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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REBECCA GANDARA,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

No. 2:16-cv-01191 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”), denying her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (the “Act”), 42 U.S.C. §§ 1381-1383f.² For the reasons that follow, the court will deny plaintiff’s motion for summary judgment and grant the Commissioner’s cross-motion for summary judgment.

¹ On January 23, 2017, Nancy A. Berryhill became the Acting Commissioner of the Social Security Administration. See <https://www.ssa.gov/agency/commissioner.html> (last visited by the court on September 18, 2017). She is therefore substituted as the defendant in this action. See 42 U.S.C. § 405(g); 20 C.F.R. § 422.210(d) (“the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant”).

² SSI is paid to financially needy disabled persons. 42 U.S.C. § 1382(a); Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371, 375 (2003) (“Title XVI of the Act, § 1381 *et seq.*, is the Supplemental Security Income (SSI) scheme of benefits for aged, blind, or disabled individuals, including children, whose income and assets fall below specified levels . . .”).

1 I. PROCEDURAL BACKGROUND

2 Plaintiff applied for supplemental security income on July 24, 2012. Administrative
3 Record (“AR”) 175 (Exh. 1D).³ The disability onset date was alleged to be March 1, 2010. AR
4 16 (decision). The applications were disapproved initially, and on reconsideration. Id. On
5 September 16, 2014, Administrative Law Judge (“ALJ”) Cynthia Floyd presided over the hearing
6 on plaintiff’s challenge to the disapprovals. AR 32-70 (transcript). Plaintiff was present and
7 testified at the hearing. Id. Plaintiff was represented by attorney Lars C. Christenson at the
8 hearing. Id. Bonnie Sinclair, a vocational expert (“VE”), also testified at the hearing. Id.

9 On October 24, 2014, the ALJ issued an unfavorable decision, finding plaintiff “not
10 disabled” under Section 1614(a)(3)(A) of Title XVI of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR
11 16-27, 28-31 (list of exhibits). On March 30, 2016, the Appeals Council denied plaintiff’s request
12 for review, leaving the ALJ’s decision as the final decision of the Commissioner of Social
13 Security. AR 6-8 (appeals council decision).

14 Plaintiff filed this action on June 1, 2016. ECF No. 1; see 42 U.S.C. §§ 405(g), 1383c(3).
15 The parties consented to the jurisdiction of the magistrate judge. ECF Nos. 7, 9. The parties’
16 cross-motions for summary judgment, based upon the Administrative Record filed by the
17 Commissioner, have been fully briefed. ECF Nos. 14 (plaintiff’s summary judgment motion), 15
18 (Commissioner’s summary judgment motion), 16 (plaintiff’s reply).

19 II. FACTUAL BACKGROUND

20 Plaintiff was born on May 20, 1973, and accordingly 39 years old on the application date.
21 AR 26. Plaintiff has a limited education, and can communicate in English. AR 26.

22 III. LEGAL STANDARDS

23 “[A] federal court’s review of Social Security determinations is quite limited.” Brown-
24 Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015). The Commissioner’s decision that a
25 claimant is not disabled will be upheld “unless it contains legal error or is not supported by
26 substantial evidence.” Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). “The findings of

27 _____
28 ³ The AR is electronically filed at ECF No. 13-1 to 13-20 (AR 1 to AR 773).

1 the Secretary as to any fact, if supported by substantial evidence, shall be conclusive....”

2 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

3 “‘Substantial evidence’ means more than a mere scintilla, but less than a preponderance; it
4 is such relevant evidence as a reasonable person might accept as adequate to support a
5 conclusion.” Garrison, 759 F.3d at 1009. “While inferences from the record can constitute
6 substantial evidence, only those reasonably drawn from the record will suffice.” Widmark v.
7 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation and internal quotation marks omitted).

8 The court reviews the record as a whole, “weighing both the evidence that supports and
9 the evidence that detracts from the Commissioner’s conclusion.” Rounds v. Comm’r Soc. Sec.
10 Admin., 807 F.3d 996, 1002 (9th Cir. 2015); Attmore v. Colvin, 827 F.3d 872, 875 (9th Cir.
11 2016) (“[w]e cannot affirm ... ‘simply by isolating a specific quantum of supporting evidence’”).

12 It is the ALJ’s responsibility “to determine credibility, resolve conflicts in the testimony,
13 and resolve ambiguities in the record.” Brown-Hunter, 806 F.3d at 492 (internal quotation marks
14 omitted). “Where the evidence is susceptible to more than one rational interpretation, one of
15 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas v. Barnhart,
16 278 F.3d 947, 954 (9th Cir. 2002). Thus, in reviewing the Commissioner’s decision, this court
17 does not substitute its discretion for that of the Commissioner. See Brown-Hunter, 806 F.3d at
18 492 (“[f]or highly fact-intensive individualized determinations like a claimant’s entitlement to
19 disability benefits, Congress places a premium upon agency expertise, and, for the sake of
20 uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their
21 discretion for that of the agency”) (internal quotation marks omitted).

22 The court may review “only the reasons provided by the ALJ in the disability
23 determination and may not affirm the ALJ on a ground upon which he did not rely.” Garrison,
24 759 F.3d at 1010. Finally, the court will not reverse the Commissioner’s decision if it is based on
25 “harmless error,” meaning that the error “is inconsequential to the ultimate nondisability
26 determination....” Brown-Hunter, 806 F.3d at 492 (internal quotation marks omitted).

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1 IV. RELEVANT LAW

2 Supplemental Security Income is available for every eligible individual who is “disabled.”
3 42 U.S.C. § 1381a. Plaintiff is “disabled” if she is “unable to engage in substantial gainful
4 activity due to a medically determinable physical or mental impairment....” Bowen v. Yuckert,
5 482 U.S. 137, 140 (1987) (quoting identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A),
6 1382c(a)(3)(A)).

7 The Commissioner uses a five-step sequential evaluation process to determine whether an
8 applicant is disabled and entitled to benefits. 20 C.F.R. § 416.920(a)(4); Barnhart v. Thomas, 540
9 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation process to determine
10 disability” under Title XVI). The following summarizes the sequential evaluation:

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

13 20 C.F.R. § 416.920(a)(4)(i), (b).

14 Step two: Does the claimant have a “severe” impairment? If so,
15 proceed to step three. If not, the claimant is not disabled.

16 Id., § 416.920(a)(4)(ii), (c).

17 Step three: Does the claimant’s impairment or combination of
18 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
19 404, Subpt. P, App. 1? If so, the claimant is disabled. If not,
20 proceed to step four.

21 Id., §§ 404.1520(a)(4)(iii), (d) and 416.920(a)(4)(iii), (d).

22 Step four: Does the claimant’s residual functional capacity make
23 him capable of performing his past work? If so, the claimant is not
24 disabled. If not, proceed to step five.

25 Id., § 416.920(a)(4)(iv), (e), (f).

26 Step five: Does the claimant have the residual functional capacity
27 perform any other work? If so, the claimant is not disabled. If not,
28 the claimant is disabled.

29 Id., § 416.920(a)(4)(v), (g).

30 The claimant bears the burden of proof in the first four steps of the sequential evaluation
31 process. 20 C.F.R. § 416.912(a) (“In general, you have to prove to us that you are blind or
32 disabled”); Bowen, 482 U.S. at 146 n.5. However, “[a]t the fifth step of the sequential analysis,

1 the burden shifts to the Commissioner to demonstrate that the claimant is not disabled and can
2 engage in work that exists in significant numbers in the national economy.” Hill v. Astrue, 698
3 F.3d 1153, 1161 (9th Cir. 2012); Bowen, 482 U.S. at 146 n.5.

4 V. THE ALJ’s DECISION

5 The ALJ made the following findings:

6 1. [Step 1] The claimant has not engaged in substantial gainful
7 activity since July 11, 2012, the application date (20 CFR 416.971
8 *et seq.*).

9 2. [Step 2] The claimant has the following severe impairments:
10 morbid obesity, bilateral knee degenerative joint disease and torn
11 meniscuses, status post bilateral knee arthroscopy, diabetes
12 mellitus, and cervical degenerative disc disease (20 CFR
13 416.920(c)).

14 3. [Step 3] The claimant does not have an impairment or
15 combination of impairments that meets or medically equals the
16 severity of one of the listed impairments in 20 CFR Part 404
17 Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).

18 4. [Residual Functional Capacity “RFC”] After careful
19 consideration of the entire record, the undersigned finds that the
20 claimant has the residual functional capacity to lift and/or carry
21 [20⁴] pounds occasionally and 10 pounds frequently; sit for 6 hours
22 in an 8-hour workday; and stand and walk 2 hours in an 8-hour
23 workday. She can climb ramps and stairs, but never climb ladders,
24 ropes, or scaffolds. She can occasionally balance, stoop, kneel, and
25 crouch, but never crawl. She must avoid concentrated exposure to
26 dangerous machinery, unprotected heights, and uneven or slippery
27 terrain. (20 CFR 416.967(b)).

28 5. [Step 4] The claimant is unable to perform any past relevant
work (20 CFR 416.965).

6. [Age] The claimant was born on May 20, 1973 and was 39 years
old, which is defined as a younger individual age 18-49, on the date
the application was filed (20 CFR 416.963).

7. [Education] The claimant has a limited education and is able to
communicate in English (20 CFR 416.964).

8. [Transferability of job skills] Transferability of job skills is not
material to the determination of disability because using the

26 ⁴ The ALJ stated plaintiff’s RFC to include “10 pounds occasionally and 10 pound frequently” in
27 this section, but in the rest of the decision the ALJ refers consistently to an RFC including “20
28 pounds occasionally and 10 pounds frequently.” See AR 20, 23, 64. The court notes this as a
typographical error.

1 Medical-Vocational Rules as a framework supports a finding that
2 the claimant is “not disabled,” whether or not the claimant has
3 transferable job skills (See SSR 82-41 and 20 CFR Part 404,
4 Subpart P, Appendix 2).

5 9. [Step 5] Considering the claimant’s age, education, work
6 experience, and residual functional capacity, there are jobs that
7 exist in significant numbers in the national economy that the
8 claimant can perform (20 CFR 416.969 and 416.969(a)).

9 10. The claimant has not been under a disability, as defined in the
10 Social Security Act, since July 11, 2012, the date the application
11 was filed (20 CFR 416.920(g)).

12 AR 18-27.

13 As noted, the ALJ concluded that plaintiff was “not disabled” under Section 1614 of Title
14 XVI of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR 27.

15 VI. ANALYSIS

16 Plaintiff argues the ALJ erred because she improperly relied on the testimony of the VE;
17 and she failed “to articulate clear and convincing reasons for rejecting” plaintiff’s pain testimony.
18 ECF No. 14 at 7, 10.

19 A. The ALJ’s Treatment Of The VE’s Testimony

20 Plaintiff argues that the ALJ failed to resolve the conflicts between the VE’s testimony
21 and the Occupational Outlook Handbook (“OOH”). ECF No. 14 at 8. Specifically, plaintiff
22 argues that the jobs identified by the VE “require a high school education or more” and are
23 inconsistent with plaintiff’s “limited education.” *Id.* The court finds the ALJ did not err.

24 Plaintiff contends that the jobs identified by the VE are “in facial conflict with the sources
25 of administrative notice.” ECF No. 14 at 8. Plaintiff cites to the OOH as a source, like the
26 Dictionary of Occupational Tiles (“DOT”), of which the Social Security Administration takes
27 administrative notice. *Id.* (citing to 20 C.F.R. § 416.966(d)(1)). However, plaintiff fails to
28 provide authority for the proposition that an ALJ must *sua sponte* identify and take administrative
notice of the educational requirements in the OOH, compare them with the VE’s hearing
testimony, and determine any inconsistencies. Plaintiff is correct that the ALJ is required to
“ascertain, weigh, and resolve conflicts between the DOT and the testimony of a vocational
expert” and that “failure to do so constitutes error.” ECF No. 14 at 8 (citing to Massachi v.

1 Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007) (emphasis added). However, plaintiff cites to no
2 authority suggesting that the same rule applies to the OOH.

3 More fundamentally, defendant argues that this issue is waived because plaintiff failed to
4 raise it during the administrative proceedings. ECF No. 15 at 10 (citing Meanel v. Apfel, 172
5 F.3d 1111, 1115 (9th Cir. 1999)). Plaintiff counters that Meanel was overruled by the Supreme
6 Court's holding in Sims v. Apfel in that "claimants who exhaust administrative remedies need not
7 also exhaust issues in a request for review by the Appeals Council in order to preserve judicial
8 review of those issues." 530 U.S. 103, 112 (2000). The issue here is not waiver by failure to seek
9 review by the Appeals Council, however, but waiver by failing to raise the issue before the ALJ.
10 The Ninth Circuit has held that Meanel remains binding with respect to proceedings before an
11 ALJ. Shaibi v. Berryhill, No. 15-16849, 2017 WL 35980852017, U.S. App. LEXIS 15959, at
12 *17 (9th Cir. Aug. 22, 2017) (finding that failure during administrative hearing to dispute VE
13 testimony on grounds including inconsistency with OOH waived the issue). Here, plaintiff was
14 represented by counsel and did not raise the vocational issue before the ALJ or the Appeals
15 Council. This court therefore finds plaintiff's claim relating to the VE testimony is waived.

16 B. The ALJ's Rejection Of Plaintiff's Pain Testimony

17 "In evaluating the credibility of a claimant's testimony regarding subjective pain, an ALJ
18 must engage in a two-step analysis." Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009); see
19 also Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012). "First, the ALJ must determine
20 whether the claimant has presented objective medical evidence of an underlying impairment
21 which could reasonably be expected to produce the pain or other symptoms alleged."
22 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotation marks and citation
23 omitted); see also Molina, 674 F.3d at 1112; Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010)
24 ("Once the claimant produces medical evidence of an underlying impairment, the Commissioner
25 may not discredit the claimant's testimony as to subjective symptoms merely because they are
26 unsupported by objective evidence." (internal quotation marks and citation omitted)). "Second, if
27 the claimant meets this first test, and there is no evidence of malingering, the ALJ can reject the
28 claimant's testimony about the severity of her symptoms only by offering specific, clear and

1 convincing reasons for doing so.” Lingenfelter, 504 F.3d at 1036 (internal quotation marks and
2 citation omitted); see also Molina, 674 F.3d at 1112; Valentine v. Comm’r of Soc. Sec. Admin.,
3 574 F.3d 685, 693 (9th Cir. 2009). “General findings are insufficient; rather, the ALJ must
4 identify what testimony is not credible and what evidence undermines the claimant’s complaints.”
5 Berry, 622 F.3d at 1234 (internal quotation marks and citation omitted); see also Lester v. Chater,
6 81 F.3d 821, 834 (9th Cir. 1995); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

7 In determining plaintiff’s credibility, the ALJ failed to present any affirmative evidence
8 that plaintiff was malingering, and was thus required to present “clear and convincing” reasons
9 for not fully crediting plaintiff’s testimony. Lester, 81 F.2d at 834.

10 The court finds that the ALJ did not err in finding plaintiff’s pain testimony not fully
11 credible, because she offered specific, clear and convincing reasons for doing so. The ALJ
12 offered three reasons in support of finding that plaintiff’s “statements concerning the intensity,
13 persistence and limiting effects of [her] symptoms are not entirely credible”: (1) plaintiff’s
14 allegations of “visual difficulties were not fully consistent with the treating source records” or her
15 own testimony; (2) plaintiff’s “allegation that she could only sit for 30 minutes was refuted by
16 [her] presentation at the hearing...[and] her admitted wide range of activities”; and (3) although
17 plaintiff had “mobility issues with her knee...[her] surgeries appeared to be successful by all
18 medical accounts.” AR 24-25.

19 First, the ALJ found that plaintiff’s allegations of visual difficulties were not fully
20 supported by the treating source records or her testimony. In assessing plaintiff’s credibility, the
21 ALJ noted that the treating source records indicated that plaintiff had a “bilateral vision of 20/30
22 with glasses” and at the hearing claimant testified “she had a driver’s license and continued to
23 drive suggest[ing] her vision was quite functionally adequate.” AR 25. In reviewing the medical
24 records, the court finds that the medical records and plaintiff’s testimony adequately supports the
25 ALJ’s credibility determination relating to plaintiff’s vision. See AR 38-39 (plaintiff testifies her
26 driving license restricts her from driving without her corrective lenses and that on average, she
27 drives her boyfriend’s Tahoe twice a week); AR 413-415 (eye examination dated 1/18/2013
28 indicates corrective lenses give plaintiff a 20/30 vision and that her glaucoma is “stable” and

1 “controlled”). Moreover, plaintiff does not contest the ALJ’s finding of plaintiff’s visual
2 difficulties. In light of the foregoing, plaintiff has not shown that the ALJ erred in partially
3 discounting plaintiff’s credibility based in part upon the inconsistency of plaintiff’s allegations of
4 visual difficulties.

5 Second, the ALJ found that plaintiff’s contention that she could only sit for 30 minutes
6 was contradicted by her demeanor at the hearing and her daily activities. Specifically, the ALJ
7 noted:

8 Her allegation that she could only sit for 30 minutes was refuted by
9 claimant’s presentation at hearing, where she sat in apparent
10 comfort throughout her 59-minute long hearing without arising or
11 excessive shifting in her chair. Her allegation that she spent half of
12 each day in the bathroom was not only inconsistent with her
13 allegation that she could only sit for 30 minutes, it was also
14 inconsistent with her admitted wide range of activities such as
15 preparing meals, going to Walmart and swap meets to shop and
16 going swimming.

17 AR 25.

18 Plaintiff contends that at the hearing, the ALJ made a “statement not made on the record
19 that [plaintiff] did not engage in *excessive* shifting- without defining excessive and tacitly
20 conceding some degree of extra-ordinary shifting.” ECF No. 14 at 11. While the Ninth Circuit
21 has “disapproved of so-called ‘sit and squirm’ jurisprudence,” an ALJ may properly consider
22 inconsistencies in a claimant's testimony and conduct at the hearing when assessing credibility.
23 Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (internal citations omitted). However,
24 “[t]he ALJ’s observations of a claimant's functioning may not form the sole basis for discrediting
25 a person’s testimony.” Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007). In this case, the ALJ
26 provided three separate reasons for rejecting plaintiff’s testimony regarding the severity of her
27 symptoms, thus the ALJ’s observation of plaintiff at the hearing was properly considered as a
28 factor in assessing her credibility.

Moreover, the ALJ also found that plaintiff’s daily activities were inconsistent with her
allegation that she could only sit for 30 minutes. Evidence that a claimant engaged in certain
daily activities can support an adverse credibility determination as long as (1) those activities
contradicted the claimant’s testimony; or (2) the claimant engaged in those activities for a

1 substantial portion of the day and they involved skills transferable to the workplace. Orn, 495
2 F.3d at 639. The ALJ points to a number of plaintiff's activities, which include preparing meals,
3 going to Walmart and swap meets to shop, and going swimming, which partially undermined the
4 credibility of her reported symptoms and limitations. AR 25. The ALJ's description regarding
5 plaintiff's ability to swim mischaracterizes the record. In her function report, plaintiff indicated
6 that she was not able to swim because having to bend her knees and kick her legs causes
7 discomfort and pain. AR 214. However, the ALJ's finding that plaintiff's pain testimony is
8 contradicted by her daily activities is otherwise supported by substantial evidence. The
9 inconsistency of plaintiff's own statements and her activities of daily living were properly
10 considered by the ALJ in evaluating her credibility.

11 Lastly, the ALJ also found plaintiff's allegations were inconsistent with her medical
12 record. The ALJ noted that her knee surgeries appeared to be "successful by all medical
13 accounts" and that there were no records showing the surgeries failed or needed to be redone, or a
14 recommendation for knee replacement surgery. AR 25. The ALJ further found that after
15 plaintiff's knee surgeries she was able to "stand, walk, and pivot without assistance, did not need
16 an assistive device, and was not a fall risk...[and that] her doctor repeatedly advised [her] to lose
17 weight." AR 25 (citing to Exh. 11F at 34, 40). The ALJ further noted that "no treating doctor
18 [had] opined [plaintiff] had any functional limitations." Id. Although the record does indicate
19 that knee replacement surgery was recommended for plaintiff's left knee, her doctor opined that
20 because plaintiff was overweight it could not be done until plaintiff reduced her weight. AR 509.
21 Moreover, the ALJ took into consideration that even if plaintiff was limited to using the walker
22 with a seat and wheels, lifting/carrying 10 pounds occasionally, standing/walking approximately
23 2 hours, performing simple/routine tasks, and being able to be off task 5-7% of the workday one
24 or two times a month, the VE testified there would still be jobs available plaintiff could perform.
25 AR 67. The ALJ did not err in partially discrediting plaintiff's testimony for being inconsistent
26 with her medical record. Even if consideration of this factor was error, it was harmless in light of
27 the other reasons given for the credibility assessment.

28 In accordance with the foregoing, the court finds that the ALJ provided specific, clear, and

1 convincing reasons for finding plaintiff's testimony not fully credible, reversal is not warranted.

2 VII. CONCLUSION

3 For the reasons set forth above, IT IS HEREBY ORDERED that:

4 1. Plaintiff's motion for summary judgment (ECF No. 14), is DENIED;

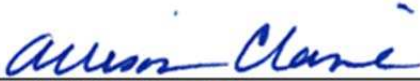
5 2. The Commissioner's cross-motion for summary judgment (ECF No. 15), is

6 GRANTED; and

7 3. The Clerk of the Court shall enter judgment for the Commissioner, and close this case.

8 DATED: September 19, 2017

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ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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