

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7  
8 LYNN ANNE SHEPHERD,

9 Plaintiff,

10 v.

11 CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

12 Defendant.  
13

NO. CV-11-0271-RHW

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT; GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

14 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No.  
15 23, and Defendant's Motion for Summary Judgment, ECF No. 26. The motions  
16 were heard without oral argument. Plaintiff is represented by Maureen J. Rosette.  
17 Defendant<sup>1</sup> is represented by Assistant United States Attorney Pamela De Rusha  
18 and Special Assistant United States Attorney Michael S. Howard.

19 **I. Jurisdiction**

20 On June 6, 2007, Plaintiff protectively filed a Title II application for  
21 disability insurance benefits (DIB) and a Title XVI application for supplemental  
22 security income (SSI). Plaintiff alleges she has been disabled beginning November  
23

24 <sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on  
25 February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure,  
26 Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this  
27 suit. No further action need be taken to continue this suit by reason of the last  
28 sentence of 42 U.S.C. § 405(g).

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT; GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ~ 1**

1 29, 2005.

2 Her application was denied initially and again denied on reconsideration. A  
3 timely request for a hearing was made. On April 2, 2009, Plaintiff appeared at a  
4 hearing in Spokane, Washington before Administrative Law Judge (ALJ) R. S.  
5 Chester. R. Thomas McKnight, Ph.D, a medical expert and Tom L. Moreland, a  
6 vocational expert, also participated. Plaintiff was represented by Maureen Rosette.

7 The ALJ issued a decision on May 6, 2009, finding that Plaintiff was not  
8 disabled. Plaintiff timely requested review by the Appeals Council, which granted  
9 her request for review. Upon review, the Appeals Council adopted the ALJ's  
10 findings and conclusions that Plaintiff was not disabled. The Appeals Council's  
11 decision became the final decision of the Commissioner. *See* 20 C.F.R. §§  
12 404.981, 422.10.

13 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern  
14 District of Washington on July 27, 2011. The instant matter is before this Court  
15 pursuant to 42 U.S.C. § 405(g).

## 16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the “inability to engage in any  
18 substantial gainful activity by reason of any medically determinable physical or  
19 mental impairment which can be expected to result in death or which has lasted or  
20 can be expected to last for a continuous period of not less than twelve months.”

21 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability  
22 only if her impairments are of such severity that the claimant is not only unable to  
23 do her previous work, but cannot, considering claimant's age, education and work  
24 experiences, engage in any other substantial gainful work which exists in the  
25 national economy. 42 U.S.C. §423(d)(2)(A).

26 The Commissioner has established a five-step sequential evaluation process  
27 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*  
28 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §  
2 404.1520(b). Substantial gainful activity is work done for pay and requires  
3 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*  
4 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in  
5 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If he is not, the ALJ  
6 proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or  
8 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not  
9 have a severe impairment or combination of impairments, the disability claim is  
10 denied. A severe impairment is one that lasted or must be expected to last for at  
11 least 12 months and must be proven through objective medical evidence. 20  
12 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the  
13 third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed  
15 impairments acknowledged by the Commissioner to be so severe as to preclude  
16 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R.  
17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed  
18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the  
19 impairment is not one conclusively presumed to be disabling, the evaluation  
20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work she  
22 has performed in the past? 20 C.F.R. § 404.1520(e). If the claimant is able to  
23 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform  
24 this work, the evaluation proceeds to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy  
26 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(f).

27 The initial burden of proof rests upon the claimant to establish a prima facie  
28 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT; GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ~ 3**

1 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or  
2 mental impairment prevents her from engaging in her previous occupation. *Id.* At  
3 step five, the burden shifts to the Commissioner to show that the claimant can  
4 perform other substantial gainful activity. *Id.*

### 5 **III. Standard of Review**

6 The Commissioner's determination will be set aside only when the ALJ's  
7 findings are based on legal error or are not supported by substantial evidence in  
8 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9<sup>th</sup> Cir. 1992)  
9 (citing 42 .S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
10 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."  
11 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975). Substantial  
12 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
13 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the  
14 ALJ's denial of benefits if the evidence is susceptible to more than one rational  
15 interpretation, one of which supports the decision of the administrative law judge.  
16 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). "If the evidence can  
17 support either outcome, the court may not substitute its judgment for that of the  
18 ALJ." *Matney*, 981 F.2d at 1019.

19 A decision supported by substantial evidence will be set aside if the proper  
20 legal standards were not applied in weighing the evidence and making the  
21 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9<sup>th</sup>  
22 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are  
23 immaterial to the ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec.*  
24 *Admin.*, 454 F.3d 1050, 1055 (9<sup>th</sup> Cir. 2006).

### 25 **IV. Statement of Facts**

26 The facts have been presented in the administrative transcript and the ALJ's  
27 decision and will only be summarized here.

28 At the time of the hearing, Plaintiff was 51 years old. She attended school

1 up to the 9<sup>th</sup> grade. She does not have her GED. She dropped out of high school  
2 because her father passed away and she was pregnant. (Tr. 382.) She is single and  
3 has two children.

4 She began working in 1997 part-time. Prior to that, she was a stay at home  
5 mom. (Tr. 158.) She worked at the Northern Quest Casino beginning in 2002 until  
6 her termination in November 29, 2005. She was terminated because of alleged  
7 inappropriate displays of affection on the gaming floor. (Tr. 50.)

8 Plaintiff alleges she is disabled because of mental health issues, chronic  
9 obstructive pulmonary disease (COPD) and neck pain and back pain from  
10 osteoarthritis and osteopenia. (Tr. 62.)

#### 11 **V. The ALJ's findings**

12 The ALJ noted that Plaintiff last met the insured status requirements of the  
13 Social Security Act through March 31, 2010. (Tr. 22.)

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
15 activity since November 29, 2005, the amended alleged onset date. (Tr. 22.)

16 At step two, the ALJ found Plaintiff has the following severe physical and  
17 mental impairments: borderline intellectual functioning and a personality disorder  
18 (Tr. 23.)

19 At step three, the ALJ found Plaintiff did not have an impairment or  
20 combination of impairments that meets or medically equals one of the listed  
21 impairments in 20 CFR Part 404, Subpart P, Appendix 1. (Tr. 25.) The ALJ  
22 considered impairments listed under Listing 12.05 (Mental Retardation) and  
23 Listing 12.08 (Personality Disorder). (Tr. 25.) The ALJ concluded that because  
24 Plaintiff's mental impairments do not cause at least two "marked" limitations or  
25 one "marked" limitation and "repeated" episodes of decompensation, the  
26 paragraph B criteria was not satisfied. (Tr. 26.)

27 The ALJ determined Plaintiff has the residual functional capacity to perform  
28

1 the full range of light work as defined in 20 C.F.R. § 404.1567(b);<sup>2</sup> except she can  
2 only perform occasional kneeling, crouching, crawling, and climbing of ladders  
3 ropes, and scaffolds. She needs to avoid concentrated exposure to fumes, odors,  
4 dusts and hazards such as unprotected heights and machinery, is limited to  
5 performing simple or well-learned tasks, can only have superficial or limited  
6 contact with the general public, and is limited to non-collaborative work with co-  
7 workers. (Tr. 27.)

8 At step four, the ALJ concluded Plaintiff was able to perform past relevant  
9 work as a fast foods worker. (Tr. 33.)

10 The ALJ did not conduct an alternative step five analysis.

## 11 **VI. The Appeals Council's Decision**

12 The Appeals Council reviewed the ALJ's decision that Plaintiff was not  
13 disabled. It adopted the ALJ's statements regarding the pertinent provisions of the  
14 Social Security Act, the SSA's regulations and rulings, the issues in the case, and  
15 the evidentiary facts. (Tr. 4.) It also adopted the ALJ's findings at step one, three,  
16 and four of the sequential evaluation, namely, Plaintiff has not engaged in  
17 substantial gainful activity since November 29, 2005, Plaintiff has severe

---

18 <sup>2</sup>(b) Light work involves lifting no more than 20 pounds at a time with frequent  
19 lifting or carrying of objects weighing up to 10 pounds. Even though the weight  
20 lifted may be very little, a job is in this category when it requires a good deal of  
21 walking or standing, or when it involves sitting most of the time with some  
22 pushing and pulling of arm or leg controls. To be considered capable of  
23 performing a full or wide range of light work, you must have the ability to do  
24 substantially all of these activities. If someone can do light work, we determine  
25 that he or she can also do sedentary work, unless there are additional limiting  
26 factors such as loss of fine dexterity or inability to sit for long periods of time.  
27 20 C.F.R. § 404.1567(b).  
28

1 impairments that do not meet or equal in severity an impairment in the Listing of  
2 Impairments, and she is capable of performing past relevant work. (Tr. 4.)

3         The Appeals Council disagreed with the ALJ's findings at step two.  
4 Specifically, the Appeals Council found that in addition borderline intellectual  
5 functioning and a personal disorder, Plaintiff has the following severe  
6 impairments: status post cervical fusion, chronic obstructive pulmonary disease,  
7 but she does not have an impairment or combination of impairments that meets the  
8 Listings. (Tr. 6.) The Appeals Council adopted the ALJ's determination of  
9 Plaintiff's residual functional capacity. (Tr. 6.)

10         The Appeals Council found that the limitations on Plaintiff's ability to  
11 perform work-related activities, based on her residual functional capacity, did not  
12 preclude performance of past relevant work as a fast food worker. (Tr. 6.). As  
13 such, the Appeals Council concluded Plaintiff was not disabled.

#### 14 **VII. Issues for Review**

15         Plaintiff presents the following issues for review:

- 16         1. Substantial evidence does not support the ALJ's conclusion in that she  
17 is more limited from a physical standpoint, as well as a psychological standpoint;
- 18         2. The ALJ erred in failing to properly consider the opinions of her treating  
19 and examining sources regarding her physical and mental residual functional  
20 capacity.

#### 21 **VIII. Discussion**

##### 22 **A. Finding of Severe Impairments**

23         Plaintiff argues the ALJ erroneously determined that she did not have  
24 specific severe physical impairments. The ALJ found that Plaintiff had severe  
25 impairments of borderline intellectual functioning and a personality disorder. (Tr.  
26 23.) The Appeals Council agreed with Plaintiff's arguments to a certain point,  
27 finding that she had additional severe impairments of status post cervical fusion  
28

1 and chronic obstructive pulmonary disease. (Tr. 5.) But, it did not find or address  
2 whether Plaintiff suffered from degenerative joint disease, osteopenia and  
3 migraines, which Plaintiff asserts affects her ability to work. The ALJ and the  
4 Appeal Council concluded that Plaintiff was capable of light duty. Plaintiff also  
5 challenges this determination. The first issue the Court must address, then, is  
6 whether the ALJ and the Appeals Council erred in not finding her degenerative  
7 joint disease, osteopenia and migraines to be severe impairments.

8 “An impairment or combination of impairments may be found ‘not severe  
9 *only if* the evidence establishes a slight abnormality that has no more than a  
10 minimal effect on an individual’s ability to work.” *Webb v. Barnhart*, 433 F.3d  
11 683, 686 (9<sup>th</sup> Cir. 2005). The analysis at step two is considered “a de minimis  
12 screening device [used] to dispose of groundless claims.” *Id.* (quoting *Smolen*,  
13 80F.3d at 1290. An ALJ may find that a claimant lacks a medically severe  
14 impairment or combination of impairments only when his conclusion is “clearly  
15 established by medical evidence.” *Id.* In reviewing the ALJ’s determination, the  
16 Court considers “whether the ALJ had substantial evidence to find that the  
17 medical evidence clearly established that [Plaintiff] did not have a medically  
18 severe impairment or combination of impairments.” *Id.*

19 With respect to Plaintiff’s allegations that she suffered from arthritis,  
20 osteopenia, bone pain, and back pain, the ALJ concluded the bulk of the medical  
21 evidence established these impairments to be non-severe. With respect to  
22 Plaintiff’s allegations that she suffered from migraines, the ALJ found there was  
23 no neurological testing or medication for migraine headaches in the record to  
24 establish any impairment.

25 The ALJ’s and the Appeals Council’s determinations that Plaintiff’s  
26 arthritis, osteopenia, bone pain, back pain, and migraines are non-severe are  
27 supported by the record. Although Plaintiff complains of chronic pain and  
28



1 migraines, there is no diagnosis of migraines, no treatment notes, and no  
2 prescriptions for medications to treat Plaintiff's migraines.<sup>3</sup> Plaintiff visited Dr.  
3 Montgomery on December 12, 2007. During that visit, she reported that she had  
4 been having more headaches recently, and had a long history of migraines. She  
5 indicated she had tried other medications in the past and they did not work. Dr.  
6 Montgomery's instructions were to continue with over-the-counter medicine. This  
7 notation does not provide the support to find that her migraines have more than a  
8 minimal effect on an individual's ability to work, especially in light of the fact  
9 that Plaintiff reported she had a long history of migraines, yet she was able to  
10 maintain continuous employment from 2002 to 2005 at Northern Quest Casino.

11 Likewise, the record is devoid of any prescriptions for pain medications for  
12 her bone pain and back pain.<sup>4</sup> There is nothing in the record that refers to or  
13 suggests any type of pain management plan. Although Plaintiff complained of hip  
14 pain, x-rays of her back and hip indicate she has mild or minimal hip dysplasia,  
15 which the doctor specifically concluded would not affect her ability to work. (Tr.  
16 354.) On February 4, 2008, she visited the emergency room for acute neck strain  
17 following a near fall. (Tr. 585.) It does not appear she was given a prescription for  
18 pain medications. (Tr. 585.) A series of x-rays of Plaintiff's lumbar spine was

---

19 <sup>3</sup>Plaintiff indicated she is taking Lithium for her mood disorders and takes over-  
20 the-counter Excedrin Migraine or Tylenol for her headaches. (Tr. 298.) On April  
21 2, 2009, she indicated that Dr. Montgomery was prescribing medicine for her  
22 migraines, but the prescription was not substantiated any where in the record. (Tr.  
23 702.)

24 <sup>4</sup>On October 31, 2008, Plaintiff saw Dr. Tubbs for a follow-up visit for back  
25 pain. She reported the pain had improved somewhat over the past week despite her  
26 not taking any pain medication. (Tr. 710.) She also indicated she was not  
27 interested in going to physical therapy. (Tr. 711.)  
28

1 taken in May, 2007, and Dr. Handy concluded they were an “essentially negative  
2 lumbar spine series.” (Tr. 413.)

3 The ALJ found Plaintiff was not credible with respect to the intensity,  
4 persistence, or functionally limiting effects of pain or other symptoms. (Tr. 29.) In  
5 doing so, the ALJ considered Plaintiff’s inconsistent statements to her health care  
6 providers and at the hearing. The ALJ noted that her allegations of “bone”  
7 problems and neck “popping” are not supported by the record; rather they are  
8 contradicted by the orthopedic evaluation of Dr. Bagby. (Tr. 30.) The ALJ found  
9 Plaintiff evasive and misrepresented facts. (Tr. 31.). The ALJ noted that medical  
10 examiners have questioned her physical allegations based on their medical  
11 findings. (Tr. 31.) The ALJ properly engaged in the two step process to evaluate  
12 Plaintiff’s testimony regarding subjective pain.<sup>5</sup> The ALJ’s credibility  
13 determinations are supported by the record.

14 The ALJ and the Appeals Council did not err in concluding that Plaintiff’s  
15 alleged impairments of arthritis, osteopenia, bone pain, back pain, and migraines

---

16 <sup>5</sup>In order to find a claimant’s testimony regarding severity of his impairments  
17 unreliable, the ALJ must make “a credibility determination with findings  
18 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily  
19 discredit claimant’s testimony.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9<sup>th</sup>  
20 Cir. 2008). (citation omitted). In doing so, the Court engages in a two-step  
21 analysis. First, the ALJ must determine whether the claimant has presented  
22 objective medical evidence of an underlying impairment ‘which could reasonably  
23 be expected to produce the pain or other symptoms alleged.’” *Lingenfelter v.*  
24 *Astrue*, 504 F.3d 1028, 1036 (9<sup>th</sup> Cir. 2007). Once a “claimant meets this first test,  
25 and there is not evidence of malingering, the ALJ can reject the claimant’s  
26 testimony about the severity of her symptoms only by offering clear and  
27 convincing reasons for doing so.” *Id.*

1 are non-severe. Substantial evidence supports this conclusion.

2 **B. Residual Functional Capacity**

3 Plaintiff argues she is more limited from a physical, as well as a  
4 psychological, standpoint. Consequently, the ALJ erred in determining her  
5 Residual Functional Capacity.

6 “When there is conflicting medical evidence, the Secretary must determine  
7 credibility and resolve the conflict.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup>  
8 Cir. 1992). More weight is given to a treating physician’s opinion than to the  
9 opinion of a non-treating physician because a treating physician is employed to  
10 cure and has greater opportunity to know and observe the patient as an individual.  
11 20 C.F.R. § 416.927(d)(1); *see also Andrews v. Shalala*, 53 F.3d 1035, 1040-41  
12 (9<sup>th</sup> Cir. 1995). Likewise, greater weight is given to the opinion of an examining  
13 physician than a non-examining physician. *Andrews*, 53 F.3d at 1041. Opinions  
14 of physicians who examined the claimant only once should be given less weight  
15 than the physicians who treated her. 20 C.F.R. § 404.1527; *Benecke v. Barnhart*,  
16 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004).

17 **i. Physical Limitations**

18 There are conflicting testimony in the record regarding Plaintiff’s physical  
19 limitations. In 2006, Dr. Phillips examined Plaintiff and found her to be capable  
20 of light exertional work. (Tr. 262.) In 2007, Dr. Bagby, after a thorough and  
21 comprehensive orthopedic evaluation, found Plaintiff capable of performing light  
22 exertional work. (Tr. 565.) In September, 2007, Dr. Yurchak reviewed Plaintiff’s  
23 records and indicated that Plaintiff was capable of a modified range of light work.  
24 (Tr. 513.)

25 On the other hand, in February, 2006, Dr. Top Sky found Plaintiff to be  
26 limited to sedentary exertional work. (Tr. 374.). In May, 2007, Christina Riebe,  
27 ARNP, completed a physical evaluation. (Tr. 481-82.) She concluded Plaintiff

1 would be limited to sedentary work and would have limited mobility, agility, and  
2 flexibility in bending, climbing, crouching, handling, kneeling, pulling, pushing,  
3 reaching, sitting, and stooping. (Tr. 389.)

4 Dr. Top Sky was Plaintiff's treating physician for a period of time within  
5 the relevant time period at issue. (Tr. 31.) If the treating doctor's opinion is  
6 contradicted by another doctor, the ALJ may not reject this opinion without  
7 providing "'specific and legitimate reasons' supported by substantial evidence in  
8 the record for doing so." *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995).

9 The ALJ gave limited weight to Dr. Top Sky's opinion for the following  
10 reason: (1) no indication of any tests to support her findings relative to the  
11 degenerative joint disease/osteopenia being present; (2) no tests that determined  
12 level of severity which would support work level to sedentary; and (3) these  
13 findings are contradicted by the orthopedic evaluations and radiological studies  
14 which found no evidence of degenerative joint disease.<sup>6</sup> (Tr. 31.) The ALJ also  
15 noted that ARNP Reibe found Plaintiff's osteopenia to have no level of severity,  
16 which corresponded to having "no interference with the ability to perform basic  
17 work-related activities." (Tr. 24.)

18 The ALJ did not provide explicit reasons for rejecting ARNP Riebe's  
19 opinion that Plaintiff was limited to only sedentary work. ARNP Riebe is not an  
20 acceptable medical source. 20 C.F.R. 404.1502. The ALJ may only discount  
21 testimony from these "other sources" if the ALJ "gives reasons germane to each  
22 witness for doing so." *Moline v. Astrue*, 674 F.3d 1104, 1111 (9<sup>th</sup> Cir. 2012). As  
23 the SSR-06-03p explains, there is a distinction between what an adjudicator must  
24 consider and what the ALJ must explain in the disability determination. At the

25 \_\_\_\_\_  
26 <sup>6</sup>The ALJ also theorized that possibly Dr. Top Sky may have offered the  
27 opinion in an effort to assist Plaintiff. (Tr. 31.) There is nothing in the record that  
28 would support this reason for giving Dr. Top Sky's opinion less weight.

1 minimum, the ALJ should ensure that the discussion of the evidence allows the  
2 claimant or subsequent reviewer to follow the adjudicator's reasoning. SSR-06-  
3 06p. Here, it is clear the ALJ considered Riebe's opinion, as the ALJ referred to  
4 ARNP Riebe's conclusions in his opinion. (Tr. 24.) The ALJ did not err in failing  
5 to specifically cite to ARNP Riebe's opinion, given that he gave limited weight to  
6 Dr. Top Sky's opinion that also provided for sedentary limitations.

7 The ALJ gave specific and legitimate reasons to give only limited weight to  
8 Dr. Top Sky's and Riebe's opinion that Plaintiff is limited to sedentary work.  
9 Moreover, substantial evidence supports finding that Plaintiff's physical  
10 limitations result in a residual functional capacity that includes light work, as  
11 reflected in Dr. Bagby's and Dr. Phillips's opinions. Notably, Plaintiff testified  
12 that on good days, she can walk up to 5 miles and routinely walks 2 to 3 miles in  
13 the summer. (Tr. 72-3.) This is consistent with someone who can perform light  
14 work.

## 15 ii. Psychological Limitations

16 Plaintiff argues the residual functional capacity does not accurately reflect  
17 her mental limitations. The residual functional capacity limited Plaintiff to  
18 performing simple or well-learned tasks, having only superficial or limited  
19 contact with the general public, and being limited to non-collaborative work with  
20 co-workers. (Tr. 27.)

21 Amy Robinson, M.S. opined that Plaintiff had moderate cognitive  
22 difficulties and marked social difficulties. (Tr. 377-80) This report was signed off  
23 by Dr. W. Scott Mabee, Ph.D. (Tr. 385.) Ashlie Hagen, M.S. opined that Plaintiff  
24 had moderate to severe cognitive and social limitations. (Tr. 544-48.) This report  
25 was also signed off by Dr. Mabee. (Tr. 554.)

26 The ALJ gave little weight to Ms. Robinson and Ms. Hagen's opinions  
27 because they did not take into account Plaintiff's ability to function within the  
28 work force for many years with her diagnosed conditions. He instead relied on

1 Dr. McKnight's testimony that Plaintiff was able to work. Dr. McKnight took into  
2 consideration the fact that Plaintiff's borderline intellectual functioning and  
3 personality disorder were present during the time that she worked at Northern  
4 Quest Casino for over three years. (Tr. 29.) As the ALJ explained, "In terms of  
5 the claimant's alleged mental impairments of a borderline personality disorder  
6 and borderline intellectual functioning, the undersigned notes such to be lifelong  
7 conditions and which did not preclude the claimant from working for several  
8 years with earnings over \$18,000 a year for four years straight at the same job."  
9 (Tr. 29.)

10 Also, the ALJ noted that while Plaintiff testified she had run-ins with her  
11 supervisors at her job at Northern Quest, she also explained she was fired for  
12 alleged public display of affection on the casino floor with her boyfriend while  
13 working, not problems with her supervisor, her co-workers, or the public. (Tr.  
14 29.) The ALJ also noted that various mental health tests were deemed invalid due  
15 to Plaintiff's over-reporting her mental pathology. (Tr. 30.) All valid mental  
16 status examinations were within normal limits. (Tr. 30.) The ALJ noted that  
17 Plaintiff's alleged memory problems are not supported in the record as Dr.  
18 Quackenbush found her memory to be functioning at the high average range. (Tr.  
19 30.) Also, the ALJ relied on the fact that Plaintiff over-reported her symptoms  
20 with respect to her mental conditions.

21 The ALJ did not err in rejecting Ms. Robinson and Ms. Hagen's opinions.  
22 The ALJ gave specific and legitimate reasons for rejecting these opinions.

23 As such, the residual functional capacity accurately reflects Plaintiff's  
24 abilities, and therefore, the ALJ did not err in concluding that Plaintiff is capable  
25 of performing past relevant work as a fast food worker.

## 26 **IX. Conclusion**

27 Plaintiff has not met her burden of showing the ALJ committed legal error  
28 or that his conclusion that Plaintiff was not disabled from November 29, 2005 to

1 May 6, 2009, is not supported by substantial evidence. The ALJ properly found  
2 that Plaintiff was capable of performing past relevant work as fast food worker  
3 and properly found that she is not disabled.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, ECF No. 23, is **DENIED**.

6 2. Defendant's Motion for Summary Judgment, ECF No. 26, is

7 **GRANTED.**

8 3. The decision of the ALJ denying benefits is **affirmed**.

9 4. The District Court Executive is directed to enter judgment in favor of  
10 Defendant and against Plaintiff.

11 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
12 file this Order and provide copies to counsel, and **close the file**.

13 **DATED** this 9<sup>th</sup> day of October, 2013.

14  
15  
16 *s/Robert H. Whaley*

17 ROBERT H. WHALEY  
18 United States District Judge

19  
20 Q:\RHW\A\CIVIL\2011\Shepherd (SS)\sj.wpd