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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KELLY M-S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C18-5155 BAT

**ORDER AFFIRMING THE
COMMISSIONER AND DISMISSING
THE CASE**

Plaintiff appeals the ALJ’s decision finding her not disabled. The ALJ found degenerative disc disease is a severe impairment; plaintiff retains the residual functional capacity (RFC) to perform light work with additional limitations; and plaintiff is not disabled because she can perform past relevant work, and other jobs in the national economy. Tr. 22-32.

Plaintiff contends the ALJ’s erred by (1) failing at step two to find diabetes, abdominal abnormalities and mild infraspinatus tendinopathy are severe impairments; (2) miscalculating her RFC; and (3) discounting her testimony about her limitations. As discussed below, the Court **AFFIRMS** the Commissioner’s final decision and **DISMISSES** the case with prejudice.

1 **DISCUSSION**

2 **A. The ALJ’s Step Two and Three Findings**

3 Plaintiff contends the ALJ erred at step two by failing to find diabetes, abdominal
4 abnormalities and mild infraspinatus tendinopathy are severe impairments. Dkt. 18 at 5.

5 At step two, the ALJ found these conditions are non-severe based upon medical records
6 establishing plaintiff’s diabetes is “stable”; plaintiff’s bile duct has no obstructive lesion, CT
7 scans show no acute inflammation process in the abdomen, and a mildly dilated CBD; and an
8 MRI shows plaintiff’s tendinopathy is “mild.” Tr. 22. The ALJ noted plaintiff has depression
9 and anxiety but her symptoms are well managed with medications, and plaintiff has never sought
10 counseling or therapy for mental health problems. Tr. 23. The ALJ also noted Dr. Leslie Pickett,
11 Ph.D., diagnosed “only malingering, cannabis abuse and opiod abuse.” *Id.*

12 At step three, the ALJ found plaintiff’s mental impairments did not meet or equal the
13 requirements of a Listed Impairment, Tr. 23-24, and also stated:

14 Although the diabetes, abdominal pain, left should mild
15 suprspinatus [sic] and mental health symptoms are non severe,
16 because the claimant has a severe impairment, all of her conditions
17 were considered in combination throughout this decision
18 regardless of the individual label or severity of any particular
19 impairment.

20 Tr. 24.

21 Plaintiff has the burden at step two of showing she has a medically determinable
22 impairment or combination of impairments and the impairment or combination of impairments is
23 severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987). Plaintiff also has the burden of showing
the ALJ harmfully erred. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

Plaintiff argues “because the ALJ failed to find [her] other conditions were not a severe
impairments, he did not consider whether she met a listing, as well as failing to account for

1 additional limitations in determining [plaintiff's] RFC. Thus the remainder of his analysis is
2 incorrect." Dkt. 18 at 6.

3 The Court rejects this conclusory argument. Arguments that are unsupported by
4 explanation or authority may be deemed waived. *See Avila v. Astrue*, No. C07-1331, 2008 WL
5 4104300 (E.D. Cal. Sept. 2, 2008) at * 2 (unpublished opinion) (citing *Northwest Acceptance*
6 *Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996) (party who presents no
7 explanation in support of claim of error waives issue); *Independent Towers of Washington v.*
8 *Washington*, 350 F.3d 925, 929 (9th Cir. 2003)).

9 Plaintiff asserts the ALJ failed to find all of plaintiff's conditions are severe but fails to
10 support the argument. It is not enough to simply state the ALJ harmfully erred, and leave the
11 Court to do counsel's work—articulating the basis of the argument through a discussion of the
12 applicable law and facts. *See e.g. Vandenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir. 2005)
13 (rejecting out of hand conclusory assertion that ALJ failed to consider whether claimant met
14 Listings because claimant provided no analysis of relevant law or facts regarding Listings);
15 *Perez v. Barnhart*, 415 F.3d 457, 462 n. 4 (5th Cir. 2005) (argument waived by inadequate
16 briefing); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n. 2 (10th Cir. 1994) (perfunctory complaint
17 fails to frame and develop issue sufficiently to invoke appellate review).

18 Additionally, as noted above, plaintiff bears the burden of showing the ALJ erred at step
19 two and three, and that the errors are harmful. Plaintiff argues her back problems (which the ALJ
20 found was severe), Category 2 Labor and Industry Claim rating show she is disabled. But she
21 presents nothing establishing how or why her mental problems, diabetes, abdominal problems or
22 tendinopathy render her more limited than the ALJ found. Plaintiff according fails to meet her
23

1 burden of proof by failing to forth how or why the ALJ erred at step two and three, and the Court
2 affirms the determinations the ALJ made at these steps.

3 **B. The ALJ’s RFC determination and Step Four Finding**

4 Plaintiff contends the ALJ failed to account for all of her limitations and thus erred in
5 finding she could perform past relevant work at step four. Dkt. 18 at 7-8. Plaintiff first argues
6 “the RFC does not account for all of [her] limitations because of her other conditions.” *Id.* at 8.
7 As discussed above, plaintiff bears the burden of establishing the ALJ harmfully erred;
8 accordingly this conclusory assertion is insufficient.

9 Plaintiff next argues a 2013 “vocational services” determined plaintiff could only
10 perform sedentary work (citing Tr. 350), and that plaintiff cannot perform past work as a flagger.
11 *Id.* The record belies the argument. While vocational services recommended plaintiff be granted
12 additional training time by placement as a general clerk, a job described as “sedentary,” Tr. 349-
13 50, vocational services ultimately concluded, Tr. 340, plaintiff “has successfully completed her
14 retraining plan to work as a General Office Clerk (DOT 209.562.010)—the light duty work that
15 the ALJ found plaintiff could perform. *See* Tr. 30. Additionally, the ALJ did not find plaintiff
16 could perform past work as a flagger. The ALJ instead found she could perform past work as a
17 bar tender or a general office clerk. *Id.*

18 And finally, plaintiff contends had the ALJ found plaintiff was limited to sedentary work,
19 plaintiff would be disabled under the “GRID rules.” Dkt. 18 at 9. The argument is foreclosed as
20 plaintiff has failed to establish the ALJ erred in finding plaintiff can perform light work. Plaintiff
21 also asserts she is limited to sedentary work in a conclusory and thus insufficient manner. As
22 plaintiff fails to meet her burden of showing the ALJ harmfully erred in failing to find she is
23 limited to sedentary work, the Court affirms the ALJ’s RFC determination.

1 **C. Plaintiff’s Testimony**

2 Plaintiff contends the ALJ erroneously relied upon the reports of the Cooperative
3 Disabilities Investigation Unit (CDIU), and Lezlie Pickett, Ph.D., to discount her testimony. Dkt.
4 18 at 10.

5 Plaintiff argues the ALJ should not have relied upon the CDUI report to discount her
6 testimony because there is other more persuasive evidence, which plaintiff contends supports her
7 claim that she is disabled. *Id.* There is no rule precluding the ALJ from relying upon CDUI
8 evidence in assessing a claimant’s testimony. On the contrary, the ALJ is entitled to rely upon
9 such investigations. *See Richards v. Berryhill*, 713 Fed.Appx. 545, 548 (9th Cir. 2017) (“The
10 ALJ did not err by giving great weight to the evidence and testimony submitted by the
11 Cooperative Disability Investigations Unit.”); *see also Elmore v. Colvin*, 617 Fed. Appx. 755 at
12 757 (9th Cir. 2015) (Rejecting argument ALJ improperly relied upon a CDIU investigation,
13 noting “the Social Security Act expressly authorizes the Commissioner to conduct such
14 investigations.”).

15 Here plaintiff does not dispute the CDIU report undermines her testimony. Rather she
16 argues the ALJ should have rejected the report in light of other evidence in the record. The
17 argument fails. The ALJ is responsible for determining credibility, resolving conflicts in medical
18 testimony, and resolving all other ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
19 1995). The Court must examine the entire record, but cannot reweigh the evidence or substitute
20 its judgment for that of the ALJ. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). But
21 this is what plaintiff’s argument would require the court to do—reweigh the ALJ’s assessment of
22 the CDUI report and reject it based upon plaintiff’s view other evidence shows she is more
23 limited than the ALJ found.

1 Plaintiff also argues the ALJ erred in relying upon Dr. Pickett’s finding that plaintiff was
2 malingering. Plaintiff argues the doctor failed to provide a logical reason why plaintiff would be
3 malingering, and that Dr. Pickett has a bad reputation for diagnosing malingering in a majority of
4 her reports and calling into question the claimant’s disability claims.

5 Dr. Pickett found plaintiff “presented with significant external and internal
6 inconsistencies,” and there “appears to be a large discrepancy between what [plaintiff] is capable
7 of doing versus what she is willing or motivated to do. Her self-acknowledged lack of motivation
8 to obtain or maintain employment, superimposed on what appears to be a significant motivation
9 to present herself as severely impaired for the purpose of obtaining disability funds render a
10 prognosis of poor.” Tr. 448. Dr. Pickett also opined plaintiff had no impairments in her
11 intellectual functioning. Tr. 449. Thus contrary to plaintiff’s argument, Dr. Pickett gave an
12 explanation in support of her “malingering” diagnosis, i.e. that plaintiff presents herself as very
13 limited because she wants social security benefits.

14 Plaintiff also argues Dr. Pickett has a bad reputation for diagnosing “malingering.”
15 Anecdotally, the Court takes notice Dr. Pickett has found malingering in other social security
16 disability appeals. *See e.g. Vandusen v. Berryhill*, 2018 WL 2411045 (W.Wash. May 29, 2018);
17 *Renner v. Berryhill*, 2018 WL 460232 (W.Wash. Jan. 18, 2018); *Comstock v. Berryhill*, 2017
18 WL 4472856 (W.Wash. Oct. 6, 2017); *Williams v. Berryhill*, 2017 WL 4054604 (W.Wash. Sept
19 14, 2017); and *Foor v. Berryhill*, 2017 WL 2729480 (W.Wash June 23, 2017). Even if this tends
20 to support plaintiff’s “bad reputation” argument, it is not a basis upon which the Court can rely to
21 reject the ALJ’s reasoning. First, there is no dispute Dr. Pickett examined plaintiff and prepared a
22 report. Second, there is no evidence the observations Dr. Pickett made in support of her opinion
23 that plaintiff presented with significant inconsistencies, is inaccurate or simply untrue. Hence,

1 while Dr. Pickett may have a “bad” reputation for regularly diagnosing malingering in claimants
2 seeking disability benefits, there is nothing showing that in plaintiff’s case, the doctor simply
3 diagnosed malingering even though there was no evidence to support the diagnosis.

4 The ALJ accordingly did not err in relying on Dr. Pickett’s opinion. *See Mohammed v.*
5 *Colvin*, 595 Fed.Appx. 696, 697 (9th Cir. 2014), citing *Benton ex rel. Benton v. Barnhart*, 331
6 F.3d 1030, 1040–41 (9th Cir.2003) (noting that evidence of malingering would support the
7 rejection of a claimant's testimony, but noting no such evidence in that case).

8 Even if the ALJ erred in relying upon Dr. Pickett’s opinion, the ALJ also discounted
9 plaintiff’s testimony based upon the independent medical examination performed by David
10 Smith, M.D. Tr. 28. Dr. Smith found no evidence of radiculopathy, only mild loss of motion of
11 the neck and tenderness, and opined plaintiff had “no restrictions.” Tr. 28. The Court cannot say
12 it was unreasonable for the ALJ to discount plaintiff’s testimony on the grounds that it is
13 inconsistent with Dr. Smith’s findings. In sum, the ALJ properly discounted plaintiff’s testimony
14 based upon Dr. Pickett’s opinion that plaintiff was malingering and the CDIU report. Even if the
15 ALJ were deemed to have erred in relying on these bases, the ALJ also properly discounted
16 plaintiff’s testimony as inconsistent with Dr. Smith’s findings. The Court concludes the ALJ
17 gave at least one valid reason supported by substantial evidence to discount plaintiff’s testimony
18 and accordingly affirms the ALJ’s determination.

19 **D. Substantial Evidence**

20 Plaintiff argues the errors the ALJ committed, individually and as a whole, establish the
21 decision is not supported by substantial evidence. Dkt. 18 at 12. The argument is foreclosed
22 because as discussed above the court rejects plaintiff’s claimed errors. Plaintiff also claims the
23 court should reverse because the ALJ mistakenly thought plaintiff had two state labor and

1 industry claims. Plaintiff provides no explanation as to how or why this is harmful, and the court
2 accordingly rejects plaintiff's conclusory assertion. Plaintiff also claims the alleged onset date
3 "should have been amended to 2011 when she had surgery on her back." *Id.* Plaintiff presents
4 nothing showing that during the administrative proceedings she moved to amend the onset date.
5 The record shows plaintiff by counsel filed a pre-hearing brief alleging she has been disabled
6 since August 28, 2014, Tr. 312, and reaffirmed that date at the hearing before the ALJ. Tr. 43.
7 The record also indicates that plaintiff went through vocational training after her surgery in 2011,
8 and successfully completed her retraining plan to work as a general office clerk, DOT 209.010,
9 in April 2014. Tr. 340. Thus the fact plaintiff had back surgery in 2011 does not itself establish
10 plaintiff's onset date given the record, and plaintiff presents no explanation showing otherwise.
11 Plaintiff has accordingly failed to establish harmful error as to the calculation of her alleged
12 onset date.

13 CONCLUSION

14 For the foregoing reasons, the Commissioner's decision is **AFFIRMED** and this case is
15 **DISMISSED** with prejudice.

16 DATED this 22nd day of October, 2018.

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BRIAN A. TSUCHIDA
Chief United States Magistrate Judge