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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHRYN E. SACKETT,
Plaintiff,

vs.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,
Defendant.

No. CV-12-5062-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
JUDGMENT, *INTER ALIA***

BEFORE THE COURT are Plaintiff's Motion For Summary Judgment (ECF No. 16) and the Defendant's Motion For Summary Judgment (ECF No. 20).

JURISDICTION

Kathryn E. Sackett, Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on April 3, 2007. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing and one was held on June 1, 2010, before Administrative Law Judge (ALJ) Benita A. Lobo via video. Plaintiff, represented by counsel, appeared and testified at this hearing. Kelly Roberts testified as a Vocational Expert (VE). On June 16, 2010, the ALJ issued a decision denying benefits. The Appeals Council denied a request for review and the ALJ's decision became the final decision of the Commissioner. This decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 1**

1 **STATEMENT OF FACTS**

2 The facts have been presented in the administrative transcript, the ALJ's
3 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.
4 At the time of the administrative hearing, Plaintiff was 39 years old. She has a
5 high school education and past relevant work experience as a cashier. Plaintiff
6 alleges disability since July 7, 2006.

7
8 **STANDARD OF REVIEW**

9 "The [Commissioner's] determination that a claimant is not disabled will be
10 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
11 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a
12 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975),
13 but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th
14 Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573,
15 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might
16 accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389,
17 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the
18 [Commissioner] may reasonably draw from the evidence" will also be upheld.
19 *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348
20 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a
21 whole, not just the evidence supporting the decision of the Commissioner.
22 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Thompson v. Schweiker*, 665
23 F.2d 936, 939 (9th Cir. 1982).

24 It is the role of the trier of fact, not this court to resolve conflicts in
25 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
26 rational interpretation, the court must uphold the decision of the ALJ. *Allen v.*
27 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

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**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 2**

1 A decision supported by substantial evidence will still be set aside if the
2 proper legal standards were not applied in weighing the evidence and making the
3 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433
4 (9th Cir. 1987).

6 ISSUES

7 Plaintiff argues the ALJ erred by: 1) improperly rejecting her depression,
8 posttraumatic stress disorder (PTSD), and migraines at Step Two of the sequential
9 evaluation process; 2) improperly rejecting the opinions of her treating and
10 examining medical providers; 3) improperly discounting her credibility regarding
11 her subjective complaints; and 4) failing to identify specific jobs available in
12 significant numbers which are compatible with her functional limitations.

14 DISCUSSION

15 SEQUENTIAL EVALUATION PROCESS

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

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
27 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one
28 determines if she is engaged in substantial gainful activities. If she is, benefits are

1 denied. 20 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the
2 decision-maker proceeds to step two, which determines whether the claimant has a
3 medically severe impairment or combination of impairments. 20 C.F.R. §§
4 404.1520(a)(4)(ii) and 416.920(a)(4)(ii). If the claimant does not have a severe
5 impairment or combination of impairments, the disability claim is denied. If the
6 impairment is severe, the evaluation proceeds to the third step, which compares
7 the claimant's impairment with a number of listed impairments acknowledged by
8 the Commissioner to be so severe as to preclude substantial gainful activity. 20
9 C.F.R. §§ 404.1520(a)(4)(iii) and 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P,
10 App. 1. If the impairment meets or equals one of the listed impairments, the
11 claimant is conclusively presumed to be disabled. If the impairment is not one
12 conclusively presumed to be disabling, the evaluation proceeds to the fourth step
13 which determines whether the impairment prevents the claimant from performing
14 work she has performed in the past. If the claimant is able to perform her previous
15 work, she is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv) and 416.920(a)(4)(iv).
16 If the claimant cannot perform this work, the fifth and final step in the process
17 determines whether she is able to perform other work in the national economy in
18 view of her age, education and work experience. 20 C.F.R. §§ 404.1520(a)(4)(v)
19 and 416.920(a)(4)(v).

20 The initial burden of proof rests upon the claimant to establish a prima facie
21 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
22 (9th Cir. 1971). The initial burden is met once a claimant establishes that a
23 physical or mental impairment prevents her from engaging in her previous
24 occupation. The burden then shifts to the Commissioner to show (1) that the
25 claimant can perform other substantial gainful activity and (2) that a "significant
26 number of jobs exist in the national economy" which claimant can perform. *Kail*
27 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 4**

1 **ALJ'S FINDINGS**

2 The ALJ found the following: 1) Plaintiff has severe impairments which
3 include low back pain due to sacroilitis, status-post carpal tunnel release on the
4 right, carpal tunnel syndrome on the left, and fibromyalgia; 2) Plaintiff does not
5 have an impairment or combination of impairments that meets or equals any of the
6 impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff has the
7 residual functional capacity (RFC) to perform light work, except no climbing of
8 ladders, ropes and scaffolds; no working at heights or around dangerous
9 machinery; only occasionally stooping, kneeling, crouching and crawling; and
10 only limited grasping and gross manipulation with the left non-dominant hand; 4)
11 Plaintiff's RFC prevents her from performing her past relevant work; and 5)
12 Plaintiff's RFC allows her to perform jobs that exist in significant numbers in the
13 national economy, including usher/ticket taker, interviewer, and
14 receptionist/information clerk. Accordingly, the ALJ concluded the Plaintiff is not
15 disabled.

16
17 **TREATING PHYSICIAN'S OPINION**

18 It is settled law in the Ninth Circuit that in a disability proceeding, the
19 treating physician's opinion is given special weight because of her familiarity with
20 the claimant and her physical condition. *Benecke v. Barnhart*, 379 F.3d 587, 592
21 (9th Cir. 2004); *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001)
22 (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)); *Lester v. Chater*,
23 81 F.3d 821, 830 (9th Cir. 1996); *Smolen v. Chater*, 80 F.3d 1273, 1285-88 (9th
24 Cir. 1996); *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
25 (9th Cir. 1995); and *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). If the
26 treating physician's opinion is not contradicted, it can be rejected only with clear
27 and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the ALJ may
28 reject the opinion if specific, legitimate reasons that are supported by substantial

1 evidence are given. *See Flaten*, 44 F.3d at 1463; *Fair*, 885 F.2d at 605. “[W]hen
2 evaluating conflicting medical opinions, an ALJ need not accept the opinion of a
3 doctor if that opinion is brief, conclusory, and inadequately supported by clinical
4 findings.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

5 Cheryl Hipolito, M.D., began treating the Plaintiff in January 2008. (Tr. at
6 pp. 460-63). Thereafter, Plaintiff continued to see Dr. Hipolito on a regular basis
7 during the next two years, right up to the date of Plaintiff’s administrative hearing
8 on June 1, 2010. Plaintiff saw Dr. Hipolito in May 2008 (Tr. at pp. 557-563); June
9 2008 (Tr. at p. 564); July 2008 (Tr. at p. 566); August 2008 (Tr. at pp. 567-68);
10 January 2009 (Tr. at p. 570); July 2009 (Tr. at pp. 572-73; 575-76); October 2009
11 (Tr. at p. 577-78); November 2009 (Tr. at pp. 579-80); December 2009 (Tr. at pp.
12 581-83); January 2010 (Tr. at pp. 584-85); February 2010 (Tr. at p. 586); and
13 April 2010 (Tr. at pp. 617-20).

14 In May 2010, at the request of Plaintiff’s counsel, Dr. Hipolito answered a
15 series of questions related to Plaintiff’s medical condition. Dr. Hipolito indicated
16 she agreed that Plaintiff needed to “lay down at least two to three hours out of any
17 eight consecutive hours to get relief from pain and/or to cope with pain, chronic
18 headaches, and/or side effects of medication.” Dr. Hipolito also agreed that it was
19 reasonable for the Plaintiff to occasionally need a wheelchair and to more
20 frequently use a cane. Finally, asked whether any of six listed categories most
21 accurately described the Plaintiff’s “physical capacity relative to the possibility of
22 maintaining full-time employment,” Dr. Hipolito checked the box indicating she
23 did “not believe that this patient is capable of performing any type of work on a
24 reasonably continuous, sustained basis.” (Tr. at pp. 629-630). The ALJ rejected
25 Dr. Hipolito’s assessment of Plaintiff’s physical limitations, giving it no weight
26 “because her opinions were mere responses to questionnaires and lacked any
27 supporting objective findings.” (Tr. at p. 20).

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**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 6**

1 Initially, it appears that Dr. Hipolito's assessment of Plaintiff's physical
2 limitations was not contradicted by any other physician who treated or examined
3 Plaintiff. The ALJ did not cite to any such contradictory opinion in her decision.
4 Accordingly, "clear and convincing" reasons needed to be offered by the ALJ in
5 order to reject Dr. Hipolito's assessment.

6 In her summary judgment memorandum, the Commissioner notes that
7 Plaintiff takes issue with the ALJ's reason for rejecting Dr. Hipolito's assessment
8 "by pointing to evidence that she believes is substantial objective findings to
9 support Dr. Hipolito's opinions." (ECF No. 20 at p. 13). The Commissioner
10 contends Dr. Hipolito "did not cite to any of the evidence Plaintiff points to as a
11 basis for her opinions." (*Id.*). While it is true that Dr. Hipolito did not cite to any
12 of this evidence in her May 2010 assessment completed pursuant to the questions
13 posed to her by Plaintiff's counsel, her chart notes over the course of the preceding
14 two years of treatment are replete with references to objective findings regarding
15 the Plaintiff's physical impairments. These are the findings Plaintiff points to in
16 her summary judgment memorandum (ECF No. 17 at p. 15): "spine tenderness,
17 paraspinal muscle tenderness, limping, antalgic gait, limited range of motion,
18 swelling of the hands and CT images of the spine."

19 On Plaintiff's first visit to Dr. Hipolito in January 2008, the doctor noted
20 that Plaintiff had "another" CT scan of the lumbar spine in 2006 which "showed
21 again a shallow, broad-based posterior protrusion of L4-L5 and L5-S1 resulting in
22 mild foraminal stenosis bilaterally at both levels;" "mild lateral recess stenosis at
23 the level of L4-L5;" "mild disc bulging at L3-L4 and mild facet arthropathy at L4-
24 L5 and L5-S1." On a number of Plaintiff's subsequent visits, Dr. Hipolito would
25 refer to these degenerative changes in Plaintiff's spine. (Tr. at pp. 580, 581, 583,
26 584, 586 and 619). On January 29, 2008, Dr. Hipolito reported as follows:

27 [Plaintiff's] [b]ack examination showed positive for tenderness
28 of the lumbosacral spine with paraspinal tenderness on palpation.
Negative for straight leg raising test. Positive for limitation of

1 motion on spinal forward flexion, hyperextension and lateral
2 bending due to pain. There is note of an antalgic gait with
favoring of the right lower extremity.

3 (Tr. at p. 462). The same results were reported as a result of back examinations
4 conducted on October 26, 2009, December 8, 2009, December 28, 2009, and
5 February 22, 2010. (Tr. at pp. 578, 581, 583 and 586).

6 In sum, the ALJ did not offer “clear and convincing” reasons supported by
7 substantial evidence in the record to reject the uncontradicted opinion of Dr.
8 Hipolito regarding functional limitations arising from Plaintiff’s physical
9 impairments. Dr. Hipolito’s responses to counsel’s questionnaire were supported
10 by objective findings. They were not “mere responses [which] lacked any
11 supporting objective findings.”

12 13 **CREDIBILITY**

14 In her decision, the ALJ referred to Dr. Hipolito’s February 22, 2010
15 examination and stated:

16 At this point, now six years after the alleged onset date of
17 disability, the claimant had still not returned to work and no
18 medical treatment was being offered other than pain
19 management. Indeed, despite the pain complaints, no
20 medical source recommended surgery. Additionally,
again, no medical source assigned any functional limitations.

21 (Tr. at p. 20).

22 The Commissioner concedes the ALJ erred in rejecting Plaintiff’s pain
23 complaints because no medical source recommended surgery. (ECF No. 20 at p.
24 21). At the hearing, the Plaintiff testified surgery was not an option because of the
25 possibility that cysts in her back would burst. (Tr. at p. 35). The medical record
26 confirms the existence of these cysts. (Tr. at pp. 339 and 367). It is also untrue
27 that as of February 22, 2010, “no medical source assigned any functional
28 limitations.” On March 3, 2008, Dr. Hipolito completed a Washington State
Department Of Social & Health Services “Physical Evaluation” form indicating

1 that Plaintiff's chronic back pain with lumbar spondylosis was of "marked"
2 severity in that it would "very significantly" interfere with her ability to sit, stand,
3 walk, lift, handle and carry. Dr. Hipolito also indicated that Plaintiff's migraine
4 headaches were of "marked" severity and would "very significantly" interfere with
5 her ability to sit, stand, walk, lift, handle, carry, see, communicate and understand
6 or follow directions. Dr. Hipolito further indicated that Plaintiff's ability to
7 balance, bend, climb, crouch, handle, kneel, push, sit and stoop would be "severely
8 limited" because it would aggravate her pain. (Tr. at pp. 467-68).

9 Dr. Hipolito never suggested that Plaintiff was malingering or engaging in
10 any kind of "pain behavior." Also, Dr. Hipolito never found that Plaintiff was
11 engaging in drug seeking behavior. In her December 8, 2009, Dr. Hipolito noted
12 the following:

13 [Plaintiff] denies drug abuse or misuse. There has been
14 no documentation of illicit substances in her urine drug
15 screen. The patient denies obtaining drugs from other
16 sources. No selling of narcotics and no obtaining narcotics
17 from the street. She was advised to undergo drug or
18 chemical dependency evaluation. She went to Advocate
19 for Wellness in Kennewick, Washington and the patient
20 was not found to have chemical dependency; although
21 she did have changes in tolerance, due to the long history
22 of being on pain medication or narcotics.

23 (Tr. at p. 581). (See also Tr. at p. 627).

24 An ALJ can only reject a plaintiff's statement about pain and physical
25 limitations based upon a finding of "affirmative evidence" of malingering or
26 "expressing clear and convincing reasons" for doing so. *Smolen*, 80 F.3d at 1283-
27 84. The record contains no affirmative evidence of malingering and the ALJ did
28 not offer "clear and convincing" reasons for rejecting Plaintiff's subjective pain
complaints which are consistent with the opinions of Dr. Hipolito regarding
Plaintiff's functional limitations. Contrary to the ALJ's finding (Tr. at p. 21), Dr.
Hipolito's opinions were based on more than "minimal" objective findings.

1 **VE HYPOTHETICAL**

2 At the administrative hearing, Plaintiff’s counsel asked the VE to assume
3 Plaintiff was limited to sedentary work with postural limitations of occasional
4 balancing, bending, climbing, crouching, handling, kneeling, pulling, pushing,
5 sitting and stooping, and to “further assume a need for recumbency in which a
6 person needs to lay down at unscheduled times during any eight consecutive hours
7 or at least two hours in eight consecutive hours.” (Tr. at p. 51). The VE indicated
8 these limitations would preclude the Plaintiff from performing all jobs. (*Id.*). The
9 limitations set forth in counsel’s hypothetical are consistent with those opined by
10 Dr. Hipolito which the ALJ improperly rejected. Because the Plaintiff cannot
11 perform any jobs existing in significant numbers in the national economy, she is
12 disabled and has been so disabled since the amended onset date of July 7, 2006.

13
14 **SEVERE IMPAIRMENTS**

15 A “severe” impairment is one which significantly limits physical or mental
16 ability to do basic work-related activities. 20 C.F.R. §§ 404.1520(c) and
17 416.920(c). It must result from anatomical, physiological, or psychological
18 abnormalities which can be shown by medically acceptable clinical and laboratory
19 diagnostic techniques. It must be established by medical evidence consisting of
20 signs, symptoms, and laboratory findings, not just the claimant's statement of
21 symptoms. 20 C.F.R. §§ 404.1508 and 416.908.

22 Step two is a *de minimis* inquiry designed to weed out nonmeritorious
23 claims at an early stage in the sequential evaluation process. *Smolen*, 80 F.3d at
24 1290, citing *Bowen*, 482 U.S. at 153-54 (“[S]tep two inquiry is a *de minimis*
25 screening device to dispose of groundless claims”). “[O]nly those claimants with
26 slight abnormalities that do not significantly limit any basic work activity can be
27 denied benefits” at step two. *Bowen*, 482 U.S. at 158 (concurring opinion).
28 “Basic work activities” are the abilities and aptitudes to do most jobs, including:

1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing, and speaking; 3) understanding, carrying out, and remembering simple instructions; 4) use of judgment; 5) responding appropriately to supervision, co-workers and usual work situations; and 6) dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b); 416.921(b).

Based on the foregoing discussion with regard to the opinions of Dr. Hipolito concerning Plaintiff's physical impairments and resulting functional limitations, and Plaintiff's subjective complaints of pain, it is unnecessary to determine whether the ALJ erred in deeming Plaintiff's depression and PTSD to be non-severe impairments. Based on that same discussion, however, it is apparent that the ALJ's finding that Plaintiff's migraines are not "severe" is not supported by substantial evidence in the record.

CONCLUSION

Plaintiff's Motion For Summary Judgment (ECF No. 16) is **GRANTED** and Defendant's Motion For Summary Judgment (ECF No. 20) is **DENIED**. Pursuant to sentence four of 42 U.S.C. §405(g), the Commissioner's decision denying benefits is **REVERSED** and this matter is **REMANDED** to the Commissioner for payment of benefits to the plaintiff in accordance with the applicable law.

IT IS SO ORDERED. The District Executive shall enter judgment accordingly and forward copies of the judgment and this order to counsel.

DATED this 15th of October, 2013.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge