

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

7

8

9

Carol Ann Schomburg,

No. CV 11-00125-PHX-NVW

10

Plaintiff,

**ORDER**

11

vs.

12

13

Michael J. Astrue, Commissioner of the  
Social Security Administration,

14

Defendant.

15

16

17

Carol Ann Schomburg seeks review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security (“the Commissioner”), which denied her disability insurance benefits and supplemental security income under sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the Administrative Law Judge (“ALJ”) is supported by substantial evidence and is not based on legal error, the Commissioner’s decision will be affirmed.

23

**I. Background**

24

**A. Factual Background**

25

Schomburg was born on February 22, 1950. She was 47 years old as of December 1, 1997, the alleged disability onset date. She previously worked as a receptionist and a collections agent. Schomburg testified that she stopped working in 1995 because she had two young daughters and was extremely tired. In 2000, 2001, and 2006, she occasionally

26

27

28

1 worked part-time as a church receptionist, but her work activity was below the level of  
2 substantial gainful activity as defined in the Social Security regulations.

3 In January 1998, Schomburg was diagnosed with infiltrating lobular carcinoma of  
4 the left breast and infiltrating ductal carcinoma of the right breast. In February 1998, she  
5 underwent bilateral mastectomies. In March 1998, imaging of her thoracic spine revealed  
6 increased uptake in the spine that was interpreted as more consistent with focal arthritis  
7 rather than metastasis. Subsequently, Schomburg received a course of chemotherapy,  
8 followed by treatment with tamoxifen. In June 1998, she reported having a little more  
9 nausea and fatigue following her fourth course of chemotherapy, but no major side  
10 effects. In July and August 1998, Schomburg continued to report fatigue. In October  
11 1998, she reported that she had no symptoms that would suggest metastatic disease.

12 In March and June 1999, Dr. Julia Antoine examined Schomburg and found no  
13 evidence of recurrent breast cancer. Dr. Antoine noted that Schomburg “reports no  
14 symptoms of any kind to suggest metastatic disease.” In October 1999, Dr. Antoine  
15 examined Schomburg and again found no evidence of recurrent breast cancer. She noted  
16 again that Schomburg reported “no symptoms to suggest metastatic disease.” In March  
17 2000, upon examining Schomburg, Dr. Antoine noted, “She has developed no  
18 symptomatology of any kind to suggest metastatic disease.” Dr. Antoine also noted there  
19 was “no evidence of relapse.” In April 2001, Dr. Antoine examined Schomburg and  
20 noted there was no evidence of recurrent disease. In December 2001, Schomburg’s left  
21 breast implant was removed due to infection.

22 An x-ray of Schomburg’s hip on May 24, 2002, showed “osteolytic metastatic  
23 disease to the right femoral head and right femoral neck.” A bone scan on May 31, 2002,  
24 showed “abnormal uptake in the entire right femoral head, as well as the level of the T4  
25 vertebra.” In June 2002, Schomburg reported pain in her right hip and midthoracic spine,  
26 and Dr. Amol Rakkar concluded that her breast cancer had recurred with skeletal  
27 metastases. In July 2002, Schomburg told Dr. Rakkar that she had just returned from  
28 vacation and she was able to do most of the activities at Disneyland, but her back pain

1 was bothering her a little bit more than before. In 2004, a metastatic mass was found in  
2 her abdomen, and Schomburg underwent chemotherapy. In January 2005, the abdominal  
3 tumor had reduced in size by 50%, but was enlarged again in June 2005. In October  
4 2005, a scan was normal with no evidence of residual or recurrent disease. In 2006,  
5 Schomburg's scans were normal, and she continued chemotherapy. In February 2009,  
6 Dr. Rakkar observed no further progression of the disease.

### 7 **B. Procedural History**

8 On April 19, 2006, Schomburg protectively applied for disability insurance  
9 benefits and supplemental security income, alleging disability beginning December 1,  
10 1997. Both applications were denied on initial review and again on reconsideration, after  
11 which Schomburg requested that her claim be heard by an ALJ. On June 1, 2009, an  
12 administrative hearing was held at which Schomburg testified and was represented by  
13 counsel. Sandra Richter, a vocational expert, also appeared and testified at the  
14 administrative hearing.

15 On September 18, 2009, the ALJ issued his decision that Schomburg was not  
16 disabled within the meaning of the Social Security Act. He found that Schomburg  
17 retained "the residual functional capacity to perform the full range of her past sedentary,  
18 semi-skilled work as a receptionist (SVP 4)."

19 On November 20, 2009, the Appeals Council denied Schomburg's request for  
20 review of the ALJ's unfavorable decision, making that decision the final decision of the  
21 Commissioner. On January 19, 2011, Schomburg sought judicial review of the decision  
22 pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

### 23 **II. Standard of Review**

24 The district court reviews only those issues raised by the party challenging the  
25 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9<sup>th</sup> Cir. 2001). The court  
26 may set aside the Commissioner's disability determination only if the determination is not  
27 supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625,  
28 630 (9<sup>th</sup> Cir. 2007). Substantial evidence is more than a scintilla, less than a

1 preponderance, and relevant evidence that a reasonable person might accept as adequate  
2 to support a conclusion considering the record as a whole. *Id.* In determining whether  
3 substantial evidence supports a decision, the court must consider the record as a whole  
4 and may not affirm simply by isolating a “specific quantum of supporting evidence.” *Id.*  
5 As a general rule, “[w]here the evidence is susceptible to more than one rational  
6 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be  
7 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

8 If the ALJ’s decision is not supported by substantial evidence or suffers from legal  
9 error, the court has discretion to reverse and remand either for an award of benefits or for  
10 further administrative proceedings. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.  
11 1996); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). “Remand for further  
12 proceedings is appropriate if enhancement of the record would be useful.” *Benecke v.*  
13 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). “Conversely, where the record has been  
14 developed fully and further administrative proceedings would serve no useful purpose,  
15 the district court should remand for an immediate award of benefits.” *Id.* (citing *Smolen*,  
16 80 F.3d at 1292).

17 The ALJ is responsible for resolving conflicts in medical testimony, determining  
18 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
19 1995). In reviewing the ALJ’s reasoning, the court is “not deprived of [its] faculties for  
20 drawing specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v.*  
21 *Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

### 22 **III. Five-Step Sequential Evaluation Process**

23 To determine whether a claimant is disabled for purposes of the Social Security  
24 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). If the ALJ determines  
25 that the claimant is disabled or not disabled at any step, the ALJ does not continue to the  
26 next step. The claimant bears the burden of proof on the first four steps, but at step five,  
27 the burden shifts to the Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.  
28 1999).

1           At the first step, the ALJ determines whether the claimant is engaging in  
2 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
3 disabled and the inquiry ends. *Id.* At the step two, the ALJ determines whether the  
4 claimant has a “severe” medically determinable physical or mental impairment.  
5 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step  
6 three, the ALJ considers whether the claimant’s impairment or combination of  
7 impairments meet or equal an impairment listed in Appendix 1 to Subpart P of 20 C.F.R.  
8 Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled.  
9 *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the claimant’s  
10 residual functional capacity and determines whether the claimant is still capable of  
11 performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not disabled  
12 and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where he  
13 determines whether the claimant can perform any other work based on the claimant’s  
14 residual functional capacity, age, education, and work experience. § 404.1520(a)(4)(v).  
15 If so, the claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

#### 16 **IV. Analysis**

17           The ALJ found that Schomburg last met the insured status requirements of the  
18 Social Security Act on June 30, 1999, when she was age 49, and although she continued  
19 to work after her alleged disability onset date, her reported earnings were not at the level  
20 of substantial gainful activity. At step two, the ALJ found that, through the date she was  
21 last insured, Schomburg had the following impairments, which are severe when they are  
22 considered in combination: a history of breast cancer status-post bilateral mastectomies,  
23 which were performed on February 4, 1998, with six months of chemotherapy, which  
24 ended in August 1998, and radiation treatment thereafter. At step three, the ALJ found  
25 that through the date she was last insured, Schomburg did not have an impairment or  
26 combination of impairments that met or medically equaled one of the listed impairments  
27 in 20 C.F.R. Part 404, Subpart P, Appendix 1.

28

1 Schomburg does not raise any issues related to the ALJ's determinations at the  
2 first three steps of the five-step sequential evaluation process. She challenges the ALJ's  
3 weighing of medical source evidence and rejection of Schomburg's symptom testimony  
4 in his determination of her residual functional capacity at step four.

5 **A. Weighing Medical Source Evidence**

6 **1. Legal Standard**

7 In weighing medical source opinions in Social Security cases, the Ninth Circuit  
8 distinguishes among three types of physicians: (1) treating physicians, who actually treat  
9 the claimant; (2) examining physicians, who examine but do not treat the claimant; and  
10 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v.*  
11 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Generally, more weight should be given to the  
12 opinion of a treating physician than to the opinions of non-treating physicians. *Id.* A  
13 treating physician's opinion is afforded great weight because such physicians are  
14 "employed to cure and [have] a greater opportunity to observe and know the patient as an  
15 individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9<sup>th</sup> Cir. 1987). Where a treating  
16 physician's opinion is not contradicted by another physician, it may be rejected only for  
17 "clear and convincing" reasons, and where it is contradicted, it may not be rejected  
18 without "specific and legitimate reasons" supported by substantial evidence in the record.  
19 *Lester*, 81 F.3d at 830. Moreover, the Commissioner must give weight to the treating  
20 physician's subjective judgments in addition to his clinical findings and interpretation of  
21 test results. *Id.* at 832-33.

22 Further, an examining physician's opinion generally must be given greater weight  
23 than that of a non-examining physician. *Id.* at 830. As with a treating physician, there  
24 must be clear and convincing reasons for rejecting the uncontradicted opinion of an  
25 examining physician, and specific and legitimate reasons, supported by substantial  
26 evidence in the record, for rejecting an examining physician's contradicted opinion. *Id.* at  
27 830-31.

28

1           The opinion of a non-examining physician is not itself substantial evidence that  
2 justifies the rejection of the opinion of either a treating physician or an examining  
3 physician. *Id.* at 831. “The opinions of non-treating or non-examining physicians may  
4 also serve as substantial evidence when the opinions are consistent with independent  
5 clinical findings or other evidence in the record.” *Thomas*, 278 F.3d at 957. Factors that  
6 an ALJ may consider when evaluating any medical opinion include “the amount of  
7 relevant evidence that supports the opinion and the quality of the explanation provided;  
8 the consistency of the medical opinion with the record as a whole; [and] the specialty of  
9 the physician providing the opinion.” *Orn*, 495 F.3d at 631.

10           Moreover, Social Security Rules expressly require a treating source’s opinion on  
11 an issue of a claimant’s impairment be given *controlling* weight if it is well-supported by  
12 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent  
13 with the other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2). If a  
14 treating source’s opinion is not given controlling weight, the weight that it will be given is  
15 determined by length of the treatment relationship, frequency of examination, nature and  
16 extent of the treatment relationship, relevant evidence supporting the opinion, consistency  
17 with the record as a whole, the source’s specialization, and other factors. *Id.*

18           Finding that a treating physician’s opinion is not entitled to controlling weight  
19 does not mean that the opinion should be rejected:

20                   [A] finding that a treating source medical opinion is not well-  
21 supported by medically acceptable clinical and laboratory diagnostic  
22 techniques or is inconsistent with the other substantial evidence in the case  
23 record means only that the opinion is not entitled to “controlling weight,”  
24 not that the opinion should be rejected. Treating source medical opinions  
are still entitled to deference and must be weighed using all of the factors  
provided in 20 C.F.R. §404.1527. . . . In many cases, a treating source’s  
medical opinion will be entitled to the greatest weight and should be  
adopted, even if it does not meet the test for controlling weight.

25 *Orn*, 495 F.3d at 631-32 (quoting Social Security Ruling 96-2p). Where there is a  
26 conflict between the opinion of a treating physician and an examining physician, the ALJ  
27 may not reject the opinion of the treating physician without setting forth specific,  
28 legitimate reasons supported by substantial evidence in the record. *Id.* at 632.

1                   **2. The ALJ Erred in Rejecting Treating Physician Dr. Amol**  
2                   **Rakkar’s Opinion that Schomburg’s Bone Cancer Was Related**  
3                   **to Her Breast Cancer, but the Error Is Not Relevant to the Issues**  
4                   **on Appeal.**

5                   Schomburg contends the ALJ erred by rejecting treating oncologist Dr. Rakkar’s  
6                   determination that “the claimant’s ‘skeletal metastases’ were definitively related to the  
7                   initial diagnosis of the claimant’s bilateral breast cancer on December 30, 1997.”  
8                   Although the ALJ’s rejection was stated within his step three determination of whether  
9                   Schomburg’s impairment satisfied the specific criteria of a Listing in Appendix 1 to  
10                  Subpart P of 20 C.F.R. Pt. 404, it appears that Schomburg challenges the rejection as it  
11                  relates to his step four determination of residual functional capacity.

12                  It is undisputed that Schomburg had breast cancer, surgery, and post-surgical  
13                  treatment in 1998, bone cancer in a femur and her thoracic spine in 2002, and cancer in a  
14                  lymph node in 2004. The opinion rejected by the ALJ is whether the 2002 or 2004  
15                  cancers were a recurrence of her 1998 breast cancer:

16                  While Dr. Rakkar diagnosed the claimant as having metastatic breast cancer  
17                  with “skeletal metastases,” his clinical record reflects notations of  
18                  speculative findings “consistent with” and “highly suggestive of” cancer,  
19                  but no conclusive objective evidence or credible medical opinion related to  
20                  Dr. Rakkar’s [*sic.*] cancer prior to at least March 15, 2005 to support his  
21                  conclusion that the claimant’s “skeletal metastases” were definitively  
22                  related to the initial diagnosis of the claimant’s bilateral breast cancer on  
23                  December 30, 1997.

24                  Dr. Rakkar did not limit the claimant’s ability to the extent that she was  
25                  unable to perform her past relevant work before the date she was last  
26                  insured, June 30, 1999. As the claimant’s treating physician for a number  
27                  of years, Dr. Rakkar was well-qualified to limit the claimant’s residual  
28                  functional capacity, but he did not do so. The absence of such limitations  
                      diminishes the claimant’s credibility. The undersigned assigns controlling  
                      evidentiary weight to Dr. Rakkar’s clinical notes as regards his conclusions  
                      and observations about the claimant’s post-operative breast cancer, but  
                      rejects Dr. Rakkar’s determination that the claimant’s “skeletal metastases”  
                      were related to her previous breast cancer.

                      Accordingly, the claimant has not show[n] that the medical evidence of  
                      record established the existence of a disabling impairment which satisfied  
                      the specific criteria of a Listing . . . prior to June 30, 1999.

                      Schomburg does not argue here that the record established the existence of a disabling  
                      impairment that satisfies a Listing at step three, but rather that by substituting his own lay

1 opinion for that of Dr. Rakkar, the ALJ adopted a residual functional capacity without  
2 basis in the record. However, although the ALJ's rejection of Dr. Rakkar's diagnosis of  
3 "metastatic breast cancer with 'skeletal metastases,'" *i.e.*, "recurrent breast cancer," may  
4 have been relevant to whether Schomburg's condition satisfied a Listing at step three, it is  
5 not relevant to the step four determination of Schomburg's residual functional capacity as  
6 of the date she was last insured.

7         Although the ALJ's rejection of Dr. Rakkar's conclusion does not affect the step  
8 four determination of Schomburg's residual functional capacity as of the date she was last  
9 insured and is therefore harmless error, it is error nonetheless. Dr. Rakkar's diagnosis  
10 that Schomburg's bone cancer first detected in 2002 was a recurrence of her breast cancer  
11 was not contradicted by any other medical sources. Thus, the ALJ was required to state  
12 clear and convincing reasons for rejecting it, and he did not. Dr. Rakkar's use of terms  
13 such as "consistent with" and "highly suggestive of" does not make his opinion  
14 speculative. The record plainly shows that medical providers who subsequently treated  
15 Schomburg accepted and relied on Dr. Rakkar's diagnosis as credible, even if not proven  
16 conclusively by objective medical evidence.

17         But, at step four, the ALJ was required to determine what residual functional  
18 capacity Schomburg had on or before June 30, 1999. If, as Dr. Antoine's uncontradicted  
19 treatment notes state, Schomburg did not experience any symptoms of cancer after  
20 surgery and treatment in 1998 and on or before June 30, 1999, her residual functional  
21 capacity was not limited during the relevant period. Thus, whether at some point after  
22 June 30, 1999, she developed bone cancer related to her earlier breast cancer does not  
23 affect her entitlement to benefits as of her last date insured.

24             **B. Subjective Symptom Testimony**

25                     **1. Legal Standard**

26         In evaluating the credibility of a claimant's testimony regarding subjective pain or  
27 other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine  
28 whether the claimant presented objective medical evidence of an impairment that could

1 reasonably be expected to produce some degree of the pain or other symptoms alleged;  
2 and, if so with no evidence of malingering, (2) reject the claimant’s testimony about the  
3 severity of the symptoms only by giving specific, clear, and convincing reasons for the  
4 rejection. *See Vasquez v. Astrue*, 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009). To support a lack of  
5 credibility finding, the ALJ is required to point to specific facts in the record that  
6 demonstrate that Schomburg’s symptoms are less severe than she claims. *Id.* at 592.

7 To be found credible regarding subjective pain or fatigue, a claimant is not  
8 required to: (1) produce objective medical evidence of the pain or fatigue itself, or the  
9 severity thereof; (2) produce objective medical evidence of the causal relationship  
10 between the medically determinable impairment and the symptom; or (3) show that her  
11 impairment could reasonably be expected to cause the severity of the alleged symptom,  
12 only that it could reasonably have caused some degree of the symptom. *Smolen v.*  
13 *Chater*, 80 F.3d 1273, 1282 (9<sup>th</sup> Cir. 1996).

14 **2. The ALJ Did Not Err by Finding Schomburg’s Subjective**  
15 **Symptom Testimony Not Credible.**

16 Schomburg contends that “the ALJ erred by rejecting Schomburg’s symptom  
17 testimony in the absence of clear and convincing reasons for doing so.” The ALJ stated:

18 After careful consideration of the evidence, the undersigned finds that the  
19 claimant’s medically determinable impairments could reasonably be  
20 expected to cause some of the symptoms alleged; however, the claimant’s  
21 statements concerning the intensity, persistence and limiting effects of these  
22 symptoms and the side-effects of the medication prescribed for her  
23 condition are not fully credible to the extent that they are inconsistent with  
24 the residual functional capacity assessment determined by the undersigned.

25 The claimant had the residual functional capacity to perform the full range  
26 of her past work as a receptionist which the Dictionary of Occupational  
27 Titles classifies as sedentary, semi-skilled work (SVP 4).

28 The ALJ gave specific, clear, and convincing reasons for rejecting Schomburg’s  
testimony about the severity of her symptoms:

The claimant alleges that she has been unable to work since December 1,  
1997 due to her impairments, limitations, symptoms, and the side-effects of  
her medication, but the medical evidence does not support her allegations.

The claimant also testified that she stopped working in December 1997 due  
to extreme fatigue, but later testified that she has continued to work, “on an

1 as-needed basis” from 2000 to the present time as a receptionist in her  
2 church. The evidence of record also shows the claimant was first diagnosed  
3 with breast cancer on December 30, 1997 and was admitted to the Boswell  
4 Memorial Hospital on February 4, 1998, a radical bilateral mastectomy was  
5 performed, and the claimant was released from the hospital on February 6,  
6 1998 (Exhibit 3F/127-129).

7 As discussed above, subsequent clinical records and tests reflect no  
8 evidence of cancer which met or equaled the criteria identified in the  
9 Listing after the bilateral mastectomy, chemotherapy, and radiation therapy  
10 until well after the claimant’s date last insured. Additionally, the claimant  
11 has not provided a persuasive reason why she was unable to perform her  
12 past relevant work prior to June 30, 1999.

13 The ALJ’s reasons for rejecting Schomburg’s symptom testimony are supported by  
14 the transcript of her hearing testimony. She testified that she quit working in 1995, more  
15 than two years before she was diagnosed with breast cancer. When the ALJ asked her  
16 why she was unable to work in 1997, she testified:

17 I had stopped working. I had my two daughters and I was extremely tired.  
18 I wasn’t feeling good. I didn’t know why. I went to doctors and they didn’t  
19 know why and it was just – I just didn’t know why until finally they came  
20 up with breast cancer.

21 When the ALJ asked Schomburg why she had stopped working in an office answering  
22 telephones, she testified: “Well, I didn’t feel – I was feeling tired and overwhelmed,  
23 exhausted. I was – it was too much.” Upon further questioning about why she had  
24 stopped working in 1995, she testified that she did not feel as though she could continue  
25 the receptionist job with two young daughters:

26 Q. And you said that you stopped that job because you weren’t feeling  
27 well?

28 A. Yes, I had the two daughters and I was – they were pretty little at the time.  
And they were – it had just took out [*sic.*] my time and I wasn’t really feeling like I  
could do both. My husband didn’t like it.

Q. Didn’t like that you stopped?

A. No, he didn’t but I just felt I needed to take a break at the time.

Schomburg also testified that in 1999 and 2000 she had nausea and diarrhea  
caused by tamoxifen, which she discontinued in 2001, but she continued to have similar  
side effects in 2009. She further testified that in 2001 and 2002 she worked 2 or 3 days a

1 week as a receptionist and in 2006 she worked occasionally as a receptionist for four  
2 hours at a time when needed.

3 Therefore, the ALJ did not err by finding Schomburg's statements concerning the  
4 intensity, persistence and limiting effects of the symptoms of her severe impairments not  
5 fully credible to the extent that she claims to have been unable to perform the full range  
6 of her past work as a sedentary, semi-skilled receptionist as of her last insured date.

7 IT IS THEREFORE ORDERED affirming the final decision of the Commissioner  
8 of Social Security denying Carol Ann Schomburg disability benefits.

9 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant  
10 against Plaintiff and that Plaintiff take nothing. The Clerk shall terminate this action.

11 DATED this 24<sup>th</sup> day of October, 2011.

12  
13   
14 \_\_\_\_\_  
Neil V. Wake  
United States District Judge

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28