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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| DIANA NEWCOMER, AKA Olsen,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>NANCY A. BERRYHILL, Acting Commissioner Social Security,<br><br>Defendant-Appellee. | No. 15-35122<br><br>D.C. No. 3:14-cv-05247-RBL<br><br>MEMORANDUM[*] |

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted March 21, 2018[**]

Before: THOMAS, Chief Judge, and TROTT and SILVERMAN, Circuit Judges

Diana Newcomer appeals the district court's decision affirming the Commissioner of Social Security's denial of Newcomer's application for disability insurance benefits and supplemental security income under Titles II and XVI of the

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

Social Security Act. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Ghanim v. Colvin*, 763 F.3d 1154, 1159 (9th Cir. 2014), and we affirm.

After the Administrative Law Judge ("ALJ") denied her claim for benefits, Newcomer presented an additional medical opinion from her treating physician, Dr. Wright, to the Appeals Council. Because the Appeals Council considered Dr. Wright's April 2013 opinion, that opinion became part of the administrative record that we "must consider when reviewing the Commissioner's final decision for substantial evidence." *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).

Even in light of the new evidence considered by the Appeals Council, substantial evidence supports the ALJ's reasoning. In his April 2013 medical opinion, Dr. Wright checked a box indicating that Newcomer would be "off task" for 20 percent of an eight-hour work day. Asked to explain this finding on the same form, Dr. Wright wrote, "Would have been able to perform sedentary duties with just her feet." Also on the same form, Dr. Wright stated that he had "no information on [Newcomer's] medical status other than her feet, and that he had "no input on her knees, hips or back. If it was just her feet she could maintain sedentary work." Dr. Wright expressly stated that the only medical conditions about which he was qualified to give an opinion were the issues with Newcomer's feet, and he believed that these issues would only limit her to sedentary work. Any

other limitations that appeared to have been included in Dr. Wright's report, including the 20 percent "off task" limitation, did not have a legitimate basis. Thus, the record as a whole continues to support the ALJ's reasoning. *See Decker v. Berryhill*, 856 F.3d 659, 665 (9th Cir. 2017) (explaining that when new medical evidence is first considered by the Appeals Council, we review whether substantial evidence based on the record as a whole supports the ALJ's reasoning).

Substantial evidence supports the ALJ's conclusion that Dr. Moslin's opinion was consistent with the residual functional capacity (RFC) assessment, and the ALJ did not err by failing to provide specific and legitimate reasons to reject Dr. Moslin's opinion. *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (requiring the ALJ to provide specific and legitimate reasons to reject the contradicted opinion of an examining physician unless that opinion is reasonably incorporated into the RFC). Dr. Moslin concluded that Newcomer could perform simple and repetitive work and may be able to hold a job in which she did not need to interact very much with others. Dr. Moslin stated that in the past, Newcomer has not been able to hold jobs for very long because of her personality disorder. However, Dr. Moslin did not clearly conclude that Newcomer would be unable to work because of these limitations. The ALJ's conclusion that Dr. Moslin's opinion was consistent with the RFC was reasonable based on the ambiguous evidence in Dr. Moslin's opinion. *See Bray*, 554 F.3d at

1222 (explaining that we will defer to the ALJ when the evidence reasonably supports more than one conclusion).

Substantial evidence also supports the ALJ's conclusion that Dr. Wheeler's opinion was consistent with the RFC, and the ALJ did not err by failing to provide specific and legitimate reasons to reject Dr. Wheeler's opinion. *See Turner*, 613 F.3d at 1223. Like Dr. Moslin, Dr. Wheeler concluded that Newcomer would have severe limitations in her ability to work due to poor social interactions. Dr. Wheeler did not conclude that Newcomer would be unable to work because of these limitations. The ALJ's conclusion that Dr. Wheeler's opinion was consistent with the RFC was reasonable based on the record. *See Bray*, 554 F.3d at 1222.

Any error in failing to consider whether personality disorder was a severe impairment at Step Two was harmless because the ALJ considered all of Newcomer's mental health limitations arising from any source. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding that any error in not finding an impairment to be severe at Step Two is harmless if the ALJ considers any resulting limitations in assessing a claimant's RFC).

The ALJ provided several clear and convincing reasons to discredit Newcomer's testimony regarding symptoms of distraction and inability to get along with others. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). First, Newcomer's allegations of debilitating pain in the lower extremities and neck were

inconsistent with objective medical evidence. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012). Second, Newcomer's symptoms responded favorably to treatment, including medication and physical therapy. *Celaya v. Halter*, 332 F.3d 1177, 1181 (9th Cir. 2003). Third, Newcomer's allegations of debilitating mental health symptoms, including debilitating anxiety and panic attacks and difficulty concentrating, were inconsistent with the medical record. *Molina*, 674 F.3d at 1113. Fourth, Newcomer failed to comply with prescribed physical therapy treatment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). Fifth, Newcomer's statements throughout the record were inconsistent, and Newcomer did not explain any of these inconsistencies when offered the opportunity to do so at the hearing. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

**AFFIRMED.**