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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 TARRY CONRAD,

No. C 08-2851 SI

9 Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

10 v.

11 MICHAEL J. ASTRUE,
12 Commissioner of Social Security Administration

13 Defendant.
_____/

14 The parties have filed cross-motions for summary judgment in this Social Security appeal.
15 Having carefully considered the parties' papers and the administrative record, the Court hereby DENIES
16 plaintiff's motion, and GRANTS defendant's motion.
17

18 **BACKGROUND**

19 On February 10, 2005, plaintiff applied for disability insurance benefits and supplemental
20 security income on the basis of "back and leg problems, hearing and mental problems." Administrative
21 Record ("AR") at 131. After the Social Security Administration denied the applications initially and
22 on reconsideration, this matter was heard by an Administrative Law Judge ("ALJ"). *Id.* at 290, 295.
23 On August 24, 2007, the ALJ issued a decision finding plaintiff was not disabled because she could
24 perform her past relevant work as a cashier. *Id.* at 18-27.
25

26 The ALJ found that the record contained insufficient evidence to establish any medically
27 determinable impairment prior to March 11, 2005. *Id.* at 21. The ALJ noted that plaintiff was seen in
28 November 2003 for neck pain after a fall, and that she was treated and released without complication.

1 *Id.* The ALJ stated, “[t]here is no documentation in the record before me showing any medical care or
2 treatment for any conditions for the period between November 2003 and March 2005.” *Id.* In March
3 2005, plaintiff was evaluated and treated for depression and active polysubstance abuse. *Id.* The ALJ
4 found that the evidence showed that beginning March 11, 2005, plaintiff had the severe impairments
5 of depression and a polysubstance use disorder, and that she had the residual functional capacity to
6 perform “a full range of work at all exertional levels but with the following nonexertional limitations:
7 she cannot understand, remember, or carry out detailed or complex instructions; and should not work
8 in a very demanding work setting.” *Id.* at 21-22. The ALJ found that plaintiff was capable of
9 performing her past relevant work as a cashier, and that she was also capable of “doing a variety of
10 clerical jobs and manual jobs, such as assembly and painting jobs” that she had previously done on a
11 temporary basis. *Id.* at 26-27.

12 Plaintiff requested review of the ALJ’s decision by the Appeals Council. In a decision dated
13 May 9, 2008, the Appeals Council adopted all of the ALJ’s findings and conclusions except for the
14 ALJ’s finding that plaintiff was capable of performing her past relevant work as a cashier. *Id.* at 10.
15 The Appeals Council noted that while plaintiff reported she had worked as a K-Mart cashier in 1998 and
16 1999, a computer query showed no earnings from K-Mart during that time, and thus it was unclear
17 whether the cashier job could be considered to be past relevant work. *Id.* The Appeals Council found
18 that “[t]he claimant’s nonexertional limitations do not significantly affect her residual functional
19 capacity to perform work-related activities at all exertional levels. Using section 204.00 of 20 CFR Part
20 404, Subpart P, Appendix 2, as a framework for decisionmaking, the claimant is not disabled (20 CFR
21 416.920(f)).” *Id.* at 10-11.¹ The Appeals Council’s decision is the final decision of the Commissioner
22 of Social Security for purposes of the Court’s review.

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24 **LEGAL STANDARD**

25 A district court’s review of a disability determination is limited, and a final administrative
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27 ¹ When the agency relies on the Medical-Vocational Guidelines, 20 C.F.R. pt. 404, subpt. P,
28 app. 2, there is no requirement that the agency enunciate specific jobs for which the claimant is
physically capable of performing. *See Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir. 1983).

1 decision may be altered “only if it is based on legal error or if the fact findings are not supported by
2 substantial evidence.” *Sprague v. Bowen*, 812 F.2d 1226, 1229 (9th Cir. 1987). Substantial evidence
3 is relevant evidence in the entire record “which a reasonable person might accept as adequate to support
4 a conclusion.” *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). Substantial evidence consists
5 of “more than a mere scintilla but less than a preponderance.” *Young v. Sullivan*, 911 F.2d 181, 183 (9th
6 Cir. 1990). The Court must consider the entire record, including evidence that both supports and detracts
7 from the ALJ’s decision. *See Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001). However,
8 the ALJ’s decision must be upheld if the evidence is susceptible to more than one rational interpretation.
9 *Allen v. Secretary of Health and Human Servs.*, 726 F.2d 1470, 1473 (9th Cir. 1984).

11 DISCUSSION

12 Plaintiff raises two issues on appeal. First, plaintiff contends that the Appeals Council erred by
13 using the Medical-Vocational Guidelines, 20 C.F.R. pt. 404, subpt. P, app. 2 (also referred to as the
14 “Grid”), to conclude that plaintiff was capable of performing other work in the national economy, and
15 that instead the testimony of a vocational expert was required. Second, plaintiff contends that the
16 Appeals Council failed to address plaintiff’s subjective complaints.

18 I. Medical-Vocational Guidelines/Vocational Expert

19 Citing *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir. 1999), plaintiff contends that “where a claimant
20 has significant non-exertional limitations, the ALJ cannot rely on the Medical-Vocational Guidelines
21 (i.e., the “Grids”),” but rather “is required to take the testimony of a vocational expert before making
22 a decision at the fifth step of the evaluation.” Pl.’s Mot. Sum. J. at 5-6. However, *Tackett* does not go
23 quite so far as plaintiff suggests.

24 As explained in *Tackett*, “[o]nce a claimant has established that he or she suffers from a severe
25 impairment that prevents the claimant from doing any work he or she has done in the past, the claimant
26 has made a *prima facie* showing of disability. At this point – step five – the burden shifts to the
27 Commissioner to show that the claimant can perform some other work that exists in ‘significant
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1 numbers' in the national economy, taking into consideration the claimant's residual functional capacity,
2 age, education, and work experience." *Id.* at 1100. The Commissioner can meet this burden by the
3 testimony of a vocational expert or by reference to the Medical-Vocational Guidelines. *Id.* at 1101. The
4 *Tackett* court described the Guidelines as follows:

5 In some cases, it is appropriate for the ALJ to rely on the Medical-Vocational Guidelines
6 to determine whether a claimant can perform some work that exists in "significant
7 numbers" in the national economy. The Medical-Vocational Guidelines are a matrix
8 system for handling claims that involve substantially uniform levels of impairment. *See*
9 20 C.F.R. pt. 404, subpt. P, app. 2.

10 The Guidelines present, in *table form*, a short-hand method for determining the
11 availability and numbers of suitable jobs for a claimant. These tables are commonly
12 known as "the grids." The grids categorize jobs by their physical-exertional
13 requirements and consists of three separate tables – one for each category: "[m]aximum
14 sustained work capacity limited to sedentary work," "[m]aximum sustained work
15 capacity limited to light work," and "[m]aximum sustained work capacity limited to
16 medium work." 20 C.F.R. pt. 404, subpt. P, app. 2, rule 200.00. Each grid presents
17 various combinations of factors relevant to a claimant's ability to find work. The factors
18 in the grids are the claimant's age, education and work experience. For each
19 combination of these factors, e.g., fifty years old, limited education, and unskilled work
20 experience, the grids direct a finding of either "disabled" or "not disabled" based on the
21 number of jobs in the national economy in that category of physical-exertional
22 requirements. *See id.*

23 *Id.* (emphasis in original).

24 *Tackett* holds that the Commissioner may use the grids only when they "completely and
25 accurately represent a claimant's limitations." *Id.* The court cautioned that "significant non-exertional
26 impairments, such as poor vision or inability to tolerate dust or gases, may make reliance on the grids
27 inappropriate. . . . However, the fact that a non-exertional limitation is alleged does not automatically
28 preclude application of the grids." *Id.* at 1102. The critical point is that the grids should only be applied
where a claimant's functional limitations – both exertional and non-exertional – "fall into a standardized
pattern accurately and completely described by the grids." *Id.* at 1103. In *Tackett*, the Ninth Circuit
held that the ALJ erred by relying solely on the grids because the claimant's need to shift, stand up, or
walk around every 30 minutes "is a significant non-exertional limitation not contemplated by the grids."
Id. at 1103-04.

Thus, contrary to plaintiff's assertions, *Tackett* does not automatically preclude use of the grids
whenever a claimant has a significant non-exertional limitation. *See Hoopai v. Astrue*, 499 F.3d 1071,

1 1076 (9th Cir. 2007) (“[A] vocational expert is required only when there are significant and ‘sufficiently
2 severe’ non-exertional limitations not accounted for in the grid.”); *Lounsbury v. Barnhart*, 468 F.3d
3 1111, 1115 n.2 (9th Cir. 2006) (“*Tackett*’s bar on exclusive reliance on the grids is limited by its
4 requirement that the nonexertional impairments invoked must be significant enough to limit further the
5 range of work permitted by exertional limitations before precluding application of the grids.”).

6 Here, plaintiff does not advance any argument regarding why, given her nonexertional
7 limitations, usage of the grids was improper. The Appeals Council adopted the ALJ’s finding that
8 plaintiff is capable of “a full range of work at all exertional levels but with the following nonexertional
9 limitations: she cannot understand, remember, or carry out detailed or complex instructions; and should
10 not work in a very demanding work setting.” AR at 21-22. There is nothing about these nonexertional
11 limitations that renders usage of the grids improper, particularly because the grids contemplate unskilled
12 work “which needs little or no judgment to do simple duties.” 20 C.F.R. § 404.1568(a); *see also Titles*
13 *II and XVI: Capability to Do Other Work – The Medical-Vocational Rules as a Framework for*
14 *Evaluating Solely Nonexertional Impairments*, SSR 85-15, Soc. Sec. Rep. Serv. 343, 1985 WL 56857,
15 at *4 (Nov. 30, 1984) (“The basic mental demands of competitive, remunerative, unskilled work include
16 the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to
17 respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes
18 in a routine work setting. . . . Where there is no exertional impairment, unskilled jobs at all levels of
19 exertion constitute the potential occupational base for persons who can meet the mental demands of
20 unskilled work.”); *see also Tackett*, 180 F.3d at 1101 n.5 (“If a claimant is found able to work the full
21 range of heavy work this is generally sufficient for a finding of not disabled.”) (internal quotations and
22 citation omitted).

23
24 **II. Plaintiff’s subjective testimony**

25 Plaintiff also contends that “the Appeals Council failed to address Ms. Conrad’s subjective
26 testimony or provide any reasons whatsoever for discrediting that testimony.” Motion at 6:21-22.
27 However, defendant correctly notes that with the exception of the ALJ’s past work finding, the Appeals
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1 Council adopted all of the ALJ's findings and conclusions, including the ALJ's detailed discussion of
2 plaintiff's subjective testimony and her credibility. AR at 9. The ALJ found plaintiff's testimony not
3 entirely credible for a number of specific reasons, including, *inter alia*, the lack of objective evidence
4 to support plaintiff's subjective complaints, large gaps in her treatment history, plaintiff's daily
5 activities, and the fact that plaintiff's symptoms appeared and increased when she failed to take
6 psychotropic medication and/or used drugs or alcohol. *Id.* at 23-26. By adopting the ALJ's findings,
7 the Appeals Council did address plaintiff's subjective testimony and her credibility, and thus plaintiff's
8 argument lacks merit.²

10 **CONCLUSION**

11 For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiff's
12 motion for summary judgment and GRANTS defendant's motion for summary judgment. (Docket Nos.
13 8 & 9).

15 **IT IS SO ORDERED.**

17 Dated: July 2, 2009

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SUSAN ILLSTON
United States District Judge

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27 ² Plaintiff does not challenge any particular aspect of the ALJ's credibility findings. In any
28 event, the Court finds that the ALJ's credibility findings are specific and supported by substantial
evidence. The ALJ explains in detail why he found plaintiff's testimony not entirely credible, including
an extensive discussion of the medical evidence. *See generally* AR at 23-26.