



1 her left hand and headaches. AR 80, 101-07. After being denied initially and on reconsideration,  
2 Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). AR 65-68, 70-73, 76.  
3 On May 16, 2008, ALJ James M. Mitchell held a hearing. AR 7-48. ALJ Mitchell denied benefits  
4 on October 14, 2008. AR 54-64. On June 3, 2010, the Appeals Council denied review. AR 1-4.

5 Hearing Testimony

6 ALJ Mitchell held a hearing on May 16, 2008, in Stockton, California. Plaintiff appeared  
7 with her attorney, Jeffrey Milam. Vocational expert (“VE”) Stephen Schmidt also appeared. AR 7.

8 Plaintiff was born in 1955. She earned a GED and completed one semester of college. She  
9 stopped working in June 2005. From April 2004 to June 2005, she worked as a school bus driver.  
10 From March 1990 to January 2002, she worked in retail, setting up display counters. In 2002, she  
11 worked as a loan officer. She could not return to those jobs because of pain on her left side, from her  
12 neck to arm. AR 9-16.

13 Plaintiff lives in a house with her husband and her twenty-five year old son. She prepares  
14 meals once or twice a day. She washes dishes three times a week. She does not mop floors, but  
15 sweeps twice a month and dusts four times a month. She goes shopping twice a month. She watches  
16 television for 1 to 1 ½ hours and reads about 1 hour each day. She does not go to church, but leaves  
17 the house three or four times a week. Although she has a driver’s license, she has not driven for  
18 three months. AR 18-23.

19 Plaintiff’s primary medical doctor is Dr. LeFevre. She has been seeing him for about four  
20 years. He told her not to lift anything over five pounds and to nap regularly because of her  
21 medication. She has been seeing Dr. Gill, a mental health professional, for the last year “as needed.”  
22 She also received treatment for a drug or alcohol problem in 2002. AR 23-25.

23 Plaintiff testified that she can stand about 15 minutes and sit about 30 minutes. She can walk  
24 about three blocks. She can put on her own socks and shoes. She is right handed and has no  
25 problems reaching in front of her or reaching to the side. She has problems reaching overhead with  
26 her left arm because of pain. She also has problems holding things with her left arm. She does not  
27 have problems picking up things with her right hand, but she has problems grasping with her left

1 hand. She feels tingling and numbness in her left hand. She does not have any problems telling the  
2 difference between hot and cold water with her hands. She has no problems writing, speaking or  
3 hearing. She has problems turning her head from left to right or looking down. She has no problems  
4 using a telephone and uses it three or four times a day. She also uses a cell phone three or four times  
5 a day. AR 26-29. She can reach and grab with her left hand for about two hours total in a day.  
6 There is nothing wrong with her right hand or arm. AR 35-37.

7 Plaintiff explained that her main complaint is her neck and left hand. On an average day, the  
8 pain is constant, severe, sharp and throbbing. She cannot concentrate and is depressed. AR 30-33.  
9 She takes pain medication, including methadone, but the pain doesn't change. She uses a neck collar  
10 and gets injections about three to five times a year. She sleeps 12 to 13 hours a day because she is  
11 tired all the time and in pain. AR 33-35.

12 The VE described Plaintiff's past relevant work as driver, 913.663-018, medium, SVP 3;  
13 displayer, 398.081-010, medium, SVP 6; loan clerk, 205.367-022, sedentary, SVP 4. The loan clerk  
14 position would have transferability to other sedentary office positions. AR 40.

15 For the first hypothetical, the ALJ asked the VE to assume an individual 52 years of age, with  
16 a high school education, one semester of college, and Plaintiff's work history. This person could lift,  
17 push, pull 20 occasionally, 10 frequently, could walk/stand frequently, and could sit, stoop or bend  
18 occasionally. The VE testified that this person could not perform Plaintiff's past relevant work.  
19 However, this person could perform other semiskilled jobs in the regional economy, including file  
20 clerk and general clerk. Additionally, there would be unskilled jobs, including cashier and  
21 assembler. AR 41-42.

22 For the second hypothetical, the ALJ asked the VE to assume the person was unlimited in  
23 attention, concentration, understanding and memory. This person had diminished, but correctable  
24 vision, and unlimited hearing. This person was slightly limited, six hours or less, in overhead reach  
25 with the left nondominant feature. Fine and gross manipulative ability was slightly limited with  
26 respect to the nondominant feature, but unrestricted with respect to the right. This person also was  
27 slightly limited in the ability to do a simple routine task. She had no environmental restrictions. She  
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1 could have unlimited public contact and occasional supervision. She had slight to moderate pain.  
2 The VE testified that there would be complete erosion of the assembler job, but no erosion of the  
3 other jobs. AR 42.

4 For hypothetical 2A, the ALJ asked the VE to assume a person that was slightly limited in  
5 attention, concentration, understanding and memory, and was moderately limited in overhead reach  
6 with the left, nondominant feature. The VE testified that there would be no erosion of the previously  
7 mentioned jobs. AR 42.

8 For hypothetical 2B, the ALJ asked the VE to assume a person with moderate to severe pain,  
9 moderate limitations in fine and gross manipulative abilities with the left nondominant feature, and  
10 with a slightly limited ability to do SRT. The VE testified that there would be complete erosion of  
11 the previously mentioned jobs. AR 42-43.

12 For hypothetical three, the ALJ asked the VE to assume an individual 52 years of age, with a  
13 high school education, one semester of college and Plaintiff's work history. This person could lift,  
14 push, and pull ten occasionally, five frequently, could walk, stand, stoop and bend occasionally and  
15 could sit frequently. The VE testified that this person could return to Plaintiff's past relevant work  
16 as a loan clerk. The VE further testified that there would be semiskilled and unskilled jobs this  
17 person could perform, including receptionist, data entry, information clerk, and assembly. AR 43.

18 For hypothetical four, the ALJ asked the VE to assume a person who was unlimited in  
19 attention, concentration, understanding and memory. Her vision was diminished, but correctable,  
20 and her hearing was unlimited. She was slightly limited in overhead reach with the left nondominant  
21 feature, but the right was intact. She was slightly limited in the ability to do SRT. She had no  
22 environmental restrictions. She could have unlimited public contact and needed occasional  
23 supervision. Her pain was slight to moderate. The VE testified that this person could return to  
24 Plaintiff's past relevant work as a loan clerk, but there would be complete erosion of the data entry  
25 and assembly work. AR 43-44.

26 For hypothetical 4A, the ALJ asked the VE to assume a person who was slightly limited in  
27 attention, concentration, understanding and memory. She was moderately limited (three hours or  
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1 less per shift) in overhead reach with the left nondominant feature. The VE testified that this person  
2 could return to Plaintiff's past relevant work as a loan clerk. There was no erosion of the previously  
3 mentioned jobs. AR 44.

4 For hypothetical 4B, the ALJ asked the VE to assume a pain level described as moderate to  
5 severe requiring frequent medication. This person would be moderately limited in both fine and  
6 gross manipulative abilities with the left nondominant feature, but remained only slightly limited in  
7 the ability to do SRT. The VE testified that this person could not return to Plaintiff's past relevant  
8 work as a loan clerk and there would be complete erosion of the previously mentioned jobs. AR 44.

9 For the next hypothetical, Plaintiff's attorney asked the VE to assume a light RFC with an  
10 inability to move the neck in various directions more than ten percent of a day. The VE testified that  
11 it would eliminate Plaintiff's past relevant jobs. AR 45. The VE further clarified that if a person  
12 could do the full range of sedentary or light work, but could not move the neck in any direction more  
13 than ten percent of the day, it would eliminate her sedentary past relevant work as a loan clerk.  
14 Additionally, if the person could perform the full range of sedentary or light work, but had to  
15 alternate sitting and standing every 15 minutes of the day, it would eliminate the past relevant work.  
16 If the person could perform the full range of sedentary and light work, but was restricted to  
17 occasional reaching, handling, pushing, pulling, grasping and fine manipulation with the left upper  
18 extremity, the person could not do Plaintiff's past relevant work. AR 45-46.

19 For the next hypothetical, Plaintiff's attorney asked the VE to consider a person who was  
20 limited to no more than six hours out of eight sitting and no more than six hours out of eight standing  
21 and walking, could lift 20 pounds occasionally, 10 frequently, could feel occasionally with the left  
22 upper extremity and could reach occasionally in all directions with the left upper extremity. The VE  
23 testified that this person would not be able to do past relevant work. If she could not reach forward,  
24 to the sides or up for more than a third of the day, then it would preclude the other jobs. AR 46-47.

#### 25 Medical Record

26 During the course of 2004, Plaintiff reported recurring neck pain and left arm numbness. AR  
27 482-88, 492. At least one physician believed Plaintiff's diffuse complaints of pain were suggestive

1 of a rheumatologic etiology. AR 486-87.

2 On January 18, 2005, Plaintiff was diagnosed with cervical spondylolisthesis. AR 493. A  
3 cervical spine x-ray showed reversal of the normal lordotic curvature of the cervical spine and  
4 moderate to significant degenerative changes. AR 186.

5 On March 21, 2005, Plaintiff saw Dr. Hans U. Bueff for complaints of neck pain, left-sided  
6 arm pain, along with left hand weakness and some numbness. She did not drop objects and her  
7 EMG nerve conduction studies were basically normal. Plaintiff told Dr. Bueff that she was taking  
8 sulindac and six Vicodin per day, but continued to drive a school bus. On physical examination,  
9 Plaintiff had decreased rotation of the cervical spine in all directions, but had good range of motion  
10 of both shoulder and elbow joints. Following a review of X-rays and a MRI, Dr. Bueff diagnosed  
11 chronic neck pain due to advanced cervical spondylosis with spondylolisthesis C4 on C5 and cervical  
12 spondylosis C5-C7. Due to advanced degenerative changes involving her whole cervical spine, Dr.  
13 Bueff believed she might benefit from a facet injection and acupuncture. AR 140-41.

14 On May 11, 2005, Plaintiff consulted Dr. R. LeFevre regarding her worsening neck pain. AR  
15 168. He prescribed Norco. AR 169.

16 On June 28, 2005, Plaintiff had diminished range of motion of her cervical spine. Per Dr.  
17 Bueff, Plaintiff would require spine stabilization. AR 210.

18 On July 5, 2005, Plaintiff complained of new onset increased neck pain. A CT scan showed  
19 no significant interval change since November 2004. There were degenerative changes and  
20 alignment abnormalities in the cervical spine. AR 137. On July 28, 2005, Dr. Bueff recommended a  
21 cervical epidural steroid injection. AR 142, 211.

22 On August 22, 2005, Plaintiff complained of left forearm pain. On examination, she was  
23 tender at the carpal tunnel syndrome area. AR 205-06.

24 In August 2005, Plaintiff received a tri-level left cervical facet injection. AR 136. In  
25 September 2005, Plaintiff received a left cervical trigger point injection. AR 135.

26 On October 19, 2005, Plaintiff sought follow-up treatment for left wrist pain. Plaintiff's  
27 EMG/NCS showed mild carpal tunnel syndrome. AR 182, 195. Plaintiff received a steroid injection

1 to her left wrist. AR 182.

2 On October 26, 2005, Plaintiff received a multilevel right cervical facet injection AR 134.

3 On November 3, 2005, Plaintiff underwent facet injections. AR 184. Thereafter, on  
4 November 23, 2005, Plaintiff complained of neck pain despite injections to her facet joints. Dr.  
5 Bueff believed that Plaintiff might benefit from anterior cervical discectomy and fusion, C4-C6.  
6 Plaintiff maintained temporary total disability. AR 143.

7 On November 29, 2005, Plaintiff again saw Dr. LeFevre and reported increased pain and  
8 headaches. She could turn her head to the left, but it hurt. On physical examination, she had diffuse  
9 tenderness on both sides of her neck, left trapezius greater than the right. Plaintiff said that Norco  
10 and Flexeril did not help and Dr. LeFevre prescribed new medications. AR 177-78.

11 On December 5, 2005, Plaintiff underwent an initial evaluation for physical therapy. When  
12 she failed to show for a follow-up appointment, she was discharged. AR 196.

13 In January 2006, Dr. LeFevre prescribed Norco, methadone and other medications. AR 179.  
14 In February, Dr. LeFevre increased the methadone. AR 223. In March, Dr. LeFevre opined that  
15 Plaintiff was doing well with methadone. He refilled her prescription for 4-6 tablets every six hours.  
16 AR 233. On March 9, 2006, Plaintiff reported that the methadone helped a fair amount. She was  
17 able to lay tile and finish stain on furniture. AR 533-34. On April 26, 2006, Plaintiff reported that  
18 she did not start Paxil since she was feeling better. Dr. LeFevre prescribed 8-10 tablets of  
19 methadone every 6-8 hours for intractable neck pain. AR 319.

20 On April 29, 2006, Dr. Erik Roberson completed a consultative orthopedic evaluation.  
21 Plaintiff complained of neck pain. On physical examination, Plaintiff had no difficulty walking into  
22 the exam room and sat comfortably throughout the interview. She was able to get up on the  
23 examination table and sit up from a supine position. She was able to remove and replace her shoes  
24 and socks without much difficulty. She was able to stand from a chair without pushing with her  
25 arms. Her basic gait was unremarkable. She was able to stand on either leg and to hop on both feet.  
26 She was able to squat fully and return to a standing position. She had no spasms or back tenderness.  
27 Her muscle bulk and tone were normal and her power was 5/5 bilaterally. Her fine dextrous

1 movements of the hands were normal bilaterally. Dr. Roberson diagnosed degenerative disease of  
2 the cervical spine and noted that she was scheduled for a C3-C4 fusion. Given the objective  
3 findings, Dr. Roberson opined that Plaintiff could be expected to stand six hours in an eight-hour day  
4 and sit without restrictions. She could lift and carry 25 pounds frequently and 50 pounds  
5 occasionally. She had no postural, manipulative or environmental limitations. AR 228-31.

6 On May 26, 2006, Dr. Bueff noted that Plaintiff was taking 8-10 methadone tablets every 6-8  
7 hours, along with Norco, baclofen and other medications. He opined that she was “dependent on  
8 narcotics.” AR 316-17.

9 On May 27, 2006, Plaintiff underwent an anterior cervical discectomy and fusion C4 to C6.  
10 Her postoperative course was significant for intractable pain. On discharge, she ambulated without  
11 any problem. AR 457. While in the hospital, a psychiatric evaluation showed severe narcotic  
12 dependence. She was to simplify her pain regimen and taper slowly. AR 468-69.

13 On June 5, 2006, Plaintiff saw Dr. LeFevre. She reported doing better and that her  
14 methadone was giving her good pain relief. She wanted to decrease her medications. AR 315. On  
15 June 13, 2006, Plaintiff again saw Dr. LeFevre and reported that she was doing better. He prescribed  
16 ibuprofen and methadone. AR 314.

17 On June 26, 2006, Plaintiff saw Richard Boggs, PA, for a post-operation follow-up  
18 appointment. She complained of continuous pain to her neck worse than before her operation. PA  
19 Boggs noted that Plaintiff was taking 400mg of methadone per day, which “was not prescribed by  
20 Dr. Bueff, and was never condoned, and especially at this dosage.” On examination, Plaintiff had a  
21 depressed mood and was very anxious and agitated. She had abnormal active and passive range of  
22 motion of her neck. PA Boggs was unable to examine Plaintiff due to pain. He discussed her  
23 examination with Dr. Bueff. AR 288-89.

24 On July 5, 2006, Dr. LeFevre received a message from Dr. Bueff. Dr. Bueff reportedly was  
25 “very concerned” that Plaintiff had an addiction problem because her pain had not completely  
26 disappeared post operation. According to Dr. LeFevre, there was no indication that Plaintiff had a  
27 medication abuse problem. AR 412.



1 A CT of the cervical spine showed the anatomic alignment to be near normal. AR 435.

2 On July 13, 2006, Dr. LeFevre noted that Plaintiff was doing better. AR 412.

3 On July 27, 2006, Plaintiff reported to Dr. LeFevre that her pain was worse than it was before  
4 surgery. She said that she could not look up or turn to the left at all. She was prescribed actiq,  
5 methadone, and xanax. Dr. LeFevre discussed the meaning of being “opioid dependent,” explaining  
6 that it was similar to having insulin dependent diabetes. AR 312, 411-12.

7 On August 2, 2006, Plaintiff’s symptoms continued to be very bothersome. Dr. Bueff  
8 recommended a TENS unit and physical therapy. AR 285.

9 On August 15, 2006, A. R. Garcia, a state agency physician, completed a Psychiatric Review  
10 Technique. Dr. Garcia opined that Plaintiff’s mental impairment was not severe. AR 236.

11 On August 17, 2006, Plaintiff saw Dr. Bueff and reported that her symptoms were slightly  
12 better three months after surgery. Dr. Bueff recommended a selective facet block at the C2-3 level.  
13 AR 282.

14 On September 25, 2006, Plaintiff saw Dr. Michael D. Reitz and received a left C2-3 facet  
15 block. She did not experience relief after the injection, which suggested that this facet was not her  
16 primary pain generator. AR 267.

17 On September 26, 2006, Plaintiff saw Dr. Marie Montfort for hip pain. On examination, she  
18 had hip tenderness with normal range of motion. She was tearful and sad, but refused  
19 antidepressants. AR 410-11. A subsequent x-ray showed normal bilateral hips and pelvis. AR 414.

20 On September 28, 2006, Plaintiff told Dr. LeFevre that her pain levels were 5-6/10 up to a  
21 9/10. She was not resting during the day and tried to keep busy. Dr. LeFevre prescribed a benzoin  
22 tincture, a duragesic, actiq, and methadone. AR 309.

23 On October 11, 2006, Plaintiff underwent a left C3-4 facet joint injection. AR 266. She  
24 reportedly experienced two or three days of relief after the injection. AR 265. On October 18, 2006,  
25 she received a C2-3 left facet injection. AR 300. Dr. Reitz later indicated that Plaintiff’s facet joint  
26 blocks failed to produce any significant relief and they would not pursue other injections. AR 264.

27 On November 2, 2006, Plaintiff reported continued severe neck pain. On examination, she  
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1 had decreased range of motion of the cervical spine. Dr. Bueff opined that Plaintiff was “not doing  
2 well,” was permanently disabled and would not return to gainful employment. He recommended a  
3 selective nerve root block of C2 on the left and a facet block C2-3 and C3-4 at the same time, stating  
4 Plaintiff’s “DJD [was] so severe that all injections together might help better.” AR 277.

5 On November 22, 2006, Dr. Reitz administered left great occipital and left C2-3/C3-4 facet  
6 blocks. AR 298.

7 On November 27, 2006, Plaintiff told Dr. LeFevre that she felt better for a couple of days  
8 after the facet injections and was able to turn to the left, but the improvement did not last. On  
9 examination, she walked stiffly with decreased mobility of the neck. Dr. LeFevre prescribed  
10 methadone, actiq, duragesic, xanax and baclofen. AR 308.

11 On February 8, 2007, Plaintiff told Dr. LeFevre that decreasing her methadone caused  
12 increased pain. She denied depression. AR 408.

13 On February 14, 2007, Plaintiff received a C3-4 facet intervention. AR 429.

14 On February 15, 2007, Dr. Bueff indicated that Plaintiff was “doing fair.” She had a new  
15 facet block and her pain was a 2. On examination, she had decreased range of motion of her cervical  
16 spine. AR 329.

17 On March 16, 2007, Dr. Madelaine Aquino, M.D., completed a consultative orthopedic  
18 evaluation. Plaintiff complained of constant neck pain with occasional radiation to the upper  
19 extremities causing weakness and numbness of the left upper extremity. During the examination,  
20 Plaintiff was able to ambulate with a normal gait pattern and was able to tolerate sitting during the  
21 examination. She would move her entire upper body whenever she turned side to side. On physical  
22 examination, she had mild tightness of the cervical paraspinals with tenderness to palpation from the  
23 base of the skull down to the T1 level. She had decreased range of motion of the cervical spine in all  
24 planes. There was no evidence of muscle atrophy in the upper and lower extremities. She had  
25 decreased light touch sensation in the distal upper extremities with no specific dermatomal  
26 distribution. Plaintiff had no significant motor deficits and only mild sensory deficits, but there was  
27 no specific dermatome distribution corresponding to her areas of pathology. The main finding was a  
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1 limitation of range of motion of cervical spine due to the surgical fusion. Dr. Aquino opined that  
2 Plaintiff should be able to stand and walk about six hours in an eight-hour workday, could sit about  
3 six hours in an eight-hour day with regular breaks, could lift and carry 10 pounds frequently and 20  
4 pounds occasionally. She also should avoid any above head activities and no stooping, crouching or  
5 crawling because of the limitation of her range of motion of the cervical spine. Dr. Aquino further  
6 opined that Plaintiff may occasionally feel, but there were no limitations with grasping or fingering  
7 and she could occasionally reach. AR 330-34.

8 On April 26, 2007, J. V. Glaser, a state agency medical consultant, completed a Physical  
9 Residual Functional Capacity Assessment form. Dr. Glaser opined that Plaintiff could lift and carry  
10 20 pounds occasionally, 10 pounds frequently, could stand and/or walk about 6 hours in an 8-hour  
11 workday, could sit about 6 hours in an 8-hour workday and could push and/or pull without  
12 limitation. Plaintiff also could climb ramps or stairs occasionally, but could never balance and  
13 should avoid tasks requiring hyperextension of the neck. She frequently could balance, stoop, kneel,  
14 crouch and crawl, Her reaching and feeling were limited, but her handling and fingering were  
15 unlimited. She must avoid all overhead tasks. She could perform ring feeling on an occasional  
16 basis. AR 338-42.

17 On April 30, 2007, Plaintiff told Dr. Reitz she had experienced seven weeks of pain relief  
18 since the prior injection. She received another left C3-4 facet injection. AR 428.

19 On June 13, 2007, Dr. LeFevre increased Plaintiff's methadone because her pain was still  
20 "miserable." He also suggested a mental health appointment for anxiety and depression. AR 380.

21 On June 25, 2007, Plaintiff saw Dr. Reitz for an additional C3-4 facet injection. She reported  
22 no significant relief from her last C3-4 injection. AR 427.

23 On July 27, 2007, Plaintiff was referred by her lawyer to Dr. Harwant Kaur Gill for  
24 evaluation and treatment of depression. Plaintiff complained of a depressed mood, crying spells,  
25 insomnia, decreased energy, decreased concentration and hopelessness about her chronic neck pain.  
26 She denied any other current stressors. On mental status exam, Plaintiff had mild psychomotor  
27 retardation and was moderately depressed. Dr. Gill diagnosed depression, major, recurrent with a  
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1 Global Assessment of Functioning (“GAF”) of 61-70 with mild symptoms. Dr. Gill prescribed  
2 Venlafaxin. Plaintiff declined outpatient treatment. AR 353.

3 Plaintiff had a follow-up appointment with Dr. Gill for medication management on August  
4 13, 2007. Dr. Gill indicated that there were no changes in her assessment. He assigned her a GAF of  
5 71-80 with transient symptoms. As Plaintiff reported intolerable side effects from Venlafaxin, she  
6 was prescribed Paxil. AR 354-55.

7 On August 1, 2007, Plaintiff saw Dr. Sun Duk Hansrote for complaints of left hand weakness  
8 and numbness. On examination, Plaintiff had no focal weakness/atrophy in her left upper extremity.  
9 She had positive Tinel’s at the left ulnar with decreased light touch at the left medial hand. A prior  
10 EMG report showed mild conduction slowing in the left median nerve at the wrist. AR 377-78. An  
11 electrodiagnostic study of Plaintiff’s left hand completed in August 2007 was normal. Plaintiff was  
12 given an intramuscular Botox injection. AR 378.

13 On September 4, 2007, Plaintiff complained to Dr. Bueff of left sided arm pain, which was  
14 not truly dermatomal. She had normal left arm strength. AR 456.

15 On September 18, 2007, Dr. Bueff completed a Questionnaire form. He opined that  
16 Plaintiff’s medical problems precluded her from performing any full-time work at any exertional  
17 level. Her primary impairments were chronic pain syndrome, cervical fusion, and failed  
18 improvement after surgery. Dr. Bueff did not identify how long Plaintiff could sit, stand or walk.  
19 Instead, he opined that the Plaintiff’s pain was “so severe” that she could not do any work because of  
20 severe cervical arthritis and chronic pain syndrome. He believed that she had been disabled to this  
21 degree since the day of her surgery. AR 355-57.

22 A cervical spine MRI completed on September 25, 2007, showed mild left foraminal  
23 narrowing at C3-4 and mild thecal sac compression at C6-7. AR 404.

24 Plaintiff saw Dr. LeFevre on October 5, 2007. She reported a good result with L3-4 facets  
25 for up to 6 weeks and her pain level was down. AR 377. He encouraged her to have an epidural and  
26 pursue the possibility of rhizotomy. He also noted that he filled out a questionnaire “to help file for  
27 disability.” AR 378. On the Questionnaire form, Dr. LeFevre opined that Plaintiff’s medical  
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1 problems precluded her from performing any full-time work at any exertional level. Her primary  
2 impairments included severe pain with any neck movement, weakness and pain in her arms and an  
3 inability to turn her neck side to side. She could sit for 15 minutes in an 8-hour day, stand/walk 15  
4 minutes in 8-hour day and must lie down or elevate her legs for 3 hours in an 8-hour day. Dr.  
5 LeFevre based his opinion on Plaintiff's inability to move her neck. She also was unable to use her  
6 arms and hand, and she could not lift, reach, handle, feel, push/pull, or grasp. AR 358-59.

7 On March 11, 2008, Plaintiff saw Dr. John Gallo for complaints of anxiety. She reported  
8 taking 10 to 12 methadone at a time for her chronic pain, but would like to taper back. AR 522-23.

9 A subsequent cervical spine x-ray showed slight reversal of the usual cervical lordosis and  
10 moderate changes of spondylosis. AR 402.

11 On April 10, 2008, Dr. Montfort counseled Plaintiff on her medications and chronic pain.  
12 Plaintiff was to begin weaning herself off of medications and try exercise for her depression. AR  
13 374. The next day, Dr. LeFevre directed her to continue with methadone and actiq. AR 373.

#### 14 ALJ's Findings

15 The ALJ found that Plaintiff met the insured status requirements through March 31, 2010,  
16 and had not engaged in substantial gainful activity since June 22, 2005. The ALJ further found that  
17 Plaintiff had a severe cervical impairment. Despite this impairment, Plaintiff retained the residual  
18 functional capacity ("RFC") to perform light work, except that she had slightly limited attention,  
19 concentration, understanding, and memory because of her slight to moderate pain, which required  
20 occasional medication. Her reaching with the left, nondominant upper extremity was moderately  
21 limited overhead, and she had slight fine and gross manipulation restriction with her left upper  
22 extremity. She could sit, stoop and bend occasionally. With this RFC, the ALJ concluded that  
23 Plaintiff could not perform any past relevant work, but had skills transferable to other jobs in the  
24 national economy. AR 59-64.

#### 25 SCOPE OF REVIEW

26 Congress has provided a limited scope of judicial review of the Commissioner's decision to  
27 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, the  
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1 Court must determine whether the decision of the Commissioner is supported by substantial  
2 evidence. [42 U.S.C. 405 \(g\)](#). Substantial evidence means “more than a mere scintilla,” [Richardson](#)  
3 [v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v. Weinberger, 514](#)  
4 [F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is “such relevant evidence as a reasonable mind might  
5 accept as adequate to support a conclusion.” [Richardson, 402 U.S. at 401](#). The record as a whole  
6 must be considered, weighing both the evidence that supports and the evidence that detracts from the  
7 Commissioner’s conclusion. [Jones v. Heckler, 760 F.2d 993, 995 \(9th Cir. 1985\)](#). In weighing the  
8 evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*,  
9 [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#). This Court must uphold the  
10 Commissioner’s determination that the claimant is not disabled if the Commissioner applied the  
11 proper legal standards, and if the Commissioner’s findings are supported by substantial evidence.  
12 *See* [Sanchez v. Sec’y of Health and Human Serv., 812 F.2d 509, 510 \(9th Cir. 1987\)](#).

### 13 **REVIEW**

14 In order to qualify for benefits, a claimant must establish that she is unable to engage in  
15 substantial gainful activity due to a medically determinable physical or mental impairment which has  
16 lasted or can be expected to last for a continuous period of not less than 12 months. [42 U.S.C. §](#)  
17 [1382c \(a\)\(3\)\(A\)](#). A claimant must show that she has a physical or mental impairment of such  
18 severity that she is not only unable to do her previous work, but cannot, considering her age,  
19 education, and work experience, engage in any other kind of substantial gainful work which exists in  
20 the national economy. [Quang Van Han v. Bowen, 882 F.2d 1453, 1456 \(9th Cir. 1989\)](#). The burden  
21 is on the claimant to establish disability. [Terry v. Sullivan, 903 F.2d 1273, 1275 \(9th Cir. 1990\)](#).

22 In an effort to achieve uniformity of decisions, the Commissioner has promulgated  
23 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20 C.F.R. §](#)  
24 [404.1520\(a\)-\(g\)](#). Applying the process in this case, the ALJ found that Plaintiff: (1) had not engaged  
25 in substantial gainful activity since June 22, 2005; (2) has an impairment or a combination of  
26 impairments that is considered “severe” (cervical impairment) based on the requirements in the  
27 Regulations ([20 C.F.R. § 404.1520\(c\)](#)); (3) does not have an impairment or combination of

1 impairments which meets or equals one of the impairments set forth in Appendix 1, Subpart P,  
2 Regulations No. 4; (4) cannot perform her past relevant work; but (5) has transferable skills to  
3 perform other jobs that exist in significant numbers in the national economy. AR 59-64.

4 Here, Plaintiff contends that the ALJ erred by: (1) discounting her credibility; (2) rejecting  
5 the opinion of consultative examiner, Dr. Aquino; (2) rejecting the opinions of her treating  
6 physicians, Drs. Bueff and LeFevre; (3) failing to consider the effects of her mental impairments; and  
7 (5) failing to establish that there were other jobs in the national economy that she could perform.

## 8 DISCUSSION

### 9 A. Credibility Determination

10 Plaintiff first argues that the ALJ's credibility finding was inadequate and unsupported by  
11 clear and convincing reasons. Absent evidence showing that a claimant is malingering, an ALJ must  
12 set forth "clear and convincing" reasons for rejecting pain testimony. [Valentine v. Comm'r Soc. Sec.](#)  
13 [Admin.](#), 574 F.3d 685, 693 (9th Cir. 2009).

14 Here, the Commissioner contends that the ALJ's credibility determination is supported by  
15 record evidence suggesting malingering. [Smolen v. Chater](#), 80 F.3d 1273, 1283-84 (9th Cir. 1993)  
16 (ALJ must make specific findings and state clear and convincing reasons to reject a claimant's  
17 symptom testimony unless affirmative evidence of malingering is suggested in the record). In  
18 particular, the Commissioner points to the ALJ's express citation of Plaintiff's statements to Dr.  
19 Roberson that she had constant radiating pain, but she was able to sit comfortably throughout the  
20 interview, had no difficulty walking, was able to get onto the examination table, was able to sit up  
21 from a supine position, and was able to remove and replace and her shoes and socks without much  
22 difficulty. AR 60-61, 228-31. Plaintiff counters that neither the ALJ nor any physician made  
23 explicit findings of malingering. While Plaintiff is correct, it is clear that the ALJ relied on record  
24 evidence suggesting, at a minimum, inconsistency and exaggeration of pain symptoms. An ALJ may  
25 properly consider exaggerated complaints in discounting a claimant's credibility. [Thomas v.](#)  
26 [Barnhart](#), 278 F.3d 947, 958-59 (9th Cir.2002); [Tonapeytan v. Halter](#), 242 F.3d 1144, 1148 (9th Cir.  
27 [2001](#)) (ALJ may use "ordinary techniques of credibility evaluation," including consideration of  
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1 inconsistent statements). Indeed, the ALJ contrasted Plaintiff's assertions of *constant* pain with her  
2 lack of pain and lack of physical difficulties during examination by Dr. Roberson. In a similar  
3 fashion, the ALJ noted that in a later orthopedic evaluation, Plaintiff again reported constant sharp  
4 and radiating pain with occasional weakness and numbness, but the examining doctor found no  
5 significant motor deficits and no evidence of any muscle atrophy. The examining doctor also found  
6 that the distribution of Plaintiff's mild sensory deficits did not correspond with her areas of  
7 pathology. AR 61, 330-34. Thus, the ALJ did not err in considering records of inconsistent reports  
8 and exaggeration of pain in his credibility determination.

9 Plaintiff also contends that the ALJ "entirely failed to consider the seven criteria for  
10 evaluation of credibility" set forth in Social Security Ruling ("SSR") 96-7p. SSR 96-7p provides  
11 factors that may be considered to determine a claimant's credibility, such as: 1) the individual's daily  
12 activities; 2) the location, duration, frequency, and intensity of the individual's pain and other  
13 symptoms; 3) factors that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness,  
14 and side effects of any medication the individual takes or has taken to alleviate pain or other  
15 symptoms; 5) treatment, other than medication, the individual receives or has received for relief of  
16 pain or other symptoms; 6) any measures other than treatment the individual uses or has used to  
17 relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes  
18 every hour, or sleeping on a board); and 7) any other factors concerning the individual's functional  
19 limitations and restrictions due to pain or other symptoms. SSR 96-7p. An ALJ is not required to  
20 discuss and analyze each and every one of the factors enumerated in SSR 96-7p. *See, e.g., Howard*  
21 *v. Astrue*, 2010 WL 546715, \*13 (E.D. Cal. Feb. 10, 2010) (plaintiff incorrectly argued that SSR 96-  
22 7p sets forth mandatory factors that an ALJ must analyze); *Collins v. Astrue*, 2009 WL 1202891, \*6  
23 (C.D. Cal. Apr.27, 2009); *O'Neal v. Barnhart*, 2006 WL 988253, \*12 n. 7 (C.D. Cal. Apr.13, 2006).  
24 Instead, the ALJ must give consideration to these factors. *See* SSR 96-7p.

25 In this case, the record as a whole reflects adequate consideration of these factors. For  
26 instance, the ALJ considered Plaintiff's testimony regarding her daily activities (AR 60), the  
27 location, duration, frequency, and intensity of her pain and other symptoms (AR 60-62), the factors



1 that precipitate and aggravate the symptoms (AR 29-30), the type, effectiveness, and side effects of  
2 any medication (AR 60), her treatment (AR 61-62), any measures other than treatment to relieve pain  
3 or other symptoms (AR 60) and any other factors concerning her functional limitations and  
4 restrictions (AR 60, 61). The ALJ also received testimony regarding Plaintiff's work history. AR  
5 10-16, 40.

6 As Plaintiff contends, the ALJ found that the medical evidence did not support Plaintiff's  
7 allegations of severe pain and its disabling effects. Plaintiff argues this is error because an ALJ may  
8 not discount a claimant's credibility solely because it is not corroborated by objective medical  
9 findings. "While subjective pain testimony cannot be rejected on the sole ground that it is not fully  
10 corroborated by objective medical evidence, the medical evidence is still a relevant factor in  
11 determining the severity of the claimant's pain and its disabling effects." [Rollins v. Massanari, 261](#)  
12 [F.3d 853, 857 \(9th Cir.2001\)](#). Here, the ALJ did not limit his consideration solely to a lack of  
13 objective evidence. The ALJ considered, among other things, inconsistencies in Plaintiff's claims  
14 concerning pain, inconsistencies in Plaintiff's testimony and reports, Plaintiff's behaviors and  
15 activities, and her longitudinal medical history, in addition to the objective medical evidence. As to  
16 the lack of objective evidence, the ALJ noted Dr. Roberson's findings that Plaintiff had normal  
17 motor strength, muscle bulk and tone and had a normal neurological examination. AR 61, 228-31.  
18 The ALJ also noted Plaintiff's report that she was miserable because of pain in June 2007, but a  
19 September 2007 MRI of her cervical spine showed only mild narrowing and compression. AR 61-  
20 62, 404.

21 Plaintiff additionally argues that the ALJ improperly rejected her testimony that she could  
22 stand 15 minutes, walk three blocks and sit 30 minutes at one time. The ALJ rejected this testimony  
23 by noting Plaintiff's inconsistent reports regarding her physical limitations. As noted above, in  
24 weighing a claimant's credibility, one factor an ALJ may consider includes inconsistent testimony.  
25 [Tonapetyan, 242 F.3d at 1148; Fair v. Bowen, 885 F.2d 597, 603 \(9th Cir. 1989\)](#). In this case, the  
26 ALJ contrasted a previous written statement that she could stand for two hours, sit for two hours and  
27 walked 1½ miles a week. He also noted that she testified to performing basic household chores and  
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1 shopping as needed. AR 60, 109-110.

2 Plaintiff argues that the ALJ improperly rejected testimony that she could lift and carry no  
3 more than five pounds with her left upper extremity. However, the ALJ found no medical evidence  
4 of weakness in the record. AR 62. Similarly, the ALJ rejected Plaintiff's claims that she had  
5 difficulty grasping and holding things based on evidence that she only had mild carpal tunnel  
6 syndrome of her left upper extremity and does not drop things. AR 61.

7 Plaintiff also complains that the ALJ rejected her testimony regarding her ability to  
8 concentrate. As a practical matter, however, the ALJ partially credited Plaintiff's testimony, finding  
9 that she had slightly limited attention, concentration, understanding, and memory because her pain  
10 required occasional medication. AR 59. There was no other evidence of a severe mental  
11 impairment. AR 62, 353, 354-55.

12 B. Dr. Aquino's Opinion

13 Plaintiff asserts that the ALJ erred by failing to proffer a reason for rejecting Dr. Aquino's  
14 determination that she was limited to occasional feeling and reaching. AR 333. Plaintiff's assertion  
15 lacks merit.

16 As an initial matter, an ALJ need not believe everything a physician sets forth, and may  
17 accept all, some, or none of the physician's opinions. [Magallanes v. Bowen, 881 F.2d 747, 753-754](#)  
18 [\(9th Cir. 1989\)](#). Although the ALJ did not specifically state that he was rejecting Dr. Aquino's  
19 feeling and reaching limitation, it is clear that he both considered it and applied it to Plaintiff's left  
20 upper extremity. An ALJ need not recite a magical "incantation" expressly rejecting a physician's  
21 opinion. [Id. at 755](#). Rather, a reviewing court is "not deprived of [its] faculties for drawing specific  
22 and legitimate inferences from the ALJ's opinion" if those inferences are there to be drawn. [Id.](#)

23 Here, the ALJ thoroughly summarized Dr. Aquino's examination and conclusions. As part of  
24 this summary, the ALJ noted Dr. Aquino's findings that Plaintiff had no muscle atrophy, no tightness  
25 of the muscles and only mild sensory deficits that did not correspond with her areas of pathology.  
26 The ALJ also considered Dr. Aquino's assessment that Plaintiff could occasionally reach or feel. AR  
27 61. However, the ALJ ultimately found that Plaintiff's reaching with her left, non-dominant upper  
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1 extremity was moderately limited overhead and that she had a slight fine and gross manipulation  
2 restriction with her left upper extremity as well. AR 62. In so doing, the ALJ took into account  
3 Plaintiff's testimony that she was disabled by pain on the left side of her neck down to her left arm.  
4 Indeed, Plaintiff testified that she had no problems reaching in front of her or to the side. Instead,  
5 she limited her problems to overhead reaching with her left arm and grasping with her left hand. As  
6 to feeling, Plaintiff testified that she had numbness and tingling only in her left hand. AR 26-29.  
7 The ALJ also cited a nerve conduction study revealing mild carpal tunnel syndrome of her left upper  
8 extremity. AR 60, 61. Thus, it is readily apparent that the ALJ applied Dr. Aquino's generalized  
9 limitations in reaching and feeling to Plaintiff's left upper extremity based on Plaintiff's more  
10 specific testimony and on the objective medical evidence.

11 C. Opinions of Treating Physicians, Drs. Bueff and LeFevre

12 *Dr. Bueff*

13 Plaintiff first argues that the ALJ erred in rejecting Dr. Bueff's opinion that she could not  
14 work. However, the ALJ properly reasoned that Dr. Bueff's opinion was not directed at a medical  
15 issue. A doctor's statement about a claimant's ability to work is not a proper medical source opinion,  
16 but an administrative finding reserved to the Commissioner. Social Security Ruling ("SSR") 96-5p.  
17 Disability has both a medical and vocational component. See [20 C.F.R. § 404.1560](#). Because a  
18 medical source does not have the expertise to comment on the vocational component of disability, a  
19 statement by a medical source that a person is unable to work is not accorded much weight. See [20](#)  
20 [C.F.R. § 404.1527\(e\)\(1\)](#).

21 Additionally, the ALJ noted that Dr. Bueff's statement did not address medical issues such as  
22 Plaintiff's specific functioning or why her disability arose on the date of surgery. The statement also  
23 did not identify supporting diagnoses or clinical findings, noting it was primarily "pain." AR 355-  
24 57. Finding Dr. Bueff's opinion "conclusory," the ALJ appropriately assigned it little weight. An  
25 ALJ need not accept a treating physician's opinion that is conclusory, brief and unsupported by  
26 clinical findings. [Tonapetyan, 242 F.3d at 1149](#); [Matney v. Sullivan, 981 F.2d 1016, 1019 \(9th Cir.](#)  
27 [1992\)](#); [Magallanes, 881 F.2d at 751](#).

1           *Dr. LeFevre*

2           As with Dr. Bueff's opinion, Plaintiff contends that the ALJ erred in assigning less weight to  
3 the opinion of treating physician, Dr. LeFevre.

4           Treating physicians are owed considerable deference. [Edlund v. Massanari, 253 F.3d 1152,](#)  
5 [1157 \(9th Cir.2001\)](#). However, their opinions can “be rejected for specific and legitimate reasons  
6 that are supported by substantial evidence in the record.” *Id.* (internal quotation marks omitted). The  
7 “reasons must be sufficiently specific to make clear to any subsequent reviewers the weight the  
8 adjudicator gave to the treating source's medical opinion and the reasons for that weight.” *Id.*  
9 (internal quotation marks omitted). “The ALJ is responsible for determining credibility, resolving  
10 conflicts in medical testimony, and resolving ambiguities.” *Id. at 1156.*

11           Here, the ALJ considered Dr. LeFevre's opinion and provided specific and legitimate reasons  
12 for according it less weight. AR 62. First, the ALJ rejected Dr. LeFevre's statement that Plaintiff  
13 had weakness in her arm because treatment records did not identify any significant arm weakness.  
14 AR 62. A lack of supporting clinical findings is a valid reason for rejecting a treating physician's  
15 opinion. [Magallanes, 881 F.2d at 751](#); see also [Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d](#)  
16 [1190, 1195 \(9th Cir. 2004\)](#) (ALJ properly discounted or assigned minimal weight to treating  
17 physician opinions that were unsupported by objective evidence and that lacked substantive medical  
18 findings); [Holohan v. Massanari, 246 F.3d 1195, 1202 n. 2 \(9th Cir. 2001\)](#) (stating that a physician's  
19 opinion may be “entitled to little if any weight” where the physician “presents no support for her or  
20 his opinion”). According to the record, Plaintiff complained of weakness and pain in her left arm  
21 and hand, but an October 2005 EMG/NCS showed only mild carpal tunnel syndrome. AR 182, 195.  
22 When she was examined by Dr. Aquino in March 2007, there was no evidence of muscle atrophy in  
23 the upper extremities. Although she had mild sensory deficits, there was no specific dermatome  
24 distribution corresponding to her areas of pathology. AR 330-34. In August 2007, Plaintiff had no  
25 focal weakness/atrophy in her left upper extremity and an electrodiagnostic study of her left hand  
26 was normal. AR 377-78. In September 2007, she had normal left arm strength. AR 456. As the  
27 record lacks objective evidence and substantive medical findings demonstrating any arm weakness,

1 the ALJ did not err by rejecting Dr. LeFevre's unsupported statement.

2         Second, the ALJ rejected Dr. LeFevre's statements that Plaintiff suffered from severe pain  
3 with any neck movement and was unable to turn from side to side. Although the ALJ acknowledged  
4 that Plaintiff had a limited range of motion of her cervical spine, he reasoned that this had more to do  
5 with her cervical fusion than with intractable pain. AR 62. The ALJ's determination is consistent  
6 with the examination completed by Dr. Aquino, who found that Plaintiff had limited range of motion  
7 of her cervical spine due to her surgical fusion. AR 333. "[W]hen an examining physician provides  
8 independent clinical findings that differ from the findings of the treating physician, such findings are  
9 substantial evidence. Independent clinical findings can be either (1) diagnoses that differ from those  
10 offered by another physician and that are supported by substantial evidence, or (2) findings based on  
11 objective medical tests that the treating physician has not herself considered." [Orn v. Astrue, 495](#)  
12 [F.3d 625, 632 \(9th Cir. 2007\)](#) (Internal quotations and citations omitted). Dr. Aquino's assessment  
13 was based on independent clinical findings. Specifically, Dr. Aquino noted that Plaintiff was able to  
14 ambulate with a normal gait pattern; was able to tolerate sitting during the examination; had no  
15 evidence of muscle atrophy in her extremities; had strength of 5/5 throughout the upper and lower  
16 extremities; and had symmetric and brisk reflexes. Although she had tenderness to palpation over  
17 the cervical paraspinals and spine, she had no other tender areas in the back and no tightness of the  
18 upper trapezius muscles. Tellingly, she had no significant motor deficits. AR 330-33. In contrast,  
19 there is no indication that Dr. LeFevre completed a similar examination of Plaintiff at the time he  
20 filled out his Questionnaire. AR 358-59, 377-78. Accordingly, the ALJ properly considered that  
21 Plaintiff's range of motion issues were the result of her cervical spine fusion, and not intractable  
22 pain.

23         Third, and finally, the ALJ rejected Dr. LeFevre's assessment that she could sit, stand or walk  
24 for 15 minutes at a time and that she must lie down for 3 hours each day based on Plaintiff's account  
25 of her daily activities. AR 62. A claimant's daily activities provide a relevant basis for rejecting a  
26 treating physician's opinion. *See, e.g., Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 601-*  
27 [02 \(9th Cir. 1999\)](#). Here, the ALJ noted that Plaintiff could perform a variety of tasks, including  
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1 preparation of meals once or twice a day, washing dishes three times a week, sweeping twice a  
2 month, dusting four times a month, going shopping twice a month and making her bed twice a week.  
3 AR 19-20, 62. Indeed, contrary to Dr. LeFevre’s assessment, Plaintiff testified that she could sit  
4 about 30 minutes, could walk about three blocks and needed to lie down about 2 hours during the  
5 day. AR 26, 35. In sum, the ALJ provided specific and legitimate reasons, supported by the record,  
6 for discounting Dr. LeFevre’s opinion.

7 Plaintiff appears to reject the ALJ’s analysis of the medical record, citing the treatment  
8 records of Drs. Bueff and LeFevre. However, Plaintiff’s interpretation of those records does not  
9 render the ALJ’s findings and conclusions improper. As noted above, Dr. Bueff provided few, if  
10 any, objective findings to support his non-medical opinion about Plaintiff’s inability work.  
11 Similarly, the ALJ cited the unsupported nature of particular aspects of Dr. LeFevre’s opinion, along  
12 with contradictory medical evidence. [Magallanes, 881 F.2d at 750](#) (the court must uphold the ALJ’s  
13 decision where the evidence is susceptible to more than one rational interpretation).

14 Based on the above, the ALJ’s analysis of the medical opinions is supported by substantial  
15 evidence and free of legal error.

16 D. Mental Impairments

17 In this case, the ALJ determined that Plaintiff did not have a severe mental impairment at step  
18 two of the sequential evaluation process. Plaintiff does not take issue with the ALJ’s step two  
19 determination. Rather, Plaintiff argues that the ALJ failed to properly consider the effects of  
20 Plaintiff’s mental impairments in her residual functional capacity. The Court disagrees.

21 In making a residual functional capacity assessment, an ALJ is required to consider even  
22 medically determinable impairments that are not severe under step two, as well as the limiting effects  
23 thereof. *See* [20 C.F.R. §§ 404.1545\(a\)\(2\), 404.1545\(e\)](#). Here, in assessing Plaintiff’s RFC, the ALJ  
24 relied on Dr. Gill’s psychiatric report completed in July 2007, which noted only “mild symptoms.”  
25 AR 62. As a practical matter, Plaintiff does not address this portion of Dr. Gill’s opinion, nor does  
26 she address Dr. Gill’s additional findings that she had a logical thought process, normal  
27 concentration, normal attention, fair insight and good judgment. AR 352-53. Indeed, Dr. Gill did

1 not assign any limitations to Plaintiff's mental functional capacity. Insofar as Plaintiff relies on Dr.  
2 Gill's diagnosis of depression, major, recurrent, this is insufficient. The mere diagnosis of an  
3 impairment is not sufficient to sustain a finding of disability. [Key v. Heckler, 754 F.2d 1545, 1549](#)  
4 [\(9th Cir. 1985\)](#).

5 Further, the ALJ accurately observed that Plaintiff was referred to Dr. Gill by her attorney.  
6 AR 62. There is no indication that he discounted Dr. Gill's opinion for this reason. Rather, the ALJ  
7 noted that Plaintiff did not want any follow-up treatment and there was no indication that her  
8 depression met the durational requirement. AR 62. Although Plaintiff asserts that record evidence  
9 demonstrates depression from the date of her surgery through the hearing decision, Plaintiff does not  
10 direct the court to such longitudinal evidence. The court notes that Plaintiff denied depression in  
11 February 2007. AR 527. Plaintiff also does not cite to medical evidence of functional limitations or  
12 evidence of more than mild symptoms. In fact, Dr. Gill identified only transient symptoms in August  
13 2007. AR 354-55.

14 Based on the above, the ALJ properly evaluated evidence of any mental impairment.

15 E. RFC Finding and Vocational Expert Testimony

16 As a final matter, Plaintiff asserts that the VE's testimony has no evidentiary value because  
17 the ALJ's hypothetical question did not reflect her actual limitations.

18 The hypothetical posed to the vocational expert must accurately reflect the claimant's  
19 physical and mental limitations that are determined credible and supported by the record. However,  
20 the ALJ may exclude restrictions in the hypothetical that are unsupported by the record or discredited  
21 as unreliable. [Osenbrock v. Apfel, 240 F.3d 1157, 1163-64 \(9th Cir.2001\)](#); [DeLorme v. Sullivan, 924](#)  
22 [F.2d 841, 850 \(9th Cir.1991\)](#); [Embrey v. Bowen, 849 F.2d 418, 423 \(9th Cir. 1988\)](#).

23 As discussed above, the ALJ properly accounted for Plaintiff's mental and physical  
24 limitations.

25 **RECOMMENDATION**

26 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial  
27 evidence and is based on proper legal standards. Accordingly, the Court RECOMMENDS that

1 Plaintiff's appeal from the administrative decision of the Commissioner of Social Security be  
2 DENIED and that JUDGMENT be entered for Defendant Michael J. Astrue and against Plaintiff  
3 Pamela Kruse.

4         These findings and recommendations will be submitted to the Honorable Lawrence J. O'Neill  
5 pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within thirty (30) days after being served  
6 with these findings and recommendations, the parties may file written objections with the court. The  
7 document should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
8 The parties are advised that failure to file objections within the specified time may waive the right to  
9 appeal the District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

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IT IS SO ORDERED.

**Dated: May 26, 2011**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE