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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

REGINA KARASIK-TOSK,
Plaintiff,
v.
NANCY BERRYHILL,
Defendant.

Case No. 17-cv-06623-BLF

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT; REVERSING THE DENIAL OF BENEFITS; AND REMANDING FOR FURTHER ADMINISTRATIVE PROCEEDINGS

[Re: ECF 26, 27]

Plaintiff Regina Karasik-Tosk, proceeding through counsel, appeals a final decision of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying her application for a period of disability and disability insurance benefits under Title II of the Social Security Act. Before the Court are Plaintiff’s motion for summary judgment (“Pl. Mot.,” ECF 26) and Defendant’s cross-motion for summary judgment (“Def. Mot.,” ECF 27).¹ Plaintiff filed a brief in response to Defendant’s motion (“Resp.,” ECF 32). The matter was submitted without oral argument pursuant to Civil Local Rule 16-5.

For the reasons discussed below, the Court GRANTS IN PART AND DENIES IN PART Plaintiff’s motion; GRANTS IN PART AND DENIES IN PART Defendant’s cross-motion; REVERSES the denial of benefits; and REMANDS for further administrative proceedings.

¹ Defendant moves for summary judgment on the same issues as Plaintiff. For ease, the Court refers to the arguments as Plaintiff’s arguments.

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I. BACKGROUND

Plaintiff was born on November 12, 1960 and graduated from high school. Admin. Record (“AR”) 205, 255. She is not currently married and has one dependent child. AR 206, 207. She has past relevant work as a caregiver and medical biller. AR 84, 255.

Plaintiff filed a claim for disability insurance benefits on April 10, 2014, alleging disability beginning January 1, 2014.² AR 21, 49–50, 205–16. She claims several impairments, including degenerative disc disease, fibromyalgia, arthritis of the hip, migraines, and depression. AR 253–62.

Plaintiff’s application was denied initially and upon reconsideration. AR 21, 42–90, 128–44. She requested and received a hearing before an administrative law judge (“ALJ”), which was held on February 3, 2016. AR 21, 42. The ALJ heard testimony from two individuals: Plaintiff and Darlene T. Mcquary, a vocational expert (“VE”). *Id.* The ALJ issued a written decision on April 29, 2016, finding that Plaintiff was not disabled and therefore was not entitled to benefits. AR 18–36. On September 15, 2017, the Appeals Council affirmed the ALJ’s decision, making it the final decision of the Commissioner. AR 1–3. Plaintiff filed this action on November 16, 2017. ECF 1.

II. LEGAL STANDARD

A. Standard of Review

Pursuant to sentence four of 42 U.S.C. § 405(g), district courts “have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 USC § 405(g). However, “a federal court’s review of Social Security determinations is quite limited.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). Federal courts “leave it to the ALJ to determine credibility, resolve conflicts in the testimony, and resolve ambiguities in the record.” *Id.* (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014)).

² Plaintiff originally alleged disability since September 29, 2010, but later amended her alleged onset date to January 1, 2014. AR 49–50.

1 A court “will disturb the Commissioner’s decision to deny benefits only if it is not
2 supported by substantial evidence or is based on legal error.” *Brown-Hunter*, 806 F.3d at 492
3 (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence as
4 a reasonable mind might accept as adequate to support a conclusion, and must be more than a
5 mere scintilla, but may be less than a preponderance.” *Rounds v. Comm’r of Soc. Sec. Admin.*,
6 807 F.3d 996, 1002 (9th Cir. 2015) (internal quotation marks and citations omitted). A court
7 “must consider the evidence as a whole, weighing both the evidence that supports and the
8 evidence that detracts from the Commissioner’s conclusion.” *Id.* (internal quotation marks and
9 citation omitted). If the evidence is susceptible to more than one rational interpretation, the ALJ’s
10 findings must be upheld if supported by reasonable inferences drawn from the record. *Id.*

11 Finally, even when the ALJ commits legal error, the ALJ’s decision will be upheld so long
12 as the error is harmless. *Brown-Hunter*, 806 F.3d at 492. However, “[a] reviewing court may not
13 make independent findings based on the evidence before the ALJ to conclude that the ALJ’s error
14 was harmless.” *Id.* The court is “constrained to review the reasons the ALJ asserts.” *Id.*

15 **B. Standard for Determining Disability**

16 “To determine whether a claimant is disabled, an ALJ is required to employ a five-step
17 sequential analysis, determining: (1) whether the claimant is doing substantial gainful activity;
18 (2) whether the claimant has a severe medically determinable physical or mental impairment or
19 combination of impairments that has lasted for more than 12 months; (3) whether the impairment
20 meets or equals one of the listings in the regulations; (4) whether, given the claimant’s residual
21 functional capacity, the claimant can still do his or her past relevant work; and (5) whether the
22 claimant can make an adjustment to other work.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th
23 Cir. 2014) (internal quotation marks and citations omitted). The residual functional capacity
24 (“RFC”) referenced at step four is what a claimant can still do despite his or her limitations. *Id.* at
25 1160 n.5. “The burden of proof is on the claimant at steps one through four, but shifts to the
26 Commissioner at step five.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir.
27 2009).

28

1 **III. DISCUSSION**

2 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
3 activity from her alleged onset date, January 1, 2014, through the date of the decision.³ AR 23.

4 At step two, the ALJ found that Plaintiff had the following severe impairments: “degenerative disc
5 disease, fibromyalgia, and arthritis of the hip.” AR 23–28. However, as is relevant here, the ALJ
6 found that there was insufficient evidence to support Plaintiff’s alleged depression was a severe
7 mental impairment. AR 26–28. At step three, the ALJ concluded that Plaintiff’s impairments did
8 not meet or medically equal the severity of one of the listed impairments in the regulations. AR
9 28.

10 Prior to making a step four determination, the ALJ found that Plaintiff had the RFC to
11 perform the full range of light work. AR 28–34. Light work is defined in the regulations as
12 follows:

13 Light work. Light work involves lifting no more than 20 pounds at a time with
14 frequent lifting or carrying of objects weighing up to 10 pounds. Even though the
15 weight lifted may be very little, a job is in this category when it requires a good deal
16 of walking or standing, or when it involves sitting most of the time with some
17 pushing and pulling of arm or leg controls. To be considered capable of performing
18 a full or wide range of light work, you must have the ability to do substantially all of
19 these activities. If someone can do light work, we determine that he or she can also
20 do sedentary work, unless there are additional limiting factors such as loss of fine
21 dexterity or inability to sit for long periods of time.

22 20 C.F.R. § 404.1567(b).

23 Based on the above RFC and the testimony of the VE, the ALJ found at step four that
24 Plaintiff was capable of performing her past relevant work as a medical code biller. AR 34. The
25 ALJ made an alternative step five determination that Plaintiff could perform other jobs that exist
26 in the national economy. *Id.* The ALJ therefore found that Plaintiff was not disabled from her
27 alleged onset date through the date of the decision. AR 36.

28 Plaintiff asserts that the ALJ’s decision is legally insufficient because: (1) the ALJ erred in
failing to find Plaintiff’s depression to be a severe impairment, and thus his analyses at steps 4 and
5 are not supported by substantial evidence; (2) the ALJ improperly rejected the medical evidence
of Plaintiff’s treating doctors; and (3) the ALJ improperly rejected Plaintiff’s testimony. The

³ Plaintiff has not yet reached her date last insured, December 31, 2019. AR 23.

1 Court addresses each argument in turn.

2 **A. The Degree of Plaintiff’s Mental Impairment**

3 At step two, the ALJ concluded that Plaintiff’s claimed mental impairment of depression
4 was non-severe. AR 26–28. Plaintiff argues that this finding is not supported by substantial
5 evidence in the record. To be severe, an impairment must “last for a continuous period of at least
6 twelve months,” 20 C.F.R. § 404.1509, and it must “significantly limit” the claimant’s “physical
7 or mental ability to do basic work activities.” 20 C.F.R. § 404.1522(a). Basic work activities are
8 “the abilities and aptitudes necessary to do most jobs,” including such abilities as “understanding,
9 carrying out, and remembering simple instructions.” *Id.* § 404.1522(b). The Court first
10 summarizes the ALJ’s decision and then addresses Plaintiff’s arguments and the Commissioner’s
11 opposition thereto.

12 **1. The ALJ’s Decision**

13 The ALJ ultimately concluded that Plaintiff’s depression was not a severe impairment
14 because there was “scant evidence of mental health treatment,” and because Plaintiff had “denied
15 psychiatric hospitalizations” and “been treated with outpatient medication management primarily
16 over the years.” AR 26. He also concluded that Plaintiff’s “routine treatment records do not
17 evidence psychiatric deficits apart from the claimant’s reports of depressive symptoms related in
18 some way to her chronic pain.” AR 26. In reaching this conclusion, the ALJ noted that Plaintiff
19 “has been diagnosed with depression NOS” and “assessed a Global Assessment of Functioning
20 (GAF) score of approximately 65, indicative of only mild symptoms or some difficulty in social or
21 occupational functioning.” AR 26.

22 The ALJ considered the four broad functional areas for evaluating mental disorders (*see* 20
23 CFR § 404.1520a) and found the following: (1) Plaintiff had mild limitation in the area of
24 activities of daily living because she cares for her 16-year old son, performing light cooking,
25 chores, paying the bills, and walking the dog for fifteen minutes at a time three times a day, and
26 she is able to drive and shop independently, as well as maintain part-time employment as a
27 caregiver for 37 hours a month, performing chores for clients and driving them to appointments,
28 among other tasks; (2) Plaintiff had mild limitation in the area of social functioning because she

1 had no problems getting along with family, friends, and authority figures, she could visit with
2 people in person and remotely, she was married, and she was able to cooperate well and connect
3 interpersonally during a psychological evaluation; (3) Plaintiff had mild limitation in the area of
4 concentration, persistence, or pace because though she testified she had been released from a
5 recent job after three weeks because she had trouble concentrating and following instructions, she
6 enjoys reading, drawing, and concerts, and she uses the computer to do tasks, and she was able to
7 successfully perform many tests during her psychological evaluation; and (4) Plaintiff had no
8 extended periods of decompensation. AR 26–27. Based on these results, the ALJ concluded
9 Plaintiff’s depression was non-severe. AR 27 (citing 20 CFR § 404.1520a(d)(1) (“If we rate the
10 degrees of your limitation as “none” or “mild,” we will generally conclude that your
11 impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a
12 minimal limitation in your ability to do basic work activities”).

13 In making this functional assessment, the ALJ considered the opinion of several medical
14 sources. First, the ALJ gave “significant weight” to consultative psychological examiner Dr.
15 Charles DeBattista. Dr. DeBattista examined Plaintiff. The ALJ found that Plaintiff “complained
16 of depression and pain, but reported benefit from Wellbutrin over the past 10 to 17 years, and at
17 lower doses than she has taken in the past.” AR 27 (citing AR 492–44). She also complained that
18 her mood was sometimes depressed and is strongly affected by her physical condition. Dr.
19 DeBattista also performed mental status testing on Plaintiff. Plaintiff “demonstrated no
20 psychomotor agitation or retardation” and her “thought process was coherent and organized.” AR.
21 27 (citing AR 492–44). Likewise, her “content was relevant and non-delusional,” and she had
22 “normal speech rate, rhythm, and tone.” *Id.* As for her memory, her “digit span was six forward,”
23 she “could recall three of three objects immediately, and two of three objects after five minutes.”
24 AR 492–44. Finally, as to “concentration and calculations,” through she “got lost in doing Serial
25 Threes and made approximately four errors on the first seven Serial Threes,” she could “spell
26 ‘world’ forward and backward, perform simple multiplication, and followed the conversation
27 well.” AR 27 (citing AR 492–44). From these results Dr. DeBattista concluded that Plaintiff was
28 “mildly to moderately impaired in her ability to relate and interact with coworkers and the public;

1 maintain concentration and attention, persistence and pace; and associate with day-to-day work
2 activity, including attendance and safety.” AR 27. But he also opined that Plaintiff “would be
3 expected to at least maintain improvement over the next six to 12 months with continued
4 medication management.” AR 27.

5 The ALJ also considered the opinions of two psychological consultants: Drs. Timothy
6 Schumacher and Dara Goosby. Those consultants opined that Plaintiff “has mild restriction in
7 activities of daily living; moderate difficulties in maintaining social functioning; moderate
8 difficulties in maintaining concentration, persistence, or pace; and no episodes of decompensation
9 of extended duration.” AR 27 (citing AR 97–106, 120–23). While they opined that Plaintiff could
10 not sustain difficult, detailed three- to four-step work duties over extended periods, they found she
11 could “perform one to two step assignment for up to two-hour intervals during a regular workday
12 and workweek.” AR 27–28. Finally, they opined Plaintiff’s mood symptoms would be
13 aggravated by close interactions with the general public and critical supervision, but that she could
14 engage in routine contacts with coworkers and employers. AR 97–106, 120–23. The ALJ gave
15 “little weight” to the consultants’ opinion that Plaintiff’s mental impairment was severe. AR 28.
16 In so doing, the ALJ recognized the consultants were “non-treating, non-examining sources,” and
17 that, as Dr. DeBattista had recognized, Plaintiff “has managed her condition with Wellbutrin over
18 the past 10 to 17 years, and, more recently, at a lower dose than she has taken in the past.” AR 28.
19 Moreover, Plaintiff was able to perform work as a caregiver and complete daily living activities,
20 “which likely requires a strong skill set in social functioning, concentration, persistence and pace.”
21 AR 28.

22 **2. The ALJ Did Not Err in Concluding that Plaintiff’s Mental Impairment Is**
23 **Not Severe**

24 Plaintiff argues that the ALJ erred in finding that her mental impairment was not severe,
25 and, in turn, by not including relevant limitations in her RFC. At bottom, Plaintiff argues that the
26 reviewing doctors’ opinion, in combination with Plaintiff’s testimony, indicated that “Plaintiff
27 should be limited to work involving 1 to 2 step tasks and limited contact with supervisors and the
28 general public”—limitations that were not in her RFC. Pl. Mot. at 13.

1 Plaintiff notes that Dr. DeBattista diagnosed Plaintiff with depression and noted that
2 Plaintiff had fatigue and “very few ‘good days.’” *Id.* at 11 (quoting AR 492). Dr. DeBattista
3 noted Plaintiff appeared mildly depressed and displayed some problems with concentration. *Id.* at
4 11–12 (AR 492). He opined that she would be “mildly to moderately impaired in her ability to
5 maintain concentration, attention, persistence, and pace.” *Id.* at 12 (citing AR 494). As to Dr.
6 Schumacher, Plaintiff notes he opined that Plaintiff had “mild restriction in performing activities
7 of daily living, moderate difficulties in maintaining social functioning, and moderate difficulties in
8 maintaining concentration, persistence, and pace overall,” and that Plaintiff had the limitations as
9 described by the ALJ. *Id.* (citing AR 97, 104). Dr. Goosby affirmed these limitations. *Id.* (citing
10 AR 120).

11 Plaintiff argues that the ALJ erred in his conclusion because Plaintiff’s testimony about her
12 work and daily activities does not conflict with the consultants’ opinions. *See id.* at 12–13.
13 Plaintiff testified that she can work no more than 1.5–2 hours per day. AR 51. According to
14 Plaintiff, this cannot be extrapolated to a conclusion that she can “sustain concentration,
15 persistence, or pace in performing detailed or multiple step tasks for 8 hours per day, 5 days per
16 week, as required to perform full-time work.” Pl. Mot. at 12. Moreover, contrary to the ALJ’s
17 conclusions, her job as caregiver does not require strong social skills because she “works one-on-
18 one with a single disabled individual.” *Id.* Plaintiff concludes that the limitations on 1- to 2-step
19 tasks identified by the consultants should have been included as a limitation in the RFC, and that if
20 such limitations had been included, they would have eliminated all but one of the jobs the VE
21 identified at steps 4 and 5, thus rendering the ALJ’s decision unsubstantiated. *See id.* at 13–14.

22 The Court agrees with Defendant that the ALJ did not err in finding that Plaintiff’s
23 depression is not a severe impairment. Substantial evidence supports this conclusion. The ALJ
24 found that there was “scant evidence of mental health treatment,” and Plaintiff had “denied
25 psychiatric hospitalizations” and “been treated with outpatient medication management primarily
26 over the years.” AR 26. Plaintiff does not refute this finding. This evidence supports a finding
27 that Plaintiff’s depression is not a severe impairment. *See Malloy v. Colvin*, 664 F. App’x 638,
28 641 (9th Cir. 2016) (upholding ALJ finding that mental impairment was not severe where “record

1 showed minimal and inconsistent treatment for any psychological symptoms Malloy may have
2 experienced” (internal quotation marks omitted); *Lasich v. Astrue*, 252 F. App’x 823, 825 (9th
3 Cir. 2007) (same, where claimant “provided little evidence of significant psychiatric or
4 psychological findings demonstrating severe mental impairment and had not been regularly treated
5 by a licensed psychologist or psychiatrist or received regular mental health counseling or
6 therapy”). Likewise, the ALJ noted that Plaintiff’s “routine medical records do not evidence
7 psychiatric deficits.” AR 26; *see, e.g.*, AR 511 (indicating normal mental status at August 20,
8 2014 examination); AR 1027 (noting normal mood and affect, judgment and insight at July 26,
9 2015 examination). Though the ALJ recognized that Plaintiff had been diagnosed with
10 depression, that diagnosis was “indicative of only mild symptoms or some difficulty in social or
11 occupational functioning,” AR 26, and “[t]he existence of a mental impairment alone does not
12 establish functional limitation or disability.” *Leddy v. Berryhill*, 702 F. App’x 647, 648 (9th Cir.
13 2017).

14 And perhaps most importantly, Plaintiff ignores entirely the ALJ’s finding that Plaintiff
15 had “reported benefit from Wellbutrin over the past 10 to 17 years, and at lower doses than she has
16 taken in the past.” AR 27; *see* AR 492 (Dr. DeBattista noting that Plaintiff functions better on
17 Wellbutrin and is taking a lower dose); AR 66–67 (Plaintiff noting Wellbutrin “seems to agree
18 with [her] more or less”). The Ninth Circuit has affirmed findings that depression is not a severe
19 impairment where “[a]lthough the record established that [claimant] had a long history of
20 depression, the record also established that her depression was treatable and responsive to
21 medication.” *Dorrell v. Colvin*, 670 F. App’x 480, 480 (9th Cir. 2016).

22 Plaintiff also does not appear to argue that the ALJ should not have afforded “great
23 weight” to Dr. DeBattista’s opinion. Instead, Plaintiff appears to read Dr. DeBattista’s opinion
24 differently than the ALJ. *See* Mot. at 11–12 (describing Dr. DeBattista as opining that Plaintiff
25 had depression and was mildly to moderately impaired). But the Court gives deference to the
26 ALJ’s reading of this opinion. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005)
27 (“If the record would support more than one rational interpretation, we defer to the ALJ’s
28 decision”). Dr. DeBattista reported the results of several tests that Plaintiff successfully completed

1 and opined, based on his examination and Plaintiff’s interactions with him, that Plaintiff is able “to
2 do detailed and complex instructions,” that her “concentration and attention, persistence and pace
3 is mildly to moderately impaired,” and, among other things, that “her ability to relate and interact
4 with coworkers and the public is mildly impaired.” AR 494.

5 Likewise, the ALJ’s findings with respect to each of the four functional areas is supported
6 by substantial evidence. The ALJ found that Plaintiff performed a variety of daily activities, both
7 for her own home and as a part-time caregiver, including chores around the house, as well as tasks
8 that required driving to different locations and interacting with others, including at the grocery
9 store and doctor’s appointments. AR 26; *see, e.g.*, AR 26, 68–69, 78–80, 265–69, 493. The ALJ
10 also found that Plaintiff had mild limitation in social functioning, consistent with Dr. DeBattista’s
11 opinion, because she could get along with people she knew and authority figures, and she
12 generally interacted well with others. AR 26. Again, Plaintiff does not counter this evidence,
13 except by referencing the consultants’ opinions. Finally, for concentration, persistence and pace,
14 the ALJ again found mild limitation based on Dr. DeBattista’s examination and Plaintiff’s ability
15 to perform daily tasks and tasks at work. AR 26. Each of these findings was supported by
16 substantial evidence, including Dr. DeBattista’s examination and Plaintiff’s own testimony.

17 Given this substantial evidence, the ALJ did not err in giving “little weight” to Drs.
18 Schumacher’s and Goosby’s opinions that Plaintiff’s depression was severe and that she faced
19 certain additional limitations. First, these conclusions conflicted with much of the evidence
20 described above, as recognized by the ALJ—evidence that, in part, Plaintiff does not challenge
21 (*e.g.*, the finding that Wellbutrin worked for Plaintiff). Second, Dr. DeBattista’s opinion
22 warranted greater weight than the consultants’ because he actually examined Plaintiff. *See* 20
23 C.F.R. § 404.1527(c)(1). And third, the ALJ seemingly did not discount these opinions altogether,
24 but rather found the ultimate conclusion unsupported. For example, Dr. Schumacher opined that
25 several of Plaintiff’s abilities were only moderately limited. AR 103.

26 In sum, the ALJ’s finding that Plaintiff’s depression was not severe is supported by
27 substantial evidence, and thus the Court GRANTS summary judgment for Defendant on this issue.
28

1 **B. The ALJ’s Rejection of Medical Evidence from Plaintiff’s Treating Doctors**

2 Plaintiff next argues that the ALJ erred in failing to give sufficient weight to the opinions
3 of Plaintiff’s treating physicians Drs. Balon and Allen in determining her RFC. “Generally, the
4 opinion of a treating physician must be given more weight than the opinion of an examining
5 physician, and the opinion of an examining physician must be afforded more weight than the
6 opinion of a reviewing physician.” *Ghanim*, 763 F.3d at 1160. “If a treating physician’s opinion
7 is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not
8 inconsistent with the other substantial evidence in the case record, it will be given controlling
9 weight.” *Id.* (internal quotation marks, citation, and brackets omitted).

10 To reject an uncontradicted opinion of a treating physician, the ALJ must provide clear and
11 convincing reasons that are supported by substantial evidence. *Id.* at 1160–61. If the treating
12 physician’s opinion is contradicted by the opinion of another physician, the ALJ may reject the
13 treating physician’s opinion based upon “specific and legitimate reasons that are supported by
14 substantial evidence.” *Id.* at 1161 (internal quotation marks and citation omitted); *see also Bray*,
15 554 F.3d at 1228 (“[T]he ALJ need not accept the opinion of any physician, including a treating
16 physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings.”
17 (internal quotation marks, citation and alteration omitted)). In determining how much weight to
18 give a treating physician’s opinion, the ALJ must consider the following factors: “the length of the
19 treatment relationship and the frequency of examination by the treating physician, the nature and
20 extent of the treatment relationship between the patient and the treating physician, the
21 supportability of the physician’s opinion with medical evidence, and the consistency of the
22 physician’s opinion with the record as a whole.” *Id.* (internal quotation marks, citation, and
23 brackets omitted).

24 **1. The Ninth Circuit’s Decision in *Revels*⁴**

25 In October 2017, the Ninth Circuit issued its opinion in *Revels v. Berryhill*, 874 F.3d 648
26 (9th Cir. 2017), which details how ALJ’s should approach evaluating claims based on an
27 impairment of fibromyalgia. In explaining what fibromyalgia is, the court noted that the condition

28 _____
⁴ Neither party cited this case in the briefing.

1 is diagnosed “entirely on the basis of the patients’ reports of pain and other symptoms.” *Id.* at 656
2 (citation omitted). In describing a landmark 2012 Social Security Ruling, the court also noted that
3 “fibromyalgia does not rely on X-rays or MRIs” and its symptoms “wax and wane”—people with
4 fibromyalgia “may have bad days and good days.” *Id.* (citation omitted). Given these facts, “an
5 analysis of RFC should consider a longitudinal record whenever possible.” *Id.* (citation omitted).
6 The court then set down a rule that “[i]n evaluating whether a claimant’s residual functional
7 capacity renders them disabled because of fibromyalgia, the medical evidence must be construed
8 in light of fibromyalgia’s unique symptoms and diagnostic methods.” *Id.* at 662.

9 After providing this background, the court went on to reverse several of the ALJ’s findings
10 for many reasons. First, the ALJ improperly gave a treating rheumatologist’s opinion “no
11 weight.” *Id.* at 663. The ALJ erred on many fronts with respect to this physician, who had treated
12 the patient on twelve occasions. As is relevant here, first, the ALJ concluded that on four of
13 twelve occasions, the plaintiff lacked certain tender points and had normal range of motion. The
14 Ninth Circuit rejected this reason because one can diagnose fibromyalgia with only eleven of
15 eighteen tender points, and because a person with fibromyalgia “may have muscle strength,
16 sensory functions, and reflexes that are normal.” *Id.* (citation and alteration omitted). And the
17 ALJ also rejected this opinion because it was “not supported by objective medical evidence.”
18 Despite plaintiff having several normal results in exams, MRIs, and x-rays, the Ninth Circuit held
19 that the ALJ’s finding “demonstrate[d] a fundamental lack of knowledge about fibromyalgia,”
20 which is “diagnosed entirely on the basis of patients’ reports of pain and other symptoms,” and
21 “there are no laboratory tests to confirm the diagnosis.” *Id.*; *see also id.* at 665 (holding ALJ
22 reasoning was flawed in holding that the physical therapist’s opinions went “far beyond what is
23 supported by objective testing”). While tender-point examination constitutes objective evidence,
24 the symptoms of fibromyalgia can “wax and wane.” *Id.* Finally, the ALJ held that the doctor’s
25 opinion conflicted with the claimant’s testimony at the hearing, because the claimant testified she
26 could conduct normal daily activities. *Id.* at 664. The Ninth Circuit rejected this conclusion
27 because the ALJ had omitted highly relevant qualifications the claimant had made in reciting her
28 daily activities. *Id.*

1 The Ninth Circuit also held that the ALJ erred in rejecting the claimant’s testimony as to
 2 the severity of her symptoms. *Id.* at 665–68. The ALJ had stated that the “testimony was
 3 undercut by the lack of objective findings supporting her claims of severe pain.” *Id.* “He
 4 highlighted several examinations that had mostly normal results, such as an X-ray and MRIs of
 5 Revels’ neck and back, as well as the nerve conduction and velocity study of her hands.” *Id.* The
 6 Ninth Circuit rejected this conclusion because the examination results “are perfectly consistent
 7 with debilitating fibromyalgia,” given that a diagnosis requires subjective complaints with few
 8 objective tests. *Id.* The Ninth Circuit also rejected the ALJ’s conclusion that there was a “wide
 9 disparity” between the claimant’s symptoms and her reports of daily activities. *Id.* at 667.
 10 Though she might have performed any number of activities in a day (such as washing dishes,
 11 doing laundry, taking her children to school), she consistently testified that she could not do all
 12 such activities in a single day and that she regularly needed to take breaks. *Id.* at 667–68.

13 Since the decision in *Revels*, the Ninth Circuit has had opportunity to apply this precedent.
 14 In *Smith v. Berryhill*, No. 16-17077, 2019 WL 76884, at *1 (9th Cir. Jan. 2, 2019), the Ninth
 15 Circuit upheld an ALJ’s rejection of the treating physician’s opinion where the ALJ found the
 16 opinion “relied largely on [the claimant’s] self-reports and because [the doctor’s] opinion was not
 17 supported by Smith’s medical record.” The court held this rejection was supported by substantial
 18 evidence because the claimant “described engaging in activities, on a regular basis,” that
 19 contradicted the doctor’s opinion as to the degree of impairment. *Id.* Likewise, “the ALJ did not
 20 cherry-pick the medical record,” which “contradict[ed] several of her symptom complaints.” *Id.*
 21 And the Ninth Circuit upheld the rejection of a second treating physician’s check-box opinion
 22 where the opinion made clear that “objective evidence did not support her opinion,” and the doctor
 23 “relied, at least in part, on [the claimant’s] subjective reports,” which contradicted the claimant’s
 24 medical records. *Id.* at *2.

25 In *Roberts v. Berryhill*, 734 F. App’x 489, 490 (9th Cir. 2018), the Ninth Circuit likewise
 26 affirmed an ALJ ruling against a claimant who had fibromyalgia. The ALJ did not commit error
 27 in rejecting a physical therapist’s opinion as contradicting the opinions of three other physicians.
 28 In so holding, the court distinguished *Revels*, in which the ALJ gave no weight to a

1 rheumatologist’s opinion who had treated the patient at least 12 times in two years. Likewise, the
2 court held that substantial evidence supported the ALJ’s rejection of the claimant’s testimony
3 about the severity of her symptoms because the testimony “[did] not comport with objective
4 evidence in her medical record.” *Id.* at 491 (citation omitted). Specifically, the claimant “claimed
5 debilitating pain and fatigue, but her intermittent doctor visits did not reflect such issues.” *Id.*
6 And the ALJ properly considered “the full longitudinal record” and rejected the testimony because
7 the claimant had “unexplained gaps in treatment.” *Id.* And finally, the ALJ found that the
8 claimant’s daily activities were inconsistent with her claimed disability. *Id.* at 491–92.

9 **2. The Physicians’ Opinions**

10 **a. Dr. Balon**

11 Dr. Galina Balon treated Plaintiff on April 16, 2014. AR 434–36. Dr. Balon recognized
12 that Plaintiff was applying for disability due to multiple medical problems, including severe
13 fibromyalgia, insomnia, and diffuse medical ache. AR 434. Plaintiff reported to Dr. Balon “a list
14 of her complaints and symptoms,” which included, among many other things, anxiety, insomnia,
15 diffuse musculoskeletal pain and morning stiffness, burning sensation in both lower extremities,
16 migraines, severe nausea, chronic fatigue, and increased immobility. AR 435. As a result of her
17 examination, Dr. Balon reported Plaintiff appeared really drained and depressed, but was alert and
18 oriented. AR 435, 436. She had paravertebral tenderness and sciatic bilaterally, as well as 18
19 tender points, which is consistent with fibromyalgia. AR 435. She was also experiencing right
20 shoulder pain, tingling, and numbness and hypoesthesia of both lower extremities. AR 435.

21 Dr. Balon agreed with Dr. Han, another one of Plaintiff’s doctors, that Plaintiff’s bilateral
22 sciatica could be radiculopathy, and noted she would obtain an MRI of the lumbar spine. AR 436.
23 She also referred Plaintiff to neurology for her numbness and hypoesthesia, as well as her
24 migraines. AR 436. Dr. Balon recommended physical therapy and surgery referral if Plaintiff’s
25 shoulder pain did not improve, and Dr. Balon indicated they would continue treatment of
26 Plaintiff’s insomnia and fibromyalgia. AR 436. She also noted that Plaintiff needed help
27 navigating the mental health system to find help for her depression and anxiety. AR 436. Dr.
28 Balon also supported Plaintiff’s application for disability. She noted that her “symptoms . . . truly

1 make her unable to perform regular work, even part-time work, and creates some difficulties
2 taking care of her own household.” AR 436. She opined that Plaintiff needed to see a physiatrist
3 and neurologist and obtain an MRI, as well as see a psychiatrist for aggressive treatment. AR 436.

4 The ALJ gave “little weight” to Dr. Balon’s opinion for several reasons. First, Dr. Balon
5 supported Plaintiff’s claim for disability. AR 33. Second, her opinion was “generally based on
6 the claimant’s subjective complaints with little objective findings to support that the claimant is
7 functionally limited in any capacity.” AR 33. And third, Dr. Balon based her opinion in part on
8 Dr. Han’s, but Dr. Han’s opinion was conditioned on MRI findings and consultations that had not
9 yet occurred at the time of Dr. Balon’s examination. AR 33.

10 Plaintiff argues that this finding was inappropriate because Dr. Balon made objective
11 findings, such as noting Plaintiff’s positive tender points for fibromyalgia, the muscle tenderness,
12 and the decreased sensation in Plaintiff’s lower extremities. Pl. Mot. at 16. Moreover, Plaintiff
13 argues that Dr. Balon’s opinion is supported by an earlier MRI of Plaintiff’s spine showing mild
14 degenerative disc disease and scoliosis, as well as an x-ray showing facet degeneration. *Id.* (citing
15 AR 329–30). Finally, according to Plaintiff, the ALJ’s finding that there is little evidence of
16 functional limitations is inconsistent with the ALJ’s finding at step two that Plaintiff has severe
17 degenerative disc disease, hip arthritis, and fibromyalgia. *Id.*

18 The parties dispute which test the Court should apply in evaluating this claim. The dispute
19 turns on whether Plaintiff’s non-treating, non-examining physicians’ opinions can “contradict” a
20 treating physician’s (Dr. Balon’s) opinion under the law. If not, then the Court must find “clear
21 and convincing” reasons why the ALJ rejected Dr. Balon’s testimony. *See* Pl. Mot. at 15; Resp. at
22 5–6. If not, the Court need only find that the ALJ provided specific and legitimate reasons for
23 discounting her opinion. Def. Mot. at 13 n.9.

24 The Court agrees with Defendant that the ALJ needed only provide specific and legitimate
25 reasons supporting his opinion, and that he satisfied that standard here. The Ninth Circuit applies
26 the “specific and legitimate reason test” in cases in which a non-treating, non-examining
27 physician’s opinion conflicts with a treating physician’s opinion. *See, e.g., Cain v. Barnhart*, 74
28 F. App’x 755, 756 (9th Cir. 2003) (“We conclude that the ALJ erred by according greater weight

1 to the opinion of a non-examining, non-treating physician than to the opinions of Cain’s treating
2 and examining physicians without providing ‘specific’ and ‘legitimate’ reasons supported by
3 ‘substantial evidence in the record’ for doing so.”). Indeed, Plaintiff’s own case stands for this
4 proposition. In *Winans v. Bowen*, in determining whether the non-examining, non-treating
5 physicians’ opinions could outweigh contrary opinion from a treating physician, the Ninth Circuit
6 applied the rule that “[i]f the ALJ wishes to disregard the opinion of the treating physician,
7 he . . . must make findings setting forth specific, legitimate reasons for doing so that are based on
8 substantial evidence in the record.” 853 F.2d 643, 647 (9th Cir. 1987) (internal quotation marks
9 and citation omitted). And Plaintiff’s other cited case, *Gallant v. Heckler*, does not help her,
10 because in that case, unlike this one, the non-examining, non-treating physician’s opinion was
11 “contradicted by all other evidence in the record.” 753 F.2d 1450, 1454 (9th Cir. 1984).

12 As shown above, the ALJ listed specific, legitimate reasons for rejecting Dr. Balon’s
13 opinion that are supported by substantial evidence in the record. First, Dr. Balon advocated for
14 Plaintiff’s applying for disability, despite a lack of objective evidence before her. *See Meador v.*
15 *Astrue*, 357 F. App’x 764, 765 (9th Cir. 2009) (“The ALJ permissibly regarded Dr. Mark as an
16 advocate, where he appeared to be acting to assist Plaintiff and the medical record lacked objective
17 evidence to support his opinion.”).

18 Second, substantial evidence demonstrated that Dr. Balon relied heavily on Plaintiff’s
19 complaints, as opposed to objective evidence. AR 30. Dr. Balon only detailed the symptoms
20 Plaintiff reported, and then, in making her findings, seemingly referred back to those symptoms in
21 referencing the “symptoms described above.” AR 436. Moreover, though she performed a
22 physical examination, she did not report any functional limitations that she had witnessed, and the
23 only other objective evidence she cited was Dr. Han’s report, as discussed below. AR 436.
24 Ultimately, her examination led mostly to referrals to other doctors for future evaluation. AR 436.
25 Though Plaintiff references a previous MRI showing degenerative disc disease, Dr. Balon does not
26 appear to reference this MRI, and it is unclear whether she even considered it. *See* AR 434–36.
27 The ALJ’s finding was thus supported by substantial evidence. *See* 20 C.F.R. § 404.1527(c)(3)
28 (“The more a medical source presents relevant evidence to support an opinion, particularly

1 medical signs and laboratory findings, the more weight we will give that opinion.”). Third, and
2 finally, the ALJ noted that Dr. Balon relied on Dr. Han’s assessment, which itself was conditional,
3 and the condition precedent had not yet been met. Plaintiff does not contest this fact.

4 Contrary to Plaintiff’s assertion, the ALJ’s rejection of Dr. Balon’s opinion for the RFC is
5 not inconsistent with his finding at step 2 that Plaintiff had several severe impairments. The
6 severity finding is separate and distinct from the RFC definition and the subsequent steps. A
7 finding of severity does not mean that a finding of functional limitations or disability will follow.
8 In fact, Dr. Balon did not even identify any functional limitations (opining only that Plaintiff
9 would be unable to perform regular work), such that even if the ALJ had erred, such error was
10 ultimately harmless. *See Champagne v. Colvin*, 582 F. App’x 696, 697 (9th Cir. 2014) (affirming
11 ALJ’s rejection of treating physicians’ opinions because “none of the treating providers gave an
12 opinion regarding his functional limitations” and the plaintiff had “identified no additional
13 medically necessary limitation that should have been included in the residual functional
14 capacity”).

15 Likewise, this result is not inconsistent with *Revels*. First, fibromyalgia was not the only
16 condition Dr. Balon noted Plaintiff might have, and there was little objective evidence for any of
17 the other conditions. Nowhere is Dr. Balon’s proposed functional capacity limited to Plaintiff’s
18 fibromyalgia. Second, even as to fibromyalgia, the doctor in *Revels* was a specialist (a
19 rheumatologist) who had a long history with the patient, treating her on at least twelve occasions,
20 and his conclusions were based on that long history as well as his expertise. Here, there is no
21 evidence that Dr. Balon has a history with Plaintiff. *See Roberts*, 734 F. App’x at 490. Indeed,
22 her opinion was expressly tied to Dr. Han’s opinion, which was not yet conclusive. Moreover, the
23 ALJ did not afford her opinion “no weight,” as in *Revels*, instead giving it at least a “little” weight.
24 Likewise, while *Revels* makes clear that a plaintiff’s subjective reports can support certain
25 symptomatic findings, Dr. Balon did not aver as to specific functional limitations supported by
26 Plaintiff’s reports. As in *Smith*, it appears that Dr. Balon “relied largely on [the claimant’s] self-
27 reports,” though her “opinion was not supported by [Plaintiff’s] medical record.” 2019 WL
28 76884, at *1.

1 As such, the ALJ did not err in discounting Dr. Balon’s opinion, and thus the Court
2 GRANTS summary judgment for Defendant on this issue.

3 **b. Dr. Allen**

4 Dr. Patti Allen most recently treated Plaintiff on February 1, 2016. AR 1706–10. Dr.
5 Allen first treated Plaintiff on July 16, 2015 and saw Plaintiff every 2–3 months thereafter. AR
6 1706. Dr. Allen listed Plaintiff’s diagnoses as fibromyalgia and chronic depression. AR 1706.
7 She described that Plaintiff was experiencing symptoms including diffuse pain in multiple areas of
8 her body, non-restorative sleep, chronic fatigue, swelling, frequent and severe headaches, and
9 depression. AR 1706–09. She also indicated she did not know if Plaintiff had positive tender
10 points. AR 1706. Dr. Allen opined that Plaintiff’s pain was severe enough to interfere with her
11 work 33–66% of the workday. AR 1707. She noted that Plaintiff’s pain was worsened by stress,
12 fatigue, and movement, or overuse. AR 1708. She also opined that Plaintiff could sit for one hour
13 and stand for 25 minutes at a time, and sit for 3 hours, stand for 1 hour, and walk for 2 hours in an
14 8-hour day, but she would need to walk around for 5 minutes every hour. AR 1708. Dr. Allen
15 noted Plaintiff would need to take breaks throughout the day for ten minutes, but she did not say
16 how frequently such breaks would be needed. AR 1709. Dr. Allen opined Plaintiff could
17 occasionally twist, rarely climb stairs, and should never crouch, squat, or climb ladders, but that
18 she could look down and up and turn her head. AR 1709. She opined Plaintiff would be absent
19 about 4 days each month. AR 1710.

20 The ALJ gave Dr. Allen’s opinion “little weight.” AR 33. First, the ALJ noted Dr. Allen’s
21 limited treating history with Plaintiff. AR 33. Second, he noted that Dr. Allen “provided no
22 objective findings or analysis to support the limitations” she had assessed. AR 33. Specifically,
23 though she treated the patient for fibromyalgia, she indicated she did not know if Plaintiff had
24 tender points. Third, her findings conflicted with other evidence in the record. Specifically,
25 Plaintiff’s other physical examinations had shown “mild findings,” and Plaintiff’s work activity
26 and daily living activities (discussed at length above) demonstrated a higher level of functioning
27 than Dr. Allen opined. AR 33 (citing AR 460, 483–84, 509–11, 589, 1090–91).

28 Plaintiff argues that the ALJ erred for several reasons. First, “although Dr. Allen had a

1 limited treatment history of Plaintiff, Plaintiff was referred to Dr. Allen by her treating doctor, Dr.
2 Balon, who noted the presence of objective signs of fibromyalgia, including the 18 positive tender
3 points.” Pl. Mot. at 17–18. Second, Plaintiff’s daily activities do not contradict Dr. Allen’s
4 findings. *Id.* And third, the ALJ did not provide reasons for discounting Plaintiff’s inability to
5 concentrate and need for extra breaks. *Id.*

6 As shown above, the ALJ listed specific, legitimate reasons for rejecting Dr. Allen’s
7 opinion that are supported by substantial evidence in the record. First, the ALJ properly gave
8 reduced weight to Dr. Allen’s testimony because she had not been treating Plaintiff for long. *See*
9 20 C.F.R. § 404.1527(c)(2)(i) (“Generally, the longer a treating source has treated you and the
10 more times you have been seen by a treating source, the more weight we will give to the source’s
11 medical opinion.”). Next, the ALJ reasonably concluded that Dr. Allen’s opinion was not
12 substantiated by objective findings. Though Plaintiff argues Dr. Balon knew of Plaintiff’s 18
13 tender points, Dr. Allen explicitly stated that she was not aware whether Plaintiff had any tender
14 points. AR 1706. A lack of objective evidence for the found limitations is a valid ground upon
15 which the ALJ can determine that less weight is appropriate. *See* 20 C.F.R. § 404.1527(c)(3)
16 (“The more a medical source presents relevant evidence to support a medical opinion, particularly
17 medical signs and laboratory findings, the more weight we will give that medical opinion.”);
18 *Burkhart v. Bowen*, 856 F.2d 1335, 1339 (9th Cir. 1988) (affirming rejection of treating
19 physician’s opinion where it contained “no description—either objective or subjective—of
20 medical findings, personal observations or test reports upon which [the physician] could have
21 arrived at his conclusion”); *cf.* *Chaudhry v. Astrue*, 688 F.3d 661, 671 (9th Cir. 2012) (“The ALJ
22 need not accept the opinion of any physician, including a treating physician, if that opinion is
23 brief, conclusory, and inadequately supported by clinical findings.” (citation omitted)). As the
24 Ninth Circuit held in *Smith*, the ALJ can properly reject a check-box opinion where “objective
25 evidence [does] not support [the] opinion” and the subjective evidence is otherwise not supported,
26 as discussed below. 2019 WL 76884, at *2.

27 Finally, the ALJ’s conclusion that Dr. Allen’s proposed limitations contradicted other
28 evidence in the record is supported by substantial evidence. The evidence demonstrates that other

1 providers found, at various times, that Plaintiff’s symptoms and limitations were not as severe as
 2 Dr. Allen had concluded. For example, in May 2014, a provider found, among other similar
 3 findings, that Plaintiff had mild to moderate tenderness to palpation along the midline of the
 4 lumbar spine; full range of motion at the hips, knees, and ankles; a normal gait; no atrophy,
 5 edema, or cyanosis in her lower extremities; and the ability to complete the straight leg raise
 6 limited by hamstring tightness only at approximately 60 degrees bilaterally. AR 460. *See also*
 7 AR 483 (June 2014 exam with similar results, including a negative straight leg raise test); AR 510
 8 (August 2014 test documenting normal motor strength in all extremities, normal reflexes, normal
 9 coordination, and normal gait); AR 589 (documenting negative straight leg raises); AR 1090–91
 10 (noting strong straight leg raise and good flexibility). Though fibromyalgia symptoms may “wax
 11 and wane,” the ALJ relied on a long history of “mild findings” (including as to Plaintiff’s other
 12 impairments), in holding that Dr. Allen’s testimony was rebutted. *See Smith*, 2019 WL 76884, at
 13 *1 (upholding ALJ rejection of treating physician where ALJ “did not cherry-pick the medical
 14 record,” which “contradict[ed] several of her symptom complaints”).

15 Moreover, the ALJ’s finding that Plaintiff’s daily activities contradicted Dr. Allen’s
 16 opinion is supported by substantial evidence, as discussed in part above with respect to the ALJ’s
 17 evaluation of Plaintiff’s depression. The ALJ catalogued the numerous daily activities Plaintiff is
 18 able to perform, including performing house chores, caring for her son, and working part-time as a
 19 caregiver. *See* AR 26; *e.g.*, AR 26, 68–69, 78–80, 265–69, 493. He also relied in part on Dr.
 20 DeBattista’s opinion to find that Plaintiff only had mild limitation in concentration, persistence
 21 and pace. AR 26. The Court does not second-guess the ALJ’s rational interpretation of the
 22 evidence. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). These daily activities can
 23 contradict a treating physician’s opinion. *See Smith*, 2019 WL 76884, at *1. Thus, the ALJ’s
 24 finding was supported by substantial evidence. *Coaty v. Colvin*, 673 F. App’x 787, 788 (9th Cir.
 25 2017), *cert. denied sub nom. Coaty v. Berryhill*, 137 S. Ct. 2309 (2017) (rejecting treating
 26 physician’s opinion in part because the opinion was “speculative and inconsistent with [the
 27 claimant’s] activities of daily living during the relevant period”).

28 As such, the ALJ did not err in discounting Dr. Allen’s opinion, and thus the Court

1 GRANTS summary judgment for Defendant on this issue.

2 **C. The ALJ’s Rejection of Plaintiff’s Testimony**

3 Plaintiff’s final argument is that the ALJ erred in rejecting her testimony as to the intensity,
4 persistence, and limiting effects of her alleged symptoms. Pl. Mot. at 19–21.

5 An ALJ engages in a two-step analysis to determine whether a claimant’s testimony
6 regarding subjective pain or symptoms is credible. “First, the ALJ must determine whether the
7 claimant has presented objective medical evidence of an underlying impairment which could
8 reasonably be expected to produce the pain or other symptoms alleged.” *Garrison v. Colvin*, 759
9 F.3d 995, 1014 (9th Cir. 2014) (citation omitted). The ALJ held that Plaintiff’s medically
10 determinable impairments could reasonably be expected to cause the alleged symptoms. AR 32.
11 Defendant does not refute this holding. *See generally* Def. Mot. at 20.

12 “If the claimant satisfies the first step of this analysis, and there is no evidence of
13 malingering, the ALJ can reject the claimant’s testimony about the severity of her symptoms only
14 by offering specific, clear and convincing reasons for doing so.” *Id.* (citation omitted). Defendant
15 does not argue that Plaintiff is a malingerer.

16 Plaintiff testified that she has not been able to perform substantial work since January 1,
17 2014. AR 50. She testified that she was diagnosed with fibromyalgia in 1998 and described the
18 symptoms she was experiencing. AR 56. As summarized fairly by the ALJ, Plaintiff testified
19 “she wakes early in the morning, suffering from a severe migraine, nausea, vomiting, and muscle
20 pain all over her body. She reported experiencing pain in the base of her skull, neck and
21 shoulders, lasting about three weeks before it subsides on its own, and that stress is an aggravating
22 factor. She also alleges she experiences low back pain with sciatica, as well as hip and knee pain
23 on a regular basis. The claimant testified her symptoms of insomnia, migraines, and diffuse
24 muscle pain, worsened around 2013.” AR 29 (citing AR 42–84; 266, 271); *see* AR 55–59. She
25 gets migraines 3–4 times a week that usually subside by the time she goes to work in the
26 afternoon.

27 She also testified that she could not stand for long without sitting, that she can sit for 35
28 minutes in comfortable seating before she needs to stand and stretch, and that she had pain in her

1 neck and shoulder that sometimes affects her right hand and ability to lift objects. AR 29 (citing
2 AR 42–84; 267); *see* AR 69–70. Plaintiff also has attempted various medical treatments (such as
3 physical therapy) and is involved in cognitive behavior therapy. *See* AR 42–84. She also
4 admitted her doctors have recommended she exercise, but she testified that she experiences
5 substantial pain after exercising. AR 60–62. And she testified as to her daily activities, as
6 described above, including performing chores, driving to various locations, and serving as a
7 caregiver for approximately two hours a day. AR 50–53, 67–68. She testified that she does not
8 enjoy travelling, though she has taken two flights that were each difficult in order to attend family
9 weddings (one in 2013 to Florida and one in 2015 to New York, which was split into two legs).
10 AR 71–72. She also used to drive a total of 2–3 hours a day for her job, but not all in one sitting,
11 and she does not drive that much now. AR 72–73.

12 The ALJ concluded that Plaintiff’s testimony “concerning the intensity, persistence and
13 limiting effects of these symptoms are not entirely consistent with the medical evidence and other
14 evidence in the record.” AR 32. Specifically, the ALJ found that much of her medical history was
15 self-reported, with the objective evidence pointing to “age-consistent findings.” AR 32. He noted
16 that Plaintiff had testified that her conditions are “not that bad,” and that Plaintiff had not followed
17 the providers’ recommendations to exercise. AR 33. Though Plaintiff testified she lost her job
18 because she couldn’t concentrate and was having some physical limitations, her numerous daily
19 activities conflicted with this testimony. AR 33 (citing AR 265–69). Likewise, though she
20 testified she was unable to perform sedentary work, she also testified that she “reported driving
21 consistently for two to three hours as a time” and that she flew to Florida in 2013 and New York
22 in 2015. AR 33. He concluded that “[t]he claimant’s ability to sit for long periods of time is
23 inconsistent with the claimant’s reported subjective symptomology.” AR 33.

24 At bottom, Plaintiff argues that the ALJ erred by concluding that her daily activities are
25 inconsistent with her testimony that “she cannot sit, stand, or walk for long enough, concentrate or
26 focus well enough, or lift enough weight to make it through a typical work day.” Pl. Mot. at 19.
27 Specifically, she notes that none of her daily activities or her part-time work require her to sit or
28 work consistently for long periods of time. *Id.* at 20. Likewise, she argues that the fact she took

1 several flights (one of which was before the alleged onset date) is not sufficient to show that she
2 can sustain work throughout a work day. *See id.* at 19–20 (arguing that “[i]t was improper for the
3 ALJ to single out ‘a few periods of temporary well-being from a sustained period of impairment’
4 in an attempt to discredit Plaintiff.” (quoting *Garrison*, 759 F.3d 995)).

5 The Court finds that the ALJ’s rejection of Plaintiff’s testimony as to the severity of her
6 limitations was not supported by clear and convincing reasons with respect to her limitation on
7 sitting for extended periods of time.

8 As an initial matter, the Court notes that the ALJ properly discredited some of Plaintiff’s
9 testimony. As is uncontested by Plaintiff, the ALJ concluded that the medical evidence (which he
10 detailed extensively, AR 30–32) contradicted some of Plaintiff’s purported limitations, where
11 “substantially all of the evidence point[ed] to age-consistent findings.” AR 32; *see also* AR 29.
12 As discussed above with respect to Dr. Allen’s opinion, the ALJ found that many of the providers
13 found only “mild” impairments and limitations. *See* AR 33 (citing AR 460, 483–84, 509–11, 589,
14 1090–91). Likewise, the ALJ detailed other medical findings from providers supporting his
15 conclusion that the symptoms were consistent with age. *See* AR 29–32; *see* AR 448 (showing
16 some positive findings, but also full range of motion in the hip and an MRI finding of only mild
17 arthritis); AR 460 (showing some positive findings but no evidence of lumbar radiculopathy, and
18 also full active motion in the hips, knees, and ankles bilaterally, ability to walk on heels and toes,
19 normal gait, and no muscle atrophy of lower extremities); AR 586 (notes reflect only mild arthritic
20 changes in both hips); AR 1091 (finding good flexibility, no limp, only mild osteoarthritis, and
21 early arthritis). The ALJ also rightly considered that Plaintiff did not follow the instructions of her
22 providers by failing to exercise despite their continued recommendations. *See Coleman v. Astrue*,
23 423 F. App’x 754, 756 (9th Cir. 2011) (finding plaintiff’s “failure to follow repeated medical
24 recommendations that she treat her pain with exercise and increased activity levels” undermined
25 her credibility).

26 After detailing the inconsistencies between Plaintiff’s testimony and the objective medical
27 evidence, the ALJ then considered Plaintiff’s daily activities. Given the extent of these activities,
28 as discussed above, the ALJ’s reliance on this evidence was a clear and convincing reason to reject

1 Plaintiff’s testimony as to her ability to concentrate. *See, e.g., Bray*, 554 F.3d at 1227 (affirming
2 rejection of plaintiff’s testimony where, in part, plaintiff led “an active lifestyle, including
3 cleaning, cooking, walking her dogs, and driving to appointments”).

4 Despite his appropriate rejection of parts of Plaintiff’s testimony, the ALJ did not provide
5 clear and convincing reasons for discounting Plaintiff’s purported inability to sit for longer than 35
6 minutes before needing to stand and stretch. AR 70. The only reasons the ALJ cited for rejecting
7 this “sedentary work”-related evidence was Plaintiff’s ability to drive for two to three hours “at a
8 time” and her two cross-country flights. AR 33. However, the ALJ misstated Plaintiff’s
9 testimony as to the former: She never testified that she could or did drive for two to three hours *at*
10 *a time*; instead, she testified that in the past she drove two to three hours *in a day* “with breaks in
11 between” but not “all in one shot.” AR 72–73. And she testified that she no longer drives that
12 much in a day. AR 72. As to the cross-country flights, two instances of flying cross-country to
13 attend a loved one’s wedding (one of which was outside the claimed disability period, and at least
14 one of which was broken into two legs), AR 70–72, do not provide clear and convincing reasons
15 to reject Plaintiff’s testimony that she cannot sit for extended periods of time. Even ignoring the
16 fact that one can get up and walk around on a plane, Plaintiff’s willingness and ability to put
17 herself through pain to attend a loved one’s wedding is evidence only that she loves her family,
18 not that she can sit for extended periods of time day in and day out at a full-time job. Finally,
19 none of the objective medical evidence or Plaintiff’s daily activities contradict her assertion that
20 she cannot sit for long periods of time—indeed, as discussed above, Plaintiff’s daily activities
21 appear fairly active. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (“Only if the level
22 of activity were inconsistent with Claimant’s claimed limitations would these activities have any
23 bearing on Claimant’s credibility.”).

24 Because the ALJ did not provide clear and convincing reasons to discredit Plaintiff’s
25 testimony as to the limitation on her ability to sit for extended period of time, the Court GRANTS
26 summary judgment for Plaintiff on this issue.

27 **D. Remand for Further Proceedings is Appropriate**

28 Having concluded that the ALJ committed the errors discussed above, the Court must

1 decide whether the errors are harmless and, if not, the appropriate remedy. “An error is harmless
2 only if it is inconsequential to the ultimate nondisability determination, or if despite the legal error,
3 the agency’s path may reasonably be discerned.” *Brown-Hunter*, 806 F.3d at 494 (internal
4 quotation marks and citations omitted). Here, the errors were not harmless, because they were key
5 to the RFC finding upon which the ALJ based his denial of benefits at steps four and five.
6 Moreover, the Court cannot discern the agency’s path absent appropriate consideration of all
7 relevant evidence of record. The Court therefore must determine the appropriate remedy.

8 A remand for an immediate award of benefits may be appropriate in the “rare
9 circumstances” in which the following three requirements are met: (1) “the ALJ has failed to
10 provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical
11 opinion”; (2) “the record has been fully developed and further administrative proceedings would
12 serve no useful purpose”; and (3) “if the improperly discredited evidence were credited as true, the
13 ALJ would be required to find the claimant disabled on remand.” *Brown-Hunter*, 806 F.3d at 495
14 (internal quotation marks and citation omitted). Even if all three requirements are satisfied, the
15 Court “retain[s] flexibility in determining the appropriate remedy.” *Id.* (internal quotation marks
16 and citation omitted).

17 The Court concludes that a remand for further proceedings is appropriate here. The first
18 factor is met, as the ALJ failed to provide legally sufficient reasons for failing to credit Plaintiff’s
19 testimony. However, the second and third factors are not met. Plaintiff testified that she could not
20 sit for more than approximately 35 minutes, after which she would need to stand up and stretch.
21 Though Plaintiff’s attorney proposed hypotheticals to the VE meant to encapsulate Plaintiff’s
22 testimony as to her limitations, the VE never opined on a hypothetical including this limitation
23 alone. The closest hypothetical contemplated a claimant who would need to take a five minute
24 break ever 45 minutes, which would include “hav[ing] to change positions . . . from sitting,
25 standing, or walking so that may include walking for five minutes . . . during which they would be
26 off task.” VE 87–88. But Plaintiff did not testify explicitly that she would be off task or that she
27 would need to walk around just because she needed to stand and stretch every 35 minutes. The
28 record is not fully developed on what Plaintiff’s purported limitations are when she needs to stand,

1 and thus the Court cannot hold that the ALJ would be required to find the claimant disabled on
2 remand.

3 Accordingly, the Court will grant in part and deny in part Plaintiff's motion for summary
4 judgment and will grant in part and deny in part Defendant's cross-motion for summary judgment.
5 Pursuant to sentence four of 42 U.S.C. § 405(g), the Court will reverse the denial of benefits and
6 remand for further administrative proceedings consistent with this order.

7 **IV. ORDER**

- 8 (1) Plaintiff's motion for summary judgment is GRANTED IN PART AND DENIED
9 IN PART;
- 10 (2) Defendant's motion for summary judgment is GRANTED IN PART AND
11 DENIED IN PART;
- 12 (3) The denial of benefits is REVERSED; and
- 13 (4) The matter is REMANDED to the Commissioner for further proceedings
14 consistent with this order.

15 The Clerk is instructed to close the file.

16
17
18 **IT IS SO ORDERED.**

19
20 Dated: March 11, 2019



21
22 BETH LABSON FREEMAN
United States District Judge