UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

CHERYL A. STEIN,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

6:15-cv-00894-YY

OPINION AND ORDER

YOU, Magistrate Judge:

INTRODUCTION

Plaintiff, Cheryl A. Stein ("Stein"), seeks judicial review of the final decision by the Commissioner of Social Security[1] ("Commissioner") denying her applications for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act ("SSA"), 42 USC §§ 401–433 (West 2015), and Supplemental Security Income ("SSI") under Title XVI of the SSA, 42 USC §§ 1381–1383f (2012). This court has jurisdiction to review the

[1] Although the pleadings give various names for the defendant, the official title and only proper named defendant is the "Commissioner of Social Security." 42 U.S.C. § 902(a)(1).

Commissioner's decision pursuant to 42 USC § 405(g) and § 1383(c)(3). All parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c) (2012). For the reasons set forth below, the Commissioner's decision is AFFIRMED.

ADMINISTRATIVE HISTORY

Stein protectively filed for DIB and SSI on May 4, 2012, alleging a disability onset date of July 16, 2010. Tr. 16.[2] Her application was denied initially and on reconsideration. Tr. 16. On January 8, 2014, a hearing was held before Administrative Law Judge ("ALJ") Wynne O'Brien-Persons. Tr. 16. The ALJ issued a decision on January 30, 2014, finding Stein not disabled. Tr. 26–27. The Appeals Council denied a request for review on March 24, 2015. Tr. 1. Therefore, the ALJ's decision is the Commissioner's final decision subject to review by this court. 20 CFR §§ 404.981, 416.1481, 422.210 (2016).

BACKGROUND

Born in 1967, Stein was 46 at the time of the hearing before the ALJ. Tr. 25. She has a 10th-grade education and past relevant work experience as a child monitor, hand packager, and packaging supervisor. Tr. 25, 62, 235. Stein alleges that she is unable to work due to the combined impairments of cervical disc disease, irritable bowel syndrome ("IBS"), and chronic, severe foot pain. Tr. 16, 192, 199, 234.

MEDICAL BACKGROUND

Stein underwent a surgical discectomy and spinal fusion in 2008. Tr. 318. The X-rays immediately after surgery showed good position to the fusion and resection of the disk

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[2] Citations are to the page(s) indicated in the official transcript of the record filed on November 24, 2015 (docket #13).

herniation. Tr. 307. Stein alleges she suffered from pain radiating down her arms, as well as in her neck and upper shoulders. Tr. 314. In 2010, Stein saw a medical practitioner alleging ongoing neck pain for the last year. Tr. 318. Stein was sent for an X-ray and MRI. Tr. 315, 318. The MRI revealed a central annular distention in the spinal column, without frank disc herniation and without cord compression. Tr. 307. The MRI also revealed that her spinal fusion was still solid. *Id.* The neurosurgical specialist who treated her did not send her to physical therapy because it appeared she was doing well with her current level of symptoms. *Id.*

Stein also complained of anxiety and depression, but testified she did not feel she needed psychiatric medication and was not taking any. Tr. 56, 313. She also suffers from panic attacks, swings between crying and raging, and has difficulty sleeping. Tr. 314.

Stein is obese and drinks 12 or more beers a day. Tr. 328. Stein complains of constant bilateral foot pain while walking. Tr. 327. Stein alleges IBS and that she has diarrhea and goes to the bathroom at least ten times a day. Tr. 400. At various times through the period at issue, Stein has taken Flexeril, Vicodin, and Venlafaxine. Tr. 319, 328, 350.

DISABILITY ANALYSIS

Disability is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 USC § 423(d)(1)(A). The ALJ engages in a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. 20 CFR §§ 404.1520, 416.920 (2016); *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

At step one, the ALJ determines if the claimant is performing substantial gainful activity. If so, the claimant is not disabled. 20 CFR §§ 404.1520(a)(4)(i) & (b), 416.920(a)(4)(i) & (b).

At step two, the ALJ determines if the claimant has "a severe medically determinable physical or mental impairment" that meets the 12-month durational requirement. 20 CFR §§ 404.1520(a)(4)(ii) & (c), 416.909, 416.920(a)(4)(ii) & (c). Absent a severe impairment, the claimant is not disabled. *Id*.

At step three, the ALJ determines whether the severe impairment meets or equals an impairment "listed" in the regulations. 20 CFR §§ 404.1520(a)(4)(iii) & (d), 416.920(a)(4)(iii) & (d); 20 CFR Pt. 404, Subpt. P, App. 1 (Listing of Impairments). If the impairment is determined to meet or equal a listed impairment, then the claimant is disabled.

If adjudication proceeds beyond step three, the ALJ must first evaluate medical and other relevant evidence in assessing the claimant's residual functional capacity ("RFC"). The claimant's RFC is an assessment of work-related activities the claimant may still perform on a regular and continuing basis, despite the limitations imposed by his or her impairments. 20 CFR §§ 404.1520(e), 416.920(e); Social Security Ruling ("SSR") 96-8p, 1996 WL 374184 (July 2, 1996).

At step four, the ALJ uses the RFC to determine if the claimant can perform past relevant work. 20 CFR §§ 404.1520(a)(4)(iv) & (e), 416.920(a)(4)(iv) & (e). If the claimant cannot perform past relevant work, then at step five, the ALJ must determine if the claimant can perform other work in the national economy. 20 CFR §§ 404.1520(a)(4)(v) &

(g), 416.920(a)(4)(v) & (g); *Bowen v. Yuckert*, 482 U.S. 137, 142 (1987); *Tackett*, 180 F.3d at 1099.

The initial burden of establishing disability rests upon the claimant. *Tackett*, 180 F3d at 1098. If the process reaches step five, the burden shifts to the Commissioner to show that jobs exist in the national economy within the claimant's RFC. *Id*. If the Commissioner meets this burden, then the claimant is not disabled. 20 CFR §§ 404.1520(a)(4)(v) & (g), 416.920(a)(4)(v) & (g), 416.960(c).

ALJ'S FINDINGS

At step one, the ALJ concluded that Stein has not engaged in substantial gainful activity since July 16, 2010, the date that the application was protectively filed. Tr. 18.

At step two, the ALJ determined that Stein has the severe impairments of cervical degenerative disc disease, obesity, and headaches. Tr. 18.

At step three, the ALJ concluded that Stein does not have an impairment or combination of impairments that meets or equals any of the listed impairments. Tr. 19. The ALJ found that Stein has the RFC to perform sedentary work, specifically:

> The claimant is able to lift and/or carry ten pounds. She is able to stand and/or walk for two hours and sit for six hours in an eight hour workday with normal breaks. She is able to perform work that allows her to change positions every thirty minutes. She is able to push and/or pull with her bilateral upper extremities frequently. She is able to crawl frequently. She is able to climb ladders, ropes, or scaffolds occasionally. She is able to perform work that does not include repetitive rotation, flexion, or extension of the neck. She is able to reach overhead bilaterally with her upper extremities on an occasional basis. She is able to grasp with her bilateral hands on a frequent basis. She must avoid concentrated exposure to hazards, such as moving machinery or working at heights. She is able to perform work that has ready bathroom access.

Tr. 19.

Based upon the testimony of a vocational expert ("VE"), the ALJ determined at step four that Stein's RFC precluded her from returning to her past relevant work. Tr. 25.

At step five, the ALJ found that considering Stein's age, education, and RFC, she was capable of performing the following jobs: cashier, information clerk, order clerk, charge account clerk. Tr. 26.

Accordingly, the ALJ determined that Stein was not disabled at any time through the date of the decision.

STANDARD OF REVIEW

The reviewing court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. 42 USC § 405(g); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). This court must weigh the evidence that supports and detracts from the ALJ's conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998)). The reviewing court may not substitute its judgment for that of the Commissioner. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1205 (9th Cir. 2008) (citing *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007)); *see also Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). Where the evidence is susceptible to more than one rational interpretation, the Commissioner's decision must be upheld if it is "supported by inferences reasonably drawn from the record." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (*quoting Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004)); *see also Lingenfelter*, 504 F.3d at 1035.

DISCUSSION

Stein argues the ALJ erred by improperly assessing: (1) Stein's credibility; (2) the medical opinion of Stephan Schepergerdes, M.D.; (3) Stein's mental impairments; and (4) jobs Stein could perform in the national economy at step five.

I. Credibility

The ALJ must consider a claimant's symptom testimony, including statements regarding the claimant's pain and workplace limitations. 20 CFR §§ 404.1529, 416.929. The ALJ is responsible for determining the credibility of such statements. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Unless there is affirmative evidence showing the claimant is malingering, the Commissioner's reasons for rejecting the claimant's subjective testimony must be clear and convincing. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). The ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints. *Id.*; *Reddick*, 157 F.3d at 722. If medical evidence contradicts the plaintiff's testimony, the ALJ may find the plaintiff less than credible, so long as it is not the sole reason to discredit the plaintiff. *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). The evidence upon which the ALJ relies must be substantial. *See Reddick*, 157 F.3d at 724. The ALJ's overall credibility decision may be upheld even if some of the ALJ's reasons for rejecting the claimant's testimony are overturned. *Batson*, 359 F.3d at 1197.

Stein first contends that the ALJ erred in finding she was not credible because the medical record did not support her complaints.[3] Tr. 21. Specifically, she claims the ALJ incorrectly analyzed her 2010 MRI by failing to recognize the severe disc prolapse, the disc bulge at C5-5, and ventral cord flattening.

Stein accurately recites the impressions of the reviewing radiologist. Tr. 316. However, the ALJ also relied on the impressions of Dr. Stephen McGirr, who concluded that the MRI showed no cord flattening and presented without frank disc herniation. Tr. 21, 307. Dr. McGirr further concluded that Stein's condition was improving and no additional treatment or imaging was recommended. Tr. 21, 309. Dr. McGirr had performed Stein's fusion surgery in 2008 and examined her in a follow-up appointment. Tr. 307. Dr. McGirr commented on an area in which he specializes and can reasonably be considered a treating physician for the purposes of this analysis. *See Benton v. Barnhart*, 331 F.3d 1030, 1038 (9th Cir. 2003) (there is no definitive line for determining when a relationship between a plaintiff and physician is a treating one; a single visit may suffice); *see also Holohan v. Massinari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (the regulations give more weight to the opinions of treating physicians). Because the ALJ properly relied on Dr. McGirr's opinion in interpreting the MRI, the ALJ did not err in finding that the results of the MRI contradicted Stein's testimony and undermined her credibility.

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[3] The ALJ found: "[T]he claimant's statements concerning the intensity, persistence and limiting effects of [her] symptoms are not entirely credible. As discussed below, the treatment record does not fully corroborate the claimant's testimony. Furthermore, the claimant's claims of debilitated functioning are not consistent with contemporaneous reports of actual functioning." Tr. 20-21.

Stein next takes issue with the ALJ's credibility assessment based on inconsistent statements she made regarding household activities. An ALJ may find a plaintiff's testimony less than fully credible if it is inconsistent with other statements made by the plaintiff. *Thomas v. Barnhart*, 278 F.3d 947, 958–59 (9th Cir. 2002). Here, the ALJ noted that Stein's testimony contradicted previous statements she had made. Tr. 22. For example, Stein testified at the hearing that she only does some chores when she "has to," and will do the dishes "once in awhile." Tr. 53. However, Stein told the examining physician, Dr. DeWayde Perry, that she "does cooking and cleaning such as vacuuming, sweeping, mopping, dishes and laundry" as well as weeding the flowerbed. Tr. 328. Stein also testified that she normally leaves her house once a week to eat or pick up groceries. Tr. 54. However, in her written Function Report, Stein stated she could not leave her house except in an emergency. Tr. 257. The ALJ did not err in identifying these discrepancies and using them to assess Stein's credibility.

Stein argues Dr. Perry's notes are vague and refer to household activities performed by Stein's partner and not Stein herself. In his report, Dr. Perry wrote: "She lives with her partner. She does cooking and cleaning such as vacuuming, sweeping, mopping, dishes and laundry. She will also do weeding in the flower bed." Tr. 328. Dr. Perry recorded these notes, however, under the "Activities of Daily Living" section in a report designed to assess Stein's level of functioning. It would make no sense for Dr. Perry, who was writing a report about Stein, to record such detailed observations about Stein's partner.

Stein also challenges the ALJ's rejection of her anal-fissure claim and gastrointestinal problems. Stein argues that the ALJ ignored a notation by Dr. Paul Evans, who had performed her colonoscopy, that "she has had a rectal fissure." Tr. 400. As the

ALJ noted, however, Dr. Evans ultimately concluded that Stein's rectal examination was normal and no "anal lesion or abnormality was detected." Tr. 22, 403. The ALJ further noted that Dr. Schepergerdes found "[n]o gross internal hemorrhoids or even a fissure is visible." Tr. 22, 387. Rather, Stein was diagnosed with a rectal anal fissure only by "history and symptoms." *Id.* While Stein characterizes this as a "credibility" issue, it is more properly characterized as the rejection of a diagnosis based on the lack of objective evidence. Neither doctor ultimately concluded that Stein had a rectal fissure. The court must defer to the ALJ's decision if it is a reasonable interpretation of the record. *Tommasetti*, 533 F.3d at 1038. Based on the lack of objective medical evidence, the ALJ did not err in rejecting that impairment in assessing Stein's applications for benefits.

With respect to Stein's gastrointestinal problems, there was also substantial evidence to question Stein's credibility. Stein testified she suffers from IBS and went to the bathroom "15+" times per day. Tr. 55. As Dr. Perry noted, however, Stein does not have an IBS diagnosis. Tr. 328. Additionally, Stein was seen by a specialist in 2013 who was unable to determine any cause, either infectious or inflammatory, for her complaints even after performing an extensive gastrointestinal workup. Tr. 21, 397, 400.

Next, without much argument, Stein takes issue with the ALJ's finding that she was not credible because she stopped working to help her daughter with babysitting, not because of her impairments. An ALJ may discount a plaintiff's credibility when the plaintiff stopped working due to reasons other than their impairments. *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). Therefore, the ALJ did not err by using that evidence to doubt Stein's credibility.

Finally, Stein argues that her "addiction to alcohol is not a reason to discredit her complaints." However, the ALJ did not question Stein's credibility because she is an alcoholic, but rather because she declined to follow her doctor's treatment recommendation to take Antabuse, a drug that is prescribed to alcoholics and sometimes causes an unpleasant reaction. Tr. 22, 60. An ALJ may use a plaintiff's refusal to follow a recommended treatment course to doubt her credibility. *Burch*, 400 F.3d at 681. The ALJ therefore did not err in determining Stein's credibility.

II. Dr. Schepergerdes

Stein argues the ALJ improperly rejected Dr. Schepergerdes's opinion. The ALJ is responsible for resolving ambiguities and conflicts in the medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ must provide clear and convincing reasons for rejecting the uncontradicted medical opinion of a treating or examining physician, or specific and legitimate reasons for rejecting contradicted opinions, so long as they are supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). 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." *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012). Additionally, the ALJ may discount physicians' opinions based on internal inconsistencies, inconsistencies between their opinions and other evidence in the record, or other factors the ALJ deems material to resolving ambiguities. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601–02 (9th Cir. 1999).

Stein first saw Dr. Schepergerdes on April 29, 2010 for neck pain and tension headaches and had previously seen Dr. Schepergerdes' physician assistant, Sara Stanford,

on January 11, 2010, for similar symptoms.[4] Tr. 315, 318. She was sent for an MRI to find the source of her alleged neck pain. Tr. 318. Stein saw Dr. Schepergerdes again on June 18, 2010 for neck pain and depression. Tr. 314. She complained of panic attacks and mood swings. *Id.* Stein returned to Dr. Schepergerdes on July 6, 2010 for anxiety, depression, and alcohol intake. Tr. 313. Nearly a year later, Stein saw Dr. Schepergerdes on July 1, 2011, complaining of hemorrhoids and blood in her stool. Tr. 312. Then, over a year later, on October 15, 2012, Stein saw Dr. Schepergerdes for a rectal examination, because her depression medication was not working and because her neck and heels hurt. Tr. 381.

Dr. Schepergerdes filled out his assessment on October 29, 2012, diagnosing Stein with cervical disc disease, chronic pain, and depression. Tr. 341-44. In support, he cited a cervical MRI revealing abnormal discs, and stated that Stein's symptoms included neck pain, headaches, pain radiating into the arms, fatigue, and lack of stamina for repetitive tasks. Tr. 341–42. Dr. Schepergerdes opined that Stein needed to lie down or rest during the day, and limited her to standing and walking less than two hours per workday and sitting less than six hours per workday. Tr. 342–43. He stated that Stein could use her hands to perform fine and gross manipulations for about one hour per workday. Tr. 343. He opined that Stein would be unable to work for two days out of each month due to her impairments. Tr. 344.

The ALJ gave "little weight" to Dr. Schepergerdes's opinion. Tr. 24. In contrast, the ALJ gave "significant weight" to the opinions of Norman Staley, M.D., and Martin Lahr, M.D., M.P.H., the state agency initial and reconsideration physical consultants. Tr.

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[4] Stein alleges Dr. Schepergedes began treating her in 2004, but this is not supported by the record.

23. In addition, the ALJ gave "partial weight" to the opinion of examining physician, DeWayde Perry, M.D. Tr. 24.

The ALJ doubted Dr. Schepergerdes's opinion, noting the doctor sympathized with Stein and possibly wrote his opinion to avoid unnecessary doctor–patient tension. Tr. 23–24. This reasoning is an insufficient basis on which to premise the rejection of Dr. Schepergerdes's opinion. On the one hand, "[t]he Secretary may not assume that doctors routinely lie in order to help their patients collect disability benefits." *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995), as amended (Apr. 9, 1996); *see also Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir 1998) (citing *Lester*, 81 F.3d at 833)). On the other hand, the Commissioner may legitimately consider whether the doctor "had agreed to become an advocate and assist in presenting a meaningful petition for Social Security benefits." *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).

However, whether or not the ALJ viewed Dr. Schepergerdes as crossing the line from treatment provider to advocate, the ALJ also supplied several specific and legitimate reasons for rejecting Dr. Schepergerdes's opinion. The ALJ found Dr. Schepergerdes's opinion "extreme" compared to other medical opinions of record and concluded that Dr. Schepergerdes's opinion conflicted significantly with other medical opinions of record, including Dr. Perry, an independent examining physician who performed objective testing of Stein's physical capabilities. Tr. 327–31. An opinion by a non-treating physician based on an independent examination may constitute substantial evidence sufficient to reject the opinion of a treating physician. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

The difference between the conclusions of Drs. Schepergerdes and Perry is marked. The ALJ spelled out these differences, noting that Dr. Schepergerdes opined that Stein could

lift 10 pounds occasionally and never lift 20 pounds; Dr. Perry opined that Stein could lift 20 pounds occasionally and 10 pounds frequently. Tr. 23–24, 331, 343. Dr. Schepergerdes stated Stein could sit for less than 6 hours in an 8 hour workday; Dr. Perry stated Stein had no sitting limitations. Tr. 23–24, 330, 343. Dr. Schepergerdes stated Stein could only perform manipulations for an hour or less; Dr. Perry stated Stein had no handling or fingering limitations. Tr. 23–24, 331, 343.

The ALJ found the limitations endorsed by Dr. Schepergerdes not supported by or consistent with the evidence. Tr. 23. In particular, the ALJ found a mismatch between those limitations and an MRI showing "nothing acutely surgical," Stein's 2010 denial of upper extremity radicular symptoms (Tr. 23, 388–89), only a single appointment in 2011 at which Stein complained of rectal, rather than cervical, pain (Tr. 23, 312), and the lack of any mention of radiculitis until two October 2012 visits when Stein complained of "left C5 distribution radiculitis" after her initial application for benefits was denied and she requested that Dr. Schepergerdes fill out a questionnaire from her attorney (Tr. 23, 381–83). Additionally, the ALJ found the limitations endorsed by Dr. Schepergerdes unsupported by "objective findings, such as her MRI and orthopedic examination findings that showed a slight loss of neck range of motion with normal findings for her strength, sensation, and reflexes." Tr. 24.

A treating doctor's opinion may properly be rejected when the doctor's "treatment notes provide no basis for the functional restrictions he opined should be imposed on [the claimant]." *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). The ALJ's decision to reject Dr. Schepergerdes's opinion on the basis that it is not supported by the record or by objective findings is supported by the record.

Stein argues that Dr. Perry's opinion came from a one-time examination, unsupported by any other evidence, and the medical records he reviewed were incomplete. An ALJ, however, may rely on the opinion of a physician premised on a one-time examination. *Tonapetyan*, 242 F.3d at 1149. Dr. Perry's opinion is also bolstered by the opinions of the non-examining consulting doctors, Dr. Staley and Dr. Lahr. Tr. 80, 103. Additionally, the record shows that Dr. Perry took Stein's medical history orally, and there is no evidence he did not consider it in his opinion. Tr. 327–331. Dr. Perry performed a range of objective functional tests on Stein and more medical evidence would not necessarily have helped him in evaluating her performance. Tr. 327–31.

The ALJ also gave little weight to Dr. Schepergerdes's opinion because, although he was Stein's treating physician, he met with Stein infrequently. Tr. 23. An ALJ may properly evaluate the weight to give a contradicted treating physician's opinion by looking at the length of the treatment relationship and frequency of visits. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). While Stein saw Dr. Schepergerdes beginning in 2010, the record reveals very few appointments with him during the relevant period. Tr. 349–67.

The ALJ further reasoned that Dr. Schepergerdes's opinion relied heavily on Stein's subjective complaints. When a doctor's opinion relied heavily on a plaintiff's subjective complaints, and the ALJ has discounted the plaintiff's complaints, the ALJ may reject the opinion. *Tommasetti*, 533 F.3d at 1041. Stein saw Dr. Schepergerdes in 2012 specifically complaining of "left C5 distribution radiculitis." Tr. 381. Without confirming this diagnosis through objective tests, Dr. Schepergerdes wrote in his chart notes that Stein suffered from C5 distribution radiculitis. Tr. 382. Additionally, in 2011 Stein saw Dr. Schepergerdes due to rectal pain. Despite noting that Stein had only a hemorrhoid and "not

even a fissure," Dr. Schepergerdes diagnosed Stein with an anal fissure by "history and symptoms." Tr. 312. These instances tend to show Dr. Schepergerdes relied on Stein's subjective assessments of her condition; the ALJ thus did not err rejecting his opinion.

Stein argues the ALJ impermissibly ignored Dr. Schepergerdes's review of an MRI showing a severe prolapse at C4-5, among other diagnoses. The ALJ did not simply disregard Dr. Schepergerdes's interpretation of the MRI; he relied instead on an interpretation of the MRI by Dr. McGirr, who opined Stein did not suffer from a frank disc herniation. The ALJ did not err in relying on Dr. McGirr's expert neurosurgical opinion over that of Dr. Schepergerdes, who is not a specialist.

III. Mental Impairments

Stein also argues that the ALJ erred by failing to find her mental impairments severe at step two. Step two is a *de minimis* threshold used to dispose of meritless claims. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An impairment or combination of impairments may be rejected at step two only if the evidence establishes a slight abnormality that minimally affects a plaintiff's ability to work. *Id.* An ALJ has a duty to fully and fairly develop the record if it is incomplete. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003). The ALJ's duty to develop the record is triggered by ambiguous evidence. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

Stein argues that the record shows she suffered from depression exceeding the *de minimis* step two threshold. The ALJ, however, found that Stein's depression was not severe based on substantial evidence in the record. For example, at the hearing, Stein testified that she was not receiving mental health treatment, was not taking psychoactive medication, had stopped taking medication because she "felt at one point that [she] didn't

need them anymore," and did not want to continue on medication because the dosage was increasing. Tr. 56. The ALJ reasonably concluded from her testimony that Stein either was not suffering from a mental health impairment or it was adequately controlled. Even if the evidence could support more than one rational interpretation, the court must defer to the Commissioner's findings if they are supported by inferences reasonably drawn from the record. *Batson*, 359 F.3d at 1193.

Stein also argues that the ALJ erred by failing to consider her depression in combination with her other impairments in formulating the RFC analysis. Again, Stein stated her depression was either under control or cured. Moreover, Stein's treating physician, Dr. Schepergerdes, diagnosed Stein with depression, but did not include any mental health limitations in his opinion. Tr. 341–44.

IV. VE Hypothetical

Stein argues that the ALJ failed to ask the VE whether her testimony conflicted with the DOT. When a VE provides information about the requirements of an occupation, the ALJ has an affirmative duty to determine whether the information conflicts with the DOT and to obtain an explanation for the apparent conflict. *Massachi v. Astrue*, 486 F.3d 1149, 1152-53 (9th Cir. 2007). Here, at the conclusion of the VE's testimony, the ALJ asked the VE whether her answers "were in accordance with the DOT, its companion publications, and your professional experience," and the VE answered, "Yes." Tr. 68. By asking this question, the ALJ fulfilled the duty required under *Massachi*.

Stein next contends that the ALJ erred by not discovering the inconsistency between the VE's testimony that she could perform the jobs of cashier and information clerk, which are classified as light work, and the RFC, which restricts her to sedentary work. The VE

presented these jobs in response to the ALJ's hypothetical of an employee who is able to perform light work. Tr. 63. The ALJ erred by incorporating these jobs into the written opinion because, as the Commissioner concedes, Stein cannot perform light work. However, the error was harmless because the ALJ and VE identified two sedentary jobs existing in significant numbers in the national economy.

Stein argues the remaining jobs identified by the VE, order clerk and charge account clerk, are in conflict with her RFC. Specifically, she contends that those jobs require frequent reaching but her RFC states she is able to "reach overhead bilaterally with her upper extremities on an occasional basis." Tr. 19.

The DOT descriptions for order clerk and charge account clerk are as follows:

> Order Clerk [DOT 209.567-014]: Takes food and beverage orders over telephone or intercom system and records order on ticket: Records order and time received on ticket to ensure prompt service, using time-stamping device. Suggests menu items, and substitutions for items not available, and answers questions regarding food or service. Distributes order tickets or calls out order to kitchen employees. May collect charge vouchers and cash for service and keep record of transactions.
>
> Charge Account Clerk [DOT 205.367-014]: Interviews customers applying for charge accounts: Confers with customer to explain type of charge plans available. Assists customer in filling out application or completes application for customer. Reviews applications received by mail. Files credit applications after credit department approves or disapproves credit. May check references by phone or form letter and notify customer of acceptance or rejection of credit [CREDIT CLERK (clerical)]. May verify entries and correct errors on charge accounts [CUSTOMER-COMPLAINT CLERK (clerical)], using adding machine. May answer credit rating requests from banks and credit bureaus. May issue temporary shopping slip when credit references appear satisfactory.

The DOT descriptions provide no detail about the type of reaching required in these jobs. However, the companion *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (1993) ("*Selected Characteristics*") indicates

both jobs require frequent reaching. *Selected Characteristics* at 335. "Reaching" is defined as "[e]xtending hand(s) and arm(s) in any direction. *Id.* App. C-3.

The court rejected a similar argument in *Fenton v. Colvin*, No. 6:14-CV-0350-SI, 2015 WL 3464072, at *2 (D. Or. June 1, 2015). Fenton's RFC similarly stated that she could "occasionally do bilateral overhead reaching." Transcript of Record at 18, *Fenton*, 2015 WL 3464072 (ECF #8). Fenton argued that the sedentary job of Addresser (DOT 209.587–010), which the VE testified Fenton could perform, was inconsistent with her limitations because the job required frequent reaching. The court disagreed, holding that, "[w]hile this position requires frequent 'reaching,' it was reasonable for the VE to conclude that it does not require frequent 'bilateral overhead reaching.'" *Id.* Moreover, if the VE's testimony was in conflict with the DOT, it was adequately explained. The VE testified that she relied on the DOT, the Occupational Outlook Handbook, the ONet, and her years of experience, application in the field, job analyses, and understanding of the workplace. *Id.* The court held that "[t]he VE's testimony, knowledge, and experience, combined with the observation regarding the job description for the Addresser position, provides sufficient evidence to supplement the DOT." *Id.*

The court reached the same result in *Strain v. Colvin*, No. CV 13-01973-SH, 2014 WL 2472312, at *2 (C.D. Cal. June 2, 2014). Strain's RFC restricted him from any overhead reaching with his right upper extremity. *Id.* The VE stated that the plaintiff could perform the jobs of production inspector, hand bander, and tub operator, all of which require some reaching. *Id.* The plaintiff argued that those jobs conflicted with his RFC and that the VE and ALJ were required to explain the conflict. *Id.* The court disagreed, holding that while reaching was required for the assigned jobs, a reasonable person could read the job

descriptions and conclude those jobs required very little overhead reaching. *Id.* A reasonable reading of the job descriptions, combined with the VE's knowledge and experience, provided the "necessary substantial evidence to supplement the DOT." *Id.*

Similarly in this case, a reasonable person could read the job descriptions for order clerk and charge account clerk and conclude that those jobs require little or no bilateral overhead reaching. Both jobs appear to primarily involve operating a telephone or intercom device and collecting information from customers, using that information to complete food orders or credit applications, then communicating the information on so that the food order or credit application can be processed. While the job description certainly indicates that the ability to reach out to pick up a telephone is required, nothing in those descriptions hints that bilateral overhead reaching is required at all, much less "frequently." Moreover, the VE testified that her testimony was in accordance with the DOT, its companion publications, and her professional experience, including experience placing individuals in the job market, doing job analysis and research, and engaging in peer discussion and literature review. Tr. 66, 68. The ALJ's decision therefore is supported by substantial evidence.

Stein urges the court to follow the ruling in *Skelton v. Comm'r of Soc. Sec.*, No. 06:13-CV-01117-HZ, 2014 WL 4162536, at *11 (D. Or. Aug. 18, 2014), in which the court reached a different result. Skelton's RFC included an occasional overhead reaching restriction involving the right upper extremity. The VE stated that Skelton could perform the jobs of bottle packer, marker II, and garment sorter, which require frequent or constant reaching. *Id.* The court held that those jobs conflicted with the RFC, found the ALJ erred at step five, and remanded the case for further proceedings. *Id.*

Skelton is distinguishable, however, because the VE in that case never testified that his conclusions were in accordance with the DOT, its companion publications, and his professional experience. Transcript of Record at 83–88, *Skelton*, 2014 WL 4162536 (ECF #15). Moreover, none of the jobs at issue in *Skelton* were sedentary jobs consisting primarily of conveying information and processing paperwork. Instead, they were production jobs sorting, marking, and loading products into boxes at a production pace. The nature of such jobs clearly lends itself to the likelihood that a bilateral overhead reaching would be performed on a regular—or at least more than occasional—basis. Thus, it is no surprise that *Skelton* was remanded in order to obtain VE testimony not in conflict with the DOT. In contrast, the job descriptions of the jobs identified by the VE in this case do not indicate any need for bilateral overhead reaching. Given the job descriptions and in light of the VE's testimony, this court finds no error.

In this case, as discussed above, the record contains such additional testimony, and ALJ's determination is therefore supported by substantial evidence.

ORDER

For the reasons discussed above, pursuant to sentence four of 42 U.S.C. § 405(g), the Commissioner's decision is AFFIRMED.

DATED April 6, 2017.

/s/ Youlee Yim You

Youlee Yim You
United States Magistrate Judge