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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LERITA TEVERBAUGH,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,

16 Defendant.

Case No.: 17-cv-1522-JM (RNB)

**REPORT AND
RECOMMENDATION REGARDING
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

(ECF Nos. 11, 12)

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18 This Report and Recommendation is submitted to the Honorable Jeffrey T. Miller,
19 United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule
20 72.1(c) of the United States District Court for the Southern District of California.

21 On July 26, 2017, plaintiff Lerita Teverbaugh filed a Complaint pursuant to 42
22 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social
23 Security denying her applications for a period of disability and disability insurance benefits
24 and supplemental security income (“SSI”). (ECF No. 1.)

25 Now pending before the Court and ready for decision are the parties’ cross-motions
26 for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that
27 plaintiff’s motion for summary judgment be **DENIED**, that the Commissioner’s cross-
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1 motion for summary judgment be **GRANTED**, and that Judgment be entered affirming the
2 decision of the Commissioner and dismissing the action with prejudice.

4 **PROCEDURAL BACKGROUND**

5 On September 11, 2013, plaintiff protectively filed applications for a period of
6 disability and disability insurance benefits and SSI under Title II and XVI, respectively, of
7 the Social Security Act, alleging disability beginning January 19, 2013. (Certified
8 Administrative Record [“AR”] 194-203, 204-09.) After her applications were denied
9 initially and upon reconsideration (AR 129-33, 137-41), plaintiff requested an
10 administrative hearing before an administrative law judge (“ALJ”). (AR 146-47.) An
11 administrative hearing was held on November 18, 2015. Plaintiff appeared at the hearing
12 with counsel, and testimony was taken from her and a vocational expert (“VE”). (AR 32-
13 78.)

14 As reflected in his January 22, 2016 hearing decision, the ALJ found that plaintiff
15 had not been under a disability, as defined in the Social Security Act, from her alleged
16 onset date through the date of the decision. (AR 10-24.) The ALJ’s decision became the
17 final decision of the Commissioner on May 26, 2017, when the Appeals Council denied
18 plaintiff’s request for review. (AR 1-6.) This timely civil action followed.

20 **SUMMARY OF THE ALJ’S FINDINGS**

21 In rendering his decision, the ALJ followed the Commissioner’s five-step sequential
22 evaluation process. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that
23 plaintiff had not engaged in substantial gainful activity since January 19, 2013, her alleged
24 onset date. (AR 15.)

25 At step two, the ALJ found that plaintiff had the following severe impairments:
26 degenerative disc disease of the lumbar and cervical spines, obesity, diabetes mellitus II,
27 and osteoarthritis versus rheumatoid arthritis. (AR 15.)

28 At step three, the ALJ found that plaintiff did not have an impairment or combination

1 of impairments that met or medically equaled the severity of one of the impairments listed
2 in the Commissioner’s Listing of Impairments. (AR 16.)

3 Next, the ALJ determined that, from the alleged onset date to the date of the decision,
4 plaintiff had the residual functional capacity (“RFC”) “to perform the full range of semi-
5 skilled, light work.” (AR 16.)

6 For purposes of his step four determination, the ALJ adduced and accepted the VE’s
7 testimony that a hypothetical person with plaintiff’s vocational profile would be able to
8 perform the requirements of plaintiff’s past relevant work as a companion. Accordingly,
9 the ALJ found that plaintiff was not disabled at step four. (AR 19-20.)

10 11 **DISPUTED ISSUES**

12 As reflected in plaintiff’s cross-motion for summary judgment, the disputed issues
13 that plaintiff is raising as the grounds for reversal and remand are as follows:

- 14 1) Whether the ALJ failed to properly evaluate the medical evidence in assessing
15 plaintiff’s RFC; and
16 2) Whether the ALJ failed to properly evaluate plaintiff’s subjective complaints.
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18 **STANDARD OF REVIEW**

19 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
20 determine whether the Commissioner’s findings are supported by substantial evidence and
21 whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846
22 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a
23 preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Desrosiers v. Sec’y of*
24 *Health & Human Servs.*, 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is
25 “such relevant evidence as a reasonable mind might accept as adequate to support a
26 conclusion.” *Richardson*, 402 U.S. at 401. This Court must review the record as a whole
27 and consider adverse as well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 529-
28 30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation,

1 the Commissioner's decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452
2 (9th Cir. 1984).

4 DISCUSSION

5 A. Reversal is not warranted based on the ALJ's alleged failure to properly 6 evaluate the medical evidence in assessing plaintiff's RFC.

7 Plaintiff contends that the ALJ's physical RFC assessment is deficient because he
8 did not mention in his decision his consideration of Social Security Ruling ("SSR") 02-1p,
9 *available at* 2002 WL 34686281, which deals with obesity. Plaintiff appears to be arguing
10 that, if the ALJ had properly considered SSR 02-1p, he would have found plaintiff more
11 limited in her standing and walking abilities. (*See* ECF No. 11 at 5-7.) Although plaintiff
12 cites the findings on examination of Dr. Dao, the consultative examiner, and maintains
13 those findings are "inconsistent with the ability to engage in the prolonged standing and
14 walking required of light work," (*see* ECF No. 13 at 4), Dr. Dao expressly opined that
15 plaintiff could stand and walk for 6 hours in an 8-hour work day. (*See* AR 325.) Dr. Dao's
16 opinion, based on his own clinical findings and examination of plaintiff, constituted
17 substantial evidence on which the ALJ could properly rely for purposes of his RFC
18 determination. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Based on
19 their review of the medical record, the State agency physicians likewise opined that
20 plaintiff could stand/walk for 6 hours. (*See* AR 86, 111.) Their opinions also constituted
21 substantial evidence upon which the ALJ could properly rely for purposes of his RFC
22 determination. *See Thomas v. Barnhart*, 278 F.3d 947, 957(9th Cir. 2002) ("The opinions
23 of non-treating or non-examining physicians may also serve as substantial evidence when
24 the opinions are consistent with independent clinical findings or other evidence in the
25 record.").

26 Plaintiff further contends that the ALJ's mental RFC assessment is deficient because
27 it "represents nothing more than an impermissible lay medical opinion." (*See* ECF No. 11
28 at 7.) The Court disagrees. The ALJ was fulfilling his responsibilities under the

1 Commissioner's regulations when, after analyzing the record as a whole, he determined
2 that plaintiff's partially credited pain complaints would eliminate her ability to perform
3 skilled work.

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5 **B. Reversal is not warranted based on the ALJ's alleged failure to properly**
6 **evaluate plaintiff's subjective complaints.**

7 At the administrative hearing, plaintiff attributed her inability to work to abdominal
8 pain caused by constipation and lower back pain. (*See* AR 40-41.) However, plaintiff
9 admitted that her abdominal and lower back pain was alleviated with her daily pain
10 medication and bi-monthly epidurals, to the point where she did not need a doctor. (AR
11 39-40, 44, 51.) Plaintiff also confirmed that, despite her pain, there had never been a day
12 that she could not provide any help or care for her grandson. (AR 70.)

13 Plaintiff also testified at the administrative hearing about her daily activities. During
14 a typical day, plaintiff spends time preparing food, sitting down, lying down, and relaxing.
15 In the morning, she wakes up, takes her pain medication, and drives her grandchildren,
16 ages 12 and 14, to school. (AR 49.) Due to her grandson's special needs (psychosis,
17 bipolar, and brain tumor), plaintiff takes care of him and is paid for approximately 50 hours
18 a month of in-home care by In-Home Support Services ("IHSS"). (AR 53, 61.) She cooks
19 breakfast for him daily and supervises him as he eats and dresses. (AR 64-65.) In the
20 evening, plaintiff cooks dinner, helps her grandchildren with their homework, and monitors
21 her grandson while he brushes his teeth. (AR 52, 67.) Plaintiff travels to Lancaster,
22 California and Los Angeles, California for her and her grandchildren's doctor visits. (AR
23 51-52.)

24 The ALJ found that, while plaintiff's medically determinable impairments could
25 reasonably be expected to cause the alleged symptoms, her statements concerning the
26 intensity, persistence and limiting effects of the symptoms were not entirely credible. (*See*
27 AR 17.)

1 An ALJ's assessment of pain severity and claimant credibility is entitled to "great
2 weight." See *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Nyman v. Heckler*, 779
3 F.2d 528, 531 (9th Cir. 1986). Under the "Cotton standard," where the claimant has
4 produced objective medical evidence of an impairment which could reasonably be
5 expected to produce some degree of pain and/or other symptoms, and the record is devoid
6 of any affirmative evidence of malingering, the ALJ may reject the claimant's testimony
7 regarding the severity of the claimant's pain and/or other symptoms only if the ALJ makes
8 specific findings stating clear and convincing reasons for doing so. See *Cotton v. Bowen*,
9 799 F.2d 1403, 1407 (9th Cir. 1986); see also *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th
10 Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Bunnell v. Sullivan*, 947
11 F.2d 341, 343 (9th Cir. 1991). "General findings are insufficient; rather the ALJ must
12 identify what testimony is not credible and what evidence undermines the claimant's
13 complaints." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (internal quotation
14 marks and citations omitted).

15 Here, one of the reasons cited by the ALJ in support of his adverse credibility
16 determination was that plaintiff's regular activities suggested that she was more capable
17 than she alleged. (See AR 17.)

18 The Ninth Circuit has noted that there are "two grounds for using daily activities to
19 form the basis of an adverse credibility determination": Evidence of the daily activities
20 either (1) contradicts the claimant's other testimony, or (2) meets the threshold for
21 transferable work skills. See *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here, while
22 it appears that the ALJ was specifically invoking the first ground, plaintiff's ability to work
23 part-time as a paid caregiver for her disabled grandson actually implicated both grounds.
24 The Court therefore finds that this reason constituted a legally sufficient reason on which
25 the ALJ could properly rely in support of his adverse credibility determination. See *Molina*
26 *v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) ("Even where those activities suggest some
27 difficulty functioning, they may be grounds for discrediting the claimant's testimony to the
28 extent that they contradict claims of a totally debilitating impairment."); *Berry v. Astrue*,

1 622 F.3d 1228, 1234-35 (9th Cir. 2010) (evidence that claimant’s self-reported activities
2 suggested a higher degree of functionality than reflected in subjective symptom testimony
3 adequately supported adverse credibility determination); *Valentine v. Commissioner Social*
4 *Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009) (evidence that claimant exercised and
5 undertook projects suggested that claimant’s later claims about the severity of his
6 limitations were exaggerated); *Bray v. Commissioner of Social Security Admin.*, 554 F.3d
7 1219, 1227 (9th Cir. 2009) (“In reaching a credibility determination, an ALJ may weigh
8 consistencies between the claimant’s testimony and his or her conduct, daily activities, and
9 work record, among other factors.”).

10 The other reason cited by the ALJ in support of his adverse credibility determination
11 was that “[t]he objective medical evidence and all other evidence is not reasonably
12 consistent with the claimants allegations of total disability under our rules, but it is
13 sufficient to limit the claimant to only semi-skilled work.” (AR 17.) In support of this
14 reason, the ALJ proceeded to discuss the examination findings and physician opinions of
15 record. He noted for example that “[m]ost treatment notes list only subjective allegations
16 without clinical findings to support them,” and that “[t]hose records that do mention
17 clinical findings note primarily tenderness to palpation, but no acute distress, normal gait,
18 good range of motion throughout the extremities, and nearly full to full strength.” He also
19 cited *inter alia* Dr. Dao’s consultative internal medical medicine evaluation and Dr. Dao’s
20 opinion that plaintiff could perform medium work with frequent postural activities. (*See*
21 AR 17-18.)

22 Plaintiff contends that this second reason was legally insufficient because an adverse
23 credibility determination may not be based solely on the alleged lack of support in the
24 objective medical evidence. (*See* ECF No. 11 at 10-11; ECF No. 13 at 6.) Here, however,
25 lack of objective medical support was not the sole basis for the ALJ’s adverse credibility
26 determination, but just one of the reasons. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th
27 Cir. 2005) (“Although lack of medical evidence cannot form the sole basis for discounting
28 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.”).

1 The Court therefore finds that the ALJ's second stated reason also constituted a
2 legally sufficient reason on which the ALJ could properly rely in support of his adverse
3 credibility determination. *See, e.g., Molina*, 674 F.3d at 1113 (ALJ properly rejected
4 claimant's testimony in part because it was inconsistent with medical evidence in the
5 record); *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007) (ALJ properly considered
6 conflict between claimant's testimony about knee pain and specific evidence in the record);
7 *Morgan v. Comm'r of Soc. Sec.*, 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may properly
8 consider conflict between claimant's testimony of subjective complaints and objective
9 medical evidence in the record); *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998) (ALJ
10 may properly rely on weak objective support for the claimant's subjective complaints);
11 *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995) (ALJ may properly rely on lack of
12 objective evidence to support claimant's subjective complaints).

13 14 **CONCLUSION AND RECOMMENDATION**

15 For the foregoing reasons, this Court **RECOMMENDS** that plaintiff's motion for
16 summary judgment be **DENIED**, that the Commissioner's cross-motion for summary
17 judgment be **GRANTED**, and that Judgment be entered affirming the decision of the
18 Commissioner and dismissing this action with prejudice.

19 Any party having objections to the Court's proposed findings and recommendations
20 shall serve and file specific written objections within 14 days after being served with a
21 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections
22 should be captioned "Objections to Report and Recommendation." A party may respond
23 to the other party's objections within 14 days after being served with a copy of the
24 objections. *See* Fed. R. Civ. P. 72(b)(2). *See id.*

25 IT IS SO ORDERED.

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27 Dated: July 25, 2018

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ROBERT N. BLOCK
United States Magistrate Judge