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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BEVERLY MARIE ROBERTS,

Plaintiff(s),

v.

NANCY A. BERRYHILL,

Defendant(s).

Case No. 2:16-CV-1232 JCM (GWF)

ORDER

Presently before the court is Magistrate Judge Foley's report and recommendation ("R&R"). (ECF No. 29). Defendant Carolyn W. Colvin ("defendant") filed a response (ECF No. 30), to which plaintiff Beverly Marie Roberts ("plaintiff") replied (ECF No. 31).

Also before the court is plaintiff's motion to remand to the Social Security Administration. (ECF No. 24). Defendant filed a response (ECF No. 24), to which plaintiff replied (ECF No. 28).

Also before the court is defendant's motion for summary judgment. (ECF No. 27). Plaintiff filed a response (ECF No. 28). Defendant has not filed a reply, and the time to do so has passed.

I. Facts

The parties do not object to the factual presentation in the R&R. Therefore, the court adopts the factual representation in the R&R and will detail factual and procedural background in the discussion section of this order as necessary to explain the court's holding.

II. Legal Standard

A party may file specific written objections to the findings and recommendations of a United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);

1 LR IB 3-2. Where a party timely objects to a magistrate judge’s report and recommendation, the
2 court is required to “make a de novo determination of those portions of the [report and
3 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). The court “may accept,
4 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.”
5 Id.

6 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of
7 a magistrate judge within fourteen (14) days from the date of service of the findings and
8 recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a
9 motion within fourteen (14) days after service of the motion.

10 **III. Discussion**

11 Magistrate Judge Foley’s R&R holds that (1) the administrative law judge (“ALJ”) erred
12 in considering plaintiff’s failure to receive medical treatment for her symptoms during a period
13 of time in which she did not have health insurance as support for her finding that plaintiff’s
14 impairments were not “severe,” (2) the ALJ erred in rejecting the credibility of plaintiff’s
15 testimony regarding the severity of her impairments under “step two” of her analysis, and (3) the
16 ALJ erred in rejecting the credibility of plaintiff’s testimony regarding the severity of her
17 impairments under “step four” of her analysis. (ECF No. 29). Accordingly, Magistrate Judge
18 Foley recommends that the case be remanded for further administrative determination as to
19 whether plaintiff was disabled within the meaning of the Social Security Act. Id.

20 Defendant objects to Magistrate Judge’ Foley’s R&R, arguing that he “misinterpreted the
21 ALJ’s findings and improperly reweighed the evidence.” (ECF No. 30). Specifically, defendant
22 argues that the ALJ’s findings were supported by the objective medical evidence, and thus that
23 his determination that plaintiff had a “non-severe” impairment under the meaning of the Social
24 Security Act was supported by “substantial evidence of record.” Id.

25 A federal court’s review of an ALJ’s decision is limited to determining (1) whether the
26 ALJ’s findings are supported by substantial evidence and (2) whether the ALJ applied the proper
27 legal standards. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *Delorme v. Sullivan*, 924
28 F.2d 841, 846 (9th Cir. 1991). The Ninth Circuit has defined substantial evidence as “more than

1 a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
2 might accept as adequate to support a conclusion.” *Woish v. Apfel*, 2000 WL 1175584 (N.D.
3 Cal. 2000) (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)); see also *Lewis v.*
4 *Apfel*, 236 F.3d 503 (9th Cir. 2001).

5 The Court must look to the record as a whole and consider both adverse and supporting
6 evidence. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Where the factual findings of the
7 Commissioner of Social Security are supported by substantial evidence, the District Court must
8 accept them as conclusive. 42 U.S.C. § 405(g). Hence, where the evidence may be open to more
9 than one rational interpretation, the Court is required to uphold the decision. *Moore v. Apfel*, 216
10 F.3d 864, 871 (9th Cir. 2000) (quoting *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984)).
11 See also *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court may not substitute its
12 judgment for that of the ALJ if the evidence can reasonably support reversal or affirmation of the
13 ALJ’s decision. *Flaten v. Sec’y of Health and Human Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995).

14 The court now conducts a de novo review of the portions of Magistrate Judge Foley’s
15 R&R to which defendant objects. See 28 U.S.C. § 636(b)(1).

16 **a. *Plaintiff’s failure to receive medical treatment for her symptoms***

17 At “step two” of the ALJ’s analysis, the ALJ is tasked with determining whether the
18 claimant has a medically determinable impairment that is “severe” or a combination of
19 impairments that is “severe.” 20 CFR § 404.1520(c); 20 CFR § 416.920(c). (ECF No. 20-1).
20 The parties do not dispute that the ALJ found that plaintiff has two medically determinable
21 impairments: DeQuervain’s tenosynovitis, which causes plaintiff pain in her right hand and
22 wrist, and Hepatitis C. (ECF No. 20-1 at 28).

23 However, based in part upon the ALJ’s finding that plaintiff had “not generally received
24 the type of medical treatment one would expect for a totally disabled individual,” the ALJ
25 ultimately concluded that plaintiff’s impairments were not “severe” under the meaning of the
26 Social Security Act, and therefore that plaintiff was not entitled to benefits. *Id.* at 31.

27 Defendant objects to Magistrate Judge Foley’s finding that the ALJ erred in considering
28 plaintiff’s failure to seek regular medical treatment for her symptoms. (ECF No. 30). However,

1 it is well-settled in the Ninth Circuit that a claimant’s “failure to receive medical treatment
2 during the period that he had no medical insurance cannot support an adverse credibility
3 finding.” *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). The parties do not dispute that
4 plaintiff did not have medical insurance during the relevant time-frames. (ECF No. 30); (ECF
5 No. 20-1 at 73).

6 Therefore, to the extent that the ALJ considered plaintiff’s “relatively infrequent trips to a
7 doctor for the allegedly disabling symptoms” as support for her finding that plaintiff’s
8 impairments were not “severe,” the ALJ acted in error. Insofar as the R&R supports this
9 holding, the court hereby adopts Magistrate Judge Foley’s R&R. (ECF No. 29). However,
10 because the ALJ set forth a number of reasons for discrediting plaintiff’s testimony regarding the
11 severity of her impairments, the court will continue its analysis with respect to defendant’s
12 objections to the R&R.

13 ***b. The credibility of plaintiff’s testimony under “step two”***

14 In further support of her “step two” findings, the ALJ found that plaintiff’s allegations
15 regarding the “intensity, persistence and limiting effects of her symptoms are not generally
16 credible.” (ECF No. 20-1 at 31). The ALJ noted that plaintiff’s “allegations of debilitating and
17 limiting physical symptoms are inconsistent with the objective medical evidence, which can
18 indicate an attempt by the claimant to exaggerate the severity of her symptoms.” *Id.* Moreover,
19 the ALJ noted that plaintiff’s testimony with respect to the severity of her impairments was
20 inconsistent with her testimony about her daily living activities, which indicated that plaintiff
21 was capable of performing a wider array of physical activities than would be expected of a
22 person with her alleged impairments. *Id.*

23 In making this determination, the ALJ compared plaintiff’s testimony regarding the
24 severity of her limitations with various tests and examinations conducted by multiple physicians,
25 as well as plaintiff’s own testimony with respect to her daily activities. (ECF No. 20-1 at 31–
26 35). The ALJ must, however, provide specific, cogent reasons for disbelieving the claimant’s
27 testimony when a medical impairment has been established. If there is no affirmative evidence
28

1 of malingering, the ALJ's reasons for rejecting the claimant's testimony must be clear and
2 convincing. *Orn*, 495 F.3d at 635; *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014).

3 Magistrate Judge Foley found that the ALJ's "reasons for rejecting the credibility of
4 [p]laintiff's testimony based on her activities of daily living also fall short of being clear and
5 convincing." (ECF No. 29). Defendant objects to the R&R as to this point, arguing that the ALJ
6 also considered the "equivocal nature of the objective evidence" in addition to plaintiff's own
7 testimony in making her determination. (ECF No. 30).

8 The court finds that there are two issues to be resolved with respect to this portion of the
9 R&R and defendant's objection thereto: first, the court must determine the propriety of the ALJ's
10 consideration of the "objective medical evidence," and second, the court must determine the
11 propriety of the ALJ's consideration of plaintiff's testimony regarding her daily living activities.

12 First, while an ALJ may not consider lack of medical evidence as the sole basis for
13 discounting pain testimony, "it is a factor that the ALJ can consider in his credibility analysis."
14 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Therefore, insofar as the ALJ considered
15 other permissible factors in determining that plaintiff's impairments were not "severe" under the
16 Social Security Act, her consideration of the objective medical evidence was not in error.

17 Second, an ALJ is permitted to consider daily living activities in his or her credibility
18 analysis. However, to do this, the ALJ must make specific findings related to those activities.
19 *Id.* See *Morgan v. Apfel*, 169 F.3d 595, 600 (9th Cir. 1999) (claimant's ability to fix meals, do
20 laundry, work in the yard, and occasionally care for his friend's child was evidence of claimant's
21 ability to work).

22 In considering plaintiff's daily living activities, the ALJ made the following findings:

23
24 The claimant alleged her daughter performs the household cleaning. However,
25 the claimant acknowledged that some days she is able to wipe countertops, make
26 her bed, and fold laundry. She claimed she sometimes experiences pain
27 symptoms when she performs the aforementioned household chores. She
28 contended she sometimes has to stop and take a rest break while performing
household chores. She alleges these rest breaks last for one and one half to two
hours. . .

The claimant attempted to minimize her daily activities. Despite her alleged
symptoms and limitations, she described activities of daily living, which are not
limited to the extent one would expect, given the claimant's complaints of

1 disabling symptoms and limitations. The claimant maintained she experiences
2 hand pain and has difficulty holding onto items. However, the claimant testified
3 she remains capable of the following: she is able to care for her personal hygiene
4 needs, such as her hair; she is able to prepare herself meals; she can perform
5 household chores, such as wiping countertops, making her bed, and folding
6 laundry; and she is able to hold onto a steering wheel and drive herself to run
7 errands. . . I find the claimant’s ability to participate in the aforementioned
8 activities undermines the credibility of the claimant’s allegations of disabling
9 functional limitations.

10 (ECF No. 20-1 at 31–32).

11 The Ninth Circuit has held that even where evidence of a claimant’s daily activities “may
12 also admit of an interpretation more favorable to [the claimant],” so long as the ALJ’s
13 interpretation is rational, the court must uphold the ALJ’s decision. Burch, 400 F.3d at 681.

14 The court finds that the ALJ’s interpretation of plaintiff’s testimony with respect to her
15 daily living activities was rational. Moreover, because the ALJ properly considered plaintiff’s
16 daily living activities along with the objective medical evidence (such that the objective medical
17 evidence was not the sole factor considered), the court finds that the ALJ’s “step two”
18 determination was not made in error.

19 Indeed, the court finds these factors lend clear and convincing support to the ALJ’s
20 determination that plaintiff’s testimony regarding the severity of her impairments was not fully
21 credible. Although the ALJ improperly considered plaintiff’s failure to seek medical treatment
22 during a period of time when she did not have health insurance, the ALJ also relied upon no
23 fewer than nine separate physical examinations and diagnostic tests conducted by various
24 physicians, all of which produced “unremarkable” or “normal” results with respect to plaintiff’s
25 right hand and wrist. (ECF No. 20-1 at 31–34) (reciting the results of four physical
26 examinations, three x-rays, and two electromyograms).

27 The court finds that these tests, when considered in light of plaintiff’s own testimony
28 regarding her daily living activities, serve as “clear and convincing” reasons for rejecting
29 plaintiff’s testimony regarding the severity of her impairments. See Orn, 495 F.3d at 635.
30 Therefore, insofar as the R&R finds that the ALJ “did not have substantial evidence to support
31 her finding” that plaintiff did not have a severe impairment at “step two” of her analysis, the
32 court hereby rejects Magistrate Judge Foley’s R&R. (ECF No. 29).

1 **c. *The credibility of plaintiff's testimony under "step four"***

2 At "step four" of the ALJ's analysis, the ALJ is tasked with determining whether the
3 claimant has the residual functional capacity to perform the requirements of her past relevant
4 work. 20 CFR § 404.1520(e), 404.1545, 416.920(e), 416.945. Using the same reasoning she set
5 forth in support of her "step two" findings, the ALJ made an alternate finding at "step four" that
6 plaintiff has the "residual functional capacity to perform light work as defined in 20 CFR
7 404.1567(b) and 416.967(b) except: she would need the opportunity to change position at the
8 workstation once every two hours, otherwise she needs only regular, normal breaks in the mid-
9 morning, for lunch, and in the afternoon, as required by state and/or federal labor laws." (ECF
10 No. 20-1 at 35).

11 Magistrate Judge Foley concluded that because the ALJ relied on the same reasoning to
12 support her findings at "step four" that she relied upon at "step two," the "grounds for her
13 assessment were not proper findings." (ECF No. 29 at 19). However, because the court rejects
14 the R&R insofar as it concludes that the ALJ's "step two" findings were made in error, it must
15 also necessarily reject the R&R to the extent that it predicates its "step four" findings on the
16 same reasoning. (ECF No. 29).

17 **d. Summary**

18 The court finds that the ALJ erred in considering plaintiff's failure to seek consistent
19 medical treatment for her symptoms during a period of time when she did not have health
20 insurance as support for her determination that plaintiff's impairments were not "severe" under
21 the Social Security Act. Such considerations are contrary to Ninth Circuit precedent. See Orn,
22 495 F.3d at 638. However, the court finds that the ALJ properly considered the lack of objective
23 medical evidence of a severe impairment, as well as evidence of plaintiff's daily living activities
24 in determining that plaintiff's impairments are not "severe" under the Social Security Act. See
25 Burch, 400 F.3d at 681.

26 Nevertheless, where one of the ALJ's reasons supporting his adverse credibility finding
27 are invalid, the court must determine whether the ALJ's reliance on such reasons was harmless
28 error. *Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1162 (9th Cir. 2008). The Ninth Circuit has

1 held that so long as “there remains substantial evidence supporting the ALJ’s conclusions on . . .
2 credibility and the error does not negate the validity of the ALJ’s ultimate [credibility]
3 conclusion, such is deemed harmless and does not warrant reversal.” Id. (citations omitted).

4 The court finds that the ALJ’s decision was supported by substantial evidence in the
5 record, including her own findings with respect to the credibility of plaintiff’s pain testimony and
6 numerous physical examinations and tests which revealed that plaintiff’s wrist showed no
7 significant abnormality to substantiate her claims of having a “severe” impairment. (ECF No.
8 20-1 at 29–35).

9 Therefore, the court will adopt in part and reject in part Magistrate Judge Foley’s R&R,
10 consistent with the foregoing. (ECF No. 29). The court will also deny plaintiff’s motion to
11 remand to the Social Security Administration (ECF No. 24), and grant defendant’s cross-motion
12 for summary judgment. (ECF No. 27).

13 **IV. Conclusion**

14 Accordingly,

15 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Magistrate Judge
16 Foley’s R&R (ECF No. 29) be, and the same hereby is, ADOPTED in part and REJECTED in
17 part, consistent with the foregoing.

18 IT IS FURTHER ORDERED that defendant’s motion for summary judgment (ECF No.
19 27) be, and the same hereby is, GRANTED.

20 IT IS FURTHER ORDERED that plaintiff’s motion to remand to the Social Security
21 Administration (ECF No. 24) be, and the same hereby is, DENIED.

22 The clerk of court is instructed to enter judgment accordingly and close the case.

23 DATED February 27, 2019.

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26 UNITED STATES DISTRICT JUDGE
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