NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 31 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CYNTHIA S. CONLEY, Plaintiff - Appellant, v. COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION, Defendant - Appellee.	No. 07-35902 D.C. No. CV-06-01332-KI MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Submitted March 6, 2009**
Portland, Oregon

Before: GRABER, FISHER, and M. SMITH, Circuit Judges.

Cynthia Conley appeals the Commissioner of Social Security's denial of her application for disability insurance benefits and supplemental security income. As the facts and procedural history are familiar to the parties, we do not recite them

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

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

here except as necessary to explain our disposition. We review de novo the district court's judgment upholding the Commissioner's denial of benefits. *See Hoopai v. Astrue*, 499 F.3d 1071, 1074 (9th Cir. 2007). The decision should be upheld "unless it is based on legal error or is not supported by substantial evidence." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Conley raises eight issues on appeal.

1. Medical Opinion Evidence

The administrative law judge (ALJ) discredited Dr. Howard Gandler's opinion, giving more weight to the evidence of two other experts: Conley's treating physician Dr. Louise McHarris and medical expert Dr. William DeBolt. Dr. DeBolt criticized Dr. Gandler's assessment as incomplete because, for example, Dr. Gandler had failed to identify Conley's tender points or control points as required by the American College of Rheumatology protocol. In addition, the ALJ discussed the opinions of all of Conley's other examining physicians, nearly all of whose diagnoses differed from Dr. Gandler's. Finally, the ALJ discredited Dr. Gandler's opinion because he relied on Conley's subjective report and did not review other reports in the record. Thus, there was substantial evidence supporting the ALJ's decision, *see Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999), and the ALJ gave specific and

legitimate reasons for discrediting Dr. Gandler's opinion, *see Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).[1]

2. Severe Impairments

The ALJ found that Conley's fibromyalgia, mental impairments, obstructive sleep apnea, and migraine headaches were not severe impairments. Because the ALJ proceeded to the next step and because she included all these impairments in the residual functional capacity finding, concluding that the above impairments were not severe was, at most, harmless error. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). Even if the findings were not harmless, however, they were supported by substantial evidence for the reasons described in Sections 1 and 5.

3. Lay Witness Testimony

The ALJ gave no weight to Debra Anderson's statement that Conley's daily living activities were "markedly" limited, that her social functioning was "moderately" limited, that her concentration persistence and pace were "markedly" limited, and that she has "marked" episodes of decompensation. The ALJ reasoned that because Anderson was not a mental health professional, she was not qualified to make assessments of whether the claimant was "markedly," "moderately," or

[1] We lack authority to overturn *Bayliss*. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

otherwise limited. The ALJ rejected Alvin Prather's testimony because he stated, among other things, that Conley has a memory impairment and has trouble grasping objects, statements that were inconsistent with the medical record. Because the lay witnesses' testimony was inconsistent with the medical evidence and the ALJ provided "germane" reasons for discounting it, the ALJ did not err. *See Lewis v. Apfel*, 236 F.3d 503, 511–12 (9th Cir. 2001).

4. Credibility Determination

The ALJ referenced Conley's credibility throughout the written decision, citing various reasons for finding her not fully credible. The ALJ, based on her observations at the hearing, found possible exaggeration and malingering, as well as a "functional component" to Conley's limitations. The ALJ also noted Conley's various inconsistent statements concerning physical therapy. All of these are permitted considerations, *see Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996), and the decision was supported by substantial evidence.

5. Severity of Mental Impairment

Substantial evidence shows that any mental impairment was not severe. After discussing Dr. Sapp's records of Conley's treatment, the ALJ stated:

> Regarding the claimant's depression, the undersigned considered criteria "B" and "C" of the affective disorders of the Listing of Impairments. The undersigned finds that the record has not shown limitations at a "marked" or "extreme" degree in functional areas such as activities of daily living; socialization; concentration, persistence and pace, and episodes of decompensation. The undersigned notes that the claimant did not have an evaluation by a psychologist or psychiatrist, and did not receive any significant mental health treatment other than antidepressant medication.

In making these findings, the ALJ, as required, "show[ed] the significant history, including examination and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s)." 20 C.F.R. § 404.1520a(e)(2). Moreover, "[t]he decision . . . include[d] a specific finding as to the degree of limitation in each of the functional areas," *id.*, and thus was not erroneous.

6. Residual Functional Capacity Finding

Social Security Ruling 96-8p requires that the Residual Functional Capacity "include a narrative discussion describing how the evidence supports each conclusion." *Id.* at *7. Here, the ALJ discussed extensively what actions Conley could perform in an eight-hour day. Conley's reliance on *Reddick v. Chater*, 157 F.3d 715 (9th Cir. 1998), is misplaced because in *Reddick*, unlike here, the claimant had chronic fatigue syndrome, which the *Reddick* ALJ failed to consider. *See id.* at 724.

The ALJ here expressly stated that she considered all Conley's impairments, including those that the ALJ deemed non-severe. Moreover, the ALJ was not required to consider the opinion of Dr. Gandler for the reasons described above. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004).

7. Step Four Finding

The ALJ noted that it "is not really clear" whether the work as a booth cashier and administrative clerk constituted substantial gainful activity. Therefore, the ALJ proceeded to perform the step five analysis, *see* 20 C.F.R. § 404.1520(a)(4)(iv)–(v), and any error at step four was harmless, *see Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

8. Step Five Finding

At step five, the ALJ, relying on the testimony of the vocational expert (VE), found that Conley could perform work in the national economy. In response to the ALJ's hypothetical, the VE identified jobs that Conley could perform, including booth cashier, administrative clerk, ticket seller, skilled and semi-skilled clerk positions, electrode cleaner, and storage/facilities clerk. For all the reasons discussed above, the ALJ's hypothetical was validly based on only those limitations with substantial support.

AFFIRMED.