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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Micki Lynn Baldwin,

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CIV-13-01621-PHX-MHB

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Plaintiff,

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ORDER

11

vs.

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Carolyn W. Colvin, Commissioner of the
Social Security Administration,

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Defendant.

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Pending before the Court is Plaintiff Micki Baldwin’s appeal from the Social Security Administration’s final decision to deny her claim for disability insurance benefits. After reviewing the administrative record and the arguments of the parties, the Court now issues the following ruling.

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I. PROCEDURAL HISTORY

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On September 11, 2009, Plaintiff filed an application for a period of disability and disability insurance benefits alleging disability beginning February 20, 2009. (Transcript of Administrative Record (“Tr.”) at 12, 141.) Plaintiff’s claims were denied initially and on reconsideration. (Tr. at 64-79, 82-84.) Thereafter, Plaintiff requested a hearing before an administrative law judge, and a hearing was held on February 9, 2012. (Tr. at 30-63.) Afterwards, the ALJ issued a decision finding that Plaintiff was not disabled. (Tr. at 9-27.) The Appeals Council denied Plaintiff’s request for review, (Tr. at 1-5), making the ALJ’s decision the final decision of the Commissioner. This appeal followed.

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1 **II. STANDARD OF REVIEW**

2 The Court must affirm the ALJ’s findings if the findings are supported by substantial
3 evidence and are free from reversible legal error. See Reddick v. Chater, 157 F.3d 715, 720
4 (9th Cir. 1998); Marcia v. Sullivan, 900 F.2d 172, 174 (9th Cir. 1990). Substantial evidence
5 means “more than a mere scintilla” and “such relevant evidence as a reasonable mind might
6 accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401
7 (1971) (citation omitted); see Reddick, 157 F.3d at 720.

8 In determining whether substantial evidence supports a decision, the Court considers
9 the administrative record as a whole, weighing both the evidence that supports and the
10 evidence that detracts from the ALJ’s conclusion. See Reddick, 157 F.3d at 720. “The ALJ
11 is responsible for determining credibility, resolving conflicts in medical testimony, and for
12 resolving ambiguities.” Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995); see
13 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). “If the evidence can reasonably
14 support either affirming or reversing the [Commissioner’s] conclusion, the court may not
15 substitute its judgment for that of the [Commissioner].” Reddick, 157 F.3d at 720-21.

16 **III. THE ALJ’S FINDINGS**

17 In order to be eligible for disability or social security benefits, a claimant must
18 demonstrate an “inability to engage in any substantial gainful activity by reason of any
19 medically determinable physical or mental impairment which can be expected to result in
20 death or which has lasted or can be expected to last for a continuous period of not less than
21 12 months.” 42 U.S.C. § 423(d)(1)(A). An ALJ determines a claimant’s eligibility for
22 benefits by following a five-step sequential evaluation:

- 23 (1) determine whether the applicant is engaged in “substantial gainful activity”;
- 24 (2) determine whether the applicant has a medically severe impairment or
25 combination of impairments;
- 26 (3) determine whether the applicant’s impairment equals one of a number of listed
27 impairments that the Commissioner acknowledges as so severe as to preclude the
28 applicant from engaging in substantial gainful activity;

1 (4) if the applicant's impairment does not equal one of the listed impairments,
2 determine whether the applicant is capable of performing his or her past relevant
work;

3 (5) if the applicant is not capable of performing his or her past relevant work,
4 determine whether the applicant is able to perform other work in the national
economy in view of his age, education, and work experience.

5 See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987) (citing 20 C.F.R. §§ 404.1520,
6 416.920). At the fifth stage, the burden of proof shifts to the Commissioner to show that the
7 claimant can perform other substantial gainful work. See Penny v. Sullivan, 2 F.3d 953, 956
8 (9th Cir. 1993). The Commission must consider claimant's residual functional capacity and
9 vocational factors such as age, education, and past work experience. Id.

10 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
11 activity since February 20, 2009 – the alleged onset date. (Tr. at 14.) At step two, she found
12 that Plaintiff had the following severe impairments: Obesity (5'3" x 170 pounds), status post
13 cervical spine fusion, lumbar spine degenerative disc disease with mild stenosis, a depressive
14 disorder, and headaches. (Id.) The ALJ found that there was no objective medical evidence
15 on record of Plaintiff having a bone marrow diagnosis or any evidence to conclude that this
16 is a condition likely to even last 12 months or cause even minimal limitations on Plaintiff's
17 functioning. (Id.)

18 At step three, the ALJ stated that Plaintiff did not have an impairment or combination
19 of impairments that met or medically equaled an impairment listed in 20 C.F.R. Part 404,
20 Subpart P, Appendix 1 of the Commissioner's regulations. (Tr. at 14.) After consideration
21 of the entire record, the ALJ found that Plaintiff -

22 has the residual functional capacity to perform less than the full range of light
23 work as defined in 20 CFR 404.1567(b), with lifting and carrying to 20 pounds
24 occasionally and 10 pounds frequently, sitting, standing and walking to 6 out
25 of 8 hours per day, no climbing ladders, ropes or scaffolds, occasional
26 climbing ramps and stairs, frequent balancing, crouching, crawling, kneeling
and stooping, the need to avoid all exposure to hazardous heights and use of
moving machinery, with the mental capacity to perform simple, routine and
repetitive tasks, but without specification as to the number of steps required to
complete the task, only occasional interaction with the public, coworkers and
supervisors.

27 (Tr. at 16.)

1 The ALJ determined that Plaintiff was unable to perform any past relevant work, as
2 her past work as a caregiver was medium and semi skilled. (Tr. at 21.) The ALJ determined
3 that, “considering [Plaintiff]’s age, education, work experience, and residual functional
4 capacity, there are jobs that exist in significant numbers in the national economy that
5 [Plaintiff] can perform.” (Tr. at 22.)

6 Therefore, the ALJ concluded that Plaintiff has not been under a disability, as defined
7 in the Social Security Act, from February 20, 2009, through the date of her decision. (Tr. at
8 134.)

9 IV. DISCUSSION

10 In her brief, Plaintiff contends that the ALJ erred by: (1) erroneously rejecting treating
11 physician opinions, (2) misstating evidence to the detriment of Plaintiff, and (3) improperly
12 discrediting Plaintiff’s testimony. (Doc. 18.) Plaintiff requests that the Court remand for
13 determination of benefits.

14 A. Medical Source Opinion Evidence

15 Plaintiff contends that the ALJ erred by failing to properly weigh medical source
16 opinion evidence. Specifically, Plaintiff argues that the ALJ erred by rejecting Plaintiff’s
17 treating physicians Drs. Duncan and Smith, and giving “considerable weight” to the single
18 opinion of the “State agent,” Dr. Young. (Doc. 18, at 1-4.)

19 “The ALJ is responsible for resolving conflicts in the medical record.” Carmickle v.
20 Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008). Such conflicts may arise
21 between a treating physician’s medical opinion and other evidence in the claimant’s record.
22 In weighing medical source opinions in Social Security cases, the Ninth Circuit distinguishes
23 among three types of physicians: (1) treating physicians, who actually treat the claimant; (2)
24 examining physicians, who examine but do not treat the claimant; and (3) non-examining
25 physicians, who neither treat nor examine the claimant. See Lester v. Chater, 81 F.3d 821,
26 830 (9th Cir. 1995). A treating physician’s opinion is entitled to “substantial weight.” Bray
27 v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir. 2009) (quoting Embrey v.
28 Bowen, 849 F.2d 418, 422 (9th Cir. 1988)). A treating physician’s opinion is given

1 controlling weight when it is “well-supported by medically accepted clinical and laboratory
2 diagnostic techniques and is not inconsistent with the other substantial evidence in [the
3 claimant’s] case record.” 20 C.F.R. § 404.1527(d)(2). On the other hand, if a treating
4 physician’s opinion “is not well-supported” or “is inconsistent with other substantial
5 evidence in the record,” then it should not be given controlling weight. Orn v. Astrue, 495
6 F.3d 624, 631 (9th Cir. 2007) (citation omitted).

7 If a treating physician’s opinion is not contradicted by the opinion of another
8 physician, then the ALJ may discount the treating physician’s opinion only for “clear and
9 convincing” reasons. See Carmickle, 533 F.3d at 1164 (quoting Lester, 81 F.3d at 830-31).
10 If a treating physician’s opinion is contradicted by another physician’s opinion, then the ALJ
11 may reject the treating physician’s opinion if there are “specific and legitimate reasons that
12 are supported by substantial evidence in the record.” Id. (quoting Lester, 81 F.3d at 830).

13 Since the opinions of Drs. Duncan and Smith were contradicted by the examining and
14 reviewing doctors’ opinions, as well as other objective medical evidence, the specific and
15 legitimate standard applies.

16 Historically, the courts have recognized the following as specific, legitimate reasons
17 for disregarding a treating or examining physician’s opinion: conflicting medical evidence;
18 the absence of regular medical treatment during the alleged period of disability; the lack of
19 medical support for doctors’ reports based substantially on a claimant’s subjective complaints
20 of pain; and medical opinions that are brief, conclusory, and inadequately supported by
21 medical evidence. See, e.g., Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005); Flaten
22 v. Secretary of Health and Human Servs., 44 F.3d 1453, 1463-64 (9th Cir. 1995); Fair v.
23 Bowen, 885 F.2d 597, 604 (9th Cir. 1989).

24 Plaintiff began seeing Dr. Duncan as early as November, 2008, and had been treated
25 by Dr. Duncan for migraines since 2002. (Tr. at 268-69, 332.) In January, 2009, Dr. Duncan
26 reported that Plaintiff complained of neck and back pain, and that her pain had been
27 particularly worse over the last few months. (Tr. at 262.) Dr. Duncan reported that
28 Plaintiff’s “[s]traight leg raising” is negative bilateral,” and her knees and ankle strength is

1 “equal and strong bilaterally.” (Id.) A cervical spine examination indicated degenerative
2 changes in the mid cervical spine. (Tr. at 275.) An MRI revealed mild to moderate stenosis,
3 present in C5-5 and C5-6 disc spaces, and a left foraminal disc protrusion at C5-6. (Tr. at
4 270.) A complete thoracic spine series revealed, on February 10, 2009, mild thoracic
5 scoliosis and degenerative changes. (Tr. at 272.)

6 Dr. Duncan saw Plaintiff in a follow-up visit on February 20, 2009, and noted that
7 Plaintiff’s CT scan and x-ray revealed severe left foraminal stenosis at C5/6, the area of
8 Plaintiff’s most significant symptoms, and that she would be seeing a neurosurgeon in April
9 and getting a nerve condition study done. (Tr. at 261.) In March, 2009, Dr. Duncan saw
10 Plaintiff for a “follow-up” for her anxiety, and noted that Plaintiff was taking Xanax and had
11 started exercising recently, which had “helped her tremendously.” (Tr. at 260.) Dr. Duncan
12 recommended that Plaintiff continue her exercise, noting that it “might resolve all together
13 as long as she continues on her exercise program.” (Id.) In May, 2009, Dr. Duncan saw
14 Plaintiff for a follow-up, and reported that Plaintiff continues to have her pain in her neck
15 which goes down into her left shoulder and arm. (Tr. at 259.)

16 Plaintiff reported to Dr. Duncan during a visit on October 9, 2009, that she was
17 experiencing pain in her back that goes down her leg and causes her leg and foot to go numb
18 on the right side. (Tr. at 347.) Dr. Duncan noted that Plaintiff was palpably tender in the
19 spine, but that reflexes were intact, and strength was equal and strong bilaterally. (Id.) A
20 thoracic spine series found “very minimal spondylosis deformans [and] otherwise
21 unremarkable x-rays of the thoracic and lumbar spine for age,” and a “small left parasagittal
22 disc herniation at the T9-10 level, which exerts minimal mass effect upon the interior aspect
23 of the thoracic spinal cord.” (Tr. at 366-67.) Dr. Duncan reported on November 18, 2009,
24 that Plaintiff was on Soma at night and Hydrocodone during the daytime, and takes about six
25 pain pills a day. (Tr. at 246.)

26 On January 28, 2010, Dr. Duncan completed a headache questionnaire, and described
27 Plaintiff’s headaches as on averages “2-3 per month,” and 3-days in duration. (Tr. at 332.)
28 Dr. Duncan opined that the effect of Plaintiff’s headaches would result in an average of 12-

1 14 absences from work per month. (Id.) In a residual functional capacity questionnaire, Dr.
2 Duncan reported as extreme Plaintiff's limitations on ability to make judgments on simple
3 work-related decisions, to understand and remember detailed instructions, interact
4 appropriately with the public, supervisors or co-workers, respond appropriately to work
5 pressures in a usual work setting, and to changes in a routine work setting. (Tr. at 333-34.)
6 In support of his assessment, Dr. Duncan stated that Plaintiff "has classic symptomatology of
7 migraine, imaging studies have been negative which would be expected. Reacted to typical
8 migraine medications w/arterial constriction [and] chest pain. Managed suboptimally [with]
9 narcotics." (Id.) Nerve Conduction Study ordered by Dr. Duncan was determined to be
10 normal on February 24, 2009, although there were some signs reported of denervation of the
11 paraspinal muscles. (Tr. at 256.)

12 In a follow-up visit on March 19, 2010, Plaintiff reported having pain in her shoulder
13 and down the arm on the left side and some sensory deprivation of her left upper extremity.
14 (Tr. at 344.) In a well-woman examination on March 23, 2009, Plaintiff denied any current
15 migraine headaches. (Tr. at 343.) An MRI of the Plaintiff's brain on April 5, 2010, did not
16 reveal any masses or acute findings. (Tr. at 364.) On October 27, 2010, Plaintiff visited Dr.
17 Duncan after having re-injured her neck a few weeks before. (Tr. at 339.) Plaintiff reported
18 that she was "doing well" until a couple of weeks ago when she was "riding on her quad and
19 a dog ran out in front of her and she had to change directions very quickly" and she
20 "wrenched her neck." (Id.) Plaintiff reported increasing pain in her neck and increasing
21 weakness of her left upper extremity since her surgery (spinal fusion) in August, 2010. (Id.)
22 A follow-up x-ray and MRI of the cervical spine indicated that the C4-5 and C5-6 appeared
23 normal. (Tr. at 356, 358.)

24 On January 25, 2011, Plaintiff returned to Dr. Duncan for a follow-up, and reported
25 continuing radiculopathy in her left upper extremity with numbness and weakness and pain
26 in her neck and shoulder. (Tr. at 337.) Dr. Duncan noted that, other than the surgical fusion
27 of the discs, her cervical spine was normal. (Id.) Dr. Duncan suggests also that Plaintiff
28 "apply for social security disability," and states that "we will try to help her in any way

1 possible.” (Tr. at 337.) Plaintiff continued to report pain symptom to Dr. Duncan during
2 follow-up appointments on December 23, 2010, and May 10 and 19, 2011. (Tr. at 335, 336-
3 38.) Dr. Duncan reported on May 19, 2011 that Plaintiff has “profound physical limitations
4 and moderate to severe psychiatric impairment as well.” (Tr. at 335.)

5 Dr. Duncan completed a headache questionnaire and medical assessment of ability to
6 do work related activities on May 19, 2011. (Tr.at 369-72.) Dr. Duncan reported that in an
7 8-hour work day, Plaintiff can sit a total of 4 hours, and stand/walk a total of 2 hours, but that
8 Plaintiff could stand/walk for a single period of 10 minutes at a time. (Id.) Dr. Duncan
9 reported that Plaintiff can only lift or carry up to 5 pounds occasionally, never stoop or squat,
10 occasionally crawl, climb or reach, never or only occasionally use her left hands for simple
11 grasping, pushing/pulling or fine manipulation, never use her feet for repetitive movements.
12 (Id.) Dr. Duncan found that Plaintiff should be totally restricted from unprotected heights,
13 being around moving machinery, and driving automobile equipment, and should be
14 moderately restricted from exposure to dust, fumes, gasses, and marked changes in
15 temperature or humidity. (Id.) Dr. Duncan additionally limited Plaintiff’s activities due to
16 her pain and fatigue, which he rated as moderately severe. (Id.) In the headache
17 questionnaire, Dr. Duncan reported that Plaintiff’s migraines occurred two times weekly,
18 with a pain level of 7 to 8 out of 10, and that the headaches affect Plaintiff’s concentration,
19 attention, memory and capacity to work, and that, in his opinion, the effect of Plaintiff’s
20 headaches would result in her missing an average of more than 6 days of work per month.
21 (Id.)

22 Plaintiff sought chiropractic treatment on six occasions in March, 2010, for arm
23 numbness/pain, headaches, low back pain, vertigo and neck pain. (Tr. at 373-80.) During
24 her last visit, Bruce Weary, D.O., reported that Plaintiff appeared to be 40% improved, but
25 that she reported a worsening of her neck pain. (Tr. at 373.)

26 In December, 2011, Plaintiff was seen by Dr. Barranco at Barrow Neurological
27 Associates, post-op (spinal fusion surgery in August, 2010). (Tr. at 381-89.) Dr. Barranco
28 reported that Plaintiff advised that she was “doing extremely well,” and had no further pain

1 in her arms and neck. (Id.) Dr. Barranco noted that Plaintiff appeared healthy, alert and in
2 no acute distress, and was walking normal. (Id.) Plaintiff's motor strength in her upper
3 extremities was described as 5 out of 5, except for her left deltoid, which was described as
4 4 out of 5. (Id.) Dr. Barranco also noted that Plaintiff was not having any significant neck
5 pain or headaches. (Id.) In reviewing Plaintiff's MRI, Dr. Barranco found that Plaintiff had
6 "some minor age compatible degenerative changes" in her cervical spine, but "no significant
7 structural or mechanical cervical spine pathology." (Tr. at 405.)

8 Plaintiff moved to Montana and began seeing Donna Smith, D.O., at Northwest CHC
9 in August, 2011. (Tr. at 427.) Dr. Smith assessed Plaintiff with tobacco use disorder,
10 hypothyroidism, and myeloradiculitis. (Tr. at 428.) On August 15, 2011, Plaintiff saw Dr.
11 Hall, MD, at Northwest CHC, and reported significant increase in lower back pain since she
12 stopped taking oxycontin 5 days before. (Tr. at 424.) On August 17, 2011, an MRI of
13 Plaintiff's lumbar spine was performed to assess Plaintiff's symptoms of lower back pain and
14 numbness with weakness in her legs, and revealed that Plaintiff had mild stenosis at L4-5,
15 with borderline narrowing of the left lateral recess due to a combination of spondylosis and
16 a posterior central disc protrusion which showed mild interior extrusion of disc, and mild
17 fatty canal stenosis at L5-S1. (Tr. at 432.)

18 On August 18, 2011, Plaintiff saw Dr. Smith and reported that her chronic back pain
19 was worsening, and reported left side seat and leg numbness, and increasing left leg
20 weakness. (Tr. at 421.) Dr. Smith opined that Plaintiff was limited to lifting 5 pounds. (Tr.
21 at 422.) On September 22, 2011, Dr. Smith reported that neurologically Plaintiff's gait was
22 coordinated and even, although she maneuvered the exam table with difficulty, that her distal
23 strength and sensation were largely intact. (Tr. at 418.) On October 10, 2011, Plaintiff
24 reported to Dr. Smith that she hadn't had any depression episodes lately and had weaned
25 herself off of Prozac. (Tr. at 414.) Plaintiff also reported that she still had pain on a daily
26 basis but that it did not impair her ability to function. (Id.) Dr. Smith indicated that Plaintiff
27 did not have dizziness or headaches. (Tr. at 415.)

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1 On March 10, 2012, Dr. Smith completed a medical assessment of Plaintiff's ability
2 to do work-related activities. (Tr. at 451-53.) Dr. Smith reported that in an 8 hour work day,
3 Plaintiff can sit and stand/walk, respectively, for a total of less than one hour per day. (Id.)
4 Dr. Smith opined that Plaintiff could lift up to 5 pounds frequently, and 6-20 pounds
5 occasionally, that she can carry up to 10 pounds occasionally, and that she can occasionally
6 stoop, squat, crawl and reach. (Id.) Dr. Smith also indicated that Plaintiff can use her hands
7 frequently for simple grasping, and pushing/pulling of controls, but only occasionally for fine
8 manipulation. (Id.) Dr. Smith opined that Plaintiff can use both feet for repetitive
9 movements, and is totally restricted in activities involving unprotected heights, being around
10 moving machinery, exposure to dust, fumes, gases, and moderately restricted in activities
11 involving driving automobile equipment and exposure to marked changes in temperature or
12 humidity. (Id.) Dr. Smith rated Plaintiff's complaints of pain and fatigue as affecting her
13 ability to function as moderately severe. (Id.)

14 Ken Young, D.O., from the state agency examined Plaintiff on November 3, 2009.
15 (Tr. at 276.) Plaintiff's chief complaint to Dr. Young was pain involving her entire back, but
16 especially her cervical region and thoracic and lumbar area. (Id.) Plaintiff reported that she
17 was able to do the "light stuff" of daily living, but that her daughter had to help her with the
18 heavy stuff, such as lifting or sweeping. (Id.) Dr. Young reported that Plaintiff was able to
19 walk to the examination room without assistance, could sit comfortably, get off the exam
20 table, and take her shoes off and put them back on. (Tr. at 277.) He noted her gait was stiff
21 and almost spastic like. (Id.) Plaintiff could squat, but Dr. Young noted that there was
22 definitely imbalance and vertiginous behavior. (Tr. at 278.) Dr. Young noted that Plaintiff
23 did not use, and did not need an assistive device. (Id.) Dr. Young noted no weakness in
24 motor strength. (Id.) In his functional assessment, Dr. Young felt that Plaintiff's conditions
25 would impose limitations for 12 continuous months, but that she could stand/walk and sit for
26 6-8 hours, respectively, in a work day. (Tr. at 279.) Dr. Young opined that Plaintiff could
27 lift up to 20 pounds occasionally and 10 pounds frequently, that Plaintiff was unlimited in
28 her seeing, hearing and speaking capacity, and unrestricted in the activities of climbing,

1 stooping, kneeling, crouching, crawling, reaching, handling, fingering and feeling. (Tr. at
2 280.) Dr. Young found that Plaintiff should be restricted from working around heights and
3 moving machinery, mainly because of Plaintiff's imbalance and possible vertiginous
4 behavior. (Tr. at 281.) Radiological examination of Plaintiff's cervical spine took place on
5 November 3, 2009, with the radiologist finding mild degenerative spondylosis of the cervical
6 spine, and less than 5% levoscoliosis of the thoracic spine. (Tr. at 282-83.)

7 On December 3, 2009, psychologist Stephen Gill, Ph.D., examined Plaintiff at the
8 request of the state agency, and noted that, although Plaintiff reported depression and chronic
9 back pain, she reported being able to care for herself, cook, do light housework, go on
10 errands and shop, pay bills and handle money, drive her car, follow simple questions and
11 instructions, and read and write simple sentences. (Tr. at 286-87.) Dr. Gill diagnosed
12 Plaintiff as having depressive disorder, secondary to her degenerative disc disease, NOS.
13 (Tr. at 287.) He opined that Plaintiff has the ability to avoid hazards and exercise a degree
14 of social judgment, has limited skill in interacting with others, has distractions before her
15 which in certain instances interfere with her ability to concentrate, but that, in consideration
16 of her back pain, Plaintiff is able to learn a simple repetitive task and apply that task in an
17 appropriate set of circumstances. (Tr. at 288.)

18 In Plaintiff's activities of daily living, she reported being independent in self care,
19 does some cooking and some light household chores, and in social functioning, she reported
20 getting along well with family members and medical personnel, and picks up her grandson
21 from school. (Tr. at 224-231.) Plaintiff manages her own finances, does some shopping, can
22 sometimes drive, reads, and writes in a journal. (Id.) At her hearing, Plaintiff testified that
23 she is no longer driving due to her neck pain and left arm pain and weakness, and although
24 she benefitted from neck surgery, she re-injured her neck riding an all-terrain vehicle. (Tr.
25 at 38-40.) Plaintiff testified that, even with medication, she experiences 6/10 low back pain,
26 5/10 hip pain, and 6/10 knee pain, and that she experiences medication side effects including
27 poor memory, fatigue and nausea. (Tr. at 47-49.) Plaintiff also testified that she had not
28 been taking any medications for depression or anxiety for about six or seven months, but that

1 she intended to start mental health treatment eventually. (Tr. at 42-43.) She also testified
2 that her doctor had limited her to lifting 5 pounds or less. (Id.)

3 The state agency reviewing physicians, Jonathan Zuess, MD, and Kathleen Handal,
4 MD, completed their review on December 8, 2009. Dr. Zuess, a psychiatrist, noted Plaintiff
5 suffers from depressive disorder, NOS, and opined that she had mild limitation on restriction
6 of activities of daily living, difficulties in maintaining social functioning, and difficulties in
7 maintaining concentration, persistence or pace. (Tr. at 302.) In Dr. Zuess's mental residual
8 functional capacity assessment, he noted that Plaintiff was moderately limited in her ability
9 to remember locations and work-like procedures, in her ability to carry out detailed
10 instruction, in her ability to maintain attention and concentration for extended periods, in her
11 ability to complete a normal weekday and workweek without interruptions, and in her ability
12 to interact appropriately with the general public. (Tr. at 305-06.)

13 Dr. Handal diagnosed Plaintiff with C5-6 disc disorder, with a secondary diagnosis
14 as hypothyroid disorder. (Tr. at 309.) She limited Plaintiff to lifting/carrying up to 20
15 pounds occasionally, up to 10 pounds frequently, about 6 hours of standing and/or walking
16 during an 8-hour workday, and about 6 hours of sitting in an 8-hour workday. (Tr. at 310.)
17 She opined that Plaintiff could only occasionally climb stairs, and never balance. (Tr. at
18 311.) Dr. Handal found no manipulative, visual, or communicative limitations, and only
19 avoiding hazards as an environmental limitation. (Tr. at 313.)

20 In her evaluation of the objective medical evidence, the ALJ first addressed Dr.
21 Duncan's opinion that Plaintiff's pain and headaches prevented her from being able to work,
22 that she would miss over 6 days of work per month as a result of her impairments and
23 associated limitations, would be limited on standing and walking ten minutes at a time for
24 a total of four hours, could never fine manipulate with her left hand, drive, operate
25 machinery, and that she experienced moderately severe pain and fatigue. (Tr. at 19.) The
26 ALJ rejected Dr. Duncan's opinion because it was based upon the Plaintiff's subjective
27 complaints, and was not supported by his own objective and clinical or laboratory findings
28 or treatment notes. (Tr. at 19-20.) For instance, the ALJ observed that Dr. Duncan's

1 treatment notes do not show that Plaintiff has any restrictions on fine manipulation, and do
2 not provide any explanation for the extreme limits he imposes on Plaintiff's functional
3 capacity. (Tr. at 20.) With respect to mental health issues, the ALJ found that, as a primary
4 care physician, Dr. Duncan's opinions in that regard are outside his medical specialty. The
5 ALJ also noted that Dr. Duncan had expressed a sympathetic opinion on Plaintiff's functional
6 limitations and had indicated that he "[would] help her" with her SSI application process and
7 paperwork. (Id.) Dr. Duncan's treatment notes also reflected that he instructed Plaintiff to
8 follow-up as needed and that her condition was stable. (Id.)

9 The ALJ then rejected the opinion of Dr. Smith in her medical source statement dated
10 March 10, 2012, that Plaintiff could not sustain sedentary work activity, and had moderately
11 severe limitations associated with pain and fatigue, because Dr. Smith had only a short term
12 relationship with Plaintiff (less than 6 months), had based her opinion primarily on Plaintiff's
13 subjective complaints, and her opinion was conclusory with little explanation. (Tr. at 20.)
14 See, 20 C.F.R. §404.1527(c)(2)(i) (stating that an ALJ should consider whether a treating
15 source has seen a claimant "a number of times and long enough to have obtained a
16 longitudinal picture" of claimant's impairment).

17 The ALJ gave considerable weight to Dr. Young's opinion that Plaintiff could perform
18 a wide range of light work activity with limited exposure to heights and moving machinery,
19 based upon the objective nature of Dr. Young's exam and his consistency with the greater
20 objective record, however, the ALJ found for additional postural limitations. (Tr. at 20.)
21 The ALJ noted that Dr. Young had diagnosed pain complaints relating primarily to Plaintiff's
22 spine, with some minor loss of range of motion and some imbalance and vertiginous
23 behavior, and found that Plaintiff's gait was stiff and almost spastic. (Id.) The ALJ also
24 observed that Dr. Young found that Plaintiff could squat, that her motor was 5/5 throughout,
25 with no atrophy, weakness, that her cervical spine range of motion was decreased by 2-5
26 degrees in cervical rotation and lateral side mainly to the left, and that her paravertebral spine
27 exhibited general absence of muscle spasm, tenderness, crepitus, effusions or trigger points
28 noted. (Id.)

1 The ALJ gave greater weight to the opinion of Dr. Gill that Plaintiff retained the
2 mental capacity for simple, unskilled work, based on the objective nature of his evaluation
3 and his consistency with the greater objective record. (Tr. at 21.) The ALJ stated that the
4 treatment notes of record failed to controvert the assertion that Plaintiff can perform simply,
5 unskilled, repetitive tasks. (Id.)

6 The ALJ considered the opinions of the state agency’s reviewing physicians regarding
7 Plaintiff’s residual functional capacity and gave them greater weight because their opinions
8 were not inconsistent with the greater objective record, particularly regarding their finding
9 that Plaintiff could perform a wide range of light work activity with some postural and
10 environmental limitations, no more than mild to moderate mental limitations, with the ability
11 to perform simple, unskilled work with limited social contact in the workplace.

12 The Court finds that the ALJ properly weighed the medical source opinion evidence,
13 and gave specific and legitimate reasons, based on substantial evidence in the record, for
14 discounting the physicians and evidence which Plaintiff relies upon in her brief. The ALJ
15 discredited the various physicians’ assessments due to inconsistencies with Plaintiff’s
16 treatment record and the medical evidence as a whole. The ALJ also found that the opinions
17 were conclusory, lacked supporting clinical findings, and were based on Plaintiff’s own
18 subjective complaints. See, e.g., Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008)
19 (finding the incongruity between doctor’s questionnaire responses and her medical records
20 provides a specific and legitimate reason for rejecting the opinion); Connett v. Barnhart, 340
21 F.3d 871, 875 (9th Cir. 2003) (“We hold that the ALJ properly found that [the physician’s]
22 extensive conclusions regarding [the claimant’s] limitations are not supported by his own
23 treatment notes. Nowhere do his notes indicate reasons why [the physician would limit the
24 claimant to a particular level of exertion].”); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
25 Cir. 2001) (holding that the ALJ properly rejected a physician’s testimony because “it was
26 unsupported by rationale or treatment notes, and offered no objective medical findings to
27 support the existence of [the claimant’s] alleged conditions”); Morgan v. Comm’r Soc. Sec.
28 Admin., 169 F.3d 595, 602 (9th Cir. 1999) (citing Fair, 885 F.2d at 605) (An ALJ may reject

1 a treating physician’s opinion if it is based “to a large extent” on a claimant’s self-reports that
2 have been properly discounted as incredible.) Therefore, the Court finds no error.

3 **B. The ALJ’s Development of the Record**

4 Plaintiff argues that the ALJ erred by discounting Plaintiff’s assertion of a 5-pound
5 limitation in her lifting ability, finding no objective evidence of a bone marrow disorder, and
6 by not reading or reviewing the medical records of Drs. Duncan and Smith. (Doc. 18, at 10.)
7 The ALJ has a “duty to fully and fairly develop the record and to assure that the claimant’s
8 interests are considered.” Tonapetyan, 242 F.3d at 1150 (citing Smolen v. Chater, 80 F.3d
9 1273, 1288 (9th Cir. 1996)). However, “an ALJ’s duty to develop the record further is
10 triggered only when there is ambiguous evidence or when the record is inadequate for proper
11 evaluation of evidence.” Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001).
12 Ultimately, it is the plaintiff’s burden to prove that he or she is disabled. See id. at 459
13 (citing 42 U.S.C. § 423(d)(5) (Supp. 2001)).

14 Although Plaintiff asserted a 5-pound limitation, Dr. Smith had opined in March,
15 2012, that Plaintiff could occasionally lift up to 20 pounds. (Tr. at 451.) In addition, in a
16 follow-up appointment at Barrow Neurological Associates in December, 2011, after her
17 spinal fusion surgery, Dr. Barranco reported that Plaintiff reported she was doing extremely
18 well and had no further pain in her arms and neck, and assessed her motor strength in her
19 upper extremities as 5 out of 5, except for Plaintiff’s left deltoid, which Dr. Barranco
20 described as 4 out of 5. Thus, objective medical evidence supported the ALJ’s discounting
21 of Plaintiff’s reported limitation.

22 The ALJ also did not err in finding that the objective record did not support a finding
23 that Plaintiff suffered from a bone marrow disorder. Plaintiff asserts that Dr. Smith’s notes
24 reflected Plaintiff’s prior exposure to copper mines and nuclear testing. Although this noted
25 exposure is arguably insufficient to support a medical finding of bone marrow disorder, in
26 the end there was simply no evidence that, even if Plaintiff suffered from a bone marrow
27 disorder, that the condition was likely to last 12 months, or cause minimal functioning. The
28 ALJ did not therefore err in concluding that Plaintiff did not have the severe impairment of

1 bone marrow disorder. Plaintiff also complains that the ALJ failed to recognize her “C6
2 denervation.” (Doc. 18, at 10.) In fact, the ALJ found that Plaintiff had the severe
3 impairment of post cervical spine fusion, lumbar spine degenerative disc disease with mild
4 stenosis, and referenced extensively the medical findings relating to her reported neck and
5 back pain. (Tr. at 17-18.) It is also evident by the ALJ’s written analysis of the medical
6 records of Plaintiff’s treating physicians, that she reviewed the records of Drs. Duncan and
7 Smith. Thus, the ALJ did not err by failing to consider the medical objective evidence
8 relating to the condition of her spine.

9 **C. Plaintiff’s Subjective Complaints**

10 Plaintiff argues that the ALJ erred in rejecting her subjective complaints in the
11 absence of clear and convincing reasons for doing so.

12 If there is no evidence of malingering, “the ALJ can reject the claimant’s testimony
13 about the severity of her symptoms only by offering specific, clear and convincing reasons
14 for doing so.” Lingenfelter v. Astrue, 504 F.3d 1028, 1036-37 (9th Cir. 2007) (citations
15 omitted). The ALJ must identify “what testimony is not credible and what evidence
16 undermines the claimant’s complaints.” See Parra v. Astrue, 481 F.3d 742, 750 (9th Cir.
17 2007) (quoting Lester, 81 F.3d at 834).

18 In weighing a claimant’s credibility, the ALJ may consider many factors, including,
19 “(1) ordinary techniques of credibility evaluation, such as the claimant’s reputation for lying,
20 prior inconsistent statements concerning the symptoms, and other testimony by the claimant
21 that appears less than candid; (2) unexplained or inadequately explained failure to seek
22 treatment or to follow a prescribed course of treatment; and (3) the claimant’s daily
23 activities.” Smolen, 80 F.3d at 1284; see Orn, 495 F.3d at 637-39.¹ The ALJ also considers

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25 ¹ With respect to the claimant’s daily activities, the ALJ may reject a claimant’s
26 symptom testimony if the claimant is able to spend a substantial part of her day performing
27 household chores or other activities that are transferable to a work setting. See Fair, 885 F.2d
28 at 603. The Social Security Act, however, does not require that claimants be utterly
incapacitated to be eligible for benefits, and many home activities may not be easily
transferable to a work environment where it might be impossible to rest periodically or take

1 “the claimant’s work record and observations of treating and examining physicians and other
2 third parties regarding, among other matters, the nature, onset, duration, and frequency of the
3 claimant’s symptom; precipitating and aggravating factors; [and] functional restrictions
4 caused by the symptoms” Smolen, 80 F.3d at 1284 (citation omitted).

5 Plaintiff was represented by counsel at the 2012 administrative hearing. (Tr. at 12.)
6 She testified that she is not driving due to neck pain and left arm pain and weakness. (Tr. at
7 17.) She reported benefitting from neck surgery, but said that she re-injured her neck riding
8 an off-road all-terrain vehicle, and that, even with medication, she experiences 6/10 low back
9 pain, 5/10 hip pain, and 6/10 knee pain. Plaintiff testified that she experiences medication
10 side effects, to include poor memory, fatigue and nausea. (Id.)

11 With respect to daily living activities, the ALJ noted that Plaintiff has mild restriction,
12 is independent in self care, cooks, does household chores and watches her grandson. (Tr. at
13 15.) She reported mild difficulties with social functioning, gets along well with family
14 members and medical personnel, picks up her grandson from school, and is married. (Id.)
15 With respect to concentration, the ALJ noted that Plaintiff reported moderate difficulties, has
16 some limitations due to pain, but manages her own finances, shops, drives, reads, works on
17 word puzzles and keeps a journal. (Id.)

18 The ALJ concluded that “[Plaintiff]’s statements concerning the intensity, persistence
19 and limiting effects of these symptoms are not credible to the extent they are inconsistent
20 with the [] residual functional capacity assessment.” (Tr. at 132.) As the ALJ did not find
21 evidence of malingering, she can reject the plaintiff’s testimony about the severity of her
22 symptoms only by offering specific, clear and convincing reasons for doing so. Having
23 reviewed the record, the Court finds that the ALJ identified several clear and convincing
24 reasons supported by the record for discounting Plaintiff’s statements regarding her
25 limitations. In recounting what Plaintiff reported in her daily living activities and in her
26 testimony, the ALJ noted that, although Plaintiff claimed to have difficulty remembering

27
28 medication. See id.

1 spoken instructions, her daily activities indicate that she is able to remember and perform
2 simple tasks on a regular basis. (Tr. at 17.)

3 The ALJ found that the objective record did not support the alleged frequency nor
4 severity of Plaintiff's migraines, as Dr. Duncan's progress notes indicated that Plaintiff was
5 inconsistent in her reporting and at times denied current headaches, and noted fewer
6 headaches per month than Plaintiff asserted. (Tr. at 17.) The ALJ also noted that Plaintiff
7 did not report headaches to the consultive examiners, and that a magnetic resonance imaging
8 scan (MRI), performed in 2011, showed no abnormalities. (Id.)

9 The ALJ found that Plaintiff's complaints of chronic and disabling neck pain were not
10 supported by the objective record, noting that a 2009 cervical spine MRI revealed
11 degenerative changes with the most severe being left foraminal disc protrusion at C5-6, a
12 2009 nerve conduction study revealed predominantly normal findings, and 2009 spinal x-rays
13 showed less than 5% levoscoliosis of the thoracic spine and mild degenerative spondylosis
14 of the cervical spine. (Tr. at 18.) The ALJ stated that, thereafter, Plaintiff underwent
15 cervical decompression, fusion and plating at C4-5 and C5-6 in July 2010. (Id.) The ALJ
16 noted that Plaintiff did well postoperatively through October, 2010, and then reported a
17 return of neck pain. (Id.) The ALJ notes that subsequent MRI findings and neurological
18 findings are not consistent with Plaintiff's allegations of extreme pain and limitations. (Tr.
19 at 18.)

20 With respect to Plaintiff's complaints of debilitating back pain, the ALJ found that the
21 objective and clinical findings do not show any significant nerve root compression, noting
22 that an August, 2011, lumbar spine MRI showed mild stenosis, and that Plaintiff had reported
23 on October 20, 2011, that her pain did not impair her ability to function. (Tr. at 18.) The
24 ALJ found that, given Plaintiff's history of cervical fusion, cervical degenerative disc disease
25 and lumbar degenerative disc disease, she would be unable to lift and carry heavy weights,
26 but that this limitation was accommodated by the residual functional capacity. (Id.)

27 The ALJ also found that Plaintiff's reported medication side effects were not
28 supported by progress records and clinical laboratory findings. (Tr. at 18.) The ALJ noted

1 several other inconsistencies in the record, - Plaintiff testified her left hand was weak and had
2 atrophied, which the objective medical evidence did not support - Plaintiff's alleged
3 difficulties in fingering, handling or gripping were not demonstrated and inconsistent with
4 recent neurological examination showing a 4/5 muscle strength in the left upper extremity -
5 Plaintiff's gait is often described as coordinated, even and normal, and, - the medical records
6 fail to demonstrate that Plaintiff's use of a cane is medically necessary. (Id.)

7 Turning to Plaintiff's mental health, the ALJ noted that her treatment had been
8 infrequent with no history of psychiatric hospitalization, and that mental health progress
9 notes from May 2010 revealed that Plaintiff's mood was improved and that she was feeling
10 better, and that Plaintiff reported to her physician in October, 2011, that she had completely
11 weaned herself off of her depression medication. (Tr.at 19.) Also, Plaintiff had not resumed
12 her mental health treatment since her relocation to Montana. (Id.) The ALJ found that these
13 factors undermine the alleged severity of Plaintiff's mental health impairments. (Id.)

14 The ALJ also noted that Plaintiff had not cooperated fully in the development of her
15 claim, as her attorney had cancelled a scheduled consultative examination on April 14, 2010,
16 and did not provide a regulatory basis for refusal to attend the exam. (Tr. at 19.) The ALJ
17 stated that this did not bolster Plaintiff's credibility, because it demonstrates a lack of
18 cooperation in the development of her claim, and that Plaintiff ultimately bears the burden
19 of showing she is disabled. (Id.) Plaintiff argues that the ALJ's consideration of her lack of
20 cooperation in attending a consultative examination was not proper, as her attorney had
21 articulated reasons for cancelling the examination, and because Plaintiff did attend
22 consultative examinations on November 11 and 13, 2009. (Doc. 18, at 14.) A claimant's
23 lack of cooperation in consultive examinations may be considered by an ALJ in assessing
24 credibility. See, Tonapetyan v. Halter, 242 F.3d 1148 (9th Cir. 2001). Even if the ALJ had
25 improperly considered Plaintiff's lack of cooperation, as argued by Plaintiff, that error is
26 harmless, as the ALJ cited numerous other specific and cogent reasons for her adverse
27 credibility determination, and there was substantial evidence supporting her conclusion. See,
28 Carmickle v. Comm'r Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008) (ALJ's reliance

1 on two invalid reasons in making adverse credibility determination subject to harmless error
2 analysis).

3 In summary, the Court finds that the ALJ provided a sufficient basis to find Plaintiff's
4 allegations not entirely credible. While perhaps the individual factors, viewed in isolation,
5 are not sufficient to uphold the ALJ's decision to discredit Plaintiff's allegations, each factor
6 is relevant to the ALJ's overall analysis, and it was the cumulative effect of all the factors
7 that led to the ALJ's decision. The Court concludes that the ALJ has supported her decision
8 to discredit Plaintiff's allegations with specific, clear and convincing reasons and, therefore,
9 the Court finds no error.

10 **D. Conclusion**

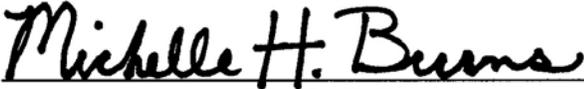
11 Substantial evidence supports the ALJ's decision to deny Plaintiff's claim for
12 disability insurance benefits in this case. Consequently, the ALJ's decision is affirmed.

13 Based upon the foregoing discussion,

14 **IT IS ORDERED** that the decision of the ALJ and the Commissioner of Social
15 Security be affirmed;

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

18 DATED this 10th day of September, 2014.

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20 _____
21 Michelle H. Burns
22 United States Magistrate Judge
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