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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CAROL MARIE WEED,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 3:17-CV-05712-DWC

ORDER AFFIRMING DEFENDANT’S
DECISION TO DENY BENEFITS

Plaintiff Carol Marie Weed filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant’s denial of her application for disability insurance benefits (“DIB”). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 2.

After considering the record, the Court concludes Plaintiff has failed to show the Administrative Law Judge (“ALJ”) erred when he found Plaintiff did not have a severe mental impairment and was not disabled under Listing 1.04. Further, the ALJ gave a clear and convincing reason for discounting Plaintiff’s subjective symptom testimony. Accordingly, the decision of the

1 Acting Commissioner of Social Security (“Commissioner”) is affirmed pursuant to sentence four
2 of 42 U.S.C. § 405(g).

3 FACTUAL AND PROCEDURAL HISTORY

4 On February 11, 2013, Plaintiff filed an application for DIB, alleging disability as of
5 January 25, 2008. *See* Dkt. 7, Administrative Record (“AR”) 14. The application was denied upon
6 initial administrative review and on reconsideration. *See* AR 14. A hearing was held before ALJ
7 Gene Duncan and a decision denying benefits was issued on April 24, 2014. *See* AR 75-82, 87-
8 133. Plaintiff appealed to the Appeals Council and, on September 18, 2015, the Appeals Council
9 remanded the case to the ALJ. AR 69-70. In the remand order, the Appeals Council directed the
10 ALJ to further evaluate whether Plaintiff could perform her past relevant work. *See id.* The
11 Appeals Council also directed the ALJ to expand the record, if warranted, and offer Plaintiff an
12 opportunity for a hearing. *See id.*

13 Following the Appeals Council remand, the ALJ held a hearing on March 17, 2016. AR 29-
14 66. In a decision dated April 11, 2016, the ALJ again found Plaintiff not disabled. AR 14-23.
15 Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council, making the
16 ALJ’s April 11, 2016 decision the final decision of the Commissioner. *See* AR 1-5, 20 C.F.R. §
17 404.981, § 416.1481.¹

18 In the Opening Brief, Plaintiff maintains the ALJ erred by failing to properly consider: (1)
19 Plaintiff’s mental impairments; (2) whether Plaintiff met Listing 1.04; and (3) Plaintiff’s subjective
20 symptom testimony. Dkt. 11, p. 2.

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23 ¹ The Court notes that the April 11, 2016 decision is the final decision of the Commissioner. However, as
24 the Appeals Council did not disturb the majority of the ALJ’s findings in the April 24, 2014 decision, the ALJ
adopted much of the 2014 decision. Therefore, in determining if the ALJ erred, the Court has referred to the 2014
decision when that analysis was adopted by the ALJ in the 2016 decision.

1 areas as ‘none’ or ‘mild’ and ‘none’ in the fourth area, [the ALJ] will generally conclude that [the
2 claimant’s] impairment(s) is not severe, unless the evidence otherwise indicates that there is more
3 than a minimal limitation in [the claimant’s] ability to do basic work activities.” *Id.* at (d)(1). “An
4 impairment or combination of impairments can be found ‘not severe’ only if the evidence
5 establishes a slight abnormality having ‘no more than a minimal effect on an individual[’]s ability
6 to work.’” *Smolen*, 80 F.3d at 1290 (*quoting Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
7 (*adopting* Social Security Ruling “SSR” 85-28)).

8 Here, the ALJ found Plaintiff suffered from the following severe impairments: sciatica,
9 chronic pain syndrome, opioid dependence, and use of marijuana. AR 17. The ALJ did not find
10 Plaintiff had any severe mental impairments. *See* AR 17-18, 77-78.

11 Plaintiff argues she suffers from depression. Dkt. 11, p. 7. For her depression to constitute a
12 medically severe impairment, Plaintiff must establish a diagnosis of depression through objective
13 medical evidence (i.e., signs and laboratory findings). *See* SSR 96-3p; *Ukolov v. Barnhart*, 420
14 F.3d 1002, 1006 (9th Cir. 2005) (finding the plaintiff failed to establish an impairment at Step Two
15 when “none of the medical opinions included a finding of impairment, a diagnosis, or objective test
16 results”). Plaintiff provides no record citations showing she has been diagnosed with depression.
17 *See* Dkt. 11, pp. 6-7. Plaintiff cites only to her testimony, wherein she testified that she thought she
18 had depression. Dkt. 11, p. 7; AR 42. As Plaintiff failed to cite to any medical evidence showing
19 she has been diagnosed with depression and that it limits her ability to perform basic work
20 activities, the Court finds Plaintiff has not shown the ALJ erred at Step Two. *See Shinseki v.*

23 *See Rose v. Berryhill*, 256 F.Supp.3d 1079, 1083 n. 3 (C.D. Cal. June 13, 2017) (“the reviewing court generally
24 applies the law in effect at the time of the ALJ’s decision”).

1 Sanders, 556 U.S. 396, 410 (2009) (finding the plaintiff has the burden of demonstrating there are
2 harmful errors in the ALJ’s decision).

3 **II. Whether the ALJ erred in failing to properly consider Plaintiff’s sciatica at Step**
4 **Three.**

5 Plaintiff argues the ALJ erred by failing to consider whether Plaintiff’s sciatica met Listing
6 1.04. Dkt. 11, pp. 7-8. At Step Three of the sequential evaluation process, the ALJ considers
7 whether one or more of the claimant’s impairments meets or equals an impairment listed in
8 Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). Each Listing sets forth
9 the “symptoms, signs, and laboratory findings” which must be established in order for a claimant’s
10 impairment to meet the Listing. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). If a claimant
11 meets or equals a Listing, the claimant is considered disabled without further inquiry. *See* 20
12 C.F.R. § 416.920(d).

13 The burden of proof is on the claimant to establish she meets or equals any of the
14 impairments in the Listings. *See Tackett*, 180 F.3d at 1098. “A generalized assertion of functional
15 problems,” however, “is not enough to establish disability at step three.” *Id.* at 1100 (citing 20
16 C.F.R. § 404.1526). A mental or physical impairment “must result from anatomical, physiological,
17 or psychological abnormalities which can be shown by medically acceptable clinical and
18 laboratory diagnostic techniques.” 20 C.F.R. § 404.1508. It must be established by medical
19 evidence “consisting of signs, symptoms, and laboratory findings.” *Id.*; *see also* Social Security
20 Ruling (“SSR”) 96–8p, 1996 WL 374184 *2 (a step three determination must be made on basis of
21 medical factors alone). An impairment meets a listed impairment “only when it manifests the
22 specific findings described in the set of medical criteria for that listed impairment.” SSR 83–19,
23 1983 WL 31248 *2. The ALJ “is not required to discuss the combined effects of a claimant’s
24 impairments or compare them to any listing in an equivalency determination, unless the claimant

1 presents evidence in an effort to establish equivalence.” *Burch v. Barnhart*, 400 F.3d 676, 683 (9th
2 Cir. 2005).

3 In considering Step Three, the ALJ found Plaintiff’s “impairments, when considered either
4 singly or in combination, do not meet or medically equal any of the listed impairments found in 20
5 CFR Part 404, Subpart P, Appendix 1.” AR 78; *see* AR 18 (referring to findings in the 2014 ALJ
6 decision). The ALJ also provided specific discussion finding the evidence failed to show Plaintiff
7 met the requirements of Listing 1.00, impairments related to the musculoskeletal system. AR 78;
8 *see* AR 18.

9 Plaintiff argues sciatica is typically analyzed under Listing 1.04A or 1.04C.⁴ Dkt. 11, pp. 7-
10 8. Plaintiff asserts neither Listing 1.04A nor 1.04C requires an inability to perform fine and gross
11 movements effectively or an inability to ambulate effectively. *Id.* Because the ALJ only discussed
12 whether Plaintiff had an inability to perform fine and gross movements effectively or an inability
13 to ambulate effectively when determining if Plaintiff met a Listing, Plaintiff contends the ALJ did
14 not properly consider Listing 1.04 and, therefore, erred as a matter of law. *See id. Id.*

15 Here, the ALJ generally considered musculoskeletal impairments under Listing 1.00; but,
16 did not specifically identify Listings 1.04A or 1.04C in his discussion. *See* AR 18, 78. However,
17 “[i]t is unnecessary to require the [ALJ], as a matter of law, to state why a claimant failed to satisfy
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19 ⁴ The Social Security Administration states a claimant’s impairments meet Listing 1.04 when a claimant
20 has a disorder of the spine, (“e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis,
degenerative disc disease, facet arthritis, vertebral fracture”) with:

21 A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain,
22 limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle
weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back,
positive straight-leg raising test (sitting and supine); or

23 . . .

24 C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate
medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and
resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R. pt. 404, Subpart P, app. 1, § 1.04.

1 every different section of the listing of impairments.” *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201
2 (9th Cir. 1990). Plaintiff has not provided any evidence or explanation showing she meets Listings
3 1.04A or 1.04C. *See* Dkt. 11. Thus, Plaintiff has not shown the ALJ erred simply because he failed
4 to specifically discuss Listing 1.04.

5 Furthermore, while Plaintiff contends neither Listing 1.04A nor Listing 1.04C requires the
6 loss of the ability to perform fine and gross movements or ambulate effectively, Listing 1.04C does
7 require an inability to ambulate effectively. *See* 20 C.F.R. pt. 404, Subpart P, app. 1, § 1.04C. In
8 his decision, the ALJ found the evidence failed to show Plaintiff was unable to ambulate
9 effectively. *See* AR 78. While the ALJ did not specifically discuss Listing 1.04C, he found Plaintiff
10 did not meet one of the requirements found in Listing 1.04C. *See* AR 78. Plaintiff does not
11 challenge the ALJ’s finding that the evidence fails to show Plaintiff unable to ambulate effectively.
12 *See* Dkt. 11, pp. 7-8. Therefore, the Court is not persuaded by Plaintiff’s argument that the ALJ
13 erred as a matter of law because the inability to ambulate effectively is not found in Listings 1.04A
14 or 1.04C.

15 In summation, Plaintiff has not offered a plausible theory, with record citations, explaining
16 how Plaintiff meets Listing 1.04A or Listing 1.04C. Thus, Plaintiff has failed to demonstrate the
17 ALJ erred, “as a matter of law,” simply because he did not specifically identify Listings 1.04A and
18 1.04C when determining Plaintiff did not meet a listed impairment at Step Three. *See Burch v.*
19 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005) (affirming the district court’s finding that the claimant
20 “bears the burden of proving that ... she has an impairment that meets or equals the criteria of an
21 impairment listed in Appendix 1 of the Commissioner’s regulations”); *Lewis v. Apfel*, 236 F.3d
22 503, 514 (9th Cir. 2001) (finding the ALJ did not err at Step Three when the plaintiff offered no
23 theory, plausible or otherwise, as to how his impairments combined to equal a listed impairment or
24

1 | pointed to evidence showing his combined impairments equal a listed impairment); *Scott v. Colvin*,
2 | 2013 WL 1562009, *5-6 (W.D. Wash. March 20, 2013) (finding the plaintiff failed to show the
3 | ALJ erred at Step Three when the plaintiff did not proffer any plausible theory as to how his
4 | combined impairments equaled a listed impairment). Therefore, the Court concludes Plaintiff has
5 | failed to show the ALJ erred at Step Three of the sequential evaluation process.

6 | **III. Whether the ALJ provided sufficient reasons for discounting Plaintiff's pain**
7 | **complaints.**

8 | Plaintiff contends the ALJ erred by failing to properly analyze Plaintiff's complaints that
9 | her pain was not "well-controlled." Dkt. 11, pp. 8-9. To reject a claimant's subjective complaints,
10 | the ALJ must provide "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821,
11 | 834 (9th Cir. 1996) (citation omitted). The ALJ "must identify what testimony is not credible and
12 | what evidence undermines the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918
13 | (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons
14 | for rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834.
15 | Determinations regarding a claimant's subjective symptom testimony are solely within the control
16 | of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not
17 | "second-guess" this determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition,
18 | the Court may not reverse a determination regarding a claimant's subjective symptom testimony
19 | where the determination is based on contradictory or ambiguous evidence. *Id.* at 579.

20 | Plaintiff testified she is unable to work due to chronic back and neck pain. AR 34, 36. She
21 | uses marijuana and methadone for pain. AR 34, 92-93. At the first ALJ hearing, Plaintiff testified
22 | her back pain is normally a five on a one to ten pain scale. AR 95. At the second hearing, Plaintiff
23 | testified that in 2008 her pain was an eight, nine, or ten on a ten point pain scale. AR 36. Plaintiff
24 |

1 stated she could only walk a quarter of a mile before she had to stop, could only sit or stand for five
2 to ten minutes before changing positions, and could comfortably lift five to ten pounds. AR 37-38.

3 The ALJ discussed Plaintiff's subjective symptom testimony and found Plaintiff's
4 impairments could be expected to cause some of her symptoms. AR 19. However, the ALJ
5 determined Plaintiff's "statements concerning the intensity, persistence, and limiting effects of
6 these symptoms during the relevant time period are not entirely consistent with the overall
7 evidence of record." AR 19.

8 The ALJ specifically found Plaintiff's statements were inconsistent with statements she
9 made to medical providers. *See* AR 19-21, 80. An ALJ may consider prior inconsistent statements
10 concerning symptoms and "other testimony by [plaintiff] that appears less than candid in weighing
11 plaintiff's credibility." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). Here, the
12 medical records cited by the ALJ show that Plaintiff reported to her medical providers that her pain
13 was well-controlled. *See* AR 19-21, 80. For example, on May 22, 2008, treatment notes state
14 Plaintiff's chronic abdominal pain is well-controlled on methadone and Vicodin. AR 520. Plaintiff
15 reported her pain was about a three on a scale of one to ten. AR 520. In July 2008, Plaintiff again
16 reported her chronic back and abdominal pain were under fair control. AR 518. Further, on
17 November 7, 2008 Plaintiff reported to her doctor that her chronic pain is usually one to three on a
18 scale of one to ten. AR 514. She also denied any medication side effects. AR 514. The doctor
19 noted Plaintiff's chronic pain was well-controlled on the current doses of methadone and Vicodin.
20 AR 515. In March of 2009, Plaintiff again reported that her chronic pain is "under good control"
21 with her medication and is usually a three or less on the pain scale. AR 506. Thus, the evidence
22 cited by the ALJ shows Plaintiff's statements made to her medical providers were inconsistent with
23 her subjective symptom testimony regarding her uncontrolled pain.

1 The Court notes Plaintiff does not challenge the ALJ's specific findings. *See* Dkt. 11, pp. 8-
2 9. Rather, Plaintiff argues the ALJ incorrectly discounted Plaintiff's testimony that the medical
3 providers inaccurately recorded her pain. *See id.* at p. 9; AR 53-54. Plaintiff asserts she is part of
4 the national opioid epidemic. *Id.* at p. 9. As stated above, the Court may not reverse a
5 determination as to a claimant's subjective symptom testimony where the determination is based
6 on contradictory or ambiguous evidence. *Allen*, 749 F.2d at 579. Here, Plaintiff has not shown the
7 ALJ erred. Instead, Plaintiff argues the ALJ gave weight to the treatment notes despite statements
8 made by Plaintiff contradicting the validity of the treatment notes. Plaintiff has not shown her
9 single statement alleging the treatment notes are inaccurate is sufficient for the Court to conclude
10 the ALJ erred in discounting Plaintiff's subjective symptom testimony.

11 In conclusion, there is evidence in the record which supports the ALJ's finding that
12 Plaintiff's testimony was inconsistent with her statements to medical providers. Therefore, the ALJ
13 has provided a clear and convincing reason, supported by substantial evidence for discounting
14 Plaintiff's subjective symptom testimony. Accordingly, the ALJ did not error in assessing
15 Plaintiff's complaints of pain.

16 CONCLUSION

17 Based on the foregoing reasons, the Court hereby finds the ALJ properly concluded
18 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is affirmed pursuant
19 to sentence four of 42 U.S.C. § 405(g).

20 Dated this 22nd day of February, 2018.

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22 _____
23 David W. Christel
24 United States Magistrate Judge