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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 DAWN T. GORTON,

6 Plaintiff,

7 v.

8 CAROLYN W. COLVIN,
Commissioner of Social Security¹,

9 Defendant.

NO. CV-12-00347-JLQ

MEMORANDUM OPINION AND
ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT

10
11 BEFORE THE COURT are Cross-Motions for Summary Judgment. (ECF
12 NO. 14 & 16). Plaintiff is represented by attorney **Lora Lee Stover**. Defendant is
13 represented by Assistant United States Attorney **Pamela J. DeRusha** and Special
14 Assistant United States Attorney **Franco Becia**. This matter was previously
15 before Magistrate Judge Imbrogno. It was reassigned to the undersigned for all
16 further proceedings on August 30, 2013. The court has reviewed the
17 administrative record and the parties' briefs. The case was submitted for decision
18 without oral argument on September 3, 2013.

19 This court's role on review of the decision of the Administrative Law Judge
20 (ALJ) is limited. The court reviews that decision to determine if it was supported
21 by substantial evidence and contains a correct application of the law. *Valentine v.*
22 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). This court is
23 obligated to affirm the ALJ's findings if they are supported by substantial
24

25 _____
26 ¹Carolyn W. Colvin became the Acting Commissioner of Social
27 Security on February 14, 2013. Pursuant to Rule 25(d) of the
28 Federal Rules of Civil Procedure, Ms. Colvin is substituted for
Michael Astrue as the Defendant in this suit. No further action
need be taken to continue this matter by reason of the last
sentence of 42 U.S.C. 405(g).

1 evidence and the reasonable inferences to be drawn therefrom. *Molina v. Astrue*,
2 674 F.3d 1104, 1110-11 (9th Cir. 2012). Substantial evidence is such relevant
3 evidence that a reasonable mind might accept as adequate to support the
4 conclusion.

5 **I. JURISDICTION**

6 In August 2009, Plaintiff/Claimant Dawn T. Gorton, then 40 years of age,
7 filed an application for disability insurance benefits alleging a disability onset date
8 of March 26, 2009, the date on which she underwent a spinal fusion surgery.
9 Plaintiff alleged at the time of her application an inability to work due to back pain
10 and heart palpitations. Her application was denied initially and on
11 reconsideration. After a timely request, a hearing was held before Administrative
12 Law Judge Caroline Siderius on November 30, 2010. (Transcript at ECF No. 10-2
13 pages 39-78). The ALJ issued a decision denying benefits on February 7, 2011.
14 (ECF No. 10-2, p. 18-28). Plaintiff filed a request for review with the Appeals
15 Council, which was denied on April 11, 2012. The decision of the ALJ became
16 the final decision of the Commissioner, which is appealable to the district court
17 pursuant to 42 U.S.C. § 405(g).

18 **II. SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act defines "disability" as the "inability to engage in
20 any substantial gainful activity by reason of any medically determinable physical
21 or mental impairment which can be expected to result in death or which has lasted
22 or can be expected to last for a continuous period of not less than twelve months."
23 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant
24 shall be determined to be under a disability only if the impairments are of such
25 severity that the claimant is not only unable to do her previous work but cannot,
26 considering claimant's age, education and work experiences, engage in any other
27 substantial gainful work which exists in the national economy. 42 U.S.C. §§
28 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920;
3 *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987):

4 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
5 §§ 404.1520(b), 416.920(b). If she is, benefits are denied. If she is not, the
6 decision maker proceeds to step two.

7 Step 2: Does the claimant have a medically severe impairment or
8 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant does not have a severe impairment or combination of impairments, the
10 disability claim is denied. If the impairment is severe, the evaluation proceeds to
11 the third step.

12 Step 3: Does the claimant's impairment meet or equal one of the listed
13 impairments acknowledged by the Commissioner to be so severe as to preclude
14 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. Pt.
15 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
16 impairments, the claimant is conclusively presumed to be disabled. If the
17 impairment is not one conclusively presumed to be disabling, the evaluation
18 proceeds to the fourth step.

19 Step 4: Does the impairment prevent the claimant from performing work she
20 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
21 is able to perform her previous work, she is not disabled. If the claimant cannot
22 perform this work, the inquiry proceeds to the fifth and final step.

23 Step 5: Is the claimant able to perform other work in the national economy
24 in view of her age, education and work experience? 20 C.F.R. §§ 404.1520(f),
25 416.920(f).

26 The initial burden of proof rests upon the Plaintiff to establish a prima facie
27 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
28 (9th Cir. 1971). The initial burden is met once a claimant establishes that a

1 physical or mental impairment prevents her from engaging in her previous
2 occupation. The burden then shifts to the Commissioner to show (1) that the
3 claimant can perform other substantial gainful activity and (2) that a "significant
4 number of jobs exist in the national economy" which claimant can perform. *Kail*
5 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

6 **III. STANDARD OF REVIEW**

7 "The [Commissioner's] determination that a claimant is not disabled will be
8 upheld if the findings of fact are supported by substantial evidence and the
9 [Commissioner] applied the proper legal standards." *Delgado v. Heckler*, 722
10 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is
11 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
12 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,
13 601-602 (9th Cir. 1989). "It means such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion." *Richardson v. Perales*, 402
15 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as
16 the [Commissioner] may reasonably draw from the evidence" will also be upheld.
17 *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court
18 considers the record as a whole, not just the evidence supporting the decision of
19 the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989). This
20 court may set aside a denial of benefits only if the basis for denial is not supported
21 by substantial evidence or if it is based on legal error. *Thomas v. Barnhart*, 278
22 F.3d 947, 954 (9th Cir. 2002). It is the role of the trier of fact, not this court, to
23 resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400. If the evidence
24 supports more than one rational interpretation, the court must uphold the decision
25 of the ALJ. *Thomas*, 278 F.3d at 954 (9th Cir. 2002).

26 **IV. STATEMENT OF FACTS**

27 The facts are contained in the medical records, administrative transcript, and
28 the ALJ's decision, and are only briefly summarized here. At the time the ALJ

1 issued her decision, Plaintiff was 40 years old. Plaintiff has a high school
2 education. Plaintiff's primary work history was in the healthcare field as a
3 phlebotomist. Plaintiff had worked full-time as a phlebotomist for approximately
4 8 years proceeding her alleged onset of disability in March 2009. (ECF No. 10, p.
5 151). Past work experience also included telephone customer service
6 representative and patient service representative in the years 1998 to 2001.

7 Plaintiff was experiencing back pain at least as early as March 2008, and
8 underwent various treatment including steroid injections. (ECF No. 10, p. 265). In
9 March 2009, she underwent a spinal fusion surgery, and was originally expected to
10 be on leave from work for three months to recover. In June 2009, Plaintiff's
11 surgeon, Dr. Bronson extended this period by two months. In August 2009,
12 Plaintiff filed her application for benefits, alleging she had been disabled since the
13 date of the spinal fusion surgery on March 26, 2009.

14 V. COMMISSIONER'S FINDINGS

15 The ALJ found at **Step 1** that Plaintiff had not engaged in substantial
16 gainful activity since March 26, 2009, the alleged onset date. According to the
17 earnings records, Plaintiff earned \$10,248.28 in 2009 (ECF No. 10, p. 125), which
18 approaches the substantial gainful activity level. Presumably, most of these
19 earnings occurred in the first three months of 2009, prior to her back surgery.

20 At **Step 2**, the ALJ found the medical evidence established the following
21 severe impairments: degenerative disc disease and premature ventricular
22 contractions (hereafter "PVC"). (ECF No. 10-2, p. 23).

23 At **Step 3**, the ALJ found that Plaintiff did not have an impairment or
24 combination of impairments that met or medically equaled one of the listed
25 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d)).
26 The ALJ found that Plaintiff's degenerative disc disease did not meet listing 1.04.
27 The ALJ also found that Plaintiff's PVC did not meet any of the cardiovascular
28 listings under section 4.01, and specifically did not meet the listing 4.05 for

1 recurrent arrhythmias.

2 At **Step 4**, the ALJ evaluated Plaintiff's residual functional capacity (RFC)
3 and found that Plaintiff could perform light work and could return to her past
4 relevant work as a phlebotomist, receptionist, or patient insurance clerk. (ECF No.
5 10-2, p. 24-27).

6 The ALJ did not reach **Step 5**, having concluded at Step 4 that Plaintiff
7 could perform her past relevant work.

8 VI. ISSUES

9 Plaintiff's briefing lists four issues for review: 1) that the ALJ erred in
10 rejecting the opinions of Plaintiff's surgeon (Dr. Bronson) as to Plaintiff's back
11 condition; 2) that the ALJ erred in assessing Plaintiff's RFC; 3) that the ALJ erred
12 in assessing Plaintiff's credibility; and 4) that the ALJ erred in finding Plaintiff
13 capable of performing past relevant work (ECF No. 15, p. 7-8). Some of these
14 arguments are limited. The argument devoted to issue #2 concerning RFC appears
15 in one paragraph on page 13 of Claimant's brief. The argument in support of Issue
16 #4 is not clearly delineated in Claimant's brief. Apparently the argument is that
17 the ALJ erred in posing an improper hypothetical to the vocational expert.

18 VII. DISCUSSION

19 **A. Did the ALJ err in Rejecting the Opinion of Plaintiff's Treating** 20 **Surgeon, Dr. Bronson?**

21 Plaintiff argues that the ALJ erred in rejecting the opinion of Plaintiff's
22 treating physician who, in a follow-up exam to the March 2009 back surgery,
23 opined in August 2009 that Plaintiff was not capable of returning to work and
24 would likely be unable to work for twelve to eighteen months. The ALJ directly
25 addressed Dr. Bronson's opinion. (ECF No. 10-2, p. 27). The ALJ gave the
26 conclusion of inability to work "little weight...for a number of reasons." *Id.* The
27 ALJ explained that the conclusion was inconsistent with Dr. Bronson's findings of
28 normal neurological exam and normal x-rays. Further, the ALJ stated the opinion

1 was merely a “snapshot” as opposed to a longitudinal assessment of capacity to
2 function.

3 As a general rule, more weight should be given to the opinion of a treating
4 source than to the opinion of doctors who do not treat claimant. *Lester v. Chater*,
5 81 F.3d 821, 830 (9th Cir. 1995). Clear and convincing reasons are required to
6 reject the opinion of a treating provider. *Id.* A conclusion by a health care
7 provider that an individual cannot work is not binding on the ALJ. See 20 C.F.R. §
8 404.1527(d)(1)(“A statement by a medical source that you are ‘disabled’ or
9 ‘unable to work’ does not mean that we will determine that you are disabled.”).

10 An overall review of the medical record supports the ALJ’s determination
11 that Dr. Bronson’s August 2009 prediction as to the period of disability was
12 unsupported by the record. Plaintiff had the spinal fusion surgery on March 26,
13 2009. At an April 14, 2009, office visit with Dr. Darin Eckert, Plaintiff is
14 described as doing “extremely well” with only “mild” back pain, and is not taking
15 pain medication. (ECF No. 11, p. 286). However, Plaintiff then fell in early-May
16 2009, and went to Inland Neurosurgery and Spine for a check up. At that time, she
17 complained of increased pain and was taking some muscle relaxants and pain
18 medication. The diagnosis was lower lumbar strain which may set her back a
19 week or more on her recovery, but radiographic images showed no evidence of
20 breakage, loosening, or pulling out of the fusion hardware. (ECF No. 11, p. 239-
21 240). At an office visit of May 29, 2009, Plaintiff was two months post-surgery,
22 was complaining of increased pain, and had recently stopped taking her pain
23 medication. (ECF No. 11, p. 236).

24 Plaintiff had initially expected to miss three months of work, as described
25 by Advanced Registered Nurse Practitioner Chad Bailey on Plaintiff’s Family
26 Medical Leave Act certification. (ECF No. 11, p. 379-380). In June 2009, Dr.
27 Bronson extended that by two months. Then on August 18, 2009, Dr. Bronson
28

1 wrote that: “Dawn is in today for recheck. She is at the six-month mark.” (*Id.* at
2 231). Plaintiff was actually just less than five months post-surgery. Dr. Bronson
3 notes that Plaintiff is having a lot of back pain, and that she is “off narcotics at this
4 point.” He also states the “examination is relatively benign”. He then wrote: “It is
5 continuing to disable her. She is applying for long-term disability through work
6 and I do feel that she is not capable of gainful employment at this time due to her
7 back and I anticipate it will probably be a year to 18 months, if she will be able to
8 return to work.” (*Id.*). He then recommends rehabilitation exercise, including lap
9 swimming. Thus, the ALJ’s assessment that Dr. Bronson’s conclusion is
10 inconsistent with objective findings is supported by the record. The examination
11 was “relatively benign”, the x-rays were normal, and Plaintiff was off pain
12 medication, yet Dr. Bronson forecast 12 to 18 months of disability. The ALJ
13 provided clear and convincing reasons for rejecting Dr. Bronson’s prediction of an
14 additional 12 to 18 months of recovery time from the back surgery.

15 In September 2009, Plaintiff went to the Deaconess Medical Center
16 Emergency Room for back pain, but left without being seen. (ECF No. 11, p. 442).
17 She also went to the Deaconess E.R. on October 14, 2009, for what is described in
18 the notes as a “one-day history of lower back pain.” (*Id.* at 439). The note further
19 described that Plaintiff was having increased pain twice per week. Dr. Chaganur
20 describes, after examining her, that Plaintiff was in “mild pain” and prescribed
21 some pain medication.

22 The Defendant initially denied benefits in a letter dated January 26, 2010.
23 At that time, Plaintiff was 10-months post-surgery and the letter stated in part:
24 “We realize that you are presently unable to work, but your condition is not
25 expected to prevent you from working for 12 consecutive months.” (ECF No. 10,
26 p. 79). One month later, at a February 23, 2010 office visit with Dr. Eckert, his
27 note describes that Plaintiff is not taking pain medication and she “feels strong
28 enough to return to work.” (ECF No. 11, p. 329). Dr. Scottolini’s case analysis,

1 dated March 23, 2010, states that Plaintiff had “excellent results” from her back
2 surgery, the clinical evidence did not support that she is now worse, and she is
3 engaged in an active lifestyle. (*Id.* at 382). Although recovery from Plaintiff’s
4 back surgery took longer than originally predicted, the ALJ’s finding that the
5 evidence did not establish a twelve month period of disability is supported by
6 substantial evidence. This court must "uphold the ALJ's decision where the
7 evidence is susceptible to more than one rational interpretation." *Cantrall v.*
8 *Colvin*, __ F.3d __ (9th Cir. Sept. 13, 2013) citing *Burch v. Barnhart*, 400 F.3d 676,
9 680-81 (9th Cir. 2005).

10 **(I) Premature Ventricular Contractions (“PVC”)**

11 The foregoing discussion of the medical evidence record has primarily
12 focused on Plaintiff’s back condition and spinal surgery. The ALJ also found that
13 Plaintiff’s PVC were a severe impairment. The ALJ found this impairment, taken
14 separately or in combination with her back condition, did not render Plaintiff
15 disabled. At least as early as August 2008, Plaintiff experienced the PVC. At an
16 office visit with Dr. Eckert on August 8, 2008, he notes that Plaintiff has been
17 largely “asymptomatic” and will “rarely” notice a rapid heart rate. (ECF No. 11, p.
18 376). An EKG confirmed frequent PVC and Dr. Eckert recommended Plaintiff
19 avoid caffeine. In September 2009, Plaintiff underwent an Echocardiography with
20 exercise test, which showed all chambers of heart to be within normal limits for
21 size and function and “no abnormalities noted.” (ECF No. 11, p. 300). The test
22 did show “occasional PVCs” in recovery from exercise, but the overall conclusion
23 was “normal stress echo”. (*Id.*). Dr. Scottolini in his March 2010 report wrote that
24 Plaintiff’s “heart disease is not a signif. problem”. (*Id.* at 382). In April 2011, Dr.
25 Stagaman, a cardiologist, wrote that Plaintiff was on prescription medication for
26 her PVCs and is “100% better with minimal palpitations” and increased energy.
27 (ECF No. 11, p. 472).
28

1 **B. Did the ALJ err in Assessing Plaintiff’s Residual Functional**
2 **Capacity?**

3 At page 13 of the Plaintiff’s brief (ECF No. 15), Plaintiff argues that the
4 ALJ did not account for how Plaintiff’s pain would affect her ability to attend and
5 concentrate, or how stress in the workplace would affect her overall abilities.
6 Plaintiff cites to no record evidence in support of this argument. The record does
7 not support a conclusion that Plaintiff had difficulties with concentration or stress
8 in the workplace. Plaintiff’s self-report and that of her fiancée indicated she deals
9 well with stress. (ECF No. 10, p. 168-69; 176-77). Her functional report details
10 no problems with concentration. Dr. Fitterer’s Psychiatric Review found no mental
11 impairments and noted that Plaintiff “doesn’t allege
12 concentration/memory/understanding problems, handles stress and change well.”
13 (ECF No. 11, p. 395). Plaintiff has not demonstrated that the ALJ erred in
14 assessing Plaintiff’s RFC.

15 **C. Did the ALJ err in Assessing Plaintiff’s Credibility?**

16 The ALJ found Plaintiff was not entirely credible as to the intensity,
17 persistence, and limiting effects of her symptoms. (ECF No. 10-2, p. 25). The ALJ
18 found the medical record did not support the claimed degree of limitation. The
19 ALJ cited to the office note of Dr. Eckert, just one month after back surgery, which
20 stated Plaintiff was doing “extremely well” in her post-surgery recovery. The ALJ
21 also cited to additional medical records in November and December 2009,
22 approximately 8-months post-surgery. (*Id.*). The ALJ further found that Plaintiff’s
23 activity level did not support her allegation of disability. (*Id.* at 26). The ALJ
24 noted that several of Plaintiff’s physician’s encouraged her to do more exercise,
25 and that Dr. Scottolini stated Plaintiff, “engaged in an active lifestyle that is
26 incongruent with her allegations of worsening symptomology.” (*Id.*)
27
28

1 Credibility determinations are for the ALJ. It is the role of the ALJ to assess
2 credibility and weigh the evidence, “[w]here the evidence is susceptible to more
3 than one rational interpretation, it is the ALJ’s conclusion that must be upheld.”
4 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). From this court’s review of
5 the record, Plaintiff appears to have been quite candid at the administrative
6 hearing. Plaintiff indicated that she thought her back pain would not prohibit her
7 from doing a job where she could alternate sitting and standing. (ECF No. 10, p.
8 50). She testified she was not taking any pain medication for her back. (*Id.* at 52).
9 She also testified that she did not have any psychological problems, including
10 depression or anxiety. (*Id.* at 53). She testified that although she had asthma, the
11 attacks never would impair her from being on the job site. (*Id.* at 61).

12 There is also evidence of record which supports the ALJ’s analysis of
13 Plaintiff’s credibility, or the lack thereof. For example, Plaintiff initially applied
14 for benefits based on her back condition and PVC, however on application for
15 reconsideration Plaintiff claimed to suffer from several other conditions, including
16 knee and shoulder pain, irritable bowel syndrome, headaches, and depression.
17 (ECF No. 10, p. 183). At the hearing before the ALJ, Plaintiff returned to
18 allegations of back pain and PVC, and specifically disclaimed any problems with
19 depression. The court notes that the application for reconsideration was prepared
20 by a non-attorney employee of Allsup, Inc., a for-profit company that assists
21 claimants in obtaining Social Security benefits. Thus, the discrepancy may be the
22 fault of that employee. Additionally, at the hearing before the ALJ Plaintiff gave
23 somewhat inconsistent testimony, at times indicating that her back pain had
24 improved and her chest pain was now the problem, and at other times stating the
25 back pain was her “main problem.” Additionally, the ALJ found that Plaintiff had
26 failed to follow medical advice. Specifically, she had not quit smoking, despite
27 repeated advice to do so, and at times she had failed to take her PVC medication.
28 (ECF No. 10, p. 26). A failure to follow treatment advice can support an adverse

1 credibility determination. See *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir.
2 2012)(“We have long held that, in assessing a claimant’s credibility, the ALJ may
3 properly rely on unexplained or inadequately explained failure to seek treatment or
4 follow a prescribed course of treatment.”). The ALJ did not err in assessing
5 Plaintiff’s credibility.

6 **D. Did the ALJ err at Step 4 in finding Plaintiff could perform Past**
7 **Relevant Work?**

8 Plaintiff argues that the ALJ posed an improper hypothetical to the
9 vocational expert by not fully representing Plaintiff’s impairments and pain
10 complaints. The ALJ’s hypothetical was based on the RFC, and as discussed
11 *supra*, the RFC determination is supported by substantial evidence. An ALJ is
12 required to include only those limitations she finds supported by substantial
13 evidence in her hypothetical question. *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-
14 63 (9th Cir. 2001). The ALJ did not err in framing the hypothetical questions or
15 relying on the vocational expert’s testimony.

16
17 **VIII. CONCLUSION**

18 The Commissioner’s and ALJ’s decision is supported by substantial
19 evidence in the record and is based on proper legal standards. It must therefor be
20 affirmed. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

21 **IT IS HEREBY ORDERED:**

- 22
- 23 1. Plaintiff’s Motion for Summary Judgment (ECF No. 14) is **DENIED**.
 - 24 2. Defendant’s Motion for Summary Judgment (ECF No. 16) is
25 **GRANTED**.
 - 26 3. The Clerk is directed to enter Judgment dismissing the Complaint and
27 the claims therein with prejudice.
- 28

