

1 I.

2 **DISPUTED ISSUES**

3 As reflected in the Joint Stipulation, the disputed issues which Plaintiff
4 raises as the grounds for reversal and/or remand are as follows:

- 5 (1) Whether the Administrative Law Judge (“ALJ”) properly evaluated
6 Plaintiff’s subjective complaints of pain; and
7 (2) Whether the ALJ properly considered Plaintiff’s treating physician’s
8 opinion.

9 (JS at 4.)

10 II.

11 **STANDARD OF REVIEW**

12 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision
13 to determine whether the Commissioner’s findings are supported by substantial
14 evidence and whether the proper legal standards were applied. DeLorme v.
15 Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more
16 than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402
17 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of
18 Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial
19 evidence is “such relevant evidence as a reasonable mind might accept as adequate
20 to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The
21 Court must review the record as a whole and consider adverse as well as
22 supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986).
23 Where evidence is susceptible of more than one rational interpretation, the
24 Commissioner’s decision must be upheld. Gallant v. Heckler, 753 F.2d 1450, 1452
25 (9th Cir. 1984).

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1 **III.**

2 **DISCUSSION**

3 **A. The ALJ's Findings.**

4 The ALJ found that Plaintiff has the severe impairments of arthritis of the
5 left hip, right shoulder, and left knee; and left bunion and hammer toes with
6 potential for surgical intervention. (Administrative Record ("AR") at 55.) He also
7 found that Plaintiff has the residual functional capacity to perform a narrowed
8 range of sedentary work, with the following limitations: Plaintiff is able to lift
9 and/or carry twenty pounds occasionally and ten pounds frequently; she can stand
10 and/or walk for fifteen to thirty minutes at one time with the use of a cane as
11 needed, and can carry on this way for one hour out of an eight-hour period; she can
12 sit for seven hours with normal breaks, such as every two hours; she cannot walk
13 on uneven surfaces, climb stairs or ladders, work at heights, or balance; she cannot
14 work above shoulder level on the right due to arthroscopic surgery on the right
15 shoulder and decompression in September 2007; she cannot operate foot pedals on
16 the left side due to her left lower extremity impairments; she can occasionally bend
17 and stoop; she can perform simple, repetitive tasks; she must be able to lie down
18 during the lunch break and would miss work two days a month. (Id. at 56-57.)
19 Relying on the testimony of a vocational expert ("VE"), the ALJ concluded that
20 Plaintiff was capable of performing work as a small items assembler (such as
21 hospital products or eyeglasses), and charge account clerk. (Id. at 62.)

22 **B. The ALJ's Credibility Determination.**

23 Plaintiff contends that the ALJ failed to articulate sufficient reason for
24 rejecting her subjective complaints of impairment. (JS at 4-12.) Specifically, at
25 the hearing, Plaintiff testified about the nature and extent of her condition. She
26 testified that: she suffers from pain and swelling in the hips, shoulder, left knee,
27 and left foot (AR at 13-14); her foot and knee pain are the most severe, and the
28 pain is the biggest obstacle to working (id. at 26-27); her foot pain is a 9.5 out of

1 10, and she could not do a sitting job due to pain (id. at 30); she has problems with
2 weight bearing, and although she has pain when sitting, it is worse standing (id. at
3 22); she cannot be on her feet two hours a day, sit for more than fifteen to thirty
4 minutes at a time, and needs to lie down during the day (id. at 24, 58); she takes
5 Narco and Ibuprofen, and utilized Vicodin in the past, the pain is a 9 out of 10
6 before medication (id. at 24-25); and she wakes up three to four times a night due
7 to pain, and spends the majority of her day lying down (id. at 36). (Id. at 58.)

8 In his decision, the ALJ discounted Plaintiff's credibility as follows:

9 After considering the evidence of record, the undersigned finds
10 that the claimant's medically determinable impairments could reasonably
11 be expected to produce the alleged symptoms, but that the claimant's
12 statements concerning the intensity, persistence and limiting effects of
13 these symptoms are not entirely credible. The consultative examiner
14 found symptom magnification and poor effort on the claimant's part.
15 Mood lability appeared volitional and exaggerated at the psychiatric
16 consultative examination. Also, at the psychiatric consultative
17 examination, she denied a history of alcohol abuse; yet, records from her
18 treating physician clearly show that she did have a problem with alcohol
19 and had been an alcoholic. In addition, at the hearing, the claimant
20 testified that she stopped drinking on her own. If the claimant was not
21 truthful in certain aspects of her claim, then it is reasonable to conclude
22 that she was not truthful in her testimony and exaggerated her pain and
23 symptoms. As discussed below, two doctors, including the claimant's
24 own treating physician, Dr. Birkenstein, were not comfortable filling out
25 disability papers for the claimant.

26 (Id. (citations omitted).) Thus, the ALJ discredited Plaintiff's testimony based on
27 the consultative examiner's findings, the psychiatric examiner's findings,
28 Plaintiff's conflicting and inconsistent statements regarding her alcohol abuse, and

1 statements by her treating physicians regarding filling out disability papers.

2 An ALJ's assessment of pain severity and claimant credibility is entitled to
3 "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.
4 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). An ALJ's credibility finding must be
5 properly supported by the record and sufficiently specific to ensure a reviewing
6 court that the ALJ did not arbitrarily reject a claimant's subjective testimony.
7 Bunnell v. Sullivan, 947 F.2d 341, 345-47 (9th Cir. 1991). When, as here, an
8 ALJ's disbelief of a claimant's testimony is a critical factor in a decision to deny
9 benefits, the ALJ must make explicit credibility findings. Rashad v. Sullivan, 903
10 F.2d 1229, 1231 (9th Cir. 1990); Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir.
11 1981); see also Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (an implicit
12 finding that claimant was not credible is insufficient).

13 Under the "Cotton test," where the claimant has produced objective medical
14 evidence of an impairment which could reasonably be expected to produce some
15 degree of pain and/or other symptoms, and the record is devoid of any affirmative
16 evidence of malingering,³ the ALJ may reject the claimant's testimony regarding
17 the severity of the claimant's pain and/or other symptoms only if the ALJ makes
18 specific findings stating clear and convincing reasons for doing so. See Cotton v.
19 Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Smolen v. Chater, 80 F.3d
20 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993);
21 Bunnell, 947 F.2d at 343.

22 To determine whether a claimant's testimony regarding the severity of her
23 symptoms is credible, the ALJ may consider, *inter alia*, the following evidence: (1)
24 ordinary techniques of credibility evaluation, such as the claimant's reputation for
25 lying, prior inconsistent statements concerning the symptoms, and other testimony

27 ³ The medical expert testified at the hearing that there was nothing in the
28 record to suggest malingering or feigning of Plaintiff's symptomatology. (AR at
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1 by the claimant that appears less than candid; (2) unexplained or inadequately
2 explained failure to seek treatment or to follow a prescribed course of treatment;
3 (3) the claimant’s daily activities; and (4) testimony from physicians and third
4 parties concerning the nature, severity, and effect of the claimant’s symptoms.
5 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also Smolen, 80
6 F.3d at 1284. The Social Security Rulings (“SSR”) further provide that an
7 individual may be less credible for failing to follow prescribed treatment without
8 cause. SSR 96-7p.

9 In this case, there is no debate that the objective medical evidence provides
10 indication of an impairment that could reasonably be expected to produce some
11 degree of pain and/or other symptoms. In discounting Plaintiff’s credibility, the
12 ALJ relied in part on the consultative examiner’s findings that although Plaintiff’s
13 examination revealed an antalgic gait, there seemed to be “a fairly large subjective
14 component,” and Plaintiff exhibited “poor effort” when rotating her right shoulder.
15 (AR at 60 (citing id. at 309, 310).) Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir.
16 1993) (consultative examiner noted that claimant’s complaints of pain were
17 “mildly amplified”); Thomas, 278 F.3d at 959 (claimant’s failure to give a
18 sufficient effort during physical capacity evaluations supported ALJ’s credibility
19 determination). Elsewhere in his decision, the ALJ noted that the consultative
20 examiner also indicated that although Plaintiff limped, she did not need an assistive
21 device to walk,⁴ and that although she complained of pain in the left knee, left foot,
22 and right hip, she was receiving no ongoing treatment. (AR at 60 (citing id. at
23 307.)) In fact, he notes that on September 25, 2006, one year after her hip surgery,
24 she reported to Dr. Mayo that she had occasional right hip pain but overall was

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26 ⁴ The clinical psychologist also noted that although Plaintiff brought a
27 walker to the session, she “did not place the walker on the ground and use it for
28 stability.” (AR at 344.) Instead, she “carried the walker above the ground as if she
was carrying a handheld item.” (Id.)

1 “very pleased” with the results of her hip replacement. (Id. at 59.) Her primary
2 complaints at that time were a painful left foot/toe and right shoulder pain. (Id.)
3 Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (ALJ
4 may properly rely on conflict between claimant’s testimony of subjective
5 complaints and objective medical evidence in the record).

6 The ALJ also noted the psychiatric consultative examiner’s finding that
7 Plaintiff’s “[m]ood lability appeared volitional and exaggerated” at that
8 examination. (AR at 58.) In her report, the clinical psychologist noted that
9 Plaintiff’s mood was “somewhat exaggerated and histrionic,” and that Plaintiff
10 became hyperemotional during the examination;⁵ however when the consultative
11 examining psychologist explained that Plaintiff was there for an intake interview,
12 Plaintiff’s “crying immediately ceased and she became very logical and matter-of-
13 fact.” (Id. at 344.) The consultative examiner diagnosed Plaintiff with histrionic
14 personality disorder. (Id. at 346.) This diagnosis is made if the individual
15 “displays rapidly shifting and shallow expression of emotions” and “shows self-
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18 ⁵ Specifically, the clinical psychologist observed:

19 When the claimant arrived into the office for the interview process, the
20 claimant immediately began crying and asked if she could take “a pill.”
21 She stated she was too upset to proceed without the pills. The claimant
22 kept repeating that she needed to take a pill in order to calm down. The
23 claimant was supplied with water and took a pill. Within 30 seconds to
24 a minute, the claimant appeared visibly calmer. This is unusual. The
25 claimant was calmer for approximately 5-10 minutes and then began to
26 become hyperemotional once again. The claimant then began to beg for
27 reassurance, asking that this writer reassure her that she would get better
28 and everything would be okay in her life. When it was explained to her
that this was not a therapeutic alliance nor a counseling service, and that
this was an intake interview process, her crying immediately ceased and
she became very logical and matter-of-fact. This appears to indicate that
there is a cognitive component to her hyperemotionality.

(AR at 344.)

1 dramatization, theatrically, and exaggerated expression of emotion.” Diagnostic
2 and Statistical Manual of Mental Disorders-DSM-IV-TR 714 (Am. Psych. Ass’n
3 ed., 4th ed. 2000). An individual with this disorder often seems to turn on and off
4 her emotions too quickly to be deeply felt. Id. at 711.

5 Plaintiff contends that the ALJ improperly used a genuine symptom of
6 Plaintiff’s diagnosis of histrionic personality disorder, i.e., her mood lability, to
7 reject her pain testimony. (JS at 9.) However, an ALJ’s consideration of a
8 claimant’s tendency to exaggerate and “poor effort” during a consultative
9 examination, have been found to support discrediting the claimant’s testimony.
10 Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001). Moreover, the Court
11 agrees with the Commissioner that even if a tendency to exaggerate can be
12 attributed to the histrionic personality disorder, the effect remains the same –
13 Plaintiff has a tendency to exaggerate her physical complaints. Thus, given the
14 additional evidence in the record, the ALJ could reasonably infer that Plaintiff’s
15 complaints were not as severe as she presented. Tommasetti v. Astrue, 533 F.3d
16 1035, 1041 (9th Cir. 2008) (ALJ may draw reasonable inferences from the record).

17 Citing Young v. Heckler, 803 F.2d 963, 966 (9th Cir. 1986), Plaintiff
18 contends it was error for the ALJ to rely on Plaintiff’s inconsistent statements
19 regarding her alcohol abuse as a basis to finding her not entirely credible. (JS at
20 10.) However, Young merely stands for the proposition that because of an
21 alcoholic’s propensity for downplaying the adverse effects of their drinking, undue
22 weight should not be given to such testimony in the face of medical evidence to the
23 contrary, as that testimony is not conclusive on the issue of a claimed alcohol-
24 related disability. Young, 803 F.2d at 966. That is not the issue here. In fact,
25 Young specifically found that the ALJ did not err in considering the claimant’s
26 testimony regarding his drinking habits. Id. Moreover, Ninth Circuit case law is
27 clear that an ALJ may properly consider a claimant’s inconsistent reports regarding
28 substance abuse. Thomas, 278 F.3d at 959 (citing Verduzco v. Apfel, 188 F.3d

1 1087, 1090 (9th Cir. 1999) (relying on inconsistent statements about alcohol use to
2 reject claimant's testimony).

3 Finally, the Court agrees with Plaintiff that Dr. Birkenstein's and Dr.
4 Mayo's comments regarding their lack of confidence or comfort in filling out
5 disability paperwork is too vague and ambiguous to alone support discounting
6 Plaintiff's credibility. However, even if this finding was error, the error was
7 harmless because there was substantial additional evidence supporting the ALJ's
8 credibility determination. Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d
9 1155, 1162, 1163 (9th Cir. 2008) (an error by the ALJ with respect to one or more
10 factors in a credibility determination may be harmless if there "remains substantial
11 evidence supporting the ALJ's conclusions" in that regard).

12 Based on the foregoing, the Court finds that the ALJ provided clear and
13 convincing reasons supported by substantial evidence for discounting Plaintiff's
14 credibility regarding the extent of her pain. Thus, there was no error.

15 **C. Treating Physician.**

16 Plaintiff contends that the ALJ rejected the opinion of Joseph Mayo, III,
17 M.D., Plaintiff's orthopedic surgeon,⁶ without providing a specific and legitimate
18 reason for that rejection. (JS at 17-22.) Specifically, in a September 25, 2006,
19 letter from Dr. Mayo to Dr. Birkenstein regarding Plaintiff's condition, Dr. Mayo
20 wrote:

21 Unfortunately, she was kicked out of her fiancée's house. The wedding
22 is off. She owes twenty-some thousand dollars and can't get a job. She
23 wants to get on social security disability so she can get Medical
24 Insurance. Obvious orthopedic reason that would preclude her from
25 gainful employment. She should get on a good pain management
26 regimen. I called Dr. Birkenstein to see if he could be of help.

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28 ⁶ Dr. Mayo performed the total right hip replacement. (AR at 225.)

1 (AR at 225.)

2 With respect to Dr. Mayo’s opinion, the ALJ stated:

3 The doctor’s impression was: osteoarthritis of the left great toe,
4 knee, and right shoulder acromioclavicular joint. The claimant was
5 noted to want to get on Social Security disability so that she could get
6 medical insurance. Dr. Mayo stated that the claimant had an obvious
7 orthopedic reason that would preclude her from gainful employment and
8 that he would contact the claimant’s general practitioner, Dr.
9 Birkenstein, to see if he could be of help.

10 Dr. Mayo was of the opinion that the claimant had a disability that
11 would preclude her from gainful employment; yet, he was not
12 comfortable filing out any disability papers for her and referred her to
13 her treating physician, Dr. Birkenstein who was also not comfortable
14 completing any disability papers for the claimant [and] said that her
15 attorney would know a physician that would do this for her.^[7]

16 (Id. at 59 (citing id. at 218, 225).)

17 It is well-established in the Ninth Circuit that a treating physician’s opinions
18 are entitled to special weight, because a treating physician is employed to cure and
19 has a greater opportunity to know and observe the patient as an individual.

20 McAllister v. Sullivan, 880 F.2d 1086, 1089 (9th Cir. 1989). The weight given a
21 treating physician’s opinion depends on whether it is supported by sufficient
22 medical data and is consistent with other evidence in the record. See 20 C.F.R. §
23 404.1527(d)(2). If the treating physician’s opinion is uncontroverted by another
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26 ⁷ Dr. Birkenstein said: “Regarding her other issues I have told her and the
27 lawyer that I am not confident to do disability papers. Apparently Dr. Mayo is not
28 either so my suggestion is that the attorney would know a physician that could do
this for her. I did tell her that I was pleased that Dr. Lords was able to find
something wrong that can be fixed.” (AR at 218.)

1 doctor, it may be rejected only for “clear and convincing” reasons. Lester v.
2 Chater, 81 F.3d 821, 830 (9th Cir. 1995); Baxter v. Sullivan, 923 F.2d 1391, 1396
3 (9th Cir. 1991). If the treating physician’s opinion is controverted, it may be
4 rejected only if the ALJ makes findings setting forth specific and legitimate
5 reasons that are based on the substantial evidence of record. Thomas, 278 F.3d at
6 957; Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989); Winans v. Bowen,
7 853 F.2d 643, 647 (9th Cir. 1987).

8 “The treating physician’s opinion is not, however, necessarily conclusive as
9 to either a physical condition or the ultimate issue of disability.” Magallanes, 881
10 F.2d at 751 (citing Rodriguez v. Bowen, 876 F.2d 759, 761-62 & n.7 (9th Cir.
11 1989)); Tonapetyan, 242 F.3d at 1149 (although a treating physician’s opinion is
12 generally afforded the greatest weight in disability cases, it is not binding on an
13 ALJ with respect to the existence of an impairment or the ultimate determination of
14 disability). The issue of whether a claimant is disabled within the meaning of the
15 Social Security Act is an issue reserved for the Commissioner, and therefore the
16 opinion of a treating physician that a claimant is disabled will not be given special
17 significance. 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1).

18 Plaintiff contends the ALJ did not properly address the weight he gave to
19 this opinion, and that the fact that Dr. Mayo did not want to fill out disability
20 paperwork yet stated in a report to another physician that he believes Plaintiff
21 cannot engage in employment, lends more veracity to his opinion, not less, as
22 inferred by the ALJ. (JS at 20.) Assuming that the statement actually reflects Dr.
23 Mayo’s opinion, a fact of which the Court is not convinced,⁸ Plaintiff’s claim fails.
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26 ⁸ Although the ALJ apparently assumed that Dr. Mayo himself opined that
27 Plaintiff had an “[o]bvious orthopedic reason” precluding gainful employment, the
28 Court finds Dr. Mayo’s written statement is vague and ambiguous at best. Reading
this statement in context, it might just as easily be inferred that Dr. Mayo may have
(continued...)

1 It is up to the ALJ to resolve conflicts and ambiguities in the medical evidence.
2 Tommasetti, 533 F.3d at 1041-42; Andrews v. Shalala, 53 F.3d 1035, 1039-40 (9th
3 Cir. 1995). Where the opinion of the treating physician is contradicted, and the
4 opinion of a nontreating source is based on independent clinical findings that differ
5 from those of the treating physician, the opinion of the nontreating physician may
6 itself be substantial evidence. Andrews, 53 F.3d at 1041. In such a case, it is
7 solely the province of the ALJ to resolve the conflict. Id.; Tonapetyan, 242 F.3d at
8 1149 (a consultative examiner’s opinion “constitutes substantial evidence, because
9 it rests on its own independent examination” of the claimant).

10 The ALJ need not accept the opinion of any physician, even a treating
11 physician, if the opinion is brief, conclusory, and inadequately supported by
12 clinical findings. Thomas, 278 F.3d at 957. Moreover, although he did not
13 specifically state that he was rejecting Dr. Mayo’s opinion because it conflicted
14 with the testimony of Dr. Landau, the medical expert, the ALJ did state that he
15 gave greater weight to the medical expert’s testimony and opinion, an opinion
16 which conflicted with Dr. Mayo’s conclusion. (AR at 61 (see id. at 14-20, 307-
17 311)); Morgan, 169 F.3d at 602 (ALJ may rely, in part, on the testimony of a
18 medical advisor to reject a treating physician’s opinion). Dr. Landau expressly
19 considered Dr. Mayo’s treatment notes, as well as evidence of Plaintiff’s foot and
20 shoulder impairments. (AR at 15-16.) An ALJ need not recite a magical
21 “incantation” expressly rejecting a physician’s opinion. Magallanes, 881 F.2d at
22 755. Rather, a reviewing court is “not deprived of [its] faculties for drawing
23 specific and legitimate inferences from the ALJ’s opinion.” Id. As such, it is
24 proper for a reviewing court to read an ALJ’s discussion of one physician and draw

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26 ⁸(...continued)

27 simply been reporting statements made to him by Plaintiff regarding her desire to
28 get disability benefits, including her belief that she would qualify because of an
“[o]bvious orthopedic reason” that would keep her from gainful employment.

1 inferences relevant to other physicians “if those inferences are there to be drawn.”

2 Id.

3 In the present case, Dr. Mayo did not give a specific assessment of
4 Plaintiff’s functional abilities during an eight-hour workday; he merely
5 conclusorily stated, in essence, that she was precluded from gainful employment
6 due to orthopedic reasons. The ALJ’s decision to question Dr. Mayo’s opinion in
7 light of the fact that he would not prepare a disability report, for whatever reasons,
8 was a specific and legitimate reason for rejecting Dr. Mayo’s opinion and a rational
9 resolution of the evidence presented. Burch v. Barnhart, 400 F.3d 676, 680-81 (9th
10 Cir. 2005). Moreover, other than this one ambiguous statement by Dr. Mayo, there
11 is no other indication in the record that any physician found Plaintiff totally
12 disabled.

13 Based on the above, the Court finds that the ALJ provided specific and
14 legitimate reasons for rejecting Dr. Mayo’s opinion regarding Plaintiff’s preclusion
15 from gainful employment for orthopedic reasons. Thus, there was no error.

16 **IV.**

17 **ORDER**

18 Based on the foregoing, IT THEREFORE IS ORDERED that Judgment be
19 entered affirming the decision of the Commissioner, and dismissing this action
20 with prejudice.

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23 Dated: December 17, 2010



24 HONORABLE OSWALD PARADA
25 United States Magistrate Judge
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