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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEENA RAE DAVIS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. C16-00474 BHS

ORDER AFFIRMING THE
COMMISSIONER'S DECISION

I. BASIC DATA

Type of Benefits Sought:

- (X) Disability Insurance
- (X) Supplemental Security Income

Plaintiff's:

Sex: Female

Age: 43

Principal Disabilities Alleged by Plaintiff: Right rotator cuff tear, arthritis, herniated discs, neck injury, depression, anxiety, mood disorder, and chronic pain

Principal Previous Work Experience: Certified nurse assistant

1 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

2 Before ALJ Joanne E. Dantonio:

3 Date of Hearing: July 31, 2013; hearing transcript AR 43-111

4 Date of Decision: July 14, 2014

5 Appears in Record at: AR 18-42

6 Summary of Decision:

7 The claimant has not engaged in substantial gainful activity since the
8 amended alleged onset date. The claimant has the following severe
9 impairments: cervical spine degenerative disc disease, status post
10 C6-7 foraminotomy, discectomy, and fusion; bilateral carpal tunnel
11 syndrome (“CTS”), status post releases; fibromyalgia; light shoulder
12 strain, status post rotator cuff repair; bipolar disorder; anxiety
13 disorder; panic disorder; history of attention deficit hyperactivity
14 disorder (“ADHD”); and poly-substance dependence/abuse. The
15 claimant does not have an impairment or combination of
16 impairments that meets or medically equals the severity of one of the
17 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

18 Based on all of the claimant’s impairments, including the substance
19 use disorders, the claimant has a residual functional capacity
20 (“RFC”) that precludes her from being capable of performing past
21 relevant work or other jobs available in significant numbers in the
22 national economy. However, if the claimant stopped the substance
abuse, she would have the RFC to perform light work except that she
can never climb ladders, ropes, or scaffolds, occasionally climb
stairs, occasionally stoop, crouch, crawl, and kneel, and less than
occasionally balance. She needs to sit/stand at will, i.e. sit/stand
every 30 minutes, and take a 15-minute break every two hours and a
30-minute break after four hours. She can frequently handle and
finger. She needs to avoid concentrated exposure to extreme cold,
vibration, and hazards. There should be no requirement to drive.
Further, she can perform simple, repetitive tasks that do not require
contact with the public or crowds.

If the claimant stopped the substance abuse, considering her age,
education, work experience, and RFC, there would be a significant
number of jobs in the national economy that she could perform.

1 Therefore, the claimant has not been disabled at any time from the
2 amended alleged onset date of February 18, 2012, through the date
of the decision.

3 Before Appeals Council:

4 Date of Decision: January 29, 2016

5 Appears in Record at: AR 1-5

6 Summary of Decision: Declined review

7 **III. PROCEDURAL HISTORY—THIS COURT**

8 Jurisdiction based upon: 42 U.S.C. § 405(g)

9 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

10 **IV. STANDARD OF REVIEW**

11 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's
12 denial of Social Security benefits when the ALJ's findings are based on legal error or not
13 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
14 1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than
15 a preponderance, and is such relevant evidence as a reasonable mind might accept as
16 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
17 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
18 determining credibility, resolving conflicts in medical testimony, and resolving any other
19 ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
20 While the Court is required to examine the record as a whole, it may neither reweigh the
21 evidence nor substitute its judgment for that of the ALJ. *See Thomas v. Barnhart*, 278
22 F.3d 947, 954 (9th Cir. 2002). "Where the evidence is susceptible to more than one

1 rational interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion
2 must be upheld.” *Id.*

3 **V. EVALUATING DISABILITY**

4 The claimant, Deena Rae Davis (“Davis”), bears the burden of proving that she is
5 disabled within the meaning of the Social Security Act (“Act”). *Meanel v. Apfel*, 172
6 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in
7 any substantial gainful activity” due to a physical or mental impairment which has lasted,
8 or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
9 §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if her
10 impairments are of such severity that she is unable to do her previous work, and cannot,
11 considering her age, education, and work experience, engage in any other substantial
12 gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also*
13 *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

14 The Commissioner has established a five-step sequential evaluation process for
15 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.
16 § 416.920. The claimant bears the burden of proof during steps one through four.
17 *Valentine v. Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five,
18 the burden shifts to the Commissioner. *Id.*

19 **VI. ISSUES ON APPEAL**

- 20 1. Did the ALJ err in assessing the medical evidence in the record?
- 21 2. Did the ALJ err in assessing Davis’s testimony?
- 22 3. Did the ALJ err in assessing the lay witness testimony?

1 4. Did the ALJ err in assessing whether Davis’s drug abuse and alcoholism
2 (“DAA”) was a material factor to her disability?

3 5. Did the ALJ err in assessing Davis’s RFC in the absence of DAA and
4 therefore in determining that Davis could perform other work at step five?

5 **VII. DISCUSSION**

6 Davis appeals the Commissioner’s decision denying her disability benefits,
7 arguing that the ALJ committed several errors requiring reversal. Dkt. 14. The Court
8 addresses the alleged errors in turn.

9 **A. Medical Evidence**

10 Davis argues that the ALJ erred in evaluating the medical evidence in the record.
11 *See* Dkt. 14 at 3-14. The ALJ is responsible for determining credibility and resolving
12 ambiguities and conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715,
13 722 (9th Cir. 1998). In resolving questions of credibility and conflicts in the evidence, an
14 ALJ’s findings “must be supported by specific, cogent reasons.” *Id.* at 725. The ALJ can
15 do this “by setting out a detailed and thorough summary of the facts and conflicting
16 clinical evidence, stating his interpretation thereof, and making findings.” *Id.*

17 The ALJ must provide “clear and convincing” reasons for rejecting the
18 uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81
19 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician’s opinion is
20 contradicted, that opinion “can only be rejected for specific and legitimate reasons that
21 are supported by substantial evidence in the record.” *Id.* at 830-31.
22

1 **1. David Moore, Ph.D.**

2 Davis argues that the ALJ erred by failing to give a specific and legitimate reason
3 supported by substantial evidence to discount the opinion of David Moore, Ph.D. *See*
4 Dkt. 14 at 8-9. The court disagrees.

5 Dr. Moore examined Davis in July of 2012 and diagnosed her with several
6 conditions, including polydrug dependence and malingering. *See* AR 704. Dr. Moore
7 opined that Davis had several marked and moderate mental limitations. *See* AR 706.
8 The ALJ, in evaluating Davis's RFC in the absence of DAA, discounted Dr. Moore's
9 opinion because it was rendered while Davis was using or had recently used substances.
10 *See* AR 35.

11 Davis argues that because she was hospitalized in a psychiatric ward without
12 access to unprescribed drugs or alcohol at the time of the examination, the ALJ's reason
13 for discounting Dr. Moore's opinion is not supported by substantial evidence. *See* Dkt.
14 14 at 9. However, in the clinical interview that Dr. Moore performed, he elicited details
15 of Davis's substance use and her daily activities when she was not hospitalized. *See* AR
16 705. Dr. Moore accordingly diagnosed Davis with polydrug dependence. *See* AR 704.
17 Dr. Moore then concluded that Davis's cognitive and social abilities were compromised
18 in part "by her unstable addiction recovery" and estimated that she would remain so
19 impaired for eight to 11 months. *See* AR 705. The record confirms that Davis had a
20 positive drug test in April of 2012, three months before the evaluation. *See* AR 983.
21 Therefore, regardless of Davis's access to drugs or alcohol while temporarily
22 hospitalized, substantial evidence supports that Dr. Moore's opinion was rendered when

1 Davis had recently been using substances and was based in part on Davis's substance use.
2 The ALJ did not err by discounting the opinion when assessing Davis's functional
3 limitations in the absence of DAA.

4 **2. State Agency Medical Consultants**

5 Davis argues that the ALJ erred by giving too much weight to the opinions of state
6 agency medical consultants Robert Hander, M.D., Charles Wolfe, M.D., Matthew
7 Comrie, Psy.D., and Christmas Covell, Ph.D. *See* Dkt. 14 at 13-14. The Court disagrees.

8 A state agency medical consultant is a "highly qualified" physician with expertise
9 in evaluating "medical issues in disability claims." *See* Social Security Ruling ("SSR")
10 96-6p, 1996 WL 374180 at *2. An ALJ must explain the weight given to the opinions in
11 her decision. *See id.* An ALJ must also evaluate the degree to which the providers of
12 these opinions consider all of the pertinent evidence, including opinions of treating and
13 other examining sources. *See* 20 C.F.R. § 404.1527(c)(3).

14 Here, the ALJ gave great weight to the opinions of the state agency medical
15 consultants but in fact assessed Davis with an RFC with stricter limitations based on
16 other physicians' opinions. *See* AR 30, 34-35. Davis first argues that the ALJ erred by
17 "fail[ing] to acknowledge that their opinions [were] inconsistent with the clinical
18 findings" in the record. *See* Dkt. 14 at 13-14. In fact, the ALJ tacitly acknowledged
19 some inconsistencies by incorporating stricter limitations into Davis's RFC. *See* AR 30.
20 Davis does not specifically identify which other clinical findings show that the RFC is
21 unsupported by substantial evidence. *See* Dkt. 14 at 13-14. Regardless, considering that
22 the ALJ outlined all of the clinical findings that supported her assessment (*see* AR 32-

1 35), Davis’s argument amounts to a request that the Court reweigh the evidence, which
2 the Court must not do. *See Thomas*, 278 F.3d at 954. Substantial evidence supports the
3 weight the ALJ assigned to the state agency medical consultants’ opinions.

4 Second, Davis argues that the ALJ erred by “failing to acknowledge” that the
5 opinions of nonexamining physicians are generally entitled to less weight than the
6 opinions of examining physicians. *See Dkt. 14* at 14. However, “[i]n order to discount
7 the opinion of an examining physician in favor of the opinion of a nonexamining medical
8 advisor, the ALJ must set forth specific, *legitimate* reasons that are supported by
9 substantial evidence in the record.” *Van Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir.
10 1996) (emphasis in original). Here, the ALJ provided such a reason to discount Dr.
11 Moore’s opinion in favor of the consultants’ opinions. *See supra* § VII.A.1.

12 Finally, Davis argues that the ALJ erred by giving great weight to the opinions of
13 the state agency medical consultants because the consultants did not review any evidence
14 beyond November of 2012. *See Dkt. 14* at 14. However, that other medical evidence
15 was produced after the date of the consultants’ opinions does not alone render them stale.
16 Instead, the ALJ must evaluate their consistency with the entire record, including any
17 evidence produced after the consultants’ opinions were issued. *See SSR 96-6p* at *2.
18 Again, because the ALJ outlined the clinical findings that supported the consultants’
19 opinions, substantial evidence supports the ALJ giving the opinions great weight while
20 assessing Davis with an RFC with some stricter limitations.

1 **3. Other Medical Evidence**

2 Davis describes in detail the findings of 30 other medical providers, arguing only
3 that these findings “undermine[d] the ALJ’s analysis of Davis’s testimony as well as the
4 ALJ’s reliance on the opinions of the state agency physicians.” *See* Dkt. 14 at 3-14, Dkt.
5 20 at 3. As discussed above, substantial evidence supports the ALJ’s assignment of great
6 weight to the state agency medical consultants’ opinions. *See supra* § VII.A.2. The
7 Court will not reweigh the evidence. *See Thomas*, 278 F.3d at 954. As discussed below,
8 the ALJ did not err in discounting Davis’s testimony. *See infra* § VII.B.

9 **B. Davis’s Testimony**

10 Davis argues that the ALJ erred in evaluating her testimony. *See* Dkt. 14 at 14-21.
11 The Court disagrees.

12 Questions of credibility are solely within the control of the ALJ. *See Sample v.*
13 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not “second-guess” this
14 credibility determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). Unless
15 affirmative evidence shows the claimant is malingering, an ALJ’s reasons for rejecting
16 the claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.2d at 834.
17 However, an ALJ may dismiss a claimant’s subjective complaints where there is
18 affirmative evidence of malingering. *See Valentine*, 574 F.3d at 693.

19 Here, the ALJ discounted Davis’s testimony because, among other reasons, Dr.
20 Moore diagnosed Davis with malingering. *See* AR 31. Affirmative evidence supports
21 this finding. Dr. Moore diagnosed Davis with malingering after finding that Davis
22 engaged in “impression management, exaggerating neuropsych symptoms and socially

1 | inappropriate behavior.” *See* AR 704. Dr. Moore found that Davis was “med seeking”
2 | and “faking” bad behavior. *See* AR 707. He found that her memory was “somewhat
3 | selective from an impression management standpoint.” *See id.* Finally, Dr. Moore
4 | questioned the validity of Davis’s mental testing results because of her efforts to
5 | manipulate those results. *See id.* Therefore, the ALJ gave a sufficient reason supported
6 | by affirmative evidence to discount Davis’s testimony.

7 | Davis argues that the ALJ may not discount Davis’s testimony based on a finding
8 | of malingering because SSR 16-3p eliminates the use of the term “credibility” and states
9 | that ALJs should not assess a claimant’s overall character or truthfulness. *See* Dkt. 14 at
10 | 16. However, without deciding whether SSR 16-3p, which became effective March 16,
11 | 2016, applies retroactively, Davis’s argument fails in any case because SSR 16-3p still
12 | instructs ALJs to compare a claimant’s subjective reports to “[i]mportant information
13 | about symptoms recorded by medical sources and reported in the medical evidence.” *See*
14 | SSR 16-3p, 2016 WL 1119029 at *6. Certainly, a medical diagnosis of malingering and
15 | findings that an individual is faking symptoms fall within the scope of what an ALJ may
16 | consider. Therefore, the ALJ did not err by discounting Davis’s testimony because of
17 | affirmative evidence that she was malingering.

18 | **C. Lay Witness Evidence**

19 | Davis argues that the ALJ erred in evaluating the lay witness testimony of her
20 | roommate Carl Johnson. *See* Dkt. 14 at 22. The Court disagrees.

21 | “In determining whether a claimant is disabled, an ALJ must consider lay witness
22 | testimony concerning a claimant’s ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*,

1 454 F.3d 1050, 1053 (9th Cir. 2006). If an ALJ disregards the testimony of a lay witness,
2 the ALJ must provide reasons “that are germane to each witness.” *Nguyen v. Chater*, 100
3 F.3d 1462, 1467 (9th Cir. 1996).

4 Here, the ALJ discounted Mr. Johnson’s testimony in assessing Davis’s RFC in
5 the absence of DAA because it was not clear that Mr. Johnson’s testimony was regarding
6 Davis’s functioning in the absence of DAA. *See* AR 35. Mr. Johnson completed his
7 report in the same month that Davis had a positive drug test. *See* AR 259, 983.
8 Therefore, the ALJ provided a germane reason supported by substantial evidence to
9 discount Mr. Johnson’s testimony in assessing Davis’s RFC in the absence of DAA.

10 **D. DAA as a Material Factor and Step-Five Finding**

11 Davis argues that the ALJ erred in finding that Davis’s DAA was a material factor
12 to her disability. *See* Dkt. 14 at 22-23. Davis also argues that the ALJ erred in assessing
13 her RFC and finding at step five that she could perform work available in the national
14 economy. *See id.* at 23. However, both arguments are premised on the errors alleged
15 above. Therefore, because the Court finds that the ALJ did not err in evaluating the
16 medical evidence, Davis’s testimony, or the lay witness evidence, the ALJ’s DAA
17 analysis, RFC assessment, and step-five finding are supported by substantial evidence
18 and not in error. *See supra* §§ VII.A., B., C.

VIII. ORDER

Therefore, it is hereby **ORDERED** that the Commissioner's final decision is **AFFIRMED**.

Dated this 20th day of January, 2017.



BENJAMIN H. SETTLE
United States District Judge

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