produced by a given
impairment, the ALJ may disbelieve that testimony provided specific findings are made. See
Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

 As to plaintiff’s credibility, the ALJ stated:

1 Claimant's allegations are partially credible. Claimant appears credible
2 and sincere, but the evidence does not support her allegations to the extent
3 alleged, and the medications seem to work (Exhibit 5F). Claimant has
4 generally been compliant with prescription medications (Exhibit 4F 5F).
5 However, she continued to smoke against medical advice (testimony and
6 Exhibit 5F/94).

7 Plaintiff argues that the ALJ's lengthy discussion of the medical evidence that followed the
8 above "does not lend itself easily to meaningful judicial review. . . ." Plaintiff also argues that
9 the ALJ's statement that her "medications seem to work" is too vague. Finally, plaintiff argues
10 that the ALJ offered a reference to plaintiff's continued smoking "as a way of neutralizing her
11 compliance with medications, which normally supports a claimant's credibility."

12 The court finds no error. As defendant notes, the ALJ properly considered
13 evidence showing that plaintiff responded well to medication. See Warre v. Commissioner of
14 Social Security, 439 F.3d 1001 (9th Cir. 2006). The court does not agree with plaintiff that the
15 ALJ's statement that plaintiff's "medications seem to work" is vague given the numerous
16 instances reflected in the record where plaintiff stated that her symptoms were improved with
17 medication. Moreover, the ALJ properly detailed a conservative course of treatment inconsistent
18 with debilitating symptoms. Finally, though plaintiff states that she does not smoke very much
19 and is trying to quit, the fact remains that she continues to smoke despite COPD and
20 recommendations that she quite completely. The ALJ was also entitled to consider this fact.

21 **C. Lay Witness Evidence**

22 In determining whether a claimant is disabled, an ALJ generally must consider lay
23 witness testimony concerning a claimant's ability to work. See Dodrill v. Shalala, 12 F.3d 915,
24 919 (9th Cir. 1993); 20 C.F.R. §§ 404.1513(d)(4) & (e), 416.913(d)(4) & (e). Indeed, "lay
25 testimony as to a claimant's symptoms or how an impairment affects ability to work is competent
26 evidence . . . and therefore cannot be disregarded without comment." See Nguyen v. Chater, 100
F.3d 1462, 1467 (9th Cir. 1996). Consequently, "[i]f the ALJ wishes to discount the testimony
of lay witnesses, he must give reasons that are germane to each witness." Dodrill, 12 F.3d at

1 919. The ALJ may cite same reasons for rejecting plaintiff's statements to reject third-party
2 statements where the statements are similar. See Valentine v. Commissioner Soc. Sec. Admin.,
3 574 F.3d 685, 694 (9th Cir. 2009) (approving rejection of a third-party family member's
4 testimony, which was similar to the claimant's, for the same reasons given for rejection of the
5 claimant's complaints).

6 Lay evidence was presented by plaintiff's sister. As to this evidence, the ALJ
7 stated:

8 In a third party statement dated June 9, 2012, claimant's sister, Bridgette
9 Joseph-Green, repeats claimant's subjective complaints (Exhibit 4E). The
10 evidence shows that claimant has certain limitations, but is not precluded
11 from all work activity.

11 Plaintiff argues that the ALJ's analysis fails to specify any reason germane to Ms. Joseph-Green,
12 and that the ALJ's rationale is "impermissibly vague." The court does not agree. In essence, by
13 noting that Ms. Joseph-Green's testimony repeated plaintiff's testimony, the ALJ properly
14 rejected the lay witness statements for the same reasons the ALJ rejected plaintiff's statements.

15 **D. Additional Evidence**

16 When evidence is submitted for the first time to the Appeals Council, and where
17 the Appeals Council considers that evidence in denying review, the new evidence is part of the
18 record which this court must consider in determining whether the ALJ's decision is supported by
19 substantial evidence. See Brewes v. Commissioner of Social Security, 682 F.3d 1157 (9th Cir.
20 2012).

21 According to plaintiff, she submitted "a considerable amount of probative,
22 material evidence that the ALJ had not seen" upon requesting review by the Appeals Council of
23 the July 2014 decision. Plaintiff argues that the Appeals Council erred in stating that it had
24 reviewed this evidence but concluding that it did "not provide a basis for changing the
25 Administrative Law Judge's decision. . . ." Specifically, plaintiff notes that the Appeals
26 Council's order failed to discuss any of the medical opinions contained in the new evidence.

1 Plaintiff argues that the new evidence is notable in that it contains the September
2 2014 opinion of treating psychiatrist, Dr. Bokarius, supporting a finding of disabling mental
3 impairments. Plaintiff also states that the new evidence contains a January 2014, report by Dr.
4 Rosenberg regarding physical limitations. Finally, plaintiff states that the new evidence provides
5 additional support for Dr. Cabayan's opinion that plaintiff requires a sit/stand option.

6 A review of the new evidence reflects a September 18, 2014, medical source
7 statement provided by qualified medical examiner V. Bokarius, M.D., Ph.D. Dr. Bokarius
8 opined that plaintiff has marked limitation in her ability to interact with co-workers, supervisors,
9 and the public. The doctor also opined that plaintiff is moderately limited in her ability to
10 understand, remember, and carry out simple one-or-two job instructions. Dr. Bokarius opined
11 that plaintiff is extremely limited in her ability to understand, remember, and carry out extensive
12 technical or complex instructions, ability to maintain concentration and attention for at least two-
13 hour increments, and ability to withstand the stress and pressure associated with day-to-day work
14 activity over an eight-hour workday. Dr. Bokarius stated that plaintiff "has only partially
15 responded to treatment" and added that her prognosis is "guarded."

16 The new evidence also contains a January 21, 2014, report by Jacob Rosenberg,
17 M.D., also a qualified medical examiner. The doctor noted that plaintiff had not had active care
18 "for a long time" and that "she really does not know any exercises to do, which would certainly
19 facilitate her recovery." Dr. Rosenberg opined that, with physical therapy, plaintiff would
20 "improve adequately to return to some employment."

21 As to Dr. Rosenberg's report, plaintiff has not identified any opinions which are
22 inconsistent with the ALJ's residual functional capacity finding. To the extent the doctor's
23 statement that plaintiff could work in the future with physical therapy implies that the doctor
24 believed that she was incapable of working now, the question of disability is a legal
25 determination reserved to the agency. As to new records from Dr. Cabayan supporting the
26 doctor's opinion that plaintiff requires a sit/stand option, as discussed above, that opinion was

1 accepted by the ALJ and included in the finding that plaintiff has the residual functional capacity
2 to perform light work.

3 Dr. Bokarius, however, expressed several opinions in the September 18, 2014,
4 medical source statement which were not included in the ALJ's residual functional capacity
5 finding. Specifically, Dr. Bokarius opined that plaintiff has marked limitation in her ability to
6 interact with co-workers, supervisors, and the public. The doctor also opined that plaintiff is
7 extremely limited in her ability to maintain concentration and attention for at least two-hour
8 increments, and withstand the stress and pressure associated with day-to-day work activity over
9 an eight-hour workday. By failing to specifically discuss these opinions, the Appeals Council's
10 decision does not provide any rationale supporting the agency's tacit rejection of Dr. Bokarius'
11 opinions. The matter will be remanded for consideration of Dr. Bokarius' September 2014
12 opinions.

13 IV. CONCLUSION

14 For the foregoing reasons, this matter will be remanded under sentence four of 42
15 U.S.C. § 405(g) for further development of the record and/or further findings addressing the
16 deficiencies noted above.

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's motion for summary judgment (Doc. 16) is granted;
- 19 2. Defendant's cross motion for summary judgment (Doc. 21) is denied;
- 20 3. This matter is remanded for further proceedings; and
- 21 4. The Clerk of the Court is directed to enter judgment and close this file.

22
23 DATED: October 12, 2017

24 
25 **CRAIG M. KELLISON**
26 UNITED STATES MAGISTRATE JUDGE