UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MINH KIM TRUONG,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

Case No.: 16-CV-02748-H-DHB

ORDER:

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

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

[Doc. Nos. 12-1, 17-1]

On November 7, 2016, Plaintiff Minh Kim Truong ("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 April 9, 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 proceedings. (Doc. No. 12.) On May 7, 2017, Defendant filed a cross-motion for summary judgment and a response in opposition to Plaintiff's motion, requesting the Court affirm the Commissioner's final

decision. (Doc. Nos. 13, 14.) On May 11, 2017, Defendant filed an amended cross-motion for summary judgment and an amended response in opposition to Plaintiff's motion. (Doc. Nos. 17, 18.) On June 13, 2017, Plaintiff filed a response in opposition to the cross-motion for summary judgment and a reply. (Doc. No. 19.) On June 26, 2017, Defendant filed a reply. (Doc. No. 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 decision of the Administrative Law Judge ("ALJ").

BACKGROUND

On March 22, 2013, Plaintiff applied for disability insurance benefits, claiming a disability onset date of February 15, 2012. (AR234-40.) The Social Security Administration denied Plaintiff's application for benefits initially on June 10, 2013, and again upon reconsideration on January 31, 2014. (AR90-93, 95-99.) On February 27, 2014, Plaintiff requested a hearing before an ALJ. (AR101-02.)

On March 30, 2015, an ALJ held a hearing where Plaintiff appeared with counsel and testified. (AR40-46.) At the hearing, the ALJ also heard testimony from a medical expert and a vocational expert. (AR46-64.) In a decision dated May 11, 2015, the ALJ determined that Plaintiff had the following severe impairments: a mood disorder and myositis. (AR13, 29.) Despite this finding, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that met or equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR13-16.) The ALJ determined that Plaintiff had the residual functional capacity ("RFC") to perform medium work, but not work involving unprotected heights or dangerous machinery. (AR16.) The ALJ also determined that Plaintiff was capable of performing routine and noncomplex tasks, but needed to avoid sustained, intense interaction with the public, coworkers, and supervisors. (Id.) In light of these impairments, the ALJ determined that Plaintiff could not perform past relevant work. (AR28.) 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

representative occupations of industrial cleaner and kitchen helper. (AR28-29.) Based on these findings, the ALJ determined that Plaintiff was not disabled from February 15, 2012, the alleged onset date, through May 11, 2015, the date of the ALJ's decision. (AR29.)

Plaintiff requested review of the ALJ's decision by the Appeals Council. (AR1.) Upon requesting review by the Appeals Council, Plaintiff also submitted an opinion letter from Dr. Henderson and additional medical records from Kaiser Permanente. (AR1106-1293.) The Appeals Council included this additional evidence in the record. (AR6.) On September 27, 2016, the Appeals Council denied Plaintiff's request for review, rendering the ALJ's decision final. (AR1-4.)

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)(1)(A)). "To determine whether a claimant meets this definition, the ALJ conducts a five-step sequential evaluation." Id.; see 20 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.
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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.
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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.
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> 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.[1]
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> 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. 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. If the Commissioner meets this burden, the claimant is "not disabled" and therefore not entitled to disability insurance benefits. 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); see also 20 C.F.R. §§ 404.1520, 416.920.

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[1] "At step four, the ALJ must consider the functional limitations imposed by the claimant's impairments and determine the claimant's residual functional capacity." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1194 (9th Cir. 2004).

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 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).

Further, 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)).

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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 Plaintiff had not engaged in a substantially gainful activity since her application date of February 15, 2012. (AR13.) At step two, the ALJ found that Plaintiff was suffering from the following severe impairments: a mood disorder and myotisis. (Id.) At step three, the ALJ found that none of Plaintiff's impairments, independently or in combination, met one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id.) Next, in order to complete step four, the ALJ determined that Plaintiff's RFC allowed her to perform medium work, with the exception of work involving unprotected heights or dangerous machinery. (AR16.) The ALJ also determined that Plaintiff was capable of performing routine and noncomplex tasks, but must avoid sustained, intense interaction with the public, coworkers, and supervisors. (Id.)

In so finding, the ALJ rejected Plaintiff's alleged disability. Plaintiff alleged that her disability arose from four sources: fibromyalgia, neuropathy, depression, and poor coordination. (See generally AR40-46.) Plaintiff claimed these conditions resulted in debilitating pain that prevented her from engaging in many basic activities, including any work-related activities. (Id.)

The ALJ determined that none of Plaintiff's conditions justified her inability to work any job. The ALJ dismissed Plaintiff's fibromyalgia claim because Dr. Lorber, an impartial, nonexamining, medical expert, found the diagnosis of fibromyalgia was not supported. (AR25.) Similarly, the ALJ determined that Plaintiff did not suffer from neuralgia[2] because Dr. Lorber testified that her migraines and various alleged pains were not supported by any findings from physical exams. (Id.) As for Plaintiff's depression,

[2] Trigeminal neuralgia is a chronic pain condition that affects the trigeminal nerve, which carries sensation from the face to the brain. Trigeminal neuralgia, Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/trigeminal-neuralgia/basics/definition/con-20043802 (last accessed Jul. 6, 2017).

the ALJ did not dismiss it entirely, but found that it only moderately limited her social functioning and concentration. (AR26.) The ALJ concluded at step four that Plaintiff was unable to perform her past employment. (AR 28.) At step five, however, the ALJ found that Plaintiff was not disabled, pursuant to Medical Vocational Rule 203.19. (AR29.)

Plaintiff moves for summary judgment on the grounds that the ALJ erred in determining Plaintiff had a medium RFC. (Doc. No. 12-1 at 23.) Additionally, Plaintiff claims that the ALJ, in his analysis at step five, failed to consider Plaintiff's alleged inability to communicate in English. (Id. at 11-12.) Finally, Plaintiff argues that the ALJ's decision is incorrect in light of the additional evidence Plaintiff presented to the Appeals Council. For the following reasons, the Court disagrees and grants summary judgment for Defendant.

A. The ALJ Did Not Err in Determining Medium RFC

Plaintiff claims that the ALJ incorrectly found that Plaintiff had the capacity to perform medium work as defined in 20 C.F.R. 404.1567(c). (Doc. No. 12-1 at 23-24.) Plaintiff contends the RFC determination was erroneous because (1) substantial evidence does not support the ALJ's conclusion, (2) the ALJ assigned insufficient weight to treating physicians, and (3) the ALJ did not provide sufficient reasons for finding Plaintiff only partially credible. (See id.)

An individual's RFC is his or her ability to do sustained work activities despite limitations from any impairments. 42 U.S.C. § 404.1545(a). The RFC assessment considers any symptoms related to a claimant's impairment(s), such as pain, that may limit what the claimant can do in a work setting. Id. In establishing a claimant's RFC, the ALJ must assess all relevant evidence in the record, and consider all of the claimant's impairments, including those categorized as non-severe. Id. § 404.1545(a)(3),(e). While non-severe impairments alone may not limit an individual's ability to work, they may be critical to the outcome of a claim when considered with other limitations. SSR 96-8p.

The ALJ must evaluate all medical opinions it receives in determining the claimant's RFC. 20 C.F.R. § 404.1527(c). A medical opinion is "a statement from a medical source

about what [claimants] can still do despite [their] impairments." Id. § 404.1527(a)(1). Generally, the ALJ gives more weight to opinions from treating sources. Id. § 404.1527(c)(1), (c)(2). Unless the treating source's opinion is well supported "by medically acceptable clinical and laboratory diagnostic techniques" and is not inconsistent with other evidence in the record, the ALJ cannot give it controlling weight. Id. § 404.1527(c)(2). In cases where a treating source was not given controlling weight, non-treating, non-examining physicians may provide substantial evidence to support the ALJ's findings. Thomas, 278 F.3d at 957. In determining how much weight to give medical opinions of non-treating physicians, the ALJ considers: (1) the extent of the medical examination; (2) how much the opinion is supported and explained by evidence in the record; (3) how consistent the medical opinion is with the record as a whole; (4) whether the opinion comes from a specialist; and (5) other factors that support or contradict the medical opinion. See 20 C.F.R. § 404.1527 (c)(1)-(6). The ALJ must incorporate evidence from prior state agency medical consultants as appropriate and give weight according to the standards stated above. Id. § 404.1513a(b)(1)[3]

With these requirements in mind, the ALJ's RFC finding of a medium work limitation was properly based on substantial evidence in the record and free from legal error. Thus, the Court affirms.

1. Substantial Evidence Supports the ALJ's RFC Determination

"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 ALJ has

[3] State agency medical consultants are considered to be "highly qualified and experts in Social Security disability evaluation." 20 C.F.R. § 404.1513a(b)(1)

a responsibility "to determine credibility, resolve conflicts in the testimony, and resolve ambiguities in the record." Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1098 (9th Cir. 2014) (quoting Andrews, 53 F.3d at 1039). As such, the ALJ's decision must be upheld where the evidence is susceptible to more than one rational interpretation. Andrews 53 F.3d at 1039. In regard to both Plaintiff's physical and mental conditions, the ALJ decision is supported by substantial evidence.

i. Physical Conditions

Plaintiff argues the ALJ's RFC determination is not supported by substantial evidence in light of her various physical ailments. Plaintiff claims the ALJ overlooked her left finger deformity, which originates from a workplace accident in a Vietnamese sugarcane factory prior to 1979, and causes her too much pain to work. (AR41-43; see also Doc. No. 12-1 at 13-15.) Additionally, Plaintiff asserts that the ALJ improperly disregarded her alleged neuralgia and fibromyalgia. Contrary to Plaintiff's argument, the ALJ's RFC determination was not erroneous given that the decision to discount the severity of Plaintiff's physical conditions was supported by substantial evidence. Andrews, 53 F.3d at 1039 ("Substantial evidence . . . is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.")

In finding Plaintiff capable of engaging in medium-level work, the ALJ relied heavily on the testimony of Dr. Lorber, a non-treating medical expert. (AR25.) With regard to Plaintiff's finger, Dr. Lorber testified that claimant had good dexterity in her left hand and that nothing in the record indicated a worsening of Plaintiff's index finger. (See AR25, 51.) In developing his opinion, Dr. Lorber relied on evidence that Plaintiff was able to assemble small parts for many years after her finger injury, and testified that the medical records indicated that her condition had not worsened. (Id.) Additionally, Dr. Lorber pointed out that Plaintiff stopped working at her job because of pelvic pain rather than issues with her left index finger. (AR27.) Although Plaintiff's treating physicians provided some evidence supporting a disability finding, Dr. Lorber cited numerous instances in the record that show Plaintiff's left index finger did not produce a severe disability. (AR24;

see also AR903, 918, 1103 (indicating that the pain in Plaintiff's left index finger was neither caused by fibromyalgia nor related to Plaintiff's prior injury).) Dr. Lorber's testimony, in conjunction with the evidence he cited, constituted substantial evidence to disregard Plaintiff's left index finger impairment. Thomas, 278 F.3d at 957 (9th Cir. 2002) ("The opinions of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are consistent with independent clinical findings or other evidence in the record."); Tonepetyan v. Halter, 242 F.3d 1144 (9th Cir. 2001) (holding that the opinion of a non-examining medical expert may constitute substantial evidence when it is consistent with other independent evidence in the record); Andrews, 53 F.3d at 1041 ("reports of the nonexamining advisor need not be discounted and may serve as substantial evidence when they are supported by other evidence in the record").

Similarly, substantial evidence supports the ALJ's RFC determination despite Plaintiff's complaints of neuralgia. In analyzing Plaintiff's alleged neuralgia impairment, the ALJ began by noting that although Plaintiff reported severe headaches and body pain, multiple physical examinations showed normal musculoskeletal and neurological findings that support minimal limitations. (AR17.) Specifically, the ALJ noted that a May 3, 2012 exam at Kaiser revealed that she was in no acute distress, had normal neck range of motion, intact cranial nerves II-XII, normal coordination, no HEENT abnormalities, and normal motor strength. (AR18 (citing AR384-89).) Findings from a CT scan of Plaintiff's head during this examination at Kaiser showed no evidence of intracranial abnormalities that would cause severe headaches. (AR832-33.) To corroborate this, the ALJ cited a July 27, 2012 diagnosis finding no evidence of aneurysm, arteriovenous malformation, venous angioma, multiple sclerosis plaques in the brain stem, atrophy, or swelling, which demonstrated that there was no definite cause for Plaintiff's alleged trigeminal neuralgia. (AR19 (citing AR835-837).) Despite diagnoses of neuralgia from other doctors, the ALJ gave controlling weight to Dr. Lorber's testimony in referencing these tests. (See AR23.) The ALJ's reliance on Dr. Lorber's testimony, which is corroborated by the record,

amounts to substantial evidence to support a finding that Plaintiff did not suffer from a severe neuralgia impairment. Thomas, 278 F.3d at 957.

Lastly, the ALJ's RFC determination was proper despite Plaintiff's claim of fibromyalgia because substantial evidence supports the ALJ's conclusion that Plaintiff did not meet the diagnostic requirements for fibromyalgia. Andrews, 53 F.3d at 1039. On July 25, 2012, the Social Security Administration issued a Policy Interpretation Ruling providing guidance on how to determine if a person has a medically determinable impairment of fibromyalgia. SSR 12-2p, 77 Fed. Reg. 43640 (July 25, 2012). This ruling established the criteria for a finding of fibromyalgia: an applicant must have: (1) a history of widespread pain; (2) at least eleven positive trigger points on physical examination, or repeated manifestations of at least six fibromyalgia symptoms; and (3) evidence that other disorders that could cause the symptoms were excluded. Id.

The ALJ gave controlling weight to Dr. Lorber's testimony that Plaintiff did not conclusively suffer from fibromyalgia. (AR24.) None of the various diagnoses of fibromyalgia, as Dr. Lorber pointed out, were supported by a finding of eleven or more positive trigger point sites. (AR23.) Dr. Lorber pointed to a lack of support in the evidence to invalidate a finding of fibromyalgia, which amounts to a specific and legitimate reason for discrediting the findings of other physicians. Dominguez v. Colvin, 927 F. Supp. 2d 846, 860 (C.D. Cal. 2013) ("[T]he ALJ reasonably concluded that that diagnosis was not 'well documented' because 'no physician indicated number of tender trigger points to confirm the diagnosis.'"). Additionally, the ALJ noted that in two separate exams for chronic pain due to fibromyalgia on March 25 and June 24, 2014, Plaintiff had intact cranial nerves II-XII, normal muscle bulk, intact sensation and symmetrical reflexes in all four extremities, normal gait, and was alert and in no acute distress. (AR18 (citing AR902-23).) The ALJ noted that a more recent exam on March 31, 2015 corroborates these findings given that Plaintiff was in no acute distress, and had intact cranial nerves II-XII with full visual fields and facial sensation. (AR19 (citing AR1103-04.) Therefore, the ALJ was

permitted to rely on Dr. Lorber's opinion because it was supported by these objective medical findings, and thus amounts to substantial evidence. Thomas, 278 F.3d at 957.

ii. Mental Conditions

The ALJ did not err in his RFC determination, even though the ALJ determined that Plaintiff suffered from a severe impairment of mood disorder, because it is supported by substantial evidence. In the RFC analysis, the ALJ noted that Dr. Engelhorn, a state consultative examiner found Plaintiff to have generally normal cognitive findings, except that Plaintiff had a somewhat depressed mood. (AR20 (citing AR620-23).) Additionally, an August 30, 2014 exam by Dr. Henderson revealed Plaintiff had an impaired memory, depressed mood, poor energy, poor concentration and attention, and limited judgment. (AR21 (citing AR932-33).) The ALJ properly incorporated these findings in the RFC analysis, and determined that Plaintiff suffers from a severe impairment of a Mood Disorder which precludes sustained interaction with the public, coworkers, and supervisors, but does not prevent her from undertaking all jobs. Fry v. Astrue, No. EDCV 09-1933 AJW, 2010 WL 2948826, at *3 (C.D. Cal. July 23, 2010) (holding that the ALJ properly incorporated the opinions of physicians in determining that Plaintiff had a severe impairment of mood disorder); Price v. Astrue, No. ED CV 09-01118-VBK, 2010 WL 480985, at *1 (C.D. Cal. Feb. 3, 2010) (finding that the ALJ considered varied psychiatric evidence, and thus made a proper determination that Plaintiff had a severe impairment of mood disorder); (see also AR27.).

Substantial evidence in the record, which the ALJ cited, supports a finding that Plaintiff's severe mental impairment would not preclude Plaintiff from a medium RFC. (See AR21, 26.) Specifically, the ALJ noted that findings in Mental Status examinations (MSE) were generally unremarkable and within normal limits. (AR20.) For example, on May 9, 2012, Plaintiff denied being depressed and an examination showed she had normal mood and affect. (AR375-76).) Additionally, the ALJ cited to both MSEs and physical examinations, dated April 20, 2012 through December 5, 2014, showing numerous reports of intact cognitive functioning and a normal mood. (AR21 (citing AR334-55, 1029-78).)

Dr. Henderson, who began treating Plaintiff once a month on February 1, 2013, (see AR880), did not find that Plaintiff had any serious mental impairment until his January 5, 2015 diagnosis, (AR934). Moreover, Dr. Engelhorn noted that Plaintiff's daily activities and lack of hospitalization demonstrates that Plaintiff does not suffer from severe mental impairments. (AR621.) As such, substantial evidence in the record indicates that the ALJ's RFC evaluation of Plaintiff's mental impairments were not erroneous. Thomas, 278 F.3d at 957

In sum, the ALJ relied on sufficient evidence to support a Medium RFC finding regarding Plaintiff's left index finger, neuralgia, fibromyalgia, and mental impairment. This evidence is susceptible to more than one rational interpretation, and the ALJ's RFC determination must therefore be affirmed. Andrews 53 F.3d at 1039.

2. The ALJ Properly Evaluated the Opinion Evidence

Plaintiff asserts that the ALJ's RFC determination was erroneous because the ALJ improperly discredited the opinions of treating physicians in favor of nonexamining medical expert, Dr. Lorber's evaluation. (Doc. No. 12-1 at 13-18.) 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 513969, *7 (N.D. Cal. 1998). 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' opinion, 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).

i. Physical Conditions

Plaintiff argues that the ALJ improperly discredited various treating physicians' opinions regarding her physical ailments. (Doc. 12-1 at 18.) Specifically, the ALJ gave minimal weight, if any, to the opinions of Drs. Geanacou, Sidrick, Cohen, Amand, and Grisolia. In doing so, the ALJ discounted the alleged severity of Plaintiff's finger pain and fibromyalgia.

In analyzing Plaintiff's left index finger deformity, the ALJ did not err in discrediting the opinions of Drs. Sidrick and Grisolia because the ALJ provided specific and legitimate reasons, which are supported by substantial evidence. Dr. Sidrick did not make a diagnosis of chronic pain, but described that Plaintiff had a decreased range of motion in her left index finger. (AR894-95, 899-900.) In turn, on March 31, 2015, Dr. Grisolia found that Plaintiff suffered from a chronic pain in her left index finger that developed within the last two years of the date. (AR1103.) The ALJ disregarded these opinions because "few detailed findings [in the physicians' reports] support significant limitations," and Dr. Lorber testified that Plaintiff did not have a severe impairment in her left index finger.

(AR18.) Dr. Lorber cited evidence that Plaintiff was able to assemble small parts for many years after her finger injury, and testified that the medical records indicated that her condition had not truly worsened since the injury. (AR25, 51.) In addition, the ALJ pointed to numerous instances in the record that show Plaintiff's left index finger did not produce a severe disability. (AR24; see also AR903, 918, 1103 (indicating that the pain in Plaintiff's left index finger was neither caused by fibromyalgia nor related to Plaintiff's prior injury).) This amounts to specific and legitimate reasons for rejecting the opinions of Dr. Sidrick and Grisolia. Reddick, 157 F.3d at 725.

With regard to Plaintiff's fibromyalgia, the ALJ disregarded the conclusory opinions of treating and examining physicians Drs. Geanacou, Cohen, Sidrick, and Grisolia because their diagnoses were not supported by the medical evidence. (AR27.) Plaintiff was first diagnosed with fibromyalgia, absent an explanation of criteria, on June 7, 2012 by one of her treating physicians, Dr. Geanacou. (AR1209.) On March 4, 2013, Dr. Cohen, a rheumatologist, similarly diagnosed Plaintiff with fibromyalgia, and identified tenderness in several trigger point areas, but did not document the exact number of positive trigger points. (AR1199.) In a diagnosis on December 13, 2013, Dr. Sidrick, another treating physician, wrote that Plaintiff was unable to work due to fibromyalgia, but did not document any positive trigger points. In a July 26, 2014 letter, Dr. Sidrick described Plaintiff as having symptoms consistent with fibromyalgia, including chronic pain and depression. (AR918.) Dr. Grisolia, a neurologist, affirmed Plaintiff's fibromyalgia diagnosis on June 24, 2014, but did not support this finding with a trigger point assessment. (AR902.) Finally, on October 30, 2014, Dr. Geanacou referred Plaintiff for chiropractic treatment to alleviate her fibromyalgia symptoms. (AR928.)

The ALJ did not err in disregarding the opinions of Plaintiff's treating and examining physicians. Treating physician opinions are properly discredited if they are "conclusory, brief, and unsupported by the record." Batson, 359 F.3d at 1195. Here, none of the diagnoses of fibromyalgia are supported by the record because, as Dr. Lorber pointed out, they did not satisfy the SSDI's diagnostic criteria of eleven or more positive trigger point

sites. See SSR 12-2p, 77 Fed. Reg. 43640 (July 25, 2012); (AR23.) Indeed, only Dr. Cohen's diagnosis on March 4, 2013 identified any trigger points, which still lacked a sufficient number to support a finding of fibromyalgia because he only noted eight. (AR1199.) These findings of fibromyalgia were also contradicted by a March 25, 2014 examination performed by Dr. Grisolia, who found her to have a normal gait and intact neurological functions. (AR902-903.) The ALJ was permitted to reject the conclusory diagnoses of fibromyalgia because they were inconsistent with Social Security's diagnostic criteria for fibromyalgia, and the evidence in the record. See Batson, 359 F.3d at 1195 ("ALJ may discredit treating physicians' opinions that are conclusory, brief, and unsupported by the record as a whole . . . or by objective medical findings."); 20 C.F.R. §§ 404.1527(c)(4) ("Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion."), 416.927(c)(4) (same).

ii. Mental Conditions

Plaintiff argues that the ALJ erred in discounting the opinions of Dr. Henderson and Dr. Lessner with regards to Plaintiff's mental impairments. (See Doc. No. 12-1 at 19.) On July 11, 2014, Dr. Lessner, an examining physician, diagnosed Plaintiff with major depression with psychotic features, posttraumatic stress disorder, and paranoid personality disorder. (AR916-17.) Additionally, Dr. Lessner scored Plaintiff with a GAF of 30-40, indicating major mental impairment, and precluding Plaintiff from making decisions, concentrating, or working in any job environment. (See id.) On January 5, 2015, Dr. Henderson, a treating physician, similarly diagnosed Plaintiff with major depression and post-traumatic stress disorder. (AR934.) In this diagnosis, Dr. Henderson described that Plaintiff cannot comprehend or follow instructions, perform simple and repetitive tasks, or make decisions on her own. (Id.) Notwithstanding these findings, the ALJ gave most weight to the opinion of Dr. Engelhorn, a state examiner, who diagnosed Plaintiff only with mood disorder. (See AR26.)

The ALJ did not err in discounting Dr. Lessner's and Dr. Henderson's opinions, as he gave "specific and legitimate reasons" which are supported by "substantial evidence."

Reddick, 157 F.3d at 725. The ALJ cited the findings of several examining and treating physicians, including Drs. Geanacou and Cohen, which contradicted a finding of severe mental impairment. (See AR21.) These physical exams generally indicated that Plaintiff had a normal mood, and oppose a finding of a disabling mental impairment. (See generally AR1029-78). Furthermore, Plaintiff testified she was capable of activities, such as grocery shopping and going to church, that are impossible for someone with the severe mental impairments from which Plaintiff allegedly suffers. See Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (holding that an ALJ permissibly relied on testimony regarding Plaintiff's daily activities in rejecting a physician's opinion that Plaintiff was capable of carrying such activities out due to mental impairments); (see also AR21 (citing AR621).). This amounts to specific and legitimate reasons and offers proper grounds for rejecting the opinions of Plaintiff's physicians. Reddick, 157 F.3d at 725.

Additionally, the ALJ "may reject a treating physician's opinion if it is based to a large extent on a claimant's self-reports that have been properly discounted as incredible." Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (citations and internal quotation marks omitted). As the ALJ points out, Dr. Lessner's and Dr. Henderson's opinions, while based on clinical tests such as the Bender Gestalt test, were largely based on Plaintiff's reported symptoms. (See AR26.) Given that Plaintiff had been determined to be partially incredible, the ALJ rightfully discounted these examinations and their conclusions.[4] See Brawner v. Sec'y of Health & Human Servs., 839 F.2d 432, 433 (9th Cir. 1988). As such, the ALJ properly rejected the physicians' findings of severe mental disability, and gave controlling weight to Dr. Engelhorn's opinion, which is reflected in Plaintiff's RFC assessment. (AR27.)

In sum, the ALJ properly evaluated the opinion evidence regarding Plaintiff's fibromyalgia, left index finger pain, and mental impairment. The ALJ thoroughly explored

[4] The Court provides further explanation for this finding in Section A3 of this order.

the medical record, stated his interpretations, and made findings supported by substantial evidence. Heckler, 722 F.2d at 502.

3. The ALJ Properly Evaluated Plaintiff's Testimony

Plaintiff claims that the ALJ erred by partially rejecting Plaintiff's testimony regarding her subjective pain and the intensity of her symptoms. (Doc. No. 12-1 at 21-23.) Defendant asserts that the ALJ supported his decision to discount Plaintiff's testimony with substantial evidence. (Doc. No. 17-1 at 16-18.) After reviewing the record and the ALJ's reasoning, the Court concludes that the ALJ did not err in determining Plaintiff to be only partially credible given that Plaintiff's daily activities involved the "performance of physical functions that are transferable to a work setting." Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir. 2001).

In evaluating the credibility of a claimant's testimony regarding subjective pain or the intensity of symptoms, the ALJ must engage in a two-step analysis. Molina, 674 F.3d at 1112. "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." Treichler, 775 F.3d at 1102 (internal quotation marks omitted). "Second, if the claimant has produced that evidence, and the ALJ has not determined that the claimant is malingering, the ALJ must provide 'specific, clear and convincing reasons for' rejecting the claimant's testimony regarding the severity of the claimant's symptoms." Id. (quoting Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.1996)).

"With respect to daily activities, [the Ninth Circuit] has held that if a claimant 'is able to spend a substantial part of [her] day engaged in pursuits involving the performance of physical functions that are transferable to a work setting, a specific finding as to this fact may be sufficient to discredit a claimant's allegations.'" Vertigan, 260 F.3d at 1049; see also Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (finding that an ALJ properly determined that the claimant's "ability to fix meals, do laundry, work in the yard, and occasionally care for his friend's child served as evidence of [the

claimant]'s ability to work"); Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008) (finding that the ALJ properly supported his adverse credibility determination by pointing to evidence in the record showing that the claimant "ha[d] normal activities of daily living, including cooking, house cleaning, doing laundry, and helping her husband in managing finances"). Here, as in Vertigan, the ALJ found that Plaintiff's testimony was not entirely credible because it was inconsistent with her daily activities. (AR21-22.) Specifically, the ALJ noted that, after the alleged onset date, Plaintiff reported that she had been using a treadmill every day and often practiced yoga and Tai Chi. (AR21 (citing AR822).) Plaintiff also reported that she could prepare simple meals, use a computer, go to church once a weak, and go grocery shopping. (AR21 (citing AR621).) These daily activities involve the "performance of physical functions that are transferable to a work setting" and, thus, the ALJ properly relied on Plaintiff's reported daily activities in finding her testimony not entirely credible. Vertigan, 260 F.3d at 1049.

B. The ALJ Did Not Err in Assessing Plaintiff's Language Abilities at Step Five

In her reply brief, Plaintiff contends for the first time that the ALJ erred at step five by failing to consider her limited English language skills. (Doc. No. 19 at 9.) The ALJ found that Plaintiff "is able to communicate in English" and did not include language limitations in any of his hypothetical questions to the Vocational Expert ("VE"). (AR28; see AR58-64.) Plaintiff argues this was erroneous because the ALJ's finding is not supported by substantial evidence and, thus, the VE should have been questioned regarding the impact of Plaintiff's language limitations. The Court disagrees. The ALJ's finding is supported by substantial evidence, in particular that Plaintiff previously worked for 18 years in a job requiring DOT Level 2 reading skills, and, thus, the ALJ's examination of the VE was not improper.

The ALJ's finding that Plaintiff is able to communicate in English is supported by substantial evidence. Plaintiff worked for 18 years as an electronics assembler—a job that the Dictionary of Occupational Titles ("DOT") says requires, at minimum, a level two language development. See DOT No. 726.684-018. This language development level

indicates an employee can "[w]rite compound and complex sentences," "[s]peak clearly and distinctly," and has a "[p]assive vocabulary of 5,000-6,000 words." Additionally, in a July 11, 2014 psychological evaluation, Doctor Henderson stated that Plaintiff "appeared to understand much of the English dialogue." (AR907.) As such, there is substantial evidence supporting the ALJ's finding that Plaintiff could communicate in English. See Palomares, 887 F. Supp 2d. at 921–22 ("Because the language requirement for Mr. Palomares' previous occupation is the lowest level in the DOT, the Court assumes that the ability to communicate in English . . . is consistent with the level one language requirements and the language ability found by the ALJ).

Certainly there is some evidence in the record to support Plaintiff's claim that she has limited English skills. For example, at her hearing in front of the ALJ, Plaintiff testified that she could speak "very little" English and required an interpreter. (AR37-40.) Similarly, Plaintiff's disability application states that she cannot speak, read, or understand English, but she can write more than her name in English. (AR255.) Also, various medical records indicate that Plaintiff sometimes used interpreters, including her daughter, for over-the-phone and in-person consolations with various physicians. (See AR342, 363, 392, 402, 456, 619, 637, 672, 932, 1088, 1102, 1115, 1145, 1291.) This conflicting evidence, however, does not obviate the fact that Plaintiff was successfully employed for 18 years in a job that required her to be able to communicate in English. Because the record is subject to more than one rational interpretation, the Court must uphold the ALJ's conclusion. Andrews 53 F.3d at 1039.

As the ALJ's finding that Plaintiff was able to communicate in English was supported by substantial evidence, the ALJ did not err by omitting any literacy limitation from the hypotheticals he posed to the VE. Osenbrock v. Apfel, 240 F.3d 1157, 1164-65 (9th Cir. 2001) (holding that the ALJ did not err in asking hypothetical questions to the VE that did not consider some of Plaintiff's alleged limitations because they were not supported by substantial evidence). Furthermore, Plaintiff's reliance on both Pinto v. Massanari, 249 F.3d 840 (9th Cir. 2001) and Silveira v. Apfel, 204 F.3d 1257 (9th Cir.

2000) is misplaced. In Pinto, the ALJ found that the SSDI applicant spoke "very little English" but then failed to "address the impact of [the applicant's] illiteracy on her ability to find and perform a similar job." 249 F.3d at 847. As such, the Ninth Circuit remanded the case, holding that "in order for an ALJ to rely on a job description in the Dictionary of Occupational Titles that fails to comport with a claimant's noted limitations, an ALJ must definitively explain this deviation." That holding is inapplicable here because the ALJ found the Plaintiff could communicate in English—indeed she had held a job of equivalent or higher language skills for 18 years. Similarly, Silveira is inapplicable because, there, the ALJ "made no express finding that Silveira was literate in English" and the Ninth Circuit remanded for the ALJ to determine whether Silveira was literate. 204 F.3d at 1261-62. Here, the ALJ found that Plaintiff could communicate in English. This finding is supported by substantial evidence and, thus, there was no error in the examination of the VE. Osenbrock, 240 F.3d at 1164-65; see also Landeros v. Astrue, No. CV 11-7156-JPR, 2012 WL 2700384, at *6 (C.D. Cal. July 6, 2012) (rejecting plaintiff's argument that "apparent conflicts" existed between VE's testimony and DOT in part because plaintiff's counsel failed to question VE about any such conflicts).

C. New Evidence Submitted to the Appeals Council

Plaintiff argues that the ALJ improperly disregarded substantial portions of the record and the Appeals Council erred in refusing to give weight to the supplemental evidence that was submitted after the ALJ hearing. The Ninth Circuit has held that evidence evaluated in a decision by the Appeals Council "becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence." The district court may remand the case to the ALJ to reconsider the decision in light of the additional evidence. Taylor v. Comm'r of Soc. Sec. Admin., 659 F.3d, 1228, 1233. However, "under 42 U.S.C. § 405(g), remand is warranted" only if Plaintiff can show the additional evidence is material. Bruton v. Massanari, 268 F.3d 824, 827 (9th Cir. 2001). Evidence is material if it bears "directly and substantially on the matter in dispute" and there is a reasonable possibility

that it would have changed the outcome of the administrative hearing. Mayes v. Massanari, 276 F.3d 453, 462 (9th Cir. 2001). Plaintiff did not meet her burden.

The additional evidence that Plaintiff submitted to the Appeals Council concerned Plaintiff's medical condition from a few months before the ALJ's May 11, 2015 decision to almost a year after the decision. (AR1112-1293.) Although the new evidence shows that Plaintiff was diagnosed with arthritis in her left index finger on June 6, 2015, (AR1125), her testimony regarding her daily activities, including using a computer, contradict a finding of severe pain in her finger. Additionally her activities involving daily exercises in yoga and Tai Chi contradict any new medical evidence of finding of severe, debilitating pain in her cervical spine. (See AR1112.) Accordingly, the new evidence does not provide a dispositive confirmation of Plaintiff's subjective complaints of pain in her finger and her spine, given that the weight of the new record still contradicts her testimony. Cook v. Comm'r of Soc. Sec., No. 2:16-CV-00061-FVS, 2017 WL 1479430, at *5 (E.D. Wash. Mar. 29, 2017) ("Moreover, even considering this 'new evidence,' the ALJ's finding that the Plaintiff's subjective complaints are not credible because the overall medical evidence does not support Plaintiff's alleged limitations, is still supported by substantial evidence, for all the reasons discussed herein.") (citing Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)). There is no reasonable possibility that the ALJ would have found Plaintiff disabled, even with due consideration given to the additional evidence. Mayes, 276 F.3d at 462. As such, the new evidence is not material and this case need not be remanded to the ALJ. Id.

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CONCLUSION

For the foregoing reasons, the Court concludes that the ALJ's decision was supported by substantial evidence and based on proper legal standards. Therefore, the ALJ's disability determination must be upheld. See Garrison, 759 F.3d at 1009. Accordingly the Court denies Plaintiff's motion for summary judgment, grants the Defendant's cross-motion for summary judgment, and affirms the Commissioner's final decision.

IT IS SO ORDERED.

DATED: July 25, 2017

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT