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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLY ELAINE ADAMS,)
)
) *Plaintiff,*)
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) v.)
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)
)
) CAROLYN W. COLVIN, Acting)
) Commissioner of Social Security)
)
) *Defendant.*)
)
)

CASE NO. 15-CV-00548-BJR

ORDER ADOPTING REPORT AND
RECOMMENDATION AND AFFIRMING
COMMISSIONER

Before the Court are Plaintiff’s Objections [15] to the Report and Recommendation (“R&R”) [14] of the Honorable Mary Alice Theiler, United States Magistrate Judge. Having reviewed the Complaint, the briefs of the parties, the R&R, Plaintiff’s Objection, and Defendant’s Response [16], the Court adopts the R&R and affirms the decision of the Commissioner.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed an application for Social Security Disability benefits and Supplemental Security Income on September 22, 2010, alleging an onset date of her disability of July 30, 2008. A.R. 282-294. The application was denied and Plaintiff requested a hearing before an Administrative

1 Law Judge (“ALJ”) on July 11, 2011. A.R. 169-76, 178-82, 187-90. After a hearing on February
2 2, 2012, the ALJ found that Plaintiff was not disabled. A.R. 38-85, 232-33. Following an appeal
3 and remand, the ALJ held a second hearing. A.R. 86-137; 164-68. During the hearing Plaintiff
4 amended the alleged onset date of her disability to October 14, 2010. A.R. 93. On September 27,
5 2013, the ALJ issued a decision finding that Plaintiff was not disabled and could perform work as
6 an administrative clerk, a customer service representative, a telephone solicitor, a mail clerk, and
7 a small parts assembler. A.R. The ALJ’s September 27, 2013, decision became the final decision
8 of the Commissioner on February 6, 2015. *See* 20 C.F.R. §§ 404.981, 416.1481 (2015).

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10 Plaintiff filed the instant case on April 7, 2015. On September 23, 2015, Judge Theiler
11 issued an R&R recommending that the decision of Commissioner be affirmed. Plaintiff filed her
12 Objections on October 7, 2015.

13 II. STANDARD OF REVIEW

14 When a party objections to an R&R, the district court must review *de novo* those portions of
15 the R&R to which objection is made. *See United States v. Raddatz*, 447 U.S. 667, 673 (1980);
16 Fed. R. Civ. P. 72(b). The district court may accept, reject, or modify, in whole or in part, the
17 findings and recommendations made by the Magistrate Judge. *Raddatz*, 447 U.S. at 673-74.

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19 When reviewing the decision of an ALJ, a district court must determine whether the ALJ’s
20 decision complies with the relevant legal requirements and whether the decision is supported by
21 substantial evidence. *See Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). “Substantial
22 evidence ‘means such relevant evidence as a reasonable mind might accept as adequate to support
23 a conclusion.’” *Id.* (quoting *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir.
24 2009)). If the ALJ’s decision is supported by substantial evidence, the district court may not
25 reverse merely because evidence exists in the record that might support a contrary outcome, or

1 because the court would have decided the case differently. *Molina*, 674 F.3d at 1110. Further, if
2 the ALJ’s reasoning contains an error, but the plaintiff has not shown the error to be harmful, the
3 court may not reverse. *Id.* (citing *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)); *See also Stout*
4 *v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

5 Here, Plaintiff’s Objections are nearly identical to her opening brief: she argues that the
6 ALJ (and Magistrate Judge) incorrectly weighed the medical opinion evidence, failed to properly
7 evaluate Plaintiff’s credibility, and failed to present a hypothetical that accurately describes her
8 medical limitations. While the Court considers the issues *de novo*, the Court notes that Plaintiff’s
9 objections are not properly directed to the findings of the Magistrate Judge; merely reiterating
10 arguments made before the Magistrate Judge without responding to the R&R does little to assist
11 the court or Plaintiff herself.

13 III. ANALYSIS

14 A. Medical Evidence

15 1. Drs. McDuffee and Dees

16 Plaintiff argues that the ALJ erred by not assigning controlling weight to the opinions of Drs.
17 McDuffee and Dees. Controlling weight is assigned to the opinions of treating physicians. As
18 noted by the Magistrate Judge, however, Drs. McDuffee and Dees were not treating physicians
19 but, rather, examining physicians. They examined Plaintiff on behalf of the Washington State
20 Department of Social and Health Services (“DSHS”). *See* 20 C.F.R. § 404.1502 (“We will not
21 consider an acceptable medical source to be your treating source if your relationship with the
22 source is not based on your medical need for treatment or evaluation, but solely on your need to
23 obtain a report in support of your claim for disability.”); *see also Andrews v. Shalala*, 53 F.3d
24 1035, 1042 n.3 (9th Cir. 1995) (explaining that a treating source may not be a doctor with whom
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1 the relationship is based solely to receive a report in support of a claim for disability). Further, the
2 record between Plaintiff and Drs. McDuffee and Dees does not reflect any “treatment.” In fact,
3 Plaintiff’s brief describes only how Drs. Dees and McDuffee *examined* Plaintiff.¹ There is no
4 indication of any treatment by these doctors. *Cf. Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)
5 (an examining physician examines but does not treat the claimant). Controlling weight is not
6 applied to examining opinions and, therefore, the ALJ did not err by not assigning controlling
7 weight to the opinions. To the extent that Plaintiff’s remaining argument depends on Drs.
8 McDuffee and Dees being her treating physicians, her argument fails.
9

10 Plaintiff also objects to the manner in which the ALJ weighed the opinions of Drs. McDuffee
11 and Dees, arguing that they “provided support for their opinions.” As noted by the Magistrate
12 Judge, however, Plaintiff does not address the actual question of whether the ALJ’s ruling
13 discounting the examining opinions of Drs. McDuffee and Dees is supported by substantial
14 evidence. The Court finds that the ALJ’s decision was supported by substantial evidence. The
15 ALJ explicitly mentioned specific evidence in the record – including reports by McDuffee and
16 Dees – in identifying what testimony she discredited and why. A.R. 27 (finding that McDuffee’s
17 three medical opinions are “inconsistent with the evidence, including [Plaintiff’s] performance on
18 mental status exams, which showed that she was irritable, but fully oriented, with intact cognitive
19 functioning.”); *Id.* (Dee’s opinions are “inconsistent with the evidence, including the claimant’s
20 performance on mental status testing, which showed that she was adequately dressed, she was
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25 ¹ Indeed, evidence in the record demonstrates that Dr. McDuffee checked a box indicating Plaintiff
was not eligible to receive treatment from her agency. A.R. 413, 790. In response to another
question asking whether Plaintiff was receiving mental health services from her agency, Dr.
McDuffee checked “No.” A.R. 790.

1 alert, friendly, and cooperative, and she recalled two out of three objects after a five-minute delay,
2 which suggested a mildly impaired ability to learn.”).

3 **2. Drs. Basnett and Disney**

4 Plaintiff next argues that the ALJ failed to appropriately weight the opinions of treating
5 psychiatrist Dr. Basnett and treating physician² Dr. Disney. An ALJ may reject the opinion of a
6 treating physician by providing clear and convincing reasons supported by substantial evidence in
7 the record. *Lester v. Chater*, 81 F.3d at 830-31.

8
9 The ALJ discounted the opinions of Drs. Basnett and Disney after comparing them with the
10 clinical evidence in the record. Specifically, the ALJ discounted their opinions because Plaintiff’s
11 symptoms improved with medication, and because evidence demonstrated Plaintiff’s continued
12 ability to work. The ALJ cited medical evidence supporting this conclusion. Plaintiff’s sleep,
13 nightmares, and plantar fasciitis improved with medication, and when Plaintiff took her
14 medication, her depression improved. A.R. 24-25. The ALJ also pointed to Dr. Basnett’s note
15 that Plaintiff found her antidepressant regimen and therapy beneficial. While Plaintiff objects that
16 the opinions of Drs. Basnett and Disney were properly supported, she fails to rebut the substantial
17 evidence relied upon by the ALJ. Because the ALJ’s discounting of the opinions of Drs. Basnett
18 and Disney was for clear and convincing reasons that are supported by substantial evidence in the
19 record, Plaintiff’s objections fail.
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21 **3. Mr. Arnold and Ms. Reed**

22 Plaintiff next argues that the Magistrate Judge and ALJ erred in discounting the medical
23 opinions of therapists Mr. Arnold and Ms. Reed, and that the Magistrate Judge and ALJ failed to
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² Plaintiff states that Dr. Disney is a psychiatrist. Pl.’s Objections, Docket No. 15 at 4. As correctly identified by the Magistrate Judge, Dr. Disney is a family medicine physician. A.R. 1089-96.

1 discuss all the factors relevant to “other source” opinions as required by the Commissioner’s
2 regulations. Plaintiff’s objections fail to address any of the points made in the R&R and simply
3 reiterate Plaintiff’s arguments in her opening brief. This alone is fatal to Plaintiff’s objections.
4 *See United States v. Reeves*, 2015 WL 273597, at *5 (D. Nev. Jan. 21, 2015) (noting that an
5 objecting party’s failure to actually address the R&R is treated simply as a failure to file
6 objections).

7
8 Nevertheless, to respond to Plaintiff’s objections: the ALJ gave “little weight” to the opinions
9 of Mr. Arnold and Ms. Reed, finding that they conflicted with medical evidence and Plaintiff’s
10 testimony. Opinions from “‘other sources’ cannot establish the existence of a medically
11 determinable impairment.” Soc. Sec. Ruling 06-03p, 2006 SSR LEXIS 5, at *5. Nevertheless,
12 when an ALJ rules on whether a plaintiff is disabled, they consider all relevant evidence in the
13 record. *Id.* When considering the opinions of “other sources” the factors in 20 C.F.R. §
14 404.1527(d) and 416.927(d) do not explicitly apply, but “these same factors *can* be applied”
15 *Id.* at *11. If the ALJ wishes to discount the testimony of an “other source,” the ALJ must give
16 relevant reasons for discounting the testimony. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050,
17 1051 (9th Cir. 2006).
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19 The ALJ considered the opinions of Arnold and Reed and provided germane reasons for
20 discounting the testimony. *See* A.R. 28 (Reed’s opinion is “inconsistent with the evidence,
21 including [Plaintiff]’s presentation on mental status exam, which showed that she was polite,
22 cooperative, and recalled two out of three words at five minutes” and “conflicts with [Plaintiff]’s
23 statements that she has two friends with whom she interacts daily, and that she attends church and
24 visits the apartment office to sign onto Facebook to interact with family.”); A.R. 27-28 (Arnold’s
25 opinion “conflict[s] with the evidence, including [Plaintiff]’s performance on mental status exam,

1 which showed that she was cooperative, friendly, and polite [,]” and “conflict[s] with [Plaintiff]’s
2 testimony that she does continue to use alcohol and marijuana but that she is able to help her
3 daughter by caring for her grandchildren.”). Plaintiff’s objections are not persuasive.

4 **4. Dr. Ankuta**

5 Finally, Plaintiff asserts that the Magistrate Judge inaccurately represented Plaintiff’s
6 argument that the ALJ had “cherry-picked” findings from the report of Dr. Ankuta. Plaintiff does
7 not actually address the Magistrate Judge’s finding that the ALJ accounted for Dr. Ankuta’s
8 opinion in the Residual Functional Capacity (“RFC”) assessment. Further, this “cherry-picking
9 argument” was not in Plaintiff’s opening brief. Accordingly, Plaintiff’s objection fails.
10

11 **B. Credibility**

12 Plaintiff argues that the Magistrate Judge erroneously concluded that the ALJ appropriately
13 evaluated Plaintiff’s credibility. The Magistrate Judge, in the R&R, made the following findings:

- 14 (1) That the ALJ’s finding that Plaintiff’s volunteer activities damaged her credibility because
15 they were inconsistent with certain aspects of her testimony was appropriate;
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17 (2) That the ALJ properly discounted Plaintiff’s credibility based on a finding that Plaintiff did
18 not accurately report her use of drugs and alcohol; and
19
20 (3) That the ALJ properly discounted Plaintiff’s credibility based on Plaintiff’s receipt of
21 unemployment benefits, and her application and interviewing for jobs during the period
22 that she asserted she was disabled.

23 Rather than addressing the points in the R&R, Plaintiff’s objections simply reiterate the
24 arguments made in her opening brief and are not specifically addressed to the R&R. The Court
25 has reviewed the findings of the Magistrate Judge *de novo* and adopts them in full. Plaintiff’s
objections fail.

C. Vocational Expert Testimony

1
2 Finally, Plaintiff argues that both the Magistrate Judge and the ALJ erred in not including
3 “moderate restriction in concentration, persistence, or pace” in the hypothetical poses to the
4 Vocational Expert in the RFC.

5 A five-step regulatory framework is used to determine whether an individual is disabled. 20
6 C.F.R. § 404.1520(a)(4); *see also Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987) (describing five-
7 step process). At step three the ALJ determines whether a plaintiff’s condition “meets or equals
8 one of the listed impairments.” *Id.* at 141. If a plaintiff’s condition does not meet or equal one of
9 the listed impairments, but the impairment is still severe, the plaintiff’s condition is evaluated
10 further at steps four and five. *Id.* At step four the ALJ determines an applicant’s RFC. The RFC
11 is “an assessment of an individual's ability to do sustained work-related physical and mental
12 activities in a work setting on a regular and continuing basis.” *Brown v. Astrue*, 405 F. App'x 230,
13 233 (9th Cir. 2010) (quoting Soc. Sec. Ruling 96-8p, 1996 SSR LEXIS). The limitations the ALJ
14 identifies in step three are separate from the RFC assessed in step four. At step four, if the plaintiff
15 shows that he or she is unable to return to her previous job, the burden shifts to the Commission
16 to show that the plaintiff is able to do other types of work that exist in the national economy.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999) (quoting *Embrey v. Bowen*, 849 F.2d 418,
18 422 (9th Cir. 1988)).

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21 The Administration can satisfy its burden to show the claimant can do other work that exists
22 in the national economy by posing hypothetical questions to a vocational expert (“VE”) that
23 accurately described the claimant’s medical limitations. *Andrews v. Shalala*, 53 F.3d 1035, 1043
24 (9th Cir. 1995). When the ALJ poses a hypothetical question to a VE, the question must "include
25 all of the claimant's functional limitations, both physical and mental." *Brink v. Comm'r Soc. Sec.*

1 *Admin.*, 343 F. App'x 211, 212 (9th Cir. 2009) (quoting *Flores v. Shalala*, 49 F.3d 562, 570 (9th
2 Cir. 1995)).

3 Here, at step three the ALJ found, with regard to “concentration, persistence, or pace,” that
4 Plaintiff has “moderate difficulties.” A.R. 22. When the ALJ posed a hypothetical to the VE the
5 ALJ stated that Plaintiff “has sufficient concentration to understand, remember and carry out
6 simple, repetitive tasks, as well as complex tasks of the kind found in work with SVPs up to four.”
7 A.R. 124. Plaintiff argues that this hypothetical does not accurately reflect a moderate restriction
8 in concentration, persistence, or pace. Plaintiff relies on *Brinks*, in which the court reversed the
9 Commissioner when the ALJ’s hypothetical did not include any reference to the plaintiff’s
10 moderate limitations in concentration, and instead “reference only ‘simple, repetitive work,’
11 without including limitations on concentration” 343 F. App’x at 212.
12

13 *Brinks* is inapposite. Here, the ALJ included Plaintiff’s limitations in concentration in the
14 hypothetical question. As noted above, the ALJ stated that Plaintiff had “sufficient *concentration*
15 to understand, remember and carry out simply, repetitive tasks” A.R. 124 (emphasis added).
16 Accordingly, the ALJ’s assessment was “consistent with the restrictions identified in the medical
17 testimony.” *Brinks*, 343 F. App’x at 212 (quoting *Stubbs-Danielson v. Astrue*, 539 F.3d 1169,
18 1174 (9th Cir. 2008)).
19

20 Other than focusing on the holding in *Brinks*, Plaintiff provides no support, such as medical
21 evidence, for her argument that the ALJ’s hypothetical “do[es] not accurately reflect a moderate
22 restriction” in Plaintiff’s concentration, persistence, or pace. Pl.’s Objections at 9. Accordingly,
23 this objection fails.
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IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- (1) The Court **ADOPTS** the Report and Recommendation in full;
- (2) The Court **AFFIRMS** the decision of the Commissioner;
- (3) Plaintiff's Complaint is **DISMISSED**;
- (4) The Clerk of the Court is respectfully directed to send copies of this Order to Plaintiff, Defendant, and to Judge Theiler.

IT IS SO ORDERED.

DATED this 18th day of December, 2015.



BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE