UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LARAINE FLEMING,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

Case No.: 3:16-cv-02682-H-MDD

ORDER:

(1) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; and

(2) GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

[Doc. Nos. 16-1, 17-1]

On October 29, 2016, Laraine Fleming ("Plaintiff") filed a complaint pursuant to 42 U.S.C. § 405(g) requesting judicial review of the Social Security Administration Commissioner's ("Defendant") final decision denying her disability benefits. (Doc. No. 1.) On February 13, 2017, Defendant filed an answer to Plaintiff's complaint and the administrative record. (Doc. Nos. 11, 12.) On April 14, 2017, Plaintiff filed a motion for summary judgment, requesting that the Court reverse the Commissioner's final decision and order the payment of benefits, or alternatively, remand the case for further administrative proceedings. (Doc. No. 16.) On May 16, 2017, Defendant filed a cross-

motion for summary judgment and a response in opposition to Plaintiff's motion, requesting that the Court affirm the Commissioner's final decision. (Doc. Nos. 17, 18.) For the reasons below, the Court denies Plaintiff's motion for summary judgment, grants Defendant's cross-motion for summary judgment, and affirms the Commissioner's final decision.

BACKGROUND

On June 27, 2013, Plaintiff applied for disability insurance benefits, claiming a disability onset date of April 14, 2012. (AR50-51.) The Social Security Administration denied Plaintiff's application for benefits initially on September 27, 2013, and again upon reconsideration on December 3, 2013. (AR82, 89.) On December 19, 2013, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR95-96.)

On March 25, 2015, an ALJ held a hearing where Plaintiff appeared with counsel and testified. (AR31-41, 43-46.) At the hearing, the ALJ also heard testimony from a vocational expert. (AR42-43, 46-48.) On May 7, 2015, the ALJ determined that Plaintiff had the following severe impairments: history of stroke, hypertension and related encephalopathy, and morbid obesity; but concluded that Plaintiff did not have an impairment or combination of impairments that met or equaled a listed impairment. (AR18-20.) The ALJ determined that Plaintiff had the residual functional capacity ("RFC") to perform medium work, including the ability to stand, walk, and sit for a minimum of six hours in an eight hour day, without the need to shift positions at will or take unscheduled breaks during that workday. (AR21.) The ALJ further determined that Plaintiff could engage in frequent stooping and crouching, occasional climbing of stairs, and no climbing of ladders. (Id.) Based on this RFC assessment and Plaintiff's age, education, and work experience, the ALJ concluded that there were jobs in significant numbers in the national economy that Plaintiff could perform, specifically the occupations of administrative clerk and mortgage loan processor. (AR26.) As a result of these findings, the ALJ determined that Plaintiff was not disabled from April 14, 2012, the alleged onset date, through May 7, 2015, the date of the ALJ's decision. (Id.)

Plaintiff requested review of the ALJ's decision by the Appeals Council. (AR10-12.) On August 23, 2016, the Appeals Council denied Plaintiff's request for review, rendering the ALJ's decision final. (AR1-3.)

DISCUSSION

I. The Legal Standard for Determining Disability

"A claimant is disabled under Title II of the Social Security Act if he is unable to 'engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or … can be expected to last for a continuous period of not less than 12 months.'" Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007) (quoting 42 U.S.C. § 423(d)(12)(A)). "To determine whether a claimant meets this definition, the ALJ conducts a five-step sequential evaluation." Id.; see C.F.R. §§ 404.1520, 416.920. The Ninth Circuit has summarized this process as follows:

> The burden of proof is on the claimant as to steps one to four. As to step five, the burden shifts to the Commissioner. If a claimant is found to be "disabled" or "not disabled" at any step in the sequence, there is no need to consider subsequent steps. The five steps are:
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> Step 1. Is the claimant presently working in a substantially gainful activity? If so, then the claimant is "not disabled" within the meaning of the Social Security Act and is not entitled to disability insurance benefits. If the claimant is not working in a substantially gainful activity, then the claimant's case cannot be resolved at step one and the evaluation proceeds to step two. See 20 C.F.R. § 404.1520(b).
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> Step 2. Is the claimant's impairment severe? If not, then the claimant is "not disabled" and is not entitled to disability insurance benefits. If the claimant's impairment is severe, then the claimant's case cannot be resolved at step two and the evaluation proceeds to step three. See 20 C.F.R. § 404.1520(c).
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> Step 3. Does the impairment "meet or equal" one of a list of specific impairments described in the regulations? If so, the claimant is "disabled" and therefore entitled to disability insurance benefits. If the claimant's impairment neither meets nor equals one of the impairments listed in the regulations, then the claimant's case

cannot be resolved at step three and the evaluation proceeds to step four. See 20 C.F.R. § 404.1520(d).

Step 4. Is the claimant able to do any work that he or she has done in the past? If so, then the claimant is "not disabled" and is not entitled to disability insurance benefits. If the claimant cannot do any work he or she did in the past, then the claimant's case cannot be resolved at step four and the evaluation proceeds to the fifth and final step. See 20 C.F.R. § 404.1520(e).

Step 5. Is the claimant able to do any other work? If not, then the claimant is "disabled" and therefore entitled to disability insurance benefits. See 20 C.F.R. § 404.1520(f)(1). If the claimant is able to do other work, then the Commissioner must establish that there are a significant number of jobs in the national economy that claimant can do. There are two ways for the Commissioner to meet the burden of showing that there is other work in "significant numbers" in the national economy that claimant can do: (1) by the testimony of a vocational expert, or (2) by reference to the Medical–Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If the Commissioner meets this burden, the claimant is "not disabled" and therefore not entitled to disability insurance benefits. See 20 C.F.R. §§ 404.1520(f), 404.1562. If the Commissioner cannot meet this burden, then the claimant is "disabled" and therefore entitled to disability benefits.

Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999) (citation omitted); see also 20 C.F.R. §§ 404.1520, 416.920. As part of step four, the ALJ must determine the claimant's RFC, i.e., the most a claimant can do despite her limitations. See 20 C.F.R. § 404.1545; Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). "In determining a claimant's RFC, an ALJ must consider all relevant evidence in the record, including, *inter alia*, medical records, lay evidence, and the effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment." Robbins v. Social Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006) (internal quotation marks omitted).

II. Standards of Review for Social Security Determinations

Unsuccessful applicants for social security disability benefits may seek judicial review of a Commissioner's final decision in a federal district court. See 42 U.S.C. § 405(g). "As with other agency decisions, federal court review of social security

determinations is limited." Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1098 (9th Cir. 2014).

"An ALJ's disability determination should be upheld unless it contains legal error or is not supported by substantial evidence." Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). "'Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). The district court must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusions. Garrison, 759 F.3d at 1009. "'Where the evidence as a whole can support either a grant or a denial, we may not substitute our judgment for the ALJ's.'" Bray, 554 F.3d at 1222 (quoting Massachi v. Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007)). "'The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities.'" Garrison, 759 F.3d at 1010 (quoting Shalala, 53 F.3d at 1039).

In addition, even when the ALJ commits legal error, a reviewing court will uphold the decision where that error is harmless. Treichler, 775 F.3d at 1099; see also Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) ("We have long recognized that harmless error principles apply in the Social Security Act context."). "[A]n ALJ's error is harmless where it is 'inconsequential to the ultimate nondisability determination.'" Molina, 674 F.3d at 1115. "'[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.'" Id. at 1111 (quoting Shinseki v. Sanders, 556 U.S. 396, 409 (2009)).

III. Analysis

In denying Plaintiff's disability application, the ALJ's analysis proceeded through each of the five steps. At step one, the ALJ determined that as a threshold matter Plaintiff was not working, and thus Plaintiff was not engaged in substantial gainful

activity. (AR18.) At step two, the ALJ found that Plaintiff had three severe impairments: history of stroke, hypertension and related encephalopathy, and morbid obesity. (Id.) At step three, the ALJ found that none of Plaintiff's impairments, independently or in combination, met one of the listed impairments. (AR20.) Next, in order to complete step four, the ALJ determined that Plaintiff's RFC allowed her to perform medium work, with occasional climbing of ramps and stairs, frequent stooping and bending, and no climbing of ladders. (AR21.) The ALJ based his RFC determination on Plaintiff's symptoms to the extent the symptoms were consistent with the objective medical record. (Id.) Using this RFC, the ALJ concluded that Plaintiff was capable of performing past relevant work as a mortgage loan processor and administrative clerk. (AR25.) In so finding, the ALJ rejected Plaintiff's alleged disability.

Plaintiff moves for summary judgment on the grounds that the ALJ failed to articulate specific and legitimate reasons for rejecting Dr. Thomas Harless' medical opinions.[1] (Doc. No. 16-1 at 8-9.) Specifically, Plaintiff contends that the ALJ erroneously discredited Dr. Harless' opinions regarding the limitation on using her hands, the need for a sit-stand option, and her trouble speaking. (Id.) Dr. Harless was Plaintiff's treating physician, and at the time of rendering the opinions, had been treating Plaintiff every three months for 18 months. (AR319.) Defendant cross-moves for summary judgment on the grounds that the ALJ's opinion contains no legal error, as he reasonably rejected Dr. Thomas Harless' opinion in areas where it was not supported by the objective medical record or where the opinion was contradicted by another physician. (Doc. No. 17-1 at 12.)

Whether an ALJ properly discredited a treating physician's opinion is a question of law. Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); Meschino v. Apfel, 1998 WL

[1] Plaintiff's brief also refers to the opinion of a Rita Hyman, PH.D. (Doc. No. 16-1, at 3.) This name is only mentioned once and the brief subsequently only refers to the medical opinions of Dr. Harless. The Court believes the mention of Rita Hyman was a mistake, and interprets Plaintiff's argument as referring to the opinion of Dr. Harless.

513969, *7 (N.D. Cal. 1998) ("The opinion of Dr. Grotz, as that of a treating physician, is entitled to special weight. The ALJ did not provide legitimate reasons for disregarding it. Thus, she committed legal error."). The Ninth Circuit distinguishes among three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining physicians)." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995), as amended (Apr. 9, 1996); see also 20 C.F.R. § 404.1502 (defining treating, examining, and nonexamining sources). Generally, the opinions of treating physicians are given more weight than the opinions of examining physicians, which are in turn given more weight than the opinions of nonexamining physicians. See Benton ex rel. Benton v. Barnhart, 331 F.3d 1030, 1038 (9th Cir. 2003). Treating physicians' opinions, in particular, are given "special weight" and the ALJ must justify a decision to disregard them. Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir. 1988).

If a treating physician's opinion is not contradicted by another doctor, the ALJ may only disregard the opinion if he justifies that decision with "clear and convincing reasons supported by substantial evidence in the record." Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998) (internal quotation marks omitted). Even if a treating physician's opinion is contradicted by another doctor, the ALJ may still only disregard it by providing "'specific and legitimate reasons' supported by substantial evidence in the record." Id. (quoting Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983)). "The ALJ may meet his burden by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). Furthermore, an "ALJ may discredit treating physicians' opinions that are conclusory, brief, and unsupported by the record as a whole, or by objective medical findings." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

The ALJ discredited the portions of Dr. Harless' opinion regarding Plaintiff's (1) hand limitation, (2) need for a sit-stand option, and (3) speaking limitation. The Court

addresses each opinion in turn and concludes that the ALJ provided legally sufficient justifications for discrediting a treating physician. Reddick, 157 F.3d at 725. Thus, the Court grants summary judgment for Defendant.

A. Hand Limitation

Plaintiff argues that the ALJ improperly discredited Dr. Harless' opinion that Plaintiff had significant limitations to the use of her hands. (Doc. No. 16-1 at 5.) Defendant disagrees, arguing that the ALJ properly discredited Dr. Harless' opinion because it was not supported by the record and was contradicted by the findings of Dr. Stover. (Doc. No. 17-1 at 15.) The Court agrees with Defendant; the ALJ properly discredited Dr. Harless' opinion by providing specific and legitimate reasons for so doing.

Dr. Harless is an Internal Medicine doctor who treated Plaintiff in 2013 following her stroke. (AR318-323.) During this time, Dr. Harless completed a "Stroke Residual Functional Capacity Questionnaire" that indicated Plaintiff had limitations in reaching, handling, and fingering. (AR322.) Specifically, Dr. Harless opined that Plaintiff was limited to grasping, turning, or twisting objects for only 75% of an 8-hour work day, could only use her left hand for finger manipulation for 75% of a work day, and could only use her right hand for finger manipulation for 10% of a work day. (Id.)

The ALJ discredited Dr. Harless' opinion about Plaintiff's hand limitations because the record contained no evidence of these limitations on account of neurological or musculoskeletal impairments.[2] (AR24.) For example, the ALJ noted that Dr. Stover, an examining neurologist, found no manipulative limitations as to reaching, handling, fingering or feeling. (AR24; AR329.) Similarly, the ALJ reviewed a February 10, 2014 neurological exam that returned normal findings, with full muscle strength in all extremities. (AR23; AR343-346.)

[2] The ALJ's opinion refers to Dr. Harless as Dr. Thomas.

The ALJ's reasons for discrediting Dr. Harless are sufficient. Because Dr. Harless' opinion was contradicted by another doctor, Dr. Stover, the ALJ need only provide specific and legitimate reasons for rejecting it. Reddick v. Charter, 157 F.3d 715, 725 (9th Cir. 1998). And the ALJ can do this by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Magallanes v. Bown, 881 F.2d 747, 751 (9th Cir. 1989). That is what the ALJ did here. The ALJ thoroughly reviewed the available medical evidence, identified the conflicting medical opinions of Dr. Harless and Dr. Stover, and made findings as to which information was more credible by comparing it to the objective medical record. As such, the ALJ's ultimate determination was proper. See Garrison, 759 F.3d at 1010 ("The ALJ is responsible for determining credibility [and] resolving conflicts in medical testimony"). Consequently, the Court rejects Plaintiff's argument that the ALJ improperly discredited Dr. Harless' opinion about Plaintiff's hand limitations.

B. Sit-Stand Option

Plaintiff argues the ALJ improperly discredited Dr. Harless' opinion that Plaintiff was limited in the amount of sustained sitting and standing she could do. (Doc. No. 16-1 at 8.) In particular, Plaintiff contends the ALJ did not grant enough weight to Dr. Harless' opinion concerning Plaintiff being able to sit for one hour at a time and stand for 15 minutes at one time, and argues that the ALJ should have assessed a "sit-stand" option when determining Plaintiff's RFC. (Id.) Defendant disagrees, arguing that Plaintiff failed to prove a reversible error with respect to the ALJ's decision to discredit Dr. Harless. (Doc. 17-1, at 12.) The Court finds that the ALJ properly discredited Dr. Harless by pointing to Dr. Stover's contradicting opinion and to a lack of support in the record.

Dr. Harless indicated in his "Stroke Residual Functional Capacity Questionnaire" that Plaintiff was limited in the amount of sustained sitting and standing she could do.

(AR320.) Specifically, he opined that Plaintiff could only sit for one hour before needing to get up, and could only stand for 15 minutes before needing to sit down. (Id.)

The ALJ discredited Dr. Harless' opinion concerning Plaintiff's sitting and standing limitations because the record contained no evidence of these limitations. (AR24.) For example, the ALJ pointed to an August 21, 2013 examination done by Dr. Stover showing normal gait and station, and to February 2014 progress reports showing full muscle strength in all extremities. (Id.; AR328, 345.) In addition, the ALJ reviewed other progress reports done shortly after Plaintiff's stroke in 2012 that do not show abnormal gait or poor strength in extremities. (AR24; see, e.g., AR274 (noting that gait was "not abnormal"); AR290 (noting that Plaintiff's son was not needed to help her to the doctor's office); AR345 (noting extremities at full strength.))

The ALJ's reasons for discrediting Dr. Harless are sufficient. As the ALJ observed, Dr. Harless' opinion was generally not consistent with the objective medical record. (AR24.) Because of this, the ALJ need not accept Dr. Harless' opinion. Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001); see also Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003) (treating doctor's questionnaire properly discredited when it failed to "provide [a] basis for the functional restrictions he opined should be imposed on [claimant]"). Furthermore, Dr. Harless' opinion was directly contradicted by that of Dr. Stover (AR328), and the ALJ could permissibly rely on Dr. Stover's findings and opinion when discrediting Dr. Harless. Tonapetyan, 242 F.3d at 1149 (non-examining physician opinion may constitute substantial evidence when it is consistent with other independent evidence in the record). Here, the ALJ reviewed the medical record and made findings as to whether Dr. Stover's or Dr. Harless' opinion better comported with the available medical evidence. Garrison, 759 F.3d at 1010 ("The ALJ is responsible for determining credibility [and] resolving conflicts in medical testimony"). The ALJ's ultimate determination to discredit Dr. Harless and accept Dr. Stover is proper. Consequently, the Court rejects Plaintiff's argument that the ALJ improperly discredited Dr. Harless' opinion concerning Plaintiff's need for a sit-stand option.

C. Speaking Limitation

Plaintiff argues that the ALJ improperly discredited Dr. Harless' opinion that Plaintiff had a significant speaking limitation. (Doc. No. 16-1 at 6.) Specifically, Plaintiff contends that the ALJ did not provide a reason for rejecting Dr. Harless' opinion concerning Plaintiff's speaking limitations. (Id.) Defendant disagrees, pointing to Dr. Stover's contrary opinion and to lack of support in the record as a whole. (Doc. No. 17-1 at 11.) The Court finds that the ALJ properly discredited Dr. Harless by accepting Dr. Stover's contrary opinion and by noting conflicting evidence in the record.

In his "Stroke Residual Functional Capacity Questionnaire," Dr. Harless marked that one of Plaintiff's symptoms was that she exhibited "speech/communication difficulties." (AR319.) In addition, there are treatment notes that report Plaintiff would speak one word at a time with periodic pauses during routine check-ups. (AR359.)

The ALJ discredited Dr. Harless' opinion and the treatment notes because there was conflicting evidence in the medical record. (AR22.) For example, the ALJ noted that Dr. Stover opined during his examination that Plaintiff exhibited normal speech and mental status. (Id.; AR327.) The ALJ also found that Dr. Stover's opinion was entitled to great weight as it was based on a personal examination, and because it was consistent with the rest of the record. (AR24; See, e.g., AR290 (noting speech was "fluent"); AR293 (noting speech was slow and deliberate, but fluent.))

The ALJ's reasons for discrediting Dr. Harless' opinion regarding Plaintiff's speaking limitations are sufficient. Because Dr. Harless' opinion conflicted with the opinion of Dr. Stover, the ALJ is responsible for "determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." Garrison, 759 F.3d at 1010. And when "the evidence can reasonably support either affirming or reversing a decision, [the Court] may not substitute our judgment for that of the [ALJ]." Id. Here, the ALJ thoroughly reviewed the available medical evidence, made findings as to credibility, permissibly relied on the opinion of Dr. Stover, and rejected Dr. Harless' questionnaire. Tonapetyan, 242 F.3d at 1149; see also Batson v. Comm'r of Soc. Sec.

Admin., 359 F.3d 1190, 1195 (ALJ may discredit treating physicians' opinions that are "conclusory, brief, and unsupported by the record as a whole"); Carranza v. Colvin, 2014 WL 2889639 (finding proper the rejection of a treating physician questionnaire where its conclusions were not supported by clinical or diagnostic testing). As such, the ALJ's ultimate determination is proper. Consequently, the Court rejects Plaintiff's argument that the ALJ improperly discredited Dr. Harless' opinion concerning her speaking limitations.

Plaintiff contends that the ALJ's rejection of Dr. Harless' opinion is nonetheless improper because the ALJ did not explicitly assign a weight to the opinion, nor did he explicitly provide a reason at all for rejecting it. (Doc. No. 16-1 at 6.) However, by explicitly accepting Dr. Stover's opinion, the ALJ implicitly rejected Dr. Harless' opinion and thus assigned it little to no weight. (AR22.) See Magallanes v. Bowen, 881 F.2d 747, 755 (ALJ does not have to recite "magic words" when discrediting evidence; the reviewing court is allowed to draw specific and legitimate inferences from ALJ's opinion); c.f. Elmore v. Colvin, 617 Fed.Appx. 755, 758 (finding ALJ implicitly rejected opinions of physicians by explicitly rejecting a similar opinion from a different physician). Even if the ALJ did err in not explicitly providing reasons or assigning a weight to Dr. Harless' opinion, the error is harmless because he "would have reached the same result absent the error." Molina v. Astrue, 674 F.3d 1104, 1115. Because the ALJ permissibly relied on the findings of Dr. Stover indicating that Plaintiff had no trouble speaking, the ALJ's decision to discredit Dr. Harless would have been reached whether or not he made this decision explicit.

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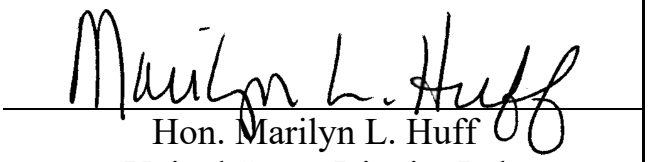
CONCLUSION

The Court concludes that the ALJ's decision was supported by substantial evidence and was based on proper legal standards. Therefore, the ALJ's disability determination must be upheld. Accordingly, the Court grants Defendant's cross-motion for summary judgment, and denies the Plaintiff's motion for summary judgment.

IT IS SO ORDERED

DATED: July 24, 2017



Hon. Marilyn L. Huff
United States District Judge