IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

JUDY LOUISE KELSEY,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

Case No. 6:16-cv-01253-AA

OPINION AND ORDER

AIKEN, Judge:

Plaintiff Judy Louise Kelsey brings this action pursuant to the Social Security Act ("Act"), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner of Social Security ("Commissioner"). The Commissioner denied plaintiff's applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). For the reasons set forth below, the Commissioner's decision is affirmed.

BACKGROUND

In June 2007, plaintiff applied for DIB and SSI, alleging disability beginning December 18, 2003. Tr. 134. After a hearing, an ALJ found plaintiff not disabled, Tr. 39–61, and the

Appeals Council denied review, Tr. 1–3. On appeal, the Commissioner conceded error and this Court remanded for further proceedings. *See Graham v. Colvin*, 2014 WL 715523, *1 (D. Or. Feb. 24, 2014).[1] Following a new hearing, an ALJ again found plaintiff not disabled. Tr. 413–24. In 2011, while plaintiff's prior appeal was pending, plaintiff filed a new SSI application. Tr. 1049–50. That application yielded a finding that plaintiff was disabled as of February 17, 2011. Tr. 413. As a result, the decision now under review concerns only the period between December 18, 2003, and February 16, 2011. Tr. 1050.

STANDARD OF REVIEW

The district court must affirm the Commissioner's decision if it is based upon 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." *Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 522 (9th Cir. 2014) (citation and quotation marks omitted). The court must weigh "both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001). If the evidence is subject to more than one interpretation but the Commissioner's decision is rational, the Commissioner must be affirmed, because "the court may not substitute its judgment for that of the Commissioner." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

[1] Although several documents in the administrative record identify plaintiff as Judy Graham, the majority of the documents, including all documents filled out in plaintiff's own handwriting, identify her as Judy Kelsey. *See, e.g.*, Tr. 146.

COMMISSIONER'S DECISION

The initial burden of proof rests upon plaintiff to establish disability. *Howard v. Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

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(a)(4); *id.* § 416.920(a)(4). At step one, the ALJ found plaintiff had not engaged in "substantial gainful activity" since the alleged disability onset date. Tr. 415; 20 C.F.R. §§ 404.1520(a)(4)(i), (b); *id.* §§ 416.920(a)(4)(i), (b). At step two, the ALJ found plaintiff had the following severe impairments: "degenerative disc disease and degenerative joint disease of the cervical spine; bilateral tendonitis of the wrists; bilateral carpal tunnel syndrome; right epicondylitis; and bursitis of the right shoulder (with worsening due to an acute shoulder injury in 2010); mood disorder due to pain; and cognitive disorder NOS[.]" Tr. 416; 20 C.F.R. §§ 404.1520(a)(4)(ii), (c); *id.* §§ 416.920(a)(4)(ii), (c). At step three, the ALJ determined plaintiff's impairments, whether considered singly or in combination, did not meet or equal "one of the listed impairments" that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. Tr. 416; 20 C.F.R. §§ 404.1520(a)(4)(iii), (d); *id.* §§ 416.920(a)(4)(iii), (d).

The ALJ found plaintiff retained the residual functional capacity to

> perform light work as defined in 20 [C.F.R. §§] 404.1567(b) and 416.967(b) except she was further limited to tasks that involved no more than 6 hours of sitting, and no more than 6 hours of standing/walking in an 8-hour workday (with normal breaks). She could frequently climb ramps or stairs, but only occasionally climb ladders, ropes, or scaffolds. She could occasionally push/pull bilaterally with the upper extremities. She could reach or use or hands overhead. She could

> frequently stop, kneel, crouch, crawl, or balance. She was limited to routine tasks involving no more than simple instructions that could be learned within 30 days. She could tolerate little, if any, interaction with the public.

Tr. 418; 20 C.F.R. § 404.1520(e); *id.* § 416.920(e). At step four, the ALJ concluded plaintiff was unable to perform any of her past relevant work. Tr. 422; 20 C.F.R. §§ 404.1520(a)(4)(iv), (f); *id.* §§ 416.920(a)(4)(iv), (f). At step five, the ALJ found plaintiff could perform several jobs existing in significant numbers in the national economy: sorter of soft good garments, tray setter, and table worker. Tr. 422–23; 20 C.F.R. §§ 404.1520(a)(4)(v), (g); *id.* §§ 416.920(a)(4)(v), (g). Accordingly, the ALJ found plaintiff not disabled and denied her application for benefits. Tr. 424.

DISCUSSION

The scope of this appeal is narrow and concerns the ALJ's treatment of three different medical opinions. Plaintiff argues that the ALJ erred by (1) failing to consider the 2004 opinion of plaintiff's treating physician, Dr. Barrett, regarding restrictions on lifting and repetitive activity; (2) failing to account for the opinion of agency reviewing psychologist, Dr. LeBray, in assessing plaintiff's cognitive limitations; and (3) failing to account for the opinion of evaluating psychiatrist, Dr. Smolen, in assessing plaintiff's cognitive limitations. The government responds that any error was harmless.

There are three types of medical opinions in Social Security disability cases: those of treating, examining, and reviewing physicians. *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Id.* at 1202; 20 C.F.R. § 404.1527(d). Where there is a conflict between two medical opinions, an ALJ may rely on the medical opinion of a non-treating doctor instead

of the contrary opinion of a treating doctor only by providing "specific and legitimate" reasons supported by substantial evidence in the record. *Holohan*, 246 F.3d at 1202. An ALJ errs by silently disregarding all or part of a medical opinion. *Garrison v. Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014). However, even the complete failure to mention a treating source's medical opinion will not support reversal if the error was harmless. *Marsh v. Colvin*, 792 F.3d 1170, 1172 (9th Cir. 2015).

I. *Dr. Barrett's Opinion*

In a March 2004 treatment note, Dr. Barrett stated that plaintiff "could not do any repetitive activity" and "could not lift greater than 10 pounds." Tr. 223. The ALJ did not discuss the treatment note in his decision and did not incorporate the restrictions from that note into the RFC. Plaintiff argues the ALJ effectively rejected Dr. Barrett's 2004 opinion without providing specific, legitimate reasons for doing so.

Although the ALJ did not address the 2004 note in his decision, he did address a six-page questionnaire Dr. Barrett completed in November 2009. That questionnaire documents a ten-pound lifting restriction, identical to the restriction in the 2004 note. Tr. 373. And the 2009 questionnaire is even more restrictive than the 2004 note with respect to repetitive movement; Dr. Barrett checked "never" when asked how often plaintiff could perform handling or fingering. Tr. 373. The ALJ acknowledged Dr. Barrett's lengthy treatment relationship with plaintiff and the deference generally due such a relationship, but nonetheless concluded that Dr. Barrett's "dire assessment" of plaintiff's limitations was "controverted by the physician's own clinical observations." Tr. 420. The ALJ supported that conclusion with a lengthy discussion of the medical records, detailing how those records were inconsistent with the severe limitations detailed in the 2009 questionnaire.

Plaintiff does not challenge the ALJ's decision to give little weight to Dr. Barrett's 2009 assessment. Moreover, after a thorough review of the record, I conclude that decision is supported by specific, legitimate reasons as required by Ninth Circuit precedent. The reasons the ALJ used to discredit the 2009 assessment apply with equal force to the 2004 treatment note. Accordingly, any error stemming from failure to address the 2004 treatment note was harmless.

II. *Dr. LeBray's Opinion*

In October 2007, Dr. LeBray reviewed plaintiff's file and completed a Mental Residual Functional Capacity Assessment. Tr. 335–38. Dr. LeBray concluded plaintiff had moderate limitations in the ability to understand, remember, and carry out detailed instructions; the ability to complete a normal workday and workweek at a consistent pace without an unreasonable number of breaks; the ability to interact appropriately with the general public; the ability to respond appropriately to changes in the work setting; and the ability to set realistic goals or make plans independently of others. Tr. 335–36. In the final section of his report, Dr. LeBray wrote:

> [C]lmnt able to understand, remember, carry out tasks of a simple nature. She is able to sustain a nml work week, work day. She is able to learn her job w/help from supervisor, then can work on her own w/o special supervision.
>
> Clmnt should not work directly w/general public d/t affective distress. She is able to get along w/her coworkers on a routine, casual, social basis. She will benefit from help setting independent goals (voc guidance) and fare best w/ a predictable workplace routine to follow (few frequent changes).

Tr. 337.

The ALJ did not discuss Dr. LeBray's assessment in his decision. Plaintiff argues that failure amounts to reversible error because the RFC assessed by the ALJ does not take into account all the limitations in Dr. LeBray's opinion. Specifically, plaintiff argues that Dr. LeBray's opinion requires a limitation to jobs with Reasoning Level 1, and that the three jobs the ALJ identified at step five all require Reasoning Level 2.

The Dictionary of Occupational Titles classifies jobs by General Educational Development Reasoning Level. A job with Reasoning Level 1 requires the worker to "[a]pply commonsense understanding to carry out simple one- or two-step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job." Dictionary of Occupational Titles, app. C (4th ed. 1991), *available at* 1991 WL 688702. A job with Reasoning Level 2 demands more; the employee must "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations." *Id.*

The first part of each Reasoning Level description concerns the complexity of instructions. Dr. LeBray opined that plaintiff would have moderate difficulty with detailed instructions, a limitation inconsistent with the demands of Reasoning Level 2. But the ALJ accounted for that limitation by restricting plaintiff to "routine tasks involving no more than simple instructions that could be learned within 30 days." Tr. 418. Although the three jobs identified at step five are all classified Reasoning Level 2 in the DOT, the vocational expert testified that they could be performed consistent with the RFC. Tr. 1078–79. Thus, there is no conflict between the jobs identified at step five and a limitation to simple instructions.

The second part of each Reasoning Level description concerns variability of tasks. Dr. LeBray's recommendation of "a predictable workplace routine" and "few frequent changes," Tr. 337, is consistent with Reasoning Level 2, which allows for "few concrete variables in or from standardized situations." Dictionary of Occupational Titles, app. C (4th ed. 1991), *available at* 1991 WL 688702. Although the ALJ erred in neglecting to address Dr. LeBray's opinion, that error was harmless because the RFC is fully consistent with that opinion.

III. *Dr. Smolen's Opinion*

Dr. Smolen evaluated plaintiff in August 2007. She assessed "moderate to severe impairment" with memory, comprehension, concentration, and attention. Tr. 320. She also stated that plaintiff "did very poorly on the intellectual portion of the mental status exam on all levels" and hypothesized a connection between childhood brain injury and cognitive function. Tr. 320. The ALJ gave "significant weight" to Dr. Smolen's report and specifically accounted for the assessed cognitive deficits "by restricting [plaintiff] to simple, routine tasks that involve little, in any, public interaction." Tr. 421. Plaintiff argues that limitation did not fully account for Dr. Smolen's opinion, and contends the ALJ should have added a restriction to Reasoning Level 1.

Although the ALJ might have imposed a Reasoning Level 1 limitation based on Dr. Smolen's opinion, his decision to impose a lesser limitation is supported by substantial evidence. As the government notes, Dr. Smolen did not differentiate between simple and complex tasks when assessing plaintiff's cognitive abilities. Moreover, Dr. LeBray reviewed Dr. Smolen's report and concluded that plaintiff would be able to carry out simple instructions with few changes in routine. Tr. 337. The ALJ permissibly reached the same conclusion, and committed no error in his evaluation of Dr. Smolen's opinion.

CONCLUSION

The Commissioner's decision is AFFIRMED and this case is dismissed.[2]

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[2] Plaintiff makes two additional arguments, neither of which is persuasive. First, she contends that the RFC contains no accommodations for her wrist tendinitis and carpal tunnel syndrome, both of which the ALJ deemed severe. To the contrary, the RFC restricted plaintiff to light work (which includes a limitation on lifting) and contained an additional limitation regarding pushing and pulling. Second, she avers that the RFC should have accounted for her "episodes of syncope in times of stress" by limiting her to Reasoning Level 1 jobs. Pl.'s Br. at

IT IS SO ORDERED.

Dated this 27th day of July 2017.

Ann Aiken
United States District Judge

14. But the attending physician who treated her after the only such episode in the medical record assessed "facetious syncope" after noting symptoms inconsistent with true syncope. Tr. 734–35.