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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BARBARA DICHTER, ) Case No. CV 12-3384-JPR  
Plaintiff, )  
vs. ) MEMORANDUM OPINION AND ORDER  
AFFIRMING THE COMMISSIONER  
CAROLYN W. COLVIN, Acting )  
Commissioner of Social )  
Security,<sup>1</sup> )  
Defendant. )

**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner's final decision denying her application for Social Security disability insurance benefits ("DIB"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed March 8, 2013, which the Court has taken under submission without oral argument. For the reasons stated below,

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<sup>1</sup> On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

1 the Commissioner's decision is affirmed and this action is  
2 dismissed.

### 3 **II. BACKGROUND**

4 Plaintiff was born on February 6, 1946. (Administrative  
5 Record ("AR") 80.) She previously worked as a cashier, customer  
6 service representative, and accounting clerk. (AR 39, 112.)

7 On January 11, 2008, Plaintiff filed an application for DIB.  
8 (AR 43.) Plaintiff alleged that she had been unable to work  
9 since January 15, 2006, because of degenerative disc disease,  
10 sciatica, and arthritis. (AR 105.) Plaintiff also has diabetes.  
11 (AR 35.) Her application was denied initially on July 16, 2008  
12 (AR 43), and upon reconsideration on July 25, 2008 (AR 47-51).

13 On September 24, 2008, Plaintiff requested a hearing before  
14 an ALJ. (AR 52-53.) A hearing was held on February 18, 2010, at  
15 which Plaintiff, who was represented by counsel, appeared and  
16 testified; a vocational expert ("VE") also testified. (AR 25-  
17 42.) In a written decision issued on May 11, 2010, the ALJ  
18 determined that Plaintiff was not disabled. (AR 15-21.) On  
19 January 12, 2012, the Appeals Council denied Plaintiff's request  
20 for review. (AR 5-7.) This action followed.

### 21 **III. STANDARD OF REVIEW**

22 Pursuant to 42 U.S.C. § 405(g), a district court may review  
23 the Commissioner's decision to deny benefits. The ALJ's findings  
24 and decision should be upheld if they are free of legal error and  
25 supported by substantial evidence based on the record as a whole.  
26 § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct.  
27 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d  
28 742, 746 (9th Cir. 2007). Substantial evidence means such

1 evidence as a reasonable person might accept as adequate to  
2 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter  
3 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than  
4 a scintilla but less than a preponderance. Lingenfelter, 504  
5 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,  
6 882 (9th Cir. 2006)). To determine whether substantial evidence  
7 supports a finding, the reviewing court "must review the  
8 administrative record as a whole, weighing both the evidence that  
9 supports and the evidence that detracts from the Commissioner's  
10 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
11 1996). "If the evidence can reasonably support either affirming  
12 or reversing," the reviewing court "may not substitute its  
13 judgment" for that of the Commissioner. Id. at 720-21.

#### 14 **IV. THE EVALUATION OF DISABILITY**

15 People are "disabled" for purposes of receiving Social  
16 Security benefits if they are unable to engage in any substantial  
17 gainful activity owing to a physical or mental impairment that is  
18 expected to result in death or which has lasted, or is expected  
19 to last, for a continuous period of at least 12 months. 42  
20 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257  
21 (9th Cir. 1992).

##### 22 **A. The Five-Step Evaluation Process**

23 The ALJ follows a five-step sequential evaluation process in  
24 assessing whether a claimant is disabled. 20 C.F.R.  
25 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th  
26 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the  
27 Commissioner must determine whether the claimant is currently  
28 engaged in substantial gainful activity; if so, the claimant is

1 not disabled and the claim must be denied. § 404.1520(a)(4)(i).  
2 If the claimant is not engaged in substantial gainful activity,  
3 the second step requires the Commissioner to determine whether  
4 the claimant has a "severe" impairment or combination of  
5 impairments significantly limiting her ability to do basic work  
6 activities; if not, a finding of not disabled is made and the  
7 claim must be denied. § 404.1520(a)(4)(ii). If the claimant has  
8 a "severe" impairment or combination of impairments, the third  
9 step requires the Commissioner to determine whether the  
10 impairment or combination of impairments meets or equals an  
11 impairment in the Listing of Impairments ("Listing") set forth at  
12 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is  
13 conclusively presumed and benefits are awarded.  
14 § 404.1520(a)(4)(iii). If the claimant's impairment or  
15 combination of impairments does not meet or equal an impairment  
16 in the Listing, the fourth step requires the Commissioner to  
17 determine whether the claimant has sufficient residual functional  
18 capacity ("RFC")<sup>2</sup> to perform her past work; if so, the claimant  
19 is not disabled and the claim must be denied.  
20 § 404.1520(a)(4)(iv). The claimant has the burden of proving  
21 that she is unable to perform past relevant work. Drouin, 966  
22 F.2d at 1257. If the claimant meets that burden, a prima facie  
23 case of disability is established. Id. If that happens or if  
24 the claimant has no past relevant work, the Commissioner then  
25 bears the burden of establishing that the claimant is not  
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27 <sup>2</sup> RFC is what a claimant can still do despite existing  
28 exertional and nonexertional limitations. 20 C.F.R. § 404.1545;  
see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 disabled because she can perform other substantial gainful work  
2 available in the national economy. § 404.1520(a)(4)(v). That  
3 determination comprises the fifth and final step in the  
4 sequential analysis. § 404.1520; Lester, 81 F.3d at 828 n.5;  
5 Drouin, 966 F.2d at 1257.

6 B. The ALJ's Application of the Five-Step Process

7 At step one, the ALJ found that Plaintiff had not engaged in  
8 any substantial gainful activity since January 15, 2006. (AR  
9 17.) At step two, the ALJ concluded that Plaintiff had the  
10 severe impairments of "lumbar disc disease and diabetes  
11 mellitus." (Id.) At step three, the ALJ determined that  
12 Plaintiff's impairments did not meet or equal any of the  
13 impairments in the Listing. (Id.) At step four, the ALJ found  
14 that Plaintiff retained the RFC to perform light work<sup>3</sup> but  
15 "limited to frequent climbing of ramps and stairs; to occasional  
16 climbing of ladders, ropes and scaffolds; and is further limited  
17 to frequent balancing, stooping, kneeling, crouching, and  
18 crawling." (AR 18.) Based on the VE's testimony, the ALJ  
19 concluded that Plaintiff was able to perform her past relevant  
20 work as an accounting clerk and customer-service representative,  
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22 <sup>3</sup> "Light work" is defined as work involving "lifting no  
23 more than 20 pounds at a time with frequent lifting or carrying  
24 of objects weighing up to 10 pounds." 20 C.F.R. § 416.967(b).  
25 The regulations further specify that "[e]ven though the weight  
26 lifted may be very little, a job is in this category when it  
27 requires a good deal of walking or standing, or when it involves  
28 sitting most of the time with some pushing and pulling of arm or  
leg controls." Id. A person capable of light work is also  
capable of "sedentary work," which involves lifting "no more than  
10 pounds at a time and occasionally lifting or carrying [small  
articles]" and may involve occasional walking or standing.  
§ 416.967(a) - (b).

1 which are both sedentary jobs. (AR 20.) At step five, the ALJ  
2 concluded that Plaintiff was not disabled. (AR 21.)

3 **V. DISCUSSION**

4 Plaintiff alleges that the ALJ erred in (1) evaluating the  
5 opinions of her treating physicians and (2) evaluating her  
6 credibility. (J. Stip. at 3.) Neither contention warrants  
7 reversal.

8 A. The ALJ Properly Evaluated the Medical Evidence

9 Plaintiff contends that the ALJ failed to properly consider  
10 the RFC assessment of her treating physician, Dr. Petra Wong, and  
11 the treatment notes of treating anesthesiologist Dr. George  
12 Elkhoury. (J. Stip. at 4-7, 11-12.) Remand is not warranted on  
13 that basis, however, because the ALJ provided legally sufficient  
14 reasons for his evaluation of the medical evidence.

15 1. Applicable law

16 Three types of physicians may offer opinions in social  
17 security cases: "(1) those who treat[ed] the claimant (treating  
18 physicians); (2) those who examine[d] but d[id] not treat the  
19 claimant (examining physicians); and (3) those who neither  
20 examine[d] nor treat[ed] the claimant (non-examining  
21 physicians)." Lester, 81 F.3d at 830. A treating physician's  
22 opinion is generally entitled to more weight than the opinion of  
23 a doctor who examined but did not treat the claimant, and an  
24 examining physician's opinion is generally entitled to more  
25 weight than that of a nonexamining physician. Id.

26 The opinions of treating physicians are generally afforded  
27 more weight than the opinions of nontreating physicians because  
28 treating physicians are employed to cure and have a greater

1 opportunity to know and observe the claimant. Smolen v. Chater,  
2 80 F.3d 1273, 1285 (9th Cir. 1996). If a treating physician's  
3 opinion is well supported by medically acceptable clinical and  
4 laboratory diagnostic techniques and is not inconsistent with the  
5 other substantial evidence in the record, it should be given  
6 controlling weight. 20 C.F.R. § 404.1527(c)(2). If a treating  
7 physician's opinion is not given controlling weight, its weight  
8 is determined by length of the treatment relationship, frequency  
9 of examination, nature and extent of the treatment relationship,  
10 amount of evidence supporting the opinion, consistency with the  
11 record as a whole, the doctor's area of specialization, and other  
12 factors. 20 C.F.R. § 404.1527(c)(2)-(6).

13 When a treating or examining doctor's opinion is not  
14 contradicted by another doctor, it may be rejected only for  
15 "clear and convincing" reasons. Carmickle v. Comm'r, Soc. Sec.  
16 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (quoting Lester, 81  
17 F.3d at 830-31). When a treating or examining physician's  
18 opinion conflicts with another doctor's, the ALJ must provide  
19 only "specific and legitimate reasons" for discounting the  
20 treating doctor's opinion. Id. Further, the ALJ "need not  
21 accept the opinion of any physician, including a treating  
22 physician, if that opinion is brief, conclusory, and inadequately  
23 supported by clinical findings." Thomas v. Barnhart, 278 F.3d  
24 947, 957 (9th Cir. 2002); accord Batson v. Comm'r of Soc. Sec.  
25 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). The weight given an  
26 examining physician's opinion, moreover, depends on whether it is  
27 consistent with the record and accompanied by adequate  
28 explanation, among other things. 20 C.F.R. § 404.1527(c)(3)-(6).

1                   2.   Relevant facts

2           On March 25, 2010, after the hearing but before the ALJ  
3 issued his written decision, Plaintiff submitted to the ALJ  
4 copies of Dr. Elkhoury's treatment notes covering the period  
5 between April 2008 and January 2010. (AR 286-349.) The notes  
6 documented Plaintiff's receipt of spinal nerve block injections  
7 to treat her back pain. (See id.)

8           Plaintiff first saw Dr. Elkhoury on April 2, 2008. At that  
9 time he noted that Plaintiff had tenderness in her lumbar spine  
10 and buttocks, a positive straight-leg-raising test, spinal  
11 flexion of 15/90 and extension of 5/30, radicular distribution in  
12 her right leg, pain that was made worse with extension of her  
13 back and prolonged sitting and standing, and tenderness over  
14 facet area; all other test and examination results were within  
15 normal limits, however. (AR 347-49.)

16          The records indicate that Plaintiff received her first  
17 injection from Dr. Elkhoury on May 15, 2008. (AR 330-35.) On  
18 that date Dr. Elkhoury completed a check-box form, indicating  
19 that Plaintiff had "severe" pain that was "made worse with"  
20 "extension/flexion of spine" and "prolonged sitting, standing,  
21 hyperextension, and walking." (AR 330.) He noted that Plaintiff  
22 had low-back pain that radiated to her right leg, which was  
23 aggravated by activity, stress, and walking and relieved by rest.  
24 (AR 331.) He noted that her flexion was 60/90 and extension was  
25 20/30, her straight-leg-raising test was positive on the right  
26 and negative on the left, her gait was "steady" and "stable," and  
27 motor and sensory tests of the bilateral lower extremities were  
28 within normal limits. (Id.) He noted that she was taking



1 Gabapentin<sup>4</sup> and Advil for pain. (Id.)

2 Dr. Elkhoury performed another injection on June 16, 2008.  
3 (AR 326.) He again indicated that she had "severe" pain but  
4 noted that her condition had improved "90%" since her last visit.  
5 (AR 326-27.) He noted that her pain was "severe" at the time of  
6 her visit but "mild" "during relief." (AR 327.) After  
7 completing the shots, Dr. Elkhoury referred Plaintiff back to her  
8 primary physician, Dr. Petra Wong, and noted that Plaintiff was  
9 "currently stable." (AR 325.)

10 On December 2, 2008, Plaintiff visited Dr. Elkhoury for an  
11 evaluation. He noted that her pain "during relief" was  
12 "moderate" but "pain now" was severe. (AR 323.) The file also  
13 contains an undated note that Plaintiff's "pain is better" and  
14 her next appointment was rescheduled to January 2009. (AR 322.)

15 The next record of Plaintiff visiting Dr. Elkhoury is from  
16 September 9, 2009, when Plaintiff visited him for an evaluation  
17 and medication refill. (AR 320-21.) Dr. Elkhoury noted that  
18 Plaintiff's pain was "50%" relieved since her last visit, her  
19 activities were "stable," and her pain "during relief" was  
20 "moderate" but "pain now" - presumably before the shot - was  
21 "severe." (AR 320.) Plaintiff received another nerve block  
22 injection from Dr. Elkhoury on September 29, 2009. (AR 316.) He  
23 noted that her condition had improved "90%" since her last visit  
24 and her pain "during relief" was "mild" but "pain now" was  
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26  
27 <sup>4</sup> Gabapentin is an anticonvulsant medication that is used  
28 to treat nerve pain, among other things. Gabapentin,  
MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html> (last updated Mar. 25, 2013).

1 severe." (Id.) He further noted that she responded to the  
2 previous nerve block injections "with 90% improvement for 15  
3 months." (AR 317.) On December 17, 2009, Dr. Elkhoury's staff  
4 received a message from Plaintiff stating that "her pain is  
5 gone."<sup>5</sup> (AR 322.)

6 Plaintiff received another nerve block injection from Dr.  
7 Elkhoury on January 25, 2010. (AR 312.) At that time he noted  
8 that Plaintiff's "pain and disability level" was "severe" but her  
9 condition had improved "50%" since her last visit, and her "pain  
10 during relief" was "moderate" but "pain now" was "severe." (AR  
11 312-13.) He noted that her spinal flexion was 40/90 and  
12 extension was 10/30, motor and sensory tests of the bilateral  
13 lower extremities were within normal limits, and her straight-  
14 leg-raising test was negative on both sides. (AR 313.) Her  
15 "current pain medications" were only "Advil (otc)" and her  
16 "medication is well tolerated." (Id.)

17 On February 20, 2008, Plaintiff's primary care physician,  
18 Dr. Wong, wrote a letter to "Whom it May Concern," stating that  
19 Plaintiff was "a candidate for permanent light duty with no  
20 lifting more than 10 to 15 lbs with proper lifting techniques"  
21 and "may need periods of time off work and having physical  
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23 <sup>5</sup> Plaintiff argues that this note is dated December 2008,  
24 not 2009. (J. Stip. at 11.) The year on the note appears to the  
25 Court to be "09" (see AR 322), but even if it were dated 2008 and  
26 the ALJ erred in characterizing it as 2009 (AR 19), any error  
27 would be harmless because, as discussed herein, ample other  
28 evidence in the record supported the ALJ's finding that the  
medical evidence showed Plaintiff's symptoms to have improved  
with treatment. See Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d  
1050, 1055 (9th Cir. 2006) (ALJ's error harmless when  
"inconsequential to the ultimate nondisability determination").

1 therapy should her back flare up." (AR 259-60.) Dr. Wong noted  
2 that Plaintiff "is not yet permanently disabled from her lumbar  
3 disc disease" and "is not [seeing] pain management or getting  
4 epidural shots for pain control." (AR 260.)

5 On January 9, 2009, Dr. Wong filled out a Physical Residual  
6 Capacity Questionnaire, stating that she had been seeing  
7 Plaintiff since April 10, 2003, and had diagnosed Plaintiff with  
8 lumbar disc disease. (AR 281.) Dr. Wong noted that Plaintiff's  
9 prognosis was "fair"; she had increased lower-back pain when  
10 walking more than two blocks, standing more than 15 to 20  
11 minutes, or sitting for more than one hour; and her pain was  
12 "constant" in her lumbar region and right leg. (AR 281.) She  
13 identified the following clinical findings and objective evidence  
14 supporting her diagnosis: an MRI showed "1-3 mm disc bul[g]es L3-  
15 4, L4-5, L5-S1 with degenerative arthritis," "decreased range of  
16 motion L5 spine," and positive straight-leg-raising test. (AR  
17 281.) She noted that Plaintiff was treated with Advil and  
18 Flexeril (a muscle relaxant) "when needed at bedtime," epidural  
19 shots, and physical therapy. (AR 282.) She stated that  
20 Plaintiff was not a malingerer and that "this patient is  
21 permanently disabled from her lumbar disc disease." (Id.) She  
22 wrote that Plaintiff could not "lift more than 10 lbs, no  
23 bending, reaching, squatting, no sitting for more than 20  
24 minutes, standing for more than 1 hr, or walking more than 2  
25 blocks," and she "must rest from 20 [to] 60 minutes after these  
26 activities and be able to lay down and rest for that time."  
27 (Id.) She circled that Plaintiff's pain would interfere with  
28 attention and concentration "frequently," and Plaintiff "often"

1 had "moderate limitation" in "the ability to deal with work  
2 stress." (AR 282-83.) She stated that Plaintiff could walk two  
3 blocks without rest and could sit one hour and stand 20 minutes  
4 but "has to lay down for up to 1 hr before doing anything else."  
5 (AR 283.) She checked that Plaintiff could sit, stand, and walk  
6 for "less than 2 hours" in an eight-hour workday, needed to  
7 include periods of walking during an eight-hour workday for 15  
8 minutes "or more" every 20 minutes, and "if back pain worse has  
9 to lay down for up to 1 hr before doing anything else." (Id.)  
10 She stated that Plaintiff "needs job that will let her lay down  
11 for 20 to 60 minutes if back pain worse" and needed unscheduled  
12 breaks "for up to 1 hr each time if back pain severe." (Id.)  
13 She stated that Plaintiff's legs needed to be elevated 90% with  
14 prolonged sitting 100% of the time and Plaintiff needed a cane  
15 "while engaging in occasional standing/walking."<sup>6</sup> (AR 284.) She  
16 checked that Plaintiff could occasionally lift 10 pounds and had  
17 "significant limitations" in doing repetitive reaching, handling,  
18 or fingering such that she could use her hands to grasp, turn,  
19 and twist objects 50% of the time, perform fine manipulations 70%  
20 of the time, and reach five percent of the time.<sup>7</sup> (Id.) She  
21 stated that Plaintiff could not bend or twist at all and would  
22 likely be absent from work "more than three times a month." (AR  
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24 <sup>6</sup> Plaintiff did not testify to using a cane (see AR 25-  
25 39), and there does not appear to be any other indication in the  
26 record that Plaintiff used a cane. (See also AR 121 (Plaintiff  
27 answering "no" when asked if she "[wore] or use[d] any device to  
assist in relieving pain or its effects").)

28 <sup>7</sup> In February 2008, Plaintiff herself apparently  
indicated that she had no limitations in reaching. (AR 102.)

1 284-85.) She also noted that Plaintiff "is non insulin dependent  
2 diabetic at this time" and "[r]equires regular timely meals[,  
3 medications,] and time to keep doctors appointments and lab draw  
4 appointments." (AR 285.)

5 3. Analysis

6 In his written decision, the ALJ gave "great weight" to Dr.  
7 Wong's February 2008 letter finding Plaintiff capable of light  
8 work and less weight to her January 2009 RFC assessment. (AR  
9 19.) The ALJ noted that contrary to Dr. Wong's RFC assessment,  
10 "the most recent treatment records substantiate that the  
11 claimant's pain was gone, requiring no more than Advil for  
12 management, she demonstrated a negative straight-leg raise, she  
13 was stable, and her physical examination was generally within  
14 normal limits." (Id.) The ALJ cited Dr. Elkhoury's notes in  
15 support of that statement. (See id. (citing AR 313, 322).) The  
16 ALJ also noted that after Plaintiff's first set of injections, in  
17 June 2008, she "was stable" and "was referred back to her primary  
18 care physician by [Dr. Elkhoury]." (Id.) He noted that  
19 Plaintiff's "pain evidently returned in November 2008 and she  
20 received additional epidural injections in December 2008 and  
21 September 2009 [(AR 297, 300)], but by December 2009, the  
22 claimant's pain was reportedly 'gone' [(AR 322)]." (Id.) He  
23 also noted:

24 A recent January 2010 physical examination revealed that  
25 the claimant demonstrated reduced flexion and extension;  
26 however, the straight-leg raise was negative, motor and  
27 sensory tests of the bilateral lower extremities were  
28 within normal limits, range of motion was stable, muscle

1 strength was stable, and her gait was steady and stable  
2 [(AR 313)]. Moreover, the only pain medication she was  
3 taking is over-the-counter Advil, which was well-  
4 tolerated (*Id.*). As such, the objective medical record  
5 fails to substantiate that the claimant's back pain is as  
6 severe or limiting as alleged.

7 (AR 19.)

8 The ALJ did not err in evaluating Dr. Elkhoury's treatment  
9 notes or Dr. Wong's 2009 RFC assessment. Plaintiff initially  
10 argues that the ALJ did not review Dr. Elkhoury's notes at all  
11 (J. Stip. at 4-7), which, as Plaintiff later concedes, is clearly  
12 not true (J. Stip. at 11; see AR 19). Plaintiff in the  
13 alternative argues that Dr. Elkhoury's notes substantiated,  
14 rather than refuted, Dr. Wong's January 2009 RFC assessment. (J.  
15 Stip. at 4, 11-12.) But as the ALJ correctly noted, Dr.  
16 Elkhoury's January 2010 notes showed that Plaintiff's condition  
17 had improved with treatment, her most recent straight-leg-raising  
18 test was negative on both sides, motor and sensory tests of the  
19 bilateral lower extremities were within normal limits on both  
20 sides, her gait was steady and stable, and her level of activity  
21 was stable. (AR 19, 313.) Inconsistency between Dr. Wong's RFC  
22 findings and the objective evidence in the record, including Dr.  
23 Elkhoury's later treatment notes and Dr. Wong's earlier  
24 assessment, was a proper basis for the ALJ to reject Dr. Wong's  
25 findings. See Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir.  
26 2003) (treating doctor's opinion properly rejected when treatment  
27 notes "provide no basis for the functional restrictions he opined  
28 should be imposed on [claimant]"); Valentine v. Comm'r, Soc. Sec.

1 Admin., 574 F.3d 685, 692-93 (9th Cir. 2009) (contradiction  
2 between treating physician's opinion and his treatment notes  
3 constitutes specific and legitimate reason for rejecting treating  
4 physician's opinion). Indeed, as noted earlier, Dr. Wong's  
5 statements in her January 2009 RFC that Plaintiff needed a cane  
6 and could reach only five percent of the time were apparently  
7 contradicted by Plaintiff herself. (See AR 102, 121.) The ALJ  
8 was entitled to reject the January 2009 RFC because it was  
9 inconsistent with the record as a whole. See 20 C.F.R.  
10 § 404.1527(c)(4) ("Generally, the more consistent an opinion is  
11 with the record as a whole, the more weight we will give to that  
12 opinion."); see also Arnold v. Astrue, No. EDCV 10-1609 JC, 2011  
13 WL 2261058, at \*7 (C.D. Cal. June 8, 2011) (ALJ entitled to  
14 reject treating doctor's opinion that was not supported by  
15 "plaintiff's statements or [by] the record as a whole" (citing  
16 Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005)));  
17 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ  
18 permissibly rejected treating physician's opinion when opinion  
19 was contradicted by or inconsistent with treatment reports).

20 As the ALJ also correctly noted, by January 2010, according  
21 to Dr. Elkhoury's notes, the only medication Plaintiff took for  
22 her pain was over-the-counter Advil, and it was "well tolerated."  
23 (See AR 19, 34, 313.)<sup>8</sup> The ALJ was entitled to reject Dr. Wong's  
24 opinion to the extent the objective medical evidence showed that  
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27 <sup>8</sup> In 2008 it was noted that Plaintiff also took  
28 Gabapentin for her pain (see AR 120, 331), but she had apparently  
discontinued that by 2010 (see AR 34, 313), which further  
indicated that her condition had improved.

1 Plaintiff's pain was effectively managed with conservative  
2 treatment. See, e.g., Rollins, 261 F.3d at 856 (ALJ may reject  
3 opinion of treating physician who prescribed conservative  
4 treatment yet opined that claimant was disabled); cf. Tommasetti  
5 v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (ALJ may infer  
6 that claimant's "response to conservative treatment undermines  
7 [claimant's] reports regarding the disabling nature of his  
8 pain").

9 Plaintiff points to findings in Dr. Elkhoury's treatment  
10 notes that, if interpreted differently than by the ALJ, could  
11 lead to a different conclusion. (See J. Stip. at 4, 11.) But  
12 any conflict in the properly supported medical-opinion evidence  
13 was the sole province of the ALJ to resolve. See Thomas, 278  
14 F.3d at 956-57.<sup>9</sup> Reversal is not warranted on this basis.

15 B. The ALJ Did Not Err in Assessing Plaintiff's  
16 Credibility

17 Plaintiff argues that the ALJ failed to provide clear and  
18 convincing reasons for discounting her credibility. (J. Stip. at  
19 12-15, 18-19.) Because the ALJ did provide clear and convincing  
20 reasons supporting his evaluation of Plaintiff's testimony and  
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23 <sup>9</sup> Moreover, Plaintiff argued to the Appeals Council that  
24 Dr. Elkhoury ultimately concluded that Plaintiff "would be  
25 limited to a reduced range of sedentary work." (AR 141.) To the  
26 extent Dr. Elkhoury so opined, and to the extent the ALJ erred in  
27 rejecting that opinion, any error was harmless because the ALJ  
28 ultimately found that Plaintiff could perform her past relevant  
work as an accounting clerk and customer-service representative,  
which are both sedentary jobs accommodating the additional  
limitations the ALJ found. (AR 20); see Stout, 454 F.3d at 1055  
(ALJ's error harmless when "inconsequential to the ultimate  
nondisability determination").



1 those reasons were supported by substantial evidence in the  
2 record, reversal is not warranted on this basis.

3 1. Applicable law

4 An ALJ's assessment of pain severity and claimant  
5 credibility is entitled to "great weight." See Weetman v.  
6 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779  
7 F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to  
8 believe every allegation of disabling pain, or else disability  
9 benefits would be available for the asking, a result plainly  
10 contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674  
11 F.3d 1104, 1122 (9th Cir. 2012). In evaluating a claimant's  
12 subjective symptom testimony, the ALJ engages in a two-step  
13 analysis. See Lingenfelter, 504 F.3d at 1035-36. "First, the  
14 ALJ must determine whether the claimant has presented objective  
15 medical evidence of an underlying impairment [that] could  
16 reasonably be expected to produce the pain or other symptoms  
17 alleged." Id. at 1036 (internal quotation marks omitted). If  
18 such objective medical evidence exists, the ALJ may not reject a  
19 claimant's testimony "simply because there is no showing that the  
20 impairment can reasonably produce the degree of symptom alleged."  
21 Smolen, 80 F.3d at 1282 (emphasis in original). When the ALJ  
22 finds a claimant's subjective complaints not credible, the ALJ  
23 must make specific findings that support the conclusion. See  
24 Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent  
25 affirmative evidence of malingering, those findings must provide  
26 "clear and convincing" reasons for rejecting the claimant's  
27 testimony. Lester, 81 F.3d at 834. If the ALJ's credibility  
28 finding is supported by substantial evidence in the record, the

1 reviewing court "may not engage in second-guessing." Thomas, 278  
2 F.3d at 959.

3 2. Relevant facts

4 In what appears to be February 2008,<sup>10</sup> Plaintiff filled out  
5 a Function Report stating that she had difficulty bending and  
6 twisting to put on socks, pants, and underwear and to cut her  
7 toenails; she could no longer squat or bend over, vacuum, change  
8 beds, clean her bathtub, sweep, or dig holes to plant plants; she  
9 could cook only meals that did not require her to stand at the  
10 stove very long; she was unable to walk through the mall, on the  
11 beach, or around the block because of back pain and "clicking of  
12 joints"; she could not go bowling or "participat[e] in any  
13 activity that requires running or walking great distances"; she  
14 had difficulty sitting, standing, walking, kneeling, squatting,  
15 climbing, bending, lifting, and sleeping because of back pain;  
16 she was unable to sit in a desk chair longer than "15 min to 2 hr  
17 max"; and she "cannot lift more than 5-10 lbs at a time." (AR  
18 99-102.) She noted that her symptoms had not changed her ability  
19 to, among other things, bathe, do her hair, do laundry, do  
20 dishes, shop or do errands, handle money, drive, use public  
21 transportation, visit friends, read, watch TV, listen to the  
22 radio, participate in social activities, reach, use her hands, or  
23 concentrate. (Id.)

24 On May 26, 2008, Plaintiff filled out a Pain Questionnaire.  
25 (AR 120-22.) In it she noted that she had pain in her lower  
26 back, right hip, and right leg that was "continuous and  
27

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28 <sup>10</sup> The Function Report is not dated, but the top of each  
page shows that it was faxed on February 7, 2008. (AR 99-103.)

1 horrific." (AR 120.) She stated that the pain occurred "every  
2 day" "24/7" but was relieved with "about 30 minutes" of rest.  
3 (Id.) She stated that she took Gabapentin once a day and Advil  
4 "every 6 hours when needed"; the medicine "[did] ease the pain  
5 some what" "within 30 minutes." (Id.) She stated that she did  
6 not wear or use any devices to relieve her pain. (AR 121.) With  
7 respect to her daily activities, she stated that she was "unable  
8 to walk long distances, limit all shopping trips, unable to mop  
9 floors and find vacuuming to be very painful," and "[s]ometimes I  
10 won't drive if my right leg is extra painful." (Id.) She stated  
11 that because of her pain she was no longer able to exercise,  
12 garden, bicycle, bowl, browse "through shops for long periods of  
13 time," or "sit in a desk chair in front of a computer to do a  
14 day['s] work." (Id.) She stated that she had to stop activity  
15 and rest "within 10 min to 30 min if walking" because of her  
16 pain, and she was able to do "short shopping trips," walk "about  
17 a block," stand 15 to 30 minutes at a time, sit for an hour at a  
18 time, drive her own car, and do light housekeeping chores. (AR  
19 122.) She noted that she needed assistance "gardening,  
20 vacuuming, sweeping, mop[pl]ing floors, moving furniture, . . .  
21 lifting heavy objects, [and] carrying grocery bags." (Id.)

22 At the hearing, Plaintiff testified that she stopped working  
23 when she was laid off in June 2004; after that she attempted to  
24 take training classes "to be a medical biller and coder," but she  
25 dropped out in January 2006 because of her back pain. (AR 29-  
26 30.) She stated that she was treated with physical therapy,  
27 which "temporarily" helped but "didn't take all of the pain  
28 away," and with epidural injections. (AR 31.) She testified

1 that the injections helped "lessen[]" the pain for "about a year"  
2 to "ease the pain and make life a little bit easier to live,"  
3 improving her ability to perform daily activities, which included  
4 reading, watching television, using the computer, and making  
5 handmade seasonal wreaths. (AR 31-32, 36.) As to her postural  
6 limitations, she stated that she could sit for about "15 minutes  
7 or a half an hour" before needing to change positions and had to  
8 lie down "periodically throughout the day" to relieve her back  
9 pain. (AR 33.) She testified that she took "just Advil" for her  
10 pain, which did not take the pain away but "help[ed] . . . dull[]  
11 it." (AR 34, 37-38.) She stated that when she had the epidural  
12 injections, which "help[] with the pain so much," she was able to  
13 cut her dose of Advil from nine pills a day to six. (AR 37.)

14           3.   Analysis

15       The ALJ evaluated Plaintiff's credibility as follows:  
16       The undersigned finds the claimant's allegations not  
17       fully credible. The claimant testified that she had  
18       worsening back pain over the last couple of years that  
19       has affected her ability to sit for long periods;  
20       however, she also testified that she started receiving  
21       epidural injections that help for one year before the  
22       pain comes back, which is inconsistent with a severe and  
23       markedly limiting impairment. The claimant also  
24       testified that she was told by Dr. Wong to lie down  
25       periodically about two years ago when they discussed her  
26       limitations; however, Dr. Wong's February 2008 letter,  
27       which addressed her limitations, indicated that the  
28       claimant could do light duty work without any suggestion

1 in the letter, or in any of Dr. Wong's records,<sup>11</sup> that  
2 she would need to lie down periodically during the day,  
3 which diminishes her credibility. Moreover, the claimant  
4 testified that she makes seasonal wreaths as a hobby  
5 while sitting down and works at a computer doing e-mails  
6 and searches. The evidence of record thus fails to  
7 support that the claimant's subjective complaints are as  
8 severe or limiting as alleged and renders her allegations  
9 less than fully credible.

10 (AR 19-20 (citation omitted).)

11 Reversal is not warranted based on the ALJ's alleged failure  
12 to make proper credibility findings or properly consider  
13 Plaintiff's subjective symptoms. Again, Plaintiff largely  
14 premises her argument on the ALJ's alleged failure to review all  
15 of Dr. Elkhoury's treatment notes, contending that he therefore  
16 necessarily failed to properly evaluate Plaintiff's credibility  
17 because he did so without the full context of those notes. (J.  
18 Stip. at 14.) As noted, Plaintiff has conceded that the factual  
19 premise of this argument is wrong, and the ALJ did review all of  
20 Dr. Elkhoury's notes. (J. Stip. at 11; see AR 19.)

21 In any event, the ALJ provided clear and convincing reasons  
22 for rejecting Plaintiff's subjective symptom testimony to the  
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24  
25 <sup>11</sup> The hearing took place in February 2010; thus, Dr.  
26 Wong's February 2008 letter was written at almost exactly the  
27 time Plaintiff claimed Dr. Wong had told her to lie down  
28 periodically, and yet it does not include any such restriction.  
Dr. Wong's January 2009 RFC finding does mention Plaintiff's  
alleged need to occasionally "lay down" during the day to rest.  
(AR 282-83.)

1 extent it was inconsistent with the RFC assessment.<sup>12</sup> (AR 19-  
2 20.) Virtually all of the medical evidence with the exception of  
3 Dr. Wong's January 2009 RFC finding - the rejection of which was  
4 proper, as explained in Section A above - indicated that  
5 Plaintiff was capable of performing light work. As the ALJ  
6 noted, the record - and Plaintiff's own testimony - showed that  
7 Plaintiff's symptoms improved with treatment and were effectively  
8 managed with over-the-counter pain medication. (AR 19, 31-32,  
9 34, 313.) The ALJ properly discounted Plaintiff's subjective  
10 testimony to the extent it conflicted with the medical record.  
11 See Carmickle, 533 F.3d at 1161 ("Contradiction with the medical  
12 record is a sufficient basis for rejecting the claimant's  
13 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in  
14 determining credibility, ALJ may consider "whether the alleged  
15 symptoms are consistent with the medical evidence"); Burch v.  
16 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of  
17 medical evidence cannot form the sole basis for discounting pain  
18 testimony, it is a factor that the ALJ can consider in his  
19 credibility analysis."); Kennelly v. Astrue, 313 F. App'x 977,  
20 979 (9th Cir. 2009) (same); Tommasetti, 533 F.3d at 1040 (ALJ may  
21 infer that claimant's "response to conservative treatment  
22 undermines [claimant's] reports regarding the disabling nature of  
23 his pain").

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24  
25 <sup>12</sup> Although the record does contain some evidence of  
26 malingering (see AR 269, 271 (examining doctor's finding that  
27 Plaintiff only "partially credible" because "claimant's  
28 allegations of the severity of impairment(s) are not fully  
supported by the objective findings")), the Court has nonetheless  
applied the clear and convincing standard.

1       Moreover, as the ALJ noted, Plaintiff admitted that she was  
2 able to do a wide variety of daily activities, including making  
3 seasonal wreaths and using the computer while sitting down,  
4 shopping, doing errands, visiting friends and family, reading,  
5 watching television, driving a car, and preparing quick meals.  
6 (AR 19-20, 32-36, 100-02.) That Plaintiff's allegations of  
7 disabling pain were inconsistent with her daily activities was a  
8 valid reason for the ALJ to discount her testimony. See Bray v.  
9 Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009)  
10 (ALJ properly discounted claimant's testimony because "she leads  
11 an active lifestyle, including cleaning, cooking, walking her  
12 dogs, and driving to appointments"); Berry, 622 F.3d at 1234-35  
13 (holding that when claimant "told medical staff he engaged in  
14 daily walks of a mile or more, had various social engagements,  
15 drove his car and did crossword puzzles, computer work, pet care,  
16 cooking, laundry and other house-keeping," ALJ properly  
17 discounted claimant's credibility based on "inconsistencies in  
18 [claimant's] reported symptoms and activities"); Molina, 674 F.3d  
19 at 1113 ("Even where [claimant's] activities suggest some  
20 difficulty functioning, they may be grounds for discrediting the  
21 claimant's testimony to the extent that they contradict claims of  
22 a totally debilitating impairment.").

23       Because the ALJ gave clear and convincing reasons for his  
24 credibility finding and those reasons were supported by  
25 substantial evidence, the Court "may not engage in  
26 second-guessing." Thomas, 278 F.3d at 959 (citation omitted).  
27 Plaintiff is not entitled to reversal on this claim.  
28

1 **VI. CONCLUSION**

2 Consistent with the foregoing, and pursuant to sentence four  
3 of 42 U.S.C. § 405(g),<sup>13</sup> IT IS ORDERED that judgment be entered  
4 AFFIRMING the decision of the Commissioner and dismissing this  
5 action with prejudice. IT IS FURTHER ORDERED that the Clerk  
6 serve copies of this Order and the Judgment on counsel for both  
7 parties.

8  
9 DATED: April 23, 2013

**JEAN ROSENBLUTH**

10 JEAN ROSENBLUTH  
11 U.S. Magistrate Judge  
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26 <sup>13</sup> This sentence provides: "The [district] court shall  
27 have power to enter, upon the pleadings and transcript of the  
28 record, a judgment affirming, modifying, or reversing the  
decision of the Commissioner of Social Security, with or without  
remanding the cause for a rehearing."