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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARRIE RUTH SAVAGE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

No. 2:16-cv-1591 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”), denying her application for disability insurance benefits (“DIB”) under Title II of the Social Security Act (“the Act”), 42 U.S.C. §§401-34.² For the reasons that follow, the court will deny plaintiff’s motion for summary judgment and grant the Commissioner’s cross-motion.

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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 August 10, 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 DIB is paid to disable persons who have contributed to the Disability Insurance Program, and who suffer from a mental or physical disability. 42 U.S.C. §423(a)(1); Bowen v. City of New York, 476 U.S. 467, 470 (1986).

1 I. PROCEDURAL BACKGROUND

2 Plaintiff applied for disability insurance benefits on March 8, 2013. Administrative
3 Record (“AR”) 11 (decision).³ The disability onset date was alleged to be December 31, 2007.
4 Id. The application was denied initially and on reconsideration. Id. On November 20, 2014, ALJ
5 Lawrence J. Duran presided over the hearing on plaintiff’s challenge to the denial. AR 24-59
6 (transcript). Plaintiff, who was represented by attorney William T. Tanoos, was present and
7 testified at the hearing. James Graham, a vocational expert, also testified at the hearing.

8 On January 30, 2015, the ALJ issued an unfavorable decision, finding plaintiff “not
9 disabled under Section 216(i) and 223(d) of Title II of the Act, 42 U.S.C. §§416(i), 423(d). AR
10 8-19 (decision), 20-23 (exhibit list). On May 12, 2016, the Appeals Council denied plaintiff’s
11 request for review, leaving the ALJ’s decision as the final decision of the Commissioner of Social
12 Security. AR 1-7 (decision, additional evidence).

13 Plaintiff filed this action on July 11, 2016. ECF No. 1; see 42 U.S.C. §§ 405(g),
14 1383(c)(3). The parties consented to the jurisdiction of the magistrate judge. ECF Nos. 7, 8. The
15 parties’ cross motions for summary judgment, based upon the Administrative Record filed by the
16 Commission, have been fully briefed. ECF Nos. 17 (plaintiff’s summary judgment motion), 24
17 (Commissioner’s summary judgment motion).

18 II. FACTUAL BACKGROUND

19 Plaintiff was born on June 30, 1957, and accordingly was 50 years old on the alleged
20 disability onset date, making her a “person closely approaching advanced age” under the
21 regulations. AR 27; see 20 C.F.R. §§ 404.1563(d) (age as a vocational factor), 416.963(c)
22 (same). Plaintiff has an 11th grade education, which is a “limited” education under the
23 regulations. AR 27; see 20 C.F.R. §§ 404.1564(b)(3) (education as a vocational factor),
24 416.964(b)(3) (same).

25 III. LEGAL STANDARDS

26 “[A] federal court’s review of Social Security determinations is quite limited.” Brown-

27 _____
28 ³ The AR is electronically filed at ECF Nos.11-3 to 11-10 (AR 1 to AR 562).

1 Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015). The Commissioner’s decision that a
2 claimant is not disabled will be upheld “unless it contains legal error or is not supported by
3 substantial evidence.” Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). ““The findings of
4 the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...”
5 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

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

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

16 It is the ALJ’s responsibility “to determine credibility, resolve conflicts in the testimony,
17 and resolve ambiguities in the record.” Brown-Hunter, 806 F.3d at 492 (internal quotation marks
18 omitted). “Where the evidence is susceptible to more than one rational interpretation, one of
19 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas v. Barnhart,
20 278 F.3d 947, 954 (9th Cir. 2002). Thus, in reviewing the Commissioner’s decision, this court
21 does not substitute its discretion for that of the Commissioner. See Brown v. Hunter, 806 F.3d at
22 492 (“[f]or highly fact-intensive individualized determinations like a claimant’s entitlement to
23 disability benefits, Congress places a premium upon agency expertise, and, for the sake of
24 uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their
25 discretion for that of the agency”) (internal quotation marks omitted).

26 The court may review “only the reasons provided by the ALJ in the disability
27 determination and may not affirm the ALJ on a ground upon which he did not rely.” Garrison,
28 759 F.3d at 1010. Finally, the court will not reverse the Commissioner’s decision if it is based on

1 “harmless error,” meaning that the error “is inconsequential to the ultimate nondisability
2 determination...” Brown-Hunter, 806 F.3d at 492 (internal quotation marks omitted).

3 IV. RELEVANT LAW

4 Disability Insurance Benefits are available for every eligible individual who is “disabled.”
5 42 U.S.C. §§423(a)(1)(E). Plaintiff is “disabled” if she is “unable to engage in substantial
6 gainful activity due to a medically determinable physical or mental impairment...” Bowen v.
7 Yuckert, 482 U.S. 137, 140 (1987) (quoting identically worded provisions of 42 U.S.C. §§
8 423(d)(1)(A).

9 The Commissioner uses a five-step sequential evaluation process to determine whether an
10 applicant is disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4);
11 Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation
12 process to determine disability” under Title II). The following summarizes the sequential
13 evaluation:

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

16 20 C.F.R. § 404.1520(a)(4)(i), (b).

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

19 Id., § 404.1520(a)(4)(ii), (c).

20 Step three: Does the claimant’s impairment or combination of
21 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
22 404, Subpt. P, App. 1? If so, the claimant is disabled. If not,
23 proceed to step four.

24 Id., § 404.1520(a)(4)(iii), (d).

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

28 Id., § 404.1520(a)(4)(iv), (e), (f).

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

Id., § 404.1520(a)(4)(v), (g).

1 As noted, the ALJ concluded that plaintiff was “not disabled” under Sections 216(i) and
2 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 18.

3 VI. ANALYSIS

4 Plaintiff argues that the ALJ failed to articulate clear and convincing reasons for only
5 partially crediting plaintiff’s testimony. Plaintiff requests that the matter be reversed and
6 remanded for the payment of benefits, or in the alternative, for further administrative proceedings.
7 ECF No. 17 at 3. The Commissioner, in turn, argues that the ALJ’s findings are supported by
8 substantial evidence and are free from legal error. For the reasons discussed below, the court
9 finds that the ALJ did not err in partially crediting plaintiff’s subjective pain testimony.
10 Accordingly, the court will grant the Commissioner’s cross-motion for summary judgment.

11 A. Credibility Determination

12 1. Legal Standards

13 “In evaluating the credibility of a claimant’s testimony regarding subjective pain, an ALJ
14 must engage in a two-step analysis.” Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009); see
15 also Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012). “First, the ALJ must determine
16 whether the claimant has presented objective medical evidence of an underlying impairment
17 which could reasonably be expected to produce the pain or other symptoms alleged.”
18 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotation marks and citation
19 omitted); see also Molina, 674 F.3d at 1112; Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010)
20 (“Once the claimant produces medical evidence of an underlying impairment, the Commissioner
21 may not discredit the claimant’s testimony as to subjective symptoms merely because they are
22 unsupported by objective evidence.” (internal quotation marks and citation omitted)). “Second, if
23 the claimant meets this first test, and there is no evidence of malingering, the ALJ can reject the
24 claimant’s testimony about the severity of her symptoms only by offering specific, clear and
25 convincing reasons for doing so.” Lingenfelter, 504 F.3d at 1036 (internal quotation marks and
26 citation omitted); see also Molina, 674 F.3d at 1112; Valentine v. Comm’r of Soc. Sec. Admin.,
27 574 F.3d 685, 693 (9th Cir. 2009). “General findings are insufficient; rather, the ALJ must
28 identify what testimony is not credible and what evidence undermines the claimant’s complaints.”

1 Berry, 622 F.3d at 1234 (internal quotation marks and citation omitted); see also Lester v. Chater,
2 81 F.3d 821, 834 (9th Cir. 1995); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

3 2. Analysis

4 In determining plaintiff's credibility, the ALJ failed to present any affirmative evidence
5 that plaintiff was malingering, and was thus required to present "clear and convincing" reasons
6 for partially rejecting plaintiff's testimony. Lester, 81 F.2d at 834.

7 The court finds that the ALJ did not err in finding plaintiff's pain testimony partially
8 credible, because he offered specific, clear and convincing reasons for doing so. The ALJ offered
9 four reasons in support of finding that plaintiff's "statements concerning the intensity, persistence
10 and limiting effects of [her] symptoms as not entirely credible": (1) plaintiff did not receive "on-
11 going and continuous medical treatment"; (2) plaintiff's "alleged loss of function is not supported
12 by objective medical findings"; (3) plaintiff's description of her daily activities are not limiting
13 "to the extent one would expect, given the complaints of disabling symptoms and limitations";
14 and (4) plaintiff's "allegations are inconsistent with her medical record." AR 17.

15 First, the ALJ referenced plaintiff's minimal treatment record. For the relevant period of
16 disability, there are two treatment records for 2007 (AR 223, 405), three for 2008 (AR 463, 552,
17 265-268), zero for 2009, two for 2010 (AR 432, 436), three for 2011 (AR 443, 452, 358-359), and
18 zero treatment records for 2012. During the hearing, plaintiff also testified to severe and intense
19 pain in her right leg and back that would have her missing work and would debilitate her "all day
20 sometimes." AR 39-40. But when the ALJ asked at the hearing whether there were any treatment
21 records for her leg and back problems, plaintiff's attorney stated "No." AR 41-42. Although
22 plaintiff testified that she went to physical therapy for six months and that it did not help alleviate
23 her pain, the ALJ noted that the record only contained evidence of one session. AR 15, 42-43,
24 436-438. It is well-established that an ALJ may discredit a plaintiff's testimony for lack of
25 consistent treatment. Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (ALJ may properly
26 rely on failure to seek treatment during "three or four month period" to discredit plaintiff's
27 subjective complaints). Moreover, plaintiff does not contest the minimal nature of the treatment
28 record. In light of the foregoing, plaintiff has not shown that the ALJ erred in discounting

1 plaintiff's credibility based in part upon the minimal treatment record.

2 Second, the ALJ found that plaintiff's alleged loss of function was not supported by
3 objective medical findings. Here, the ALJ's finding that plaintiff is not entirely credible
4 concerning the degree of her limitations is supported by substantial evidence. In assessing
5 plaintiff's credibility, the ALJ noted plaintiff's back and leg pain but stated "there were no
6 objective musculoskeletal findings to support her complaint." AR 15, 16. Furthermore, plaintiff
7 testified that the severity of her leg and back pain would "sometimes [be] every day" and would
8 last "about six hours" a day (AR 40-41). In reviewing the medical records, there were only two
9 treatment records reflecting complaints of right leg pain and/or lower back in 2010 (AR 432, 436-
10 438) and one treatment record in 2011 (AR 443). Moreover, the ALJ noted medical evidence
11 consistent with cholelithiasis, chronic calculous cholecystitis, and acute gastroenteritis but that
12 plaintiff was conservatively treated and eventually underwent surgery for her chronic calculous
13 cholecystitis. AR 16, 223, 240-242, 552. As for plaintiff's history of sarcoidosis, medical
14 records indicated "enlarged mediastinal and hilar lymph nodes" that was treated with local
15 steroids. AR 265, 268, 452, 455.

16 Plaintiff argues that the ALJ erred in rejecting plaintiff's testimony based on a lack of
17 objective medical evidence because "the regulations specifically prohibit rejecting subjective pain
18 testimony solely on the basis of objective medical evidence." ECF No. 17 at 8. Plaintiff is
19 incorrect. Although lack of medical evidence cannot form the sole basis for discounting pain
20 testimony, it is a factor that the ALJ can consider in his credibility analysis. Burch, 400 F.3d at
21 681. In this case, the ALJ provided four separate reasons for rejecting plaintiff's testimony
22 regarding the severity of her symptoms, thus the minimal objective findings in the record was a
23 properly considered factor in assessing plaintiff's credibility. Id. Even if consideration of this
24 factor was error, it was harmless in light of the other reasons given for the credibility assessment.

25 The ALJ also found that plaintiff's daily activities were inconsistent with her alleged
26 symptoms and limitations. Evidence that a claimant engaged in certain daily activities can
27 support an adverse credibility determination as long as (1) those activities contradicted the
28 claimant's testimony; or (2) the claimant engaged in those activities for a substantial portion of

1 the day and they involved skills transferable to the workplace. Orn v. Astrue, 495 F.3d 625, 639
2 (9th Cir. 2007). The ALJ points to a number of plaintiff's activities, which include preparing
3 meals for her friend and herself, caring for her personal hygiene, cleaning with the exception of
4 mopping due to back pain, laundry, shopping for groceries but with the exception of being able to
5 only carry light items, watching television, spending time with her grandkids, socializing with
6 family, attending church for two hours, and utilizing a cane for a period, partially undermined her
7 testimony regarding her disabling symptoms and limitations. AR 16. The ALJ's description
8 regarding plaintiff's attendance in church mischaracterizes the pain plaintiff testified she
9 experienced. AR 38-39. Although plaintiff would attend church twice a week for two hours, she
10 could not kneel or stand due to her leg and back pain. Id. Although she required the use of her
11 cane, plaintiff only used the cane for two years "off and on." Id. However, the ALJ's finding that
12 plaintiff's pain testimony is partially credible because it is contradicted by her daily activities is
13 supported by substantial evidence. The inconsistency of plaintiff's own statement and her
14 activities of daily living were properly considered by the ALJ in evaluating her credibility.

15 Lastly, the ALJ also found plaintiff's allegations were inconsistent with her medical
16 record. The ALJ noted that plaintiff testified to severe leg and back pain that prevented her from
17 being able to get out of bed and ultimately led to plaintiff losing her job, yet the treatment records
18 indicated her extremities were within normal limits and she had a "normal range of motion,"
19 "normal strength," and "no swelling." AR 17, 453-455. Moreover, plaintiff had "intact sensory
20 function, no focal defects, and normal deep tendon reflexes." Id. The ALJ's decision does more
21 than simply assert the medical evidence in support of plaintiff's testimony is insufficient, it points
22 specifically to reports that cast doubt upon her claims. Plaintiff does not explain why these
23 records do not constitute a specific, clear and convincing reason to find plaintiff's testimony lacks
24 credibility. Indeed, the court finds that the cited medical evidence adequately supports the ALJ's
25 credibility determination.

26 Accordingly, the ALJ provided specific, clear, and convincing reasons for finding
27 plaintiff's testimony partially credible, reversal is not warranted on this ground.

28 ///

VII. CONCLUSION

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

1. Plaintiff's motion for summary judgment (ECF No. 17), is DENIED;
2. The Commissioner's cross-motion for summary judgment (ECF No. 24), is GRANTED; and
3. The Clerk of the Court is directed to close the case.

DATED: September 8, 2017


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

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