

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means
10 relevant evidence that “a reasonable mind might accept as adequate to support a
11 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to “more than a mere scintilla[,] but less than a
13 preponderance.” *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record “is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ’s findings if they are supported by inferences reasonably drawn from the
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant’s ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant’s
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past (“past relevant work”). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant’s
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant’s age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on July 17, 2009, alleging a disability onset date
10 of February 15, 2006. Tr. 166-74. These applications were denied initially and
11 upon reconsideration, and Plaintiff requested a hearing. Tr. 81-82, 87-93, 105-06.
12 A hearing was held before an Administrative Law Judge on August 16, 2011. Tr.
13 38-76. The ALJ rendered a decision denying Plaintiff benefits on September 15,
14 2011. Tr. 21-32.

15 The ALJ found that Plaintiff met the insured status requirements of Title II
16 of the Social Security Act through September 30, 2009. Tr. 23. At step one, the
17 ALJ found that Plaintiff had not engaged in substantial gainful activity since
18 February 15, 2006, the amended alleged onset date. Tr. 23. At step two, the ALJ
19 found that Plaintiff had severe impairments consisting of (1) right shoulder bursitis
20 status post two surgical repairs; (2) lumbar degenerative disc disease; (3) hip

1 bursitis; (4) chronic pain syndrome; (5) depressive disorder; and (6) anxiety
2 disorder. Tr. 23. At step three, the ALJ found that Plaintiff's severe impairments
3 did not meet or medically equal a listed impairment. Tr. 25-26. The ALJ then
4 determined that Plaintiff had the residual functional capacity to:

5 [L]ift and/or carry up to 20 pounds occasionally and 10 pounds
6 frequently, stand and/or walk for about six hours in an eight hour
7 workday, sit for about six hours in an eight hour workday, and
8 perform unlimited pushing and/or pulling within the lifting
9 restrictions. The [Plaintiff] can frequently balance and reach,
10 occasionally climb ramps or stairs, stoop, crouch, kneel, crawl, and
11 reach overhead, and never climb ladders, ropes or scaffolds. The
12 [Plaintiff] should avoid concentrated exposure to unprotected heights,
13 and use of moving machinery. The [Plaintiff] can perform simple,
14 routine and repetitive tasks, as well as some well-learned detailed
15 tasks. The [Plaintiff] can have superficial interaction with the public
16 and co-workers, but no high level cooperation.

17 Tr. 26-30. At step four, the ALJ found that Plaintiff was unable to perform past
18 relevant work. Tr. 30. At step five, the ALJ found that Plaintiff could perform the
19 representative occupations of small parts assembler, photocopy machine operator,
20 and mail room clerk, and that such occupations existed in significant numbers in
the national economy. Tr. 30-31. In light of this step five finding, the ALJ
concluded that Plaintiff was not disabled under the Social Security Act and denied
his claims on that basis. Tr. 31-32.

The Appeals Council denied Plaintiff's request for review on January 7,
2013, making the ALJ's decision the Commissioner's final decision for purposes

1 of judicial review. Tr. 1-7; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

2 ISSUES

3 Plaintiff raises two issues for review:

- 4 1. Whether the ALJ erred in finding that Plaintiff’s testimony
5 concerning the nature and extent of her physical limitations was
6 not credible; and
7 2. Whether the ALJ erred in rejecting the opinions of Ms. Karen
8 Bichler, ARNP.

7 DISCUSSION

8 **A. Adverse Credibility Determination**

9 In social security proceedings, a claimant must prove the existence of
10 physical or mental impairment with “medical evidence consisting of signs,
11 symptoms, and laboratory findings.” 20 C.F.R. §§ 416.908; 416.927. A
12 claimant’s statements about his or her symptoms alone will not suffice. 20 C.F.R.
13 §§ 416.908; 416.927. Once an impairment has been proven to exist, the claimant
14 need not offer further medical evidence to substantiate the alleged severity of his or
15 her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).
16 As long as the impairment “could reasonably be expected to produce [the]
17 symptoms,” the claimant may offer a subjective evaluation as to the severity of the
18 impairment. *Id.* This rule recognizes that the severity of a claimant’s symptoms
19 “cannot be objectively verified or measured.” *Id.* at 347 (quotation and citation
20 omitted).

1 If an ALJ finds the claimant’s subjective assessment unreliable, “the ALJ
2 must make a credibility determination with findings sufficiently specific to permit
3 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant’s
4 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In making
5 this determination, the ALJ may consider, *inter alia*: (1) the claimant’s reputation
6 for truthfulness; (2) inconsistencies in the claimant’s testimony or between his
7 testimony and his conduct; (3) the claimant’s daily living activities; (4) the
8 claimant’s work record; and (5) testimony from physicians or third parties
9 concerning the nature, severity, and effect of the claimant’s condition. *Id.* If there
10 is no evidence of malingering, the ALJ’s reasons for discrediting the claimant’s
11 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d
12 661, 672 (9th Cir. 2012) (quotation and citation omitted). The ALJ “must
13 specifically identify the testimony she or he finds not to be credible and must
14 explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246
15 F.3d 1195, 1208 (9th Cir. 2001).

16 The ALJ provided several specific, clear and convincing reasons for
17 discrediting Plaintiff’s testimony about the severity of her physical limitations.
18 First, the ALJ noted that Plaintiff made “excessive pain complaints” during a
19 physical evaluation in December 2006, and was later observed to have potentially
20 over-reported emotional distress symptoms during a psychological evaluation in

1 November 2009. Tr. 28. In the ALJ’s view, these were “indications of symptom
2 exaggeration or magnification [which] erode[d] the credibility of [Plaintiff’s]
3 allegations of disability.” Tr. 28. Second, the ALJ noted that Plaintiff “cancelled
4 or failed to show up for doctor appointments on a number of occasions.” Tr. 28.¹
5 To the ALJ, this pattern of missed appointments “suggest[ed] that [Plaintiff’s]
6 symptoms may not have been as severe as she had alleged.” Tr. 28. Finally, the
7 ALJ noted that Plaintiff had been involuntarily discharged from the Spokane
8 CHAS clinic and was not forthcoming with a different provider about the reasons
9 for her discharge:

10 [I]n January 2010, the claimant attempted to switch her primary care
11 provider from Community Health Associates of Spokane (CHAS) to
12 Spokane Falls Family Clinic. However, there is only [a] record of one
13 visit to Spokane Falls Family Clinic. That record notes that the
14 claimant reported she had been discharged from CHAS due to
15 differences with her doctor and she was told a drug screen had been
16 positive for cocaine. She denied using cocaine, and stated that her
17 physician at CHAS had made her back worse with steroid injections.
Furthermore, when she was asked to provide medical records from
CHAS, she appeared reluctant and did not understand when the
records were needed. An examination of the treatment records shows
that the claimant did have a drug screen positive for cocaine, and she
was subsequently tapered off of methadone, but also that steroid
injections had provided some relief of the claimant’s symptoms.

18 ¹ The ALJ also noted that Plaintiff’s treatment provider had no record of her calling
19 ahead to cancel one such appointment due to car trouble as Plaintiff had claimed to
20 have done when confronted about why she missed the appointment. Tr. 28, 325.

1 These discrepancies between the claimant’s treatment records and her
2 reports to a new provider undermine the credibility of her allegations
 and reported symptoms and limitations.

3 Tr. 28; *see also* Tr. 435. Having thoroughly reviewed the record, the Court
4 concludes that the above reasons are supported by substantial evidence. The ALJ
5 did not err in making an adverse credibility determination.

6 **B. Opinions of Karen Bichler, ARNP**

7 To reject testimony of medically acceptable treating sources, an ALJ must
8 provide specific, legitimate reasons based on substantial evidence. *Molina*, 674
9 F.3d at 1111. However, only licensed physicians and other qualified specialists are
10 considered “acceptable medical sources” under the Commissioner’s regulations.
11 *Id.*; 20 C.F.R. §§ 404.1513(d); 416.913(d). As a physician’s assistant, Ms. Bichler
12 is not an “acceptable medical source.” SSR 06-03p, 2006 WL 2329939 at *2
13 (nurse practitioners and physician assistants are not “acceptable medical sources”).
14 Instead, Ms. Bichler qualifies as an “other source” as defined in §§ 404.1513(d)
15 and 416.913(d). *Molina*, 674 F.3d at 1111. Because Ms. Bichler is an “other
16 source” whose opinions about the nature and severity of Plaintiff’s impairments are
17 not entitled to controlling weight, the ALJ need only have provided “germane
18 reasons” for rejecting her opinions. SSR 06-03p, 2006 WL 2329939 at *2; *Molina*,
19 674 F.3d at 1111.

1 The ALJ provided two germane reasons for rejecting Ms. Bichler’s opinion
2 that Plaintiff was limited to sedentary work. First, the ALJ observed that Ms.
3 Bichler’s opinion was based largely on Plaintiff’s self-reported symptoms and
4 complaints. Tr. 29. In light of the ALJ’s earlier adverse credibility finding, this
5 was a permissible basis for rejecting Ms. Bichler’s opinions. *Tommasetti v. Astrue*,
6 533 F.3d 1035, 1041 (9th Cir. 2008). Plaintiff’s argument that Ms. Bichler did not,
7 in fact, base her opinions on Plaintiff’s subjective complaints is unavailing. Ms.
8 Bichler’s notes indicate that Plaintiff reported experiencing tenderness, tightness
9 and discomfort during the examination, and claimed to be responding poorly to
10 treatment. Tr. 473. These are clearly subjective assessments which informed Ms.
11 Bichler’s opinions.

12 Second, the ALJ noted that Ms. Bichler’s evaluation of Plaintiff’s physical
13 abilities consisted almost entirely of check-the-box ratings and “contain[ed] few
14 objective findings in support of the degree of limitation opined.” Tr. 30. This too
15 was a permissible basis for discounting Ms. Bichler’s opinions. *Batson v. Comm’r*
16 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

17 Moreover, even assuming for the sake of argument that the ALJ erred in
18 rejecting Ms. Bichler’s opinions, the error was harmless. As the ALJ noted at the
19 conclusion of his opinion, Plaintiff would not have been found disabled “even if
20 [her] residual functional capacity were further reduced to the sedentary range of

1 work, or [altered to require a] change [in] position briefly every 30 to 60 minutes.”

2 Tr. 31. In light of the vocational expert’s testimony that Plaintiff could perform
3 jobs existing in significant numbers in the national economy with the restrictions
4 identified by Ms. Bichler, *see* Tr. 66-67, any error in the ALJ’s treatment of Ms.
5 Bichler’s opinions was harmless. Accordingly, Defendant is entitled to summary
6 judgment.

7 **IT IS HEREBY ORDERED:**

8 1. Defendant’s Motion for Summary Judgment (ECF No. 21) is

9 **GRANTED.**

10 2. Plaintiff’s Motion for Summary Judgment (ECF No. 13) is **DENIED.**

11 The District Court Executive is hereby directed to file this Order, enter
12 **JUDGMENT** for Defendant, provide copies to counsel, and **CLOSE** the file.

13 **DATED** March 17, 2014.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge