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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MAUREEN LEESON,)	NO. CV 08-268-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE, COMMISSIONER)	
OF SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

Plaintiff filed a Complaint on January 16, 2008, seeking review of the Commissioner’s denial of benefits. The parties filed a “Consent to Proceed Before a United States Magistrate Judge” on May 23, 2008.

Plaintiff filed a “Motion for Summary Judgment or Remand” on June 20, 2008. Defendant filed “Defendant’s Motion for Summary Judgment” on September 4, 2008. The Court has taken both motions under submission without oral argument. See L.R. 7-15; “Order,” filed January 22, 2008.

1 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

2
3 Plaintiff, a physical therapist and college instructor in
4 physical therapy, filed an application for disability insurance
5 benefits on April 26, 2002 (Administrative Record ("A.R.") 83-85).
6 Plaintiff alleged disability due to bilateral arm pain and swelling
7 since June 12, 2000 (A.R. 88-89). Plaintiff's insured status
8 continued through March 23, 2006 (A.R. 335).¹

9
10 The Social Security Administration denied Plaintiff's
11 application initially (A.R. 76). Plaintiff requested a hearing, which
12 an Administrative Law Judge ("ALJ") conducted on November 19, 2002
13 (A.R. 68-75, 278-308). The ALJ examined the medical record and heard
14 testimony from Plaintiff, a medical expert, and a vocational expert
15 (A.R. 278-308). On January 21, 2003, the ALJ issued an unfavorable
16 decision, finding that Plaintiff had returned to her past relevant
17 work and had engaged in substantial gainful activity since the alleged
18 disability onset date (A.R. 40-41). The ALJ therefore denied benefits
19 (A.R. 41).

20
21 By order dated May 2, 2003, the Appeals Council vacated the
22 ALJ's January 21, 2003 decision and remanded the matter for further
23 proceedings (A.R. 21-23). The Appeals Council found that recently-
24 submitted evidence: (1) established that certain of the amounts shown
25 on Plaintiff's earnings statements were due to long-term disability

26
27 ¹ In order for Plaintiff to be eligible for disability
28 benefits, Plaintiff must establish that she became disabled prior
to the expiration of her insured status. See 42 U.S.C. §
416(i)(2)(C), 416(i)(3)(A); 20 C.F.R. 404.131(a).

1 insurance payments; and (2) suggested that any work activity after the
2 onset date was due to special accommodations from Plaintiff's employer
3 (A.R. 21).²
4

5 On remand, the ALJ found, without a further hearing, that the
6 record evidence demonstrated Plaintiff had performed substantial
7 gainful activity from at least January 2001 through May 2001 - when
8 Plaintiff was teaching a physical therapy class (A.R. 14-15
9 (November 5, 2003 decision)). The ALJ further found that, by March
10 2002, Plaintiff was capable of performing her past relevant work as a
11 college instructor based on the earlier testimony of the medical and
12 vocational experts (A.R. 16-17). The Appeals Council denied review of
13 the ALJ's November 5, 2003 decision (A.R. 382-84).
14

15 On August 6, 2004, Plaintiff filed a complaint with this Court,
16 case number CV 04-6559-E, seeking review of the Commissioner's denial
17 of benefits. The parties stipulated to a remand pursuant to sentence
18 four of 42 U.S.C. section 405(g), for further administrative
19 proceedings before a different ALJ (A.R. 392-93). The parties agreed
20 the ALJ should be instructed to: (1) give further consideration to
21 Plaintiff's residual functional capacity; (2) seek additional
22 vocational expert evidence regarding Plaintiff's past relevant work as
23

24 ² In remanding, the Appeals Council ordered the ALJ to: (1)
25 give further consideration to Plaintiff's work activity following
26 the alleged onset date; (2) consider Plaintiff's treating source
27 opinions (which were not previously discussed); (3) obtain
28 additional evidence concerning Plaintiff's alleged impairments; (4)
evaluate Plaintiff's subjective complaints; and (5) give further
consideration to Plaintiff's residual functional capacity (A.R.
22).

1 a physical therapy instructor; and (3) as warranted, consider
2 Plaintiff's ability to do other work in the national economy (A.R.
3 393). The Court issued a judgment of remand, and the Appeals Council
4 remanded the case to a new ALJ with instructions (A.R. 389-90, 398-
5 400).

6
7 The new ALJ held a hearing on February 16, 2006 (A.R. 426-45).
8 The ALJ heard testimony from a vocational expert (Id.). Plaintiff was
9 not present and did not offer any additional testimony (A.R. 428).
10 Counsel for Plaintiff advised the ALJ that Plaintiff had returned to
11 work in 2004 and had authorized counsel to speak on Plaintiff's behalf
12 (Id.). Counsel requested the ALJ to consider Plaintiff for a closed
13 period of disability from June 12, 2000 through October 17, 2004, when
14 Plaintiff returned to work (A.R. 431).

15
16 On March 23, 2006, the ALJ issued an unfavorable decision (A.R.
17 327-36). The ALJ found that Plaintiff had engaged in substantial
18 gainful activity from January 12, 2001 through May 25, 2001 (A.R. 329-
19 30 (citing 20 C.F.R. 404.1573(b)). For the closed period from May 25,
20 2001 through October 17, 2004, when Plaintiff was not performing
21 substantial gainful activity, the ALJ found Plaintiff suffered from
22 severe impairments affecting her right wrist and left elbow, but those
23 impairments did not meet or equal a listed impairment (A.R. 330).

24
25 The ALJ assessed Plaintiff with a residual functional capacity
26 restricted by "inability for more than simple gripping and minimal
27 power grasping and fine manipulation with the right upper (major)
28 extremity and an overall lifting restriction to a combined weight of

1 chest to overhead a total of about 25 pounds using both hands, minimal
2 pushing and pulling, and no extensive keyboarding" (A.R. 335-36
3 (adopting treating physician's January 31, 2001 residual functional
4 capacity assessment at A.R. 131)). The ALJ found that a person with
5 Plaintiff's limitations could perform Plaintiff's past relevant work
6 as a physical therapy instructor as that job is normally performed in
7 the national economy (A.R. 334 (adopting vocational expert testimony
8 at A.R. 432-36 for a "vocational ed instructor")). Alternatively, the
9 ALJ found that a person with Plaintiff's limitations could perform
10 other unskilled light work existing in significant numbers in the
11 national economy (i.e., as a parking lot attendant or photocopy
12 machine operator) (A.R. 334-35 (adopting vocational expert testimony
13 at A.R. 436-37)). The ALJ therefore denied benefits (A.R. 336). The
14 Appeals Council denied review (A.R. 4-6).

15 16 **STANDARD OF REVIEW** 17

18 Under 42 U.S.C. section 405(g), this Court reviews the
19 Administration's decision to determine if: (1) the Administration's
20 findings are supported by substantial evidence; and (2) the
21 Administration used proper legal standards. See DeLorme v. Sullivan,
22 924 F.2d 841, 846 (9th Cir. 1991); Swanson v. Secretary of Health and
23 Human Serv., 763 F.2d 1061, 1064 (9th Cir. 1985). Substantial
24 evidence is "such relevant evidence as a reasonable mind might accept
25 as adequate to support a conclusion." Richardson v. Perales, 402 U.S.
26 389, 401 (1971) (citation and quotations omitted).

27 ///

28 This Court "may not affirm [the Administration's] decision

1 simply by isolating a specific quantum of supporting evidence, but
2 must also consider evidence that detracts from [the Administration's]
3 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987)
4 (citation and quotations omitted). However, the Court cannot disturb
5 findings supported by substantial evidence, even though there may
6 exist other evidence supporting Plaintiff's claim. See Torske v.
7 Richardson, 484 F.2d 59, 60 (9th Cir. 1973), cert. denied, 417 U.S.
8 933 (1974); Harvey v. Richardson, 451 F.2d 589, 590 (9th Cir. 1971).

10 DISCUSSION

11
12 After consideration of the record as a whole, Defendant's
13 motion is granted and Plaintiff's motion is denied. The
14 Administration's findings are supported by substantial evidence and
15 are free from material³ legal error.

17 I. Substantial Evidence Supports the Administrative Decision.

18
19 Entitlement to disability insurance benefits requires a
20 conclusion that a claimant's impairments "are of such severity that he
21 is not only unable to do his previous work but cannot, considering his
22 age, education and work experience, engage in any other kind of
23 substantial gainful work which exists in the national economy."

24
25 ³ The harmless error rule applies to the review of
26 administrative decisions regarding disability. See Curry v.
27 Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1990); see also Stout v.
28 Commissioner, 454 F.3d 1050, 1054 (9th Cir. 2006); Batson v.
Commissioner, 359 F.3d 1190, 1196 (9th Cir. 2004); Tonapetyan v.
Halter, 242 F.3d 1144, 1148 (9th Cir. 2001).

1 42 U.S.C. § 423(d)(2)(A). As noted above, the ALJ found Plaintiff
2 capable of performing other work existing in the national economy for
3 the closed period from June 12, 2000 through October 17, 2004.
4 Substantial evidence supports this finding.

5
6 **A. The Medical Record**

7
8 The record contains a number of reports from orthopedic
9 surgeon, Dr. John Itamura, who treated Plaintiff from June 9, 2000
10 through September 6, 2002 (A.R. 122-52, 255-61). Plaintiff first
11 presented with complaints of right wrist pain and left elbow pain with
12 lifting (A.R. 150). An examination revealed a "click" in Plaintiff's
13 right wrist and tenderness, but no instability (Id.). Dr. Itamura
14 diagnosed Plaintiff with "medial epicondylitis, left," a "subluxing
15 ulnar nerve," and "cervical spondylosis" (A.R. 151). Dr. Itamura
16 noted that further testing should be done to "rule out [a] TFCC
17 [triangular fibrocartilage complex] tear" in Plaintiff's right wrist
18 (A.R. 151, 160). He ordered magnetic resonance imaging of Plaintiff's
19 right wrist, Motrin and physical therapy (A.R. 151).⁴

20
21 On June 21, 2000, Dr. Itamura reported that the MRI of
22 Plaintiff's right wrist confirmed a TFCC tear, for which he
23 recommended surgery (A.R. 163). On June 26, 2000, Plaintiff underwent
24 right wrist arthroscopy and synovectomy with debridement of the TFCC
25 tear to stabilize the wrist, and also received a steroid injection in

26
27 ⁴ At the time of his initial examination, Dr. Itamura
28 opined that Plaintiff should be precluded from lifting more than
five pounds with her left upper extremity and should not lift
anything with her right upper extremity (A.R. 151).

1 her left elbow medial epicondylar region (A.R. 160-62). When
2 Plaintiff returned to Dr. Itamura on July 14, 2000 for a post-
3 operative evaluation, Dr. Itamura reported that Plaintiff was "doing
4 quite well" with physical therapy and that her motion was "better"
5 (A.R. 155). Dr. Itamura noted that Plaintiff should continue with her
6 physical therapy (Id.).

7
8 On July 28, 2000, Plaintiff complained of subluxation of her
9 right distal radioulnar joint (i.e., a partial dislocation in her
10 wrist, where her radius and ulna meet),⁵ which Dr. Itamura confirmed
11 on examination (A.R. 146; see also A.R. 143 (August 25, 2000 report
12 noting continued instability of the distal radioulnar joint)).
13 Otherwise, Plaintiff's motion was "good" and her swelling and
14 inflammation was "down," with no noted tenderness (Id.). On
15 September 20, 2000, Plaintiff reported that she still could not do
16 weight-bearing activity with her right wrist, but that she was
17 improving (A.R. 140). Dr. Itamura noted on examination that
18 Plaintiff's distal radioulnar joint did not seem to be as
19 "subluxatable" as before (Id.). At that time, Dr. Itamura opined that
20 Plaintiff would remain totally temporarily disabled, given the "large
21 amount of manual manipulation" required by Plaintiff's work (A.R. 140-
22 41). As of October 18, 2000, Dr. Itamura's goal was to get Plaintiff

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⁵ All anatomical explanations are from the illustrations of
28 Gray's Anatomy of the Human Body (20th ed. 1918), available at
<http://www.bartleby.com/107> (last visited Sept. 24, 2008).

1 back to "modified duty" by December 2000 (A.R. 137).⁶

2
3 Dr. Itamura prepared a "Permanent and Stationary Report" on
4 January 31, 2001 - shortly after plaintiff began teaching again (A.R.
5 130-32, 277). Plaintiff had reported a "flare" since her last visit
6 with Dr. Itamura, with a return of burning pain (A.R. 130). On
7 examination, Dr. Itamura noted that Plaintiff's ulnar head was more
8 prominent on her right side than on her left side in relaxed pronation
9 (Id.). Dr. Itamura also noted that Plaintiff's left elbow still had a
10 significant amount of lipid atrophy over her medial epicondyle and her
11 ulnar nerve was still subluxatable (Id.). Dr. Itamura opined that
12 Plaintiff should have the following permanent restrictions:

13
14 She can use her right upper extremity for simple
15 gripping, but fine manipulation and power grasping
16 should be kept to a minimal [sic]. In addition, her
17 lifting restrictions should be a combined weight of
18 chest to overhead a total of about 25 pounds using both
19 hands. Pushing and pulling should also be kept to
20 minimal [sic]. I do think that teaching duties would be

21
22 ⁶ On November 17, 2000, notwithstanding Plaintiff's
23 complaints of: (1) instability of her right distal radioulnar
24 joint; (2) irritability of her right upper extremity with
25 resulting temperature and color changes in the extremity; (3)
26 irritability of her left ulnar nerve from loss of subcuticular fat
27 in her left elbow due to the steroid injection; (4) decreased
28 ability to weight bear with her right wrist and hand; (5) decreased
strength and endurance in her right upper extremity; and (6)
increased sensitivity and decreased tolerance of light touch and
pressure to her left elbow, Dr. Itamura opined that Plaintiff could
return to "modified duty," excluding any manual physical therapy,
as of December 1, 2000 (A.R. 135-36).

1 appropriate for her, however, extensive use of the
2 keyboard may be difficult for her.

3
4 (A.R. 131).⁷

5
6 On August 1, 2001, Dr. Itamura prepared an addendum to his
7 earlier permanent and stationary report (A.R. 124-26). Dr. Itamura
8 again reported that Plaintiff's problem is bilateral, explaining:

9
10 Her right upper extremity, she has problems with the
11 distal radioulnar joint. Because of the subluxation
12 when the forearm is in pronation, she cannot weightbear
13 [sic]. She has weakness and pain mostly ulnar sided.

14
15 Her left elbow, where I had injected her medial
16 epicondyle, with subsequent lipid necrosis and
17 sensitivity of her ulnar nerve. Dr. Stevanovic had seen
18 her and injected her medial antebrachial cutaneous nerve
19 with good relief of her symptoms, however, following
20 that she had significant ulnar sided paraesthesias. She
21 has significant problems, especially with flexion and
22 extension and weakness of her intrinsic. On exam of
23 the left upper extremity, the area of the lipid necrosis
24 is decreasing, however, she still has an area of atrophy
25 in the region of her medial epicondyle.

26
27 ⁷ Dr. Itamura completed a form dated March 26, 2001 listing
28 similar restrictions, including the 25-pound weight limit (A.R.
228). Where the form asked whether he expected the patient's
condition to improve in the future, Dr. Itamura wrote "?" (Id.).

1 (A.R. 124). Unlike his prior assessments, Dr. Itamura now opined that
2 Plaintiff should "progress" to lifting three pounds overhead, should
3 be limited to lifting floor to waist and waist to chest 10 pounds, and
4 to pulling five pounds, and should avoid prolonged gripping and
5 twisting of objects (A.R. 125).⁸ Dr. Itamura completed a Physical
6 Residual Functional Capacity Questionnaire on October 15, 2002
7 reporting similar restrictions (A.R. 258-61 (noting that Plaintiff
8 could occasionally lift less than 10 pounds and never lift more, and
9 must periodically alternate between sitting and standing to relieve
10 left elbow irritation from being in a prolonged bent position)); see
11 also A.R. 421 (July 23, 2003 letter from Dr. Itamura noting that he
12 had reviewed Plaintiff's case and believed her restrictions remained

15
16 ⁸ In a "Supplemental Report" dated April 1, 2002, Dr.
17 Itamura summarized Plaintiff's elbow and wrist problems and opined
18 that Plaintiff had lost 75 percent of her pre-injury capacity to
19 lift, push, pull, torque, grasp and the use of finger dexterity of
20 her upper extremities secondary to Plaintiff's injuries (A.R. 122).
21 Dr. Itamura said that Plaintiff would not be able to put up with
22 the repetitive stress which her occupation requires (Id.). The
23 report contains no detail concerning any further testing that Dr.
24 Itamura may have done to reach his opinion.

25 Dr. Itamura provided another "Supplemental Report" dated
26 September 6, 2002 for Plaintiff's work-related disability claim
27 (A.R. 255-57). Dr. Itamura explained that he felt Plaintiff had
28 lost 75 percent of her pre-injury ability in her right upper
extremity, and 15 percent loss for her use of finger dexterity, 50
percent loss for gross grip on repetition, and 75 percent loss of
pre-injury capacity for two or three repetitions for lift, push,
pull, torque and grasp in Plaintiff's left upper extremity (A.R.
255). Dr. Itamura suggested that Plaintiff should be given a
lifetime gym membership for her physical therapy needs (A.R. 256).
As with the earlier evaluations, Dr. Itamura's report did not
provide any detail concerning any testing that may have been done
to support Dr. Itamura's opinion (Id.).

1 the same as assessed on October 15, 2002)).⁹

2
3 Consultative examiner, Dr. Stuart Kushner, evaluated Plaintiff
4 on March 25, 2002, for a second opinion concerning further surgery to
5 Plaintiff's right wrist (A.R. 231-32). Plaintiff complained of
6 "burning pain and spasm in her right forearm and into her shoulder and
7 right side of her neck," "intermittent pain in the ulnar side of her
8 wrist" and "'intermittent sympathetic changes' in her right wrist,
9 forearm, and hand" (A.R. 232). Plaintiff reported an unstable right
10 distal radioulnar joint (with "episodes of instability"), and
11 intermittent numbness and tingling in her fingers, alternating between
12 the ulnar and radial nerve origin (A.R. 232, 238). However, Plaintiff
13 reportedly went to the gym one to two hours per day, six days per week
14 for limited activities (A.R. 233). Plaintiff was taking the anti-
15 inflammatory medication Mobic daily (A.R. 234).

16
17 Upon examination, Dr. Kushner noted that Plaintiff
18 demonstrated full range of motion of both elbows without a complaint
19 of pain, no pain with palpation over the lateral and medial epicondyle
20 of either elbow, and negative Tinel tests (A.R. 236). Plaintiff's
21 right hand had a slight purplish discoloration of the digits, but
22 otherwise had no abnormal masses, swelling, erythema or ecchymosis
23 (A.R. 237). Phalen, Finkelstein and Provocative tests were negative,
24 bilaterally (Id.). Plaintiff's grip strength on the right was 62, 74,

25
26 ⁹ Plaintiff's physical therapist reported that Plaintiff
27 would be unable to lift or carry more than five pounds given the
28 instability of Plaintiff's right wrist (A.R. 250). The therapist,
however, did not provide any of Plaintiff's physical therapy
records.

1 and 62 pounds; left was 70, 65, and 62 pounds (Id.). Plaintiff
2 demonstrated full active range of motion of all digits of both hands
3 and full supination and pronation of both forearms (Id.). As
4 Dr. Itamura previously had found, Dr. Kushner noted a slight dorsal
5 prominence of the right distal ulna as compared to the left distal
6 ulna when Plaintiff's forearms were fully pronated (A.R. 238).
7 Dr. Kushner, however, did not see any subluxation of the extensor
8 carpi ulnaris tendon with pronation/supination of the right forearm,
9 and noted that the right distal radial ulnar joint appeared grossly
10 stable with stress testing (Id.). Radiology tests showed no evidence
11 of any gross carpal instability (Id.). Dr. Kushner opined that
12 Plaintiff's treatment options were surgery or modified activities to
13 accommodate the distal radial ulnar joint instability pattern (Id.).
14 Dr. Kushner's report does not identify how Plaintiff's activities
15 should be modified.

16
17 A state agency physician completed a Physical Residual
18 Functional Capacity Assessment for Plaintiff dated May 21, 2002, for a
19 limited range of light work (A.R. 240-47 (noting "see consult")).¹⁰
20 Specifically, the physician opined that Plaintiff would be limited in
21 her upper extremities by preclusion from "frequent forceful

22
23 ¹⁰ "Light work involves lifting no more than 20 pounds at a
24 time with frequent lifting or carrying of objects weighing up to 10
25 pounds. Even though the weight lifted may be very little, a job is
26 in this category when it requires a good deal of walking or
27 standing, or when it involves sitting most of the time with some
28 pushing and pulling of arm or leg controls." 20 C.F.R. §
404.1567(b); see also U.S. Department of Labor, Dictionary of
Occupational Titles, Appendix C Components of the Definition
Trailer (4th ed., Rev. 1991), <http://www.oalj.dol.gov/PUBLIC/DO/REFERENCES/DOTAPPC.HTM> (similarly defining "light" work).

1 grasping/twisting with [her] right hand and fingers" (A.R. 241, 243).
2 The physician noted no other limitations.

3
4 **B. The Medical Expert's Analysis of the Medical Record**

5
6 At Plaintiff's first administrative hearing, the medical
7 expert, orthopedic surgeon Dr. Michael Gurvey, summarized the medical
8 record as follows:

9
10 [Plaintiff] has problems with the right and left upper
11 extremities. The - relative to the right upper
12 extremity[,] she had arthroscopy for a tear of the
13 triangular fibrocartilage, and a partial [synovectomy]
14 with apparently good results. On the right upper
15 extremity she has a history of subluxation of the right
16 distal radioulnar joint. This was noted by Dr.
17 [Itamura] in [Exhibit] 1F, who I believe is the treating
18 doctor. It was noted in [Exhibit] 4F, dated 3/25/02 by
19 Dr. [Kuschner] who was a consultative examiner. The
20 second area as to the left upper extremity she has a
21 chronic [epicondylitis], which is an inflammatory
22 reaction of the area of the elbow on the inner portion
23 with the tendons and muscles and (inaudible). No
24 surgeries done about this. There was some history of a
25 subluxation of the left ulnar nerve of the elbow. There
26 is no evidence, however, of neuropathy. Now the last
27 records and the first batch of data that I got as far as
28 examining doctors was Dr. [Kuschner], consulting

1 examiner in [Exhibit] 4F date 3/25/02. Subsequent
2 Exhibits 8F and 9F, former dated 9/6/02, the second, the
3 later 10/15/02, basically, dealt with Dr. [Itamura]
4 sending a supplemental report to Workman's Compensation.
5 It doesn't really go into any physical examination,
6 either of those two. He lists some restrictions which
7 he eluded [sic] to in the prior exhibits.
8

9 (A.R. 280-81). From his review of the record, Dr. Gurvey opined that
10 Plaintiff did not suffer from any ongoing disability (A.R. 282-83).
11 Dr. Gurvey opined that Plaintiff would be capable of light work with
12 mild to moderate limitations in her ability to push/pull, moderate
13 limitations in her right upper extremity for forceful grasping and
14 torquing, twisting moves, and mild limitations in her ability to do
15 repetitive forceful grasping and twisting moves with her upper left
16 extremity (A.R. 284 (noting the main difference between his assessment
17 and Dr. Itamura's last assessments of Plaintiff's capacity is the
18 amount of weight that Plaintiff could lift)).¹¹ Dr. Gurvey confirmed
19

20 ¹¹ Dr. Gurvey disagreed with Dr. Itamura's September 2002
21 residual functional capacity assessment, explaining:

22 [Dr. Itamura] felt that she had lost 75% of her
23 functional capacity in the left upper extremity for
24 push/pull (inaudible) for repetitive motion on a
25 repetitive basis. He felt that she lost 50% of her loss
26 of grip. And 15% of loss of fingering. I don't agree
27 with that based on the records, because there's no
28 evidence of ulnar neuropathy, there's just evidence of
pain about the elbow. I would agree that it would. . .
create a problem relative to some repetitive grasping,
twisting of the left upper extremity. I would have put
it in the mild limitation category. And I don't believe
the epicondylitis in itself has a problem with regard to

(continued...)

1 that a person with an unstable distal radioulnar joint would be able
2 to lift up to 20 pounds - 10 pounds with each arm (A.R. 286). He
3 explained:

4
5 [T]he problem is generally movement with the arm in a
6 pronated position, or with the palm down. So one
7 doesn't normally do lifting in that position. You
8 can't. So I put it in the moderate category based on
9 the fact that there are some positions where one would
10 lift with the, with the hands in the pronated situation.
11 In that instance, the joint could be unstable. If one
12 did it with the forearm supinated or palm up, that
13 stabilizes the situations not particularly unstable. So
14 I think that's why I gave a moderate limitation. I felt
15 it was not severe, it was not mild. I thought moderate
16 was a fair estimate, and I put it in that category
17 rather than giving percentages of what Dr. [Itamura]
18 said that's all.

19
20 (A.R. 286-87).

21
22 **C. The Vocational Expert's Testimony**

23
24 The vocational expert testified that a person with the

25
26

¹¹(...continued)
27 fine manipulation or fingering, so there's a problem
28 there.

(A.R. 283-84).

1 limitations Dr. Itamura first found to exist in January 2001 (less
2 than 12 months after the alleged onset date), adopted by the ALJ,
3 could perform work existing in the local economy as a parking lot
4 attendant or photocopy machine operator (A.R. 432, 435-37 (noting that
5 there are approximately 5,000 local parking lot attendant jobs and
6 2,500 local photocopy machine operator jobs)). This testimony
7 furnishes substantial evidence that Plaintiff could perform other work
8 existing in significant numbers in the region, and therefore Plaintiff
9 is not entitled to disability benefits for the closed period. See
10 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988); see also
11 Barker v. Secretary, 882 F.2d 1474, 1478-80 (9th Cir. 1989); Martinez
12 v. Heckler, 807 F.2d 771, 775 (9th Cir. 1986); Mickelson-Wurm v.
13 Commissioner Social Sec. Admin., 2008 WL 2795881 *4 (9th Cir. July 21,
14 2008) (unpublished disposition) (noting that the Court has previously
15 held that between 1,000 and 1,500 jobs in the regional economy
16 constitutes a "significant number" for purposes of the Social Security
17 Act); see generally 42 U.S.C. § 423(d)(2)(A).¹²

18
19 **II. Plaintiff's Various Arguments Are Unavailing.**

20
21 Plaintiff contends that: (1) the ALJ erred in finding that
22 Plaintiff had engaged in substantial gainful activity since her
23 alleged disability onset date because Plaintiff was given "special
24 accommodations"; (2) the ALJ erred in rejecting Dr. Itamura's opinion
25 concerning Plaintiff's work restrictions, and "selectively edited" the

26
27 ¹² The Court may cite unpublished Ninth Circuit opinions
28 issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir.
Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 evidence in the record to justify the conclusion that Plaintiff is not
2 disabled; (3) the ALJ erred in finding that Plaintiff had the ability
3 to perform her past relevant work as a physical therapy instructor;
4 and (4) the ALJ erred in relying on earlier credibility findings which
5 Plaintiff claims were not supported by substantial evidence. See
6 Plaintiff's "Motion for Summary Judgment or Remand," pp. 3-10. None
7 of these contentions merits relief.¹³

8
9 Plaintiff argues that the ALJ failed properly to assess the
10 opinion of Dr. Itamura in finding that Plaintiff retained the residual
11 functional capacity to do limited light work. Where, as here, a
12 treating physician's opinion is contradicted, the ALJ may reject the
13 opinion by setting forth "specific, legitimate reasons" for doing so.
14 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987); Orn v. Astrue, 495
15 F.3d 625, 631-33 (9th Cir. 2007) (discussing same). "The ALJ must do
16 more than offer his conclusions. He must set forth his own
17 interpretations and explain why they, rather than the [physician's],
18 are correct." Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).
19 "Broad and vague" reasons for rejecting the treating physician's
20 opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599, 602
21 (9th Cir. 1989).

22
23 Here, the ALJ's March 23, 2006 decision expressly rejected
24 Dr. Itamura's later, more restrictive residual functional capacity
25 assessments (A.R. 332). The ALJ stated legally sufficient reasons for

26
27 ¹³ The Court has considered all of Plaintiff's arguments and
28 has found those arguments unpersuasive. The Court discusses
Plaintiff's principal arguments herein.

1 doing so, explaining:
2

3 The ALJ believes that, at best, claimant had brief
4 exacerbation(s) after [Dr. Itamura's] January 2001
5 report,¹⁴ but that she has not swayed from the
6 assessment therein provided insofar as her sustained
7 work capacities starting in March 2002. First, the data
8 reported by Dr. Itamura in the subsequent reports [to]
9 January 2001 primarily relate to claimed increased
10 symptoms. In any event, only in March and August 2001
11 does [Dr. Itamura] provide us with any data [for] the
12 examination conducted. His responses on the October
13 2002 form state that the claimant has right upper
14 extremity instability with intermittent swelling and
15 left ulnar neuropathy with positive Tinel's sign and
16 intermittently decreased range of motion, but these
17 findings are not described in any examination post
18 August 2001. Secondly, in March 2002, the month prior
19 to the April 2002 report, Dr. Kushner's evaluation of
20 the left elbow showed full active range of motion
21 without complaint of pain, negative Tinel at the level
22 of the cubital tunnel, and no pain with palpation over
23 the lateral or medial epicondyle []. He did not relate

24
25 ¹⁴ The record supports the characterization of Plaintiff's
26 troubles as "brief exacerbations." In her request for a hearing
27 filed after Dr. Kushner's consultative examination, Plaintiff
28 reported that she suffered from "intermittent exacerbations of
symptoms [in her] bilateral upper extremities[,] treated with anti-
inflammatory medication, physical therapy and self management
techniques" (A.R. 116).

1 any of the left elbow abnormalities that Dr. Itamura
2 reported in the March and August 2001 reports. In fact,
3 her "present complaint" was restricted to "right major
4 wrist."

5
6 (A.R. 332). The ALJ summarized Dr. Kushner's examination findings,
7 and noted they "do not comport with those related by Dr. Itamura in
8 [March] and August 2001 and, as noted, Dr. Itamura's other subsequent
9 reports are either totally lacking in objective data, or, as in
10 October 2002, state them in conclusory terms without reference to any
11 specific examination after March 2002" (Id.). Finally, the ALJ also
12 noted that the medical examiner relied heavily on Dr. Kushner's
13 report and did not agree with Dr. Itamura's assessment (Id.).

14
15 An ALJ properly may reject treating physicians' conclusory
16 assessments when unsupported by adequate clinical findings. See,
17 e.g., Matney v. Sullivan, 981 F.2d 1016, 1019-20 (9th Cir. 1992);
18 Burkhart v. Bowen, 856 F.2d 1335, 1139-40 (9th Cir. 1988); Young v.
19 Heckler, 803 F.2d 963, 967-68 (9th Cir. 1986); see also Bayliss v.
20 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (contradiction between
21 treating physician's assessment and clinical notes justifies rejection
22 of assessment); Batson v. Commissioner, 359 F.3d 1190, 1195 (9th Cir.
23 2004) ("an ALJ may discredit treating physicians' opinions that are
24 conclusory, brief, and unsupported by the record as a whole . . . or
25 by objective medical findings"); Connett v. Barnhart, 340 F.3d 871,
26 875 (9th Cir. 2003) (treating physician's opinion properly rejected
27 where treating physician's treatment notes "provide no basis for the
28 functional restrictions he opined should be imposed on [the

1 claimant]"). Similarly, an ALJ properly may reject a treating
2 physician's opinion that is predicated on the properly discounted
3 subjective complaints of the claimant. Fair v. Bowen, 885 F.2d 597,
4 605 (9th Cir. 1989). Accordingly, the Court finds no material error
5 in the ALJ's rejection of Dr. Itamura's latest assessments in
6 determining Plaintiff's residual functional capacity.

7
8 Plaintiff also argues that the ALJ failed properly to assess
9 her credibility by failing to make any credibility findings, and,
10 instead, relying on the prior ALJ's credibility assessment. See
11 Plaintiff's "Motion for Summary Judgment or Remand," p. 10. Plaintiff
12 did not offer any new testimony concerning her alleged impairments on
13 remand. Rather, Plaintiff relied on prior testimony that the prior
14 ALJ previously had rejected (A.R. 15-16, 295-96, 301-06).

15
16 In the November 9, 2002 administrative hearing, Plaintiff
17 claimed that she suffered from pain and instability and loss of
18 function in both upper extremities (A.R. 302). She testified that she
19 goes to the gym every day for about an hour for a "very limited"
20 workout compared to what she used to do (A.R. 303-04 (describing "very
21 limited" as "I can't swim")). Plaintiff said she cannot take exercise
22 classes anymore, does a very limited weight program lifting no more
23 than three pounds, is able to do one hour on the treadmill, and goes
24
25
26
27
28

1 to the gym to keep the rest of her body in shape (A.R. 303-04).¹⁵

2
3 In finding Plaintiff not disabled, the ALJ noted that
4 Plaintiff's allegations were credible only to the extent that the
5 allegations comport with the ALJ's residual functional capacity
6 assessment (A.R. 335). Ordinarily, such a notation would not state a
7 legally sufficient credibility finding.¹⁶ However, the prior ALJ

8
9 ¹⁵ In a pain questionnaire dated May 15, 2002, Plaintiff
10 reported that she could do modified exercise at the gym, modified
11 yoga, limited cooking (with no lifting of heavy pots or chopping of
12 certain foods), limited driving, and modified household chores
13 (A.R. 101-02). Plaintiff said that she could not do manual
14 physical therapy, and must limit her writing and computer use (A.R.
15 102). She also reported she could not do sailing, golf, tennis,
16 swimming, riding a bicycle, or skiing (Id.).

17 In a daily activities questionnaire of the same date,
18 Plaintiff asserted that she could climb stairs but would avoid
19 lifting whenever possible (A.R. 114). She could carry grocery bags
20 from her car to her apartment three to four times per week (without
21 indicating a weight limit on what she could carry), and used a
22 backpack where possible to carry objects (Id.). Plaintiff reported
23 that she was able to walk and hike (Id.).

24 ¹⁶ To reject as not credible a claimant's testimony
25 concerning his or her limitations, at a minimum the ALJ must make
26 "specific, cogent" findings, supported in the record, to justify
27 the rejection. See Robbins v. Social Sec. Admin., 466 F.3d 880,
28 883 (2006); Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)
(citing Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) and
Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990)); Holohan
v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must
"specifically identify the testimony [the ALJ] finds not to be
credible and must explain what evidence undermines the testimony");
Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) ("The ALJ must
state specifically which symptom testimony is not credible and what
facts in the record lead to that conclusion.").

29 In the absence of evidence of "malingering," most recent Ninth
30 Circuit cases have applied the arguably more rigorous "clear and
31 convincing" standard. See, e.g., Carmickle v. Commissioner, 533

(continued...)

1 expressly had found Plaintiff's testimony not fully credible based in
2 part on Plaintiff's description of her activities of daily living
3 (A.R. 15-16). The prior ALJ's determination was legally sufficient
4 and the present ALJ properly could rely on that determination.
5

6 The ALJ's credibility findings "must be sufficiently specific
7 to allow a reviewing court to conclude the ALJ rejected the claimant's
8 testimony on permissible grounds and did not arbitrarily discredit the
9 claimant's testimony." Moisa, 367 F.3d at 885. To find the claimant
10 not credible, an ALJ may rely on (1) reasons unrelated to the content
11 of the subjective testimony (e.g., reputation for dishonesty);
12 (2) internal contradictions in the testimony; or (3) conflicts between
13 the claimant's testimony and the claimant's conduct (e.g., engaging in
14 daily activities inconsistent with the alleged symptoms, performing
15 work inconsistent with the alleged symptoms, or failing, without
16 adequate explanation, to take medication, to seek treatment or to
17 follow a prescribed course of treatment). Lingenfelter v. Astrue, 504
18 F.3d at 1040; Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch v.
19 Barnhart, 400 F.3d 676, 680-81 (9th Cir. 2005); Thomas v. Barnhart,
20 278 F.3d 947, 958-59 (9th Cir. 2002); SSR 96-7p.

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23 _____
24 ¹⁶(...continued)
25 F.3d 1155, 1160 (9th Cir. 2008); Lingenfelter v. Astrue, 504 F.3d
26 1028, 1036 (9th Cir. 2007); Robbins, 466 F.3d at 883; Moisa v.
27 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Connett v. Barnhart,
28 340 F.3d 871, 873 (9th Cir. 2003); Ballard v. Apfel, 2000 WL
1899797 *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting cases). In
the present case, the ALJ's findings incorporating the prior ALJ's
decision would have been sufficient under either standard, so the
distinction between the two standards (if any) is academic.

1 Here, the prior ALJ's credibility findings were sufficiently
2 specific. Among other reasons, the ALJ discredited Plaintiff's
3 allegations of severe and debilitating pain, instability and emotional
4 symptoms as inconsistent with Plaintiff's daily activities (A.R. 15).
5 As summarized above, Plaintiff did not provide extensive testimony
6 concerning her purported limits; Plaintiff did, however, testify
7 concerning her extensive daily activities. Such inconsistencies
8 between claimed incapacity and admitted daily activities amply support
9 the prior ALJ's rejection of Plaintiff's credibility. See Thomas v.
10 Barnhart, 278 F.3d at 958-59 (inconsistency between the claimant's
11 testimony and the claimant's conduct supported the rejection of the
12 claimant's credibility); see also Burch v. Barnhart, 400 F.3d at 680-
13 812 (daily activities can constitute "clear and convincing reasons"
14 for discounting a claimant's testimony); Rollins v. Massanari, 261
15 F.3d 853, 857 (9th Cir. 2001) (claimant's testimony regarding daily
16 domestic activities undermined the credibility of her pain-related
17 testimony); Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999)
18 (inconsistencies between claimant's testimony and actions cited as a
19 clear and convincing reason for rejecting the claimant's testimony).

20
21 Moreover, even if the ALJ had erred in failing to provide
22 adequate reasons for rejecting Plaintiff's credibility, the Court
23 finds that any such error is harmless. Plaintiff testified to her
24 extensive daily activities but did not testify to any greater
25 limitations than the ALJ found to exist. See Carmickle v.
26 Commissioner, 533 F.3d at 1162-63 (where error in ALJ's credibility
27 determination does not negate in any way the validity of the ALJ's
28 ultimate nondisability determination, i.e., where there remains

1 substantial evidence supporting the ALJ's decision, such error is
2 harmless).

3
4 **CONCLUSION**

5
6 For all of the reasons discussed herein, Plaintiff's motion for
7 summary judgment is denied and Defendant's motion for summary judgment
8 is granted.

9
10 LET JUDGMENT BE ENTERED ACCORDINGLY.

11
12 DATED: October 8, 2008.

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15 _____/S/_____
16 CHARLES F. EICK
17 UNITED STATES MAGISTRATE JUDGE
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