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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARCELLINA M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO. C17-5982-JPD

ORDER AFFIRMING THE
COMMISSIONER

Plaintiff appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court ORDERS that the Commissioner’s decision be AFFIRMED.

1 I. FACTS AND PROCEDURAL HISTORY

2 At the time of the administrative hearing, plaintiff was a forty-seven year old woman
3 with a high school education plus some college. Administrative Record (“AR”) at 51, 53.¹
4 Her past work experience includes employment growing crystals for a solar company, as a
5 wafer technician, and a Pendleton blanket operator. AR at 54-56, 70. Plaintiff was last
6 gainfully employed in October 2012. AR at 99.

7 In December 2013, plaintiff filed applications for SSI payments and DIB, alleging an
8 onset date of May 5, 2008. AR at 27, 90. Plaintiff asserts that she is disabled due to status
9 post-cervical fusion, fibromyalgia, depression, diabetes with neuropathy, migraines,
10 degenerative disc disease of the lumbar spine, status post right Achilles repair, status post left
11 shoulder surgery, and obesity. AR at 29.

12 The Commissioner denied plaintiff’s claim initially and on reconsideration. AR at 27.
13 Plaintiff requested a hearing, which took place on February 24, 2016. AR at 47-75. On April
14 7, 2016, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on
15 his finding that plaintiff could perform a specific job existing in significant numbers in the
16 national economy. AR at 24-40. Plaintiff’s request for review was denied by the Appeals
17 Council, AR at 1-6, making the ALJ’s ruling the “final decision” of the Commissioner as that
18 term is defined by 42 U.S.C. § 405(g). On November 30, 2017, plaintiff timely filed the
19 present action challenging the Commissioner’s decision. Dkt. 4.

20 II. JURISDICTION

21 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
22 405(g) and 1383(c)(3).

23 ¹ Plaintiff testified that she was currently a sophomore at Washington State University
24 studying digital technologies and culture and taking 13 credits. AR at 53. She previously
studied industrial radiography at trade school. AR at 54.

1 III. STANDARD OF REVIEW

2 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
3 social security benefits when the ALJ’s findings are based on legal error or not supported by
4 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
5 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
6 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
7 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
8 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
9 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
10 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
11 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
12 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
13 susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that
14 must be upheld. *Id.*

15 The Court may direct an award of benefits where “the record has been fully developed
16 and further administrative proceedings would serve no useful purpose.” *McCartey v.*
17 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
18 (9th Cir. 1996)). The Court may find that this occurs when:

- 19 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
20 claimant’s evidence; (2) there are no outstanding issues that must be resolved
21 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant’s evidence.

22 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
23 erroneously rejected evidence may be credited when all three elements are met).

1 IV. EVALUATING DISABILITY

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

12 The Commissioner has established a five step sequential evaluation process for
13 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
14 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
15 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
16 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
17 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
18 §§ 404.1520(b), 416.920(b).² If she is, disability benefits are denied. If she is not, the
19 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
20 or more medically severe impairments, or combination of impairments, that limit her physical
21 or mental ability to do basic work activities. If the claimant does not have such impairments,

22 _____
23 ² Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
2 impairment, the Commissioner moves to step three to determine whether the impairment meets
3 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
4 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
5 twelve-month duration requirement is disabled. *Id.*

6 When the claimant's impairment neither meets nor equals one of the impairments listed
7 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
8 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
9 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
10 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
11 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
12 true, then the burden shifts to the Commissioner at step five to show that the claimant can
13 perform other work that exists in significant numbers in the national economy, taking into
14 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
15 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
16 claimant is unable to perform other work, then the claimant is found disabled and benefits may
17 be awarded.

18 V. DECISION BELOW

19 On April 7, 2016, the ALJ issued a decision finding the following:

- 20 1. The claimant meets the insured status requirements of the Social
21 Security Act through June 30, 2015.
- 22 2. The claimant has not engaged in substantial gainful activity since May
23 5, 2008, the alleged onset date.
- 24 3. The claimant has the following severe impairments: status post
cervical fusion, fibromyalgia, depression, diabetes with neuropathy,
migraine, degenerative disc disease (DDD) of lumbar spine, status

1 post right Achilles repair, status post left shoulder surgery, and obesity
2 (based on 66 inches, 300 pounds)

- 3 4. The claimant does not have an impairment or combination of
4 impairments that meets or medically equals the severity of one of the
5 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 6 5. After careful consideration of the entire record, I find that the claimant
7 has the residual functional capacity to perform sedentary work as
8 defined in 20 CFR 404.1567(a) and 416.967(a), i.e., lift/carry ten
9 pounds occasionally and less than ten pounds frequently, except she
10 can sit for about 6 hours, stand and walk about 2 hours in an 8-hour
11 workday; can frequently climb ramps and stairs but never climb
12 ladders, ropes or scaffolds; can occasionally balance, stoop, kneel,
13 crouch and crawl; should avoid concentrated exposure to heat, cold,
14 fumes, odors, dusts and other pulmonary irritants, as well as hazards
15 such as moving machinery and unprotected heights; can occasionally
16 reach overhead with the left upper extremity and frequently handle and
17 finger with both upper extremities; can do simple, routine work; and
18 can alternate between sitting and standing about every hour with
19 change of position about 5 minutes while sustaining productivity.
- 20 6. The claimant is unable to perform any past relevant work.
- 21 7. The claimant was born on XXXXX, 1969 and was 38 years old, which
22 is defined as a younger individual age 18-44, on the alleged disability
23 onset date. The claimant subsequently changed age category to a
24 younger individual age 45-49.³
8. The claimant has at least a high school education and is able to
communicate in English.
9. Transferability of job skills is not material to the determination of
disability because using the Medical-Vocational Rules as a framework
supports a finding that the claimant is “not disabled,” whether or not
the claimant has transferable job skills.
10. Considering the claimant’s age, education, work experience, and
residual functional capacity, there are jobs that exist in significant
numbers in the national economy that the claimant can perform.
11. The claimant has not been under a disability, as defined in the Social
Security Act, from May 5, 2008, through the date of this decision.

AR at 29-40.

³ The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

1 VI. ISSUES ON APPEAL

2 The principal issues on appeal are:

- 3 1. Did the ALJ err in evaluating plaintiff’s testimony?
4 2. Did the ALJ err in evaluating the medical opinion evidence?
5 3. Did the ALJ err in assessing plaintiff’s RFC, or at step five?

6 Dkt. 14 at 1; Dkt. 18 at 2.

7 VII. DISCUSSION

8 A. The ALJ Did Not Err in Evaluating Plaintiff’s Testimony

9 1. *Legal Standard for Evaluating the Plaintiff’s Testimony*

10 As noted above, it is the province of the ALJ to determine what weight should be
11 afforded to a claimant’s testimony, and this determination will not be disturbed unless it is not
12 supported by substantial evidence. A determination of whether to accept a claimant’s
13 subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;
14 *Smolen*, 80 F.3d at 1281. First, the ALJ must determine whether there is a medically
15 determinable impairment that reasonably could be expected to cause the claimant’s symptoms.
16 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. Once a claimant produces
17 medical evidence of an underlying impairment, the ALJ may not discredit the claimant’s
18 testimony as to the severity of symptoms solely because they are unsupported by objective
19 medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v.*
20 *Chater*, 157 F.3d 715, 722 (9th Cir. 1988). Absent affirmative evidence showing that the
21 claimant is malingering, the ALJ must provide “clear and convincing” reasons for rejecting the
22 claimant’s testimony.⁴ *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014) (citing

23 _____
24 ⁴ In Social Security Ruling (SSR) 16-3p, the Social Security Administration rescinded
SSR 96-7p, eliminated the term “credibility” from its sub-regulatory policy, clarified that
“subjective symptom evaluation is not an examination of an individual’s character[.]” and

1 *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). See also *Lingenfelter v. Astrue*, 504
2 F.3d 1028, 1036 (9th Cir. 2007).

3 When evaluating a claimant’s subjective symptom testimony, the ALJ must specifically
4 identify what testimony is not credible and what evidence undermines the claimant’s
5 complaints; general findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at
6 722. The ALJ may consider “ordinary techniques of credibility evaluation,” including a
7 claimant’s reputation for truthfulness, inconsistencies in testimony or between testimony and
8 conduct, daily activities, work record, and testimony from physicians and third parties
9 concerning the nature, severity, and effect of the alleged symptoms. *Thomas*, 278 F.3d at 958-
10 59 (citing *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)).

11 2. *The ALJ Provided Several Clear and Convincing Reasons for*
12 *Discounting Plaintiff’s Testimony*

13 The ALJ found that plaintiff’s “medically determinable impairments could reasonably
14 be expected to cause some of the alleged symptoms; however, the claimant’s statements
15 concerning the intensity, persistence, and limiting effects of these symptoms are not entirely
16 consistent with the medical evidence and other evidence in the record[.]” AR at 35.

17 Specifically, the ALJ found that plaintiff’s statements regarding her symptoms were
18 inconsistent with (1) the objective medical evidence of record, (2) plaintiff’s conservative
19 treatment history, (3) plaintiff’s activities of daily living, and (4) plaintiff’s work history. AR
20 at 38-39.

21 (i) *Objective Medical Evidence*

22 An ALJ may consider the medical evidence as a relevant factor in determining the

23 indicated it would more “more closely follow [its] regulatory language regarding symptom
24 evaluation.” SSR 16-3p. However, this change is effective March 28, 2016 and not applicable
to the August 29, 2014 ALJ decision in this case. The Court, moreover, continues to cite to
relevant case law utilizing the term credibility.

1 reliability of a claimant's symptom testimony. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
2 Cir. 2001). Minimal objective findings can undermine a claimant's credibility. *Burch v.*
3 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). The ALJ did not err by citing the lack of
4 objective medical evidence, among several other reasons, for discounting plaintiff's testimony
5 about the limitations caused by her physical impairments. *See Turner v. Comm'r of Soc. Sec.*,
6 613 F.3d 1217, 1225 (9th Cir. 2010). Specifically, the ALJ found that plaintiff's statements
7 regarding her symptoms were inconsistent with the evidence of record. AR at 32-38.
8 Although the ALJ's analysis of the objective evidence in relation to plaintiff's specific claims
9 was not a model of clarity, the Court could reasonably infer from the ALJ's detailed discussion
10 what claims the ALJ found unreliable. Moreover, the ALJ's discussion of the objective
11 evidence was just one of several reasons the ALJ gave for discounting plaintiff's testimony in
12 this case. *Compare Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015) (where the
13 ALJ only discussed the objective medical evidence to support his finding the claimant was not
14 credible).

15 The ALJ noted that plaintiff was injured while working in March 2008. AR at 32, 411.
16 She had a C5-6 anterior cervical discectomy and fusion in August 2008. AR at 32, 572-573.
17 Records demonstrated that her neck was doing "generally well" one year later. AR at 32, 462.
18 Although she still had some intermittent neck pain, there were no radicular symptoms, and x-
19 rays showed good bony fusion. AR at 32. Only regular exercise and proper posture, as well as
20 vocational rehabilitation, were recommended as treatment. AR at 32, 462.

21 The ALJ further noted that Stephen Paul Engard, PAC, completed a physical
22 assessment in February 2011. AR at 36, 508-518. He opined plaintiff was limited to light work
23 based on her cervical pain, left shoulder pain, multiple peripheral pain, and morbid obesity. He
24 rated the severity of these impairments as only mild, except for her shoulder, which he rated as

1 mild to moderate. In addition, Peter Pfeiffer, M.D., conducted a physical consultative
2 examination in March 2011, which indicated some limitations from impairments but not to the
3 degree that would prevent all work. AR at 34, 526-529. Dr. Pfeiffer noted plaintiff was well
4 groomed and able to sit without distress, dress, and get on and off the examination table. The
5 neck had some decreased range of motion but all other joints were normal. Fine and gross
6 manipulation was normal. Gait and station were normal. She was neurologically intact and
7 reported that her typical day consisted of checking email, having coffee and breakfast, going to
8 school four days per week (a total of about 22 hours per week), doing homework, performing
9 light housework, grocery shopping, and handling personal care. AR at 34, 526-529.

10 The ALJ noted that treatment notes in July 2010 reflected that plaintiff's back pain was
11 gone and Savella was "really helping" her neck. AR at 33, 480-481. In July 2014, plaintiff's
12 treating physician, Navin Nagaraj, M.D., indicated that he did not think she was disabled and
13 instructed her to focus on her class work and "advance her ability to work in the real world."
14 AR at 35, 632. In March 2015, she reported that her neck pain was "well controlled" with
15 Tramadol. AR at 33, 866. In April 2015, plaintiff reported that her Cymbalta was helping her
16 neuropathy and fibromyalgia and stated the medication was "doing a great job." AR at 33, 860.
17 The ALJ noted that although the record also indicated some back pain complaints, a computed
18 tomography (CT) scan of the lumbar spine in April 2015 showed only minimal DDD without
19 stenosis. AR at 33, 898. Treatment notes in July and September 2015 reflected that plaintiff's
20 gait, strength and muscle tone were normal. AR at 34, 831, 845. Plaintiff seemed to have had
21 good results from the cervical surgery with only minor residual limitations. AR at 33. In fact,
22 in June 2010, Daniel A. Brzuske, D.O., found plaintiff had no permanent cervical impairment.
23 AR at 33, 382. No nerve or sensory deficits were noted in July 2015. AR at 33.

1 Finally, with respect to plaintiff's shoulder impairment, the ALJ noted that in June
2 2009, plaintiff had left shoulder arthroscopy and decompression. AR at 33, 459. Records
3 reflected plaintiff progressed with physical therapy, and returned to work about three months
4 after the surgery. AR at 33, 459-460. In March 2010, Jerome DaSilva, M.D., saw plaintiff for
5 an orthopedic re-evaluation of her left shoulder. AR at 33, 468. She was "happy" but still had
6 some discomfort in her shoulder. On examination, she had only a mild restriction of range of
7 motion. Treatment notes in July 2010 reflected that the prescription Savella was "really
8 helping" her shoulder. AR at 33, 480. Treatment notes in October 2012 showed no deformities
9 or tenderness in upper and lower extremities bilaterally. AR at 33, 600. The ALJ noted
10 plaintiff testified she was not taking any pain medication, and was able to drive, clean, and
11 prepare meals. AR at 33, 52, 61, 67. A treatment's effectiveness is relevant in determining the
12 severity of a claimant's symptoms. *See Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001,
13 1006 (9th Cir. 2006).

14 With respect to plaintiff's mental health, the ALJ found that there was no evidence that
15 it would preclude fulltime employment. AR at 34. During a March 2011 consultative
16 psychological examination with Scott Alvord, Psy.D., plaintiff appeared depressed but she
17 denied suicidal ideation; psychomotor movements were within normal limits; thought
18 processes were intact; speech was within normal limits; memory was intact; concentration was
19 good; abstract thinking was intact; insight was intact; fund of knowledge was good; and
20 intellectual functioning was determined to fall in the average range. AR at 34, 523-524. There
21 was little to no change at the May 2014 psychological consultative examination with Tobias
22 Ryan, Psy.D., which indicated plaintiff continued to have good mental functioning. AR at 34,
23 610-615. Treatment notes from the Vancouver Clinic and Adventist Health reflected normal
24 mood and affect in August and October 2014, as well as at appointments in 2015. AR at 34,

1 637, 691, 845, 861, 868. Beth Fitterer, PhD, a state agency consultant, reviewed the records
2 and found a severe mental impairment of “affective disorders.” AR at 37, 94-95, 106-107. She
3 opined plaintiff had moderate limitations in concentration, persistence, and pace, but should be
4 able to maintain attention and concentration with normal breaks. In September 2014, John
5 Robinson, Ph.D., another state agency consultant, affirmed Dr. Fitterer’s opinion. AR at 37,
6 123-124.

7 Plaintiff started counseling in November 2015, at which time she was depressed and
8 anxious. However, her mental status examination was normal. AR at 34, 682. She reported
9 that her spirituality had been very helpful with her pain and she was attending college for
10 computer information systems. She had only a few sessions but by December 2015, her mood
11 was somewhat improved and affect was full. AR at 34, 672. Overall, her mental status was
12 assessed as “unremarkable” and general observations were considered “normal.” AR at 34,
13 620, 632, 662, 672. Plaintiff had also taken medication (e.g., Prozac), which she reported
14 improved her mood, and had some limited counseling for depression that seemed to help. AR
15 at 34, 652, 662, 688.

16 Thus, the ALJ discussed the objective medical evidence regarding plaintiff’s physical
17 impairments in detail, and concluded that the evidence was inconsistent with the degree of
18 limitation alleged by the plaintiff. AR at 34. This was a clear and convincing reason,
19 supported by substantial evidence, for giving her testimony less weight.

20 (ii) *Conservative Treatment*

21 The ALJ also found that “other than the aforementioned surgeries, the remainder of the
22 claimant’s treatment was routine and conservative.” AR at 33. The ALJ found that plaintiff’s
23 conservative treatment history undermined her subjective testimony. Specifically, although
24 plaintiff testified that she had fibromyalgia and described feelings of stinging or burning pain

1 in her legs, she was not taking any pain medication and used natural remedies instead. AR at
2 33. Specifically, plaintiff testified that she was only taking vitamin shots and used natural
3 supplements from a naturopath. AR at 33, 9919-21. Moreover, in July 2014, her physician,
4 Navin Nagaraj, M.D., counseled her about stress reduction and relaxation techniques to reduce
5 her pain. AR at 33, 632. The ALJ concluded this lack of medication usage indicated that
6 plaintiff was not greatly bothered by this impairment. AR at 33. As noted above, the ALJ also
7 found that a few sessions of counseling, coupled with Prozac, improved her mood and mental
8 health symptoms. AR at 34, 620, 632, 652, 662, 672, 688.

9 Conservative treatment is “sufficient to discount a claimant’s testimony regarding
10 severity of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 750-751 (9th Cir. 2007). An ALJ
11 may consider medical reports of improvement and minimal treatment in evaluating a
12 claimant’s testimony. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir.
13 1999). The ALJ reasonably relied upon plaintiff’s conservative treatment, which includes
14 avoiding pain medication and limited counseling, as a reason to give her testimony less weight.
15 This was clear and convincing, and supported by substantial evidence.

16 (iii) *Activities of Daily Living*

17 An ALJ may also discredit a plaintiff’s subjective symptoms by identifying
18 inconsistencies between her complaints and activities of daily living. *Burch*, 400 F.3d at 680-
19 81; *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995). An ALJ may consider a claimant’s
20 daily activities when evaluating credibility. 20 C.F.R. §§ 404.1529(c)(3)(i), 416.929(c)(3)(i).
21 “Even where those activities suggest some difficulty functioning, they may be grounds for
22 discrediting the claimant’s testimony to the extent that they contradict claims of a totally
23 debilitating impairment.” *Molina*, 674 F.3d at 1113.

1 Here, the ALJ cited numerous activities plaintiff was able to perform that the ALJ
2 found to be inconsistent with disability. AR at 31-35, 37-38. Indeed, plaintiff was highly
3 active, and this was a clear and convincing reason for the ALJ to give plaintiff's testimony
4 regarding her symptoms less weight. For example, the ALJ noted plaintiff was able to
5 cook/prepare meals; wash dishes; walk all over her college campus; use a computer for job
6 research; clean; care for a pet; handle her own personal care without problems from mental
7 health or needing reminders; handle a savings account and use a checkbook; drive; shop in
8 stores; spend time with others; read; attend college classes and monthly religious meetings; do
9 homework; and do water aerobics. AR at 31-35, 37-39, 263-270, 612, 805.

10 (iv) *Work History*

11 The ALJ pointed out that plaintiff testified that she had jobs since the alleged
12 onset date. AR at 35. Specifically, she worked at Wafertech in 2010 and at Pendleton as a
13 blanket operator in 2012, where she made \$7916.05. AR at 35, 55-57, 259, 297. She
14 performed the job of blanket operator at the light level but quit this job once she had the
15 opportunity to go to Mt. Hood Community College, where she had a cumulative GPA of 2.75
16 after the 2014 winter term. AR at 35, 343-344. The ALJ also noted that plaintiff was now
17 attending Washington State University in Vancouver and taking four classes, which amounts to
18 13 credits and is usually considered fulltime. AR at 35. Plaintiff testified that she is currently
19 attending university about 6 hours per day, four days per week. AR at 35, 357-359.

20 Although these activities discussed above do not necessarily indicate plaintiff's ability
21 to perform work activities, the ALJ could reasonably conclude that they are inconsistent with
22 her alleged level of impairment. Plaintiff's work history and ability to maintain a full college
23 courseload was a clear and convincing reason for the ALJ to give her testimony less weight.

24 *See Thomas*, 278 F.3d at 958-959; *Morgan*, 169 F.3d at 599-600.

1 Accordingly, the ALJ concluded that “the evidence of activities of daily living, work
2 activity after the alleged onset date, quit last job to go to school (not due to a disability),
3 attending college, getting only naturopath treatment, taking no pain medications, and
4 intermittent Prozac and counseling does not equate to total disability. These were clear and
5 convincing reasons, supported by substantial evidence, for the ALJ to afford plaintiff’s
6 testimony regarding the severity of her symptoms less weight.

7 B. The ALJ Did Not Err in Evaluating the Medical Opinion Evidence

8 1. *Standards for Reviewing Medical Evidence*

9 As a matter of law, more weight is given to a treating physician’s opinion than to that
10 of a non-treating physician because a treating physician “is employed to cure and has a greater
11 opportunity to know and observe the patient as an individual.” *Magallanes v. Bowen*, 881 F.2d
12 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
13 physician’s opinion, however, is not necessarily conclusive as to either a physical condition or
14 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
15 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
16 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
17 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
18 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough
19 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
20 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
21 merely state his/her conclusions. “He must set forth his own interpretations and explain why
22 they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22
23 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.
24 *Reddick*, 157 F.3d at 725.

1 The opinions of examining physicians are to be given more weight than non-examining
2 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the
3 uncontradicted opinions of examining physicians may not be rejected without clear and
4 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
5 physician only by providing specific and legitimate reasons that are supported by the record.
6 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

7 Opinions from non-examining medical sources are to be given less weight than treating
8 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
9 opinions from such sources and may not simply ignore them. In other words, an ALJ must
10 evaluate the opinion of a non-examining source and explain the weight given to it. Social
11 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
12 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a
13 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is
14 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
15 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

16 2. *Dr. Alvord*

17 In a brief and conclusory fashion, plaintiff argues the ALJ improperly rejected the
18 opinion of Dr. Alvord regarding his opinion that her adaptive functioning was mildly to
19 moderately impaired. Dkt. 14 at 6. Plaintiff asserts that “Dr. Alvord’s findings that [plaintiff]
20 had a depressed mood and her affect was downtrodden/slightly tearful support his opinion
21 about [her] limitations.” AR at 522.

22 In rejecting Dr. Alvord’s opinion regarding his assessment of adaptive functioning, the
23 ALJ noted it was inconsistent with the mental status examination which indicated only mild
24 symptoms. AR at 38, 522-523. For example, plaintiff did very well on cognitive/intellectual

1 testing, and she was not taking any medications for her symptoms. AR at 522-524. Dr. Alvord
2 also found only mild impairments in abilities to manage household chores, follow instructions,
3 concentrate, persist, and pace. AR at 37-38, 522. Moreover, the ALJ also noted the records
4 demonstrated plaintiff was working and going to school after the alleged onset date, which the
5 ALJ logically concluded was indicative of an ability to work even without psychiatric
6 treatment. AR at 38. An ALJ may reject a medical opinion that is brief, conclusory, and
7 inadequately supported by clinical findings, or contradicted by a claimant's daily activities.
8 *Thomas*, 278 F.3d at 957. Accordingly, plaintiff has not shown any error by the ALJ in
9 assessing Dr. Alvord's opinion.

10 3. *Dr. Pfeiffer*

11 Plaintiff also asserts in a conclusory fashion that the ALJ improperly rejected the
12 opinion of Dr. Pfeiffer that she could only reach occasionally with the left arm. Dkt. 14 at 6.
13 Specifically, plaintiff asserts that Dr. Pfeiffer found that plaintiff had limited range of motion
14 in her neck and left shoulder as well as tenderness in her quadriceps and upper torso. AR at
15 528. Dr. Pfeiffer opined that plaintiff could only occasionally reach with the left arm, AR at
16 529, and diagnosed plaintiff with fibromyalgia, left shoulder pain, neck pain, and morbid
17 obesity. AR at 528. Plaintiff asserts that although "the ALJ states he is giving 'little weight' to
18 Dr. Pfeiffer's opinion . . . [his] findings confirm that [she] has a medical condition that can
19 cause pain." AR at 36.

20 As noted above, the ALJ discussed the medical evidence of record in detail, including
21 Dr. Pfeiffer's opinion. AR at 35-36. In rejecting Dr. Pfeiffer's limitation of only occasional
22 reaching with the left arm, the ALJ specifically noted that this was inconsistent with plaintiff's
23 own testimony which stated she was only limited to above the shoulder reaching with her left
24 arm. AR at 36. Moreover, the ALJ noted it was also inconsistent with the longitudinal record,

1 which was reasonable given that Jerome DaSilva, M.D., the left shoulder surgeon, limited
2 plaintiff to no overhead reaching prior to the performed surgery. AR at 36, 478. As noted
3 above, an ALJ may reject a medical opinion that is brief, conclusory, and inadequately
4 supported by clinical findings, or contradicted by a claimant's daily activities. *Thomas*, 278
5 F.3d at 957. The ALJ adopted many aspects of Dr. Pfeiffer's opinion which the ALJ found to
6 be "consistent with the medical evidence," but merely found that "her ability to reach with her
7 left arm is only limited above the shoulder according to even the claimant's testimony." AR at
8 36. Accordingly, plaintiff has not shown any error by the ALJ in evaluating Dr. Pfeiffer
9 opinion.

10 4. *Dr. Ryan*

11 Plaintiff also argues that the ALJ improperly rejected the opinion of Tobias A. Ryan,
12 Psy.D., that her ability to maintain a daily/weekly work schedule was moderately impaired due
13 to chronic pain from her fibromyalgia. Dkt. 14 at 8 (citing AR at 615). The ALJ stated that he
14 was giving Dr. Ryan's opinion "great weight," "except for the moderate impairment in
15 maintaining a schedule, as the claimant was going to school, getting good grades . . . and
16 attending water aerobics class three days per week." AR at 37. However, plaintiff argues that
17 "Dr. Ryan's opinion is consistent with [plaintiff's] testimony about how her fibromyalgia
18 affects her ability to maintain a schedule." Dkt. 14 at 8.

19 The ALJ discussed Dr. Ryan's psychological consultative examination in May 2014.
20 AR at 37, 610-615. He noted that plaintiff's mood was depressed but there was no evidence of
21 thought disturbance and stream of mental activity appeared to be within normal limits.
22 Moreover, concentration, memory, fund of knowledge, and abstract thinking were all within
23 normal limits. She completed activities of daily living independently, with normal persistence,
24 but with a slower pace. Her reported level of social participation appeared to be mildly

1 impaired, but she appeared to have the ability to maintain meaningful relationships and
2 participate in community activities. Dr. Ryan noted plaintiff had a distorted perception of her
3 personal activity level, as she indicated severe difficulty, but she being active in her faith
4 community and exercising regularly. AR at 37, 610-615.

5 The ALJ specifically noted that he gave the opinion great weight except for the opinion
6 regarding a moderate impairment in maintaining a schedule. AR at 37. He rejected this part of
7 Dr. Ryan's opinion because it was inconsistent with plaintiff's extensive daily activities, which
8 included her ability to go to school, get good grades, and attend water aerobics classes three
9 days per week. AR at 31-35, 37-39, 263-270, 612, 805.

10 As noted above, an ALJ may reject a medical opinion that is contradicted by a
11 claimant's daily activities. *Thomas*, 278 F.3d at 957. Accordingly, the ALJ did not err in his
12 assessment of Dr. Ryan's opinion, as plaintiff's daily activities evince a greater ability to
13 maintain a consistent schedule than opined by Dr. Ryan.

14 5. *David Morgan, M.D.*

15 David Morgan, M.D. conducted a psychological evaluation of plaintiff in September
16 2015, and assessed numerous marked limitations in her ability to perform activities within a
17 schedule, maintain regular attendance, be punctual, adapt to changes in routine work setting,
18 communicate and perform effectively in a work setting, maintain appropriate behavior in a
19 work setting, compete a normal workday/week without interruptions from symptoms, and set
20 realistic goals. AR at 664-671. The ALJ gave Dr. Morgan's opinion "little weight" because "it
21 is out of proportion with the rest of the medical evidence of record, and there was no indication
22 from treatment notes that the claimant's behavior was inappropriate, the claimant's activities of
23 daily living were generally indicative of high functioning, and the claimant's affect was normal
24 per Dr. Morgan." AR at 38. In fact, the ALJ noted that plaintiff's behavior was specifically

1 assessed as normal at multiple appointments. The ALJ opined that “even if her mental health
2 was as severe as determined by Dr. Morgan, it was only temporary and she engage in some
3 counseling after this evaluation.” AR at 38. The ALJ pointed out that counseling records
4 reflected “unremarkable” mental status and “generally normal” behavior. AR at 38.

5 Plaintiff argues that the ALJ improperly rejected the opinion of Dr. Morgan
6 regarding his assessed marked mental limitations in most functional areas due to her
7 depression. Dkt. 14 at 11-12. Specifically, plaintiff contends that although the ALJ stated he
8 was giving Dr. Morgan’s opinion “little weight” because it is “out of proportion with the rest
9 of the medical evidence of record,” plaintiff asserts Dr. Morgan was able to base his opinion on
10 independent clinical findings. Dkt. 14 at 12. In addition, plaintiff asserts that Dr. Morgan’s
11 opinions are consistent with the opinions of Dr. Alvord, Dr. Ryan, and Dr. Rutherford. *Id.*
12 Finally, plaintiff argues that Dr. Morgan is a psychologist who was basing his opinion on his
13 clinical findings, and that the ALJ erred by finding that even if plaintiff was as limited as Dr.
14 Morgan found, “this was only temporary.” AR at 38. Plaintiff argues “more accurately, this
15 evidence confirms that [her] symptoms wax and wane.” Dkt. 14 at 13.

16 Plaintiff has not shown any error by the ALJ in assessing Dr. Morgan’s opinion, as the
17 ALJ noted that there was no indication from the treatment notes that plaintiff’s behavior was
18 ever inappropriate and her activities of daily living were indicative of high functioning
19 individual. AR at 31-35, 37-39, 263-270, 612, 805. Moreover, the ALJ also correctly noted
20 that Dr. Morgan’s opinion was inconsistent with his own finding that plaintiff’s affect was
21 normal. AR at 38, 667. An ALJ may reject a medical opinion that is brief, conclusory, and
22 inadequately supported by clinical findings, or contradicted by a claimant’s daily activities.
23 *Thomas*, 278 F.3d at 957. Here, the ALJ found that Dr. Morgan’s opinion was contradicted by
24

1 his own findings, as well as the counseling records and plaintiff's daily activities.

2 Accordingly, the ALJ did not err in his assessment of Dr. Morgan's opinion.

3 6. *Drs. Hale, Fitterer, and Robinson*

4 Finally, plaintiff disagrees with the ALJ's decision to give great weight to the
5 opinions of the State agency reviewing physician, Drs. Hale, Fitterer, and Robinson, because
6 they did not have an opportunity to review all of the records in his case. Dkt. 14 at 13.

7 Specifically, plaintiff argues that because they did not review any evidence beyond September
8 2014, "their opinions are entitled to only limited weight." *Id.*

9 Although Drs. Hale, Fitterer, and Robinson did not review all of the records in this
10 case, the ALJ had the opportunity to review the entire record, AR at 32, and determined that
11 their opinions regarding plaintiff's RFC were consistent with the longitudinal record. AR at
12 35, 37. Although plaintiff may believe the ALJ should have afforded their opinions less
13 weight, it is the role of the ALJ to resolve conflicts in the medical opinion evidence. Where
14 the evidence is susceptible to more than one rational interpretation, it is the Commissioner's
15 that will be upheld. *Burch*, 400 F.3d at 679. Accordingly, plaintiff has not shown that the ALJ
16 erred in affording great weight to the opinions of Drs. Hale, Fitterer, and Robinson.

17 C. The ALJ Did Not Err in Assessing Plaintiff's RFC, or at Step Five


18 Because the Court has affirmed the findings of the ALJ as to plaintiff's prior
19 assignments of error, it must also conclude that there was no error in determining plaintiff's
20 RFC or relying upon that RFC at step five. Plaintiff has pointed to no credible evidence, apart
21 from plaintiff's subjective complaints which were rejected by the ALJ, establishing the
22 additional limitations that she believes should have been included in the RFC assessment.
23 Accordingly, the ALJ did not err by omitting these additional limitations from the RFC
24 assessment. *See Carmickle*, 533 F.3d at 1164–65 (holding that an ALJ's RFC assessment need

1 not include impairments for which the medical records do not establish any work related
2 impairments).

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court orders that the Commissioner's decision be
5 AFFIRMED. The role of this Court is limited. As noted above, the ALJ is responsible for
6 determining credibility, resolving conflicts in medical testimony, and resolving any other
7 ambiguities that might exist. *Andrews*, 53 F.3d at 1039. When the evidence is susceptible to
8 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.
9 *Thomas*, 278 F.3d at 954. While it may be possible to evaluate the evidence as plaintiff
10 suggests, it is not possible to conclude that plaintiff's interpretation is the only rational
11 interpretation.

12 DATED this 25th day of February, 2019.

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16 JAMES P. DONOHUE
17 United States Magistrate Judge
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