



1 **BACKGROUND**

2 Plaintiff is a 46 year old female who was found to have the medically determinable  
3 severe impairments of obesity, a history of gallbladder removal with residual pain, and a  
4 history of alcohol abuse with subsequent mood disorder. (AR 11.) Plaintiff has not engaged  
5 in substantial gainful activity since October 16, 2006, the alleged onset date. (AR 11.)

6 Plaintiff's claim for Social Security Disability Insurance benefits and Supplemental  
7 Security Income SSI benefits was denied initially on August 10, 2007, and on reconsideration  
8 on September 25, 2007. (AR 9.) Plaintiff requested a hearing, which was held before  
9 Administrative Law Judge ("ALJ") Mason D. Harrell, Jr. on February 11, 2009, in San  
10 Bernardino, California. (AR 9.) The ALJ issued an unfavorable decision on March 27, 2009.  
11 (AR 9-18.) The ALJ found that Plaintiff could perform light work with some limitations. (AR  
12 12-16.) The ALJ then determined that, although Plaintiff was unable to perform her prior  
13 relevant work, there are jobs in the national economy that she can perform. (AR 16.) As a  
14 result, the Claimant has not been under a disability within the meaning of the Social Security  
15 Act from the alleged onset date through the date of decision. (AR 17.)

16 Plaintiff requested review of the hearing decision, which was denied by the Appeals  
17 Council on June 28, 2009. (AR 1.)

18 **DISPUTED ISSUE**

19 As reflected in the Joint Stipulation, the only disputed issue that Plaintiff raises as a  
20 ground for reversal is as follows:

21 1. Whether the ALJ properly considered Plaintiff's subjective complaints and the  
22 subjective statements of Plaintiff's mother and properly assessed their credibility.

23 **STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
25 the ALJ's findings are supported by substantial evidence and whether the proper legal  
26 standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991).  
27 Substantial evidence means "more than a mere scintilla'. . . but less than a preponderance."  
28 Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402

1 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a reasonable  
2 mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401  
3 (internal quotations and citation omitted).

4 This Court must review the record as a whole and consider adverse as well as  
5 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
6 Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision  
7 must be upheld. Morgan v. Comm’r, 169 F.3d 595, 599 (9th Cir. 1999). “However, a  
8 reviewing court must consider the entire record as a whole and may not affirm simply by  
9 isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting  
10 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d  
11 625, 630 (9th Cir. 2007).

## 12 SEQUENTIAL EVALUATION

13 The Social Security Act defines disability as the “inability to engage in any substantial  
14 gainful activity by reason of any medically determinable physical or mental impairment which  
15 can be expected to result in death or . . . can be expected to last for a continuous period of  
16 not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner  
17 has established a five-step sequential process to determine whether a claimant is disabled.  
18 20 C.F.R. §§ 404.1520, 416.920.

19 The first step is to determine whether the claimant is presently engaging in  
20 substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the  
21 claimant is engaging in substantially gainful activity, disability benefits will be denied. Bowen  
22 v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant  
23 has a severe impairment or combination of impairments. Parra, 481 F.3d at 746. Third, the  
24 ALJ must determine whether the impairment is listed, or equivalent to an impairment listed,  
25 in Appendix I of the regulations. Id. If the impediment meets or equals one of the listed  
26 impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141. Fourth, the  
27 ALJ must determine whether the impairment prevents the claimant from doing past relevant  
28 work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four

1 determination, the ALJ first must determine the claimant’s residual functional capacity  
2 (“RFC”).<sup>1</sup> 20 C.F.R. § 416.920(e). The RFC must consider all of the claimant’s impairments,  
3 including those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security  
4 Ruling (“SSR”) 96-8p. If the claimant cannot perform his or her past relevant work or has no  
5 past relevant work, the ALJ proceeds to the fifth step and must determine whether the  
6 impairment prevents the claimant from performing any other substantial gainful activity.  
7 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

8 The claimant bears the burden of proving steps one through four, consistent with the  
9 general rule that at all times the burden is on the claimant to establish his or her entitlement  
10 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the  
11 claimant, the burden shifts to the Commissioner to show that the claimant may perform other  
12 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a  
13 finding that a claimant is not disabled at step five, the Commissioner must provide evidence  
14 demonstrating that other work exists in significant numbers in the national economy that the  
15 claimant can do, given the RFC, age, education, and work experience. 20 C.F.R. §  
16 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and  
17 entitled to benefits. Id.

## 18 DISCUSSION

19 The ALJ considered and properly discounted Plaintiff’s subjective pain complaints and  
20 her mother’s statements in determining Plaintiff’s RFC. Substantial evidence supports these  
21 determinations. The ALJ’s step five determination that Plaintiff can perform other jobs in the  
22 national economy is supported by substantial evidence and free of legal error.

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27 <sup>1</sup> Residual functional capacity (“RFC”) is what one “can still do despite [his or her]  
28 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R.  
§§ 404.1545(a)(1), 416.945(a)(1).

1           **A.     Plaintiff’s Abdominal Pain**

2           In 2006, Plaintiff underwent a difficult gallbladder surgery that was botched. (AR 14.)  
3 The surgical team left a sponge pad inside her, resulting in an abscess. (AR 24.) In all,  
4 Plaintiff underwent three surgeries. (AR 14, 24.)

5           At the February 11, 2009, hearing, Claimant testified that she cannot work because of  
6 continuing severe abdominal pain since the gallstone surgeries. (AR 25.) She also alleged  
7 back and chest pain. (AR 25.)

8           Dr. Landau, a non-examining, non-treating expert, reviewed Plaintiff’s medical  
9 records. He identified as medically determinable impairments “chronic abdominal pain of  
10 undetermined cause,” obesity, fatty liver, and psychiatric disorders. (AR 27.)

11           As to the alleged continuing abdominal pain, Dr. Landau noted that the abscess had  
12 been resolved. (AR 29.) There also had been numerous CT scans of the abdominal area  
13 that were unremarkable (AR 27), showing no intestinal obstructions. (AR 29.) Dr. Landau  
14 testified that there was no objective illness, pathology or etiology that would explain the  
15 severe degree of pain alleged, notwithstanding extensive investigations. (AR 27-29.) He  
16 noted that one treatment record ascribed possible “psychogenic” pain as a diagnosis. (AR  
17 14-15, 27, 29, 583.)

18           Dr. Landau assessed Plaintiff’s RFC as able to stand, walk or sit for six hours, and  
19 able to lift up to 10 pounds frequently or occasionally. (AR 27.) He testified that Plaintiff  
20 could climb stairs but not ladders or work at heights or operate motorized equipment. (AR  
21 27.) Accepting these limitations, the ALJ found that Plaintiff could perform limited light work.  
22 (AR 12.)

23           The ALJ relied heavily on Dr. Landau’s testimony in discounting Plaintiff’s abdominal  
24 pain allegations. (AR 15.) The ALJ was entitled to do so. The opinion of a non-examining,  
25 non-treating physician constitutes substantial evidence when not contradicted by all other  
26 evidence and when it is consistent with and supported by independent medical evidence in  
27 the record. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995); Lester v. Chater, 81

1 F.3d 821, 830-31 (9th Cir. 1996); Morgan, 169 F.3d at 600. Dr. Landau’s opinion was based  
2 on all the medical evidence (AR 28-29), none of which was disputed or rebutted.

3 **B. The ALJ Properly Discounted Claimant’s**  
4 **And Claimant’s Mother’s Credibility**

5 Plaintiff alleges continuing, chronic, severe abdominal pain since her 2006 gallbladder  
6 surgery. The ALJ discounted Plaintiff’s subjective pain testimony as to her alleged  
7 abdominal pain. Plaintiff’s sole challenge here is to that determination.

8 The ALJ found that Plaintiff’s medically determinable severe impairments reasonably  
9 could be expected to produce her alleged symptoms. (AR 14.) Nonetheless, the ALJ  
10 determined that Plaintiff’s statements about the intensity, persistence and limiting effects of  
11 her symptoms “are not credible to the extent they are inconsistent with the above residual  
12 functional capacity assessment.” (AR 14.) The ALJ’s credibility finding is supported by  
13 substantial evidence.

14 The test for deciding whether to accept a claimant’s subjective symptom testimony  
15 turns on whether the claimant produces objective medical evidence of an impairment that  
16 reasonably could be expected to produce the pain or other symptoms alleged. Bunnell v.  
17 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.  
18 1998); Smolen v. Chater, 80 F.3d 1273, 1281-82 esp. n. 2 (9th Cir. 1995); Cotton v. Bowen,  
19 799 F.2d 1403, 1407 (9th Cir. 1986). Once the claimant produces objective medical  
20 evidence of an underlying impairment, the ALJ may not discredit a claimant’s testimony on  
21 the severity of symptoms merely because they are unsupported by objective medical  
22 evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the  
23 claimant’s subjective symptom testimony not credible, the ALJ must make specific findings  
24 that support this conclusion. Bunnell, 947 F.2d at 345. The ALJ must set forth “findings  
25 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit  
26 claimant’s testimony.” Thomas v. Barnhart, 278 F.3d 949, 958 (9th Cir. 2002); Rollins v.  
27 Massanari, 261 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345. Unless there is  
28 evidence of malingering, the ALJ can reject the claimant’s testimony about the severity of a

1 claimant's symptoms only by offering "specific, clear and convincing reasons for doing so."  
2 Reddick, 157 F.3d 722; Smolen, 80 F.3d at 1283-84. The ALJ must identify what testimony  
3 is not credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722;  
4 Smolen, 80 F.3d at 1284.

5 In this case, the ALJ did not make any finding of malingering. Thus, the ALJ can  
6 reject Claimant's testimony on the severity of her abdominal pain only with "specific, clear  
7 and convincing reasons." Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1283-84. The ALJ  
8 did so.

9 First, the ALJ proffered that, notwithstanding extensive investigation, there was no  
10 pathology or illness that would support Plaintiff's abdominal pain symptoms and that none of  
11 the medical source opinions found a severe impairment or any limitations. (AR 15, 514, 535,  
12 593, 616-17, 635.) The lack of objective medical evidence, however, is not by itself  
13 dispositive. Bunnell, 947 F.2d at 345 (once the claimant produces objective medical  
14 evidence of an underlying impairment, an adjudicator may not reject a claimant's subjective  
15 complaints based solely on a lack of objective medical evidence); Rollins v. Massanari, 261  
16 F.3d 853, 857 (9th Cir. 2001) (subjective testimony cannot be rejected on "sole" ground that  
17 objective medical evidence is lacking). There must be other evidence. Even though not  
18 determinative of the severity of pain, the medical evidence is nonetheless a relevant factor in  
19 evaluating a claimant's subjective symptoms. Rollins, 261 F.3d at 857; Smolen, 80 F.3d at  
20 1285. Here, the medical evidence is compelling and un rebutted.

21 Second, the ALJ noted that, despite Plaintiff's pain allegations, she was taking only  
22 over the counter pain medications. Conservative treatment is an indication that the pain is  
23 not as intense as alleged. Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (evidence of  
24 conservative treatment or lack of treatment is sufficient to discount a claimant's testimony  
25 regarding the severity of his or her pain); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir.  
26 1995) (same). No physician has prescribed medication or treatment for her abdominal pain  
27 because there is no etiology for it. (AR 16.)

1 Third, the ALJ observed that, despite Plaintiff's claim that she is bedridden most of the  
2 time (AR 212, 205, 36), there was no muscle atrophy. Meanel v. Apfel, 172 F.3d 1111, 1114  
3 (9th Cir. 1999) (likely consequence of debilitating pain is inactivity and likely consequence of  
4 inactivity is muscular atrophy).

5 The Court does not credit the ALJ's assertion that Plaintiff did not need a cane  
6 because Plaintiff never asserted she did and, in any event, the cane related to lumbar  
7 difficulties not her abdominal pain. The fact that one reason offered by the ALJ is not a  
8 proper basis to discount a claimant's credibility does not mean the ALJ's overall  
9 determination of Plaintiff's credibility is incorrect. Batson v. Comm'r, 359 F.3d 1190, 1197  
10 (9th Cir. 2004) (even if one reason improper, such error does not negate overall correctness  
11 of ALJ credibility determination).

12 The Court also does not credit the Commissioner's assertion that Plaintiff's  
13 performance of ordinary mental and physical activities of daily life undermines her pain  
14 allegations. The ALJ did not make that assertion or find that Plaintiff's daily activities  
15 translated to the workplace. (AR 13.) See, e.g., Burch, 400 F.3d at 681 (daily activities are a  
16 reasonable basis to discredit a claimant's credibility if transferable to the work place).

17 The ALJ properly considered and rejected Plaintiff's mother's statements. (AR 14,  
18 206, 208, 215-20.) An ALJ can reject lay witness evidence for reasons germane to each  
19 witness whose testimony he rejects. Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009);  
20 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Here, the ALJ found the mother's  
21 statements were not supported by objective medical evidence. (AR 14.) See Bayliss v.  
22 Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (inconsistency with the medical evidence is  
23 reason to reject lay witness testimony). The ALJ also noted the mother's financial self-  
24 interest which was not an unreasonable consideration. Bunnell, 947 F.2d at 346 (ALJ can  
25 use normal techniques of credibility evaluation to determine the validity of subjective  
26 complaints).



1 The ALJ properly discounted Plaintiff's credibility because he made findings  
2 sufficiently specific to permit the court to conclude that Claimant's testimony was not  
3 arbitrarily discredited. Thomas, 278 F.3d at 958; Bunnell, 947 F.2d at 345-46 (ALJ findings  
4 entitled to deference if properly supported by record and sufficiently specific to allow  
5 reviewing court to conclude that the ALJ rejected claimant's testimony on permissible  
6 grounds and did not arbitrarily discredit claimant's subjective pain symptoms). Determining  
7 credibility is generally the province of the ALJ. Andrews, 55 F.3d at 1043.

8 The ALJ properly discounted Plaintiff's pain symptoms for specific clear and  
9 convincing reasons based on substantial evidence.

10 **ORDER**

11 IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the  
12 Commissioner of Social Security and dismissing the case with prejudice.

13 LET JUDGMENT BE ENTERED ACCORDINGLY.

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15 DATED: October 7, 2010

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE