

O

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 CENTRAL DISTRICT OF CALIFORNIA  
8 EASTERN DIVISION  
9

10 DEBRA PHILLIPS, ) Case No. EDCV 10-1204-MLG  
11 )  
12 Plaintiff, ) MEMORANDUM OPINION AND ORDER  
13 )  
14 v. )  
15 )  
16 MICHAEL J. ASTRUE, )  
17 Commissioner of the Social )  
18 Security Administration, )  
19 )  
20 )  
21 Defendant. )  
22 )  
23 )

24 Plaintiff Debra Phillips seeks judicial review of the  
25 Commissioner's final decision denying her application for Social  
26 Security Disability Insurance ("SSDI") benefits. For the reasons set  
27 forth below, the final decision of the Commissioner is affirmed.  
28

23 **I. Background**

24 Plaintiff was born on January 8, 1954 and was 55 years old at the  
25 time of the administrative hearing. (AR 15, 118.) She has completed one  
26 year of college and has work experience as a school secretary. (AR 133,  
27 135.) Plaintiff filed her application for SSDI benefits on November 13,  
28 2007, alleging disability as of January 30, 2001 due to carpal tunnel

1 syndrome, essential hypertension, back pain, discogenic and degenerative  
2 disorders of the back, arthritis, migraines and depression.  
3 (Administrative Record ("AR") 118, 124.)

4 The current application was denied initially on May 19, 2008 and  
5 upon reconsideration on July 18, 2008. (AR 59-62, 69-73). An  
6 administrative hearing was held on August 3, 2009 before Administrative  
7 Law Judge ("ALJ") Michael D. Radensky. Plaintiff, who was represented by  
8 an attorney, testified, as did a vocational expert. (AR 20-43.)

9 On October 13, 2009, ALJ Radensky denied Plaintiff's application  
10 for benefits. (AR 10-17.) The ALJ found that Plaintiff had not engaged  
11 in substantial gainful activity during the period from April 18, 2007<sup>1</sup>  
12 though the date last insured of December 31, 2007.<sup>2</sup> (AR 12.) The ALJ  
13 found that Plaintiff had the following severe impairments: back pain,  
14

---

15  
16 <sup>1</sup> Plaintiff had previously filed an application for benefits, which  
17 was denied in an unfavorable decision on April 17, 2007. (AR 44-56.)  
18 Plaintiff did not appeal that decision. The principles of res judicata  
19 apply to administrative decisions. An earlier final determination of  
20 nondisability creates a presumption of continuing nondisability with  
21 respect to any subsequent unadjudicated period of alleged disability.  
22 See *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996); see also *Miller*  
23 *v. Heckler*, 770 F.2d 845, 848 (9th Cir. 1985); *Lyle v. Secretary of*  
24 *Health and Human Services*, 700 F.2d 566, 568-69 (9th Cir. 1983); Social  
25 Security Acquiescence Ruling 97-4(9). This presumption may be overcome  
26 by a showing of "changed circumstances." *Chavez v. Bowen*, 844 F.2d 691,  
27 693 (9th Cir. 1988); *Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir.  
28 1985). To show "changed circumstances," the evidence must establish that  
the claimant suffers from an impairment that indicates a greater  
disability since the prior decision denying benefits. *Chavez*, 844 F.2d  
at 693. The ALJ found that Plaintiff had not overcome this presumption  
as to her current application.

25  
26 <sup>2</sup> Plaintiff's date last insured was December 31, 2007. In order to  
27 qualify for disability insurance benefits, Plaintiff was required to  
28 establish that she was disabled on or before the date her insured status  
expired. 20 C.F.R. §404.131(b)(1); *Vincent ex rel. Vincent v. Heckler*,  
739 F.2d 1393, 1394 (9th Cir. 1984); *Flaten v. Secretary of Health &*  
*Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995).

1 status post bilateral carpal tunnel releases, and obesity. (Id.)  
2 However, the ALJ determined that Plaintiff's impairments did not meet or  
3 were not medically equal to, one of the listed impairments in 20 C.F.R.,  
4 Part 404, Subpart P, Appendix 1. (AR 13.)

5 The ALJ adopted the previous ALJ decision in finding that, between  
6 April 18, 2007 and December 31, 2007, Plaintiff retained the residual  
7 functional capacity ("RFC") to "lift 20 pounds occasionally and 10  
8 pounds frequently, stand and/or walk six hours in an eight-hour workday,  
9 and sit six hours in an eight hour workday. The claimant must avoid work  
10 at unprotected heights or work on dangerous machinery. She can  
11 occasionally stoop, kneel, crouch, and crawl. She can never climb or  
12 balance. She is precluded from power gripping. She is limited to a  
13 maximum of two hours of keyboarding per day, 15 minutes at a time." (AR  
14 13.) The ALJ determined that Plaintiff was unable to perform any past  
15 relevant work. (AR 15.) However, the ALJ concluded, based upon the  
16 testimony of the VE, that Plaintiff was capable of performing various  
17 other jobs that exist in significant numbers in the national economy.  
18 (AR 16.) Therefore, the ALJ concluded that Plaintiff was not disabled  
19 within the meaning of the Social Security Act. 20 C.F.R. § 416.920(f).  
20 (Id.)

21 On July 28, 2010, the Appeals Council denied review (AR 1-4), and  
22 Plaintiff timely commenced this action for judicial review. On March 22,  
23 2011, the parties filed a Joint Stipulation ("Joint Stip.") of disputed  
24 facts and issues, in which Plaintiff claims that (1) the ALJ failed to  
25 properly consider lay witness testimony and (2) the ALJ failed to  
26 properly consider a treating physician's opinion. (Joint Stip. 3.)  
27 Plaintiff asks the Court to order an award of benefits, or in the  
28 alternative, remand for further proceedings. (Joint Stip. 18.) The

1 Commissioner requests that the ALJ's decision be affirmed. (Id.)

2  
3 **II. Standard of Review**

4 Under 42 U.S.C. § 405(g), a district court may review the  
5 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
6 decision must be upheld unless "the ALJ's findings are based on legal  
7 error or are not supported by substantial evidence in the record as a  
8 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*  
9 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means  
10 such evidence as a reasonable person might accept as adequate to support  
11 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*  
12 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a  
13 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,  
14 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial  
15 evidence supports a finding, the reviewing court "must review the  
16 administrative record as a whole, weighing both the evidence that  
17 supports and the evidence that detracts from the Commissioner's  
18 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
19 the evidence can support either affirming or reversing the ALJ's  
20 conclusion," the reviewing court "may not substitute its judgment for  
21 that of the ALJ." *Robbins*, 466 F.3d at 882.

22  
23 **III. Discussion**

24 **A. The ALJ Did Not Err In Failing to Discuss the Lay Witness**  
25 **Report Provided by Plaintiff's Sister**

26 Plaintiff contends that the ALJ failed to properly consider the  
27 written statements submitted by Plaintiff's sister, Sharon Davis. (Joint  
28 Stip. 3.) On March 18, 2008, Ms. Davis completed a "Function Report -

1 Adult - Third Party" form describing Plaintiff's daily activities and  
2 other functions. (AR 156-163.) Plaintiff argues that the ALJ erred by  
3 failing to discuss this report and by failing to provide germane reasons  
4 for doing so. The Commissioner argues that any error was harmless. The  
5 Court agrees.

6 The testimony of lay witnesses regarding their own observations of  
7 the claimant's impairments constitutes competent evidence that must be  
8 taken into account and evaluated by the Commissioner in the disability  
9 evaluation. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009);  
10 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006). Such  
11 testimony cannot be discounted unless the ALJ gives reasons that are  
12 germane to that witness. *Carmickle v. Commissioner, Social Sec. Admin.*,  
13 533 F.3d 1155, 1164 (9th Cir. 2008); *Stout v. Commissioner*, 454 F.3d  
14 1050, 1053 (9th Cir. 2006) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919  
15 (9th Cir. 1993)); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir.  
16 2005); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). "[W]here the  
17 ALJ's error lies in a failure to properly discuss competent lay  
18 testimony favorable to the claimant, a reviewing court cannot consider  
19 the error harmless unless it can confidently conclude that no reasonable  
20 ALJ, when fully crediting the testimony, could have reached a different  
21 disability determination." *Stout*, 454 F.3d at 1056.

22 The ALJ's failure to address Ms. Davis's written statement was  
23 harmless error under *Stout*. Ms. Davis's statements about Plaintiff's  
24 symptoms were substantially similar to Plaintiff's own statements. For  
25 example, Ms. Davis noted that Plaintiff had trouble sleeping, needed  
26 assistance in bathing and dressing, and needed to be reminded to  
27 complete various tasks. (AR 157-158.) Plaintiff similarly reported that  
28 she had difficulty sleeping, had trouble dressing herself and had

1 difficulty in following directions. (AR 145-50.) Ms. Davis reported that  
2 Plaintiff had stiffness and joint pain, as well as pain in her hands  
3 and wrists, which affected her ability to lift, walk, climb stairs and  
4 use her hands. (TR 161.) Similarly, Plaintiff reported that her  
5 impairment negatively affected her ability to lift, walk, climb stairs,  
6 and use her hands. (TR 150-151.) Plaintiff's testimony at the  
7 administrative hearing was largely the same as her sister's written  
8 statements. (AR 21-38.)

9       The ALJ fully addressed Plaintiff's subjective testimony and  
10 discounted it as not fully credible, a finding which Plaintiff does not  
11 challenge here. (AR 14-15.) Thus, because Ms. Davis's report mirrored  
12 Plaintiff's subjective testimony, this evidence did not add substantial  
13 weight to Plaintiff's claim. Under these circumstances, the failure to  
14 address this evidence was inconsequential to the ultimate determination  
15 of non-disability. *Stout*, 454 F.3d at 1055. *See, e.g., Genovez v.*  
16 *Astrue*, 2011 WL 92995, at \*2 (C.D.Cal. 2011) (the failure to address lay  
17 witness testimony was harmless because the testimony was substantially  
18 similar to the statements made by the claimant); *Lonian v. Astrue*, 2010  
19 WL 4916605, at \*4 (C.D. Cal. 2010) (the ALJ did not err by failing to  
20 discuss a letter submitted by two lay witnesses where the statements  
21 were similar to the claimant's own testimony).

22       In addition, unlike lay *testimony*, there is no controlling  
23 precedent requiring an ALJ to explicitly address *written* statements,  
24 such as the "Function Report - Adult - Third Party" form in this case.  
25 Indeed, it is clear that an ALJ is not required to discuss all evidence  
26 in the record in detail. *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th  
27 Cir. 2003). Accordingly, Plaintiff's claim is without merit.

28 //

1           **B. The ALJ Properly Considered the Opinion of Plaintiff's**  
2           **Treating Physician**

3           Plaintiff contends that the ALJ erred by rejecting a "Multiple  
4 Impairment Questionnaire" dated May 11, 2007, which was completed by  
5 Plaintiff's treating physician, Dr. John R. Sharpe, M.D. (Joint Stip.  
6 9.) The report provides various observations regarding Plaintiff's  
7 impairments and symptoms as well as her ability to complete work-related  
8 tasks. (AR 201-208.) In discussing Dr. Sharpe's report, the ALJ stated  
9 as follows:

10           The undersigned has reviewed the multiple impairment  
11 questionnaire signed on May 11, 2007 by Dr. John Sharpe, M.D.,  
12 a family practitioner. Dr. Sharpe stated in that questionnaire  
13 that his responses were based on an examination done on  
14 October 3, 2006 and that he had not seen the claimant since  
15 that time. This is the only medical evidence submitted in  
16 connection with the current claim which is dated between April  
17 18, 2007 and December 31, 2007 but it relates to an  
18 examination that predated the Administrative Law Judge  
19 decision.

20 (AR 13.)

21           It was proper for the ALJ not to accord significant weight to Dr.  
22 Sharpe's report because he had not treated Plaintiff since October 3,  
23 2006, more than seven months prior to the date of the report and prior  
24 to the relevant time period of April 18, 2007 through December 31, 2007.  
25 Moreover, because Dr. Sharpe had not examined Plaintiff since October 3,  
26 2006, a time covered by the previous unfavorable ALJ decision, the ALJ  
27 properly determined that Dr. Sharpe's report was not relevant to  
28 determining disability within the relevant period of April 18, 2007

1 through December 31, 2007.

2 Plaintiff contends that, if the ALJ was unsure whether this was a  
3 valid and current opinion as of May 11, 2007, the date of the report,  
4 the ALJ had a duty to re-contact Dr. Sharpe. (Joint Stip. 13.) A  
5 disability applicant bears the burden of proving disability and must  
6 provide medical evidence demonstrating the existence and severity of an  
7 alleged impairment. See *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir.  
8 2001); 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. § 416.912©. Nonetheless, an  
9 ALJ has a "duty to develop the record fully and fairly and to ensure  
10 that the claimant's interests are considered, even when the claimant is  
11 represented by counsel." *Mayes*, 276 F.3d at 459. An ALJ's duty to  
12 augment an existing record is triggered "only when there is ambiguous  
13 evidence or when the record is inadequate to allow for proper evaluation  
14 of the evidence." *Id.* (citing *Tonapetyen v. Halter*, 242 F.3d 1144, 1150  
15 (9th Cir. 2001)).

16 Contrary to Plaintiff's contention, the ALJ had no duty to re-  
17 contact Dr. Sharpe because there were no ambiguous or inadequate medical  
18 records which would trigger the ALJ's duty to further develop the  
19 record. Rather, Dr. Sharpe's form unequivocally stated that he had not  
20 examined Plaintiff since October 3, 2006 (TR 201), a date outside of the  
21 relevant disability period. If medical records existed that were  
22 relevant to the period of disability, either Plaintiff herself or her  
23 attorney could have procured these records, rather than expecting the  
24 ALJ to do so. See *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987) ("It is  
25 not unreasonable to require the claimant, who is in a better position to  
26 provide information about his own medical condition, to do so."); *Duenas*  
27 *v. Shalala*, 34 F.3d 719, 722 (9th Cir. 1994).

28 //



1           Moreover, Dr. Sharpe's assessments of Plaintiff's impairments and  
2 ability to complete work-related tasks was contradicted by the opinions  
3 of the examining consultative physicians. The ALJ properly relied upon  
4 the opinions of the examining consultative physicians, Drs. Keith J.  
5 Wahl, M.D., S. Khan, M.D., and F. Kalmar, M.D., each of whom "opined  
6 that the evidence submitted with the current application did not  
7 document any additional impairment or worsening of impairments since the  
8 claimant's date last insured" of December 31, 2007. (AR 14, 264-266,  
9 267-278, 279-280.) The opinion of an examining physician can constitute  
10 substantial evidence when the opinion is consistent with independent  
11 clinical findings or other evidence in the record. *See Thomas v.*  
12 *Barnhart*, 278 F.3d 948, 957 (9th Cir. 2002).

13           In sum, the ALJ accorded proper weight to Dr. Sharpe's opinion, and  
14 therefore Plaintiff is not entitled to relief on this issue.

15  
16 **IV. Conclusion**

17           For the reasons stated above, the decision of the Social Security  
18 Commissioner is **AFFIRMED**.

19  
20 DATED: March 31, 2011

21  
22 

23 \_\_\_\_\_  
24 Marc L. Goldman  
25 United States Magistrate Judge  
26  
27  
28