

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 14 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GEORGE DONATHAN,

Plaintiff - Appellant,

v.

MICHAEL J. ASTRUE,** Commissioner
of Social Security Administration,

Defendant - Appellee.

No. 05-35986

D.C. No. CV-03-01705-OMP/DJH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior Judge, Presiding

Submitted December 3, 2007***
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and CALLAHAN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael J. Astrue is substituted for his predecessor Jo Anne Barnhart as Commissioner of the Social Security Administration. *See* Fed. R. App. P. 43(c)(2).

*** The court granted Appellant's Motion to Submit Case on the Briefs pursuant to Fed. R. App. P. 34(a).

George Donathan appeals the district court’s decision upholding the Social Security Administration Commissioner’s denial of Donathan’s application for disability insurance benefits. We affirm the district court. The parties are familiar with the factual and procedural history of this case, so we do not repeat it here.

This court reviews the district court’s order affirming the administrative law judge’s (“ALJ”) denial of social security benefits *de novo*. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). The court will disturb the denial of benefits only if the decision “contains legal error or is not supported by substantial evidence.” *Id.* (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)).

We find that the ALJ provided clear and convincing reasons for rejecting Donathan’s subjective allegations regarding his impairments, symptoms, and limitations based on his questionable credibility. *See Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996) (where a claimant produces objective evidence of a condition¹ and there is no evidence of malingering, “the ALJ can reject the claimant’s testimony about the severity of her symptoms only by offering specific,

¹ The ALJ questioned whether the minimal objective evidence corroborated the existence of fibromyalgia—which would have ended the inquiry at step two, 20 C.F.R. § 404.1520—but found that Donathan’s fibromyalgia was severe “in order to view the claimant’s subjective allegations in a light most favorable to him.”

clear and convincing reasons for doing so”). The ALJ offered several reasons supporting the adverse credibility determination, including inconsistencies between Donathan’s claimed limitations and pain and his daily activities including feeding, playing with, and cleaning the pens of over 20 animals, regular fishing trips, and performing significant home repairs; Donathan’s unwillingness to seriously pursue prescribed physical and medical therapies; inconsistencies in Donathan’s stated reasons for quitting his job; inconsistencies regarding Donathan’s need for use of a cane or scooter, and Dr. Bernstein’s finding of no medical necessity supporting the need for such ambulatory assistance; the timing of Donathan’s resignation in relation to his vacation to England; an inadequately explained 18-month treatment gap; and Donathan’s focus on his disability evidenced by his seeking medical marijuana as treatment for fibromyalgia. While the support for some of the ALJ’s other reasons is questionable or ambiguous, substantial evidence supports the ALJ’s finding, *i.e.*, there is relevant evidence that a reasonable mind might accept as adequate to support the ALJ’s conclusion. *Orn*, 495 F.3d at 630; *see Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming credibility finding where one of several reasons was unsupported by the record).

Further, we find that the ALJ provided clear and convincing reasons for rejecting the opinions of treating physicians, Drs. Rice and Hudson. *Lester v.*

Chater, 81 F.3d 821, 830 (9th Cir. 1995) (ALJ must provide clear and convincing reasons for rejecting treating or examining physician’s uncontradicted opinion).

The ALJ stated that Drs. Hudson and Rice relied heavily on Donathan’s subjective reports of tender points and his fibromyalgia history, all of which is questionable in light of the proper adverse credibility determination. Donathan also presented with normal physical findings (*e.g.*, normal range of motion in neck, hips, etc.) aside from subjectively identified tender points. Additionally, these physicians’ opinions as to total disability were inconsistent with the record as a whole. Despite his general impression of fibromyalgia, Dr. Bernstein’s control point test findings and normal physical findings further undermine Dr. Rice’s and Dr. Hudson’s opinions.

The ALJ’s assessment of Dr. Rice’s and Dr. Hudson’s opinions was not free of error, but any error was harmless because it was inconsequential to the overall disability determination. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006). As raised by the dissent, the ALJ erred by characterizing Dr. Rice’s and Dr. Hudson’s opinions as dependent on Dr. Hill’s diagnosis of “borderline fibromyalgia.” This error was harmless, however, because the ALJ provided proper, independent reasons for rejecting these opinions.

The dissent also assigns error to the ALJ for consulting the American College of Rheumatology’s (“ACR”) objective fibromyalgia diagnostic criteria to

evaluate Dr. Rice's and Dr. Hudson's opinions. However, even assuming that the ALJ's reference to the ACR criteria was error, it was harmless because the ALJ properly rejected these medical opinions for reasons unrelated to the ACR standards. While an ALJ may not consult outside medical texts in order to conduct his own evaluation of the claimant's physical condition, *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975), the ALJ referred to the ACR standards as a means of evaluating whether to give the treating physicians' opinions controlling weight under 20 C.F.R. § 404.1527(d)(2)—which requires evaluation of whether the physicians used “medically acceptable” diagnostic techniques. *See also Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); Soc. Sec. Ruling 96-2p (1996). Our cases do not expressly preclude outside reference for this purpose, and we have previously acknowledged the ACR's standards as agreed-upon objective criteria for diagnosing fibromyalgia. *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004). Nonetheless, assuming that the ALJ committed error, it was harmless.

Finally, we find that the ALJ properly concluded that Donathan does not suffer from a severe mental impairment. The ALJ supported this finding with substantial evidence, including the infrequency of reports of mental impairments to treating physicians, the lack of emergency room intervention or psychiatric hospitalization, Dr. Prescott's clinical findings indicating a lack of significant

impact of mental impairments on Donathan's functioning,² Dr. Bernstein's report regarding a lack of mental impairment, and evidence of Donathan's significant daily activities that are inconsistent with the claimed severe mental impairment. The ALJ also provided specific and legitimate reasons for rejecting Dr. Kalnins's medical opinion. *Lester*, 81 F.3d at 830 (ALJ must provide specific and legitimate reasons for rejecting an examining physician's contradicted opinion). The ALJ noted Dr. Kalnins did not support her evaluation with objective clinical findings, made inconsistent statements in her report regarding the onset of Donathan's disability, and relied greatly on Donathan's incredible subjective reports. Thus, the ALJ did not err in adjudging Donathan's mental impairment non-severe.

For the foregoing reasons, we affirm the district court's decision upholding the ALJ's denial of Donathan's claim for disability benefits.

AFFIRMED.

² The ALJ adequately explained his reasons for rejecting a portion of Dr. Prescott's opinion—reporting a global assessment of functioning score of 60—by describing and resolving the conflict between the record and the score. *See Magallanes v. Bowen*, 881 F.2d 747, 750, 753 (9th Cir. 1989) (ALJ is responsible for resolving conflicts in the evidence and he need not agree with everything an expert witness says to hold that the testimony contains substantial evidence).