

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUCINDA SUE KUSKA,

Plaintiff,

CASE NO. C17-5135-MAT

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

**ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL**

Plaintiff Lucinda Sue Kuska proceeds *pro se* in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1971.¹ She has a seventh-grade education, and minimal work

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

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1 history as a housekeeper and waitress. (AR 447.)

2 Plaintiff applied for SSI in July 2011. (AR 414-20.) That application was denied initially
3 and upon reconsideration, and Plaintiff timely requested a hearing. (AR 259-62, 265-73, 275-77.)

4 On February 26, 2013, ALJ Tom Morris held a hearing, taking testimony from Plaintiff
5 and a vocational expert (VE). (AR 47-97.) On January 29, 2016, the ALJ issued a decision finding
6 Plaintiff not disabled. (AR 229-44.) Plaintiff timely appealed. The Appeals Council granted
7 Plaintiff's request for review, and remanded the case back to the ALJ for further proceedings. (AR
8 250-54.)

9 The ALJ held a second hearing on February 5, 2015 (AR 98-26), which was continued on
10 November 10, 2015 (AR 127-98), and he subsequently issued a decision finding Plaintiff not
11 disabled. (AR 20-37.) The Appeals Council denied Plaintiff's request for review on January 18,
12 2017 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff
13 appealed this final decision of the Commissioner to this Court.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
19 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
20 engaged in substantial gainful activity since the application date. (AR 22.) At step two, it must
21 be determined whether a claimant suffers from a severe impairment. The ALJ found severe
22 Plaintiff's "sprains and strains — all types; Essential hypertension; Fractures of lower limb;
23 Affective disorders; Somatoform disorders; Substance issues." (AR 22-24.) Step three asks

1 whether a claimant's impairments meet or equal a listed impairment. The ALJ found that
2 Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 24-25.)

3 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
4 residual functional capacity (RFC) and determine at step four whether the claimant has
5 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
6 performing a range of sedentary work, with the following additional limitations: she can lift/carry
7 10 pounds occasionally and frequently. She can stand/walk for a total of about five hours and sit
8 for a total of about six hours in an eight-hour workday, with normal breaks. She can push/pull
9 occasionally with the right lower extremity. She can occasionally climb ramps and stairs, but
10 never climb ladders, ropes, or scaffolds. She should avoid concentrated exposure to hazards such
11 as dangerous machinery and unprotected heights, as well as "fumes, odors, dusts, gases, poor
12 ventilation, etc." She can perform unskilled work tasks. She can maintain attendance and be
13 punctual. She is off-task about 7% of an eight-hour workday. Her work tasks should not be at a
14 production-rate pace, but be "goal-oriented work." (AR 25-26.) With that assessment, the ALJ
15 found Plaintiff unable to perform past relevant work. (AR 36.)

16 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
17 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
18 adjustment to work that exists in significant levels in the national economy. The ALJ found
19 Plaintiff capable of transitioning to other representative occupations, including small products
20 assembler, parking lot cashier, and electronic accessory assembler. (AR 36-37.)

21 This Court's review of the ALJ's decision is limited to whether the decision is in
22 accordance with the law and the findings supported by substantial evidence in the record as a
23 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more

1 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
2 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
3 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
4 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
5 2002).

6 Plaintiff argues the ALJ erred in (1) discounting favorable medical opinions as well as her
7 own subjective testimony, particularly related to her physical limitations; and (2) crediting the
8 Cooperative Disability Investigation Unit's (CDIU) report, even though the investigation was
9 based on a ruse and the ALJ did not give Plaintiff a chance to explain her statements to the
10 investigator. Plaintiff also contends that her administrative hearings were cut short. The
11 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be
12 affirmed.

13 Medical opinions

14 Plaintiff contends that the ALJ erred in failing to assess her physical RFC. Dkt. 15 at 4-5.
15 This argument overlooks the ALJ's RFC assessment, which finds Plaintiff capable of performing
16 sedentary work with additional limitations. (AR 25-26.) Plaintiff notes that some providers opined
17 that Plaintiff had certain limitations that the ALJ did not incorporate (see AR 615-21), but the ALJ
18 discussed the opinion evidence and explained why he discounted some of it. (AR 29-33.) The
19 ALJ is entitled to resolve the ambiguities in the medical evidence. *See Tommasetti v. Astrue*, 533
20 F.3d 1035, 1041 (9th Cir. 2008) ("[T]he ALJ is the final arbiter with respect to resolving
21 ambiguities in the medical evidence."). Plaintiff has not addressed any of the reasons provided by
22 the ALJ for discounting the opinion evidence, or shown that those reasons were erroneous.

23 The ALJ's written RFC assessment does, however, fail to address Plaintiff's need to change

1 positions, a limitation which the ALJ elsewhere purportedly credited. *Compare* AR 25-26 with
2 AR 29 (“In reaching the RFC finding, I have incorporated both Dr. Distad’s and Dr. Heilbrunn’s
3 opinions for sedentary exertional limitation with a need to change positions on the job.”). The
4 Commissioner contends that this “scrivener’s error” is harmless, because the ALJ addressed
5 Plaintiff’s need to alternate between sitting and standing in the VE hypothetical. Dkt. 16 at 15.
6 Plaintiff did not file a reply brief to respond to this argument.

7 The Commissioner’s argument misstates the content of the VE colloquy, but the Court
8 agrees that the ALJ’s error is nonetheless harmless. In the vocational hypothetical that elicited the
9 jobs relied upon at step five, the ALJ did not include a limitation regarding changing positions, but
10 the VE volunteered *sua sponte* that those jobs would allow for a sit/stand option. (AR 190-91.)
11 Thus, even though the ALJ erroneously excluded a limitation regarding Plaintiff’s need to change
12 positions, the VE testimony makes clear that the jobs identified at step five would allow Plaintiff
13 to change positions.

14 Plaintiff’s statements

15 The ALJ discounted Plaintiff’s subjective statements for a number of reasons, including
16 (1) inconsistency between the medical record and Plaintiff’s allegations; (2) inconsistency between
17 Plaintiff’s activities and her allegations; (3) inconsistencies within Plaintiff’s hearing testimony
18 and between other statements of record; (4) misrepresentations regarding alcohol use; and (5)
19 Plaintiff’s poor work history. (AR 28-32.)

20 Plaintiff contends that she had problems understanding all of the questions the ALJ asked,
21 and the ALJ did not appreciate her difficulty with that process. Dkt. 15 at 3-4. She also contends
22 that the ALJ erred in crediting the CDIU report, because she believes the investigating officer
23 misrepresented some of her statements to make it appear that she was currently performing

1 activities she had actually performed in the past. Dkt. 15 at 7-11. She also asserts that the veracity
2 of the CDIU report is tainted by the officer's use of a ruse to engage Plaintiff in conversation. Dkt.
3 15 at 11.

4 The hearing transcripts are consistent with Plaintiff's description of difficulties in
5 understanding; she required redirection and rephrasing on several occasions. (See, e.g., AR 57-
6 58, 68-69, 81-85, 88, 105-09, 111-19, 157, 160-64, 177-85.) The ALJ did mention that Plaintiff
7 either could not provide examples of various symptoms or provided incomplete examples (AR 31-
8 32), and this characterization of Plaintiff's testimony is reasonable. (See AR 83-87.) The ALJ
9 accommodated Plaintiff's need for additional explanation and rephrasing, and did not cite her
10 difficulty as a reason to discount her testimony.

11 The ALJ also went on to point out specific inconsistencies within Plaintiff's testimony, and
12 between Plaintiff's testimony and other evidence in the record. (AR 32.) These findings were not
13 connected to questions that Plaintiff had difficulty answering, but referenced testimony that was
14 explicitly inconsistent with other evidence, such as Plaintiff's inconsistent statements and
15 testimony regarding her alcohol use, and statements regarding her ability to sit, stand, and lift a
16 gallon of milk. (AR 32.) The ALJ did not err in considering whether Plaintiff's hearing testimony
17 was consistent with the remainder of the record. *See* SSR 96-7p ("One strong indication of the
18 credibility of an individual's statements is their consistency, both internally and with other
19 information in the case record."); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (holding
20 that inconsistent statements regarding alcohol use may be considered as a reason to reject a
21 claimant's testimony). The ALJ cited multiple inconsistencies in Plaintiff's statements, most of
22 which are unchallenged and all of which support the ALJ's determination.

23 Plaintiff's challenges to the CDIU report also fail to demonstrate error in the ALJ's

1 decision. Although the investigator's use of a ruse was understandably troubling to Plaintiff (Dkt.
2 15 at 7-8), this technique does not render the report without validity. *See Elmore v. Colvin*, 617
3 Fed. Appx. 755, 757 (9th Cir. Jul. 15, 2015). Furthermore, Plaintiff had an opportunity to testify
4 about the CDIU report at the hearing, and contended that the investigator saw her on a good day,
5 but did not contradict anything written in the report. (AR 146-47.) Furthermore, Plaintiff fails to
6 address the investigator's report of Plaintiff's current and upcoming travels in their motorhome to
7 attend concerts. (AR 1102.) Even if, as Plaintiff contends, the investigator confused some of
8 Plaintiff's historical activities for current activities, the report also details undisputedly current
9 activities that are inconsistent with her allegations and those portions of the report are
10 unchallenged. Accordingly, Plaintiff has not established error in connection with the CDIU report.

11 Administrative hearings

12 Plaintiff asserts that her administrative hearings were cut short. Dkt. 15 at 5. The record
13 does not support this assertion. The first hearing was allotted for about an hour, according to the
14 ALJ's schedule (AR 53), the ALJ ensured that Plaintiff had an opportunity at the end of the hearing
15 to tell him anything she felt had been omitted. (AR 96.) Plaintiff's subsequent hearing was again
16 scheduled for about an hour (AR 131), and Plaintiff again had an opportunity to say anything
17 additional, and instead indicated that everything had been covered. (AR 196-97.) It does not
18 appear that the ALJ prevented Plaintiff from presenting any testimony. Plaintiff has not
19 established error in this regard.

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CONCLUSION

For the reasons set forth above, this matter is AFFIRMED.

DATED this 4th day of October, 2017.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge