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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Tammy Lynn Sheridan,  
Plaintiff,  
vs.  
Carolyn Colvin, Commissioner of Social Security,  
Defendant.

No. CV-12-00277-PHX-FJM

**ORDER**

Plaintiff filed an application for disability insurance benefits on February 21, 2008. The claims were denied initially and upon reconsideration. Following a hearing on January 4, 2011, the administrative law judge ("ALJ") issued a decision finding that plaintiff was not disabled within the meaning of the Social Security Act, and denying benefits. The Appeals Council denied plaintiff's request for review on December 14, 2011, rendering the ALJ's decision final. Thereafter, plaintiff filed this action seeking judicial review pursuant to 42 U.S.C. § 405(g). We have before us plaintiff's opening brief (doc. 14), defendant's answering brief (doc. 19), plaintiff's reply brief (doc. 20), and the administrative record (doc. 10).

**I**

A district court may set aside a denial of benefits "only if it is not supported by substantial evidence or if it is based on legal error." Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is "relevant evidence which, considering the record as

1 a whole, a reasonable person might accept as adequate to support a conclusion. Where the  
2 evidence is susceptible to more than one rational interpretation, one of which supports the  
3 ALJ's decision, the ALJ's conclusion must be upheld." Id. (citation omitted).

4 The ALJ followed the Social Security Act's five-step procedure to determine whether  
5 plaintiff is disabled. See 20 C.F.R. § 416.920(a)(4). First, the ALJ determined that plaintiff  
6 meets the status requirements of the Social Security Act and has not engaged in substantial  
7 gainful activity since the date of alleged onset. Tr. 13. At step two, the ALJ found that  
8 plaintiff suffered "severe" impairments including fibromyalgia, fatigue, myalgias, dizziness,  
9 joint pain, chronic migraine headaches, type II diabetes, syncope, and situational depression  
10 and anxiety. Id. At step three, the ALJ found plaintiff's impairments do not meet the criteria  
11 listed in the regulations. Tr. 23. Next, the ALJ determined that plaintiff has the residual  
12 functional capacity ("RFC") to perform light work as defined in 20 C.F.R. § 404.1567(b).  
13 Tr. 25. At step four, the ALJ concluded that plaintiff's RFC prevents her from performing  
14 her past relevant work. Tr. 35. At step five, however, the ALJ concluded that plaintiff is not  
15 disabled because her RFC does not preclude her from performing other work existing in  
16 significant numbers in the national economy. Tr. 35-36.

17 Plaintiff challenges the ALJ's decision arguing that the ALJ erred by rejecting her  
18 symptom testimony, failed to properly weigh medical source opinion evidence, and  
19 formulated a defective RFC. Plaintiff urges that we remand for an award of disability  
20 benefits.

## 21 II

22 Plaintiff argues that the ALJ failed to properly evaluate the credibility of her symptom  
23 testimony. Absent affirmative evidence of malingering, an ALJ must give clear and  
24 convincing reasons in order to reject the plaintiff's symptom testimony. Molina v. Astrue,  
25 674 F.3d 1104, 1112-1113 (9th Cir. 2012) (citations omitted). However, the ALJ is not  
26 "required to believe every allegation of disabling pain." Id. When weighing a plaintiff's  
27 credibility, "the ALJ may consider his reputation for truthfulness, inconsistencies either in  
28 his testimony or between his testimony and his conduct, his daily activities, his work record,

1 and testimony from physicians and third parties concerning the nature, severity, and effect  
2 of the symptoms of which he complains." Light v. Social Sec. Admin., 119 F.3d 789, 792  
3 (9th Cir. 1997) (citations omitted). In addition, the ALJ may consider the dosage and  
4 effectiveness of any treatment or pain medication for relief of pain. Bunnell v. Sullivan, 947  
5 F.2d 341, 346 (9th Cir. 1991). "If the ALJ's credibility finding is supported by substantial  
6 evidence in the record, we may not engage in second-guessing." Thomas, 278 F.3d at 959.

7 First, in accordance with the regulations, the ALJ noted that plaintiff's allegations of  
8 functional limitations based on non-severe impairments would be less than entirely credible.  
9 Tr. 28. Specifically, the ALJ found that the alleged herniated disc, seizure disorder, visual  
10 impairment, degenerative changes in the neck, abnormalities in the brain stem and peripheral  
11 neuropathy were non-severe impairments because there was a lack of adequate medical  
12 evidence to support the existence of those impairments. Id. Plaintiff argues that the ALJ's  
13 finding is inconsistent with the ALJ's analysis of severe symptoms at step two of the  
14 disability determination procedure. We disagree. The severe medical impairments the ALJ  
15 identified at step two, include fibromyalgia, fatigue, myalgias, dizziness, joint pain, chronic  
16 migraine headaches, type II diabetes, syncope, and situational depression and anxiety. Tr.  
17 13. Comparing the ALJ's finding of severe symptoms to the finding of non-severe symptoms  
18 reveals no inconsistency.

19 The ALJ also found that plaintiff's statements concerning the intensity, persistence,  
20 and limiting effects of her symptoms are not entirely credible to the extent alleged. Tr. 28.  
21 Contrary to plaintiff's allegations, we find the ALJ gave clear and convincing reasons based  
22 on substantial evidence in the record to support the credibility determination. The ALJ  
23 appropriately noted that plaintiff's inconsistent reports regarding whether physical therapy  
24 helped manage her headaches do not support plaintiff's allegations of chronic and extreme  
25 pain. Tr. 29. The ALJ also noted that plaintiff reported different levels of pain relief to  
26 different providers without offering any explanation to clarify the inconsistency. Tr. 30.  
27 Plaintiff argues that the differences in the reports regarding pain relief reflected the waxing  
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1 and waning of the treatment benefits. Although plaintiff's reports on pain relief may lend  
2 themselves to an interpretation more favorable to the plaintiff, we must uphold the ALJ's  
3 rational interpretation. Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.  
4 1999) ("Where . . . the ALJ has made specific findings justifying a decision to disbelieve an  
5 allegation and those findings are supported by substantial evidence in the record, our role is  
6 not to second guess that decision.").

7         Moreover, the ALJ found that statements plaintiff made before her alleged disability  
8 onset date, indicating that she was able to sustain work activity while her back pain persisted  
9 and worsened, undermine her allegation that the back pain prevents her from working as of  
10 the date she claimed disability benefits. Plaintiff argues that the ALJ's rationale fails because  
11 the ALJ also found that medically determinable impairments preclude plaintiff from  
12 performing past work as of the alleged onset of the disability. However, the ALJ's finding  
13 that plaintiff was unable to perform past work was based on plaintiff's mental impairments,  
14 not her back pain. Thus, the ALJ's conclusion in connection with plaintiff's statements about  
15 her previous work record reasonably supports the credibility determination.

16         The ALJ also reasonably found that plaintiff's failure to continue her relationship with  
17 her pain management source or alternatively to obtain another referral adversely affected her  
18 credibility regarding the level of pain. See e.g. Molina v. Astrue, 674 F.3d 1104, 1114 (9th  
19 Cir. 2012) (affirming ALJ's decision because "it was reasonable for the ALJ to conclude that  
20 the 'level or frequency of treatment [was] inconsistent with the level of complaints.'")  
21 (citation omitted).

22         The ALJ correctly relied in part on plaintiff's activities of daily living ("ADLs") and  
23 made specific findings to support his conclusion. See 20 C.F.R. § 404.1520a(c)(3)(4) and  
24 § 416.920a(c)(3)(4) (mandating that consideration be given to ADLs); see also Bunnell v.  
25 Sullivan, 947 F.2d 341, 346–48 (9th Cir.1991) (en banc). The ALJ found that plaintiff's  
26 ability to perform household chores, care for her children and pets, pay bills, shop on the  
27 computer, entertain visitors several times each week, and go to the track to watch her son  
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1 race, was inconsistent with her allegation of extreme limitations due to pain and other  
2 symptoms. Tr. 30. These specific findings support the ALJ's decision to discount plaintiff's  
3 subjective complaints.

4 In addition to citing the aforementioned reasons undermining plaintiff's subjective  
5 complaints, the ALJ thoroughly described the objective medical evidence supporting his  
6 credibility determination. Tr. 13-23. We reject plaintiff's argument that the ALJ's reliance  
7 on objective evidence is improper. Although a lack of objective medical evidence cannot  
8 form the sole basis for discounting symptom testimony, it is a factor that the ALJ may  
9 consider in his credibility analysis. Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

10 Finally, the ALJ also concludes that plaintiff lacks credibility because her complaints  
11 to Dr. Mitchell that she was "in great pain" have not been reconciled with his opinion that  
12 plaintiff's family conflict and stress were or appeared to be "somatized." Tr. 30.  
13 Somatization disorder is "a mental disorder characterized by presentation of a complicated  
14 medical history and of physical symptoms referring to a variety of organ systems, but without  
15 a detectable or known organic basis." Chaudhry v. Astrue, 688 F.3d 661, 665 (9th Cir. 2012).  
16 It appears that plaintiff's lengthy medical history, consisting of a wide variety of symptoms,  
17 is consistent with Dr. Mitchell's diagnoses of somatization disorder. The ALJ did not  
18 explain why it is inconsistent, or specifically how Dr. Mitchell's opinion regarding  
19 somatization conflicts with the patient's reports of extreme pain. Nevertheless, because the  
20 ALJ cites to numerous other reasons to support his credibility determination, we find this was  
21 harmless error.

22 The inconsistencies in plaintiff's testimony, evidence she was able to sustain work  
23 while her pain persisted, evidence that her daily activities were inconsistent with her pain  
24 allegations, and the lack of objective medical evidence supporting the severity of her  
25 symptoms—all of which are well documented in the ALJ's decision—together constitute  
26 clear and convincing reasons in support of the ALJ's negative credibility determination.

### 27 III

1 Plaintiff argues that the ALJ should have given the opinions of plaintiff's treating  
2 physicians, Drs. Schlichting, Dominic, Hoag, Mitchell, and Fairfax, controlling weight  
3 because they are consistent with the evidence in the record. Plaintiff also argues that the ALJ  
4 failed to explain why Dr. General's opinions did not lead to a finding that plaintiff is disabled.  
5 Finally, plaintiff argues that the ALJ erred by rejecting the opinions of nurse practitioner  
6 Sharon Toth ("Ms. Toth") and physical therapist John Davis (Mr. Davis).

7 A treating physician's opinion should be given controlling weight if it is  
8 "well-supported by medically acceptable clinical and laboratory diagnostic techniques and  
9 is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §  
10 404.1527(c)(2). However, where substantial evidence in the record contradicts the opinion  
11 of the treating physician, the ALJ must consider the following factors in determining how  
12 much weight to accord that opinion: (1) the length of the treatment relationship and the  
13 frequency of examination; (2) the nature and extent of the treatment relationship; (3) the  
14 degree to which the treating physician provides supporting explanations for the opinion; (4)  
15 the consistency of the opinion with the record as a whole; (5) the area of specialty of the  
16 treating physician; (6) the treating physician's familiarity with other information in the case  
17 record. Id. § 404.1527(c)(2)-(6); Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007). An ALJ  
18 may discredit treating physicians' opinions that are conclusory, brief, and unsupported by the  
19 record as a whole, or by objective medical findings. Batson v. Commissioner of Social  
20 Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004). "The ALJ can meet this  
21 burden by setting out a detailed and thorough summary of the facts and conflicting clinical  
22 evidence, stating his interpretation thereof, and making findings." Magallanes v. Bowen, 881  
23 F.2d 747, 751 (9th Cir. 1989).

24 Here, the ALJ found that the opinions of Drs. Schlichting, Dominic, and Hoag should  
25 not be given controlling weight because they were not "well-supported by medically  
26 acceptable clinical and laboratory diagnostic techniques," as required by the regulations.  
27 20 C.F.R. § 404.1527(c)(2). Dr. Schlichting found that plaintiff had headaches, tremors,  
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1 bilateral median neuropathy, as well as hip and chest pain which restricted her to less than  
2 a full range of sedentary work. Tr. 33. Dr. Dominic's evaluation also restricted plaintiff to  
3 less than sedentary work due to chronic neck and back pain, as well as tremors. Tr. 34. Dr.  
4 Hoag diagnosed plaintiff with diabetes, migranes, cervical and lumbosacral radiculopathy,  
5 bilateral medial neuropathy, chronic neck and back pain, and tremors. Tr. 35. In connection  
6 with each of the doctor's assessments, the ALJ noted that the record does not contain any  
7 evidence of abnormal test results or evaluations confirming neuropathy, abnormal cardiac  
8 functioning, or the plaintiff's alleged hip, neck or back pain. Id. Because the ALJ found the  
9 clinical evidence inconsistent with Drs. Schlichting Dominic, and Hoag's assessments, the  
10 ALJ was not required to give their opinions controlling weight. Moreover, the ALJ did not  
11 err by giving minimal weight to Drs. Schlichting Dominic, and Hoag's opinions because he  
12 found that they were based on plaintiff's subjective complaints of pain, which, as discussed  
13 above, were properly discounted as less than credible. See Tommasetti v. Astrue, 533 F.3d  
14 1035, 1041 (9th Cir. 2008). ("An ALJ may reject a treating physician's opinion if it is based  
15 "to a large extent" on a claimant's self-reports that have been properly discounted as  
16 incredible.").

17         The ALJ properly accorded minimal weight to Dr. Mitchell's opinion that plaintiff was  
18 completely disabled. See 20 C.F.R. § 404.1527(d)(1)-(3) (treating source opinions on  
19 whether a plaintiff is disabled are reserved to the Commissioner and are not entitled to any  
20 special significance); see also McLeod v. Astrue, 640 F.3d 881, 884 (9th Cir. 2011) (A  
21 treating physician's opinion is "not binding on an ALJ with respect to the existence of an  
22 impairment or the ultimate issue of disability.") (citation and internal quotation marks  
23 omitted). Moreover, the ALJ found that Dr. Mitchell's assessment of plaintiff's impairments  
24 was extreme and inconsistent with his clinical notes, which did not offer proof of how the  
25 plaintiff's situational complaints resulted in an inability to sustain simple work  
26 responsibilities. Tr. 34. This was a valid reason for giving less weight to Dr. Mitchell's  
27 opinion. See Tommasetti, 533 F.3d at 104. (incongruity between treating doctor's  
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1 questionnaire responses and her medical records provided a specific and legitimate reason  
2 for rejecting the doctor's opinion of claimant's limitations); see also Magallanes v. Bowen  
3 881 F.2d 747, 751 (9th Cir. 1989) (finding the ALJ need not accept a treating physician's  
4 opinion which is "brief and conclusionary in form with little in the way of clinical findings  
5 to support [its] conclusion.").

6         The ALJ gave Dr. Fairfax's opinion less weight based on the nature of the treatment  
7 relationship and the physician's professional qualifications, which are factors an ALJ may  
8 consider when determining how much weight to give an opinion. Because in her opening  
9 brief plaintiff failed to specifically and distinctly argue that the ALJ erred in finding that Dr.  
10 Fairfax did not review plaintiff's records or examine her, we conclude plaintiff has waived  
11 that argument. See Melton v. Commissioner of Social Sec. Admin., 442 Fed. Appx. 339,  
12 340, 2011 WL 2727869, \*1 (9th Cir. 2011) (finding plaintiff waived the argument that the  
13 ALJ improperly rejected a treating physician's opinion because she did not argue it  
14 "specifically and distinctly" in her opening brief).

15         Plaintiff's assertion that the ALJ failed to explain why accepting Dr. General's opinion  
16 did not lead to a finding that plaintiff is disabled, erroneously assumes that his opinion  
17 conclusively establishes plaintiff's inability to work. To the contrary, Dr. General's opinion,  
18 indicates that if plaintiff's migraines could be ameliorated, she could return to work in many  
19 capacities within a few months. Tr. 365. It also indicates that plaintiff's ability to perform  
20 work-related tasks was good. Id. Accordingly, Dr. General's opinion does not necessarily  
21 lead to a disability finding. Moreover, when evidence can rationally be interpreted in more  
22 than one way, the court must uphold the commissioner's decision. Mayes v. Massanari, 276  
23 F.3d 453, 459 (9th Cir. 2001).

24         We also reject plaintiff's contention that the ALJ erred by failing to weigh Ms. Toth's  
25 opinion based on statutory factors. As a nurse practitioner, Ms. Toth is not considered an  
26 "acceptable medical source" under the regulations. See 20 C.F.R. §§ 404.1513(a)(1) and (3);  
27 see also Gomez v. Chater, 74 F.3d 967, 971 (9th Cir. 1996). The ALJ may discount  
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1 testimony from "other sources" that are not "acceptable medical sources by giving "reasons  
2 germane to each witness for doing so." Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1224  
3 (9th Cir. 2010) (citation and internal quotes omitted). The ALJ cited several germane  
4 reasons, which are substantiated by the record, for giving Ms. Toth's opinions minimal  
5 weight. First, the ALJ noted Ms. Toth's opinion as to the plaintiff's ability to work consisted  
6 primarily of a vague insurance questionnaire in which she failed to indicate the medical  
7 impairments, anticipated treatments, and functional limitations which would result in the  
8 inability to sustain work. Tr. 31. The ALJ may "permissibly reject . . . check-off reports that  
9 [do] not contain any explanation of the bases of their conclusions." Crane v. Shalala, 76 F.3d  
10 251, 253 (9th Cir. 1996). The ALJ also noted that Ms. Toth's assessment conflicts with  
11 plaintiff's own work history, which indicates she sustained substantial work into 2008. Id.  
12 Finally, the ALJ explained that Ms. Toth's February 5, 2008 opinion is inconsistent with  
13 contemporaneous medical evidence that plaintiff's diabetes was controlled by diet and oral  
14 medication. Id. Accordingly, the ALJ's assessment of Ms. Toth's opinion is free of legal  
15 error.

16 Physical therapists such as Mr. Davis also fall under the heading of "other sources"  
17 for purposes of the regulations. See 20 C.F.R. §§ 404.1513(a), (d). Accordingly, Mr. Davis's  
18 opinion is not entitled to the same deference as that of a treating physician. Turner, 613  
19 F.3d at 1224. The ALJ properly provided germane reasons for giving Mr. Davis's opinions  
20 minimal weight, including that Mr. Davis does not identify medical credentials that qualify  
21 him to render a functional capacity evaluation, and that his assessment appears to be based  
22 on the claimant's subjective complaints. Therefore, the ALJ did not err in discounting Mr.  
23 Davis's opinion.

24  
25 Based on the foregoing, we conclude that the ALJ properly weighed the opinions of  
26 plaintiff's treating and examining physicians, and properly discounted the opinions of Ms.  
27 Toth and Mr. Davis.

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**IV**

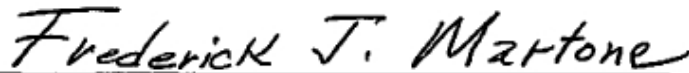
1 Finally, plaintiff argues that the ALJ erred in assessing plaintiff's RFC by failing to  
2 discuss the effects of migraine headaches, fibromyagia pain, and depression on plaintiff's  
3 ability to do work-related activities. We disagree.

4 The ALJ is not required, as plaintiff contends, to engage in a function-by-function  
5 analysis. SSR 96-8p requires only that the ALJ discuss how evidence supports the RFC  
6 assessment and explain how the ALJ resolved material inconsistencies or ambiguities in  
7 evidence. Mason v. Commissioner of Social Security, 379 Fed.Appx. 638, 639, 2010 WL  
8 1986190, \*1 (9th Cir. May 18, 2010). Here, the ALJ extensively discussed the plaintiff's  
9 reported symptoms, impairments and limitations, and considered the opinion evidence of her  
10 treating physicians to reach his conclusions regarding plaintiff's RFC. The ALJ did not  
11 determine plaintiff's ability to perform work on the sole basis of a categorical RFC  
12 assessment. Instead, the ALJ offered substantial evidence to support the conclusion that  
13 claimant has the RFC to perform light work with some restrictions.

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15 V

16 Based on the foregoing, we hold that substantial evidence in the record supports the  
17 ALJ's conclusion that plaintiff is not disabled. Therefore, **IT IS ORDERED AFFIRMING**  
18 the decision of the Commissioner denying disability benefits. The clerk shall enter final  
19 judgment.

20 DATED this 21<sup>st</sup> day of March, 2013.

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23 **Frederick J. Martone**  
24 **Senior United States District Judge**