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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Toniann Kenner,

No. CV 12-0800-PHX-JAT

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Plaintiff,

**ORDER**

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vs.

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Michael Astrue, Commissioner, Social  
Security Administration,

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Defendant.

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Pending before the Court is Plaintiff’s appeal from the Administrative Law Judge’s (“ALJ”) denial of Plaintiff’s Title II application for disability insurance benefits.

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**I. PROCEDURAL BACKGROUND**

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Plaintiff Toniann Kenner filed a Title II application for Disability Insurance Benefits on October 2, 2008, alleging that her disability began on February 22, 2002. (Record Transcript (“TR”) 116).<sup>1</sup> Plaintiff was 38 years old at the time of filing her application, and listed her illnesses, injuries, and conditions as back, shoulder, neck, and knee pain. (TR 134). Plaintiff’s application was denied initially and upon reconsideration. (TR 70, 75). On May 8, 2009, Plaintiff filed a request for a hearing, and, on December 11, 2009, Plaintiff appeared at a video hearing before an ALJ. (TR 80; TR 45). On December 22, 2009, the ALJ issued

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<sup>1</sup> Although both parties indicate that Plaintiff’s application was filed in September 2008, the application itself is dated October 2, 2008. (TR 116).

1 an unfavorable decision. (TR 24). On July 25, 2011, the Appeals Council denied Plaintiff's  
2 January 11, 2010 request for review. (TR 14; TR 22).

3 On April 17, 2012, Plaintiff filed her Complaint for Judicial Review of the ALJ's  
4 decision. (Doc. 1). Plaintiff argues that the Court should vacate the Administrative Law  
5 Decision because: (1) the ALJ erred by rejecting the opinions of treating physicians; and (2)  
6 the ALJ erred by rejecting Plaintiff's symptom testimony in the absence of clear and  
7 convincing reasons for so doing. (Doc. 12).

## 8 II. LEGAL STANDARD

9 The Commissioner's decision to deny benefits will be overturned "only if it is not  
10 supported by substantial evidence or is based on legal error." *Magallanes v. Bowen*, 881 F.2d  
11 747, 750 (9th Cir. 1989) (internal quotation omitted). Substantial evidence is more than a  
12 mere scintilla, but less than a preponderance. *Reddick v. Charter*, 157 F.3d 715, 720 (9th Cir.  
13 1998). It is such relevant evidence as a reasonable mind might accept as adequate to support  
14 a conclusion. *Id.*

15 In determining whether there is substantial evidence to support a decision, this Court  
16 considers the record as a whole, weighing both the evidence that supports the administrative  
17 law judge's conclusions and the evidence that detracts from the administrative law judge's  
18 conclusions. *Id.* If there is sufficient evidence to support the Commissioner's determination,  
19 the Court cannot substitute its own determination for that of the ALJ. *Id.* Additionally, the  
20 administrative law judge is responsible for resolving conflicts in medical testimony,  
21 determining credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035,  
22 1039 (9th Cir. 1995). Thus, if on the whole record before this Court, substantial evidence  
23 supports the Commissioner's decision, this Court must affirm it. *See Hammock v. Bowen*,  
24 879 F.2d 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g).

### 25 A. Definition of Disability

26 To qualify for disability benefits under the Social Security Act, a claimant must show,  
27 among other things, that he is "under a disability." 42 U.S.C. § 423(a)(1)(E). The Social  
28 Security Act defines "disability" as the "inability to engage in any substantial gainful activity

1 by reason of any medically determinable physical or mental impairment which can be  
2 expected to result in death or which has lasted or can be expected to last for a continuous  
3 period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). A person is “under a disability  
4 only if his physical or mental impairment or impairments are of such severity that he is not  
5 only unable to do his previous work but cannot, considering his age, education, and work  
6 experience, engage in any other kind of substantial gainful work which exists in the national  
7 economy.” 42 U.S.C. § 423(d)(2)(A).

### 8 **B. Five-Step Evaluation Process**

9 The Social Security regulations set forth a five-step sequential process for evaluating  
10 disability claims. 20 C.F.R. § 404.1520; *see also Reddick*, 157 F.3d at 721 (describing the  
11 sequential process). A finding of “not disabled” at any step in the sequential process will end  
12 the ALJ’s inquiry. 20 C.F.R. § 404.1520(a)(4). The claimant bears the burden of proof at  
13 the first four steps, but the burden shifts to the ALJ at the final step. *Reddick*, 157 F.3d at  
14 721.

15 The five steps are as follows:

16 1. First, the ALJ determines whether the claimant is “doing substantial gainful  
17 activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.

18 2. If the claimant is not gainfully employed, the ALJ next determines whether the  
19 claimant has a “severe medically determinable physical or mental impairment.” 20 C.F.R.  
20 § 404.1520(a)(4)(ii). A severe impairment is one that “significantly limits [the claimant’s]  
21 physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c). Basic work  
22 activities means the “abilities and aptitudes to do most jobs.” 20 C.F.R. § 404.1521(b).  
23 Further, the impairment must either be expected “to result in death” or “to last for a  
24 continuous period of twelve months.” 20 C.F.R. § 404.1509 (incorporated by reference in  
25 20 C.F.R. § 404.1520(a)(4)(ii)). The “step-two inquiry is a de minimis screening device to  
26 dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

27 3. Having found a severe impairment, the ALJ next determines whether the  
28 impairment “meets or equals” one of the impairments specifically listed in the regulations.

1 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is found disabled without considering the  
2 claimant’s age, education, and work experience. 20 C.F.R. at § 404.1520(d).

3 4. At step four, the ALJ determines whether, despite the impairments, the  
4 claimant can still perform “past relevant work.” 20 C.F.R. § 404.1520(a)(4)(iv). To make  
5 this determination, the ALJ compares the “residual functional capacity assessment . . . with  
6 the physical and mental demands of [the claimant’s] past relevant work.” 20 C.F.R. §  
7 404.1520(f). If the claimant can still perform the kind of work the claimant previously did,  
8 the claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

9 5. At the final step, the ALJ determines whether the claimant “can make an  
10 adjustment to other work” that exists in the national economy. 20 C.F.R. §  
11 404.1520(a)(4)(v). In making this determination, the ALJ considers the claimant’s residual  
12 functional capacity, together with vocational factors (age, education, and work experience).  
13 20 C.F.R. § 404.1520(g)(1). If the claimant can make an adjustment to other work, then he  
14 is not disabled. If the claimant cannot perform other work, he will be found disabled. As  
15 previously noted, the ALJ has the burden of proving the claimant can perform other  
16 substantial gainful work that exists in the national economy. *Reddick*, 157 F.3d at 721.

### 17 **III. ANALYSIS**

#### 18 **A. Whether the ALJ Erred by Rejecting the Opinions of Treating** 19 **Physicians**

20 Plaintiff first argues that the ALJ erred in assigning only limited weight to the opinion  
21 of Dr. Bajpai while assigning significant weight to the opinion of Dr. Ani. Plaintiff does not  
22 appear to object to the assignment of probative weight to the opinion of Dr. Guice. All three  
23 physicians treated Plaintiff.

24 The ALJ must consider all medical evidence in the record. 20 C.F.R. § 404.1527(b).  
25 “The ALJ is responsible for resolving conflicts in the medical record.” *Carmickle v.*  
26 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008). Such conflicts may arise  
27 between a treating physician’s medical opinion and other evidence in the claimant’s record.  
28 A treating physician’s opinion is usually entitled to “substantial weight.” *Bray v. Comm’r,*

1 *Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (quoting *Embrey v. Bowen*, 849 F.2d  
2 418, 422 (9th Cir. 1988)). A treating physician’s opinion is given controlling weight when  
3 it is “well-supported by medically accepted clinical and laboratory diagnostic techniques and  
4 is not inconsistent with the other substantial evidence in [the claimant’s] case record.” 20  
5 C.F.R. § 404.1527(d)(2). On the other hand, if a treating physician’s opinion “is not well-  
6 supported” or “is inconsistent with other substantial evidence in the record,” then it should  
7 not be given controlling weight. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).

8         Substantial evidence that contradicts a treating physician’s opinion may consist of  
9 either (1) an examining physician’s opinion or (2) a nonexamining physician’s opinion  
10 combined with other evidence. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). In the  
11 case of an examining physician, “[w]hen an examining physician relies on the same clinical  
12 findings as a treating physician, but differs only in his or her conclusions, the conclusions of  
13 the examining physician are not substantial evidence.” *Orn*, 495 F.3d at 632 (citing *Murray*  
14 *v. Heckler*, 722 F.2d 499, 501-502 (9th Cir. 1984)). To constitute substantial evidence, the  
15 examining physician must provide “independent clinical findings that differ from the findings  
16 of the treating physician.” *Id.* (citing *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir. 1985)).  
17 Independent clinical findings can be either “diagnoses that differ from those offered by  
18 another physician and that are supported by substantial evidence, . . . or findings based on  
19 objective medical tests that the treating physician has not herself considered.” *Id.* (citing  
20 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984); *Andrews v. Shalala*, 53 F.3d 1035, 1041  
21 (9th Cir. 1995)).

22         “The opinion of a nonexamining physician cannot by itself constitute substantial  
23 evidence that justifies the rejection of the opinion of either an examining physician or a  
24 treating physician.” *Lester*, 81 F.3d at 831. Such an opinion is only substantial evidence if  
25 supported by “substantial record evidence.” *Id.*

26         If the ALJ determines that a treating physician’s opinion is inconsistent with  
27 substantial evidence and is not to be given controlling weight, the opinion remains entitled  
28 to deference and should be weighed according to the factors provided in 20 C.F.R. §

1 404.1527(d). *Orn*, 495 F.3d at 631; SSR 96–2p at 4. These factors include: (1) the length  
2 of the treatment relationship and the frequency of examination; (2) the nature and extent of  
3 the treatment relationship; (3) the extent to which the opinion is supported by relevant  
4 medical evidence; (4) the opinion’s consistency with the record as a whole; and (5) whether  
5 the physician is a specialist giving an opinion within his specialty. 20 C.F.R. § 404.1527(d).

6 If a treating physician’s opinion is not sufficiently supported by medical evidence and  
7 other substantial evidence in the case, however, the ALJ need not give the opinion  
8 controlling weight. *Orn*, 495 F.3d at 631.

9 In this case, the record supports the ALJ’s decision to give limited weight to the  
10 opinion of Dr. Bajpai while assigning significant weight to the opinion of Dr. Ani. The ALJ  
11 set out a detailed and thorough summary of the facts and conflicting clinical evidence by  
12 recounting Plaintiff’s testimony and the medical reports of all three treating physicians. After  
13 discussing Dr. Bajpai’s opinion, the ALJ stated that she found his opinion to be “not  
14 consistent with the medical evidence of record.” (TR 32). The ALJ further stated, “Dr.  
15 Bajpai’s own reports fail to reveal the type of significant clinical and laboratory  
16 abnormalities one would expect if the claimant were in fact disabled and the doctor did not  
17 specifically address this weakness.” (TR 32). The ALJ did not err in assigning limited weight  
18 to Dr. Bajpai’s opinion after determining that his opinion was brief and conclusory with few  
19 clinical findings to support it. Accordingly, the reasons the ALJ gave for assigning limited  
20 weight to Dr. Bajpai’s opinion were sufficient.

21 **B. Whether the ALJ Erred by Rejecting Plaintiff’s Symptom**  
22 **Testimony in the Absence of Clear and Convincing Reasons**

23 Plaintiff’s second argument is that the ALJ failed to provide clear and convincing  
24 reasons for rejecting Plaintiff’s subjective reports regarding her symptoms. Plaintiff objects  
25 to the ALJ’s determination that her statements concerning the intensity, persistence, and  
26 limiting effects of the symptoms were not credible to the extent that they were inconsistent  
27 with the residual functional capacity assessment. Specifically, Plaintiff argues that the ALJ  
28 erred in finding that the evidence regarding Plaintiff’s role as caretaker of her son

1 contradicted Plaintiff's reported levels of pain. Plaintiff further argues that the ALJ  
2 improperly found that Plaintiff's earnings history undermined her credibility. (Doc. 12).

3 "Once a claimant produces medical evidence of an underlying impairment which is  
4 reasonably likely to be the cause of some pain, the ALJ 'may not discredit a claimant's  
5 testimony of pain and deny disability benefits solely because the degree of pain alleged by  
6 the claimant is not supported by objective medical evidence.'" *Orteza v. Shalala*, 50 F.3d  
7 748, 749-750 (9th Cir. 1995) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 346-347 (9th Cir.  
8 1991) (en banc)). The ALJ must make specific findings based on the record for discounting  
9 a claimant's subjective complaints. *See Savage v. Astrue*, No. CV-11-02103, 2013 WL  
10 551461, at \*7 n. 1 (D. Ariz. Feb. 13, 2013).

11 There is no question in this case that the ALJ found that there was medical evidence  
12 of underlying impairments reasonably likely to cause pain. *See* TR 31 ("the claimant's  
13 medically determinable impairments could reasonably be expected to cause the alleged  
14 symptoms; however, the claimant's statements concerning the intensity, persistence and  
15 limiting effects of these symptoms are not credible to the extent they are inconsistent with  
16 the above residual functional capacity assessment").

17 The question then is whether the ALJ discredited Plaintiff's subjective reports of pain  
18 solely because such pain was not supported by objective medical evidence. "Although an  
19 ALJ 'cannot be required to believe every allegation of disabling pain,' the ALJ cannot reject  
20 testimony of pain without making findings sufficiently specific to permit the reviewing court  
21 to conclude that the ALJ did not arbitrarily discredit the claimant's testimony." *Orteza*, 50  
22 F.3d at 750 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The adjudicator  
23 should consider numerous factors when making such credibility determinations, including  
24 the nature, location, onset, duration, frequency, radiation, and intensity of any pain;  
25 precipitating and aggravating factors (e.g., movement, activity, environmental conditions);  
26 type, dosage, effectiveness, and adverse side-effects of any pain medication; treatment, other  
27 than medication, for relief of pain; functional restrictions; and the claimant's daily activities.  
28 *Bunnell*, 947 F.2d at 346 (citing SSR 88-13, 1988 WL 236011, July 20, 1988).

1            “[I]f the claimant engages in numerous daily activities involving skills that could be  
2 transferred to the workplace, an adjudicator may discredit the claimant’s allegations upon  
3 making specific findings relating to the claimant’s daily activities.” *Id.* (citing *Fair*, 885 F.2d  
4 at 603). “An adjudicator may also use ‘ordinary techniques of credibility evaluation’ to test  
5 a claimant’s credibility.” *Id.* (internal citation omitted). “So long as the adjudicator makes  
6 specific findings that are supported by the record, the adjudicator may discredit the  
7 claimant’s allegations based on inconsistencies in the testimony or on relevant character  
8 evidence.” *Id.*

9            In this case, the ALJ made specific findings to support her determination that  
10 Plaintiff’s statements regarding the intensity, persistence, and limiting effects of her  
11 condition were not fully credible and did not prevent her from performing her past relevant  
12 work, which would not exceed her residual functional capacity to perform light work at a  
13 maximum specific vocational preparation (SVP) rating of three. In making the credibility  
14 determination, the ALJ considered the factors required by SSR 88-13.

15            The ALJ compared the reports of Plaintiff’s treating physicians with Plaintiff’s own  
16 reports of her pain, and also examined Plaintiff’s own reports for internal consistency. The  
17 ALJ concluded that Plaintiff’s subjective reports of her pain were inconsistent with the fact  
18 that she “was able to care for her four year old son at home, which can be quite demanding  
19 both physically and emotionally, without any particular assistance on a regular basis.” (TR  
20 32). Plaintiff objects to this conclusion by pointing to her reports that her mother helped her  
21 with her son for a few months, that she would at times call her husband home from work to  
22 help with their son, and that she could not pick up her son once he weighed 10 pounds or  
23 play with him. (Doc. 12). These reports, however, do not overcome the fact that Plaintiff was  
24 regularly the only person at home to care for her son.

25            The ALJ also noted that Plaintiff worked from 1986 to 2002, but that, during only five  
26 of those years, did she work at substantial gainful activity. The ALJ found that the earnings  
27 record “raise[d] a question as to whether [Plaintiff’s] continuing unemployment [was]  
28 actually due to medical impairments.” Plaintiff objects to this conclusion on the basis that the

1 first year the ALJ considered was when Plaintiff was 16 years old and that the conclusion  
2 drawn “is unfounded and shows bias against lower wage earners.” (Doc. 12). Even if  
3 Plaintiff’s earnings history from the few years before she reached adulthood are disregarded,  
4 Plaintiff worked at substantial gainful activity for five out of fourteen or fifteen years. As  
5 such, the ALJ’s observation was not unfounded nor does it show bias against lower wage  
6 earners.

7 Based on the foregoing, the ALJ did not “discredit a claimant’s testimony of pain and  
8 deny disability benefits solely because the degree of pain alleged by the claimant was not  
9 supported by objective medical evidence,” but rather made “specific findings that are  
10 supported by the record.”

11 **IV. CONCLUSION**

12 Accordingly, the ALJ did not err in finding that Plaintiff was not disabled within the  
13 meaning of the Social Security Act.

14 Based on the foregoing,

15 **IT IS ORDERED** that the decision of the Administrative Law Judge is **AFFIRMED**.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment  
17 accordingly. The judgment shall serve as the mandate of this Court.

18 DATED this 29<sup>th</sup> day of July, 2013.

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22 **James A. Teilborg**  
23 **Senior United States District Judge**  
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