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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 DEBRA I. DAILY,

9 Plaintiff,

10 v.

11 MICHAEL ASTRUE<sup>1</sup>,  
12 Commissioner of Social Security,

13 Defendant.

NO. CV-12-00389-JLQ

MEMORANDUM OPINION;  
ORDER RE: MOTIONS FOR  
SUMMARY JUDGMENT

14 Plaintiff appeals from the final decision of the Commissioner of the Social  
15 Security Administration ("Commissioner") which denied her application for  
16 Supplemental Security Income ("SSI"), after a hearing before an Administrative  
17 Law Judge ("ALJ"). This case, filed on June 8, 2012, was reassigned to the  
18 undersigned on August 1, 2013. Before the court are Cross-Motions for Summary  
19 Judgment. (ECF Nos. 17, 20). No Reply briefs were filed. Plaintiff is represented  
20 by attorney Rebecca Coufal. Defendant is represented by Assistant United States  
21 Attorney Pamela DeRusha and Special Assistant United States Attorney Nancy A.  
22 Michalanie. Jurisdiction to review the Commissioner's decision exists pursuant to  
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 suit.  
27 No further action is necessary to continue this action by reason of the last sentence  
28 of 42 U.S.C. § 405(g).

1 42 U.S.C. §§ 405(g) and 1383(c)(3).

2 **I. LEGAL STANDARDS**

3 **A. Sequential Evaluation**

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

8 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant  
9 shall be determined to be under a disability only if the impairments are of such  
10 severity that the claimant is not only unable to do her previous work but cannot,  
11 considering claimant's age, education and work experiences, engage in any other  
12 substantial gainful work which exists in the national economy. 42 U.S.C. §§  
13 423(d)(2)(A), 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential evaluation process  
15 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920;  
16 *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987):

17 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
18 §§ 404.1520(b), 416.920(b). If she is, benefits are denied. If she is not, the  
19 decision maker proceeds to Step 2.

20 Step 2: Does the claimant have a medically severe impairment or  
21 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
22 claimant does not have a severe impairment or combination of impairments, the  
23 disability claim is denied. If the impairment is severe, the evaluation proceeds to  
24 the third step.

25 Step 3: Does the claimant's impairment meet or equal one of the listed  
26 impairments acknowledged by the Commissioner to be so severe as to preclude  
27 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. Pt.  
28 404 Subpt. P App. 1. If the impairment meets or equals one of the listed

1 impairments, the claimant is conclusively presumed to be disabled. If the  
2 impairment is not one conclusively presumed to be disabling, the evaluation  
3 proceeds to Step 4.

4 Step 4: Does the impairment prevent the claimant from performing work she  
5 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant  
6 is able to perform her previous work, she is not disabled. If the claimant cannot  
7 perform this work, the inquiry proceeds to the Fifth and final Step.

8 Step 5: Is the claimant able to perform other work in the national economy  
9 in view of her age, education and work experience? 20 C.F.R. §§ 404.1520(f),  
10 416.920(f).

11 The initial burden of proof rests upon the Plaintiff to establish a prima facie  
12 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921  
13 (9th Cir. 1971). The initial burden is met once a claimant establishes that a  
14 physical or mental impairment prevents her from engaging in her previous  
15 occupation. The burden then shifts to the Commissioner to show (1) that the  
16 claimant can perform other substantial gainful activity and (2) that a "significant  
17 number of jobs exist in the national economy" which claimant can perform. *Kail*  
18 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

#### 19 **B. Standard of Review**

20 This court's role on review of the decision of the ALJ is limited. The court  
21 reviews that decision to determine if it was supported by substantial evidence and  
22 contains a correct application of the law. *Valentine v. Comm'r. Soc. Sec. Admin*,  
23 574 F. 3d 685,690 (9<sup>th</sup> Cir. 2009). This court is obligated to affirm the ALJ's  
24 findings if the are supported by substantial evidence and the reasonable inferences  
25 to be drawn therefrom. *Molina v. Astrue*, 674 F. 3d 1104, 1110-11 (9<sup>th</sup> Cir. 2012).  
26 Substantial evidence is such relevant evidence that a reasonable mind might accept  
27 as adequate to support the conclusion.

1           "The [Commissioner's] determination that a claimant is not disabled will be  
2 upheld if the findings of fact are supported by substantial evidence and the  
3 [Commissioner] applied the proper legal standards." *Delgado v. Heckler*, 722  
4 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
5 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th  
6 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,  
7 601-602 (9th Cir. 1989). "It means such relevant evidence as a reasonable mind  
8 might accept as adequate to support a conclusion." *Richardson v. Perales*, 402  
9 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as  
10 the [Commissioner] may reasonably draw from the evidence" will also be upheld.  
11 *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court  
12 considers the record as a whole, not just the evidence supporting the decision of  
13 the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989). This  
14 court may set aside a denial of benefits only if the basis for denial is not supported  
15 by substantial evidence or if it is based on legal error. *Thomas v. Barnhart*, 278  
16 F.3d 947, 954 (9th Cir. 2002). It is the role of the trier of fact, not this court, to  
17 resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400. If the evidence  
18 supports more than one rational interpretation, the court must uphold the decision  
19 of the ALJ. *Thomas*, 278 F.3d at 954 (9th Cir. 2002).

## 20 **II. PROCEDURAL HISTORY**

21           Plaintiff, a now fifty year old female (born in 1962), first filed an  
22 application for Disability Insurance Benefits ("DIB") on April 10, 2009, alleging  
23 an onset date of January 12, 2009 due to the effects of "growth spurs, heart  
24 murmur, cirrhosis," and "fatty liver." (Tr. 144). She alleged as a result of these  
25 conditions she was limited in how long she could sit, stand, and walk, and how  
26 much she could lift. She claimed she could not bend, stoop, kneel, squat or crawl  
27 and that she suffered from severe fatigue, dizziness, difficulty sleeping, and  
28 shortness of breath. (Tr. 145). Plaintiff's application was denied initially and on

1 reconsideration. (Tr. 17). On February 25, 2011 the ALJ issued her decision  
2 finding Plaintiff not disabled. (Tr. 17-26).

3 Plaintiff subsequently submitted a letter brief to the Appeals Council  
4 through new counsel, and requested review of the ALJ's decision. The Appeals  
5 Council denied her request on May 10, 2012 (Tr. 1-6), making the ALJ's ruling the  
6 "final decision" of the Commissioner as the term is defined by 42 U.S.C. § 405(g).  
7 Plaintiff now seeks judicial review of the Commissioner's final decision. (ECF  
8 No. 1).

### 9 **III. FACTUAL BACKGROUND**

10 The facts are contained in the medical records, administrative transcript  
11 (ECF No. 11)("Tr."), and the ALJ's decision, and are only briefly summarized  
12 here.

#### 13 **1. Plaintiff's History**

14 Plaintiff was born in 1962 and was 48 years old at the time of the  
15 administrative hearing. She graduated from Wilbur High School and during school  
16 needed resource room assistance. Plaintiff lives with her husband, and has two  
17 adult children of her own and an adult step-son. Plaintiff has worked as a  
18 housekeeper at assisted living facilities, a cabinet maker for Huntwood Industries  
19 (hand gluing door parts and transferring wood skins from one conveyor to another),  
20 and an assembly press operator/hardware installer for a metal fabrication company,  
21 Accrafab. (Tr. 157-163). Her last job as a janitor for Varsity contractors ended in  
22 January 2009 when she decided it was "too much" after she tripped and fell with an  
23 industrial backpack vacuum cleaner on. (Tr. 46). She has a drivers license and  
24 can drive. (Tr. 445). At the time of her disability application in 2009 she was 5'6"  
25 tall and weighed 293 pounds, though a 2010 medical record shows a decreased  
26 weight of 279 and a body mass index of 45.03. She is still deemed morbidly obese.  
27 (Tr. 144, 417).

1 **2. Commissioner's Findings**

2 Before this court is the appeal of ALJ Ausem's February 25, 2011 decision  
3 finding Plaintiff not disabled since April 10, 2009. The ALJ found at Step 1 that  
4 Plaintiff had not engaged in substantial gainful activity since January 12, 2009, the  
5 alleged onset date. (Tr. 19). At Step 2, the ALJ determined that Plaintiff had the  
6 following severe impairments: obesity, hypertension, obstructive sleep apnea, post  
7 cholecystectomy with postoperative hemorrhage, depressive disorder not  
8 otherwise specified, borderline intellectual functioning, and personality disorder  
9 with dependent features.

10 At Step 3, the ALJ determined that the Plaintiff's impairments, alone or in  
11 combination, did not meet or medically equal one of the listed impairments in 20  
12 CFR Pt. 404 Subpt. P App 1 (Listings).

13 At Step 4, the ALJ determined the Plaintiff had the residual functional  
14 capacity ("RFC") to perform light work, but with non-exertional limitations of  
15 performing semi-skilled tasks and superficial interaction with the general public.  
16 (Tr. 21). Based upon this determination of Plaintiff's RFC, the ALJ concluded  
17 Plaintiff could perform her past relevant work as a cleaner, cabinet assembler,  
18 assembly press operator, and production assembler. (Tr. 25). Alternatively, at Step  
19 5, the ALJ, relying upon testimony of a vocational expert, concluded that there are  
20 jobs that exist in significant numbers in the national economy that the claimant can  
21 perform, including sewing machine operator, production assembler, and cashier.  
22 (Tr. 26). The ALJ then noted that even had she found that Plaintiff was restricted  
23 to a sedentary level of exertion, she would not be disabled as the same jobs still  
24 existed in significant numbers at the sedentary level. (Tr. 26).

25 Accordingly, the ALJ concluded that Plaintiff was not disabled, as defined  
26 by the Social Security Act, from January 12, 2009 through the date of the decision,  
27 February 25, 2011.

1 **III. ISSUES**

2 In her Motion, Plaintiff solely contends errors in the ALJ’s decision “require  
3 this matter be at the least remanded for another hearing.” (ECF No. 18). Plaintiff  
4 contends the ALJ erred because: (1) the ALJ, at Step 2, failed to include as severe  
5 impairments plantar fasciitis, backache and elbow tendonitis; (2) the ALJ did not  
6 “have the basis to find Daily less than fully credible” regarding her characterization  
7 of the extent of her impairments; (3) the ALJ’s hypothetical questions to the  
8 vocational expert did not account for all of plaintiff’s physical limitations and  
9 restrictions due to the error at Step 2; and (4) the ALJ failed to “flesh[] out the  
10 record with an [sic] ME [medical expert].

11 The court notes that in her brief to this court, Plaintiff attempts to  
12 incorporate, by reference (and without citation), the arguments made in her April  
13 21, 2011 letter brief submitted by counsel to the Appeals Council (Tr. 222). (ECF  
14 No. 18 at 7)(“Daily incorporates the letter briefs to the AC and the transcript of the  
15 records in this Memorandum knowing the court will thoroughly review the  
16 record.”). The court has located a single brief filed with the Appeals Council,  
17 wherein Plaintiff made two entirely distinct arguments from those in Plaintiff’s  
18 Motion herein. First, Plaintiff argued to the Appeal Council that the ALJ erred in  
19 failing to find her *asthma* and *COPD* as severe impairments; and next, that the ALJ  
20 erred by finding her capable of semi-skilled work when her depression and  
21 personality disorder would not enable her to perform “anything beyond unskilled  
22 work.” (Tr. 222).

23 Plaintiff’s attempted incorporation of her Appeals Council brief without  
24 discussion in her Memorandum in support of her summary judgment motion in this  
25 court might be construed as an attempt to avoid the court’s 20-page limitation for  
26 summary judgment memoranda. Local Rule 7.1(e). Furthermore, litigants must  
27 specifically outline and discuss the factual and legal issues in their appellate briefs  
28 to this court. Otherwise, the court may consider the argument abandoned. *See*

1 *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir.1986)(the court "will  
2 not ordinarily consider matters on appeal that are not specifically and distinctly  
3 argued in appellant's opening brief." ); *United States v. Kimble*, 107 F.3d 712, 715  
4 n. 2 (9th Cir. 1997) (arguments "not coherently developed" in appellate briefs are  
5 waived on appeal); *Ehrhart v. Secretary of Health and Human Servs.*, 969 F.2d  
6 534, 537 n.5 (7th Cir. 1992)(the issue of whether the treating physician's opinion  
7 was properly evaluated "drops out because it is a no-show in the body of the  
8 brief."). The court has observed that Plaintiff's counsel has utilized this  
9 incorporation procedure in other social security appeals in this district. Counsel  
10 would be well advised to discontinue the practice of attempted incorporation of  
11 legal argument not otherwise addressed in the memorandum before the court.

#### 12 **IV. DISCUSSION**

##### 13 **A. Step Two**

14 Plaintiff contends the ALJ should have found that plantar fasciitis, elbow  
15 tendonitis and backache were severe impairments. (ECF No. 18 at 8-11). At Step  
16 2 of the evaluation process, the ALJ must determine if an impairment is "severe."  
17 20 C.F.R. § 404.1520, § 416.920. An impairment is "not severe" if it does not  
18 "significantly limit" a claimant's mental or physical abilities to do basic work  
19 activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c); see also  
20 Social Security Ruling ("SSR") 96-3p, 1996 WL 374181 \*1. Basic work activities  
21 are those "abilities and aptitudes necessary to do most jobs." 20 C.F.R. §  
22 404.1521(b), § 416.921(b); SSR 85-28, 1985 WL 56856 \*3.

23 An impairment is not severe if the evidence only establishes a slight  
24 abnormality that has "no more than a minimal effect on an individual[']s ability to  
25 work." SSR 85-28, 1985 WL 56856 \*3; *see also Smolen v. Chater*, 80 F.3d 1273,  
26 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.1988). Plaintiff  
27 has the burden of proving that her "impairments or their symptoms affect her  
28 ability to perform basic work activities." *Edlund v. Massanari*, 253 F.3d 1152,

1 1159–60 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998).

2 Plaintiff contends “[t]he evidence in the file supports finding the above noted  
3 physical problems severe,” but does not explain what this evidence is or cite any  
4 portion of the record supporting such a finding. Notably, none of these conditions  
5 were claimed by Plaintiff as a cause of disability in her application for benefits. In  
6 April 2007, Plaintiff was diagnosed with “chronic plantar fasciitis” in the left foot  
7 and excessive and prolonged pronation by podiatrist Donald Grim, D.P.M. During  
8 the exam, Plaintiff advised that her heel had been hurting for 11 years (Tr. 392), a  
9 time frame during which Plaintiff maintained employment. Grim recommended  
10 consideration of custom orthotics. Though Plaintiff’s subsequent medical records  
11 lists “foot pain” in the list of Plaintiff’s “Problems,” the last treatment note showing  
12 a complaint or record for treatment of foot pain was January 2008 which notes that  
13 “naprosyn [sic] works well to control sxs [symptoms].” (Tr. 254). Plaintiff did not  
14 prove her plantar fasciitis constituted a severe impairment and the ALJ’s failure to  
15 so find was not erroneous. Likewise, there is no history of any complaints or  
16 treatment for elbow tendonitis in the record since August 2006, when Plaintiff  
17 started moving heavy lumber at her workplace (Tr. 273). There is no evidence in  
18 the record that this condition has persisted during the relevant period since January  
19 2009.

20 Finally, concerning alleged backache, in a footnote in her brief, Plaintiff  
21 states “the backache has support in the lumbar and thoracic spine series done  
22 November 8, 2008.” Plaintiff was referred for x-rays due to Plaintiff’s fall at work  
23 in early November, 2008. (Tr. 351). The thoracic spine result was “unremarkable.”  
24 (Tr. 352). The lumbar spine result recommended a MRI “for better correlation”  
25 and noted “endplate sclerotic changes...with small osteophyte projecting  
26 posteriorly...” On February 5, 2009, Plaintiff had an appointment with her primary  
27 physician for backache. She was advised to take Tylenol and have an MRI. (Tr.  
28 247). The record does not reflect that an MRI was performed or any follow up

1 treatment for her back. (Tr. 427). As noted by the ALJ, Plaintiff only sought  
2 medical attention on 3 occasions in 2009. A January 2010 treatment record noted  
3 Plaintiff was “pain free.” (Tr. 417). The ALJ did not err by not finding Plaintiff’s  
4 back pain to be a severe impairment during the relevant period.

5 Within Plaintiff’s Step 2 argument, Plaintiff also contends the ALJ failed to  
6 “flesh[] out the record with an [sic] ME [medical expert].” The ALJ’s duty to  
7 further develop the record is triggered only when record evidence contains  
8 ambiguous evidence or is inadequate to allow for proper evaluation of the  
9 evidence. *Mayes v. Massanari*, 276 F.3d 453 (9th Cir. 2001). The record before  
10 the ALJ was neither ambiguous nor inadequate.

11 Although an ALJ’s inquiry at Step 2 is based upon a *de minimis* standard, not  
12 all impairments are severe as the mere diagnosis does not speak to its severity. The  
13 court accordingly finds the ALJ’s failure at Step 2 to find plantar fasciitis, elbow  
14 tendonitis, and backache as severe impairments does not constitute reversible error.

## 15 **B. Credibility**

16 The ALJ’s decision herein includes the often seen assessment in social  
17 security decisions that while Plaintiff’s impairments could reasonably be expected  
18 to cause some of the alleged symptoms, the “claimant’s statements concerning the  
19 intensity, persistence and limiting effects of these symptoms are not credible to the  
20 extent they are inconsistent with” an RFC of a limited range of light work or  
21 alternatively, sedentary work. (Tr. 22). Plaintiff alleges a remand is warranted  
22 because the ALJ did not “have the basis to find Daily less than fully credible”  
23 regarding her characterization of the extent of her impairments.

24 An ALJ’s assessment of pain severity and claimant credibility is entitled to  
25 “great weight.” *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Nyman v.*  
26 *Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). “[T]he ALJ is not required to believe  
27 every allegation of disabling pain, or else disability benefits would be available for  
28 the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5) (A).” *Molina v.*

1 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (internal quotation marks and citation  
2 omitted). In evaluating a claimant's subjective symptom testimony, an ALJ engages  
3 in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir.  
4 2007). “First, the ALJ must determine whether the claimant has presented objective  
5 medical evidence of an underlying impairment [that] could reasonably be expected  
6 to produce the pain or other symptoms alleged .” *Id.* at 1036 (internal quotation  
7 marks omitted). If such objective medical evidence exists, the ALJ may not reject a  
8 claimant's testimony “simply because there is no showing that the impairment can  
9 reasonably produce the degree of symptom alleged.” *Smolen*, 80 F.3d at 1282  
10 (emphasis in original). When the ALJ finds a claimant's subjective complaints not  
11 credible, the ALJ must make specific findings that support the conclusion. *Berry v.*  
12 *Astrue*, 622 F.3d 1228, 1234 (9th Cir.2010). Absent affirmative evidence of  
13 malingering, those findings must provide “clear and convincing” reasons for  
14 rejecting the claimant's testimony. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.  
15 1996). If the ALJ's credibility finding is supported by substantial evidence in the  
16 record, the reviewing court “may not engage in second-guessing.” *Thomas*, 278  
17 F.3d at 959.

18 At the administrative hearing, Plaintiff testified she only slept 3-4 hours per  
19 night as she only used her CPAP half the night, resulting in daytime fatigue. (Tr.  
20 47). She also testified that depression causes her to feel tired all the time and lack  
21 interest in doing anything. (Tr. 50). She claimed that during the day she tried to  
22 prepare meals, but tired easily and needed to rest every fifteen minutes due to back  
23 pain. She claimed she could only lift five pounds comfortably and stand 10-15  
24 minutes at a time due to back and foot pain. (Tr. 48, 54).

25 Remand is not warranted based upon the ALJ’s credibility finding. The  
26 ALJ’s standard statement is followed by a specific discussion of the reasons which  
27 factored into the ALJ’s credibility assessment. First, the ALJ considered the  
28 contradictory facts contained in the Plaintiff’s treatment notes including evidence

1 that her symptoms were being managed by treatment and evidence she was able to  
2 manage her daily activities “without issues.” The evidence reviewed by the ALJ  
3 also noted that Plaintiff did not suffer from extreme fatigue or have difficulty with  
4 walking or balance. (Tr. 384).

5 The ALJ did not rely solely upon the conflicts identified between the medical  
6 evidence and the Plaintiff’s allegations. The ALJ found the claimant’s “meager  
7 course of treatment” and treatment lapses, were inconsistent with the allegation of  
8 disabling symptoms, including alleged significant difficulties standing and  
9 walking, as well as mental impairment. Plaintiff specifically argues this part of the  
10 ALJ’s credibility assessment was in error because it “seem[ed] to circle around how  
11 seldom she went to the doctor” and the ALJ “chose not to ask Daily why she did  
12 not go to the doctor more often.” (ECF No 18 at 13, 10). However, according to  
13 Agency rules, a claimant’s statements may be less credible if the level or frequency  
14 of treatment is inconsistent with the level of complaints. See 20 C.F.R. §  
15 404.1529(c)(3)(v) (an ALJ may consider the conservative nature of claimant's  
16 treatment); SSR 96–7p (an “individual's statements may be less credible if the level  
17 or frequency of treatment is inconsistent with the level of complaints”); *Johnson v.*  
18 *Shalala*, 60 F.3d 1428, 1434 (9th Cir.1995) (inconsistencies between the record  
19 and medical evidence supports a rejection of a claimant's credibility; no medical  
20 treatment or a conservative level of medical treatment has been found to suggest a  
21 lower level of pain and functional limitations).

22 Finally, the ALJ noted the Plaintiff’s level of daily living undermined her  
23 subjective complaints. These included her ability to drive, cook, clean, do laundry,  
24 watch television, use a computer to play games and check e-mail, leave the home,  
25 grocery shop, and visit her daughter and sister. (Tr. 23). Because the ALJ  
26 considered many of the credibility factors provided by 20 C.F.R. § 404.1529 in  
27 reaching her credibility determination, the court finds that determination  
28 adequately supported. Under such circumstances, where the ALJ's credibility

1 determination is supported by substantial evidence the court will “not engage in  
2 second guessing.”

3 **C. Step Five - Vocational Expert Testimony**

4 Finally, Plaintiff contends the ALJ's hypothetical questions to the vocational  
5 expert did not account for all of Plaintiff's physical limitations due to the claimed  
6 error claimed at Step 2. Plaintiff contends this includes the walking limitations  
7 from plantar fasciitis, “*possible* sitting limitations from the ongoing back  
8 ache/pain,” or “lifting limitations which *might* result from the elbow tendonitis.”  
9 (ECF No. 18 at 15)(emphasis added).

10 An ALJ's findings will be upheld if the weight of the medical evidence  
11 supports the hypothetical posed by the ALJ. *See Martinez v. Heckler*, 807 F.2d 771,  
12 774 (9th Cir. 1987); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The  
13 vocational expert's testimony therefore must be reliable in light of the medical  
14 evidence to qualify as substantial evidence. *See Embrey v. Bowen*, 849 F.2d 418,  
15 422 (9th Cir. 1988). The ALJ's description of the claimant's disability “must be  
16 accurate, detailed, and supported by the medical record.” *Id.* (citations omitted).  
17 The ALJ, however, may omit from that description those limitations she finds do  
18 not exist. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

19 At the hearing, the ALJ posed a hypothetical question to the vocational  
20 expert containing the limitations of sedentary exertional activity, semi-skilled  
21 tasks, and no exposure to pulmonary irritants. The ALJ then asked the vocational  
22 expert to consider the additional restriction of no more than superficial contact with  
23 the general public. (Tr. 61-63). In response, the vocational expert testified that an  
24 individual with those limitations—and with the same age, education and work  
25 experience as plaintiff—would be able to perform other jobs, including sewing  
26 machine operator, production assembler, and cashier 2. (Tr. 62-63). Based on the  
27 testimony of the vocational expert, the ALJ found plaintiff would be capable of  
28 performing other jobs existing in significant numbers in the national economy

1 whether limited to light or sedentary level of exertion. Tr. 25-26. As the ALJ was  
2 not required to include hypothetical limitations not supported by substantial  
3 evidence pertaining to the relevant period, the ALJ did not err in framing the  
4 hypothetical questions or relying upon the vocational expert's testimony.

5 **V. CONCLUSION**

6 The court, in its limited role, finds that the Commissioner's and ALJ's  
7 decision is supported by substantial evidence in the record and is based on proper  
8 legal standards. It must therefor be Affirmed. *Lewis v. Astrue*, 498 F.3d 909, 911  
9 (9th Cir. 2007).

10 **IT IS HEREBY ORDERED:**

- 11 1. Plaintiff's Motion for Summary Judgment (ECF No. 17) is **DENIED**.  
12 2. Defendant's Motion for Summary Judgment (ECF No. 20) is **GRANTED**.  
13 3. The Clerk is directed to enter Judgment dismissing the Complaint and the  
14 claims therein with prejudice.

15 IT IS SO ORDERED. The District Court Executive is directed to file this  
16 Order, enter Judgment as directed above, and close this file.

17 Dated this 25<sup>th</sup> day of September, 2013.

18 s/ Justin L. Quackenbush  
19 JUSTIN L. QUACKENBUSH  
20 SENIOR UNITED STATES DISTRICT JUDGE  
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