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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Michael Sean Brozovic,
Plaintiff,
v.
Nancy A. Berryhill,
Defendant.

Case No.: 16-cv-1316-BEN-AGS

**REPORT AND RECOMMENDATION
ON SUMMARY JUDGMENT
MOTIONS**

Administrative law judges have the unenviable task of deciding if applicants for Social Security disability benefits are exaggerating their symptoms. The ALJ found so here, and plaintiff challenges that conclusion.

BACKGROUND

Plaintiff Michael Sean Brozovic believes he cannot be gainfully employed because he has an implanted pacemaker and mechanical heart valve and suffers from depression, panic disorder, insomnia, and a past aortic aneurysm and aortic arch dissection. At their worst, he asserts, his chronic pain and fatigue symptoms reduce him to simply lying in bed or walking only short distances before needing a prolonged break. After the 2014 hearing on his disability benefits application, the ALJ concluded that Brozovic’s heart-related conditions were serious, but were not disabling during the insured period, which ended

1 March 31, 2010. In this appeal, Brozovic challenges only the ALJ’s finding that his
2 symptom testimony was not credible.

3 DISCUSSION

4 A. Subjective Testimony on Severity of Symptoms

5 In evaluating the credibility of subjective pain testimony, “the ALJ must determine
6 whether the claimant has presented objective medical evidence of an underlying
7 impairment which could reasonably be expected to produce the pain or other symptoms
8 alleged.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citation omitted). If so,
9 and absent evidence of malingering, “the ALJ can only reject the claimant’s testimony
10 about the severity of the symptoms if she gives ‘specific, clear and convincing reasons’ for
11 the rejection.” *Id.* (citations omitted). “General findings are insufficient; rather, the ALJ
12 must identify what testimony is not credible and what evidence undermines the claimant’s
13 complaints.” *Id.* (citation omitted). These adverse credibility findings must be “sufficiently
14 specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s
15 testimony.” *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 n.3 (9th Cir. 2010)
16 (citation omitted). In weighing a claimant’s testimony, the ALJ may consider all the typical
17 credibility factors, such as prior inconsistent statements, falsehoods, and discrepancies
18 between the claimant’s statements and conduct. *Ghanim*, 763 F.3d at 1163; *Light v. Soc.*
19 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

20 The ALJ gave six reasons for rejecting Brozovic’s symptom testimony, which are
21 each addressed below.

22 1. Objective Medical Evidence

23 The ALJ found that “[o]bjective medical evidence does not support the claimant’s
24 [symptom] allegations prior to the expiration of his date last insured.” (AR 26.) Brozovic
25 does not dispute this point, except to note that his testimony cannot be rejected on this
26 ground alone. While true, the ALJ did not err in mentioning it as one of several reasons.
27 *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (holding that “medical
28 evidence is still a relevant factor in determining the severity of the claimant’s pain and its

1 disabling effects,” though it cannot be “the sole ground” for rejecting “subjective pain
2 testimony” (citation omitted)).

3 2. Poor Work History

4 Brozovic also does not contest the ALJ’s finding that he “had a very poor work
5 record long before he allegedly became unable to work,” with little or no earnings in eight
6 of the twelve years preceding his claimed disability. (AR 27, 149-50.) A spotty work
7 history may undermine an applicant’s claim of being too disabled to work. *See Thomas v.*
8 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (rejecting symptom testimony based on the
9 claimant’s “extremely poor work history” and ALJ’s finding that the claimant had “shown
10 little propensity to work in her lifetime”).

11 3. Unemployment for Reasons Other Than Disability

12 Similarly, Brozovic does not challenge the ALJ’s rationale that “the claimant
13 stopped working for reasons not related to the allegedly disabling impairments.” (AR 27.)
14 The ALJ noted that during a 2010 evaluation, Brozovic said that he “stopped working in
15 October 2008, well before his alleged onset date, because there was not enough work
16 available.” (AR 27, 438.) This alternative explanation for Brozovic’s unemployment is a
17 valid basis to discount his symptom testimony. *See Bruton v. Massanari*, 268 F.3d 824,
18 828 (9th Cir. 2001) (holding that ALJ properly “disregard[ed] pain testimony” based in
19 part on the claimant’s admission that “he left his job because he was laid off, rather than
20 because he was injured”).

21 4. Daily Activities

22 Another factor undercutting Brozovic’s “complaints of disabling symptoms and
23 limitations” was that his “daily activities . . . are not limited to the extent one would
24 expect[.]” (AR 27.) In 2010, Brozovic “swam in the ocean, surfed, rode his bike, performed
25 household chores and grocery shopped,” according to contemporaneous medical records
26 and reports. (AR 27, 179, 482.) Of course, a claimant “need not vegetate in a dark room”
27 to be eligible for benefits, but these sorts of everyday activities “may be grounds for
28 discrediting the claimant’s testimony to the extent that they contradict claims of a totally

1 debilitating impairment” and indicate “capacities that are transferable to a work setting.”
2 *Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9th Cir. 2012) (citations omitted).

3 Yet Brozovic argues that he was severely hampered in performing these daily
4 activities, so this rationale is a dull sword to wield against his credibility. While it may be
5 possible to square Brozovic’s reported surfing and ocean-swimming with his symptom
6 testimony—testimony such as not being able to walk more than a few blocks without
7 resting (AR 45)—the ALJ could reasonably conclude that these activities undermined
8 Brozovic’s claims. *See Molina*, 674 F.3d at 1111 (“Even when the evidence is susceptible
9 to more than one rational interpretation, we must uphold the ALJ’s findings if they are
10 supported by inferences reasonably drawn from the record.” (citation omitted)).

11 5. Failure to Seek Mental Health Treatment

12 The ALJ also found that Brozovic “has not generally received the type of mental
13 health treatment one would expect for a totally disabled individual,” with no record of
14 psychiatric medications and no psychological or psychiatric visits. (AR 27.) “[A]n
15 unexplained, or inadequately explained, failure to seek treatment . . . can cast doubt on the
16 sincerity of [a] claimant’s pain testimony.” *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166
17 F.3d 1294, 1297 (9th Cir. 1999) (citation omitted).

18 Brozovic responds that he failed to seek such treatment because he “does not have
19 the best medical insurance,” a fact he claims the ALJ “correctly state[d]” in his decision
20 but “ignored” in his credibility analysis. (ECF No. 16-1, at 9.) This is a puzzling criticism,
21 because the ALJ’s opinion never mentions medical insurance at all. It is true that an ALJ
22 cannot reject “a claimant’s complaints for lack of treatment when the record establishes
23 that the claimant could not afford it.” *Regennitter*, 166 F.3d at 1297 (citation omitted); *see*
24 *also Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) (same). But the record here shows
25 that Brozovic saw physicians on a nearly monthly basis from the time of his heart surgery
26 to the date last insured, and on a less frequent but regular basis thereafter. Yet there is no
27 evidence that Brozovic ever raised his mental health impairments at any of these
28 appointments. An ALJ may draw a negative inference when, as here, the claimant was

1 medically treated during the alleged period of poverty, but failed to mention the problem.
2 *See Orn*, 495 F.3d at 638 (noting that “an adverse credibility determination” is appropriate
3 if “during the time [the claimant] alleged she was unable to afford treatment she had
4 received other medical care and had failed to mention her back pain” (citation omitted)).
5 Thus, the ALJ did not err by relying on the lack of mental health treatment.

6 6. Conservative Treatment

7 Finally, the ALJ found that Brozovic’s treatment course was merely “routine and/or
8 conservative in nature,” with “infrequent” cardiac follow-ups. (AR 27.) “[E]vidence of
9 conservative treatment is sufficient to discount a claimant’s testimony regarding severity
10 of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) (citation omitted).
11 But the problem with the conservative-treatment rationale, as Brozovic correctly points
12 out, is that the ALJ never suggested what more aggressive treatment options might be
13 pursued. *See Lapeirre-Gutt v. Astrue*, No. 09-15642, 2010 WL 2317918, at *1 (9th Cir.
14 June 9, 2010) (“A claimant cannot be discredited for failing to pursue non-conservative
15 treatment options where none exist.”). Indeed, it is not clear why the ALJ labeled
16 Brozovic’s treatment “conservative” in the face of the many powerful medications he was
17 prescribed following his surgery. *See id.* (criticizing an ALJ’s finding of “conservative
18 treatment” considering the claimant’s “regimen of powerful pain medications and
19 injections”). Without more, this basis is not a convincing reason to reject Brozovic’s
20 symptom testimony.

21 **B. Harmless Error Analysis**

22 Because the ALJ relied on one invalid reason—and five valid ones—for disbelieving
23 the severity of Brozovic’s symptoms, this Court must review for harmless error. “So long
24 as there remains substantial evidence supporting the ALJ’s conclusions on credibility and
25 the error does not negate the validity of the ALJ’s ultimate credibility conclusion, such is
26 deemed harmless and does not warrant reversal.” *Carmickle v. Comm’r, Soc. Sec. Admin.*,
27 533 F.3d 1155, 1162 (9th Cir. 2008) (alterations and citations omitted). The five remaining
28 reasons here are specific, clear, convincing, and supported by substantial evidence in the

1 record—indeed, three of them are undisputed. They amply support the ALJ’s credibility
2 finding by themselves, so the erroneous conservative-treatment rationale was harmless. *See*
3 *id.* at 1162-63 (holding two invalid reasons for an adverse credibility finding were harmless
4 error in light of the remaining reasoning); *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
5 1219, 1227 (9th Cir. 2009) (holding that one erroneous reason “amounts to harmless error,”
6 when the ALJ “presented four other independent bases for discounting [the claimant’s]
7 testimony”).

8 CONCLUSION

9 The Court recommends that Brozovic’s summary judgment motion (ECF No. 16) be
10 **DENIED** and the Commissioner’s cross-motion for summary judgment (ECF No. 17) be
11 **GRANTED**. The parties must file any objections to this report by August 9, 2017. *See* Fed.
12 R. Civ. P. 72(b)(2). A party may respond to any objection within 14 days of being served
13 with it. *Id.*

14 Dated: July 26, 2017

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17 Hon. Andrew G. Schopler
18 United States Magistrate Judge
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