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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHANI GUTIERREZ,)	NO. ED CV 11-1650-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
MICHAEL J. ASTRUE, COMMISSIONER)	
OF SOCIAL SECURITY,)	
)	
Defendant.)	
_____)	

PROCEEDINGS

Plaintiff filed a Complaint on October 25, 2011, seeking review of the Commissioner's denial of benefits. The parties filed a consent to proceed before a United States Magistrate Judge on November 8, 2011.

Plaintiff filed a motion for summary judgment on March 23, 2012.¹ Defendant filed a cross-motion for summary judgment on April 19, 2012.

¹ Plaintiff's motion violates paragraph VI of this Court's "Order," filed October 27, 2011. Counsel for Plaintiff shall heed the Court's orders in the future.

1 The Court has taken both motions under submission without oral
2 argument. See L.R. 7-15; "Order," filed October 27, 2011.

3
4 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

5
6 Plaintiff alleges disability since August 9, 2007, based on
7 alleged "chronic [hepatitis] C, [cirrhosis] of the liver, severe
8 fatigue, complications breathing, bones ache, muscle cramps[,]
9 [d]epression and anxiety" (Administrative Record ("A.R.") 114-121,
10 135).² An administrative law judge ("ALJ") examined the record and
11 heard testimony from Plaintiff and a vocational expert (A.R. 21-42).

12
13 The ALJ found that Plaintiff has severe cirrhosis of the liver
14 secondary to hepatitis C, but retains the residual functional capacity
15 to perform a full range of medium work, limited only by not working
16 with heavy machinery (A.R. 13-14). The ALJ found, inter alia, that
17 with these limitations Plaintiff could perform her past relevant work
18 as a nurse assistant, quality control inspector, assembler of small
19 products, and general clerk "as actually and generally performed"
20 (A.R. 16-17 (adopting vocational expert testimony at A.R. 36-40)).
21 Consequently, the ALJ found Plaintiff not disabled. Id. The Appeals
22 Council denied review (A.R. 1-3).

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27 _____
28 ² Plaintiff filed later applications for benefits
alleging the same onset dates (A.R. 122-28).

1 findings are supported by substantial evidence and are free from
2 material³ legal error. Plaintiff's contrary contentions are
3 unavailing.

4
5 **I. Substantial Evidence Supports the Conclusion Plaintiff Can Work.**

6
7 Substantial evidence supports the ALJ's finding that Plaintiff is
8 not disabled. Consultative examiners found Plaintiff to be
9 essentially unimpaired, and Plaintiff's treating physician offered no
10 opinion regarding Plaintiff's functional capacity.

11
12 **A. Summary of the Medical Record**

13
14 Dr. Rakesh Chopra began treating Plaintiff in January 2007 for
15 hepatitis, which was discovered during a routine physical examination
16 (A.R. 277-78). Dr. Chopra's available treatment records consist
17 primarily of laboratory reports from blood tests and letters (A.R.
18 219-78). A liver core biopsy performed on March 6, 2007, showed
19 findings suggestive of chronic hepatitis C, grade 2-3, with some
20 fibrosis (A.R. 187-88; see also A.R. 230-31 (ultrasound of same date
21 showing no evidence of intrapelvic abnormality)).

22
23 Blood tests also showed evidence of liver disease. Plaintiff's
24 "HCV RNA, Qualitative" measures were well above the reference range.
25 See A.R. 222, 240, 250 (tests showing virus levels of 724,000,

26
27

³ The harmless error rule applies to the review of
28 administrative decisions regarding disability. See Burch v.
Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

1 240,000, and 162,000, over the course of Plaintiff's treatment).⁴
2 Hepatic function blood panels from January and August 2007, and from
3 April and May 2008, showed that Plaintiff's "AST" and "ALT" levels
4 were elevated above the reference ranges, whereas a test from January
5 2008 showed AST and ALT levels within the reference ranges (A.R. 236,
6 238, 241, 245, 251).⁵ Other tests from August and September 2007
7 showed elevated AST levels only (A.R. 242-44). A hepatic function
8 blood panel from February 18, 2009, showed that Plaintiff's albumin
9 was slightly below the reference range, but otherwise her results were
10 within the reference ranges, including her AST and ALT levels (A.R.
11 220). When Plaintiff was tested again on March 31, 2009, her hepatic
12 function blood panel showed that Plaintiff's albumin was slightly
13 below the reference range, but her AST and ALT levels once again were

14
15 ⁴ The HCV RNA, Qualitative test is reported as positive
or detected if any hepatitis viral RNA is found. The test:

16 detects and measures the number of viral RNA particles
17 in the blood. Viral load tests are often used before
18 and during treatment to help determine response to
19 treatment by comparing the amount of virus before and
20 during treatment (usually at several points in the
21 first three months of treatment). Successful treatment
22 causes a decrease of 99% or more (2 logs) in viral load
soon after starting treatment (as early as 4-12 weeks)
and usually leads to viral load being not detected even
after treatment is completed.

23 See American Association for Clinical Chemistry, Hepatitis C
24 (available online at <http://labtestsonline.org/understanding/analytes/hepatitis-c/tab/test> (last visited May 22, 2012)).

25 ⁵ AST (aspartate aminotransferase) and ALT (alanine
26 transaminase) are enzymes found in high amounts in the liver.
Diseases that affect liver cells increase the levels of AST and
27 ALT. See AST (available online at <http://www.nlm.nih.gov/medlineplus/ency/article/003472.htm> (last visited May 21, 2012)),
28 and ALT (available online at <http://www.nlm.nih.gov/medlineplus/ency/article/003473.htm> (last visited May 21, 2012)).

1 above the reference ranges (A.R. 227).

2
3 An October 5, 2007 letter from Dr. Chopra states that Plaintiff
4 has chronic hepatitis C with complaints of excess fatigue, weakness,
5 lack of energy, and generalized muscle aches and pains, "likely due to
6 hepatitis C" (A.R. 271). A March 10, 2008 letter states that
7 Plaintiff then had been treated for six months for her hepatitis and,
8 while her viral load had come down from 75,000 to 25,000 suggesting a
9 "partial response," Dr. Chopra opined that Plaintiff "obviously is not
10 a responder" (A.R. 269).

11
12 The last letter from Dr. Chopra is dated May 1, 2009, and
13 provides:

14
15 This letter is to inform the condition of our patient Shani
16 Gutierrez. Ms. Gutierrez has stage 3 liver disease and has
17 undergone treatment for her condition twice already. While
18 undergoing treatment, Ms. Gutierrez was non-responsive to
19 both treatments tried. Due to the heavy dosage of the
20 treatment, patient experiences severe side effects such as
21 anemia, hair lost [sic], depression, pain, and insomnia. If
22 you have any further questions or concerns, please feel free
23 to contact my office.

24
25 (A.R. 219). Dr. Chopra did not indicate what other options may be
26 available for treating Plaintiff's liver disease, and did not offer an
27 opinion concerning any restrictions on Plaintiff's ability to work.

28 ///

1 Dr. Bryan To performed an independent internal medicine
2 evaluation of Plaintiff dated February 4, 2009 (A.R. 193-97).
3 Plaintiff reported current liver treatment with Infergen and RibaPak,⁶
4 with side effects of fatigue, nausea, and muscle and bone pain (A.R.
5 193). Dr. To ordered a hepatic function blood test that showed an
6 "AST (SGOT)" level above the reference range but otherwise normal
7 blood references (A.R. 198). Physical examination revealed only
8 complaints of pain on range of motion (A.R. 195-96). Dr. To opined
9 that Plaintiff would be capable of pushing, pulling, lifting, and
10 carrying 50 pounds occasionally, 25 pounds frequently, standing and
11 walking six hours in an eight-hour workday, sitting without
12 limitation, frequently walking on uneven terrain, climbing ladders, or
13 working with heights, and frequently bending, kneeling, stooping,
14 crawling, and crouching, but could perform no work with heavy and
15 moving machinery (A.R. 196-97).

16
17 State agency physician Dr. F. Kalmar completed a Physical
18 Residual Functional Capacity Assessment form for Plaintiff dated
19 February 27, 2009 (A.R. 199-203). Dr. Kalmar reviewed Plaintiff's
20 March 2007 liver biopsy findings, blood test results including the
21 current hepatic function blood test, and Dr. To's evaluation (A.R.
22 204-05). Dr. Kalmar opined that Plaintiff would have the residual

23
24 ⁶ Infergen is the brand name for an interferon alfacon-1
25 injection which helps to prevent the hepatitis C virus from
26 growing. See Interferon Alfacon-1 Injection (available online at
27 [http://www.nlm.nih.gov/medlineplus/
28 druginfo/meds/a601150.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a601150.html) (last visited May 21, 2012)). Ribavirin is a drug used with an
interferon medication to help stop the virus that causes
hepatitis C from spreading inside the body. See Ribavirin
(available online at [http://www.nlm.nih.gov/medlineplus/
druginfo/meds/a605018.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a605018.html) (last visited May 21, 2012)).

1 functional capacity to perform medium work with no limitations (A.R.
2 199-203). A second State agency physician affirmed the medium
3 residual functional capacity assessment for Plaintiff on June 4, 2009
4 (A.R. 281-82).

5
6 Dr. John S. Woodard performed a complete psychiatric evaluation
7 of Plaintiff dated February 3, 2009 (A.R. 190-92). Plaintiff reported
8 suffering from depression and anxiety and periodic insomnia, but had
9 never had any psychiatric treatment (A.R. 190). Dr. Woodard diagnosed
10 Plaintiff with depressive disorder, not otherwise specified, and
11 opined that Plaintiff's prognosis was fair for improvement with
12 appropriate treatment (A.R. 192). Dr. Woodard opined that Plaintiff
13 would have only "slight" impairment in: (1) interacting with
14 supervisors and coworkers and with the public; (2) maintaining
15 concentration and attention; (3) withstanding normal stresses and
16 pressures in the workplace; (4) performing detailed, complex tasks;
17 and (5) completing a normal workweek without interruption (A.R. 192).

18
19 State agency physician Dr. S. Khan completed a Psychiatric Review
20 Technique form for Plaintiff dated March 2, 2009 (A.R. 206-16). Dr.
21 Khan opined that Plaintiff would have only mild difficulties in
22 maintaining social functioning and in maintaining concentration,
23 persistence, or pace (A.R. 214). Dr. Khan believed that Plaintiff's
24 psychiatric symptoms do not significantly decrease/impact Plaintiff's
25 ability to function (A.R. 216-18).

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1 **B. Analysis**

2
3 The ALJ found that Plaintiff would be capable of performing
4 medium work based on Dr. To's and Dr. Woodard's consultative
5 evaluations and the State agency physicians' concurrence (A.R. 14-16).
6 The consultative examiners' findings constitute substantial evidence
7 supporting the ALJ's decision. See Tonapetyan v. Halter, 242 F.3d
8 1144, 1149 (9th Cir. 2001) (consulting examiner's opinion is
9 substantial evidence that can support an ALJ's finding of
10 nondisability); see also Orn v. Astrue, 495 F.3d 625, 632 (9th Cir.
11 2007) (examining physician's independent clinical findings are
12 substantial evidence). The opinions of the non-examining State agency
13 physicians provide additional support for the ALJ's decision. See
14 Tonapetyan v. Halter, 242 F.3d at 1149 (non-examining physician's
15 opinion may constitute substantial evidence when opinion is consistent
16 with independent evidence of record); Lester v. Chater, 81 F.3d 821,
17 831 (9th Cir. 1995) (same).

18
19 Having found that Plaintiff retains the residual functional
20 capacity to perform medium work limited only by not working with heavy
21 machinery, the ALJ relied on the testimony of a vocational expert to
22 conclude that a person with Plaintiff's residual functional capacity
23 can perform her past relevant work as actually and generally performed
24 (A.R. 16-17). The vocational expert's testimony constitutes
25 substantial evidence supporting the ALJ's decision that Plaintiff is
26 not disabled. See Bray v. Commissioner of Social Security Admin., 554
27 F.3d 1219, 1228 (9th Cir. 2009) (vocational expert opinion evidence is
28 reliable to support a finding that a claimant can work if hypothetical

1 "set[s] out all the limitations and restrictions of a particular
2 claimant") (citation omitted); see also Hubble v. Astrue, 2012 WL
3 258406, at *2 (9th Cir. Jan. 30, 2012) (finding no error in ALJ's
4 conclusion that claimant was capable of performing her past relevant
5 work as generally performed in the national economy, based on a
6 hypothetical presenting claimant's residual functional capacity).⁷

7
8 **II. The ALJ Did Not Commit Any Material Error in Finding that**
9 **Plaintiff Can Perform Her Past Relevant Work.**

10
11 Plaintiff alleges that the ALJ's decision finding that Plaintiff
12 could perform her past relevant work did not sufficiently discuss the
13 physical and mental demands of the work. See Plaintiff's Motion, pp.
14 2-5 (citing Social Security Ruling 82-62). An impairment must prevent
15 a claimant from doing past relevant work; if a claimant can still do
16 her past relevant work, she will be found not disabled. See 20 C.F.R.
17 § 404.1520(e). Social Security Ruling 82-62 provides, in relevant
18 part:

19
20 The claimant is the primary source for vocational
21 documentation, and statements by the claimant regarding past
22 work are generally sufficient for determining the skill
23 level, exertional demands and nonexertional demands of such
24 work. Determination of the claimant's ability to do [past
25 relevant work] requires a careful appraisal of (1) the

26
27 ⁷ The Court may cite unpublished Ninth Circuit opinions
28 issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir.
Rule 36-3(b).

1 individual's statements as to which past work requirements
2 can no longer be met and the reason(s) for his or her
3 inability to meet those requirements; (2) medical evidence
4 establishing how the impairment limits ability to meet the
5 physical and mental requirements of the work; and (3) in
6 some cases, supplementary or corroborative information from
7 other sources such as employers, the Dictionary of
8 Occupational Titles, etc., on the requirements of the work
9 as generally performed in the economy.

10
11 The decision as to whether the claimant retains the
12 functional capacity to perform past work which has current
13 relevance has far-reaching implications and must be
14 developed and explained fully in the disability decision.
15 Since this is an important and, in some instances, a
16 controlling issue, every effort must be made to secure
17 evidence that resolves the issue as clearly and explicitly
18 as circumstances permit.

19
20 See Social Security Ruling 82-62.⁸

21
22 A claimant bears the burden of proving that "a physical or mental
23 impairment prevents [her] from engaging in any of [her] previous
24 occupations." Sanchez v. Secretary, 812 F.2d 509, 511 (9th Cir.
25 1987); see Bowen v. Yuckert, 482 U.S. 137, 146-50 (1987). Plaintiff

26
27 ⁸ Social Security rulings are binding on the
28 Administration. Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th
Cir. 1990).

1 failed to carry this burden in the present case. The ALJ properly
2 found Plaintiff capable of performing her past relevant work, based on
3 the medical evidence in conjunction with Plaintiff's reported work
4 history, her Social Security earnings record, and the vocational
5 expert's testimony. See A.R. 17 (citing record including hearing
6 testimony and concluding, "In comparing the claimant's residual
7 functional capacity with the physical and mental demands of this work,
8 the undersigned finds that the claimant is able to perform it as
9 actually and generally performed."). While the ALJ could have
10 explained this portion of the decision more fully, the record was
11 sufficiently developed on the issue of Plaintiff's past relevant work
12 to support the ALJ's conclusions.

13
14 In response to questioning from a vocational expert, Plaintiff
15 testified that in her past relevant work as a quality control
16 inspector she lifted five pounds on average (A.R. 36-37). In her past
17 relevant work as an assembler of small parts, she reportedly just put
18 little parts together (A.R. 37). In her clerical jobs, Plaintiff
19 reportedly did filing, data entry, and answered phones (A.R. 37).
20 Plaintiff said those jobs were mostly sitting and did not involve
21 lifting much weight (A.R. 37-38).⁹

22
23 ⁹ In her Disability Report - Adult form, Plaintiff
24 reported that her job as a nurse assistant required her to walk
25 and stand seven hours in an eight-hour day, sit one hour, and
26 kneel seven hours (A.R. 136). The heaviest weight Plaintiff
27 lifted reportedly was 50 pounds (A.R. 136-37). In a Work History
28 Report form, Plaintiff reported that her job as a nurse assistant
required walking and standing six hours in an eight-hour day,
sitting two hours, kneeling one hour, reaching two hours, and
writing one hour (A.R. 159). In that form, the heaviest weight

(continued...)

1 The vocational expert testified that Plaintiff's past relevant
2 work as a nurse's assistant was a medium occupation generally and as
3 performed (A.R. 38). Plaintiff's past relevant work as a quality
4 control inspector and as an assembler of small parts were light
5 occupations generally and as performed (A.R. 38). Plaintiff's past
6 relevant work as a general office clerk was a light occupation, but
7 was sedentary as performed (A.R. 38-39). The vocational expert
8 testified that a person with the residual functional capacity the ALJ
9 found to exist could perform all of Plaintiff's past relevant work
10 (A.R. 39-40). If the person were limited to light work, she could
11 still perform the inspector, assembler, and clerical jobs (A.R. 40).
12 The vocational expert testified that the testimony given was
13 consistent with the Dictionary of Occupational Titles (A.R. 40).

14
15 The ALJ was entitled to rely on this record to find Plaintiff not
16 disabled at step four of the disability analysis. See Social Security
17 Ruling 82-62 (the claimant is the primary source for vocational
18 documentation, and a claimant's statements are generally sufficient
19 for determining the demands of past relevant work); Matthews v.
20 Shalala, 10 F.3d 678, 681 (9th Cir. 1983) (claimant's description of
21 past work is considered highly probative); Santiago v. Secretary of
22 Health and Human Services, 944 F.2d 1, 5 (1st Cir. 1991) ("the ALJ is

23
24 ⁹(...continued)
25 she reported lifting was 25 pounds; Plaintiff used a machine or
26 assistance from other employees to lift objects weighing more
27 than 25 pounds (A.R. 159). Plaintiff reported that her job as a
28 small parts assembler required that she walk one hour in an
eight-hour day, sit seven hours, stoop one hour, and kneel one
hour (A.R. 160). The heaviest weight Plaintiff lifted in that
job was less than 10 pounds (A.R. 160). Plaintiff reportedly
could not remember any of her other past work (A.R. 161-65).

1 entitled to rely upon claimant's own description of the duties
2 involved in her former job").

3
4 Assuming, arguendo, the ALJ's step four findings lacked the
5 specificity contemplated by Social Security Ruling 82-62, the error
6 was harmless because the record was adequately developed and supports
7 the ALJ's findings. Compare Smith v. Astrue, 252 Fed. App'x 820, 823
8 (9th Cir. 2007) (where ALJ made insufficient findings regarding the
9 demands of a claimant's past relevant work, the court held that "at a
10 minimum," the ALJ should have referred to the Dictionary of
11 Occupational Titles or questioned the claimant at the hearing to
12 determine the demands of the past relevant work); see also Butler v.
13 Astrue, 2011 WL 5878367, at *8 (E.D. Wa. Nov. 23, 2011) (finding
14 similar error harmless where substantial evidence supported the ALJ's
15 decision at step four); Jakobs v. Astrue, 2010 WL 3636236, at *8 (C.D.
16 Cal. Sept. 15, 2010) (same, where ALJ expressly relied on vocational
17 expert testimony that was consistent with the Dictionary of
18 Occupational Titles). Even had the ALJ discussed more specifically
19 the evidence summarized above, the ALJ's decision doubtlessly would
20 have remained the same. See Batson v. Commissioner of Social Security
21 Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (error is harmless if it
22 "does not negate from the validity of the ALJ's ultimate conclusion").

23 ///

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1 **III. The ALJ Adequately Considered Dr. Chopra's Opinion and Fully and**
2 **Fairly Developed the Record.**

3
4 Plaintiff contends that the ALJ failed properly to consider Dr.
5 Chopra's opinion concerning Plaintiff's condition. Plaintiff alleges
6 that while the ALJ mentioned Dr. Chopra's diagnosis and observations
7 regarding Plaintiff's response to treatment included in Dr. Chopra's
8 May 1, 2009 letter, the ALJ failed to indicate whether he accepted or
9 rejected "Dr. Chopra's opinion." See Plaintiff's Motion, pp. 5-6.

10
11 As discussed above, Dr. Chopra offered no opinion concerning
12 Plaintiff's functional capacity. See 20 C.F.R. § 416.927(a)(2)
13 ("Medical opinions are statements from physicians and psychologists or
14 other acceptable medical sources that reflect judgments about the
15 nature and severity of your impairment(s), including your symptoms,
16 diagnosis and prognosis, what you can still do despite impairment(s),
17 and your physical or mental restrictions."). The ALJ properly
18 acknowledged Dr. Chopra's letter in summarizing the medical record and
19 in finding that Plaintiff has severe cirrhosis of the liver secondary
20 to hepatitis C. See A.R. 13-14, 16. There simply was nothing further
21 from Dr. Chopra for the ALJ to consider. See, e.g., Guerra v. Astrue,
22 2010 WL 5088774, at *5 (C.D. Cal. Dec. 7, 2010) (rejecting argument
23 that ALJ did not consider the opinion of a treating physician, where
24 the record contained no opinion that claimant's condition caused any
25 particular limitations); Hogle v. Astrue, 2010 WL 3894621, at *7 (C.D.
26 Cal. Sept. 30, 2010) (rejecting argument that ALJ failed to consider
27 opinion evidence where physician's treatment notes provided no opinion
28 concerning the claimant's impairments or limitations, and ALJ's

1 finding of severe impairment demonstrated that ALJ considered
2 physician's notes).

3
4 Plaintiff also contends that the ALJ erred by not holding the
5 record open and not contacting Dr. Chopra to clarify "any confusion,"
6 or "ambiguities or uncertainties" over Plaintiff's limitations or
7 viable treatment options. See Plaintiff's Motion, pp. 6-8. To the
8 extent Plaintiff suggests that the ALJ did not adequately develop the
9 record to obtain some kind of evaluation from Dr. Chopra, Plaintiff
10 has failed to demonstrate any material error. An ALJ's duty to
11 develop the record further is triggered only when there is ambiguous
12 evidence or when the record is inadequate to allow proper evaluation
13 of the evidence. Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir.
14 2001). Here, the record was not ambiguous or inadequate so as to
15 trigger any further duty on the part of the ALJ. Moreover, no
16 evidence suggests that any expansion of the record would have altered
17 the administrative decision. All of the physicians who offered an
18 opinion concerning Plaintiff's functional capacity believed that
19 Plaintiff retained the capacity to work. Plaintiff's speculation that
20 Dr. Chopra may have harbored a different, unstated opinion is
21 insufficient to demonstrate material error.

22
23 **IV. The ALJ Did Not Commit Material Error By Deeming Plaintiff's**
24 **Testimony Less Than Fully Credible.**

25
26 Plaintiff argues that the ALJ did not properly assess Plaintiff's
27 testimony regarding her alleged limitations. See Plaintiff's Motion,
28 pp. 9-13. An ALJ's assessment of a claimant's credibility is entitled

1 to "great weight." Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th
2 Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). The
3 discounting of a claimant's testimony regarding subjective symptoms
4 must be supported by specific, cogent findings. See Lester v. Chater,
5 81 F.3d 821, 834 (9th Cir. 1995); see also Berry v. Astrue, 622 F.3d
6 1228, 1234 (9th Cir. 2010) (reaffirming same); Varney v. Secretary of
7 Health and Human Serv., 846 F.2d 581, 584 (9th Cir. 1988) (generally
8 discussing specificity requirement); but see Smolen v. Chater, 80 F.3d
9 1273, 1282-84 (9th Cir. 1996) (indicating that ALJ must offer
10 "specific, clear and convincing" reasons to reject a claimant's
11 testimony where there is no evidence of malingering).¹⁰ Contrary to
12 Plaintiff's argument, the ALJ stated sufficient reasons for deeming
13 Plaintiff's testimony less than fully credible.

14
15 Plaintiff testified that she contracted hepatitis by blood
16 transfusion in 1976 (A.R. 25; see also A.R. 234-35 (2006 blood test
17 showing reactive hepatitis C antibody)). Plaintiff stopped working on
18 August 9, 2007, to begin eight months of chemotherapy treatment for
19 her liver (A.R. 24). Plaintiff claims she suffers from severe fatigue
20 due to two eight-month rounds of such treatment (A.R. 26).

21
22 ¹⁰ In the absence of evidence of "malingering," most
23 recent Ninth Circuit cases have applied the "clear and
24 convincing" standard. See, e.g., Molina v. Astrue, 674 F.3d 1104
25 (9th Cir. 2012); Taylor v. Commissioner of Social Security
26 Admin., 659 F.3d 1228, 1234 (9th Cir. 2011); Valentine v.
27 Commissioner, 574 F.3d 685, 693 (9th Cir. 2009); Carmickle v.
28 Commissioner, 533 F.3d 1155, 1160 (9th Cir. 2008); Lingenfelter
v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007); Ballard v. Apfel,
2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting
cases). In the present case, the ALJ's findings are sufficient
under either standard, so the distinction between the two
standards (if any) is academic.

1 Plaintiff's last round of treatment ended in February 2009 (A.R. 26
2 (inaccurately stating treatment ended in February 2010)). Plaintiff
3 said treatment was discontinued because her blood cell count was too
4 low, she was non-responsive, and "it was becoming fatal" for her (A.R.
5 27).

6
7 Plaintiff testified that she lives with her sister, who is
8 retired and who supposedly does all the shopping and household chores
9 because Plaintiff assertedly is too tired (A.R. 25, 27-28, 32).
10 Plaintiff has a driver's license, but reportedly does not drive (A.R.
11 31). Plaintiff testified that she has to lie down daily due to
12 fatigue and pain in her liver (A.R. 27).¹¹

13
14 When asked about her alleged problems with depression, Plaintiff
15 replied, "If I don't get a liver transplant, I'm going to die. Am I
16 supposed to be happy about that?" (A.R. 28). Plaintiff said she is
17 not yet on the transplant list because she does not have "Medical" and

18
19 ¹¹ In a Disability Report - Adult form, Plaintiff reported
20 that she is unable to sit, stand or walk for long periods of
21 time, is unable to lift or carry anything, cannot concentrate or
22 remember things, and is always weak (A.R. 135). In a Function
23 Report - Adult form dated October 27, 2008, Plaintiff reported
24 that she can handle her own personal care and spends her days
25 dressing herself, taking her medications, eating her meals, and
26 resting (A.R. 142-43). Plaintiff reported that it is difficult
27 to do anything due to the side effects of her medication which
28 assertedly include severe vomiting and diarrhea (A.R. 143, 146).
Plaintiff's sister supposedly prepares the meals, does all house
and yard work, and all the shopping (A.R. 144-45). Plaintiff's
only reported activity is watching television (A.R. 146).
Plaintiff reportedly could not walk far and used a cane for
ambulation, although the cane was not prescribed (A.R. 147-48).
Plaintiff's sister reported similar information in a Function
Report - Adult - Third Party form dated October 27, 2008. See
A.R. 150-57.

1 "you have to go through this process first" (A.R. 28). As of the time
2 of the hearing, it had been over a year since Plaintiff had even seen
3 a doctor (A.R. 28). Plaintiff testified:

4
5 There was nothing more [the doctor] can do to me, for me.
6 He said all I can do is go to the county for my, to try to
7 get on the list for, I need a liver transplant. I've
8 already gone through both treatments, and there was just -
9 there's nothing more they can do medically, other than a
10 liver transplant. And you know, that doesn't mean because
11 you're on the list that it might even happen. I hope it
12 does, though.

13
14 (A.R. 28-29).

15
16 At the hearing, the ALJ observed that there were no medical
17 records indicating Plaintiff has liver failure or is in need of a
18 liver transplant, and that Plaintiff's doctor diagnosed stage three
19 disease, which connotes cirrhosis but not liver failure (A.R. 29-31).
20 Apparently then retreating from her previous claim of a present need
21 for a liver transplant, Plaintiff seemed to indicate she had been told
22 she would need a liver transplant "down the road" (A.R. 31). Yet, in
23 a Disability Report - Appeal form, Plaintiff reported that her only
24 treatment option was a liver transplant (A.R. 171). Yet again, in
25 another Disability Report - Appeal form, Plaintiff reported that as of
26 May 1, 2009, Plaintiff's liver disease was only at stage three (A.R.
27 181).

28 ///

1 At one point during the hearing, Plaintiff claimed that she had
2 not seen a doctor because she assertedly does not have insurance (A.R.
3 33). The ALJ observed that if Plaintiff has a treatment need, she can
4 go to an emergency room and be treated without regard to her ability
5 to pay (A.R. 33-35). Plaintiff had not been to any emergency room
6 (A.R. 33).

7
8 The ALJ summarized Plaintiff's testimony and statements and found
9 that Plaintiff's medically determinable impairments could reasonably
10 cause Plaintiff's alleged symptoms (A.R. 15). The ALJ found
11 Plaintiff's testimony concerning her limitations less than fully
12 credible, however. The ALJ explained:

13
14 The claimant . . . asserts disability primarily because of
15 her liver disease. Her last treatment note is from May 1,
16 2009, where her physician stated that she had stage 3 liver
17 disease after being non-responsive to two courses of
18 treatment. The claimant testified she discontinued
19 treatment because her blood count was too low. She asserted
20 her liver damage is so severe that she must get a liver
21 transplant. However, stage 3 disease is consistent with
22 cirrhosis, a step before liver cancer, which normally
23 requires a transplant. There are no medical records
24 indicating liver failure or the need for a transplant. She
25 has not had any treatment in over a year. Despite asserting
26 the need for a liver transplant, her medical condition never
27 caused her to seek emergency room treatment during that
28 period. She testified she essentially relies on her sister

1 for activities of daily living. However, she overstates her
2 limitations. A consultative internal medicine examiner
3 found she was capable of working. The claimant reported
4 depression, but she has not had any mental health treatment
5 and a consultative psychiatric examiner concluded she had at
6 most slight mental work restrictions secondary to her
7 physical complaints.

8 * * *

9 While the claimant asserts side effects from liver
10 treatment, she also overstates her limitations in stating
11 she needs a liver transplant despite no documented need for
12 it and reporting she relies on her sister for virtually
13 everything. She reported a low blood count, but that does
14 not explain the absence of any treatment since May 1, 2009.
15 Further, the claimant's alleged severity of psychiatric
16 complaints never led her to seek mental health treatment.
17 Thus, the claimant's and her sister's statements are not
18 adequately supported by the objective medical evidence.

19
20 (A.R. 15-16).
21

22 Thus, in rejecting Plaintiff's credibility the ALJ essentially
23 relied on: (1) the discrepancy between Plaintiff's testimony
24 concerning her alleged need for a transplant and the medical record,
25 which does not mention any need for a transplant; (2) Plaintiff's lack
26 of medical treatment since May 1, 2009, and lack of any psychiatric
27 treatment despite Plaintiff's complaints of depression; and (3) the
28 apparent inconsistency between Plaintiff's reported limitations and

1 the evaluations of the consultative examiners concerning Plaintiff's
2 ability to function.

3
4 As the ALJ correctly pointed out, the medical evidence does not
5 support Plaintiff's testimony that her liver disease is so severe that
6 she must get a liver transplant or she will die. Although a
7 claimant's credibility "cannot be rejected on the sole ground that it
8 is not fully corroborated by objective medical evidence, the medical
9 evidence is still a relevant factor. . . ." Rollins v. Massanari, 261
10 F.3d 853, 857 (9th Cir. 2001); see also Brawner v. Secretary of Health
11 and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)
12 (misrepresentations made by claimant in the course of pursuing
13 disability benefits justifies rejection of claimant's credibility).
14 At a minimum, Plaintiff exaggerated during some of her testimony (A.R.
15 28, 31). Such exaggeration supports the ALJ's finding that Plaintiff
16 was not credible. See, e.g., Tonapetyan v. Halter, 242 F.3d 1144,
17 1148 (9th Cir. 2001) (claimant's tendency to exaggerate is an adequate
18 reason for rejecting claimant's testimony); Bickell v. Astrue, 343
19 Fed. App'x 275, 277-78 (9th Cir. 2009) (same).

20
21 Plaintiff's lack of treatment for her psychiatric complaints and
22 failure to seek any treatment of any kind from May 1, 2009 through the
23 hearing date of September 21, 2010, also supports the ALJ's finding
24 that Plaintiff was not credible. An unexplained failure to seek
25 medical treatment may discredit a claimant's allegations of disabling
26 symptoms. See Batson v. Commissioner, 359 F.3d 1190, 1196 (9th Cir.
27 2004); accord Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991)
28 (failure to seek medical treatment can justify an adverse credibility

1 determination); Fair v. Bowen, 885 F.2d 597, 603-04 (9th Cir. 1989)
2 (same). While Plaintiff claimed she had not sought liver treatment
3 since May 1, 2009, because she assertedly had no medical insurance,
4 the ALJ was not required to accept Plaintiff's explanation for failing
5 to seek treatment, given: (1) the availability of free or low-cost
6 medical care; and (2) Plaintiff's failure to explain why she had not
7 sought psychiatric care at a time when she was being treated for her
8 liver condition. Compare Orn v. Astrue, 495 F.3d 625, 638 (9th Cir.
9 2007) (failure to obtain treatment did not support adverse credibility
10 finding where the claimant explained the failure as having resulted
11 from a lack of insurance, and the ALJ did not suggest that this
12 explanation was "not believable") with Flaten v. Secretary of Health &
13 Human Services, 44 F.3d 1453, 1464 (9th Cir. 1995) (upholding an
14 adverse credibility determination where the claimant alleged an
15 inability to pay but had received other medical care during the
16 operative time). If Plaintiff's conditions were as severe as she
17 claims, one reasonably would expect Plaintiff to have sought
18 psychiatric care at some point, to have sought treatment in hospital
19 emergency rooms, or otherwise to have taken steps to be placed on a
20 liver transplant waiting list.

21
22 Finally, the discrepancy between Plaintiff's asserted limitations
23 and the findings of the consultative examiners also supports the ALJ's
24 adverse credibility determination. See Maier v. Commissioner, 154
25 F.3d 913, 915 (9th Cir. 1998) ("The ALJ's explanation that [the
26 claimant] was not credible was supported by the clear and convincing
27 reason that [the claimant's] testimony contradicts most of the medical
28 evaluations"). Plaintiff essentially reported that she could not

1 perform any daily activities beyond personal care. On physical
2 examination, Dr. To reported that Plaintiff showed no signs of
3 abdominal tenderness and had normal muscle tone and mass (A.R. 195-
4 96). Plaintiff was taking no medications for her alleged pain (A.R.
5 194; see also A.R. 139 (listing medications)). While Plaintiff
6 reported that she cannot concentrate or remember things (A.R. 135), on
7 examination Dr. Woodard reported that Plaintiff's intellection
8 function is grossly intact but that she may have functional attention
9 deficit and motivational deficit associated with depression and
10 anxiety (A.R. 191-92). Even with these symptoms, Dr. Woodard opined
11 that Plaintiff has only slight mental impairments (A.R. 192).
12 Plaintiff's testimony contradicted all or virtually all of the medical
13 evaluations regarding her capacity.

14
15 Because the ALJ's credibility findings were sufficiently specific
16 to allow this Court to conclude that the ALJ rejected Plaintiff's
17 testimony on permissible grounds, Moisa v. Barnhart, 367 F.3d 882, 885
18 (9th Cir. 2004), the Court defers to the ALJ's credibility findings.
19 See Lasich v. Astrue, 252 Fed. App'x 823, 825 (9th Cir. 2007) (court
20 will defer to ALJ's credibility determination when the proper process
21 is used and proper reasons for the decision are provided); accord
22 Flaten v. Secretary of Health & Human Services, 44 F.3d at 1464.

23 ///
24 ///
25 ///
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28 ///

1 **CONCLUSION**

2
3 For all of the foregoing reasons, Plaintiff's motion for summary
4 judgment is denied and Defendant's motion for summary judgment is
5 granted.¹²

6
7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8
9 DATED: May 25, 2012.

10
11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE
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24 _____
25 ¹² The Court has considered and rejected each of
26 Plaintiff's arguments. Neither Plaintiff's arguments nor the
27 circumstances of this case show any "substantial likelihood of
28 prejudice" resulting from any error allegedly committed by the
Administration. See generally McLeod v. Astrue, 634 F.3d 516,
522-23 (9th Cir. 2011) (discussing the standards applicable to
evaluating prejudice).