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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DIANNA L. DUNIVEN,	)	Case No. EDCV 12-0220-JEM
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	AFFIRMING DECISION OF
	)	COMMISSIONER
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

**PROCEEDINGS**

On February 10, 2012, Dianna L. Duniven (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Social Security Disability Insurance benefits. The Commissioner filed an Answer on May 29, 2012. On September 4, 2012, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be affirmed and this case dismissed with prejudice.

## BACKGROUND

1  
2 Plaintiff is a 50 year old female who applied for Social Security Disability Insurance  
3 benefits on November 19, 2008, alleging disability beginning November 29, 12, 2007. (AR 23.)  
4 Plaintiff did not engage in substantial gainful activity during the period from her alleged onset  
5 date of November 29, 2007, through her date last insured of December 31, 2008. (AR 23.)

6 Plaintiff's claim was denied initially on April 2, 2009, and on reconsideration on May 26,  
7 2009. (AR 23.) Plaintiff filed a timely request for hearing, which was held before Administrative  
8 Law Judge ("ALJ") Michael D. Radensky on June 22, 2010, in San Bernardino, California. (AR  
9 23.) Claimant appeared and testified at the hearing, and was represented by counsel. (AR 23.)  
10 Medical expert ("ME") Arthur Lorber, M.D., and vocational expert ("VE") Luis O. Mas also  
11 appeared and testified at the hearing. (AR 23.)

12 The ALJ issued an unfavorable decision on August 5, 2010. (AR 23-26.) The Appeals  
13 Council denied review on December 20, 2011. (AR 1-6.)

## DISPUTED ISSUES

14  
15 As reflected in the Joint Stipulation, Plaintiff only raises the following disputed issue as  
16 the basis for reversal and remand:

- 17 1. Whether the ALJ properly considered Dr. Savodnik's agreed medical opinion.

## STANDARD OF REVIEW

18  
19 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
20 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
21 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
22 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
23 based on the proper legal standards).

24 Substantial evidence means "more than a mere scintilla,' but less than a  
25 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.  
26 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such relevant evidence as a  
27 reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at  
28 401 (internal quotation marks and citation omitted).

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

### 9 THE SEQUENTIAL EVALUATION

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

16 The first step is to determine whether the claimant is presently engaging in substantial  
17 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging  
18 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,  
19 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or  
20 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not  
21 significantly limit the claimant's ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.  
22 1996). Third, the ALJ must determine whether the impairment is listed, or equivalent to an  
23 impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d  
24 at 746. If the impediment meets or equals one of the listed impairments, the claimant is  
25 presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine  
26 whether the impairment prevents the claimant from doing past relevant work. Pinto v.  
27 Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four determination,  
28

1 the ALJ first must determine the claimant's residual functional capacity ("RFC").<sup>1</sup> 20 C.F.R. §  
2 416.920(e). The RFC must consider all of the claimant's impairments, including those that are  
3 not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If  
4 the claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ  
5 proceeds to the fifth step and must determine whether the impairment prevents the claimant  
6 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th  
7 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 to  
10 benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the claimant, the  
11 burden shifts to the Commissioner to show that the claimant may perform other gainful activity.  
12 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a  
13 claimant is not disabled at step five, the Commissioner must provide evidence demonstrating  
14 that other work exists in significant numbers in the national economy that the claimant can do,  
15 given his or her RFC, age, education, and work experience. 20 C.F.R. § 416.912(g). If the  
16 Commissioner cannot meet this burden, then the claimant is disabled and entitled to benefits.

17 Id.

## 18 THE ALJ DECISION

19 In this case, the ALJ determined at step one of the sequential process that Plaintiff did  
20 not engage in substantial gainful activity during the period from her alleged onset date of  
21 November 29, 2007, through her date last insured of December 31, 2008. (AR 25.)

22 At step two, the ALJ determined that through the date last insured Plaintiff had the  
23 following combination of medically determinable severe impairments: degenerative disc disease  
24 of the cervical spine and lumbar spine; osteoarthritis of the knees, hips, and shoulders; possible  
25 rheumatoid arthritis; and obesity. (AR 25. )

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26  
27 <sup>1</sup> Residual functional capacity ("RFC") is what one "can still do despite [his or her] limitations"  
28 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),  
416.945(a)(1).

1 At step three, the ALJ determined that Plaintiff does not have an impairment or  
2 combination of impairments that meets or medically equals one of the listed impairments. (AR  
3 26.)

4 The ALJ then found that through the date last insured Plaintiff had the RFC to perform  
5 light work as defined in 20 C.F.R. § 404.1567(b) except for the following limitations:

6 . . . can lift and carry 20 pounds occasionally and 10 pounds frequently. She  
7 can sit for 1 hour at a time for a total of 6 hours out of an 8-hour workday.

8 She can stand and walk for 30 minutes at a time, for a total of 2 hours out of  
9 an 8-hour workday. She can occasionally bend, stoop, crouch, and kneel.

10 She cannot balance. She should avoid exposure to concentrated vibration.

11 She cannot climb ladders, ropes, or scaffolds. She can occasionally climb  
12 stairs.

13 (AR 26.) In determining this RFC, the ALJ made an adverse credibility finding. (AR 35.)

14 Significantly, Plaintiff does not challenge the ALJ's adverse credibility finding.

15 At step four, the ALJ found that through the date last insured Plaintiff was able to perform  
16 her past relevant work ("PRW") as a tax preparer. (AR 35.) The ALJ found that this work does  
17 not require the performance of work-related activities precluded by Plaintiff's RFC (AR 35) and  
18 that Plaintiff can perform her PRW as a tax preparer as it is generally performed. (AR 35.)

19 Consequently, the ALJ concluded that Claimant is not disabled within the meaning of the  
20 Social Security Act. (AR 36.)

## 21 DISCUSSION

22 Plaintiff contends that the ALJ erred in rejecting Dr. Savodnik's agreed psychiatric  
23 opinion and in not finding that Plaintiff's mental impairments were severe at step two of the  
24 sequential process. The Court disagrees.

### 25 A. Relevant Federal Law

26 In evaluating medical opinions, the case law and regulations distinguish among the  
27 opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2)  
28 those who examine but do not treat the claimant (examining physicians); and (3) those who

1 neither examine nor treat the claimant (non-examining, or consulting, physicians). See 20  
2 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). In  
3 general, an ALJ must accord special weight to a treating physician’s opinion because a treating  
4 physician “is employed to cure and has a greater opportunity to know and observe the patient  
5 as an individual.” Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If  
6 a treating source’s opinion on the issues of the nature and severity of a claimant’s impairments  
7 is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is  
8 not inconsistent with other substantial evidence in the case record, the ALJ must give it  
9 “controlling weight.” 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

10 Where a treating doctor’s opinion is not contradicted by another doctor, it may be  
11 rejected only for “clear and convincing” reasons. Lester, 81 F.3d at 830. However, if the  
12 treating physician’s opinion is contradicted by another doctor, such as an examining physician,  
13 the ALJ may reject the treating physician’s opinion by providing specific, legitimate reasons,  
14 supported by substantial evidence in the record. Lester, 81 F.3d at 830-31; see also Orn, 495  
15 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). Where a treating  
16 physician's opinion is contradicted by an examining professional’s opinion, the Commissioner  
17 may resolve the conflict by relying on the examining physician’s opinion if the examining  
18 physician’s opinion is supported by different, independent clinical findings. See Andrews v.  
19 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an  
20 uncontradicted opinion of an examining physician, an ALJ must provide clear and convincing  
21 reasons. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician’s  
22 opinion is contradicted by another physician’s opinion, an ALJ must provide specific and  
23 legitimate reasons to reject it. Id. However, “[t]he opinion of a non-examining physician cannot  
24 by itself constitute substantial evidence that justifies the rejection of the opinion of either an  
25 examining physician or a treating physician”; such an opinion may serve as substantial  
26 evidence only when it is consistent with and supported by other evidence of record. Lester, 81  
27 F.3d at 830-31; Morgan, 169 F.3d at 600.

1           **B.     Analysis**

2           In this case, the ALJ determined at step two of the sequential process that Plaintiff's  
3 mental impairment of adjustment disorder did not cause more than minimal limitation in  
4 Plaintiff's ability to do basic work activities and thus was not severe. (AR 25-26.) This finding is  
5 supported by substantial evidence.

6           The step two inquiry to determine whether a medically determinable impairment is  
7 severe is "a de minimis screening device to dispose of groundless claims." Smolen, 80 F.3d at  
8 1290. An impairment is not severe unless it significantly limits a claimant's ability to do basic  
9 work activities. 20 C.F.R. § 404.1520(c). On the other hand, an impairment can be found not  
10 severe only if the evidence establishes a slight abnormality that has no more than a minimal  
11 effect on an individual's ability to work. Smolen, 80 F.3d at 1290.

12           On September 29, 2008, Dr. Norman Reichwald conducted an initial psychological pain  
13 evaluation pursuant to her workers' compensation claim. (AR 31.) He diagnosed an  
14 adjustment disorder. (AR 32.) Seeing her again on December 16, 2008, Dr. Reichwald  
15 reported that her mental status examination was within normal limits and repeated his initial  
16 diagnosis. (AR 32.) He assessed no functional limitations. (AR 32.)

17           On March 12, 2009, Dr. Linda Smith conducted a psychiatric consulting examination of  
18 Claimant and diagnosed a mood disorder, noting that Claimant did not take the examination  
19 very seriously. (AR 32, 536-41.) Dr. Smith found she was not credible as a historian (AR 536)  
20 and that there was no evidence her alleged panic attacks resulted in any limitations. (AR 537.)  
21 Dr. Smith did not see any evidence of depression or anxiety, and did not believe that Plaintiff is  
22 impaired in her ability to work from a psychiatric standpoint. (AR 33, 540-41.) State agency  
23 review psychiatrists also determined that Claimant did not have a severe mental impairment.  
24 (AR 33.) The ALJ accepted these assessments to the extent Claimant has a non-severe  
25 mental impairment. (AR 33.)

26           On February 16, 2010, Dr. Irwin Savodnik conducted an agreed psychiatric examination  
27 of Claimant. (AR 32, 710-77.) After administering a battery of tests, Dr. Savodnik diagnosed a  
28 mood disorder and a personality disorder. (AR 33.) He indicated the following limitations: none

1 in comprehending and following instructions; slight in performing simple and repetitive tasks;  
2 moderate in maintaining an appropriate work pace to a given work load; moderate in performing  
3 complex or varied tasks; moderate to severe in relating to other people beyond giving and  
4 receiving instructions; moderate to severe in influencing people; severe in making  
5 generalizations, evaluations and decisions without immediate supervision; severe in accepting  
6 and carrying out responsibility for direction, control and planning. (AR 33, 760-61.) These  
7 limitations, if accepted, would require a finding that Claimant’s mental impairment is severe.

8         The ALJ, however, rejected these limitations and the opinion of Dr. Savodnik because of  
9 Claimant’s “lack of credibility and exaggeration during the examination.” (AR 33.) Specifically,  
10 Dr. Savodnik himself reported that Claimant’s responses to psycho-diagnostic testing were “not  
11 straightforward, candid, or objective in describing information about herself.” (AR 32-33, 719.)  
12 Her responses on a Personality Assessment Inventory indicated she was exaggerating. (AR  
13 33, 35.) She also attempted to feign mental illness. (AR 33, 35.) One test, though, did not  
14 show Claimant was malingering cognitive deficits. (AR 33.) Dr. Savodnik also noted  
15 inconsistent responses that could affect test results and thus “the interpretative hypotheses that  
16 follow in this report should be viewed cautiously.” (AR 721.) The ALJ found other evidence of  
17 Claimant exaggerating her claims, including inconsistent daily activities and refusing an  
18 epidural. (AR 35.)

19         The ALJ rejected Dr. Savodnik’s guarded assessment for specific and legitimate reasons  
20 supported by substantial evidence — contrary medical opinion and lack of credibility. Both Dr.  
21 Smith and Dr. Savodnik were examining physicians and the ALJ accepted Dr. Smith’s opinion  
22 (and that of State agency review psychiatrists) and rejected Dr. Savodnik’s assessments. The  
23 ALJ is responsible for resolving conflicts in the medical evidence. Andrews, 53 F.3d at 1039.  
24 His determination of the medical evidence if reasonable should not be second-guessed. Rollins  
25 v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Plaintiff contends that Dr. Savodnik’s opinion  
26 should be given greater weight because he administered tests and wrote a longer opinion, but  
27 those facts alone do not render the ALJ’s interpretation unreasonable. When the evidence  
28



1 reasonably supports either confirming or reversing the ALJ's decision, the ALJ's decision  
2 should not be disturbed. Batson v. Commissioner, 359 F.3d 1190, 1196 (9th Cir. 2004).

3 The ALJ, moreover, also rejected Dr. Savodnik's assessments for lack of credibility on  
4 the part of Plaintiff. Significantly, Plaintiff does not challenge the ALJ's adverse credibility  
5 finding or address the extensive evidence supporting that finding. Plaintiff incorrectly argues  
6 that the ALJ improperly rejected Dr. Savodnik's opinion based on credibility issues Dr. Savodnik  
7 took into account in proffering his assessments. The ALJ, however, also relied on the lack of  
8 credibility displayed in the mental status examination conducted by Dr. Smith, and the contrary  
9 medical opinions of Dr. Smith and the State agency review psychiatrists. Plaintiff also does not  
10 address Dr. Savodnik's own caution about his testing results. (AR 721.)

11 The contrary medical opinion and un rebutted adverse credibility determination constitute  
12 specific and legitimate reasons for rejecting the assessments of Dr. Savodnik. The ALJ's step  
13 two determination that Plaintiff's mental impairment is not severe is supported by substantial  
14 evidence. The ALJ's non-disability determination is supported by substantial evidence and free  
15 of legal error.

16 **ORDER**

17 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is  
18 AFFIRMED and this case dismissed with prejudice.

19 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

20  
21 DATED: September 18, 2012

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