

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). “Substantial evidence” means relevant evidence that “a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
11 (quotation and citation omitted). Stated differently, substantial evidence equates to
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
13 citation omitted). In determining whether this standard has been satisfied, a
14 reviewing court must consider the entire record as a whole rather than searching
15 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. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A), 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 as 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
4 the 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,
11 the 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
19 other work, the analysis concludes with a finding that the claimant is disabled and
20 is 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.
7 2012).

8 ALJ FINDINGS

9 Plaintiff filed applications for disability insurance benefits and supplemental
10 security income disability benefits on January 9, 2011, Tr. 171–79, 180–86.
11 Plaintiff alleged her disability began October 1, 2008. Tr. 180. Plaintiff’s claims
12 were denied initially, Tr. 126–29, and upon reconsideration, Tr. 132–36. Plaintiff
13 requested a hearing before an ALJ, Tr. 138–39, which was held on May 2, 2012,
14 Tr. 43–83. The ALJ rendered a decision denying Plaintiff benefits on June 18,
15 2012. Tr. 20–30.

16 At step one, the ALJ found that Plaintiff has not engaged in substantial
17 gainful activity since October 1, 2008, the alleged onset date. Tr. 22. At step two,
18 the ALJ found that Plaintiff had the following severe impairments: systemic lupus
19 erythematosus (SLE), fibromyalgia, and a history of cardiomyopathy. *Id.* The
20 ALJ did not find Plaintiff’s hypertension, migraine headaches, gastro-esophageal

1 reflux disease, thyroid goiter, and chest pain to be severe. Tr. 23. At step three,
2 the ALJ found that Plaintiff's does not have an impairment or combination of
3 impairments that meets or equals a listed impairment. Tr. 24.

4 The ALJ concluded that Plaintiff had the RFC to "perform light work as
5 defined in 20 CFR 404.1567(b) and 416.967(b) except she can occasionally climb
6 ladders, ropes, scaffolds; avoid concentrated exposure to extreme cold and heat,
7 vibrations, fumes, odors, gases, dusts, poor ventilation, and hazardous machinery
8 and heights." Tr. 24. The ALJ found, at step four, that Plaintiff's RFC allowed her
9 to perform her past relevant work as a cashier and customer service agent. Tr. 29.
10 Having concluded at step four that Plaintiff was not disabled, the ALJ did not
11 proceed to determine under step five whether Plaintiff could perform other work in
12 the national economy.

13 The Appeals Council denied Plaintiff's request for review on June 10, 2013,
14 making the ALJ's decision the Commissioner's final decision for purposes of
15 judicial review. Tr. 1-6; 20 C.F.R. §§ 404.981, 416.1484, 422.210.

16 ISSUES

17 Plaintiff raises two issues for review. First, Plaintiff argues that the ALJ
18 failed to properly consider or to properly reject Plaintiff's testimony regarding her
19 subjective impression of the severity of her symptoms. ECF No. 20 at 7. Second,
20 Plaintiff argues that the ALJ erred in concluding that Plaintiff's impairment or

1 combination of impairments did not meet or exceed the listing for systemic lupus
2 erythematosus (SLE). *Id.* at 9. The Court examines each contention in turn.

3 DISCUSSION

4 **A. Plaintiff’s Testimony**

5 Plaintiff contends that the ALJ did not properly consider and did not
6 properly reject her testimony reflecting that her capability to work was more
7 limited than the ALJ had determined.

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

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

16 Here, the ALJ, having found Plaintiff had physical impairments, proceeded
17 to evaluate “the intensity, persistence, and limiting effects of the claimant’s
18 symptoms to determine the extent to which they limit the claimant’s functioning.”
19 Tr. 26. The ALJ further stated that to the extent that the intensity, persistence, and
20 limiting effect could “not be substantiated by objective medical evidence, the

1 [ALJ] must make findings on the credibility of the statements based on a
2 consideration of the entire case record.” *Id.*

3 In reviewing the medical record, the ALJ noted a number of times that
4 Plaintiff told medical examiners that she was not following her treatment as
5 directed. Tr. 26, 27, 28. For example, medical examiners noted this in reports
6 from November 2006, December 2006, and April 2007. Tr. 275, 293, 296.
7 Significantly, plaintiff’s treating physician, Dr. Sherry Wu, observed in December
8 2008, that Plaintiff has had “compliance issues” and that she had stopped taking all
9 medications for around a year and a half. Tr. 28, 433. The ALJ concluded that
10 when Plaintiff had been prescribed medications, and had taken them as prescribed,
11 her symptoms were controlled.¹ Tr. 28. For example, in September 2011, Dr. Wu
12 noted that Plaintiff had been prescribed a high dose of vitamin D that reduced her
13 pain and improved her energy, but that Plaintiff had stopped taking it. Tr. 27, 503.
14 The ALJ also found that her non-compliance was not justified by her lack of
15 medical insurance for a period of time. Tr. 28. Plaintiff has not challenged this
16 finding. The failure to follow a prescribed course of treatment “can cast doubt on
17 the sincerity of the claimant’s pain testimony.” *Fair v. Brown*, 885 F.2d 597, 603
18 (9th Cir. 1989).

19
20 ¹ Plaintiff has not asserted this conclusion was erroneous.

1 The ALJ also noted that Plaintiff’s course of treatment has been conservative
2 with “significant periods of time where she has not taken any medications for her
3 symptoms.” Tr. 28. No doctor, including Dr. Wu, Plaintiff’s treating physician,
4 has stated that Plaintiff cannot work at the sedentary or light levels. Tr. 29. *See*
5 *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) (“[E]vidence of conservative
6 treatment is sufficient to discount a claimant’s testimony regarding the severity of
7 an impairment.”).

8 In May 2009, a consultative examination by Dr. Krishna Malireddi showed
9 that Plaintiff’s SLE was in remission. Tr. 26, 406–07. At that point, Plaintiff was
10 not taking any medication. *Id.* (An examination by treating physician Dr. Wu in
11 November 2011 also confirmed that Plaintiff’s SLE had been in remission since
12 2008. Tr. 514.) Dr. Robert Rose examined Plaintiff in April 2011, and concluded
13 that Plaintiff’s “[o]verall dexterity appears to be adequate. Her ability to handle,
14 grasp and manipulate does not appear to be affected although stamina and effort
15 cannot be addressed.” Tr. 26–27, 463. Similarly, both Drs. Rose and Wu noted
16 that Plaintiff’s grip strength was strong. Tr. 28, 463, 504, 513.

17 “While subjective pain testimony cannot be rejected on the sole ground that
18 it is not fully corroborated by objective medical evidence, the medical evidence is
19 still a relevant factor in determining the severity of the claimant’s pain and its
20 disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The

1 ALJ determined that claimant’s alleged symptoms and claimed level of limitation
2 were inconsistent with the objective medical evidence. Tr. 26. Specifically, the
3 ALJ did not find credible Plaintiff’s statement that she could not do her own hair
4 because she had difficulty gripping and holding her arms up where “her physical
5 examinations show she has a good grip strength and motor strength.” Tr. 28. The
6 ALJ also did not credit Plaintiff’s claim that she can only sit for about thirty
7 minutes because the ALJ observed Plaintiff sit for nearly an hour of testimony
8 without standing or shifting and Plaintiff exhibited no evidence of pain or
9 discomfort. *Id.* While these observations cannot be the sole reason for rejecting
10 Plaintiff’s testimony, they can be part of the ALJ’s credibility determination. *See*
11 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001); SSR 96-7P, 1996 WL
12 374186 (July 2, 1996) (“In instances where the individual attends an administrative
13 proceeding conducted by the adjudicator, the adjudicator may also consider his or
14 her own recorded observations of the individual as part of the overall evaluation of
15 the credibility of the individual's statements.”).

16 Finally, the ALJ noted that Plaintiff’s self-reported daily activities are “not
17 limited to the extent one would expect, given the complaints of disabling
18 symptoms and limitations.” Tr. 29. The ALJ observed that Plaintiff testified she
19 takes her children to school, gets on the computer to talk with her mom on
20 Facebook for about twenty minutes, watches TV an average of five hours, and

1 reads a couple hours a day, fixes meals, visits with friends, and occasionally goes
2 out to dinner. *Id.*; Tr. 65, 80–81. The ALJ concluded that this testimony was
3 inconsistent with a debilitating pain that would prevent Plaintiff’s ability to
4 perform work activities such as those of a cashier or customer service agent. *See*
5 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (“[I]f, despite his claims of pain,
6 a claimant is able to perform household chores and other activities that involve
7 many of the same physical tasks as a particular type of job, it would not be
8 farfetched for an ALJ to conclude that the claimant’s pain does not prevent the
9 claimant from working.”).

10 The ALJ’s credibility determination was based upon specific, clear, and
11 convincing reasons sufficient for this Court to conclude that the determination was
12 not arbitrary. *See Thomas*, 278 F.3d at 958–59. As such, the ALJ properly
13 evaluated and rejected Plaintiff’s testimony.

14 **B. Listing 14.02**

15 Plaintiff also contends that the ALJ erred in concluding, at step three, that
16 her SLE did not meet or medically equal a listed impairment, 20 C.F.R. 404,
17 Subpt. P, App. 1, 14.02. ECF No. 20 at 9–10. Specifically, Plaintiff argues that
18 the combination of her SLE with her fibromyalgia, history of cardiomyopathy, and
19 her testimony about fatigue and malaise, meet or equal a listed impairment. *Id.*

1 “To *meet* a listed impairment, a claimant must establish that he or she meets
2 each characteristic of a listed impairment relevant to his or her claim.” *Tackett v.*
3 *Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999) (emphasis in original). “To *equal* a
4 listed impairment, a claimant must establish symptoms, signs and laboratory
5 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
6 listed impairment, or, if a claimant's impairment is not listed, then to the listed
7 impairment ‘most like’ the claimant's impairment.” *Id.* (citing 20 C.F.R.
8 § 404.1526) (emphasis in original). A determination of medical equivalence “must
9 be based on medical evidence only.” *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir.
10 2001) (citing 20 C.F.R. § 404.1529(d)(3)); *see also Bowser v. Comm'r of Soc. Sec.*,
11 121 Fed.Appx. 231, 232 (9th Cir. 2005) (“Step three . . . directs the adjudicator to
12 determine whether, in light of the objective medical evidence, the claimant has a
13 severe impairment or combination of impairments that meets or equals the criteria
14 in the Listing of Impairments . . .”). If a claimant's impairments meet or equal a
15 Listing, the claimant is “conclusively presumed to be disabled,” and is entitled to
16 an award of benefits. *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987); *see also Lester*
17 *v. Chater*, 81 F.3d 821, 828 (9th Cir. 1995) (“Claimants are conclusively disabled
18 if their condition either meets or equals a listed impairment.”) (emphasis omitted).

19 A claimant satisfies Listing 14.02 if they have an objective diagnosis of SLE
20 accompanied by either

- 1 A. Involvement of two or more organs/body systems, with:
2 1. One of the organs/body systems involved to at least a moderate
3 level of severity; and
4 2. At least two of the constitutional symptoms or signs (severe
5 fatigue, fever, malaise, or involuntary weight loss).

6 or

- 7 B. Repeated manifestations of SLE, with at least two of the constitutional
8 symptoms or signs (severe fatigue, fever, malaise, or involuntary
9 weight loss) and one of the following at the marked level:
10 1. Limitation of activities of daily living.
11 2. Limitation in maintaining social functioning.
12 3. Limitation in completing tasks in a timely manner due to
13 deficiencies in concentration, persistence, or pace.

14 20 C.F.R. 404, Subpt. P, App. 1, 14.02.

15 The ALJ concluded that the record did not reflect the significant
16 constitutional symptoms such as signs of sever fatigue, fever, malaise, or
17 involuntary weight loss. Tr. 24. None of the medical records indicate that Plaintiff
18 suffers from severe fatigue, malaise, or fever and none indicated involuntary
19 weight loss. Moreover, as discussed above, Plaintiff's testimony concerning the
20 severity of her symptoms was properly discounted by the ALJ. As such, the Court
cannot conclude that the ALJ erred in finding that Plaintiff failed to meet her
burden to show that her combination of impairments met or equaled all of the
requirements in Listing 14.02. Accordingly, Defendant is entitled to summary
judgment.

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1 **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment (ECF No. 21) is

3 **GRANTED.**

4 2. Plaintiff's Motion for Summary Judgment (ECF No. 20) is **DENIED.**

5 The District Court Executive is hereby directed to file this Order, enter
6 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

7 **DATED** this September 17, 2014



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Thomas O. Rice
THOMAS O. RICE
United States District Judge