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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JANICE BARBARA HAMILTON,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No.: 16-cv-01823-W-MDD

**REPORT AND
RECOMMENDATION ON
CROSS MOTIONS FOR
SUMMARY JUDGMENT**

[ECF NOS. 14, 15]

Plaintiff Janice Barbara Hamilton (“Plaintiff”) filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying Plaintiff’s application for a period of disability and disability insurance benefits under Title II of the Social Security Act. Plaintiff moves the Court for summary judgment reversing the Commissioner and ordering an award of benefits, or in the alternative, to remand the case for further administrative proceedings. (ECF No. 14). Defendant has moved for summary judgment affirming the denial of benefits. (ECF No. 15).

For the reasons expressed herein, the Court recommends that Plaintiff’s

1 motion be **DENIED** and Defendant’s motion be **GRANTED**.

2 I. BACKGROUND

3 A. Factual Background

4 Plaintiff alleges that she became disabled on July 1, 2013 due to back
5 and knee pain. (A.R. 74, 24-25).¹ Plaintiff’s date of birth, December 6, 1965,
6 categorize her as a younger individual at the time of filing. She has since
7 changed her age category to that of an individual closely approaching
8 advanced age. 20 C.F.R. §§ 404.1563, 416.963; (A.R. 42).

9 B. Procedural History

10 On February 10, 2014, Plaintiff filed an application for disability
11 insurance benefits under Title II of the Social Security Act (“Act”). (A.R. 21).
12 Plaintiff’s claim was denied initially on March 14, 2014, and denied upon
13 reconsideration on June 28, 2014. (A.R. 21). A hearing was held on October
14 7, 2015, before Administrative Law Judge (“ALJ”) Donald P. Cole. (A.R. 36-
15 72). Plaintiff appeared and was represented by counsel. (A.R. 36). Plaintiff
16 and Vocational Expert (“VE”) Erin Welsh testified at the hearing. (A.R. 62-
17 70).

18 On November 25, 2015, the ALJ issued a written decision finding
19 Plaintiff not disabled. (A.R. 21-31). Plaintiff appealed and submitted
20 additional information to the Appeals Council. (A.R. 1, 6). After considering
21 the additional information, the Appeals Council denied Plaintiff’s request to
22 review the ALJ’s decision. (A.R. 1-3). Consequently, the ALJ’s decision
23 became the final decision of the Commissioner. (A.R. 1).

24 On July 15, 2016, Plaintiff filed a Complaint with this Court seeking
25

26 ¹ “A.R.” refers to the Administrative Record filed on August 4, 2016 and is
27 located at ECF No. 12.

1 judicial review of the Commissioner’s decision. (ECF No. 1). On October 27,
2 2016, Defendant answered and lodged the administrative record with the
3 Court. (ECF Nos. 11, 12). On December 2, 2016, Plaintiff moved for
4 summary judgment. (ECF No. 14). On January 6, 2017, the Commissioner
5 cross-moved for summary judgment and responded in opposition to Plaintiff’s
6 motion. (ECF Nos. 15, 16). On January 25, 2017, Plaintiff responded in
7 opposition to the Commissioner’s motion. (ECF No. 17).

8 II. DISCUSSION

9 A. Legal Standard

10 The supplemental security income program provides benefits to
11 disabled persons without substantial resources and little income. 42 U.S.C. §
12 1382. To qualify, a claimant must establish an inability to engage in
13 “substantial gainful activity” because of a “medically determinable physical
14 or mental impairment” that “has lasted or can be expected to last for a
15 continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(A).
16 The disabling impairment must be so severe that, considering age, education
17 and work experience, the claimant cannot engage in any kind of substantial
18 gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

19 The Commissioner makes this assessment through a process of up to
20 five steps. First, the claimant must not be engaged in substantial, gainful
21 activity. 20 C.F.R. § 416.920(b). Second, the claimant must have a “severe”
22 impairment. 20 C.F.R. § 416.920(c). Third, the medical evidence of the
23 claimant’s impairment is compared to a list of impairments that are
24 presumed severe enough to preclude work. 20 C.F.R. § 416.920(d). If the
25 claimant’s impairment meets or is equivalent to the requirements for one of
26 the listed impairments, benefits are awarded. *Id.* If the claimant’s
27 impairment does not meet or is not equivalent to the requirements of a listed

1 impairment, the analysis continues to a fourth and possibly fifth step and
2 considers the claimant's residual functional capacity. 20 C.F.R. § 416.920(e).
3 At the fourth step, the claimant's relevant work history is considered along
4 with the claimant's residual functional capacity. *Id.* If the claimant can
5 perform the claimant's past relevant work, benefits are denied. 20 C.F.R. §
6 416.920(f). At the fifth step, if the claimant is found not able to perform the
7 claimant's past relevant work, the issue is whether claimant can perform any
8 other work that exists in the national economy, considering the claimant's
9 age, education, work experience and residual functional capacity. 20 C.F.R.
10 § 416.920(g). If the claimant cannot do other work that exists in the national
11 economy, benefits are awarded. *Id.*

12 Sections 405(g) and 1383(c)(3) of the Social Security Act allow
13 unsuccessful applicants to seek judicial review of a final agency decision of
14 the Commissioner. 42 U.S.C. § 405(g), 42 U.S.C. § 1383(c)(3). The scope of
15 judicial review is limited, and the Commissioner's denial of benefits "will be
16 disturbed only if it is not supported by substantial evidence or is based on
17 legal error." *Browner v. Secretary of Health & Human Services*, 839 F.2d
18 432, 433 (9th Cir. 1988) (quoting *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir.
19 1986)).

20 Substantial evidence means "more than a mere scintilla" but less than a
21 preponderance. *Sandqathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). "[I]t
22 is such relevant evidence as a reasonable mind might accept as adequate to
23 support a conclusion." *Id.* (quoting *Andrews v. Shalala* 53 F.3d 1035, 1039
24 (9th Cir. 1995)). The court must consider the record as a whole, weighing
25 both the evidence that supports and detracts from the Commissioner's
26 conclusions. *Desrosiers v. Secretary of Health & Human Services*, 846 F.2d
27 573, 576 (9th Cir. 1988). If the evidence supports more than one rational

1 interpretation, the court must uphold the ALJ's decision. *Allen v. Heckler*,
2 749 F.2d 577, 579 (9th Cir. 1984). When the evidence is inconclusive,
3 "questions of credibility and resolution of conflicts in the testimony are
4 functions solely of the Secretary." *Sample v. Schweiker*, 694 F.2d 639, 642
5 (9th Cir. 1982).

6 The ALJ has a special duty in social security cases to fully and fairly
7 develop the record in order to make an informed decision on a claimant's
8 entitlement to disability benefits. *DeLorme v. Sullivan*, 924 F.2d 841, 849
9 (9th Cir. 1991). Because disability hearings are not adversarial in nature,
10 the ALJ must "inform himself about the facts relevant to his decision," even if
11 the claimant is represented by counsel. *Id.* (quoting *Heckler v. Campbell*, 461
12 U.S. 458, 471 n.1 (1983)).

13 Even if a reviewing court finds that substantial evidence supports the
14 ALJ's conclusions, the court must set aside the decision if the ALJ failed to
15 apply the proper legal standards in weighing the evidence and reaching his or
16 her decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978). Section
17 405(g) permits a court to enter a judgment affirming, modifying or reversing
18 the Commissioner's decision. 42 U.S.C. § 405(g). The reviewing court may
19 also remand the matter to the Social Security Administration for further
20 proceedings. *Id.*

21 B. The ALJ's Decision

22 The ALJ concluded Plaintiff was not disabled, as defined in the Social
23 Security Act, from July 1, 2013, through the date of the ALJ's decision,
24 November 25, 2015. (A.R. 21).

25 The ALJ found that Plaintiff has the following severe impairments:
26 degenerative disc disease and knee sprain/strain. (A.R. 23). The ALJ
27 determined that Plaintiff did not have an impairment or combination thereof

1 that meets or is medically equivalent to the severity of one of the listed
2 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
3 404.1520(d), 404.1525 and 404.1526) because no physician has opined that
4 the severity of Plaintiff's conditions equate to any listed impairment, and no
5 medical evidence in the record supports a finding thereof. (*Id.*).

6 The ALJ also found that Plaintiff has the residual functional capacity ("RFC")
7 to "perform light work as defined in 20 CFR [§] 404.1567(b) except frequently
8 balancing and crouching; occasionally climbing stairs and ramps, but no
9 climbing ladders, ropes, or scaffolds; occasionally stooping, kneeling, and
10 crawling; avoiding concentrated exposure to extreme cold, vibrations, and
11 hazards such as moving machinery and unprotected heights." (A.R. 23-24).
12 In making this finding, the ALJ noted that Plaintiff's statements regarding
13 the intensity, persistence and limiting effects of her symptoms "are not fully
14 credible" because Plaintiff's daily activities and objective medical evidence
15 did not support her alleged symptoms. (A.R. 26). Based on VE Welsh's
16 testimony, the ALJ found that Plaintiff is capable of performing past relevant
17 work as a dental assistant and office manager because her RFC permits her
18 to perform these jobs as they are actually and generally performed. (A.R. 30).
19 The ALJ specifically noted the following to be of particular relevance:

20 1. Plaintiff's Testimony

21 The ALJ noted that Plaintiff alleged back problems including disc
22 degeneration requiring disc removal, spinal fusions, metal cages, rods, screws
23 and hardware implementation, a torn disc in February 2014, repeated disc
24 tearing, L2 and L3 retrolisthesis and broad-based posterior endplate
25 osteophyte L2 and L3 3 mm causing pressure of the thecal sac, as well as
26 knee problems requiring surgical intervention. (A.R. 24). She claimed that
27 her impairments cause pain and limit her ability to perform exertional,

1 non-exertional, postural, environmental, daily and personal care activities.
2 (*Id.*). Plaintiff further claimed that she experienced ten days of paralysis
3 after her February 2014 disc tear and similar paralysis after subsequent disc
4 tears. (*Id.*). She stated that she is able to sit in a car for half an hour and
5 alleged that her impairments made it difficult to care for herself, work, sleep,
6 put shoes on and go outdoors with family and friends. (*Id.*). Plaintiff also
7 alleged that she was prescribed Flexeril, Prevacid, Xanax, Lansoprazole,
8 Alprazolam, allergy eye drops, probiotics, Salonpas and Vicoprofen. (*Id.*).
9 Plaintiff maintained the only medication that helps with her pain is “ice
10 every two hours, followed with using a tens unit.” (*Id.*). The ALJ specifically
11 noted that Plaintiff claimed that her medications caused sleepiness and
12 inability to function, but admitted that the lowest dose of Vicoprofen works.
13 (A.R. 24). Plaintiff also alleged that she wore a back brace when experiencing
14 unbearable pain and that cold/damp weather exacerbates her pain. (A.R. 25).

15 The ALJ specified that in Plaintiff’s March 6, 2014 questionnaire, she
16 admitted that she can perform activities for two to three hours after taking a
17 pain pill, and would be “good” for another two to three hours after laying
18 down for an hour. (A.R. 24-25). Plaintiff alleged disc tears happen often, and
19 they keep her in bed for three to four days. (A.R. 25). The ALJ mentioned
20 that Plaintiff attempted to walk daily, perform errands and keeps house in
21 two to three hour intervals. (*Id.*). Plaintiff acknowledged that she lived in a
22 two-story home, and that as long as she has no torn discs and paralysis, she
23 can climb twelve stairs, lift five pounds and carry two pounds. (*Id.*). She
24 further admitted she was capable of grocery shopping once a week, house
25 cleaning in small areas each day, driving and gardening once a week for
26 enjoyment. (*Id.*). Plaintiff also performed yard work, which involved using a
27 blower and cleaning windows every few months. (*Id.*). The ALJ found

1 Plaintiff's alleged impairments inconsistent with her daily activity and social
2 interaction. (*Id.*).

3 The ALJ additionally mentioned Plaintiff's March 1, 2015 letter and
4 found the assertions therein not fully credible. (A.R. 25). The ALJ noted that
5 in her letter, Plaintiff alleged that she was unable to stand or sit for more
6 than an hour, the pain kept her from sleeping through the night and bilateral
7 leg nerve pain would numb her leg and render her unable to walk for days.
8 (*Id.*). Plaintiff also asserted that a surgical solution is required because
9 another disc was collapsing and some of her implanted metal was separating
10 from bone. (*Id.*). The ALJ noted that Plaintiff's allegations were inconsistent
11 with the diagnostic imaging provided, and treatment notes did not support
12 the need for surgical intervention. (*Id.*).

13 In addition, the ALJ described that during the hearing, Plaintiff
14 testified about her surgery in 2009 or 2010, which "did more harm than
15 good". (A.R. 25). The ALJ noted that this surgery occurred prior to Plaintiff's
16 alleged onset of disability. (*Id.*). Plaintiff also testified that she took pain
17 pills every two to three hours and that her pain medications were not
18 working. (*Id.*). She also admitted to delaying additional back surgery and
19 refusing a prescription for morphine because she fears that she will "lose
20 [her] soul." (*Id.*). Plaintiff further expressed that she feared repeated disc
21 tears, which allegedly cause electric shock, collapsing, paralysis and loss of
22 bowel function. (A.R. 25, 26). She stated that disc tear recovery required
23 three to seven days of lying on her back with ice or heat. (A.R. 26). Plaintiff
24 further testified that she experienced left knee swelling and pain and that
25 her right knee stiffens with cold weather. (*Id.*).

26 The ALJ found that Plaintiff's description of the severity of her pain is
27 inconsistent with her testimony that she resisted going to the emergency

1 room three times a week for treatment because of time constraints,
2 embarrassment and her ability to obtain stronger medication from her
3 treating physician. (A.R. 25-26).

4 2. Third Party Opinions

5 The ALJ considered Plaintiff's third party correspondence dated
6 between August and November 2014 from Plaintiff's spouse, mother, former
7 aunt-in-law, friends and acquaintances. (A.R. 26). The ALJ found the third
8 parties' statements credible only with respect to Plaintiff's ability to do light
9 work. (*Id.*). More specifically, the ALJ noted that third party lay opinion
10 regarding diagnosis and the severity of Plaintiff's symptoms or side effects of
11 medications in relation to Plaintiff's ability to work is less persuasive than
12 professional medical opinion on the same issues. (*Id.*). Here, the ALJ found
13 that the third parties' opinions were not impartial because they have familial
14 and/or relationship motivations to help the Plaintiff, further, their
15 statements were not supported by medical evidence in the record. (*Id.*).

16 3. Treatment Records

17 The ALJ reviewed Plaintiff's treatment records dated from December
18 1999 through September 2015 and noted the 2013 and 2014 treatment notes
19 as particularly relevant to Plaintiff's alleged disability beginning on July 1,
20 2013. (A.R. 26). The ALJ also pointed out that Plaintiff submitted sporadic
21 treatment notes since the alleged onset date and no treatment notes since
22 March 2014, other than two disability statements in May and September
23 2015. (A.R. 26-27).

24 a. 2013 Treatment Notes

25 Plaintiff's August 14, 2013 treatment note reported that Plaintiff took

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1 Vicoprofen six times each day,² which reduced her pain and allowed her to
2 function. (A.R. 27). Plaintiff's November 6, 2013 treatment note reported
3 that her condition improved by fifty percent, and she was able to perform
4 more physical activity due to decreased pain. (*Id.*). Plaintiff had also
5 decreased her Vicoprofen intake to four to five tablets each day. (*Id.*).
6 Plaintiff claimed that her pain increased during cold weather. (*Id.*). In
7 addition, the ALJ mentioned that the treatment notes describe Plaintiff to be
8 in mild to moderate discomfort and not overmedicated. (*Id.*). The ALJ also
9 noted that other than mild to moderate lumbar paraspinal tenderness to
10 palpation with moderate spasm, limited range of motion in the lumbar spine
11 and a positive straight left leg raise test, her physical examinations were
12 generally unremarkable. (*Id.*).

13 b. 2014 Treatment Notes

14 Plaintiff's January 29, 2014 progress note indicated that in December
15 2013, she developed knee swelling. (A.R. 27). It also reported that Plaintiff
16 began to walk on a regular basis and started to walk three miles daily. (*Id.*).
17 Additionally, the treatment note reported that Plaintiff appeared to be in
18 mild to moderate discomfort and was not overmedicated. (*Id.*). The ALJ
19 noted that Plaintiff's physical examination findings were similar to those in
20 her previous exam, except for a moderate tenderness to palpation to the
21 medial joint line and above the left knee patella. (*Id.*). Otherwise, the
22 findings were generally unremarkable, and Plaintiff exhibited normal gait,
23 strength, sensation and reflexes in the lower extremities. (*Id.*).

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26 ² The ALJ mistyped the number of times Plaintiff was taking Vicoprofen; the
27 record reflects that number to be six, not eight. (*Compare A.R. 27, with A.R.*
259).

1 The ALJ additionally mentioned that Plaintiff's March 27, 2014 MRI
2 revealed status post laminectomy of L4 and partial laminectomy of L3 with
3 fusions of L3, L4, L5 and S1 bodies by pedicle screws, cages placed at L4-L5
4 disc space, combination of retrolisthesis of L2 in relation to L3 and
5 broad-based posterior endplate osteophyte formation at L2-L3 level, which
6 measured about 3 mm and caused pressure over the anterior aspect of the
7 thecal sac. (*Id.*). The ALJ noted that Plaintiff declined bilateral knee x-rays
8 and MRI to evaluate her worsening knee pain on January 29, 2014. (A.R.
9 27). The ALJ found that this demonstrates a potential unwillingness to
10 improve her condition and indicates that her symptoms were not as severe as
11 she described. (*Id.*). The ALJ further found that Plaintiff's failure to follow
12 prescribed treatment without a good reason is a basis for finding that
13 Plaintiff is not disabled. (*Id.*).

14 4. Michael Moon, M.D.

15 On May 6, 2014, treating physician, Michael Moon, M.D. opined that
16 Plaintiff cannot physically perform the customary duties of a dental
17 hygienist, cannot compete in the labor market and is permanently disabled.
18 (A.R. 28). Dr. Moon reported that Plaintiff required daily round-the-clock
19 medication to control her pain and experienced frequent lower back pain that
20 caused her to be bedbound for days at a time. (*Id.*). Dr. Moon attributed
21 Plaintiff's pain to segment instability at L2-3 and stated that surgery in this
22 region may be an option. (*Id.*). Dr. Moon also noted that Plaintiff was
23 reluctant to consider surgery and managed her pain by restricting physical
24 activity and ingesting pain medication. (*Id.*).

25 On September 16, 2015, Dr. Moon opined that Plaintiff's pain and/or
26 pain disorder, depression, anxiety and side effects from prescribed medication
27 limited her ability to work. (A.R. 28). The ALJ found that Dr. Moon's

1 treatment notes do not support these conditions. (*Id.*). Dr. Moon also
2 claimed that Plaintiff completed quarterly visits for fourteen years, but the
3 ALJ noted that there were no treatment notes in the record since March
4 2014. (*Id.*). Dr. Moon reported Plaintiff's capacity as limited to the following:
5 lifting and/or carrying 20 pounds rarely, 10 pounds occasionally and less than
6 10 pounds frequently, sitting for approximately two hours during a workday,
7 standing and/or walking for less than two hours in a workday, requiring
8 alternating positions from sitting, standing or walking, rarely bending,
9 stooping, climbing, kneeling or crawling, being absent from work more than
10 four days each month due to her condition and requiring unscheduled breaks
11 and to lie down during the workday. (*Id.*).

12 The ALJ afforded little weight to Dr. Moon's disability statements.
13 (A.R. 27, 28). The ALJ found Dr. Moon's opinions inconsistent with the entire
14 evidence of record. (A.R. 28). Specifically, the ALJ found that Dr. Moon's
15 statements were contrary to Plaintiff's treatment notes, which demonstrate
16 that Plaintiff's symptoms improved over time. (*Id.*). For example, from
17 August 2013 to November 2013, Plaintiff's pain and medication intake
18 decreased, and in January 2014, she began to walk daily. (*Id.*). The ALJ also
19 found that Dr. Moon's disability statements were inconsistent with Plaintiff's
20 refusal to undergo x-ray and MRI examinations for her knee in January
21 2014, continued performance of daily living activities, personal care and
22 social interaction, driving, resisting emergency room treatment and lack of
23 records showing repeated disc tearing. (*Id.*).

24 5. State Agency Medical Consultants

25 The State Agency Medical Consultants opined that Plaintiff can
26 perform light work including lifting and/or carrying 20 pounds occasionally
27 and 10 pounds frequently, sitting, standing and/or walking for about six

1 hours during a workday, climbing ramps and stairs, frequently to
2 occasionally, climbing ladders, ropes or scaffolds, stooping, kneeling and
3 crawling, frequently balancing and crouching and avoiding concentrated
4 exposure to extreme cold, vibration and hazards. (A.R. 29). The ALJ
5 accorded significant weight to the State Agency Medical Consultants'
6 determinations. (*Id.*). The ALJ adopted an RFC similar to the State Agency
7 Medical Consultants', with increased climbing limitations. (*Id.*). In support,
8 the ALJ cited to Plaintiff's treatment notes showing medical improvement
9 over time, refusal to undergo evaluations for knee pain and to go to the
10 emergency room, continued performance of daily activities and lack of
11 medical evidence supporting her allegations of disabling pain, The ALJ
12 specifically noted that his RFC finding is supported by the evidence as a
13 whole because Plaintiff's less-than-fully-credible complaints and the objective
14 medical evidence do not support the severity of Plaintiff's alleged symptoms.
15 (*Id.*).

16 6. Vocational Expert

17 At Plaintiff's October 7, 2015 hearing, VE Erin Welsh testified that
18 Plaintiff's past work as a dental assistant is classified as skilled light work
19 and her work as an office manager is classified as skilled sedentary work.
20 (A.R. 30, 64). In light of the VE's testimony and Plaintiff's RFC, age,
21 education and work experience, the ALJ found that Plaintiff is able to
22 perform the physical and mental demands associated with these past
23 relevant composite jobs as they are actually and generally performed.
24 (A.R. 30).

25 The ALJ additionally found that, based on the VE's testimony, Plaintiff
26 is able to perform other unskilled light work such as mailroom clerk and
27 office helper and unskilled sedentary work such as callout operator and

1 escort vehicle driver, all of which exist in significant numbers in the national
2 economy. (A.R. 30-31).

3 C. Appeals Council Decision

4 On August 1, 2016, the Appeals Council set aside its decision denying
5 Plaintiff's request for review of the ALJ's decision because Plaintiff submitted
6 new medical evidence³ to the Council not previously presented to the ALJ.
7 (A.R. 1). The Appeals Council subsequently considered the Administrative
8 Record, Plaintiff's new evidence and Plaintiff's reasons for challenging the
9 ALJ's decision. (Id.). The Appeals Council also reviewed evidence from Dr.
10 Moon, dated May 6, 2014 and September 6, 2015, but determined these
11 records were not new "because they are copies of exhibits 3F and 8F [of the
12 Administrative Record]." (Id.). The Appeals Council ultimately determined
13 that Plaintiff's new evidence "does not provide a basis for changing the
14 [ALJ's] decision." (Id.).

15 D. Whether Substantial Evidence Supports the ALJ's Decision

16 Plaintiff contends that the ALJ's non-disability determination is not
17 supported by substantial evidence and is not free of legal error. (ECF No. 14-
18 1 at 3). Specifically, Plaintiff argues that in light of Dr. Kim's report—which
19 was additional evidence submitted to and considered by the Appeals
20 Council—the ALJ's RFC assessment is not supported by substantial
21 evidence. (*Id.* at 6, 8). Plaintiff maintains that reversal is warranted because
22 Dr. Kim is a specialist who examined Plaintiff, presented medical evidence,
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25 ³ Plaintiff submitted new medical evidence from Dr. Paul Kim, M.D. Dr. Kim
26 examined Plaintiff on January 7, 2016 and concluded that she "has some
27 inability at L2-3 with adjacent segment disease with degeneration." Dr. Kim
opined that "Plaintiff is unable to work" and "is quite disabled." (A.R. 422).

1 reviewed Plaintiff's imaging reports and rendered an opinion consistent with
2 the opinion of treating physician, Dr. Moon. (*Id.* at 7-8).

3 Defendant responds that because Dr. Kim's report lacks a thorough
4 functional assessment and Plaintiff's lack of credibility is unchallenged, the
5 substantial evidence that supported the ALJ's decision is unaffected. (ECF
6 No. 15-1 at 5, 6). Defendant further asserts that Plaintiff is not entitled to a
7 remand based on her new medical report because it does not have a
8 reasonable possibility of changing the outcome of the ALJ's determination.
9 Defendant cites to *Burton v. Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984) in
10 support. (*Id.* at 6). Plaintiff replies that *Burton* is inapplicable because it
11 interprets Sentence Six of 42 U.S.C. § 405(g), and she "is requesting review
12 under Sentence Four."⁴ (ECF No. 17 at 4).

13 1. Legal Standard

14 When, as here, "the Appeals Council considers new evidence in deciding
15 whether to review a decision of the ALJ, that evidence becomes part of the
16 administrative record, which the district court must consider when reviewing
17 the Commissioner's final decision for substantial evidence." *Brewes v.*
18 *Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012); *see also*
19 *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014).

20 The Ninth Circuit distinguishes among the opinions of three types of
21

22 ⁴ The Court acknowledges that it is unclear whether the materiality and good
23 cause standard in Sentence Six of 42 U.S.C. § 405(g) is required to justify
24 remand in light of additional evidence not before the ALJ. *Compare Brewes*,
25 682 F.3d at 1164 (declining to apply the materiality standard), *with Mayes v.*
26 *Massanari*, 276 F.3d 453, 462 (9th Cir. 2001) (requiring a showing of
27 materiality and good cause). However, as more fully explained below, the
ALJ's decision is supported by substantial evidence, and therefore, the Court
need not reach this issue.

1 physicians: (1) those who treat the Plaintiff (“treating physicians”); (2) those
2 who examine but do not treat the Plaintiff (“examining physicians”); and (3)
3 those who neither examine nor treat the Plaintiff (“non-examining
4 physicians”). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). As a general
5 rule, more weight is given to the opinions of a treating source than to that of
6 a non-treating physician. *Id.* (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th
7 Cir. 1987)). Likewise, the opinion of an examining physician is typically
8 entitled to greater weight than that of a non-examining physician. *Pitzer v.*
9 *Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990).

10 In *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007), the Ninth Circuit held:

11 If a treating physician's opinion is not given ‘controlling weight’
12 because it is not ‘well-supported’ or because it is inconsistent with
13 other substantial evidence in the record, the Administration
14 considers specified factors in determining the weight it will be
15 given. Those factors include the ‘length of the treatment
16 relationship and the frequency of examination’ by the treating
17 physician; and the ‘nature and extent of the treatment
18 relationship’ between the patient and the treating physician.
19 Generally, the opinions of examining physicians are afforded more
20 weight than those of non-examining physicians, and the opinions
21 of examining non-treating physicians are afforded less weight
22 than those of treating physicians.

23 *Id.* at 631 (internal citations omitted).

24 Where a non-treating, non-examining physician’s opinion contradicts
25 the treating physician’s opinion, the ALJ may only reject the treating
26 physician’s opinion “if the ALJ gives specific, legitimate reasons for doing so
27 that are based on substantial evidence in the record.” *Jamerson v. Chater*,
112 F.3d 1064, 1066 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 F.3d
1035, 1041 (9th Cir. 1995)). “The ALJ may meet this burden by setting out a
detailed and thorough summary of the facts and conflicting evidence, stating

1 his interpretation thereof, and making findings.” *Morgan v. Apfel*, 169 F.3d
2 595, 600-601 (9th Cir. 1999) (citing *Magallanes v. Bowen*, 881 F.2d 747, 750
3 (9th Cir.1989)).

4 2. Analysis

5 The Court will conduct a two-step analysis regarding Plaintiff’s claim
6 that Dr. Kim’s new evidence and Dr. Moon’s opinion evidence together
7 outweigh the opinions of the State Medical Consultants. First, the Court will
8 determine whether the ALJ properly afforded little weight to Dr. Moon.
9 Second, the Court will determine whether Dr. Kim’s post hearing opinion
10 would alter the ALJ’s decision.

11 Here, the ALJ afforded little weight to treating physician Dr. Moon’s
12 findings because he found them to be “inconsistent with the entire evidence of
13 record.” (A.R. 28). The ALJ explained that Dr. Moon’s description of Plaintiff
14 as “essentially permanently disabled” is unsupported by his own treatment
15 records, which indicate Plaintiff’s improvement over time. (A.R. 212, 261,
16 263). For example, Dr. Moon’s treatment notes describe Plaintiff as
17 appearing to be only in “mild to moderate discomfort.” (A.R. 259, 261, 263).
18 The treatment notes also report that Plaintiff’s pain decreased from 2013 to
19 2014, as evidenced by Plaintiff reducing her Vicoprofen intake from six
20 tablets a day to four and beginning to walk on a regular basis. (A.R. 259,
21 261, 263). Additionally, Dr. Moon’s claim that Plaintiff’s psychological
22 conditions include depression and anxiety is inconsistent with his earlier
23 treatment notes, which reported that Plaintiff was “alert and oriented,” had a
24 “stable” mood and denied suicidal ideation. (A.R. 263).

25 Although Dr. Moon alleged that Plaintiff completed quarterly visits for
26 14 years, the ALJ’s record contained no treatment records since March 2014,
27 despite the ALJ’s request for updated records. (A.R. 312, 39-40, 72).

1 Plaintiff's counsel admitted during the hearing that he requested updated
2 medical records from Dr. Moon, but that they were "basically just more of the
3 same." (A.R. 39). Notably, Plaintiff admitted that she had not received any
4 other treatment besides medication since she stopped working. (A.R. 53).

5 At the hearing, Plaintiff testified she experienced severe disc tears
6 approximately three to four times a month. (A.R. 58-59). However, there are
7 no treatment notes or diagnostic reports to support Plaintiff's claim of
8 debilitating and repeated disc tears. Plaintiff was reluctant to consider
9 surgery, resisted emergency room treatment, declined x-rays and MRI
10 evaluations for her knee pain and instead chose to manage her pain by
11 restricting her physical activity and taking pain pills. (A.R. 277, 56, 264).
12 The Court notes that Plaintiff's counsel asked Plaintiff very few questions
13 about her back and knee during his direct examination at the hearing. (*See*
14 A.R. 59-62). The Court further notes that Plaintiff's alleged symptoms are
15 inconsistent with statements in her Exertion Questionnaire about her ability
16 to perform daily activities such as driving, walking daily, running errands,
17 housekeeping and gardening in two to three hour intervals. (A.R. 183-85).

18 Based on this record, the Court finds that the ALJ gave specific and
19 legitimate reasons for affording little weight to Dr. Moon's opinions and
20 relying substantially on the non-treating, non-examining State Agency
21 Medical Consultants' opinions. *See Jamerson*, 112 F.3d at 1066. Plaintiff's
22 attempt to discredit the State Agency Medical Consultants' expertise is
23 unpersuasive because both consultants are familiar with Social Security
24 rules, regulations and requirements, and their respective opinions are
25 consistent with each other and the evidence in the record. 20 C.F.R. §§
26 404.1527(c)(4), (6).

27 The Court further finds that Dr. Kim's medical opinion does not affect

1 the ALJ's decision because it does not add material information that would
2 undermine the substantial evidence relied upon by the ALJ. In addition to a
3 physical examination, Dr. Kim reviewed and relied on the December 2015
4 radiographic and diagnostic studies provided by Plaintiff. (A.R. 420). Dr.
5 Kim's findings are consistent with the findings made by the doctors who
6 conducted or interpreted those studies. (A.R. 420).

7 Dr. Kim's physical exam produced no findings contrary to the other
8 record evidence. For example, a 14-point patient evaluation showed
9 Plaintiff's neck had full range of motion, and her lumbar spine had limited
10 flexion/extension with normal stability, normal lordosis, and a well healed
11 incision posteriorly. (A.R. 420). Dr. Kim noted that Plaintiff was unable to
12 walk on her heels and toes bilaterally, but the totality of Dr. Kim's findings of
13 Plaintiff's lower extremities were consistent with the record medical
14 evidence. (*Id.*). For instance, Dr. Kim opined that she had full range of
15 motion in her hips, knees and ankles, no atrophy of the quadriceps or
16 gastrocnemius-soleus, smooth and symmetric swing phase coordination and a
17 negative straight leg raise. (*Id.*). Dr. Kim's interpretation of Plaintiff's
18 radiographic images of the lumbar spine revealed no hardware loosening,
19 solid fusion at L4-5 and posterolateral fusion at L3-4, retrolisthesis at L2-3,
20 some degeneration at L2-3 and minimal central stenosis. (*Id.*). Ultimately,
21 Dr. Kim's recommended treatment was for "facet blocks and see how she
22 responds." (A.R. 420).

23 Accordingly, the Court does not find Dr. Kim's report persuasive on the
24 issue of Plaintiff's disability. (A.R. 421). Dr. Kim's opinion was obtained after
25 the ALJ's adverse determination. *See Weetman v. Sullivan*, 877 F.2d 20, 23
26 (9th Cir. 1989); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996). The Court
27 finds that even taking into account Dr. Kim's report, the ALJ's RFC finding

1 and non-disability determination is supported by substantial evidence in the
2 record. *Brewes*, 682 F.3d at 1163; see *Sandgathe*, 108 F.3d at 980 (defining
3 substantial evidence as “relevant evidence as a reasonable mind might accept
4 as adequate to support a conclusion.”); *Browner*, 839 F.2d at 433 (denial of
5 benefits “will be disturbed only if it is not supported by substantial evidence
6 or is based on legal error.”).

7 The ALJ’s findings are consistent with the record as a whole. Section
8 416.920b of Title 20 in the Code of Federal Regulations states that after
9 reviewing all of the evidence relevant to a claimant’s claim, the ALJ makes
10 findings about what the evidence shows. The ALJ is also “responsible for
11 making the determination or decision about whether [a claimant] meet[s] the
12 statutory definition of disability.” 20 C.F.R. § 416.927(d)(1). The Court’s
13 review of the administrative record revealed no ambiguity or error indicating
14 that the ALJ’s decision was based on less than substantial evidence. 42
15 U.S.C. § 405(g).

16 Accordingly, the Court finds the ALJ’s findings of fact and conclusions
17 of law, including Plaintiff’s RFC, is supported by substantial evidence and
18 free of legal error.

19 III. CONCLUSION

20 The Court **RECOMMENDS** that Plaintiff’s Motion be **DENIED** and
21 that Defendant’s Motion be **GRANTED**. This Report and Recommendation
22 of the undersigned Magistrate Judge is submitted to the United States
23 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §
24 636(b)(1).

25 **IT IS HEREBY ORDERED** that any written objections to this report
26 must be filed with the court and served on all parties no later than **August**
27 **16, 2017**. The document should be captioned “Objections to Report and

1 Recommendation.”

2 **IT IS FURTHER ORDERED** that any reply to the objections shall be
3 filed with the court and served on all parties no later than **August 23, 2017**.

4 The parties are advised that failure to file objections within the specific time
5 may waive the right to raise those objections on appeal of the Court’s order.

6 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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8 Dated: August 2, 2017



9
10 Hon. Mitchell D. Dembin
11 United States Magistrate Judge
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