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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Yvette Rodriguez Arteaga,  
10 Plaintiff,

11 v.

12 Carolyn W Colvin,  
13 Defendant.

No. CV-13-00833-PHX-DGC

**ORDER**

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15 Pursuant to 42 U.S.C. § 405(g), Plaintiff Yvette Rodriguez Arteaga seeks judicial  
16 review of the Commissioner's decision finding her not disabled. Doc. 17. For the  
17 reasons that follow, the Court will deny Plaintiff's motion.

18 **I. Background.**

19 On September 30, 2007, Plaintiff was the victim of a gunshot to her face. The  
20 bullet shattered her right jaw and teeth and tore through her tongue and lip. A CT scan  
21 showed no evidence of acute intracranial hemorrhage and no evidence of any acute  
22 abnormality, but it did reveal that she had bullet fragments lodged in her cervical spine.  
23 Plaintiff underwent a number of surgeries to repair her jaw and facial tissues. She was  
24 discharged in stable condition on October 16, 2007. A week later, her surgeon found her  
25 to be healing well with no signs of infection. He unwired her jaw in November 2007.

26 Plaintiff did not seek additional treatment for any issue related to the gunshot  
27 wound until late December 2009, approximately three months after she applied for  
28 benefits. She sought treatment at Access2Care Family Medical Center where she

1 reported that she had experienced non-specific pain ever since being shot in her face. Tr.  
2 394. During the 18 months that she was treated at Access2Care, she was treated for jaw  
3 pain (Tr. 383, 390-91), chest pain (Tr. 378), neck pain (Tr. 365-67, 377), shoulder pain  
4 (Tr. 366, 377), and lower back pain (Tr. 365-71, 377). Plaintiff was also receiving  
5 treatment from Dr. Calderon for jaw pain. Dr. Calderon found no abnormalities on  
6 physical examinations in August 2010, January 2011, and February 2011. After  
7 adjusting Plaintiff's medications, Dr. Calderon concluded in February 2011 that  
8 Plaintiff's "right atypical facial pain" was "[w]ell controlled." Tr. 408.

9 Plaintiff applied for child's insurance benefits based on disability on  
10 November 10, 2009. Tr. 16. She also protectively filed an application for supplemental  
11 security income on September 22, 2009. *Id.* Plaintiff alleged disability beginning on  
12 September 30, 2007, in both applications. *Id.* After a hearing on August 19, 2011, an  
13 Administrative Law Judge ("ALJ") issued an opinion on August 25, 2011, finding  
14 Plaintiff not disabled. *Id.* Plaintiff's request for review was denied by the Appeals  
15 Council and the ALJ's opinion became the Commissioner's final decision. *Id.* at 3.

## 16 **II. Legal Standard.**

17 Defendant's decision to deny benefits will be vacated "only if it is not supported  
18 by substantial evidence or is based on legal error." *Robbins v. Soc. Sec. Admin.*, 466 F.3d  
19 880, 882 (9th Cir. 2006). "'Substantial evidence' means more than a mere scintilla, but  
20 less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept  
21 as adequate to support a conclusion." *Id.* In determining whether the decision is  
22 supported by substantial evidence, the Court must consider the record as a whole,  
23 weighing both the evidence that supports the decision and the evidence that detracts from  
24 it. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). If there is sufficient evidence to  
25 support the Commissioner's determination, the Court cannot substitute its own  
26 determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

27 Determining whether a plaintiff is disabled involves a sequential five-step  
28 evaluation process. The claimant must show (1) he is not currently engaged in

1 substantial gainful employment, (2) he has a severe physical or mental impairment, and  
2 (3) the impairment meets or equals a listed impairment or (4) his residual functional  
3 capacity (“RFC”) precludes him from performing his past work. If at any step the  
4 Commissioner determines that a claimant is or is not disabled, the analysis ends;  
5 otherwise it proceeds to step five. If the claimant establishes his burden through step  
6 four, the Commissioner bears the burden at step five of showing that the claimant has the  
7 RFC to perform other work that exists in substantial numbers in the national economy.  
8 *See* 20 C.F.R. § 404.1520(a)(4)(i)-(v).

9 **III. Analysis.**

10 Plaintiff contends that the ALJ’s decision is incorrect on four grounds. First, she  
11 asserts that the ALJ erred in not finding that her “blackouts” and facial pain were severe  
12 limitations. Second, she argues that the ALJ failed to properly weigh the opinion of a  
13 treating physician. Third, she argues that the ALJ improperly discounted her subjective  
14 testimony concerning the intensity, persistence, and limiting effects of her pain. Finally,  
15 she contends that the ALJ erred in relying on the Medical-Vocational Guidelines. The  
16 Court will consider each argument in turn.

17 **A. Severe Limitation.**

18 At step two, the ALJ found that Plaintiff had a severe impairment. Tr. 18. The  
19 ALJ explained that the “claimant’s symptoms arising from her borderline intellectual  
20 functioning caused and will continue to cause more than minimal work-related functional  
21 limitations.” *Id.* Plaintiff argues that the ALJ should have also found that her memory  
22 impairment and facial pain were severe impairments. Doc. 17 at 8. The Court need not  
23 address Plaintiff’s argument, however, because this alleged deficiency in the ALJ’s  
24 decision did not prejudice Plaintiff. *See Burch v. Barnhart*, 400 F.3d 676, 682-84 (9th  
25 Cir. 2005) (finding no reversible error when ALJ failed to consider obesity at step two,  
26 but considered it at subsequent steps). Assuming without deciding that this omission  
27 constituted legal error, it could only have prejudiced Plaintiff in step three or step five  
28 because the other steps, including this one, were resolved in her favor.

1           Although Plaintiff contends that the ALJ erred in not finding that her memory loss  
2 and facial pain constitute a severe impairment, she has not argued that either of those  
3 impairments meets or medically equals a listed impairment – the inquiry at step three.  
4 Plaintiff does not specify which listing she believes she meets or equals. Further, she  
5 does not set forth any evidence that would support the finding of a listed impairment. 20  
6 C.F.R. § 404.1525(d). Plaintiff bears the initial burden of proving a disability. *See*  
7 *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989). In addition, an ALJ is not  
8 required to discuss the combined effects of a claimant’s impairments or compare them to  
9 any listing in an equivalency determination unless the claimant presents evidence in an  
10 effort to establish equivalence. *See Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001).  
11 Plaintiff has presented no evidence of equivalence.

12           The ALJ considered Plaintiff’s memory loss and facial pain in step five when  
13 assessing her RFC. The ALJ made frequent reference to Plaintiff’s testimony and  
14 medical evidence regarding her memory loss and facial pain. Tr. 20-24.

15           The Court concludes that even if the ALJ erred in not finding Plaintiff’s memory  
16 loss and facial pain to be severe limitations, it was not reversible error under *Burch*.

17           **B.     Treating Physician Opinion.**

18           Plaintiff’s primary attack on the ALJ’s decision focuses on the weight given to a  
19 medical opinion by Physician’s Assistant Mr. Mitchelson.<sup>1</sup> Tr. 23-24. In January 2011,  
20 Mr. Mitchelson completed a check-the-box form opining that Plaintiff’s headaches would  
21 result in daily absences that would render her completely unable to work and that  
22 Plaintiff had extreme physical limitations that rendered her unable to sit for more than  
23 two hours of an eight hour work day, stand or walk for more than 20 minutes, or lift or  
24 carry five pounds. Tr. 372-73. The ALJ accorded this opinion little weight for a number  
25 of reasons. The ALJ found that it was not rendered by an acceptable medical source, it

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27           <sup>1</sup> The ALJ’s decision refers to this individual as Robert McPherson. The  
28 individual who filled out and signed the headache questionnaire also identified himself  
as Robert McPherson, PA. The Court’s order will nevertheless refer to the individual as  
Mr. Mitchelson because that is the name used in the parties’ briefs.

1 was not supported by the medical evidence, it was not consistent with Plaintiff's  
2 subjective complaints, and it was inconsistent with the ALJ's observations of Plaintiff.  
3 Tr. 23-24.

4 The Ninth Circuit distinguishes between the opinions of treating physicians,  
5 examining physicians, and non-examining physicians. See *Lester v. Chater*, 81 F.3d 821,  
6 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
7 physician's opinion and more weight to the opinion of an examining physician than to  
8 one of a non-examining physician. See *Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th  
9 Cir. 1995); see also 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when  
10 evaluating opinion evidence, including length of examining or treating relationship,  
11 frequency of examination, consistency with the record, and support from objective  
12 evidence). The opinion of a treating or examining physician "can only be rejected for  
13 specific and legitimate reasons that are supported by substantial evidence in the record."  
14 *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

15 Plaintiff argues that a treating physician's opinion is accorded controlling weight  
16 if it is supported by "medically acceptable diagnostic techniques and is not inconsistent  
17 with other substantial evidence in the record." Doc. 17 at 6; *Holohan v. Massanari*, 246  
18 F.3d 1195, 1202 (9th Cir. 2001). Accordingly, she asserts that the January 2011 form  
19 completed by Mr. Mitchelson should be given controlling weight or at least significant  
20 deference.

21 Plaintiff's argument fails to recognize, however, that Mr. Mitchelson is not an  
22 "acceptable medical source" for establishing impairment. 20 C.F.R. § 404.1513; *Molina*  
23 *v. Astrue*, 674 F.3d 1104, 1111 n. 3 (9th Cir. 2012) (noting that regulations have been  
24 altered such that medical employees who are supervised by licensed physicians can no  
25 longer function as acceptable medical sources). Mr. Mitchelson's medical opinions are  
26 not entitled to the same deference accorded to treating physicians under *Andrews*.  
27 Instead, Mr. Mitchelson's opinion must be evaluated under the framework set forth in 20  
28 C.F.R. § 404.1527(c), which includes the following factors: common sense indicators of

1 reliability; consistency with the record; and medical source's relative level of  
2 specialization. Medical opinions from non-acceptable medical sources are not entitled to  
3 the same deference and the Ninth Circuit has affirmed analyses discounting such sources  
4 for "germane" reasons. *Molina*, 674 F.3d at 1111.

5 The ALJ provided germane reasons for discounting Mr. Mitchelson's medical  
6 opinion. The ALJ noted Mr. Mitchelson's opinion that Plaintiff is in constant pain, can  
7 never push, pull, lift, or carry any weight, and can sit no more than 20 minutes at a time,  
8 and observed that even Plaintiff does not claim such limitations. Tr. 23-24. For example,  
9 Plaintiff testified that her headaches were rather minor when controlled by medication.  
10 Tr. 306, 309; *Warre ex rel. E.T. IV v. Comm'r Soc. Sec. Admin.*, 439 F.3d 1001, 1006  
11 (9th Cir. 2006) (finding that impairments that can be controlled effectively with treatment  
12 are not disabling). In addition, the ALJ noted that Plaintiff sat comfortably for more than  
13 20 minutes during the hearing. *Id.* at 24. The ALJ noted that no doctor has diagnosed  
14 Plaintiff with neurological abnormalities related to headaches, and that the medical  
15 evidence simply fails to show that Plaintiff's headaches result in more than a slight  
16 limitation on her activity. *Id.* at 24. The ALJ noted, for example, that Dr. Calderon's  
17 treatment notes indicate that Plaintiff's facial pain was "well-controlled" when properly  
18 medicated. Tr. 21, 408. The ALJ also noted that all three agency physicians who  
19 reviewed Plaintiff's medical record did not find Plaintiff nearly as limited as Mr.  
20 Mitchelson, and that Plaintiff's treatment records reflect only intermittent complaints of  
21 headaches. Tr. 21-24. Finally, the ALJ observed that Mr. Mitchelson is not a recognized  
22 medical source under Social Security guidelines. Tr. 24.

23 The Court concludes that the ALJ provided germane reasons for discounting Mr.  
24 Mitchelson's opinion, and that the reasons are supported by substantial evidence.

25 **C. Plaintiff's Subjective Testimony.**

26 Plaintiff testified that she has had difficulty lifting a gallon of milk since  
27 sustaining the gunshot wound, due to nerve damage in her hand. Tr. 35-36, 39-40. She  
28 testified that she suffered from daily migraine headaches that occasionally became so

1 severe that she needed to lie in a dark, quiet room for days at a time. Tr. 40-41. Plaintiff  
2 also testified of ongoing jaw pain that persisted despite the use of medication. Tr. 43-45.  
3 She also testified that she suffered from short-term memory loss, long-term memory loss,  
4 and blackouts that caused her to lose her train of thought mid-conversation. Tr. 37-38.  
5 She reported that she could only sit for 20 seconds before her legs went numb and that  
6 her neck started to burn if she sat for too long. Tr. 42. She testified that she could only  
7 stand for about 45 minutes at a time and walk for about four minutes. She indicated that  
8 she napped for about an hour every other day. Tr. 42-43.

9 The ALJ must engage in a two-step analysis to evaluate the credibility of a  
10 claimant's subjective testimony. "First, the ALJ must determine whether the claimant  
11 has presented objective medical evidence of an underlying impairment 'which could  
12 reasonably be expected to produce the pain or other symptoms alleged.'" *Lingenfelter v.*  
13 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,  
14 344 (9th Cir. 1991) (en banc)). If the claimant meets this first test, and there is no  
15 evidence of malingering, then the ALJ "can reject the claimant's testimony about the  
16 severity of her symptoms only by offering specific, clear and convincing reasons for  
17 doing so." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ may consider  
18 the following factors: the claimant's reputation for truthfulness, inconsistencies either in  
19 the claimant's testimony or between her testimony and her conduct, the claimant's daily  
20 activities, her work record, and testimony from physicians and third parties concerning  
21 the nature, severity, and effect of the symptoms of which claimant complains. *Thomas v.*  
22 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002) (citing *Light v. Soc. Sec. Admin.*, 119  
23 F.3d 789, 792 (9th Cir. 1997)).

24 At the first step, the ALJ found that "the claimant's medically determinable  
25 impairment could reasonably be expected to cause the alleged symptoms[.]" Tr. 20. At  
26 step two, however, the ALJ concluded that "the claimant's statements concerning the  
27 intensity, persistence and limiting effects of these symptoms are not credible[.]" *Id.* The  
28 ALJ canvassed objective medical evidence and opinions in the record to support this

1 conclusion. The ALJ juxtaposed Plaintiff's subjective testimony with consistently  
2 normal neurological findings (Tr. 222, 291, 325-38), the lack of diagnosed neurological  
3 abnormalities (Tr. 222, 291, 325-38), the conservative care that she received for facial  
4 pain and headaches (Tr. 365-71, 376-94, 408-09), and the fact that all three state agency  
5 physicians opined that Plaintiff suffered from no severe physical impairments and had no  
6 exertional limitations as a result of any of her impairments (Tr. 314-21, 325-34, 339-52).  
7 Tr. 21-24. The ALJ properly relied on these inconsistencies. See 20 C.F.R.  
8 § 404.1529(c)(4) (ALJ must consider conflicts between a claimant's statements and signs  
9 and laboratory findings); *Carmickle v. Comm'r, Soc. Sec. Admin.*, 553 F.3d 1155, 1161  
10 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient basis for rejecting  
11 the claimant's subjective testimony") (citation omitted). The ALJ also indicated that  
12 Plaintiff's statements made to treating providers were inconsistent with her subjective  
13 testimony. See 20 C.F.R. § 404.1529(c) (ALJ must evaluate credibility in light of  
14 inconsistencies in the record). For example, Plaintiff complained of headaches to  
15 treatment providers only intermittently, and her physician had noted that the pain was  
16 "well controlled." Tr. 21-22.

17 The Court concludes that the ALJ provided specific, clear and convincing reasons  
18 for discounting Plaintiff's testimony.

19 **D. Reliance on Medical-Vocational Guidelines.**

20 In some cases, it is appropriate for the ALJ to rely on the Medical-Vocational  
21 Guidelines to determine whether a claimant can perform some work that exists in  
22 "significant numbers" in the national economy. The Medical-Vocational Guidelines are a  
23 matrix system for handling claims that involve substantially uniform levels of  
24 impairment. See 20 C.F.R. pt. 404, subpt. P, app 2. The Guidelines present, in table  
25 form, a short-hand method for determining the availability and numbers of suitable jobs  
26 for a claimant. These tables are commonly known as "the grids." The grids are a  
27 matrices of the "four factors identified by Congress – physical ability, age, education, and  
28 work experience – and set forth rules that identify whether jobs requiring specific

1 combinations of these factors exist in significant numbers in the national economy.”  
2 *Heckler v. Campbell*, 461 U.S. 458, 461-62 (1983). “The Commissioner’s need for  
3 efficiency justifies use of the grids at step five where they *completely and accurately*  
4 represent a claimant’s limitations.” *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir.  
5 1999). “A non-exertional impairment, if sufficiently severe, may limit the claimant’s  
6 functional capacity in ways not contemplated by the guidelines. In such a case, the  
7 guidelines would be inapplicable.” *Id.* at 1102. “The fact that a non-exertional limitation  
8 is alleged does not automatically preclude application of the grids. The ALJ should first  
9 determine if a claimant’s non-exertional limitations significantly limit the range of work  
10 permitted by his exertional limitations.” *Id.* “[A] vocational expert is required only when  
11 there are significant and sufficiently severe non-exertional limitations not accounted for  
12 in the grid.” *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007).

13 Plaintiff claims that her non-exertional limitations associated with borderline  
14 intellectual functioning make reliance on the grids inappropriate. Doc. 17 at 9-10. It is  
15 not clear from Plaintiff’s brief what she believes is wrong about the ALJ’s reliance on the  
16 grids. It is possible that she asserts that medical source opinions contain additional non-  
17 exertional limitations that were not considered by the ALJ at step five. It is also possible  
18 that she asserts that the grids do not account for borderline intellectual functioning. The  
19 Court will consider both arguments.

20 To the extent Plaintiff asserts that the ALJ was required to consider additional  
21 non-exertional limitations contained in medical opinions at step five, the Court disagrees.  
22 The ALJ need consider only those limitations that are supported by the record. *Robbins*,  
23 466 F.3d at 886; *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005). The Court  
24 has explained above why the ALJ was justified in discounting the non-exertional  
25 limitations recommended by Mr. Mitchelson. Plaintiff argues that the opinions of Drs.  
26 Toro, Rabara, and Levinson include additional non-exertional limitations that should  
27 have been considered. Doc. 17 at 10. Plaintiff is incorrect. Dr. Toro concluded that  
28 Plaintiff had no exertional limitations, no postural limitations, no communicative

1 limitations, and no visual limitations. He opined, however, that Plaintiff was to avoid all  
2 exposure to workplace hazards due to her blackouts. Tr. 333. The ALJ concluded that  
3 the medical evidence did not require a RFC limitation for blackouts because the  
4 associated impairment was not severe. Tr. 23. The Court finds that this conclusion is  
5 supported by substantial evidence because no other physician found any evidence that  
6 Plaintiff suffered from such blackouts.

7 The Court finds that the opinions of Drs. Rabara and Levinson do not contain any  
8 non-exertional limitations not considered by the ALJ. The ALJ gave great weight to the  
9 opinions of Drs. Rabara and Levinson and based his RFC assessment on their opinions.  
10 Tr. 22-23. Although their medical opinions delve more deeply into the details of  
11 Plaintiff's limited intellectual capabilities, they are consistent with the ALJ's conclusion  
12 that Plaintiff can perform unskilled work. *See* 20 C.F.R. § 404.1568(a) ("Unskilled work  
13 is work which needs little or no judgment to do simple duties that can be learned on the  
14 job in a short period of time.").

15 To the extent that Plaintiff believes that the limitation of "unskilled labor" does  
16 not account for the non-exertional limitations the ALJ found to be supported by  
17 substantial evidence, she is incorrect. The limitation to "unskilled work" accounts for the  
18 non-exertional limitations – FSIQ of 70, extremely low processing speed, extremely low  
19 auditory memory, extremely low delayed memory, and a poor ability to acquire, retain,  
20 and retrieve knowledge – that Plaintiff suffers. *Cf. Hoopai v. Astrue*, 499 F.3d 1071,  
21 1076 (9th Cir. 2007). The ALJ could therefore properly rely on the grids notwithstanding  
22 Plaintiff's non-exertional limitations. *See Sorter v. Astrue*, 389 F. App'x 620, 623 (9th  
23 Cir. 2010) (noting that claimant's borderline intellectual functioning "would not affect  
24 the utility of the Grids, which . . . emphasize unskilled work that can be performed  
25 despite borderline intellectual functioning[.]").

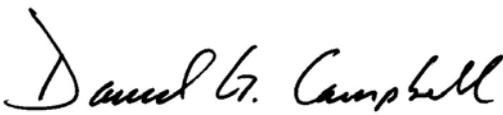
26 The Court concludes that the ALJ properly relied on the grids in determining that  
27 Plaintiff was not disabled.

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**IT IS ORDERED** that Plaintiff's motion (Doc. 17) is **denied**. The Clerk shall terminate this action.

Dated this 21st day of November, 2013.



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David G. Campbell  
United States District Judge