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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARIA C. MOTA,	)	Case No. CV 09-7047 PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	

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I.

INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Disability Insurance benefits ("DIB"). She claims that the Administrative Law Judge ("ALJ") erred when she: (1) found that Plaintiff was not credible; and (2) failed to properly consider the limitations imposed by Plaintiff's mental impairment. (Joint Stip. at 5-16, 23-28.) For the following reasons, the Court concludes that the ALJ erred in addressing Plaintiff's mental impairment and remands the case to the Agency for further proceedings consistent with this Opinion.

1 II.

2 SUMMARY OF PROCEEDINGS

3 On December 15, 2000, Plaintiff protectively filed for DIB.  
4 (Administrative Record ("AR") 124-26.) After the Agency denied the  
5 application initially and on reconsideration, she requested and was  
6 granted an administrative hearing. (AR 68-69, 94-100.) On September  
7 4, 2002, Plaintiff appeared with counsel at the hearing and testified.  
8 (AR 556-604.) On November 27, 2002, the ALJ issued a decision denying  
9 Plaintiff's application. (AR 70-82.)

10 On November 27, 2005, the Appeals Council granted Plaintiff's  
11 request for review and remanded the case to the ALJ to obtain  
12 additional evidence concerning Plaintiff's depression and anxiety,  
13 including, "if warranted and available, a consultative mental health  
14 examination with psychological testing and medical source statements  
15 . . . ." (AR 118.) The Appeals Council also ordered the ALJ to  
16 obtain evidence from a medical doctor to "clarify the nature and  
17 severity of [Plaintiff's] back impairment." (AR 119.)

18 On January 22, 2007, the ALJ held a hearing, at which Plaintiff  
19 again appeared with counsel and testified. (AR 605-44.) On March 27,  
20 2007, the ALJ issued a new decision denying benefits. (AR 13-34.)  
21 Plaintiff appealed the ALJ's decision to the Appeals Council and the  
22 Appeals Council denied review. (AR 7-11.) She then commenced this  
23 action.<sup>1</sup>

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24  
25 <sup>1</sup> The ALJ failed to comply with the Appeal's Council's  
26 instructions to obtain medical and psychological testing/examinations.  
27 (AR 16.) Instead, she pointed out the fallacy of the Appeals  
28 Council's reasoning and explained that, as a result, she would not  
comply with the mandate. (AR 16.) After she issued her decision,  
Plaintiff appealed to the Appeals Council again, and the Appeals

1 III.

2 ANALYSIS

3 A. The Credibility Determination

4 Plaintiff argues that the ALJ erred when she concluded that  
5 Plaintiff was not credible. She contends that the ALJ did not provide  
6 clear and convincing reasons for rejecting her testimony. (Joint  
7 Stip. at 9-16.) For the following reasons, the Court concludes that  
8 the ALJ did not err.

9 ALJ's are tasked with judging the credibility of witnesses.  
10 Where a claimant has produced objective medical evidence of an  
11 impairment which could reasonably be expected to produce the symptoms  
12 alleged and there is no evidence of malingering, the ALJ can only  
13 reject the claimant's testimony for specific, clear, and convincing  
14 reasons. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). In  
15 making a credibility determination, the ALJ may take into account  
16 ordinary credibility evaluation techniques as well as the claimant's  
17 daily activities. *Id.* at 1284.<sup>2</sup>

18 Plaintiff alleged that she suffered from severe pain that limited  
19 the use of her left side as a result of an injury she sustained at  
20 work in 1997. (AR 146, 284.) At the initial hearing in 2002,

21 \_\_\_\_\_  
22 Council apparently chose to ignore the ALJ's refusal to follow its  
23 mandate.

24 <sup>2</sup> Some of Plaintiff's doctors included in their reports subtle  
25 and not so subtle comments suggesting that they believed that  
26 Plaintiff was exaggerating her symptoms. These comments ranged from  
27 noting that Plaintiff "does exaggerate somewhat" (AR 293), to the more  
28 nuanced, "Her subjective complaints are considerably out of proportion  
to the objective findings." (AR 334.) Ultimately, though, the ALJ  
did not find that Plaintiff was malingering, so the Court will apply  
the more stringent standard--i.e., specific, clear, and convincing  
evidence--in evaluating the ALJ's credibility findings.

1 Plaintiff testified that her back and hips hurt when she sat for a  
2 long time. (AR 564.) She estimated that she could sit for about one  
3 hour before having to get up and walk around for about 15 minutes and  
4 that she could walk comfortably for about 45 minutes before having to  
5 sit down for 20 to 30 minutes. (AR 564, 565.) She also testified  
6 that she could stand comfortably for no longer than ten or 15 minutes.  
7 (AR 566.) Plaintiff complained that her left shoulder hurt when she  
8 raised her arms, that her left knee hurt whenever she bent it, and  
9 that her left ankle hurt when she stood for a long time. (AR 565,  
10 566.) She testified that she had been using a prescription cane to  
11 walk for the past year. (AR 567.) Plaintiff also complained of  
12 losing her grip when she lifted heavy objects with her left hand and  
13 that her left hand hurt when she lifted it. (AR 568-69.) She  
14 testified that she was taking pain medication, which helped a little  
15 bit, and receiving physical therapy twice a week, which also relieved  
16 her pain somewhat. (AR 570-71.) She explained that her doctor had  
17 prescribed daily exercises, but the exercises caused her pain. (AR  
18 571-72.) According to Plaintiff, she had to lie down once or twice a  
19 day for a half hour to relieve her pain. (AR 572.) She also  
20 testified that she suffered from memory and concentration problems and  
21 depression. (AR 569-70, 580-81, 610.)

22 The ALJ did not find Plaintiff's testimony credible. (AR 25-26.)  
23 She based this finding on the fact that: (1) Plaintiff's allegations  
24 were "out of proportion" to the objective medical findings;  
25 (2) Plaintiff's treatment for her physical and mental ailments was  
26 limited; (3) There was no objective evidence that Plaintiff suffered  
27 memory or attention problems; (4) Plaintiff's recitation of her daily  
28 physical activities suggested that she was not as limited as she

1 claimed; and (5) The evidence suggested that Plaintiff exaggerated her  
2 claims with her doctors and with the ALJ. (AR 25-26.) As explained  
3 below, the ALJ's reasons are legitimate and her findings are supported  
4 for the most part by this record. As such, her determination that  
5 Plaintiff was not credible will be affirmed.

6 The first reason offered by the ALJ to discount Plaintiff's  
7 credibility was that Plaintiff's subjective complaints could not be  
8 explained by the medical evidence. (AR 25.) The ALJ noted that  
9 Plaintiff "presents to doctors with exaggerated and out of proportion  
10 subjective complaints and non-anatomic complaints." (AR 26.) This is  
11 an appropriate basis for discounting a claimant's testimony, see  
12 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001), and is  
13 supported by the record.

14 Dr. M.I. Sami examined Plaintiff in December 1997 and noted that  
15 her complaints were "considerably out of proportion to the objective  
16 findings" and did not "correlate with normal anatomic relationships."  
17 (AR 334.) In May 2000, Dr. Wertheimer noted that Plaintiff "does  
18 exaggerate somewhat, especially in the area of the left ankle and the  
19 left shoulder." (AR 293.) After reexamining Plaintiff in July 2003,  
20 Dr. Wertheimer noted once again that she tended to exaggerate. (AR  
21 390.) Dr. Ibrahim Yashruti examined Plaintiff in 2001 and determined  
22 that "the sensory deficit in the left arm and left leg is  
23 nonanatomic." (AR 186.) Though Plaintiff's other doctors did not  
24 report similar findings, the ALJ was tasked with resolving the  
25 conflicts in the medical evidence. See, e.g., *Thomas v. Barnhart*, 278  
26 F.3d 947, 956-57 (9th Cir. 2002). Given this record, the ALJ's  
27 finding that Plaintiff should not be believed because she exaggerated  
28 her symptoms will be upheld.

1           The second reason offered by the ALJ to discount Plaintiff's  
2 testimony was that she was receiving very little, if any, treatment/  
3 medication for what she claimed was debilitating pain. (AR 25.) The  
4 ALJ noted that Plaintiff had undergone steroid injections and had  
5 taken pain medication in the past, but also noted, for example, that  
6 in February 2001 Plaintiff reported that she was not taking any pain  
7 medication at all. (AR 25.) Almost six years later, when she  
8 testified at the second administrative hearing, Plaintiff testified  
9 that she was not receiving any treatment and that the only medication  
10 that she was taking was Motrin. (AR 610.)

11           An unexplained failure to obtain medical treatment for a serious  
12 medical condition is a legitimate basis to question a claimant's  
13 testimony. *See, e.g., Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir.  
14 1999) ("[T]he ALJ properly considered [the treating physician's]  
15 failure to prescribe ... any serious medical treatment for this  
16 supposedly excruciating pain"). Plaintiff failed to provide a  
17 legitimate reason for the fact that she was purportedly suffering  
18 debilitating pain but was not being treated for it or taking  
19 medication for it. As such, the Court concludes that the ALJ's second  
20 reason for finding Plaintiff incredible is legitimate and is supported  
21 by the record.

22           The third reason offered by the ALJ to discount Plaintiff's  
23 testimony was that she did not demonstrate any memory or attention  
24 problems--which she claimed she suffered from--when she was being  
25 examined by the examining psychiatrist or when she was testifying in  
26 the administrative hearings. (AR 25.) This finding is supported in  
27 part by the record. For example, psychiatrist Eden Magpayo, who  
28 examined Plaintiff in May 2001 in connection with her application for

1 benefits, found few objective abnormalities. (AR 79, 198-201.) Dr.  
2 Magpayo did not note any memory loss. (AR 200.) On the other hand,  
3 she found that Plaintiff's memory was affected by her depression and  
4 that she would be limited in her ability to focus her attention. (AR  
5 200-01.) As to Plaintiff's testimony at the 2002 and 2007  
6 administrative hearings, the transcripts do not reveal that Plaintiff  
7 exhibited memory or concentration problems. (AR 559-82, 609-12.) In  
8 the end, the Court finds that, though some of the evidence contradicts  
9 the ALJ's findings in this regard, her findings are, for the most  
10 part, supported by the record. For this reason, they will not be  
11 disturbed.

12 The fourth reason relied on by the ALJ to find that Plaintiff's  
13 claimed limitations were not credible was that her daily activities  
14 were inconsistent with her alleged limitations. Though this, too, is  
15 a legitimate reason for discounting a claimant's credibility, *Orn v.*  
16 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *Thomas*, 278 F.3d at 958-59,  
17 it is not fully supported by the record.

18 In a written submission prior to the first administrative hearing  
19 in 2002, Plaintiff reported that she was able to take her daughter to  
20 school, do household chores, cook dinner, grocery shop, fold and put  
21 away clothes, watch television, read the newspaper, go to church,  
22 drive, socialize, and talk on the telephone. (AR 158-62.) At the  
23 2002 hearing, however, Plaintiff qualified many of these statements.  
24 For example, she testified that she could cook "with some help," that  
25 she could dust "a little," that she could do laundry with her  
26 daughters' help, and that she needed help with grocery shopping. (AR  
27 574-76.) The ALJ determined that these activities were inconsistent  
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1 with Plaintiff's claim that she was limited in her ability to sit,  
2 stand, and drive. (AR 25.)

3 Based on Plaintiff's qualifications regarding these chores, it is  
4 difficult for the Court to conclude that her ability to perform them  
5 proves that she is not being candid when she claims that she cannot  
6 work. In fact, the level of activity claimed by Plaintiff--both in  
7 her written submission and in her testimony--is not so great as to  
8 undermine her claim that she cannot work for eight hours a day, forty  
9 hours a week. For this reason, the Court rejects the ALJ's finding  
10 that Plaintiff's daily activities support a finding that she is not  
11 credible.

12 The fifth reason relied on by the ALJ to discount Plaintiff's  
13 testimony was that the evidence did not support her claimed  
14 impairments. (AR 26.) The ALJ pointed out, for example, that, even  
15 though Plaintiff claimed that she had trouble thinking and reasoning  
16 and did not understand English, Plaintiff passed the U.S. Citizenship  
17 test in English. (AR 26.) The ALJ also pointed to the fact that, in  
18 the first administrative hearing, Plaintiff testified while standing  
19 and leaning on her left arm for 15 minutes, though she complained that  
20 her left arm caused her extreme discomfort. (AR 26.) The ALJ noted  
21 that, when she asked Plaintiff about this apparent contradiction at  
22 the hearing, Plaintiff denied that she had been leaning on her left  
23 arm. (AR 26.) These inconsistencies are supported by the record and  
24 are valid reasons to question a claimant's testimony. *See, e.g.,*  
25 *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (ALJ may rely  
26 on behavior exhibited by claimant at a hearing that undermines a  
27 claimant's alleged symptoms.)



1 In the end, though the Court might quibble with some of the  
2 reasons relied on by the ALJ for discounting Plaintiff's credibility,  
3 her overall finding that Plaintiff was not credible is supported by  
4 the record and will be affirmed. See *Carmickle v. Comm'r, Soc. Sec.*  
5 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (Explaining that, in the  
6 context of credibility findings, an error is harmless "[s]o long as  
7 there remains substantial evidence supporting the ALJ's conclusions on  
8 . . . credibility and the error does not negate the validity of the  
9 ALJ's ultimate credibility conclusion." *Id.* (quoting *Batson v.*  
10 *Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004))).

11 B. Plaintiff's Mental Impairment

12 Relying on the opinion of reviewing psychiatrist Paul Balson, the  
13 ALJ concluded that Plaintiff was capable of performing simple,  
14 repetitive tasks, despite a mental impairment. (AR 24.) Plaintiff  
15 contends that this conclusion was in error. (Joint Stip. at 23-28.)  
16 She argues that the ALJ did not account for limitations noted by  
17 examining psychiatrist Eden Magpayo and did not provide specific and  
18 legitimate reasons for rejecting Dr. Magpayo's opinion. (Joint Stip.  
19 at 23-28.) For the following reasons, the Court agrees.

20 As a general rule, among the three types of physicians--  
21 (1) treating physicians (those who treat the claimant), (2) examining  
22 physicians (those who examine but do not treat), and (3) non-examining  
23 physicians (those who neither examine or treat)--the ALJ should grant  
24 the most weight to the opinion of a treating source. See *Lester v.*  
25 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (citations omitted). "The  
26 opinion of an examining physician is, in turn, entitled to greater  
27 weight than the opinion of a nonexamining physician." *Id.* Thus, in  
28 general, the opinion of the non-treating, non-examining physician is

1 given the least weight. As with the opinion of a treating physician,  
2 however, the ALJ can reject an examining physician's opinion in favor  
3 of a non-treating, non-examining physician's opinion for specific and  
4 legitimate reasons supported by substantial evidence in the record.  
5 *Id.* at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.  
6 1995)).

7 Psychiatrist Eden Magpayo performed a complete psychiatric  
8 evaluation of Plaintiff in May 2001. (AR 198-201.) Her examination  
9 revealed, among other things, that Plaintiff had depressive symptoms  
10 which "distract[ed] her from activities requiring some concentration  
11 and good memory. When she is depressed, her ability to focus  
12 attention and her capacity to interact with others is limited." (AR  
13 200-01.) The ALJ read Dr. Magpayo's opinion to mean that Plaintiff's  
14 "untreated depression causes some moderate limitations." (AR 24.)

15 Reviewing psychiatrist Paul Balson did not examine Plaintiff.  
16 Instead, he read Dr. Magpayo's report, considered the other mental  
17 health records (of which there were few), and determined that  
18 Plaintiff was capable of performing "simple, repetitive tasks." (AR  
19 202-19.) In Dr. Balson's view, Plaintiff was not restricted in  
20 activities of daily living, had mild difficulties in maintaining  
21 social functioning and moderate difficulties in maintaining  
22 concentration, persistence, and pace. (AR 212.) The ALJ accepted Dr.  
23 Balson's opinion, explaining, "In the absence of a supported residual  
24 functional capacity assessment from a treating source showing greater  
25 functional limitations, I accept the assessment from [Dr. Balson.]"  
26 (AR 24.)

27 The ALJ erred in silently rejecting Dr. Magpayo's opinion and  
28 accepting Dr. Balson's opinion instead. All things being equal, the

1 ALJ was required to give greater weight to Dr. Magpayo's opinion.  
2 *Lester*, 81 F.3d at 830. At a minimum, she was required to provide  
3 specific and legitimate reasons for choosing Dr. Balson's opinion over  
4 Dr. Magpayo's. *Id.* at 830-31. As such, the case must be remanded for  
5 further analysis.

6 The Agency disagrees. Though it implicitly concedes that the ALJ  
7 did not set forth specific and legitimate reasons for rejecting Dr.  
8 Magpayo's opinion, it argues that she was not required to because she  
9 was, in effect, accepting Dr. Magpayo's opinion, which the Agency  
10 contends was consistent with Dr. Balson's. (Joint Stip. at 28-31.)  
11 The record does not support this view.

12 The Court reads the ALJ's unambiguous statement that she is  
13 accepting Dr. Balson's opinion as an equally unambiguous statement  
14 that she is rejecting Dr. Magpayo's opinion. The Court's conclusion  
15 is bolstered by the ALJ's 2002 decision. There, after summarizing Dr.  
16 Magpayo's report, she discounted her opinion that Plaintiff suffered  
17 from a mental impairment because it was primarily based on Plaintiff's  
18 subjective complaints to Dr. Magpayo and the ALJ found that Plaintiff  
19 was not credible. (AR 79.) The ALJ's analysis in the 2002 decision  
20 highlights the fact that she did not believe that Dr. Magpayo's and  
21 Dr. Balson's opinions were consistent. Thus, the Court will not read  
22 the 2007 decision to mean that the ALJ had concluded that the critical  
23 portions of the opinions were the same and that, therefore, when she  
24 accepted Dr. Balson's opinion, she was, in effect, accepting Dr.  
25 Magpayo's opinion, too. Even were this the case, the ALJ should have  
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1 accepted Dr. Magpayo's opinion in the first instance, not Dr.  
2 Balson's.<sup>3</sup>

3 On remand, the ALJ will be required to address Plaintiff's  
4 alleged mental impairment and Dr. Magpayo's and Dr. Balson's opinions  
5 regarding it. If the ALJ finds that the opinions are the same, she  
6 can and should rely on Dr. Magpayo's opinion, since under the law that  
7 opinion is entitled to priority. If, instead, she determines that the  
8 opinions are not the same and further determines that Dr. Magpayo's  
9 opinion is infirm, she should provide specific and legitimate reasons  
10 for rejecting Dr. Magpayo's opinion and accepting Dr. Balson's.<sup>4</sup>

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16 <sup>3</sup> In the 2007 decision, the ALJ incorporated by reference "the  
17 medical evidence reported in [her 2002] decision." (AR 19.) The  
18 Court has interpreted this to mean that the ALJ was incorporating only  
19 the medical evidence, not the analysis of that evidence, e.g., her  
20 2002 finding that Dr. Magpayo's opinion should be discounted because  
it was based on Plaintiff's subjective complaints that the ALJ found  
incredible. (AR 79.)

21 <sup>4</sup> There are spots in the Agency's brief where it appears to be  
22 arguing that the ALJ rejected Dr. Magpayo's opinion for specific and  
23 legitimate reasons. For example, in arguing that the ALJ's decision  
24 should be affirmed, it points out that the ALJ considered the fact  
25 that there was no history of mental health treatment in the medical  
26 record and that neither Plaintiff's doctor or her lawyer referred her  
27 for treatment. (Joint Stip. at 30.) The Agency also notes that the  
28 ALJ considered Plaintiff's daily activities in determining that she  
was not severely impaired. (Joint Stip. at 30.) The Court has  
thoroughly reviewed the ALJ's decisions in this case and recognizes  
that it is possible that the ALJ was attempting to set forth specific  
reasons for rejecting Dr. Magpayo's opinion in her 2007 decision.  
Ultimately, however, the Court concludes that the decision is not  
clear and, therefore, remand is required.

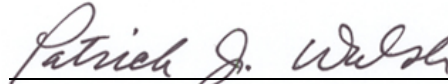
1 IV.

2 CONCLUSION

3 For these reasons, the Agency's decision is reversed and the case  
4 is remanded to the Agency for further proceedings consistent with this  
5 Opinion.<sup>5</sup>

6 IT IS SO ORDERED.

7 DATED: March 18, 2011

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9 PATRICK J. WALSH  
10 UNITED STATES MAGISTRATE JUDGE

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25 <sup>5</sup> By setting forth that the ALJ is required to reconsider the  
26 psychiatrists' opinions, the Court is not suggesting that the ALJ is  
27 limited to only that narrow issue on remand. The ALJ may consider  
28 additional evidence and conduct any further hearing she deems  
appropriate, provided that she addresses the psychiatrists' opinions  
and explains her decision regarding them.