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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JO ANN STEELE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No.: 3:17-cv-01923-LAB (RNB)

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

(ECF Nos. 17, 18)

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

On September 21, 2017, plaintiff Jo Ann Steele filed a Complaint pursuant to 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social Security denying her applications for a period of disability and disability insurance benefits and for child’s insurance benefits. (ECF No. 1.)

Now pending before the Court and ready for decision are the parties’ cross-motions for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that plaintiff’s motion for summary judgment be **DENIED**, that the Commissioner’s cross-

1 motion for summary judgment be **GRANTED**, and that Judgment be entered affirming the
2 decision of the Commissioner and dismissing this action with prejudice.

4 **PROCEDURAL BACKGROUND**

5 On December 26, 2013, plaintiff filed applications for a period of disability and
6 disability insurance benefits and for child’s insurance benefits under Title II of the Social
7 Security Act, alleging disability beginning on July 9, 2009. (Certified Administrative
8 Record [“AR”] 150-58.) After her applications were denied initially and upon
9 reconsideration (AR 99-102, 109-13), plaintiff requested an administrative hearing before
10 an administrative law judge (“ALJ”). (AR 114.) Although informed of her right to
11 representation, plaintiff chose to appear and testify without the assistance of an attorney or
12 other representative at an administrative hearing held on March 3, 2016. Testimony also
13 was taken from a vocational expert (“VE”). (AR 27-46.)

14 As reflected in his May 10, 2016 hearing decision, the ALJ concluded that plaintiff
15 had not been under a disability within the meaning of the Social Security Act prior to
16 attaining age 22 (for purposes of her application for child’s insurance benefits), and through
17 the date of his decision (for purposes of her application for a period of disability and
18 disability insurance benefits). (AR 14-21.) The ALJ’s decision became final on July 26,
19 2017, when the Appeals Council denied plaintiff’s request for review. (AR 1-5.) This
20 timely civil action followed.

22 **SUMMARY OF THE ALJ’S FINDINGS**

23 In rendering his decision, the ALJ followed the Commissioner’s five-step sequential
24 evaluation process. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that
25 plaintiff had not engaged in substantial gainful activity since June 9, 2009, her alleged onset
26 date. (AR 16.) The ALJ noted, however, that plaintiff had worked in a part-time capacity
27 as a tax preparer at wage levels just under substantial gainful activity 20 hours/week
28 throughout the entire period at issue. (*Id.*)

1 At step two, the ALJ found that plaintiff had the following severe impairments from
2 the alleged onset date: low back pain/abdominal pain of an unknown etiology, obesity,
3 chronic kidney disease/mild nephrotic syndrome, and headaches of an unknown etiology.
4 (AR 17.)

5 At step three, the ALJ found that plaintiff did not have an impairment or combination
6 of impairments that met or medically equaled one of the impairments listed in the
7 Commissioner's Listing of Impairments. (AR 17.)

8 Next, the ALJ determined that plaintiff had the residual functional capacity ("RFC")
9 to perform light work as defined in 20 C.F.R. § 404.1567(b) with occasional postural
10 movements. (AR 17.)

11 At step four, the ALJ determined that plaintiff was not able to perform her past
12 relevant work as a tax preparer. (AR 19.)

13 For purposes of his step five determination, the ALJ found that plaintiff's limitations
14 had little to no effect on the occupational base of unskilled light work. (AR 20.)
15 Accordingly, using the Commissioner's Medical-Vocational Guidelines as a framework
16 for his decision-making, the ALJ determined that plaintiff remained capable of performing
17 unskilled sedentary and light occupations that existed in significant numbers in the national
18 economy. (*Id.*) The ALJ therefore found that plaintiff was not disabled. (AR 20-21.)

20 **SOLE ISSUE IN DISPUTE**

21 The sole issue in dispute in this case is whether, in determining plaintiff's RFC, the
22 ALJ made a proper adverse credibility determination with respect to plaintiff's subjective
23 pain testimony.

25 **STANDARD OF REVIEW**

26 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
27 determine whether the Commissioner's findings are supported by substantial evidence and
28 whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846

1 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a
2 preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Desrosiers v. Sec’y of*
3 *Health & Human Servs.*, 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is
4 “such relevant evidence as a reasonable mind might accept as adequate to support a
5 conclusion.” *Richardson*, 402 U.S. at 401. This Court must review the record as a whole
6 and consider adverse as well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 529-
7 30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation,
8 the Commissioner’s decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452
9 (9th Cir. 1984).

11 DISCUSSION

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

26 As a preliminary matter, the Court notes that, while the ALJ acknowledged that the
27 consideration of a claimant’s symptoms involves a two-step process and recited the two
28 steps (*see* AR 18), he never actually made an explicit finding with respect to what he

1 described as step one (i.e., “whether there is an underlying medically determinable physical
2 or mental impairment(s). . . that could reasonably be expected to produce the claimant’s
3 pain or other symptoms”). However, plaintiff has not specifically raised this error by the
4 ALJ, which may have just been an oversight, but rather is challenging the sufficiency of
5 the reasons specified by the ALJ in support of his adverse credibility determination. (*See*
6 ECF No. 17-1 at 4-10.) Since, as discussed hereafter, the Court disagrees with plaintiff
7 that the reasons cited by the ALJ in support of his adverse credibility determination are
8 “woefully insufficient,” the Court will deem the ALJ’s technical step one error harmless.
9 *See Stout v. Commissioner of Social Security*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an
10 ALJ’s error is harmless when the error is inconsequential to the ultimate non-disability
11 determination); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir.1991) (harmless error rules
12 applies to review of administrative decisions regarding disability).

13 One of the reasons cited by the ALJ in support of his adverse credibility
14 determination was that plaintiff’s reported daily activities including part-time work activity
15 and schooling throughout the period at issue rendered her allegations of disabling
16 symptoms and limitations not fully consistent with the record. (*See* AR 19.)

17 The Ninth Circuit has noted that there are “two grounds for using daily activities to
18 form the basis of an adverse credibility determination”: Evidence of the daily activities
19 either (1) contradicts the claimant’s other testimony, or (2) meets the threshold for
20 transferable work skills. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here, while
21 it appears that the ALJ was specifically invoking the first ground, plaintiff’s ability to work
22 part-time as a tax preparer for 20 hours per week while she was a college student actually
23 implicated both grounds. The Court therefore finds that this reason constituted a legally
24 sufficient reason on which the ALJ could properly rely in support of his adverse credibility
25 determination. *See Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) (“Even where
26 those activities suggest some difficulty functioning, they may be grounds for discrediting
27 the claimant’s testimony to the extent that they contradict claims of a totally debilitating
28 impairment.”); *Berry v. Astrue*, 622 F.3d 1228, 1234-35 (9th Cir. 2010) (evidence that

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

9 Moreover, the Court concurs with the Commissioner that the part time nature of
10 plaintiff’s employment appears largely due to the fact that she was a college student for the
11 majority of this period. Plaintiff testified that she had been in college since 2012 and
12 remained there until a couple of weeks prior to the administrative hearing (i.e., for more
13 than six years after she allegedly became disabled). (*See* AR 31). Plaintiff’s levels of
14 employment and education were entirely contrary to a claim of disability. *See Matthews v.*
15 *Shalala*, 10 F.3d 678, 679-80 (9th Cir. 1993) (ALJ provided “specific findings” for
16 rejecting “claimant’s subjective allegation of pain” when he noted that she was attending
17 school three days a week, “an activity which is inconsistent with an alleged inability to
18 perform all work”).

19 The other reason cited by the ALJ in support of his adverse credibility determination
20 was that “the severity of pain alleged from [plaintiff] is disproportionate to the objective
21 evidence.” (AR 19.) The ALJ specifically noted in this regard that “[t]he examinations of
22 record within the period at issue revealed no significant findings related to neurological
23 involvement, muscle wasting, or muscle atrophy normally associated with pain and
24 inactivity” and that “the objective records consistently noted a steady/normal gait with no
25 secondary issues supportive of functional limitations beyond a wide range of light work
26 due to the combined effects of mild chronic kidney disease, obesity, and intermittent
27 complaints of headaches, abdominal pain, and low back pain of unknown etiologies.” (*See*
28 *id.*)

1 Plaintiff does not dispute that her subjective pain testimony was not supported by
2 the objective medical evidence of record, but rather contends that this second reason was
3 legally insufficient because an adverse credibility determination may not be based on the
4 alleged lack of support in the objective medical evidence. (*See* ECF No. 17-1 at 5-6.) Here,
5 however, lack of objective medical support was not the sole basis for the ALJ’s adverse
6 credibility determination, but just one of the reasons. *See Burch v. Barnhart*, 400 F.3d 676,
7 681 (9th Cir. 2005) (“Although lack of medical evidence cannot form the sole basis for
8 discounting pain testimony, it is a factor that the ALJ can consider in his credibility
9 analysis.”).

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

22 23 24 **CONCLUSION AND RECOMMENDATION**

25 For the foregoing reasons, this Court **RECOMMENDS** that plaintiff’s motion for
26 summary judgment be **DENIED**, that the Commissioner’s cross-motion for summary
27 judgment be **GRANTED**, and that Judgment be entered affirming the decision of the
28 Commissioner and dismissing this action with prejudice.

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

7 IT IS SO ORDERED.

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9 Dated: June 5, 2018



10 ROBERT N. BLOCK
11 United States Magistrate Judge
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