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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 NATALIE ANN MARIE MICONE,

8 Plaintiff,

9 vs.

10 CAROLYN W. COLVIN, Acting
11 Commissioner of Social Security,

12 Defendant.

No. CV- 14-00026-JPH

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13 BEFORE THE COURT are cross-motions for summary judgment. ECF No.
14 14, 15. The parties have consented to proceed before a magistrate judge. ECF No.
15 8. After reviewing the administrative record and the parties' briefs, the court
16 **grants** defendant's motion for summary judgment, **ECF No. 15**.

17 **JURISDICTION**

18 Micone applied for disability insurance benefits (DIB) and supplemental
19 security income (SSI) benefits on September 20, 2010, alleging onset beginning

1 December 19, 2009 (Tr. 162-69). Benefits were denied initially and on
2 reconsideration (Tr. 109-12, 114-17, 119-22). ALJ Moira Ausems held a hearing
3 August 28, 2012. Micone, her mother, and medical and vocational experts testified
4 (Tr. 48-103). The ALJ issued an unfavorable decision November 2, 2012 (Tr. 21-
5 38). November 29, 2013 the Appeals Council denied review (Tr. 1-6). The matter
6 is now before the Court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
7 for judicial review on January 21, 2014. ECF No. 2, 5.

8 **STATEMENT OF FACTS**

9 The facts have been presented in the administrative hearing transcript, the
10 ALJ's decision and the parties' briefs. They are briefly summarized here and as
11 necessary to explain the court's decision.

12 Micone was 24 years old at onset and 26 at the hearing. She graduated from
13 high school, attended college for a year and completed cosmetology school in 2006
14 or 2009 (Tr. 32, 64-66, 186-87, 293, 301, 341). She has no past relevant work (Tr.
15 32). Initially Micone alleged disability due to attention deficit hyperactivity
16 disorder (ADHD) (Tr. 186). On appeal she alleges disability based on physical and
17 psychological limitations.

18 **SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act (the Act) defines disability as the "inability to
engage in any substantial gainful activity by reason of any medically determinable

1 physical or mental impairment which can be expected to result in death or which
2 has lasted or can be expected to last for a continuous period of not less than twelve
3 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
4 plaintiff shall be determined to be under a disability only if any impairments are of
5 such severity that a plaintiff is not only unable to do previous work but cannot,
6 considering plaintiff’s age, education and work experiences, engage in any other
7 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
8 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
9 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
10 (9th Cir. 2001).

11 The Commissioner has established a five-step sequential evaluation process
12 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
13 one determines if the person is engaged in substantial gainful activities. If so,
14 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
15 decision maker proceeds to step two, which determines whether plaintiff has a
16 medically severe impairment or combination of impairments. 20 C.F.R. §§
17 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment
18 or combination of impairments, the disability claim is denied.

19 If the impairment is severe, the evaluation proceeds to the third step, which
compares plaintiff’s impairment with a number of listed impairments

1 acknowledged by the Commissioner to be so severe as to preclude substantial
2 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
3 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
4 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
5 not one conclusively presumed to be disabling, the evaluation proceeds to the
6 fourth step, which determines whether the impairment prevents plaintiff from
7 performing work which was performed in the past. If a plaintiff is able to perform
8 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
9 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
10 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
11 final step in the process determines whether plaintiff is able to perform other work
12 in the national economy in view of plaintiff's residual functional capacity, age,
13 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
16 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
17 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
18 met once plaintiff establishes that a physical or mental impairment prevents the
19 performance of previous work. The burden then shifts, at step five, to the
Commissioner to show that (1) plaintiff can perform other substantial gainful

1 activity and (2) a “significant number of jobs exist in the national economy” which
2 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a
5 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the
6 Commissioner’s decision, made through an ALJ, when the determination is not
7 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
8 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
9 1999). “The [Commissioner’s] determination that a plaintiff 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) (citing 42 U.S.C. § 405(g)). Substantial
12 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
13 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
14 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence
15 as a reasonable mind might accept as adequate to support a conclusion.”
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch
17 inferences and conclusions as the [Commissioner] may reasonably draw from the
18 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
19 1965). On review, the Court considers the record as a whole, not just the evidence
supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,

1 22 (9th Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980).

2 It is the role of the trier of fact, not this Court, to resolve conflicts in
3 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
4 interpretation, the Court may not substitute its judgment for that of the
5 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
6 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
7 set aside if the proper legal standards were not applied in weighing the evidence
8 and making the decision. *Brawner v. Secretary of Health and Human Services*, 839
9 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
10 administrative findings, or if there is conflicting evidence that will support a
11 finding of either disability or nondisability, the finding of the Commissioner is
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

13 **ALJ'S FINDINGS**

14 ALJ Ausems found Micone was insured through December 31, 2010 (Tr. 21,
15 23). At step one, she found Micone did not work at SGA levels after onset (Tr. 23).
16 At steps two and three, she found Micone suffers from borderline intellectual
17 functioning (BIF); learning disorder; reactive depression; pain disorder associated
18 with general medical conditions and psychological factors; fibromyalgia and right
19 eye blindness, impairments that are severe but do not meet or medically equal a
listed impairment (Tr. 23-24). The ALJ found Micone less than fully credible (Tr.

1 28). She found Micone is limited by right eye blindness and mental impairments
2 but is able to perform a range of light work (Tr. 27, 96-97). At step four, the ALJ
3 found Micone has no past relevant work (Tr. 32, 94-96, 243). At step five, relying
4 on a vocational expert's testimony, the ALJ found Micone can perform other jobs
5 such as cleaner, agricultural sorter and survey worker (Tr. 32-33, 97-99). The ALJ
6 concluded Micone was not disabled from onset through date of the decision (Tr.
7 33).

8 **ISSUES**

9 Micone alleges the ALJ erred when she assessed credibility and weighed the
10 medical evidence. ECF No. 14 at 6-7. The Commissioner responds that the ALJ
11 applied the correct legal standards and the decision is supported by substantial
12 evidence. She asks the court to affirm. ECF No. 15 at 2.

13 **DISCUSSION**

14 *A. Credibility*

15 Micone challenges the ALJ's credibility assessment. She alleges "no issues
16 were raised considering Plaintiff's veracity" at a consultative psychological
17 evaluation. ECF No. 14 at 10-11. Presumably Micone refers to Dr. Wildman's
18 statement in January 2011 that he felt Micone put forth maximum effort during
19 testing (Tr. 280). The Commissioner responds that the ALJ's reasons for finding
Micone less than credible are valid, and Micone fails to challenge the reasons cited

1 by the ALJ. ECF No. 15 at 7.

2 To help weigh the conflicting medical evidence, the ALJ evaluated Micone's
3 credibility. Credibility determinations bear on evaluations of medical evidence
4 when an ALJ is presented with conflicting medical opinions or inconsistency
5 between a claimant's subjective complaints and diagnosed condition. *See Webb v.*
6 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of the ALJ to make
7 credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
8 However, the ALJ's findings must be supported by specific cogent reasons.
9 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative
10 evidence of malingering, the ALJ's reason for rejecting the claimant's testimony
11 must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

12 The ALJ's reasons are clear and convincing. They include: activities
13 inconsistent with alleged limitations; unexplained or inadequately explained failure
14 to consistently seek medical treatment; the ability to work after onset; symptom
15 improvement with prescribed medication and inconsistent or unsupported
16 statements (Tr. 27-30, 177).

17 Micone's activities have included caring for pets, riding horses, driving,
18 shopping, preparing easy meals, cleaning, laundering and using a computer. She
19 camped, fished, hunted, gardened and played cards and board games. She went to
the movies, sporting events, barbeques and a bar to listen to music, with friends or

1 family. In March 2012 she had been engaged for one year, and planned to be
2 married late in the summer of 2012. She could walk three miles (Tr. 63, 85-87,
3 204-08, 212-15, 277, 305, 343, 385). In 2010 Micone said she had not had
4 treatment for eight years, from 2002 to 2010 (Tr. 221, 293). She worked after onset
5 [at less than SGA levels], at times caring for her nephew twelve hours a day (Tr.
6 62, 341, 343-44). Depression and anxiety, as well as pain, improved with
7 prescribed medication (Tr. 92, 338, 343, 355, 403). In May 2011 Micone indicated
8 scoliosis was worse. In February 2012 treatment provider Jarvis opined scoliosis
9 was mild. Micone indicated she needed a cornea transplant but this was
10 unsupported by the medical record (Tr. 75, 222, 226, 307). Micone indicated she
11 does not know how to count change, but testified she is able to if it is in her hand.
12 Complaints of a poor memory are contradicted (Tr. 67, 236, 273, 276, 293, 301,
13 328, 353, 382).

14 The ALJ's reasons are clear, convincing and supported by the record.
15 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002) (daily activities are
16 properly considered, as are inconsistencies in claimant's statements and
17 inconsistencies between statements and conduct); *Burch v. Barnhart*, 400 F.3d
18 676, 680 (9th Cir. 2005) (lack of medical evidence is properly considered as long as
19 it is not the sole basis for discounting pain testimony); *Fair v. Bowen*, 885 F.2d
597, 603 (9th Cir. 1989) (unexplained noncompliance with medical treatment is

1 properly considered); *Warrre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006
2 (9th Cir. 2006) (symptoms controlled effectively by medications are not disabling).

3 *B. Psychological limitations*

4 Micone alleges the ALJ should have given more credit to the opinion of
5 examining psychologist Robert Wildman, II, Ph.D. ECF No. 14 at 9, 11. The
6 Commissioner answers that the ALJ fully accommodated his opinion, as well as
7 those of Drs. Mabee and Skewis, when she assessed Micone's residual functional
8 capacity. ECF No. 15 at 9-11.

9 The Commissioner is correct.

10 Dr. Wildman assessed Micone in November 2010 and January 2011 (Tr.
11 273-80).

12 Micone drove herself to the first evaluation. She completed all paperwork in
13 a very complete and legible manner. She was not taking any medications. She
14 explained she was unable to find a job in the present economy. Dr. Wildman
15 diagnosed adult residuals of childhood ADHD, associated with depression of a
16 largely reactive nature, and personality disorder NOS, with avoidant and dependent
17 features. He opined memory was not impaired and Micone can follow simple and
18 detailed, but not complex, instructions. She is mildly to moderately impaired in the
19 ability to interact socially, and moderately impaired in the ability to maintain
attention and concentration, initially limiting her to simple tasks. He opined

1 Micone “very much needs to be enrolled in mental health treatment” to better
2 manage mental states. He opined she needed a payee due self-doubts and lack of
3 financial experience.

4 Dr. Wildman saw Micone two months later, in January 2011, to perform
5 testing. Results show functioning between dull normal and borderline ranges of
6 intelligence. He felt the scores represent a very minimal estimate of functioning,
7 and opined Micone’s is in the dull normal range. As noted, he felt Micone put forth
8 maximum effort. Wildman pointed out Micone has continually maintained a
9 driver’s license since she was sixteen. She was twenty-five years old when he
10 evaluated her (Tr. 273-74, 276-80).

11 The ALJ accepted Dr. Wildman’s social limitations and included them in the
12 RFC by limiting Micone to superficial contact with others. She accommodated
13 assessed moderate limitations in concentration and attention by limiting Micone to
14 simple routine tasks (Tr. 27, 96-97, 277).

15 Dr. Wildman’s opinion is consistent with the opinion of W. Scott Mabee,
16 Ph.D., who testified at the hearing, and agency reviewing psychologist Sally
17 Skewis, Ph.D. (Tr. 281-97).

18 Dr. Skewis notes during an agency interview in September 2010, no
19 problems were observed. Micone texted on her phone on and off throughout the
interview. She completed cosmetology school in 2006, took no medication and was

1 last treated in 2002 (Tr. 193, 293). Dr. Skewis, consistent with the other experts,
2 assessed moderate limitations in the ability to carry out detailed instructions, work
3 in coordination with others and interact appropriately with the general public (Tr.
4 295-96).

5 Dr. Mabee testified no mental impairment alone or in combination met or
6 equaled a Listing. He assessed an RFC for simple tasks with limited social contact;
7 once tasks are learned, Mabee opined, pace would not be a problem (Tr. 55-56).
8 This is consistent with the opinions of Drs. Skewis and Wildman, and with the
9 residual functional capacity assessed by the ALJ. Micone fails to show the ALJ
10 erred when she weighed the evidence of mental limitations.

11 *C. Physical limitations*

12 Micone alleges the ALJ should have found pain necessitates frequent
13 position changes and a left shoulder impairment restricts the use of her dominant
14 [left] hand. ECF No. 14 at 9; Tr. 305.

15 February 21, 2012, more than two years after onset, treatment provider Stacy
16 Jarvis, PA-C., performed a GAU re-evaluation. She opined Micone could lift a
17 maximum of 20 pounds, and frequently lift or carry only two pounds. Jarvis lists a
18 recent diagnosis of fibromyalgia, with a rheumatology appointment in two months
19 for “additional evaluation and treatment options.” She lists a diagnosis of scoliosis
and describes it as a chronic but mild condition. Micone told Jarvis she can sit

1 fifteen minutes before she must change position. Walking increases pain. She can
2 no longer ride horses very far or for very long due to pain and weakness afterward.
3 She suffers depression related to chronic pain. Medication provides moderate
4 relief. Jarvis opined once rheumatology confirmed the fibromyalgia diagnosis and
5 a more “appropriate medication regimen is configured, she will be able to return to
6 work.” Jarvis also felt a “true” mental health evaluation would be beneficial (Tr.
7 302, 304-07).

8 Micone alleges the ALJ should have included the need to change positions
9 in the RFC based on her pain complaints. ECF No. 14 at 9. This simply recasts the
10 allegation the ALJ improperly assessed credibility.

11 Moreover, at the April 6, 2012 rheumatology appointment mentioned by
12 Jarvis, George Morton, M.D., stated there was no evidence of a rheumatologic
13 condition. Micone had full muscle strength. Dr. Morton suggested nine further
14 tests (Tr. 304, 323, 367, 393-96).

15 Micone alleges the ALJ should have included left hand limitations caused by
16 a rotator cuff tear in her left shoulder. However, the record is clear that this
17 impairment did not last the requisite twelve months. *See* Tr. 395 (noting full
18 muscle strength on exam in April 2012); and Tr. 411 (“pretty good strength” on
19 exam in August 2012). After trials of physical therapy and injection failed,
Micone underwent acromial decompression distal clavicle excision of the left

1 shoulder on November 1, 2012 and later reported “doing fine.” (Tr. 420, 450, 456,
2 460).

3 Micone alleges her testimony is incompatible with an ability to sustain work.
4 ECF No. 14 at 11. The court has addressed the ALJ’s credibility assessment.

5 Opinions premised on Plaintiff’s subjective complaints are properly given
6 the same weight as Plaintiff’s own credibility. *Tonapetyan v. Halter*, 242 F.3d
7 1144, 1149 (9th Cir. 2001).

8 It is the ALJ’s province to resolve ambiguity in the record. Although Micone
9 alleges the ALJ should have weighed the evidence differently, the ALJ is
10 responsible for reviewing the evidence and resolving conflicts or ambiguities in
11 testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ’s
12 reasons for rejecting more dire limitations are specific, legitimate and supported by
13 substantial evidence. The ALJ assessed an RFC that is consistent with the record as
14 a whole. There was no harmful error.

14 CONCLUSION

15 After review the Court finds the ALJ’s decision is supported by substantial
16 evidence and free of legal error.

17 IT IS ORDERED:

- 18 1. Defendant’s motion for summary judgment, **ECF No. 15**, is **granted**.
- 19 2. Plaintiff’s motion for summary judgment, ECF No. 14, is denied.

1 The District Executive is directed to file this Order, provide copies to
2 counsel, enter judgment in favor of defendant, and **CLOSE** the file.

3 DATED this 8th day of July, 2014.

4
5 *s/James P. Hutton*

6 JAMES P. HUTTON

7 UNITED STATES MAGISTRATE JUDGE
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