

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIEANN E. PETERS,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

Civil No. 12cv1322 JAH (BLM)
**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT [DOC. # 13] AND
GRANTING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT [DOC. # 15]**

INTRODUCTION

Plaintiff Julieann E. Peters (“plaintiff”), through counsel, filed this action pursuant to § 405(g) of the Social Security Act (“the Act”), as amended, 42 U.S.C. § 405(g), to obtain judicial review of a “final decision” of the Commissioner of the Social Security Administration (“defendant”) denying plaintiff’s claim for Disability Insurance Benefits and Supplemental Security Income under the Act. After a thorough review of the pleadings filed by the parties, and the entire record submitted in this matter, and for the reasons set forth below, this Court **DENIES** plaintiff’s motion for summary judgment and **GRANTS** defendant’s cross-motion for summary judgment.

//
//
//
//

1 **BACKGROUND**

2 **1. Factual Background**

3 Plaintiff was born in 1957 and has a high school diploma. AR¹ at 74. Plaintiff's
4 past relevant work experience includes work as a balancing work director/accounts
5 receivable clerk and image proof-machine operator supervisor. Id. Plaintiff alleges that
6 she has been disabled since December 10, 2002 due to overuse syndrome and abnormal
7 growths on her wrists. Id. at 75.

8 **2. Procedural Background**

9 On December 22, 2008, plaintiff filed concurrent applications for Title II disability
10 insurance benefits and Title XVI supplemental security income benefits. AR at 74.
11 Plaintiff's claim was denied initially and then again upon reconsideration. Upon plaintiff's
12 request, a review hearing was held before Eve B. Godfrey, Administrative Law Judge ("the
13 ALJ"), on June 23, 2010, in San Diego, California. Id. at 30. The ALJ denied benefits in
14 a written decision dated July 9, 2010. AR at 74-80. On April 4, 2012, the Appeals
15 Council denied plaintiff's request for review. AR at 1-3.

16 Plaintiff filed the instant complaint before this Court on June 1, 2012. Defendant
17 filed an answer and lodged the administrative record on August 28, 2012. Plaintiff filed
18 her motion for summary judgment on October 26, 2012 and defendant filed his
19 opposition and cross motion for summary judgment on November 23, 2012.

20 **DISCUSSION**

21 **1. Legal Standards**

22 **a. Qualification for Disability Benefits**

23 To qualify for disability benefits under the Social Security Act, an applicant must
24 show that: (1) he suffers from medically determinable impairment that can be expected
25 to result in death or that has lasted or can be expected to last for a continuous period of
26 not less than twelve months; and (2) the impairment renders the applicant incapable of
27 performing the work that he or she previously performed or any other substantially gainful

28

¹AR refers to the Administrative Record lodged with this Court.

1 employment that exists in the national economy. *See* 42 U.S.C. § 423(d)(1)(A), 2(A). An
2 applicant must meet both requirements to be “disabled.” *Id.*

3 The Secretary of the Social Security Administration has established a five-step
4 sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§
5 404.1520, 416.920. Step one determines whether the claimant is engaged in “substantial
6 gainful activity.” If he is, disability benefits are denied. 20 C.F.R. §§ 404.1520(b),
7 416.920(b). If he is not, the decision maker proceeds to step two, which determines
8 whether the claimant has a medically severe impairment or combination of impairments.

9 If the claimant does not have a severe impairment or combination of impairments,
10 the disability claim is denied. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the impairment
11 is severe, the evaluation proceeds to the third step, which determines whether the
12 impairment is equivalent to one of a number of listed impairments that the Secretary
13 acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R.
14 §§ 404.1520(d); 20 C.F.R. Part 404 Appendix 1 to Subpart P. If the impairment meets
15 or equals one of the listed impairments, the claimant is conclusively presumed to be
16 disabled. If a condition “falls short of the [listing] criterion” a multiple factor analysis is
17 appropriate. *Celaya v. Halter*, 332 F.3d 1177, 1181 (9th Cir. 2003). Of such analysis,
18 “the Secretary shall consider the combined effect of all the individual’s impairments
19 without regard to whether any such impairment, if considered separately, would be of such
20 severity.” *Id.* at 1182 (quoting 42 U.S.C. § 423(d)(2)(B)).

21 If the impairment is not one that is conclusively presumed to be disabling, the
22 evaluation proceeds to the fourth step, which determines whether the impairment prevents
23 the claimant from performing work he has performed in the past. If the claimant cannot
24 perform his previous work, the fifth and final step of the process determines whether he
25 is able to perform other work in the national economy considering his age, education, and
26 work experience. The claimant is entitled to disability benefits only if he is not able to
27 perform other work. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

28 The claimant has the initial burden of demonstrating a *prima facie* case of disability.

1 Varney v. Secretary of Health & Human Services, 846 F.2d 581, 583 (9th Cir. 1988).
2 The claimant does this by showing that he cannot perform any previous relevant work.
3 Miller v. Heckler, 770 F.2d 845, 850 (9th Cir. 1985). Once the *prima facie* case of
4 disability has been established, the burden shifts to the Secretary to establish the claimant
5 can perform other work. Id. The Secretary can satisfy this burden by either soliciting
6 testimony of a vocational expert (“VE”) or by reference to the Medical Vocational
7 Guidelines. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001).

8 **b. Judicial Review of an ALJ’s Decision**

9 Section 405(g) of the Act allows unsuccessful applicants to seek judicial review of
10 a final agency decision of the Commissioner. 42 U.S.C. § 405(g). The scope of judicial
11 review is limited. The Commissioner’s denial of benefits “will be disturbed only if it is not
12 supported by substantial evidence or is based on legal error.” Brawner v. Secretary of
13 Health and Human Servs., 839 F.2d 432, 433 (9th Cir. 1988) (citing Green v. Heckler,
14 803 F.2d 528, 529 (9th Cir. 1986)).

15 Substantial evidence means “more than a mere scintilla” but less than a
16 preponderance. Sandgathe v. Charter, 108 F.3d 978, 980 (9th Cir. 1997)(citation
17 omitted). “[I]t is such relevant evidence as a reasonable mind might accept as adequate
18 to support a conclusion.” Id. (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
19 1995)). The Court must consider the record as a whole, weighing both the evidence that
20 supports and detracts from the Commissioner’s conclusions. Desrosiers v. Secretary of
21 Health & Human Servs., 846 F.2d 573, 576 (9th Cir. 1988)(citing Jones v. Heckler, 760
22 F.2d 993, 995 (9th Cir. 1985)). If the evidence supports more than one rational
23 interpretation, the Court must uphold the ALJ’s decision. Allen v. Heckler, 749 F.2d 577,
24 579 (9th Cir. 1984) (citing Allen v. Secretary of Health and Human Servs., 726 F.2d
25 1470, 1473 (9th Cir. 1984)). When the evidence is inconclusive, “questions of credibility
26 and resolution of conflicts in the testimony are functions solely of the Secretary.” Sample
27 v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).

28 However, even if the reviewing court finds that substantial evidence supports the

1 ALJ's conclusions, the Court must set aside the decision if the ALJ failed to apply the
2 proper legal standards in weighing the evidence and reaching a decision. *See Benitez v.*
3 *Califano*, 573 F.2d 653, 655 (9th Cir. 1978). Section 405(g) permits a court to enter a
4 judgment affirming, modifying, or reversing the Commissioner's decision. 42 U.S.C.
5 § 405(g). The reviewing court may also remand the matter to the Social Security
6 Administrator for further proceedings. *Id.* "If additional proceedings can remedy defects
7 in the original administrative proceeding, a social security case should be remanded."
8 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990) (quoting *Lewin v. Schweiker*, 654
9 F.2d 631, 635 (9th Cir. 1981)).

10 2. The ALJ's Decision

11 In the present case, the ALJ, using the five-step analysis, first found that plaintiff
12 was not engaged in substantial gainful activity during the relevant time period. AR at 79.
13 The ALJ then found plaintiff had the following severe impairments during the relevant
14 period: status-post carpal tunnel release (bilateral); status-post left shoulder impingement
15 surgery; and right shoulder bursitis/tendonitis, which the ALJ determined were severe
16 impairments under 20 C.F.R. §§ 404.1520(c) and 416.920(c). *Id.* However, the ALJ also
17 found plaintiff's impairments did not meet or medically equal those listed in 20 C.F.R.
18 Part 404, Subpart P, Appendix 1. *Id.*

19 The ALJ further found plaintiff:

20 has the residual functional capacity to perform light work as defined in 20
21 CFR 404.1567(b) and 416.967(b) except for any pushing and pulling using
22 her upper extremities of less than ten pounds frequently and no more than
23 10 pounds occasionally; no overhead usage of her arms; no more than
24 occasional usage of her hands for grasping or fine manipulations or skin
receptors; no climbing ladders, ropes or scaffolds, work in cold temperatures
or which would expose her to vibration; is precluded from work around
unprotected heights and moving machinery; nor more than frequent
climbing ramps and stairs and frequent balancing, stooping, and kneeling.

25 AR at 79. The ALJ determined plaintiff was unable to perform any of her past work but,
26 due to plaintiff's residual functional capacity for light level work, found there are jobs
27 existing in the national economy that plaintiff can perform. *Id.* Based on these findings,
28 the ALJ concluded that, "[c]onsidering the claimant's age, education, work experience, and

1 residual functional capacity, there are jobs that exist in significant numbers in the national
2 economy that the claimant can perform.” AR at 79. As a result, the ALJ found plaintiff
3 had not been under a “disability” from December 10, 2002 through the date of the
4 decision. Id. at 80.

5 **3. Analysis**

6 Plaintiff moves for summary judgment on the grounds that (a) the ALJ erred in
7 accepting the testimony of the VE because the VE’s testimony was based on an inaccurate
8 residual functional capacity; (b) the ALJ erred in finding plaintiff’s subjective symptom
9 complaints not credible; and (c) plaintiff was denied her right to counsel.

10 **a. Vocational Expert Testimony**

11 Plaintiff first contends the ALJ erred in accepting the testimony of the VE because
12 the VE testified plaintiff could perform alternative jobs that required overhead usage of
13 plaintiff’s arms even though the ALJ’s residual functional capacity, propounded in the
14 hypothetical posed to the VE at the review hearing, required no overhead usage. Doc. #
15 13-1 at 3-4. Plaintiff points out the ALJ specifically included a preclusion from reaching
16 or extending her arms overhead but the jobs the VE identified, furniture rental clerk,
17 recreational aide, and investigator, each require both upper extremities to reach in all
18 directions. Id. at 4 (citing DOT² ## 295.357-018, 344.677-014, 241.367-038). Because
19 the ALJ accepted the VE’s testimony which plaintiff claims clearly conflicts with the DOT,
20 plaintiff contends that reversal is mandated. Id. at 6 (citing Massachi v. Astrue, 486 F.3d
21 1149, 1154 (9th Cir. 2007)).

22 In opposition, defendant contends the ALJ’s decision as well as the opinion of the
23 VE are consistent with the DOT. Doc. # 15-1 at 2. Defendant explains that the ALJ
24 found plaintiff was restricted from overhead reaching but not restricted from reaching at
25 or below shoulder level. Id. (citing AR at 59-61, 79). Defendant points out the ALJ asked
26 the VE whether a person with plaintiff’s residual functional capacity, age, education and
27 work history could perform other work, to which the VE testified plaintiff could perform

28 ² “DOT” stands for the *Dictionary of Occupational Titles*.

1 certain jobs requiring occasional reaching. Id. (citing AR at 59-61). Based on this
2 testimony, defendant contends the ALJ properly found plaintiff could perform light jobs
3 requiring occasional reaching which defendant argues is consistent with the DOT. Id. at 3
4 (citing Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)(upholding the ALJ’s finding
5 that plaintiff could perform light work even though restricted from overhead reaching);
6 Gallo v. Commissioner of SSA, 449 Fed. Appx. 648, 649-50 (9th Cir. 2011)(“We find no
7 prejudicial error in the ALJ’s failure to impose an [occasional] overhead reaching limitation
8 that ... would not even have prevented her from doing work more strenuous than the
9 sedentary work contemplated in the RFC.”); Kassebaum v. Commissioner of Soc. Sec., 420
10 Fed Appx. 769, 771 (9th Cir. 2011)(upholding the ALJ’s decision that plaintiff could
11 perform work as a kitchen helper or laundry worker even though restricted to occasional
12 overhead reaching)).

13 This Court agrees with defendant. Although plaintiff characterizes the VE’s
14 testimony as conflicting with the DOT, this Court finds the VE’s testimony does not
15 conflict. Plaintiff does not dispute she is only restricted from overhead reaching and, thus,
16 may occasionally reach below the shoulder level. Therefore, because the three identified
17 jobs require only occasional reaching, the VE’s testimony does not conflict with the DOT.
18 See Burch, 400 F.3d at 679; Gallo, 449 Fed. Appx. at 649-50; Kassebaum, 420 Fed. Appx.
19 at 771. Accordingly, this Court finds the ALJ did not err.

20 **b. Plaintiff’s Subjective Symptom Testimony**

21 Plaintiff next contends the ALJ erred in rejecting her subjective symptom testimony
22 without providing legally sufficient reasoning to support the rejection. Doc. # 13-1
23 at 11-22. When evaluating a plaintiff’s claim of subjective symptom testimony, the ALJ
24 must engage in a two step analysis: the Cotton test³ and an analysis of plaintiff’s
25 credibility. Smolen v. Chater, 80 F.3d 1273, 1281-82 (9th Cir. 1996). The Cotton test
26 requires the ALJ to determine whether plaintiff has produced objective medical evidence
27

28 ³ The court in Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986), set out a threshold test for
evaluating symptom testimony.

1 of an underlying impairment and whether the symptoms alleged could reasonably be
2 produced by the impairment. Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991). If
3 plaintiff meets the Cotton test, and there is no evidence of malingering, the ALJ must offer
4 specific, clear and convincing reasons to reject plaintiff's symptom testimony. *See* Dodrill
5 v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

6 To meet the standard, the ALJ must specify which testimony is not credible and
7 "what evidence suggests the complaints are not credible." Id. The ALJ "must evaluate the
8 intensity, persistence, and limiting effects of the individual's symptoms to determine the
9 extent to which the symptoms limit the individual's ability to do basic work activities."
10 Social Security Ruling, No. 96-7p, 1996 WL 374186 *2 (SSA July 2, 1996). When the
11 individual's statements in that regard are not substantiated by objective medical evidence,
12 "the adjudicator must make a finding on the credibility of the individual's statements
13 based on a consideration of the entire case record," including but not limited to "the
14 medical signs and laboratory findings, the individual's own statements about the
15 symptoms, any statements and other information provided by treating or examining
16 physicians. . . about the symptoms and how they affect the individual, as well as any other
17 "relevant evidence in the case file." Id.

18 In addition to medical evidence, the adjudicator "must consider" the kinds of
19 evidence identified in 20 C.F.R. §§ 404.1529(c) and 426.929(c), including factors such
20 as the claimant's daily activities, factors that precipitate or aggravate the symptoms,
21 medications taken to relieve pain, treatment other than medication, and "[a]ny other
22 factors concerning the individual's functional limitations and restrictions due to pain or
23 other symptoms." Id.

24 The ALJ presented six reasons for finding plaintiff's subjective symptom testimony
25 not credible: (1) no physician has opined plaintiff is disabled; (2) plaintiff reported she
26 has no problems dressing, bathing or personal hygiene; (3) plaintiff settled her workers
27 compensation claim, which conflicts with her complaints of ongoing hand pain; (4)
28 plaintiff testified she is able to drive an automobile and does so for herself and her parents

1 despite her hand and shoulder problems; (5) plaintiff has not undergone surgery since
2 November 2004 and no surgery has been recommended to date; and (6) there is no
3 evidence of psychiatric hospitalization or emergency room treatment for mental
4 impairment. AR at 77-78. Plaintiff contends each of these six reasons fail to sufficiently
5 support the ALJ's rejection of her subjective symptom testimony. Doc. # 13-1 at 11-22.

6 In opposition, defendant points out that, even if one or more of the ALJ's reasons
7 are "invalid, the question is whether the ALJ's decision remains legally valid, despite such
8 error, based on the ALJ's 'remaining reasoning and ultimate credibility determination.'" Doc. # 15-1 at 5 (quoting Carmickle v. Comm'r Soc. Sec. Adm., 533 F.3d 1155, 1162
9 (9th Cir. 2008)). Defendant explains that, here, the ALJ found plaintiff's subjective
10 symptom testimony inconsistent with her own statements concerning her daily living
11 activities. Id. For example, defendant points to plaintiff's testimony concerning her
12 inability to grab, grasp, or hold with her hands such that peeling open a milk carton caused
13 shocks of pain and her claim that she could not do anything at all on a daily basis, thus
14 lying in bed all day. Id. (citing AR at 43, 45, 215). Defendant contends the ALJ properly
15 found these statements inconsistent with plaintiff's admission that she drives her parents
16 around and shops for them, as well as her admission to a doctor that she was able to go
17 out on her own and had no difficulty dressing, bathing or hygiene. Id. (citing AR at 46,
18 76, 215, 480).

19
20 Defendant further explains the ALJ noted there was a lack of objective evidence
21 supporting plaintiff's claimed disabling impairments, including the fact that no treating
22 or examining physician opined plaintiff was disabled. Id. (citing AR at 77-78). Defendant
23 contends the ALJ's reasoning concerning the lack of opinion by treating or examining
24 physicians is a proper reason for rejection because the ALJ may properly consider it as one
25 factor in the credibility analysis. Id. at 6 (citing 20 C.F.R. § 404.1529(c)(1),(2); Burch,
26 400 F.3d at 681). In addition, defendant contends the ALJ appropriately considered, in
27 rejecting plaintiff's testimony, the lack of psychiatric hospitalization or emergency room
28 treatment, as well as the fact that no doctor had recommended further surgery for plaintiff.

1 Id. (citing Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999)(minimal or conservative
2 treatment found to be a proper basis for rejecting subjective symptom testimony); Burch,
3 400 F.3d at 681 (lack of consistent treatment considered “powerful evidence” supporting
4 lack of credibility)). Thus, according to defendant, these reasons cited by the ALJ are
5 specific, clear and convincing reasons supporting the rejection of plaintiff’s subjective
6 symptom testimony. Id.

7 Defendant also argues that plaintiff incorrectly claims the ALJ wrongly found
8 plaintiff did not receive surgery between November 2004 through the date of the decision
9 based on a May 2011 record indicating she underwent exploratory surgery on her left
10 wrist, noting the May 2011 record was submitted to the Appeals Council over 10 months
11 after the ALJ issued the decision. Id. (citing Doc. # 13-1 at 19; AR at 587). Defendant
12 contends the May 2011 record should not be considered here because the evidence does
13 not relate to the relevant period at issue in this case and because the surgery was not a
14 major procedure relating to any work limiting impairment. Id. at 7 (noting the procedure’s
15 purpose was to remove an uncomfortable growth and explore the area). Thus, defendant
16 contends the new evidence does nothing to change the reasonableness of the ALJ’s
17 decision.

18 This Court finds the ALJ presented specific, clear and convincing reasons for
19 rejecting plaintiff’s subjective symptom testimony. This Court agrees with defendant that
20 the ALJ’s reasoning concerning the lack of objective evidence supporting a disability
21 finding is properly considered as one factor in determining whether to reject a plaintiff’s
22 testimony. This Court, upon a careful review of the record, further agrees with defendant
23 that plaintiff’s testimony concerning her daily activities conflicted with plaintiff’s own
24 statements. In addition, this Court finds the ALJ’s reasoning regarding the lack of
25 psychiatric treatment, emergency room treatment or further surgery is a specific, clear and
26 convincing reason for rejecting plaintiff’s testimony. This Court further finds the new
27 evidence plaintiff seeks to be considered is not relevant here. Therefore, this Court finds
28 the ALJ did not err in rejecting plaintiff’s testimony.

