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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

TOYA L. RUSSELL,	)	Case No. CV 11-08413-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Toya Russell seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance benefits ("DIB") and for Supplemental Security Income ("SSI") benefits. For the reasons discussed below, the decision of the Commissioner is affirmed and the action is dismissed with prejudice.

**I. Facts and Procedural Background**

Plaintiff was born on July 23, 1960. (Administrative Record ("AR") at 160.) She completed two years of college and has work experience as a secretary, data entry clerk and receptionist. (AR at 17, 187, 190.) Plaintiff filed her application for DIB on June

1 8, 2009, and for SSI benefits on June 10, 2009, alleging disability  
2 beginning March 27, 2008, due to shoulder and arm pain, asthma and  
3 degenerative disc disease. (AR at 130-133, 134-136.) Her  
4 application was denied initially on September 14, 2009. (AR at 76-  
5 80.) Administrative Law Judge ("ALJ") Robert Eisman held an  
6 administrative hearing on November 10, 2010. Plaintiff, represented  
7 by an attorney, testified as did a vocational expert ("VE") and a  
8 medical expert. (AR at 26-69.)

9 ALJ Eisman issued an unfavorable decision on December 9, 2010.  
10 (AR at 7-24.) The ALJ found that Plaintiff suffered from the  
11 following severe impairments: obesity, asthma, cervical spine  
12 degenerative disease, and history of bilateral upper extremity  
13 shoulder sprain/strain. (AR at 13.) However, these severe  
14 impairments did not meet the requirements of a listed impairment  
15 found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id.)

16 The ALJ found that Plaintiff retained the residual functional  
17 capacity ("RFC") to perform light work as defined in 20 C.F.R.  
18 404.1567(b) as follows: "[S]he can exert up to 20 pounds of force  
19 occasionally and/or up to 10 pounds of force frequently and/or a  
20 negligible amount of force constantly to move objects. The claimant  
21 can stand and walk up to 6 hours and sit up to 6 hour in an 8-hour  
22 workday with normal breaks. Due to her obesity, she can perform  
23 work that does not require climbing ladders, ropes or scaffolds,  
24 and no more than occasional climbing of ramps or stairs, balancing,  
25 stooping, kneeling, crouching or crawling. The claimant is right-  
26 hand dominant and can frequently lift and reach overhead with her  
27 left upper extremity. She can frequently operate foot controls with  
28 her right and/or left lower extremities. The claimant can perform

1 work that does not require concentrated exposure to extreme cold,  
2 extreme heat, hazardous machinery, unprotected heights, or other  
3 high risk, hazardous or unsafe conditions, and that does not  
4 require any exposure to environmental irritants or poorly  
5 ventilated areas (i.e., asthma precautions)." (AR at 14.)

6 The ALJ found that Plaintiff could perform her past relevant  
7 work as a data entry clerk, secretary and receptionist. (AR at 17.)  
8 Therefore, the ALJ concluded that Plaintiff was not disabled under  
9 the Social Security Act. (AR at 19.)

10 The Appeals Council denied review on August 25, 2011 (AR at 1-  
11 3), and Plaintiff commenced this action for judicial review. On May  
12 1, 2012, the parties filed a Joint Stipulation ("Joint Stip.") of  
13 disputed facts and issues, including the following claims of error:  
14 (1) the ALJ did not properly consider the evidence of a mental  
15 impairment; (2) the ALJ failed to properly consider the opinion of  
16 the treating physician; and (3) the ALJ erred in evaluating  
17 Plaintiff's credibility and subjective testimony. (Joint Stip. at  
18 4.) Plaintiff asks the Court to reverse and order an award of  
19 benefits, or in the alternative, remand for further administrative  
20 proceedings. (Joint Stip. at 31-32.) The Commissioner requests that  
21 the ALJ's decision be affirmed. (Joint Stip. at 33.)  
22

## 23 **II. Standard of Review**

24 Under 42 U.S.C. § 405(g), a district court may review the  
25 Commissioner's decision to deny benefits. The Commissioner's  
26 decision must be upheld unless "the ALJ's findings are based on  
27 legal error or are not supported by substantial evidence in the  
28 record as a whole." *Tackett v. Apfel*, 180 F.3d 1094 (9th Cir.

1 1999); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).  
2 Substantial evidence means more than a scintilla, but less than a  
3 preponderance; it is evidence that a reasonable person might accept  
4 as adequate to support a conclusion. *Lingenfelter v. Astrue*, 504  
5 F.3d 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*,  
6 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
7 substantial evidence supports a finding, the reviewing court "must  
8 review the administrative record as a whole, weighing both the  
9 evidence that supports and the evidence that detracts from the  
10 Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720  
11 (9th Cir. 1996). "If the evidence can support either affirming  
12 or reversing the ALJ's conclusion," the reviewing court "may not  
13 substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d at  
14 882.

### 16 **III. Discussion**

#### 17 **A. The ALJ Properly Considered the Evidence Regarding** 18 **Plaintiff's Alleged Mental Impairment**

19 Plaintiff contends that the ALJ improperly relied on the  
20 opinion of the consultative examining psychiatrist, Dr. Minh-Khoi  
21 Duong, M.D. and disregarded the report of the reviewing State  
22 Agency physician, Dr. C. Dudley, M.D., who posited greater  
23 limitations in various mental functions than did Dr. Duong. (Joint  
24 Stip. at 4). Dr. Duong diagnosed Plaintiff with major depressive  
25 disorder and a global assessment of functioning ("GAF") score of  
26 75. (AR at 13, 247.) Dr. Duong determined that Plaintiff could  
27 carry out both simple and complex instructions, relate to others,  
28 cope with workplace stress, and deal with changes in a routine work

1 setting. (Id.) Dr. Dudley, on the other hand, opined that Plaintiff  
2 had moderate difficulties in maintaining concentration, persistence  
3 or pace and that Plaintiff could only perform work involving  
4 simple, repetitive tasks, given that she had a limited ability to  
5 maintain concentration. (AR at 257, 259.)

6 The ALJ properly analyzed the entire medical record and relied  
7 on the consultative psychiatrist's opinion in concluding that  
8 Plaintiff was not disabled. (AR at 14, 16.) Because there were no  
9 mental health records from a treating physician, the ALJ properly  
10 gave "great weight" to Dr. Duong's opinion that Plaintiff had no  
11 difficulty carrying out simple or complex instructions. (AR at 16.)  
12 The ALJ also appropriately relied on Dr. Duong's opinion because it  
13 was the most consistent with the medical record as a whole. See 20  
14 C.F.R. §§ 404.1527(d)(4), 416.927(d)(4) ("Generally, the more  
15 consistent an opinion is with the record as a whole, the more  
16 weight we will give the opinion.") As noted by the ALJ, Plaintiff  
17 had no history of psychiatric hospitalizations, was not seeing a  
18 psychiatrist, was able to do relatively well on the psychiatric  
19 interview, was taking online courses in English and health, had a  
20 GAF score of 75, and had testified that the Zoloft she takes  
21 controls her depression. (AR at 13-14, citing AR at 43.)

22 The ALJ also correctly noted that the reviewing physician's  
23 opinion was inconsistent with the rest of the medical record (AR at  
24 16), which constitutes a specific and legitimate reason to reject  
25 the opinion. See *Thomas*, 278 F.3d 948, 957-58 (9th Cir. 2002). (AR  
26 at 16.) It is the responsibility of the ALJ to resolve conflicts  
27 and ambiguities in the medical record and determine the credibility  
28 of medical sources. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.

1 1999); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1989).  
2 Therefore, the ALJ properly relied on the report of the  
3 consultative examiner.

4 **B. The ALJ Accorded Appropriate Weight to the Opinion of**  
5 **Plaintiff's Treating Physician**

6 Plaintiff contends that the ALJ erred in failing to give  
7 controlling weight to the opinion of Plaintiff's treating  
8 physician, Dr. Mark Schneider, D.O. (Joint Stip at 12.) On  
9 September 13, 2010, Dr. Schneider completed a Residual Functional  
10 Capacity Questionnaire, which concluded that Plaintiff had the  
11 following limitations: she could sit only up to one hour per day;  
12 she could stand for only 15 minutes at a time; she would be able to  
13 use her hands to grasp, do fine manipulation and reach only 10-15%  
14 of a workday; and she would likely not be able to work more than  
15 four hours per day. (AR at 279-286.)

16 An ALJ should generally accord greater probative weight to a  
17 treating physician's opinion than to opinions from non-treating  
18 sources. See 20 C.F.R. § 404.1527(d)(2). The ALJ must give specific  
19 and legitimate reasons for rejecting a treating physician's opinion  
20 in favor of a non-treating physician's contradictory opinion. *Orn*  
21 *v. Astrue*, 495 F.3d 625 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d  
22 821, 830 (9th Cir. 1996). However, the ALJ need not accept the  
23 opinion of any medical source, including a treating medical source,  
24 "if that opinion is brief, conclusory, and inadequately supported  
25 by clinical findings." *Thomas*, 278 F.3d at 957; accord *Tonapetyan*,  
26 242 F.3d at 1149. The factors to be considered by the adjudicator  
27 in determining the weight to give a medical opinion include:  
28 "[l]ength of the treatment relationship and the frequency of

1 examination" by the treating physician; and the "nature and extent  
2 of the treatment relationship" between the patient and the treating  
3 physician. *Orn*, 495 F.3d at 631-33; 20 C.F.R. §§  
4 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii).

5 The ALJ provided several legitimate reasons for refusing to  
6 give Dr. Schneider's opinion controlling weight, each of which was  
7 supported by substantial evidence in the record. First, the ALJ  
8 found that the September 13, 2010 Residual Functional Capacity  
9 Questionnaire was not fully reliable because it was conclusory and  
10 because there were no treatment records or diagnostic findings to  
11 support the extreme functional limitations found by Dr. Schneider.  
12 (AR at 16.) The ALJ noted that the medical record and Dr.  
13 Schneider's own treatment records contradicted his finding of  
14 extreme limitations:

15 For example, Dr. Schneider noted in February 2010 that  
16 Tylenol helped the claimant's neck pain, and that she  
17 needed to stretch and use ergonomic equipment, which is  
18 not indicative of an impairment that would result in the  
19 severe limitations reflected in his opinion. Moreover, he  
20 notes paresthesia and numbness in the claimant's hands,  
21 but there are no EMG or NCV studies to confirm the  
22 existence of a physiologic cause of the symptoms.  
23 Furthermore, a vague notation of decreased grip strength  
24 left greater than right is insufficient for a finding of  
25 severe hand limitations. Additionally, there is no  
26 objective medical evidence that the claimant has markedly  
27 limiting neck or shoulder function, since the only  
28 diagnostic tests in the record reveal mild degenerative

1 cervical spine changes.

2 (AR at 16-17.) An ALJ may discredit a treating physician's opinion  
3 if it is conclusory, brief, and unsupported by the record as a  
4 whole or by objective medical findings. *Batson v. Comm'r*, 359 F.3d  
5 1190, 1195 (9th Cir. 2004); *Tonapetyan*, 242 F.3d at 1149.

6 In addition, Dr. Schneider's findings of marked limitations  
7 in Plaintiff's ability to perform work-related activities was  
8 inconsistent with the findings of the reviewing State Agency  
9 physician, Dr. K. Beig, M.D. (AR at 16, citing AR at 237-241.)  
10 Contrary to Dr. Schneider's opinion that Plaintiff was extremely  
11 limited in her ability to perform a range of work-related  
12 functions, Dr. Beig found that Plaintiff was capable of a full  
13 range of light work. The ALJ was entitled to rely on the reviewing  
14 physician's findings, particularly when they were consistent with  
15 the evidence as a whole, unlike those of Dr. Schneider. The  
16 findings of a nontreating, nonexamining physician can amount to  
17 substantial evidence, so long as other evidence in the record  
18 supports those findings. *Andrews*, 53 F.3d at 1041; *Magallanes v.*  
19 *Bowen*, 881 F.2d 747, 752 (9th Cir. 1989).

20 The ALJ also noted that he was giving less weight to the  
21 September 13, 2010 report because, although it was signed by Dr.  
22 Schneider, it was apparently filled out by a non-physician  
23 assistant. (AR at 17.) An ALJ may accord opinions from other  
24 sources less weight than opinions from acceptable medical sources.  
25 See *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996); see also  
26 C.F.R. § 416.927(a)(2). Here, it is unclear whether the September  
27 13, 2010 report is from an "acceptable medical source." (AR at  
28 285.) However, even assuming that it is, the ALJ provided proper



1 reasons for failing to give controlling weight to Dr. Schneider's  
2 opinion, as discussed above, and any error was harmless. See  
3 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)  
4 (harmless error rule applies to review of administrative decisions  
5 regarding disability); *Burch v. Barnhart*, 400 F.3d 676, 679 (9th  
6 Cir. 2005).

7 **C. The ALJ Properly Evaluated Plaintiff's Subjective**  
8 **Symptom Testimony**

9 Plaintiff contends that the ALJ failed to provide clear and  
10 convincing reasons for discounting her subjective symptom  
11 testimony. (Joint Stip. at 21.) To determine whether a claimant's  
12 testimony about subjective pain or symptoms is credible, an ALJ  
13 must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d  
14 586, 591 (9th Cir. 2009) (citing *Lingenfelter v. Astrue*, 504 F.3d  
15 1028, 1035-36 (9th Cir. 2007)). First, the ALJ must determine  
16 whether the claimant has presented objective medical evidence of  
17 an underlying impairment which could reasonably be expected to  
18 produce the alleged pain or other symptoms. *Lingenfelter*, 504 F.3d  
19 at 1036. "[O]nce the claimant produces objective medical evidence  
20 of an underlying impairment, an adjudicator may not reject a  
21 claimant's subjective complaints based solely on a lack of  
22 objective medical evidence to fully corroborate the alleged  
23 severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th  
24 Cir. 1991) (en banc). To the extent that an individual's claims of  
25 functional limitations and restrictions due to alleged pain is  
26 reasonably consistent with the objective medical evidence and  
27 other evidence in the case, the claimant's allegations will be  
28 credited. SSR 96-7p, 1996 WL 374186 at \*2 (explaining 20 C.F.R. §§

1 404.1529(c)(4), 416.929(c)(4)).<sup>1</sup>

2 Unless there is affirmative evidence showing that the  
3 claimant is malingering, the ALJ must provide specific, clear and  
4 convincing reasons for discrediting a claimant's complaints.  
5 *Robbins*, 466 F.3d at 883. "General findings are insufficient;  
6 rather, the ALJ must identify what testimony is not credible and  
7 what evidence undermines the claimant's complaints." *Reddick*, 157  
8 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
9 1996)). The ALJ must consider a claimant's work record,  
10 observations of medical providers and third parties with knowledge  
11 of claimant's limitations, aggravating factors, functional  
12 restrictions caused by symptoms, effects of medication, and the  
13 claimant's daily activities. *Smolen v. Chater*, 80 F.3d 1273, 1283-  
14 84 & n.8 (9th Cir. 1996). The ALJ may also consider an unexplained  
15 failure to seek treatment or follow a prescribed course of  
16 treatment and employ other ordinary techniques of credibility  
17 evaluation. *Id.* (citations omitted).

18 Plaintiff testified at the administrative hearing to the  
19 following symptoms and functional limitations: she has neck pain  
20 which is aggravated by sitting, walking and using her hands and  
21 shoulders; she has pain in her knee; she can stand for about 15  
22 minutes and can finger for only five to ten minutes twice a day;  
23 she spends most of her day lying down; and she suffers from carpal  
24 tunnel syndrome and asthma. (AR at 36-42, 46, 52-53.)

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26 <sup>1</sup> "The Secretary issues Social Security Rulings to clarify the  
27 Secretary's regulations and policy .... Although SSRs are not  
28 published in the federal register and do not have the force of law,  
[the Ninth Circuit] nevertheless give[s] deference to the  
Secretary's interpretation of its regulations." *Bunnell*, 947 F.2d  
at 346 n.3.

1 The ALJ found that Plaintiff's medical impairments could  
2 reasonably be expected to cause the alleged symptoms. (AR at 17.)  
3 The ALJ was therefore required to provide specific, clear and  
4 convincing reasons for rejecting Plaintiff's subjective  
5 allegations of pain and functional limitations.

6 The ALJ provided various reasons for discrediting Plaintiff's  
7 testimony, each of which is fully supported by the record. First,  
8 the ALJ noted that Plaintiff's allegation that she could only use  
9 her fingers for five to ten minutes at a time without pain was  
10 inconsistent with other statements she made regarding her computer  
11 use, such as using her computer to read emails and check Facebook  
12 and also that she was taking online college courses in English and  
13 health. (AR at 17, citing AR at 48-49, 52, 57, 245.) This  
14 inconsistency was appropriately considered in determining  
15 credibility. See *Thomas*, 278 F.3d at 958-59 (inconsistency between  
16 the claimant's testimony and conduct supported rejection of  
17 claimant's credibility).

18 The ALJ also properly determined that Plaintiff's ability to  
19 perform certain daily activities, such as cooking and baking,  
20 doing housework, grocery shopping, driving, and using the computer  
21 were at odds with her claims of debilitating pain. (AR at 17.)  
22 While it is true that "one does not need to be 'utterly  
23 incapacitated' in order to be disabled," *Vertigan v. Halter*, 260  
24 F.3d 1044, 1050 (9th Cir. 2001), the extent of Plaintiff's  
25 activity here supports the ALJ's finding that Plaintiff's reports  
26 of her impairment were not fully credible. See *Bray v. Comm'r of*  
27 *Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009); *Curry v.*  
28 *Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (finding that the

1 claimant's ability to "take care of her personal needs, prepare  
2 easy meals, do light housework and shop for some groceries ... may  
3 be seen as inconsistent with the presence of a condition which  
4 would preclude all work activity") (citing *Fair v. Bowen*, 885 F.2d  
5 597, 604 (9th Cir. 1989)). In addition, the ALJ noted that the  
6 ability to do all of these daily activities was at odds with  
7 Plaintiff's testimony that she had to lie down 75% of the day  
8 because of pain and was essentially bedridden. (Id.)

9       The ALJ made specific findings articulating clear and  
10 convincing reasons for his rejection of Plaintiff's subjective  
11 testimony. *Smolen*, 80 F.3d at 1284. It is the responsibility of  
12 the ALJ to determine credibility and resolve conflicts or  
13 ambiguities in the evidence. *Magallanes*, 881 F.2d at 750. A  
14 reviewing court may not second-guess the ALJ's credibility  
15 determination when it is supported by substantial evidence in the  
16 record, as here. See *Fair*, 885 F.2d at 604. It was reasonable for  
17 the ALJ to rely on the reasons stated above, each of which is  
18 fully supported by the record, in rejecting the credibility of  
19 Plaintiff's subjective complaints. In sum, the ALJ reasonably and  
20 properly discredited Plaintiff's subjective testimony regarding  
21 the severity of her symptoms as not being wholly credible.

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1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Social  
3 Security Commissioner is **AFFIRMED** and the action is **DISMISSED** with  
4 prejudice.

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6 Dated: May 18, 2012



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Marc L. Goldman  
United States Magistrate Judge

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