

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEA ANN LYNCH,

Case No. 3:16-cv-00357-MA

Plaintiff,

OPINION AND ORDER

v.

COMMISSIONER SOCIAL SECURITY
ADMINISTRATION,

Defendant.

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1 - OPINION AND ORDER

MARSH, Judge

Plaintiff Lea Ann Lynch seeks judicial review of the final decision of the Commissioner of Social Security denying her application for a period of disability and disability insurance benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-403, and application for Supplemental Security Income (“SSI”) disability benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. This Court has jurisdiction pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). For the reasons that follow, I affirm the Commissioner’s decision.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff protectively filed applications for DIB and SSI on January 30, 2012, alleging disability beginning June 6, 2008, due to depression, anxiety, migraines, gluten intolerance, post-surgical foot tumor, regional complex pain syndrome, fibromyalgia, dyslexia, and shingles. Tr. Soc. Sec. Admin. R. (“Tr.”) at 89, ECF Nos. 12-13. Plaintiff’s claims were denied initially and upon reconsideration. Plaintiff filed a request for a hearing before an administrative law judge (“ALJ”). The ALJ held a hearing on June 2, 2014, at which Plaintiff appeared with her attorney and testified. A vocational expert, Steve Duchesne, also appeared at the hearing and testified. On August 1, 2014, the ALJ issued an unfavorable decision. The Appeals Council denied Plaintiff’s request for review, and therefore, the ALJ’s decision became the final decision of the Commissioner for purposes of review.

Plaintiff was born in 1963, and was 45 years old on the alleged onset of disability date. Plaintiff has a high school education, has some training as a massage therapist, and at the time of the hearing was enrolled part-time in community college. Plaintiff has past relevant work as a location

manager, and also has worked as a food demonstrator, intake worker/eligibility worker, and massage therapist.

THE ALJ'S DISABILITY ANALYSIS

The Commissioner has established a five-step sequential process for determining whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920. Each step is potentially dispositive. The claimant bears the burden of proof at steps one through four. *See Valentine v. Commissioner Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At step five, the burden shifts to the Commissioner to show that the claimant can do other work which exists in the national economy. *Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).

The ALJ found that Plaintiff meets the insured status requirements through June 30, 2014. At step one, the ALJ found that Plaintiff has not engaged in substantial gainful activity since her alleged onset of disability. At step two, the ALJ found that Plaintiff had the following severe impairments: fibromyalgia, depressive disorder, pain disorder with both psychological and general medical factors, personality disorder, and attention-deficit hyperactivity disorder ("ADHD"). At step three, the ALJ found that Plaintiff's impairments, or combination of impairments, did not meet or medically equal a listed impairment.

The ALJ assessed Plaintiff with a residual functional capacity ("RFC") to perform light work with additional limitations: Plaintiff can occasionally balance, stoop, kneel, crouch, and crawl; must avoid concentrated exposure to fumes, odors, dusts, gases, and poor ventilation; can understand, remember, and carry out simple, repetitive, routine tasks; and can tolerate occasional contact with the general public.

At step four, the ALJ found that Plaintiff is unable to perform her past relevant work. At step five, the ALJ found that considering Plaintiff's age, education, work experience, and residual functional capacity, jobs exist in significant numbers in the national economy that Plaintiff can perform, including such representative occupations as: electronics assembler, mail clerk, and housekeeper. Accordingly, the ALJ concluded that Plaintiff has not been under a disability under the Social Security Act from June 6, 2008 through the date of the decision.

ISSUES ON REVIEW

On appeal to this court, Plaintiff contends the following errors were committed: (1) the ALJ improperly evaluated her testimony; (2) the ALJ improperly evaluated some of the medical evidence; (3) the ALJ improperly determined she does not meet Listing 12.04; and (4) the RFC and hypothetical to the vocational expert ("VE") fail to incorporate all of her mental health functional limitations. The Commissioner argues that the ALJ's decision is supported by substantial evidence and is free of legal error. Alternatively, the Commissioner contends that even if the ALJ erred, Plaintiff has not demonstrated harmful error.

STANDARD OF REVIEW

The district court must affirm the Commissioner's decision if the Commissioner applied proper legal standards and the findings are supported by substantial evidence in the record. 42 U.S.C. § 405(g); *Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). "Substantial evidence is 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." *Hill*, 698 F.3d at 1159 (internal quotations omitted); *Valentine*, 574 F.3d at 690. The court must weigh all the evidence, whether it supports or detracts from the Commissioner's decision. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014);

Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). The Commissioner's decision must be upheld, even if the evidence is susceptible to more than one rational interpretation. *Batson v. Commissioner Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). If the evidence supports the Commissioner's conclusion, the Commissioner must be affirmed; "the court may not substitute its judgment for that of the Commissioner." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001); *Garrison*, 759 F.3d at 1010.

I. The ALJ Did Not Err in Discounting Plaintiff's Credibility

To determine whether a claimant's testimony regarding subjective pain or symptoms is credible, an ALJ must perform two stages of analysis. 20 C.F.R. §§ 404.1529, 416.929. The first stage is a threshold test in which the claimant must produce objective medical evidence of an underlying impairment that could reasonably be expected to produce the symptoms alleged. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012); *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). At the second stage of the credibility analysis, absent affirmative evidence of malingering, the ALJ must provide clear and convincing reasons for discrediting the claimant's testimony regarding the severity of the symptoms. *Carmickle v. Commissioner Soc. Sec. Admin.*, 533 F.3d 1155, 1166 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007).

The ALJ must make findings that are sufficiently specific to permit the reviewing court to conclude that the ALJ did not arbitrarily discredit the claimant's testimony. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); *Tommasetti*, 533 F.3d at 1039. Factors the ALJ may consider when making such credibility determinations include the objective medical evidence, the claimant's treatment history, the claimant's daily activities, inconsistencies in testimony, effectiveness or

adverse side effects of any pain medication, and relevant character evidence. *Ghanim*, 763 F.3d at 1163; *Tommasetti*, 533 F.3d at 1039.

At the hearing, Plaintiff testified that she is taking two classes in college (seven credit hours), has a 3.00 grade point average (“GPA”), and is trying to obtain a degree in Communications. Tr. 61-62. Plaintiff testified that she receives accommodations at school with dictation due to her dyslexia. Tr. 62. Plaintiff testified that she has tutoring two hours per week, attends classes for two hours a day, four days a week, and works in the library eight hours a week. Tr. 52, 62-63. Plaintiff testified that she worked full-time in 2011 for three months, and also has performed some part-time work doing wine demonstrations. Tr. 53. Plaintiff described her past work with movie production as scouting locations for filming. Tr. 55. Plaintiff testified that she can no longer perform any kind of prior work because she cannot physically work the long hours, sometimes lasting 14 hours, and needs to rest after taking a two hour class. Tr. 56.

Plaintiff described being out of breath after walking short distances and that she is in pain due to her foot issues and fibromyalgia. Tr. 58-59. Plaintiff stated that she has pain in her shoulders, but that she can reach overhead and reach in front of her. Tr. 65-66. Plaintiff described difficulty with vomiting and that she has IBS. Tr. 60. Plaintiff testified that she takes zoloft and lorazepam for her mental health issues and that they help a little bit, but that she does not take any pain medication. Tr. 59, 66.

Plaintiff testified that she is able to drive, does her own shopping, is able to clean house in small increments, and does her own laundry. Tr. 64. Plaintiff stated that she spends time reading and watching TV, and that she uses the computer to do homework and look for jobs. Tr. 68.

Plaintiff testified that her biggest hurdle to employment is that she “can’t stand being around people right now.” Tr. 75. Plaintiff also stated that she cannot handle criticism. Tr. 75.

In a February 8, 2012 Function Report, Plaintiff reported that she gets sick from her gluten intolerance, that she cannot stand on her feet, and that her muscles hurt from fibromyalgia. Tr. 266. Plaintiff described a typical day as taking a shower, washing clothes, feeding the animals, making lunch, looking for work, eating dinner, then going to bed. Tr. 227. Plaintiff stated that the pain in her stomach from her gluten intolerance wakes her at night. Tr. 227. Plaintiff indicated no difficulty with personal care and needs no reminders to take medication. Tr. 227-28. Plaintiff stated that she performs all cleaning, laundry and yard care. Tr. 228. Plaintiff drives, can shop independently for groceries once a month for two hours. Tr. 229. Plaintiff stated she leaves the house daily to run errands. Tr. 229. Plaintiff described that she no longer plays sports due to pain, and that she spends time with friends occasionally. Tr. 230. Plaintiff indicated she has trouble lifting and standing due to the pain in her foot, can walk half a mile before needing to rest for 15 minutes, and can concentrate for 30 minutes. Tr. 231. Plaintiff stated she has no trouble with authority figures, gets physically sick from stress, and has vertigo and tinnitus. Tr. 232. Plaintiff indicated she takes trazodone and flexeril. Tr. 233.

In the decision, the ALJ offered specific, clear and convincing reasons for the adverse credibility determination, including: (1) inconsistency with objective medical records; (2) inconsistency with reported daily activities; (3) active pursuit of employment; and (4) receipt of unemployment benefits.

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A. *Inconsistency with Medical Record*

Contradiction with the medical record is a sufficient basis for discounting a claimant's credibility. *Carmickle*, 533 F.3d at 1161; *see also Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (holding that an ALJ may consider lack of medical evidence but it cannot be the only factor supporting an adverse credibility finding); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective . . . testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's symptoms and their disabling effects." (citing 20 C.F.R. § 404.1529(c)(2))). An ALJ also may rely on a claimant's conservative treatment to discredit the severity of a claimant's allegations where the claimant has not provided a good reason for failing to seek a more aggressive course. *Carmickle*, 533 F.3d at 1162.

The ALJ found that Plaintiff's allegations of difficulties with ambulation and widespread body pain were not as debilitating as she alleged. Here, the ALJ discussed that Plaintiff's claims were undermined by the medical records of several providers, including a normal physical examination in April 2011, except for some range of motion limitations in her left toes following foot surgery; that she had normal range of motion in all extremities in May 2012, and no focal tenderness; neurologic findings were intact; and that in she ambulated without assistance and had a steady gait despite pain complaints. Tr. 501-02, 768, 774, 969-70, 1045-46. And, the ALJ discussed that in March 2014, she had good range of motion in her back and neck, with no tenderness and no edema. Tr. 32, 950.

Additionally, the ALJ found her allegations of severe body pain were inconsistent with her January 2014 report that she takes flexeril for her fibromyalgia pain only once or twice a month. Tr.

32, 1040-41. Additionally, the ALJ discussed that Plaintiff declined referrals for acupuncture, physical therapy, and a pain management social worker and was instead started on a very low dose of nortriptyline. Tr. 26, 1034. And, the ALJ noted Plaintiff's allegations of chronically debilitating pain were inconsistent with her hearing testimony that she takes no pain medication. Tr. 59. The ALJ's findings are wholly supported by substantial evidence. Based on the longitudinal treatment record, the ALJ could reasonably find that Plaintiff's claims of disabling body pain and difficulty ambulating are not fully supported by the objective medical record.¹

The ALJ found that Plaintiff's psychiatric symptoms wax and wane, but are not disabling. The ALJ detailed numerous treatment notes indicating no psychiatric difficulties, including an October 2010 office visit and an April 2011 treatment note showing no mood difficulties. Tr. 33, 501-02. The ALJ discussed treatment notes from Brie Petrie, Psy.D., to whom Plaintiff self-referred for counseling. Tr. 33, 623-24. Dr. Petrie treated Plaintiff occasionally from August 2011 through April 2012. Tr. 623-43. Dr. Petrie noted that Plaintiff reported feelings of sadness, insomnia, fatigue, worthlessness, and difficulty concentrating. As the ALJ accurately indicated, Dr. Petrie diagnosed mild depression with moderate symptoms. Notably, there is an absence of severe depressive symptoms described in Dr. Petrie's treatment notes. To be sure, the ALJ's findings that Plaintiff's depressive symptoms wax and wane, but are not disabling, are clearly supported by Dr. Petrie's notes.

¹ At step two, the ALJ thoroughly discussed numerous other conditions and alleged impairments, such as complex regional pain syndrome, irritable bowel syndrome, right shoulder problems, chronic fatigue syndrome, neuropathy, and vertigo, that are not supported by objective medical evidence. Tr. 26-28. The ALJ thoroughly discussed the objective medical evidence and found these impairments were not as debilitating as alleged, and determined they were not severe impairments. Tr. 26. Although not challenged by Plaintiff, nevertheless the court has reviewed those findings and readily concludes they are supported by substantial evidence.

The ALJ also discussed that in December 2013, Plaintiff complained of increasing depression, but that her mood and affect were normal, as were her thought content and behavior. Tr. 33, 1044-46. The provider recommended increasing Plaintiff's zoloft to address her concerns, which Plaintiff agreed to do after school finals were completed. Tr. 1046. As the ALJ accurately discussed, in January 2014, Plaintiff reported mild anxiety for which she takes lorazepam twice a month, and did not appear depressed. Tr. 33, 968-69. And, as the ALJ discussed, treatment notes from Mary E. Joyce reveal that Plaintiff reported improved mood, and "feeling better" in February 2014 group and individual counseling sessions. Tr. 33, 1064-67. And, as the ALJ correctly noted, Ms. Joyce's notes revealed that Plaintiff continued to report improvement in March 2014. Tr. 1058. The ALJ found that based on the record, Plaintiff's mental health symptoms demonstrate that she experiences occasional down cycles, but her symptoms are not severe enough to prevent her from working, and discounted Plaintiff's allegations of disabling depression and anxiety based on their lack of objective record support.

The ALJ must review Plaintiff's treatment notes in light of overall diagnostic picture. *Ghanim*, 763 F.3d at 1163; *Garrison*, 759 F.3d at 1017. Plaintiff has reported symptoms of mild depression and anxiety with occasional bouts of more severe depression. Examining the record as a whole, I conclude that the longitudinal picture of Plaintiff's mental health supports the ALJ's finding that the severity of Plaintiff's subjective symptoms is inconsistent with the clinical evidence. Even if the objective medical evidence could support Plaintiff's interpretation, the ALJ's determination is reasonable and must be upheld. *Batson*, 359 F.3d at 1193.

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B. Inconsistency with Reported Activities

The ALJ reasonably determined that Plaintiff's activities were inconsistent with her allegations concerning her limitations. Engaging in daily activities that are incompatible with the severity of symptoms alleged can support an adverse credibility determination. *Ghanim*, 763 F.3d at 1165; *Molina*, 674 F.3d at 1112-13 (holding that a claimant's daily activities may be grounds for discrediting claimant's testimony). Contradiction with a claimant's activities of daily living is a clear and convincing reason for rejecting a claimant's testimony. *Tommasetti*, 533 F.3d at 1039. As the ALJ accurately detailed, Plaintiff engages in numerous activities that are inconsistent with her allegations that she is unable to work due to her severe mental and physical limitations. Here, the ALJ detailed that Plaintiff gets together with friends occasionally, spends time reading, watching television, doing homework, is able to use a computer, and checks her Facebook account, but does not post anything. Tr. 32-33. The ALJ also discussed Plaintiff's ability to attend college classes, work at the school library for eight hours a week, maintain a 3.0 GPA, and attend tutoring for two hours a week, and found them inconsistent with her allegations that she has disabling limitations in reading and mathematics. The ALJ reasonably found that these activities demonstrate that Plaintiff is able to persist, perform simple tasks, and engage in basic social interactions contrary to her allegations. Tr. 33.

The ALJ also reasonably discounted Plaintiff's allegations of disabling physical limitations based on some of the activities detailed in the record, such as Plaintiff's ability to do perform all personal care, prepare meals, perform household cleaning, laundry, grocery shopping, and yard work. Additionally, the ALJ detailed that in January and February 2012, Plaintiff admitted she performed household repairs, is able to drive a car, and leaves the house daily to run errands. Tr. 33. The

ALJ's findings concerning Plaintiff's activities are backed by substantial evidence in the record. Given the multitude and type of activities Plaintiff admitted to performing, the ALJ rationally found that Plaintiff's activities undermined her allegations of severe physical limitations impeding her ability to perform any work. I conclude that when the ALJ's first and second reasons are combined, they provide clear and convincing support for the ALJ's adverse credibility determination. *Molina*, 674 F.3d at 1113 (finding claimant's daily activities and inconsistency with medical evidence supported adverse credibility determination).

C. Active Pursuit of Employment

The ALJ properly discredited Plaintiff because she was actively pursuing employment and worked part-time while asserting that she is totally disabled. *Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (discounting claimant's credibility where she recently worked and sought out other employment while pursuing disability). In the decision, the ALJ detailed that a physician's November 2009 treatment notes reveal that Plaintiff asked to be released to work only three months after she requested that her disability be extended, suggesting that her condition had improved. Tr. 421-25. Plaintiff argues that she requested to be returned to work because her disability benefits had been exhausted, not because her condition improved. Even if the record could support Plaintiff's interpretation, the ALJ's interpretation is rational and supported by inferences reasonably drawn from the record; it will not be disturbed. *Molina*, 674 F.3d at 1111.

Additionally, the ALJ noted that in September 2011, Plaintiff expressed frustration with her inability to find employment after moving to Oregon. The ALJ also detailed that in a 2012 Function Report, Plaintiff indicated that looking for work was a daily activity. Tr. 34, 227. Moreover, the ALJ noted that Plaintiff reported to her counselor that she enjoyed working in March 2012, worked

in film production in Louisiana in May 2012, in December 2012 was working picking up and delivering phone books, and testified at the hearing she was working eight hours a week in the library. Tr. 628, 631-32. The ALJ discussed that Plaintiff was employed part-time doing wine sampling demonstrations. Tr. 34, 631-32. The ALJ noted that Plaintiff expressed concern regarding her job skills as a barrier to employment, not her alleged impairments. Tr. 641-43.

Plaintiff suggests that she stopped working delivering phone books due to her irritable bowel syndrome symptoms and that the ALJ erred in discounting her credibility on this basis. However, as the ALJ discussed, Plaintiff underwent a full gastroenterology work-up that revealed no severe abnormalities, and the ALJ noted that her alleged digestive symptoms did not prevent her from attending school and working in the library. Tr. 977-81. Based on the lack of objective support, the ALJ found that Plaintiff's symptoms were episodic and not as debilitating as alleged. Tr. 26. In summary, Plaintiff's continued search for work evidences behavior that the ALJ reasonably found inconsistent with her allegations of disability. The ALJ's findings are fully supported by substantial evidence and therefore are entitled to deference. *Burch*, 400 F.3d at 679 ("Where evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld").

D. Unemployment Benefits

Receipt of unemployment benefits is one of many factors that may be considered when evaluating disability. 20 C.F.R. §§ 404.1512(b)(3), (5); 416.912(b)(3), (5). Receipt of unemployment benefits may undermine a claimant's alleged inability to work if the record establishes that the claimant held herself out as available for full-time work. *Carmickle*, 533 F.3d at 1161-62. At the hearing, the ALJ inquired whether Plaintiff collected unemployment benefits in California and whether she drew unemployment for full-time work. Tr. 70. Plaintiff confirmed that she received

them based on a full-time job and that she drew unemployment benefits until they were exhausted. Tr. 70. Additionally, the ALJ inquired whether Plaintiff was required to certify that she was ready, willing, and able to work. Tr. 70. Plaintiff confirmed that was required to make that certification. Tr. 70.

Plaintiff argues the ALJ erroneously discredited her on this basis. In her Reply, Plaintiff contends that she did not certify that she was able to work a full-time schedule and relies on Oregon administrative regulations that define “available for work” as meaning either full- or part-time work. See Pl’s Reply Br. at 3, ECF No. 18 (citing Or. Admin. R. 471-30-036(2)(b)). Plaintiff’s argument is undermined by her clear hearing testimony. Here, the ALJ specifically referred to California unemployment benefits, and Plaintiff clearly responded that she received benefits based on full-time work. Tr. 70. *Cf. Carmickle*, 533 F.3d at 1161-62 (determining it was not clear from record whether claimant held himself out as available for full- or part-time work); *Miller v. Colvin*, No. CV 13-1259-E, 2014 WL 1873276, *4 (C.D. Cal. May 9, 2014) (discussing Oregon and California unemployment benefits and holding oneself out as available for full-time or part-time work). Thus, the ALJ reasonably discounted Plaintiff’s credibility because she drew full-time benefits and held herself out as available for work. The ALJ’s findings are wholly supported by substantial evidence, and this provides a specific, clear and convincing reason to discount Plaintiff’s subjective allegations. *Molina*, 674 F.3d at 1111 (stating ALJ’s findings must be upheld if based on inferences reasonably drawn from the record).

Considering the record as a whole, Plaintiff’s statements that she continued to seek employment while alleging disability, her receipt of unemployment benefits for full-time work, the inconsistency of her reported activities, and the lack of objective medical evidence to corroborate

the extent of her pain, physical, and mental limitations constitute clear and convincing reasons to discredit her credibility.

II. The ALJ Did Not Err in Evaluating the Medical Evidence

In general, the opinion of a treating physician is given more weight than the opinion of an examining physician, and the opinion of an examining physician is afforded more weight than the opinion of a nonexamining physician. *Ghanim*, 763 F.3d at 1160; *Garrison*, 759 F.3d at 1012; *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007). “If a treating physician’s opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, [it will be given] controlling weight.” *Orn*, 495 F.3d at 631 (internal quotations omitted)(alterations in original); 20 C.F.R. § 416.927(c). To reject the uncontradicted opinion of a treating physician, the ALJ must provide “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

If the treating physician’s opinion is contradicted, the ALJ must consider how much weight it is entitled to considering the factors in 20 C.F.R. § 416.927(c)(2-6). The factors include the length of the treatment relationship, the frequency of examination, the nature and supportability of the opinion, and its consistency with other evidence in the record as a whole. 20 C.F.R. § 416.927(d)(2-6); *Ghanim*, 763 F.3d at 1161. If a treating or examining doctor’s opinion is contradicted by another doctor’s opinion, it may be rejected by specific and legitimate reasons. *Taylor v. Commissioner Soc. Sec. Admin.*, 659 F.3d 1228, 1232 (9th Cir. 2011). However, “[t]he ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

Only physicians and certain other qualified specialists are considered “[a]cceptable medical sources.” *Molina*, 674 F.3d at 1111 (alteration in original); see also 20 C.F.R. § 416.913(a). Nurse practitioners and therapists are considered “other sources.” 20 C.F.R. § 416.913(d). An ALJ must evaluate the opinions from other sources, and may discount such testimony if the ALJ provides germane reasons for doing so. *Ghanim*, 763 F.3d at 1161; 20 C.F.R. § 416.927(c).

Plaintiff argues that the ALJ failed to provide adequate reasons for discounting some of the limitations and opinions of Paul Rethinger, Ph.D.; James E. Bryan, Ph.D.; John F. Elliot, M.A.; Frances Nause, M.Ed.; and Mary Joyce, L.P.C.

A. Dr. Rethinger

Plaintiff complains that despite giving weight to the opinion of Dr. Rethinger, the ALJ erred by failing to incorporate her difficulties with pace into the RFC. I disagree. Dr. Rethinger is a nonexamining agency physician who completed a Mental Residual Functional Capacity Assessment on October 16, 2012. Tr. 121. Dr. Rethinger reviewed records and assessed that Plaintiff is moderately limited in her ability to understand and remember detailed instructions, and that she has difficulty with pace and vigilance and would have difficulty recalling detailed tasks. Tr. 124. Dr. Rethinger also opined that Plaintiff is moderately limited in her ability to maintain attention and concentration for extended periods, and would have difficulty sustaining concentration on difficult tasks due to her Attention Deficit Hyperactivity Disorder (“ADHD”). Tr. 124.

In the decision, the ALJ did not adopt Dr. Rethinger’s conclusion that Plaintiff “has difficulty with pace, as she has attended college classes and maintained a 3.0 GPA and did fairly well on testing during mental health evaluations.” Tr. 35. Additionally, the ALJ limited Plaintiff to simple, routine tasks to “account for any difficulties with pace that may occur.” Tr. 35. The ALJ otherwise

found Dr. Rethinger's opinion to be consistent with Plaintiff's reported activities, observations of treatment providers and evaluators, and gave his opinion "great weight." Tr. 35.

Plaintiff contends that the ALJ erred because her limitations with pace are substantiated by her other treatment providers, citing records from her therapist John Elliott and examining physician Dr. Bryan. Tr. 765, 904. I disagree. As will be discussed in detail below, the ALJ did not err in giving Mr. Elliott's opinion no weight, and the RFC limiting Plaintiff to simple, routine tasks clearly is consistent with Dr. Bryan's evaluation. Additionally, the ALJ could reasonably find that Plaintiff could perform simple routine tasks based on her ability to take college classes, work in the library, and maintain a 3.0 GPA. See *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173-74 (9th Cir. 2008) (holding ALJ did not err in limiting claimant to simple routine work where claimant engaged in activities such as housework, hobbies, cooking, and reading). Inconsistency between a physician's opinion and claimant's daily activities can be a specific and legitimate reason to discount that opinion. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 600-02 (9th Cir. 1999). As discussed above, the ALJ's findings concerning Plaintiff's activities are supported by substantial evidence in the record, and the ALJ could find Dr. Rethinger's pace limitations did not reflect Plaintiff's actual abilities. The ALJ's interpretation is reasonable, and will not be disturbed.

Moreover, as the ALJ indicated, an RFC limiting Plaintiff to simple, routine tasks is clearly consistent with Dr. Rethinger's opinion, which indicated that Plaintiff was "not significantly limited" in her ability to understand, remember, and carry out short and simple instructions, and perform activities within a schedule, sustain a routine, and make simple work-related decisions. Tr. 124. Thus, the ALJ did not err in discounting Dr. Rethinger's pace limitations, and the RFC adequately

captures the remaining limitations credited by the ALJ. *Id.* at 1174. The ALJ's interpretation of Dr. Rethinger's opinion is reasonable, backed by substantial evidence, and will not be disturbed.

B. Dr. Bryan

Plaintiff argues that the ALJ failed to incorporate Dr. Bryan's assessed limitations in concentration. Dr. Bryan performed a neuropsychological evaluation of Plaintiff on January 12, 2012. Tr. 897. Dr. Bryan conducted a series of objective tests, including but not limited to the California Verbal Learning Test-II, Rey Complex Figure Test, Trail Making Test Parts A & B, Wechsler Abbreviated Scale of Intelligence ("WASI"), Wechsler Memory Scale-IV (WMS-IV, Logical Memory & Visual Reproduction subtests), WMS-III Working Memory Subtests, and the Wisconsin Card Sorting Test-Computer Version-3. Tr. 897. Dr. Bryan was asked to perform cognitive and mental health testing to assess factors that may impede Plaintiff's independent functioning for vocational rehabilitation services. Tr. 897. Plaintiff reported chronic physical pain that reaches "near-maximum subjective levels (10 on a 0-10 scale) every few days" and that she requires frequent breaks. Tr. 899. Plaintiff reported to Dr. Bryan that stress aggravates her physical pain and fatigue, that she suffers situational depression, and suffers from dyslexia, regional complex pain syndrome, fibromyalgia, nausea and stomach pain. Plaintiff also reported to Dr. Bryan that she is independent with self-care, housekeeping, has performed home repairs and painting, and enjoys canvas painting. Tr. 899-900.

On testing, Dr. Bryan found Plaintiff's intellectual functioning to be in the average range, and her attention, concentration, and speed to range from average on the WMS-III Working Memory Index to extremely low on the Trail Making Test A & B and Stroop Test. Tr. 904. Dr. Bryan found Plaintiff's language and visual-constructional functioning to be average, while her new learning and

memory to range from high average to borderline. Tr. 904-05. Dr. Bryan's testing showed that Plaintiff's reading recognition was sufficient to allow her to understand most common information, such as newspapers, magazines and instructions, and her mathematics reasoning sufficient to perform daily monetary transactions and measuring. Tr. 905-06. Dr. Bryan also indicated that Plaintiff's psychological profile was significant for "extreme endorsement of somatic health complaints." Tr. 906. Dr. Bryan diagnosed Attention Deficit Hyperactivity Disorder, Depressive Disorder, and Pain Disorder with psychological factors and general medical condition. Tr. 907. Dr. Bryan opined that Plaintiff's strengths were her ability to understand the gist of written materials at an upper high school level, and opined that "some of the Extremely Low speed ratings during testing are influenced by a somatoform style, given that there is no clear, objective basis for them[.]" Tr. 908. Dr. Bryan recommended that Plaintiff engage in comprehensive mental health treatment, including counseling and antidepressant medication, and that a skills- or trade-oriented educational program would best suit Plaintiff's academic skill level. Tr. 907-08.

The ALJ accurately discussed Dr. Bryan's opinion and concluded that his objective findings show some functional limitations, but that her limitations are not disabling. The ALJ concluded that when examining Plaintiff's abilities, Dr. Bryan's opinion is consistent with the capacity for simple routine tasks with limited social interactions. Tr. 30, 32-34.

According to Plaintiff, the ALJ erred by discounting the Stoop Effect Test, on which Plaintiff tested "Extremely Low." Tr. 904. I disagree. Contrary to Plaintiff's suggestion, the ALJ thoroughly and specifically discussed Dr. Bryan's "low speed ratings," which includes the Stroop Effect Test, and that Dr. Bryan found no clear, objective basis for the low ratings, and that Plaintiff's somatoform disorder may be the cause. Tr. 30, 34. Here, the ALJ discussed that these findings were inconsistent

with Plaintiff's ability to pursue a degree and earn a 3.0 GPA, and that Plaintiff's actual functioning exceeds the limitations found in the clinical setting, and favored the opinion of Dr. Rethinger on this point. Tr. 30. Moreover, the ALJ indicated that while Plaintiff's somatic disorder may be the cause of some speed deficits, it could also be that Plaintiff's subjective symptoms are not as severe as alleged. Tr. 34. As discussed above, the ALJ appropriately discounted Plaintiff's subjective symptoms. Thus, the ALJ found Dr. Bryan's opinion as to Plaintiff's processing speed to be inconsistent with Dr. Rethinger, inconsistent with other record evidence, and premised on Plaintiff's subjective symptoms which the ALJ found unreliable. Accordingly, the ALJ has identified specific and legitimate reasons for discounting Dr. Bryan's opinion. *Thomas*, 278 F.3d at 957 (ALJ properly rejected treating physician's opinion where ALJ made findings setting out a detailed summary of facts, conflicting evidence, and stating interpretation of that evidence, and making findings); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (holding ALJ properly discounted treating physician's opinion whose conclusions were based largely on claimant's subjective complaints that lacked credibility). The ALJ's findings are wholly supported by substantial evidence, is a rational interpretation of the record, and the court will not engage in second-guessing. Tr. 30, 32, 34. *Edlund*, 253 F.3d at 1156.

C. Mr. Elliott

Plaintiff contends that the ALJ erred in rejecting Mr. Elliott's opinion. The ALJ gave Mr. Elliot's opinion "no weight." Mr. Elliott was Plaintiff's treating mental health therapist from January 2006 to July 2009. Tr. 761. Mr. Elliott is not an acceptable medical source, but is an "other source" whose opinion the ALJ may consider pursuant to 20 C.F.R. §§ 404.1513(d), 416.913(d).

The ALJ was required to provide “germane reasons” to discount Mr. Elliott’s opinion. *Molina*, 674 F.3d at 1111. The ALJ readily met this standard.

Mr. Elliott provided a report dated April 30, 2012 in which he indicated that at the time he treated Plaintiff, she presented with problems of severe depression, anxiety with panic attacks, hostility, decompensation, and chronic pain. Tr. 763. Mr. Elliott diagnosed bipolar disorder, depressed, without psychotic features and alcohol dependence in remission. Tr. 765. Mr. Elliott indicated that Plaintiff is not competent to sustain employment and opined that Plaintiff suffered marked limitations in activities of daily living, extreme difficulties with social functioning, extreme problems with concentration, persistence and pace, and has experienced four or more episodes of decompensation of extended duration. Tr. 766.

In the decision, the ALJ accurately discussed Mr. Elliott’s opinion and gave his opinion “no weight” because it is not supported by any objective findings in the record. Inconsistency with objective medical evidence is a specific and legitimate reason to discount a treating physician’s opinion. *Batson*, 359 F.3d at 1196 (ALJ may discredit treating physicians’ opinions that are unsupported by objective medical findings or the record as a whole); *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995) (inadequate clinical findings provide clear and convincing reasons for ALJ to reject treating physician’s opinion). Specifically, the ALJ rejected Mr. Elliott’s opinion that Plaintiff has suffered four episodes of decompensation each of extended duration, because it is wholly unsupported by any record evidence whatsoever. I note that Mr. Elliott’s underlying treatment notes are not part of the record before me. As the ALJ detailed, the record is devoid of *any evidence* that Plaintiff has suffered even one episode of decompensation previously, let alone that she has suffered four or more. Tr. 35, 766. This reason alone is germane to Mr. Elliott, and would

constitute a clear and convincing reason if a higher level of justification were required. *See Miller v. Comm'r Soc. Sec. Admin.*, Case No. 3:15-cv-02132-MA, 2016 WL 6868154, *7 (D. Or. Nov. 21, 2016) (upholding ALJ's rejection of physician's opinion where there was no evidence of decompensation). The ALJ's finding is supported by substantial evidence and singularly calls into question the validity of Mr. Elliott's opinion.

Additionally, the ALJ discounted Mr. Elliott's opinion that Plaintiff has extreme limitations in concentration, persistence and pace and social functioning because those findings also are not supported by objective findings in the record. The ALJ specifically discussed that extreme limitations in any two categories of the "paragraph B" criteria is incompatible with an ability to perform any gainful activity whatsoever. Tr. 35. The ALJ specifically reasoned that Mr. Elliott's assessed limitations are undermined by Plaintiff's ability to go to college part-time and earn a 3.0 GPA and continued part-time employment. The ALJ findings are wholly supported by substantial evidence in the record. Accordingly, the ALJ has provided multiple germane reasons for discounting Mr. Elliott's opinion; the ALJ did not err. *Molina*, 674 F.3d at 1111-12.

D. Ms. Nause

Plaintiff argues that the ALJ failed to provide germane reasons for discounting Ms. Nause's opinion. Ms. Nause appears to be counselor with vocational rehabilitation services. Ms. Nause provided an opinion dated December 9, 2011, in which she states that Plaintiff has held 24 jobs as a location manager for the film industry, each job lasting less than three months in duration. Tr. 684. Ms. Nause opined that Plaintiff's difficulty interacting in a socially acceptable manner, lack of stamina, and difficulties with anxiety, reading, math, and depression make it difficult for her to obtain employment. Tr. 683-84. In the decision, the ALJ discussed Ms. Nause's opinion and gave

E. Ms. Joyce

Plaintiff appears to contend that the ALJ failed to incorporate Ms. Joyce's assessment that Plaintiff has moderate limitations in social functioning. Ms. Joyce provided counseling to Plaintiff beginning in September 2013 on a weekly basis. Tr. 1010. In an April 4, 2014 opinion, Ms. Joyce diagnosed Plaintiff with PTSD, complex, and major depressive disorder, moderate, recurrent. Tr. 1010. Ms. Joyce discussed that Plaintiff endorses a cycle of complaint and conflict, and that she has made little progress in changing this pattern. Tr. 1012. Ms. Joyce opined that Plaintiff's symptoms could be expected to last for at least 12 months, that her psychiatric condition exacerbates Plaintiff's pain, and that Plaintiff would miss three days of work each month. Tr. 1114-15. Ms. Joyce also opined that Plaintiff suffers marked limitations in activities of daily living, moderate limitations in social functioning, often experiences deficiencies in concentration, persistence, and pace, and has suffered repeated episodes of decompensation. Tr. 1017.

In the decision, the ALJ provided several germane reasons for giving Ms. Joyce's opinion "no weight." First, as the ALJ discussed, there simply is no objective record support for Ms. Joyce's opinion that Plaintiff has suffered repeated episodes of decompensation. As discussed above, Plaintiff has identified no record support for this contention. Second, as the ALJ accurately discussed, the record belies Ms. Joyce's opinion that Plaintiff suffers marked limitations in her activities of daily living. Tr. 36. As the ALJ indicated, Plaintiff is able to regularly attend school and attends to all her daily needs independently. Tr. 64, 68, 227-28, 899-900. Third, as the ALJ correctly indicated, many of Ms. Joyce's responses in her opinion are premised on Plaintiff's discredited subjective reports. Tr. 1014. The ALJ's findings are wholly supported by substantial

evidence and readily provides multiple germane reasons for discounting Ms. Joyce's opinion. *Molina*, 674 F.3d at 1111-12.

III. The ALJ Did Not Err in Finding that Plaintiff Does Not Meet Listing 12.04

To meet Listing 12.04, Plaintiff's impairments must meet or equal both parts A and B, or parts A and C of the listing criteria. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.04. In order to meet or equal the "paragraph B" criteria, a claimant demonstrate at least two of the following: marked activities of daily living; marked difficulties in maintaining social functioning; marked difficulties maintaining concentration, persistence or pace; or repeated episodes of decompensation, each of extended duration. *Id.* Substantial evidence supports the ALJ's findings that Plaintiff has mild restriction in her activities of daily living, moderate difficulties with social functioning and concentration, persistence and pace, and has experienced no episodes of decompensation. Tr. 29-30.

Plaintiff contends that the ALJ erred in failing to find that she meets Listing 12.04. Plaintiff argues that she meets the paragraph B criteria relying on the opinions of Mr. Elliott and Ms. Joyce. Ms. Joyce and Mr. Elliott opined that Plaintiff has marked restrictions in her activities of daily living and that she has suffered repeated episodes decompensation. As discussed above, the ALJ validly discounted the opinions of Mr. Elliott and Ms. Joyce because there is no objective record support for their opinions that Plaintiff has suffered any episodes of decompensation. Additionally, their opinions that Plaintiff has marked restrictions in activities of daily living is belied by Plaintiff's numerous self-reports that she is independent with all self-care. Tr. 64, 68, 227-28, 899-900. Having examined the ALJ's analysis at step three, I readily conclude the ALJ did not err in finding that Plaintiff does not meet Listing 12.04. The ALJ's step three findings are supported by substantial evidence and free of legal error.

IV. RFC and Hypothetical to the Vocational Expert

Plaintiff argues that the RFC fails to account for all of her concentration limitations, and that the ALJ erred by failing to perform a function-by-function analysis as required by Social Security Ruling 96-8p. I disagree.

Plaintiff essentially repeats her contention that the ALJ erroneously evaluated the medical evidence. The ALJ did not erroneously omit restrictions from Plaintiff's RFC relating to her concentration and social judgment because the RFC limits her to simple, repetitive routine tasks with occasional contact with the general public. *See Stubbs-Danielson*, 539 F.3d at 1176 (approving a similar RFC finding in similar circumstances). As discussed at length above, the ALJ did not err in evaluating Plaintiff's credibility or in assessing the medical evidence. Here, the RFC appropriately includes those limitations credited by the ALJ, are supported by substantial evidence, and that did not rely on Plaintiff's subjective complaints. *Bayliss*, 427 F.3d at 1217. "Preparing a function-by-function analysis for medical conditions or impairments that the ALJ found neither credible nor supported by the record is unnecessary." *Id.* Moreover, the hypothetical posed to the VE contained all of the limitations the ALJ found credible and supported by substantial evidence in the record. *Id.* Accordingly, the ALJ's finding that Plaintiff could perform jobs that exist in substantial numbers in the national economy was supported by substantial evidence and free of reversible legal error.

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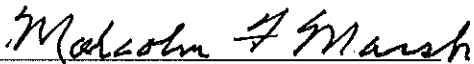
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CONCLUSION

For the reasons set forth above, the Commissioner's final decision denying benefits to Plaintiff is AFFIRMED.

IT IS SO ORDERED.

DATED this 3 day of APRIL, 2017.


Malcolm F. Marsh
United States District Judge