

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 September 25, 2009 and February 1, 2010.
10 Tr. 154-161, 162-167. Plaintiff claimed an onset date of May 15, 2009. *Id.* The
11 claims were denied initially and upon reconsideration. Tr. 84-87, 92-93, 97-99.
12 The Plaintiff requested a hearing, and a hearing was held before an Administrative
13 Law Judge on January 12, 2012. Tr. 43-71. The ALJ issued a decision denying
14 Plaintiff benefits on January 27, 2012. Tr. 20-31.

15 The ALJ found that Plaintiff meets the insured status requirements of the
16 Social Security Act through June 30, 2015. Tr. 22. At step one, the ALJ found
17 that Plaintiff had not engaged in substantial gainful activity since May 15, 2009,
18 the alleged onset date. *Id.* At step two, the ALJ found that Plaintiff had the
19 following severe impairments: obesity; diabetes mellitus; pain in right shoulder,
20 knee, hip and back with minimal abnormal findings. *Id.* At step three, the ALJ

1 found that Plaintiff does not have an impairment or combination of impairments
2 that meets or medically equals one of the listed impairments. Tr. 23-25. The ALJ
3 then determined that Plaintiff had the residual functional capacity (RFC) to:

4 perform light work as defined in 20 CFR 404.1567(b) and 416.967(b)
5 except all postural activities are limited to occasional and the claimant
6 should never crawl or climb ladders, ropes or scaffolds. The claimant
7 should not perform overhead reaching with the right upper extremity
8 and should avoid concentrated exposure to extreme cold, wetness,
9 humidity, vibrations and hazards.

10 Tr. 26. At step four, the ALJ found that Plaintiff was unable to perform any past
11 relevant work as a farm worker and caregiver (medium exertion). Tr. 29. At step
12 five, after having considered Plaintiff's age, education, work experience, and
13 residual functional capacity, the ALJ found that there are light exertion jobs that
14 exist in significant numbers in the national economy that the claimant can perform,
15 such as potato chip sorter, silver wrapper and agricultural sorter. Tr. 30-31.
16 Accordingly, the ALJ found Plaintiff not disabled. Tr. 31.

17 The Appeals Council denied Plaintiff's request for review on February 6,
18 2013, making the ALJ's decision the Commissioner's final decision for purposes
19 of judicial review. Tr. 1-8; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

20 ISSUES

Plaintiff raises four issues for review:

1. Whether the ALJ improperly rejected the opinions of Dr. Palmatier and PA-C Paul Furan that Plaintiff was limited to sedentary work (ECF No.

1 14 at 6-7);

- 2 2. Whether the ALJ fulfilled her duty to fully develop the record (*id.* at 8-
3 10);
- 4 3. Whether the ALJ committed harmful reversible error by making
5 improper credibility findings (*id.* at 10-14).
- 6 4. Whether the ALJ committed harmful reversible error by rejecting
7 Plaintiff’s subjective complaints based on her activities of daily living
8 (*id.* at 14-16).

7 DISCUSSION

8 **A. Opinions of Treating Medical Sources.**

9 A treating physician's opinions are entitled to substantial weight in social
10 security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted,
12 an ALJ may reject it only by offering “clear and convincing reasons that are
13 supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th
14 Cir. 2005). “However, the ALJ need not accept the opinion of any physician,
15 including a treating physician, if that opinion is brief, conclusory and inadequately
16 supported by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation
17 omitted). “If a treating or examining doctor's opinion is contradicted by another
18 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
19 reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at
20 1216 (*citing Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir. 1995)). An ALJ may

1 also reject a treating physician's opinion which is “based to a large extent on a
2 claimant's self-reports that have been properly discounted as incredible.”

3 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (internal quotation and
4 citation omitted).

5 Although the treating physician’s opinion is generally afforded the greatest
6 weight, it is not binding on the ALJ regarding the existence of an impairment or
7 determination of disability. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir.
8 2001). Although the contrary opinion of a non-examining medical expert does not
9 alone constitute a specific, legitimate reason for rejecting a treating or examining
10 physician's opinion, it may constitute substantial evidence when it is consistent
11 with other independent evidence in the record. *Tonapetyan*, 242 F.3d at 1149
12 (citation omitted); *accord Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

13 Plaintiff contends Dr. Palmatier and PA Furan opined she was limited to
14 sedentary work and the ALJ committed harmful reversible error by rejecting these
15 opinions and finding instead that she could perform light work. ECF No. 14 at 6-7.

16 Defendant contends that where there is conflicting medical evidence, the
17 Commissioner must determine credibility and resolve the conflict. Defendant
18 contends that “[o]ne way that an ALJ can give specific, legitimate reasons for
19 rejecting controverted medical opinions is by summarizing the conflicting evidence

1 in detail and interpreting it. *See Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
2 1989).”

3 The Court has thoroughly reviewed the administrative record and cannot
4 conclude that Dr. Palmatier and PA Furan, both working at the Sunnyside Worker
5 Clinic, opined Plaintiff was limited to sedentary work. It is true, as Plaintiff
6 contends, that these treating medical sources on occasion opined that Plaintiff
7 could perform no work. *See e.g.*, Tr. 470, 478, 479, 482. Yet, on at least as many
8 occasions these treating sources opined that Plaintiff could return to “full duty” or
9 “light duty” work. *See e.g.*, Tr. 462, 466, 467, 468, 471, 474. Then of course,
10 there are all those other occasions that these treating medical sources opined that
11 Plaintiff could return to “modified duty.” *See e.g.*, Tr. 464, 465, 469, 472, 475,
12 476, 481, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496,
13 500, 501, 502, 505. To further complicate matters, Dr. Palmatier observed on
14 March 10, 2010, that Plaintiff “was noted to be at maximum medical improvement.
15 . . . there was no impairment given for the right hip or right knee areas. . . she was
16 judged to be able to work. . . she was working as a sorter in a sit/stand option. . . .
17 [and she] could continue on the same light duty program as before with sit/stand
18 option sedentary type work.” Tr. 497-498.

19 At the administrative hearing before the ALJ, Plaintiff’s counsel
20 acknowledged the equivocation in the record by Dr. Palmatier, but conceded that

1 Dr. Palmatier’s opinion included light duty work: “I know he classified it at one
2 point, he said, modified lighter duty. Another place he put sedentary type work.
3 So, with occasional stand/walk, sorry, and nothing frequent lifting, this is
4 consistent with light work.” Tr. 70. Consequently, the ALJ made the following
5 findings:

6 Dr. Palmatier stated the claimant could continue with light duty
7 with a sit/stand option at a sedentary work level. However, his
8 opinion is accorded less weight because his findings are not
9 consistent with his own records or findings on multiple
10 examinations. In addition, Dr. Palmatier’s opinion is not
11 consistent with the examinations and findings throughout the
12 remainder of the record. In fact, Dr. Palmatier himself expressed
13 doubts about the claimant's pain complaints in the face of a lack of
14 objective findings and he recommended she return to work.
15 Furthermore, the claimant did not take pain medication other than
16 Ibuprofen for pain complaints. Dr. Palmatier’s opinion the
17 claimant is limited to sedentary work with a "sit/stand" option is
18 extremely contrary to all the other opinions contained within the
19 record and in his own treatment records.

20 Tr. 28. These findings are supported by the record and within the prerogative of
the Commissioner to resolve conflicting evidence and the seemingly contradictory
evidence from the same medical sources.

B. The ALJ’s Duty to Develop the Record.

Plaintiff faults the ALJ for not seeking evidence to clarify what Dr.
Palmatier and Mr. Furan were opining by their ambiguous references to light duty
and modified duty. ECF No. 14 at 8-9. Additionally, Plaintiff faults the ALJ for

1 not developing the record regarding her shoulder impairment and resulting surgery.
2 *Id.* at 9-10. Defendant contends the record is fully developed. Most importantly,
3 the ALJ reviewed and discussed the post-operative physical therapy records
4 concerning Plaintiff's shoulder. Tr. 24. Plaintiff's counsel assured the ALJ that he
5 had ordered and would submit the shoulder surgery records. That never happened.
6 Post-operative, the MRI evidence was normal, she had good range of motion, but
7 experienced pain predominately from overhead flexion. *See* Tr. 24. The ALJ
8 accommodated this restricted range of overhead reaching with the right upper
9 extremity in formulating the RFC. Plaintiff fails to show harmful error from the
10 absent surgery records.

11 Given the occupation Plaintiff was actually performing, work as a sorter,
12 which Dr. Palmatier acknowledged, there was no further obligation of the ALJ to
13 develop the record concerning his opinion about light duty and modified duty.
14 Considering the record as a whole, as the Court must, including the statements of
15 Plaintiff's counsel concerning both of these issues, there has been no showing of
16 harmful error.

17 **C. Plaintiff's Credibility.**

18 Plaintiff contends the ALJ erroneously discounted her credibility because of
19 1) the inconsistencies as to how her injuries occurred, 2) because the ALJ
20 erroneously found that Plaintiff reported she will not go back to work regardless of

1 what treating and examining sources determine, and 3) the ALJ erroneously found
2 Plaintiff was recalcitrant to any type of treatment measures that would improve her
3 functioning. ECF No. 14 at 10-11. Additionally, Plaintiff contends the ALJ
4 erroneously used Plaintiff's activities of daily living to discount her credibility. *Id.*
5 at 14-16.

6 Defendant contends the ALJ properly considered these factors (including
7 activities of daily living, despite Plaintiff's insistence that Defendant waived this
8 issue by not addressing it) in weighing Plaintiff's credibility, citing *Thomas v.*
9 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

10 In the event that an ALJ finds the claimant's subjective assessment
11 unreliable, "the ALJ must make a credibility determination with findings
12 sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not
13 arbitrarily discredit claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958
14 (9th Cir. 2002). In making such a determination, the ALJ may consider, *inter alia*:
15 (1) the claimant's reputation for truthfulness; (2) inconsistencies in the claimant's
16 testimony or between his testimony and his conduct; (3) the claimant's daily living
17 activities; (4) the claimant's work record; and (5) testimony from physicians or
18 third parties concerning the nature, severity, and effect of the claimant's condition.
19 *Id.* The ALJ may also consider a claimant's "unexplained or inadequately
20 explained failure to seek treatment or to follow a prescribed course of treatment."

1 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). If there is no evidence
2 of malingering, the ALJ’s reasons for discrediting the claimant’s testimony must
3 be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th
4 Cir. 2012) (quotation and citation omitted). The ALJ “must specifically identify
5 the testimony she or he finds not to be credible and must explain what evidence
6 undermines the testimony.” *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
7 2001).

8 Here, the ALJ provided specific, clear and convincing reasons, supported by
9 substantial evidence in the record, for discounting Plaintiff’s complaints of total
10 disability. First, Plaintiff’s explanation of how her injuries occurred makes perfect
11 sense to the Court, but this explanation was not before the ALJ. The record
12 supports the ALJ’s finding that her inconsistent explanations show she may not be
13 a reliable historian. Tr. 23.

14 Contrary to Plaintiff’s assertion, the record supports the ALJ’s statement that
15 she “reported she will not go back to work regardless of what treating and
16 examining sources determine.” Tr. 26, 493 (“She reports that she will not go back
17 to work regardless of what we say here.”) Albeit, the ALJ cited Ex. 13F/30, rather
18 than Ex. 13F/39.

19 Contrary to Plaintiff’s assertion, the record also supports the ALJ’s
20 statement that she “was recalcitrant to any type of treatment measures that would

1 improve her functioning.” Tr. 28, 453. The ALJ made this observation in
2 connection with statements in the record, made by two independent medical
3 examiners.

4 Finally, the ALJ’s observations concerning Plaintiff’s activities of daily
5 living are supported by the record. These activities were not the sole reason for
6 finding Plaintiff not disabled, but properly used by the ALJ in conjunction with
7 other evidence in the record to support the ALJ’s findings.

8 Evidence about daily activities is properly considered in making a credibility
9 determination. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).¹ However, a
10 claimant need not be utterly incapacitated to be eligible for benefits. *Id.* Many
11 activities are not easily transferable to what may be the more grueling environment
12 of the workplace, where it might not be possible to rest or take medication. *Id.*
13 (citation omitted). Yet daily activities may be grounds for an adverse credibility
14 finding if a claimant is able to spend a substantial part of his day engaged in
15 pursuits involving the performance of physical functions that are transferable to a
16 work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

17
18 ¹ Plaintiff’s citation to a quote from a nonexistent Ninth Circuit decision is quite
19 unhelpful to the Court. ECF No. 14 at 15. The Court expects complete candor
20 from counsel, not half-truths and imaginary citations.

1 The Court has reviewed the record as a whole and notes that there are
2 several other specific, clear and convincing reasons given by the ALJ for
3 discounting Plaintiff's testimony. These findings have not been challenged and are
4 supported by substantial evidence, thus, no error has been shown.

5 **IT IS HEREBY ORDERED:**

6 1. Defendant's Motion for Summary Judgment (ECF No. 18) is

7 **GRANTED.**

8 2. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **DENIED.**

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

11 **DATED** May 30, 2014.



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

THOMAS O. RICE
United States District Judge