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6                    IN THE UNITED STATES DISTRICT COURT  
7                    FOR THE DISTRICT OF ARIZONA

8  
9        Valerie Tipa,

10    Plaintiff,

11        v.

12        Carolyn W. Colvin, Acting Commissioner  
13        of Social Security,

14    Defendant.

No. CV-13-08293-PCT-DGC

**ORDER**

15  
16                    Plaintiff Valerie Tipa seeks review under 42 U.S.C. § 405(g) of the final decision  
17        of the Commissioner of Social Security (“the Commissioner”), which denied her  
18        disability insurance benefits and supplemental security income under sections 216(i) and  
19        223(d) of the Social Security Act. Because the decision of the Administrative Law Judge  
20        (“ALJ”) is supported by substantial evidence and is not based on legal error, the  
21        Commissioner’s decision will be affirmed.

22        **I.     Background.**

23                    On April 13, 2010, Plaintiff applied for disability insurance benefits and  
24        supplemental security income, alleging disability beginning April 4, 2008. On June 29,  
25        2012, she appeared with her attorney and testified at a hearing before the ALJ. A  
26        vocational expert (“VE”) also testified. On July 24, 2012, the ALJ issued a decision that  
27        Plaintiff was not disabled within the meaning of the Social Security Act. The Appeals  
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1 Council denied Plaintiff's request for review of the hearing decision, making the ALJ's  
2 decision the Commissioner's final decision.

### 3 **II. Legal Standard.**

4 The district court reviews only those issues raised by the party challenging the  
5 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The court  
6 may set aside the Commissioner's disability determination only if the determination is  
7 not supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d  
8 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a  
9 preponderance, and relevant evidence that a reasonable person might accept as adequate  
10 to support a conclusion considering the record as a whole. *Id.* In determining whether  
11 substantial evidence supports a decision, the court must consider the record as a whole  
12 and may not affirm simply by isolating a "specific quantum of supporting evidence." *Id.*  
13 As a general rule, "[w]here the evidence is susceptible to more than one rational  
14 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be  
15 upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

16 Harmless error principles apply in the Social Security Act context. *Molina v.*  
17 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains  
18 substantial evidence supporting the ALJ's decision and the error does not affect the  
19 ultimate nondisability determination. *Id.* The claimant usually bears the burden of  
20 showing that an error is harmful. *Id.* at 1111.

### 21 **III. The ALJ's Five-Step Evaluation Process.**

22 To determine whether a claimant is disabled for purposes of the Social Security  
23 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears  
24 the burden of proof on the first four steps, but at step five, the burden shifts to the  
25 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

26 At the first step, the ALJ determines whether the claimant is engaging in  
27 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
28 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant

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

13 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
14 the Social Security Act through December 31, 2013, and that she has not engaged in  
15 substantial gainful activity since April 4, 2008. At step two, the ALJ found that Plaintiff  
16 has the following severe impairments: lumbar back pain/degenerative disc disease status-  
17 post fusion surgery, obesity, and degenerative joint disease of the right hip. At step three,  
18 the ALJ determined that Plaintiff does not have an impairment or combination of  
19 impairments that meets or medically equals an impairment listed in Appendix 1 to  
20 Subpart P of 20 C.F.R. Pt. 404. At step four, the ALJ found that Plaintiff has the RFC to  
21 perform:

22 [S]edentary work as defined in 20 CFR 404.1567(a) with no  
23 climbing ladders, ropes, or scaffolds; no more than occasional  
24 balancing, stooping, crouching, kneeling, crawling, climbing  
25 ramps and stairs; and no concentrated exposure to excessive  
26 vibrations, moving machinery except motor vehicles, or  
unprotected heights.

27 The ALJ further found that Plaintiff is able to perform her past relevant work as a  
28 receptionist. At step five, the ALJ concluded that considering Plaintiff’s age, education,

1 work experience, and RFC, there are jobs that exist in significant numbers in the national  
2 economy that Plaintiff could perform.

#### 3 **IV. Analysis.**

4 Plaintiff argues that the ALJ “misconstrued” practically all of the relevant  
5 objective medical evidence and all of the subjective testimony. Plaintiff’s generalized  
6 arguments appear to boil down to an assertion that the ALJ’s decision is defective for  
7 three reasons: (1) the ALJ improperly weighed the opinions of Plaintiff’s treating  
8 physician and a consultative examiner; (2) the ALJ improperly evaluated Plaintiff’s  
9 credibility; and (3) the ALJ improperly determined that Plaintiff could perform her past  
10 relevant work. Plaintiff also argues that this matter should be assigned to a different ALJ  
11 if a remand is necessary because the ALJ assigned to her case is prejudiced against her.  
12 The Court will address each argument below.

##### 13 **A. Weighing of Medical Source Evidence.**

14 Plaintiff argues that the ALJ improperly weighed the medical opinions of the  
15 following medical sources: treating physician Katherine Metzger, D.O., and consultative  
16 examiner Mark Brecheisen, D.O. The Court will address the ALJ’s treatment of each  
17 opinion below.

##### 18 **1. Legal Standard.**

19 The Ninth Circuit distinguishes between the opinions of treating physicians,  
20 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
21 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
22 physician’s opinion and more weight to the opinion of an examining physician than to  
23 one of a non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th  
24 Cir. 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when  
25 evaluating opinion evidence, including length of examining or treating relationship,  
26 frequency of examination, consistency with the record, and support from objective  
27 evidence). If it is not contradicted by another doctor’s opinion, the opinion of a treating  
28 or examining physician can be rejected only for “clear and convincing” reasons. *Lester*,

1 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). A  
2 contradicted opinion of a treating or examining physician “can only be rejected for  
3 specific and legitimate reasons that are supported by substantial evidence in the record.”  
4 *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

5 An ALJ can meet the “specific and legitimate reasons” standard “by setting out a  
6 detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
7 interpretation thereof, and making findings.” *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th  
8 Cir. 1986). But “[t]he ALJ must do more than offer [her] conclusions. [She] must set  
9 forth [her] own interpretations and explain why they, rather than the doctors’, are  
10 correct.” *Embrey*, 849 F.2d at 421-22. The Commissioner is responsible for determining  
11 whether a claimant meets the statutory definition of disability and does not give  
12 significance to a statement by a medical source that the claimant is “disabled” or “unable  
13 to work.” 20 C.F.R. § 416.927(d).

## 14 **2. Katherine Metzger, D.O.**

15 Dr. Metzger completed a check-the-box form on May 21, 2012 offering the  
16 following opinions: Plaintiff could occasionally lift or carry ten pounds and could  
17 frequently lift or carry five pounds; Plaintiff could stand and/or walk four hours in a work  
18 day with the use of a cane; Plaintiff needs to alternate standing and sitting to avoid  
19 stiffening and pain; Plaintiff needs to elevate her legs two to three times per day because  
20 of swelling; Plaintiff could never climb, balance, stoop, kneel, crouch, or crawl; Plaintiff  
21 had no restrictions as to heights, noise, temperature extremes, chemicals, or dust; and  
22 Plaintiff should not be around moving machinery. A.R. 383-85. The ALJ accorded Dr.  
23 Metzger’s opinion “partial weight.” A.R. 17.

24 Dr. Metzger’s medical opinion was contradicted by the opinion of Dr. Brecheisen,  
25 who opined that Plaintiff had greater abilities than those identified by Dr. Metzger. The  
26 ALJ could therefore discount Dr. Metzger’s opinion for specific and legitimate reasons  
27 supported by substantial evidence. *Lester*, 81 F.3d at 830-31. The ALJ provided four  
28 reasons for according Dr. Metzger’s opinion partial weight.

1 First, the ALJ noted that Dr. Metzger's opinion assessed limitations from "5/8/12  
2 to present" and not from Plaintiff's alleged onset date. A.R. 17, 385. Dr. Metzger's  
3 opinion failed to meet the duration requirement because the assessed impairments had not  
4 lasted for a continuous period of at least 12 months and Dr. Metzger's opinion does not  
5 state that Plaintiff's limitations are expected to last for a continuous period of at least 12  
6 months. 20 C.F.R. § 404.1509.

7 Second, the ALJ concluded that Dr. Metzger's opinion was inconsistent with her  
8 own treatment notes. A.R. 17. The treatment notes included reports of "unremarkable  
9 examinations including no acute distress, ambulation without assistance, no neurological  
10 abnormalities, a normal range of motion in all areas, an unremarkable back including  
11 none-to-slight tenderness, and no edema." A.R. 15, 377-85. The mild impairments  
12 supported by Dr. Metzger's treatment notes are not consistent with the severe restrictions  
13 contained in her medical opinion. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th  
14 Cir. 2008) (incongruity between questionnaire responses and medical records provides a  
15 legitimate reason for discounting opinion).

16 Third, the ALJ found that the brevity of Dr. Metzger's treating relationship with  
17 Plaintiff strongly suggested that the limitations included in Dr. Metzger's opinion were  
18 "regurgitations of the claimant's self-report." A.R. 17. By the time Dr. Metzger filled  
19 out her check-the-box form, the treating relationship had lasted less than one month and  
20 Dr. Metzger had seen Plaintiff only one time. A.R. 381-85. The ALJ properly relied on  
21 the short duration of the treatment relationship to discount Dr. Metzger's opinion.  
22 *Benton v. Barnhart*, 331 F.3d 1030, 1038-39 (9th Cir. 2003) (finding the duration of the  
23 treatment relationship and the frequency and nature of the contact relevant in weighing  
24 medical opinion evidence). The ALJ's decision to discount Dr. Metzger's opinion is  
25 buttressed by Dr. Metzger's notation in her treatment notes that she "filled out the form  
26 for [Plaintiff's] lawyers" with Plaintiff's help. A.R. 379; *see Batson v. Comm'r of Soc.*  
27 *Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (stating that the ALJ could discount a  
28 treating physician's opinion because it was "based on [the claimant]'s subjective

1 descriptions of pain.”); *Benton*, 331 F.3d at 1038-39. The mild limitations and  
2 unremarkable findings made by Dr. Metzger further support the ALJ’s belief that Dr.  
3 Metzger’s medical opinion was based on Plaintiff’s self-report rather than on Dr.  
4 Metzger’s medical observations. A.R. 377-85.

5 Fourth, the ALJ asserted that Dr. Metzger’s opinion was inconsistent with reliable  
6 medical evidence of record. The ALJ based this assertion on two sources: (1) physical  
7 examinations performed by Dr. Metzger herself and described above, and (2) physical  
8 therapy records submitted by a therapist from whom Plaintiff received treatment  
9 following her surgery. A.R. 265-88. The physical therapy records include multiple  
10 clinical tests establishing Plaintiff’s range of motion, strength, reflexes, gait, mobility,  
11 and recuperation. The records also include multiple statements made and documents  
12 submitted by Plaintiff indicating that her pain had significantly abated, she relied less on  
13 her cane, she no longer wore her back brace, she could satisfactorily perform all of her  
14 tasks of daily living, and her mobility had improved. A.R. 266-67, 71-72. The records  
15 even contain a statement by Plaintiff asserting that she felt ready to return to work in an  
16 office position so long as she did not have to lift more than 20 pounds. A.R. 267, 272.  
17 *See Orn*, 495 F.3d 631 (explaining that consistency with the medical record as a whole is  
18 a relevant factor when evaluating a medical opinion).

19 Plaintiff argues that it was error for the ALJ to rely on records submitted by the  
20 physical therapist because the therapist is not an acceptable medical source as defined by  
21 Social Security Rulings. Doc. 13 at 8; SSR 06-03p. Plaintiff is incorrect. Although the  
22 therapist is not an “acceptable medical source” as defined by Ruling 06-03p, the ruling  
23 clearly indicates that the therapist is an “other source” from whom the ALJ may gather  
24 evidence that sheds light on the severity of Plaintiff’s impairments and how the  
25 impairments affect Plaintiff’s ability to function. Thus, the ALJ could rely on the  
26 physical therapist’s records to discount Dr. Metzger’s medical opinion. SSR 06-03p.

1           The ALJ relied on specific, legitimate, and permissible reasons to discount Dr.  
2 Metzger’s opinion, and those reasons are supported by substantial evidence. The Court  
3 concludes that the ALJ did not commit legal error.

4                           **3.     Mark Brecheisen, D.O.**

5           Plaintiff argues that the ALJ mischaracterized the report submitted by consultative  
6 examiner Mark Brecheisen, D.O., by stating that he opined that Plaintiff was capable of a  
7 sedentary lifting level of “no more than 10 pounds,” when Dr. Brecheisen actually found  
8 that Plaintiff was capable of “less than 10 pounds both occasionally and frequently.”  
9 Doc. 13 at 9-10. Plaintiff is correct that these two standards are different and that the  
10 ALJ incorrectly summarized Dr. Brecheisen’s finding. But this error had no impact on  
11 the ALJ’s ultimate decision because the ALJ discounted Dr. Brecheisen’s lifting  
12 requirement, noting that it was based on Plaintiff’s self-report. A.R. 16; *Batson*, 359 F.3d  
13 at 1195. The Court concludes, therefore, that the ALJ did not commit legal error.

14                           **B.     The ALJ Did Not Err in Evaluating Plaintiff’s Credibility.**

15           In evaluating the credibility of a claimant’s testimony regarding subjective pain or  
16 other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine  
17 whether the claimant presented objective medical evidence of an impairment that could  
18 reasonably be expected to produce some degree of the pain or other symptoms alleged;  
19 and, if so, and if there is no evidence of malingering, (2) reject the claimant’s testimony  
20 about the severity of the symptoms only by giving specific, clear, and convincing reasons  
21 for the rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

22           The ALJ complied with this two-step analysis. The ALJ first found that Plaintiff’s  
23 medically determinable impairments could reasonably be expected to cause the alleged  
24 symptoms. The ALJ then found Plaintiff’s statements regarding the intensity,  
25 persistence, and limiting effects of the symptoms not credible to the extent they are  
26 inconsistent with the ALJ’s residual functional capacity assessment. In other words, the  
27 ALJ found Plaintiff’s statements not credible to the extent she claims she is unable to  
28 perform in a competitive work environment.

1           At the hearing Plaintiff testified the she has not worked since April 2008, when  
2 she “herniated [her] back.” A.R. 33. Plaintiff stated that she uses a cane to walk at all  
3 times. A.R. 33-34. She asserted that she needs to recline and shift her weight when  
4 sitting and alternate between sitting and standing in order to alleviate her pain. A.R. 34,  
5 36. She testified the she experiences “excruciating” pain in her back and right hip that  
6 has worsened since her October 2008 back surgery and which is not alleviated with pain  
7 medication. A.R. 38, 41. Plaintiff testified that she experiences intensely painful muscle  
8 spasms in her legs a few times a day that prevent her from driving and require two hours  
9 or so of recovery time. A.R. 40-41. Plaintiff asserted that she has endured migraines  
10 three times a week since 2008, which last twelve hours and require her to “go to a dark  
11 room, put ice on [her] head, turn off the lights, [and hear] no sound.” A.R. 42-43. The  
12 only medication she has taken to combat her migraines is Tylenol. A.R. 43. She testified  
13 that her right kneecap pops out of place several times a week, requiring her to “push[] it  
14 back in.” A.R. 43-44. She stated that she can lift “maybe ten pounds.” A.R. 44. She  
15 asserted that she has trouble concentrating, which causes her to randomly forget what she  
16 was talking about or doing several times per day. A.R. 45. As to activities of daily  
17 living, Plaintiff testified that her disabled, quadriplegic husband does most of the  
18 housework and that she remains in her bed some days because of her pain. A.R. 45-46.  
19 At the hearing, Plaintiff’s attorney brought attention to the fact that Plaintiff elevated her  
20 legs on a second chair while she was testifying, used a cane, brought a “grabber” to the  
21 hearing in order to demonstrate that she could not stoop, and alternated between standing  
22 and sitting during her testimony.

23           The ALJ gave the following reasons for finding Plaintiff’s testimony not fully  
24 credible: (1) the objective medical evidence did not support Plaintiff’s allegations of total  
25 disability; (2) Plaintiff’s testimony was inconsistent with statements made to healthcare  
26 providers immediately after her surgery; (3) Plaintiff’s testimony about the intensity of  
27 her back and hip pain is not consistent with her failure to seek treatment for nearly two  
28 and a half years; (4) once Plaintiff did seek care for her pain, she received conservative

1 treatment and over-the-counter medication only; (5) Plaintiff's activities of daily living  
2 were inconsistent with her allegations of pain; (6) the record contains several inconsistent  
3 statements from Plaintiff regarding both her degree of limitations and other matters  
4 indirectly related to her functioning and overall credibility; and (7) Plaintiff's hearing  
5 testimony was exaggerated. A.R. 15-16. After carefully reviewing the record, the Court  
6 finds that each of the reasons cited by the ALJ for finding Plaintiff's testimony not fully  
7 credible is supported by substantial evidence in the record.

8 Plaintiff argues that the ALJ's assertion that her condition improved post-surgery  
9 is baseless. Doc. 13 at 10, 15-16. To the contrary, multiple relevant sources indicate that  
10 Plaintiff's mobility and level of pain improved over time after her surgery, including her  
11 physical therapist (A.R. 266-87) and a radiologist who found "less prominent" disc  
12 bulges and a decrease in right-sided narrowing when comparing an April 2012 MRI of  
13 Plaintiff's back to a March 2008 MRI (A.R. 374). Substantial evidence therefore  
14 supported that ALJ's assertion that Plaintiff's condition improved over time.

15 Plaintiff contends that the ALJ erred in finding her less credible based on the  
16 assertion that Plaintiff collected unemployment benefits after the alleged onset of her  
17 disability. Doc. 13 at 11. Plaintiff correctly observes that she failed to collect  
18 unemployment benefits during the relevant time period. A.R. 204-05. In addition, while  
19 there may be an inconsistency between Plaintiff's decision to file for unemployment  
20 benefits, which requires an attestation of Plaintiff's ability to work, and her decision to  
21 file for disability benefits, which requires an attestation of Plaintiff's inability to work,  
22 the record here does not establish whether Plaintiff held herself out as available for full-  
23 time or part-time work. Only the former is inconsistent with her disability allegations.  
24 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). Therefore,  
25 the ALJ's reliance on this potential inconsistency in discounting Plaintiff's credibility  
26 was error. Because the ALJ provided many other reasons for discounting Plaintiff's  
27 credibility, however, the Court concludes that the error was harmless.

28

1 Plaintiff asserts that the ALJ erred in finding that she only takes “over-the-counter  
2 pain medication.” Doc. 13 at 16. Plaintiff bases this assertion on the fact that she also  
3 takes multiple prescription medications, including Tramadol, Gabapentin, and Ropinirole.  
4 A.R. 245. While it is true that Plaintiff was prescribed these medications approximately  
5 three months prior to her hearing before the ALJ, throughout the majority of the relevant  
6 time period Plaintiff only reported taking over-the-counter medications for her pain.  
7 A.R. 226, 244, 245, 311, 349-50. Thus, while the ALJ’s statement is not entirely correct,  
8 it accurately captures the fact that Plaintiff medicated her “excruciating pain” with  
9 Tylenol and other over-the-counter pain medications until just before her administrative  
10 hearing.

11 Plaintiff contends that the ALJ erred by finding that Plaintiff used a cane that was  
12 not prescribed or medically necessary. Doc. 13 at 8-9. Plaintiff asserts that both Drs.  
13 Metzger and Brecheisen testified that the cane was prescribed and medically necessary.  
14 *Id.* Plaintiff is correct. A.R. 312, 384. This error, which eliminates the ALJ’s conclusion  
15 that Plaintiff used a cane that was not prescribed, does not render the ALJ’s other  
16 findings legally erroneous.

17 Plaintiff contends that it was error for the ALJ to discount her testimony based on  
18 contradictory evidence of her activities of daily living. Doc. 13 at 14. Plaintiff bases her  
19 contention on the existence of evidence in the record that tends to support her testimony  
20 regarding her activities of daily living. Plaintiff similarly contests the ALJ’s conclusions  
21 that Plaintiff engaged in physical exercise and that she made inconsistent statements  
22 regarding marijuana use during the administrative process because other evidence exists  
23 in the record supporting an alternate interpretation of the record. The Court may not,  
24 however, re-weigh the evidence. “If the ALJ’s finding is supported by substantial  
25 evidence, the court may not engage in second-guessing.” *Tommasetti*, 533 F.3d at 1039.  
26 The Court will not second-guess the ALJ’s conclusions because they are supported by  
27 substantial evidence.  
28

