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

8  
9 Susan Venezia,

No. CV-16-08020-PCT-NVW

10 Plaintiff,

**ORDER**

11 v.

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

14 Defendant.  
15

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

22 **I. BACKGROUND**

23 Plaintiff was born in October 1950. She completed the equivalent of a high school  
24 education. From 1985 to 2000, Plaintiff worked as a pharmacy assistant. From October  
25 2003 to July 2011, Plaintiff worked for Lowe’s, designing and selling kitchen and  
26 bathroom countertops and sinks. On March 25, 2010, she was hospitalized for a  
27 hemorrhagic stroke, secondary to hypertension. She was discharged on March 27, 2010,  
28 in stable condition. A physical therapy evaluation found no need for further physical

1 therapy or rehabilitation. At some point after her stroke, Plaintiff returned to work for  
2 approximately a year.

3 On July 25, 2011, Lowe's terminated Plaintiff's employment.<sup>1</sup> For the next year,  
4 she received unemployment compensation and sought work as a retail clerk. In 2014,  
5 Plaintiff testified that the most serious health problems affecting her ability to work are  
6 fibromyalgia, headaches, and osteoporosis.<sup>2</sup> She is able to drive, shop, manage money,  
7 prepare simple meals, wash dishes, manage personal care, feed pets, watch television,  
8 and use a computer and electronic tablet.

9 On December 28, 2011, Plaintiff applied for disability insurance benefits, alleging  
10 disability beginning July 25, 2011. On February 19, 2014, she appeared with her attorney  
11 and testified at a video hearing before the ALJ. A vocational expert also testified. On  
12 April 22, 2014, the ALJ issued a decision that Plaintiff was not disabled within the  
13 meaning of the Social Security Act. The Appeals Council denied Plaintiff's request for  
14 review of the hearing decision, making the ALJ's decision the Commissioner's final  
15 decision. On February 4, 2016, Plaintiff sought review by this Court.

## 16 **II. STANDARD OF REVIEW**

17 The district court reviews only those issues raised by the party challenging the  
18 ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). A court may  
19 set aside the Commissioner's disability determination only if the determination is not  
20 supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625,  
21 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a  
22 preponderance, and relevant evidence that a reasonable person might accept as adequate  
23 to support a conclusion considering the record as a whole. *Id.* Generally, when the  
24 evidence is susceptible to more than one rational interpretation, courts must uphold the

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25 <sup>1</sup> Plaintiff said she was terminated because she did not remember how to design  
26 kitchens correctly, but on another occasion she said she was terminated for arriving late  
27 to work.

28 <sup>2</sup> Although Plaintiff referred to osteoporosis, her attorney questioned her about  
symptoms she experienced due to osteoarthritis.

1 ALJ's findings if they are supported by inferences reasonably drawn from the record.  
2 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). "Overall, the standard of review  
3 is highly deferential." *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir.  
4 2015).

### 5 **III. FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

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

10 At the first step, the ALJ determines whether the claimant is engaging in  
11 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
12 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant  
13 has a severe medically determinable physical or mental impairment. § 404.1520(a)(4)(ii).  
14 If not, the claimant is not disabled and the inquiry ends. *Id.* At step three, the ALJ  
15 considers whether the claimant's impairment or combination of impairments meets or  
16 medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.  
17 § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled. *Id.* If  
18 not, the ALJ proceeds to step four. At step four, the ALJ assesses the claimant's residual  
19 functional capacity and determines whether the claimant is still capable of performing  
20 past relevant work. § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the  
21 inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where he determines  
22 whether the claimant can perform any other work based on the claimant's residual  
23 functional capacity, age, education, and work experience. § 404.1520(a)(4)(v). If so, the  
24 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

25 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
26 the Social Security Act through September 30, 2016, and that she has not engaged in  
27 substantial gainful activity since July 25, 2011, the alleged onset date. The ALJ also  
28 found that Plaintiff received unemployment compensation in the fourth quarter of 2011

1 and in all four quarters of 2012. The ALJ found this to be inconsistent with a claim for  
2 disability because a claimant must certify that she is physically and mentally able,  
3 willing, and available to work to be eligible for unemployment compensation.

4 At step two, the ALJ found that Plaintiff has the following medically determinable  
5 impairments: controlled hypertension, history of stroke March 25, 2010, migraines,  
6 asthma, obesity, borderline intellectual functioning, anxiety, and depression. The ALJ  
7 found that Plaintiff does not have an impairment or combination of impairments that has  
8 significantly limited (or is expected to significantly limit) her ability to perform basic  
9 work-related activities for 12 consecutive months. Therefore, at step two, the ALJ  
10 concluded that Plaintiff does not have a severe impairment or combination of  
11 impairments, and she is not disabled. By reaching this conclusion at step two, the ALJ  
12 was not required to assess Plaintiff's residual functional capacity, determine whether she  
13 is still capable of performing past relevant work, or determine whether Plaintiff has skills  
14 that are transferable to other work.

#### 15 **IV. ANALYSIS**

16 At step two, the ALJ was required to determine whether Plaintiff has a severe  
17 medically determinable physical or mental impairment. An impairment or combination  
18 of impairments is not severe if it does not significantly limit a claimant's physical or  
19 mental ability to do basic work activities. 20 C.F.R. § 404.1521(a). "Basic work  
20 activities" means the abilities and aptitudes to do most jobs, such as walking, standing,  
21 sitting, seeing, hearing, etc. 20 C.F.R. § 404.1521(b). At step two, Plaintiff had the  
22 burden of proving she has impairments that significantly limit her ability to do basic work  
23 activities.

24 Plaintiff contends that the evidence of record shows that her stroke, migraines,  
25 asthma, obesity, borderline intellectual functioning, anxiety, and depression significantly  
26 limit her ability to perform basic work activities. She further contends that the ALJ  
27 abused his discretion in concluding Plaintiff does not have a severe impairment or  
28

1 combination of impairments because he erred in weighing medical source opinion  
2 evidence, assessing Plaintiff's credibility, and weighing third-party reports.

3 **A. The ALJ Did Not Err in Weighing Medical Source Opinion Evidence.**

4 **1. Legal Standard**

5 Generally, more weight should be given to the opinion of a treating physician than  
6 to the opinions of physicians who do not treat the claimant, and the weight afforded a  
7 non-examining physician's opinion depends on the extent to which he provides  
8 supporting explanations for his opinions. *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th  
9 Cir. 2014). Where a treating physician's opinion is not contradicted by another  
10 physician, it may be rejected only for "clear and convincing" reasons, and where it is  
11 contradicted, it may not be rejected without "specific and legitimate reasons" supported  
12 by substantial evidence in the record. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

13 In deciding weight to give any medical opinion, the ALJ considers not only  
14 whether the source has a treating or examining relationship with the claimant, but also  
15 whether the treatment or examination is related to the alleged disability, the length of the  
16 relationship, frequency of examination, supporting evidence provided by the source, and  
17 medical specialization of the source. 20 C.F.R. § 404.1527(c). Generally, more weight is  
18 given to the opinion of a specialist about medical issues related to his area of specialty  
19 than to the opinion of a source who is not a specialist. 20 C.F.R. § 404.1527(c)(5). The  
20 ALJ may discount a physician's opinion that is based only the claimant's subjective  
21 complaints without objective evidence. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
22 1190, 1195 (9th Cir. 2004). The opinion of any physician, including that of a treating  
23 physician, need not be accepted "if that opinion is brief, conclusory, and inadequately  
24 supported by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,  
25 1228 (9th Cir. 2009).

26 **2. Treating Psychiatrist Katherine Cheeves, M.D.**

27 Plaintiff contends she has severe mental impairment due to her stroke on March  
28 25, 2010, and by her anxiety and depression. Dr. Cheeves' responses on the October 5,

1 2012 Mental Impairment Questionnaire, which covered the period from 2011 to October  
2 5, 2012, are inconsistent with her treatment notes. On March 31, 2011, Dr. Cheeves  
3 noted that Plaintiff reported she was doing well, was tolerating full-time employment,  
4 and maintaining good concentration and stress tolerance. Dr. Cheeves observed Plaintiff  
5 had organized thoughts and good concentration and attention. On June 9, 2011, Dr.  
6 Cheeves observed that Plaintiff was alert, had good concentration, and had good work  
7 functioning. Plaintiff reported feeling well. On September 16, 2011, Dr. Cheeves noted  
8 that Plaintiff was coping with job loss, her anxiety/depression symptoms had increased,  
9 and she was unable to afford medication without insurance coverage. Dr. Cheeves also  
10 noted that Plaintiff had decreased concentration, had lost ability to concentrate on reading  
11 for a period, and now was reading again. On November 4, 2011, Dr. Cheeves noted that  
12 Plaintiff was generally feeling well and her prescribed medication was effective with no  
13 side effects. On February 3, 2012, Dr. Cheeves reported Plaintiff had not been feeling as  
14 well in the last month after a prolonged upper respiratory infection, her mood had been  
15 variable depending on continued stressors, and her affect was “a bit restricted.” At each  
16 of these office visits, Plaintiff demonstrated adequate insight and judgment. At each  
17 office visit except for February 3, 2012, Dr. Cheeves reported Plaintiff’s affect as  
18 euthymic, *i.e.*, normal, non-depressed, reasonably positive.

19 The ALJ did not err by considering and giving little weight to Dr. Cheeves’  
20 October 5, 2012 Mental Impairment Questionnaire. On the Questionnaire, Dr. Cheeves  
21 described Plaintiff’s symptoms as poor energy, limited concentration because of anxiety,  
22 rapid mood changes, and poor stress tolerance. Dr. Cheeves opined that Plaintiff’s  
23 psychiatric symptoms exacerbated her chronic pain symptoms, and her impairments  
24 would cause Plaintiff to be absent from work more than three times per month. The form  
25 listed 25 work-related mental abilities and aptitudes and requested an explanation with  
26 medical/clinical findings for each ability or aptitude rated fair or poor. Dr. Cheeves rated  
27 Plaintiff as fair or poor on 24 of the 25 items and gave only the following general  
28 explanation: “associated/secondary to clinical depression/stroke.” Dr. Cheeves opined

1 that Plaintiff had marked restriction of activities of daily living, marked difficulties in  
2 maintaining social functioning, frequent deficiencies of concentration, and three or more  
3 episodes of deterioration or decompensation in work or work-like settings. However, Dr.  
4 Cheeves opined that Plaintiff does not have a low I.Q. or reduced intellectual functioning.

5 The ALJ provided clear and convincing reasons for giving little weight to Dr.  
6 Cheeves' opinion. He found that Dr. Cheeves' opinion is inconsistent with her treatment  
7 notes and the entire record of evidence. Dr. Cheeves' opinion stated Plaintiff had three or  
8 more episodes of deterioration or decompensation, yet Dr. Cheeves had not documented  
9 any psychiatric hospitalization. The ALJ also found that Dr. Cheeves' treatment notes  
10 are consistent with his findings. Dr. Cheeves' treatment notes showed that Plaintiff  
11 received routine and conservative mental health treatment and reported feeling better  
12 with her prescription medications. Further, the record showed no evidence that Plaintiff  
13 was restricted in activities of daily living, social functioning, or concentration, or had  
14 experienced periods of decompensation of extended duration.

### 15 **3. Psychological Consultative Examiner Shannon Tromp, Ph.D.**

16 The ALJ gave some weight to Dr. Tromp's opinion. He did not give her opinion  
17 full weight because it relies on Plaintiff's subjective allegations rather than Dr. Tromp's  
18 examination findings and is inconsistent with the objective record. Dr. Tromp assessed  
19 Plaintiff's affect as cheerful and animated, her memory fair, her attention and  
20 concentration good, comprehension fair, her estimated intellect low average, and her  
21 judgment and insight good. Dr. Tromp said that Plaintiff reported depression and anxiety  
22 but did not manifest those symptoms during the examination. Dr. Tromp opined that  
23 Plaintiff's childlike grammar during the interview likely was a decline from her speech  
24 before the stroke because she must have had better language skills to work as a kitchen  
25 designer at Lowe's. Dr. Tromp observed mild deficits with "speech, memory and  
26 perhaps with adhering to a schedule." She observed no problems with sustained  
27 concentration and persistence, social interaction, or adapting to change. Dr. Tromp did  
28 not find Plaintiff has severe impairments.

1           Therefore, the ALJ did not err in weighing medical source opinion evidence.

2           **B.     The ALJ Provided Clear and Convincing Reasons for Discrediting**  
3           **Plaintiff's Symptom Testimony.**

4           If a claimant's statements about pain or other symptoms are not substantiated by  
5           objective medical evidence, the ALJ must consider all of the evidence in the case record,  
6           including any statement by the claimant and other persons, concerning the claimant's  
7           symptoms. SSR96-7p. The ALJ must consider all of the evidence presented, including  
8           the claimant's daily activities; the location, duration, frequency, and intensity of the pain  
9           or other symptoms; factors that precipitate and aggravate the symptoms; effectiveness  
10          and side effects of any medication taken to alleviate pain or other symptoms; treatment  
11          other than medication; any measures other than treatment the claimant uses to relieve  
12          pain or other symptoms; and any other factors concerning the claimant's functional  
13          limitations and restrictions due to pain or other symptoms. *Id.* Then the ALJ must make  
14          a finding on the credibility of the claimant's statements about symptoms and their  
15          functional effects. *Id.*

16          In evaluating the credibility of a claimant's testimony regarding subjective pain or  
17          other symptoms, the ALJ is required to engage in a two-step analysis: (1) determine  
18          whether the claimant presented objective medical evidence of an impairment that could  
19          reasonably be expected to produce some degree of the pain or other symptoms alleged;  
20          and, if so with no evidence of malingering, (2) reject the claimant's testimony about the  
21          severity of the symptoms only by giving specific, clear, and convincing reasons for the  
22          rejection. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). In making a credibility  
23          determination, an ALJ "may not reject a claimant's subjective complaints based solely on  
24          a lack of objective medical evidence to fully corroborate the claimant's allegations."  
25          *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (internal  
26          quotation marks and citation omitted). But "an ALJ may weigh inconsistencies between  
27          the claimant's testimony and his or her conduct, daily activities, and work record, among  
28          other factors." *Id.*



1           The ALJ summarized Plaintiff's testimony and reports as claiming that her  
2 impairments cause difficulty with exertional and nonexertional, postural, mental, and  
3 daily activities; difficulty with experiencing numbness, thinking and speaking, hearing,  
4 sleeping, panic attacks, concentrating, isolating at home, and working; dyslexia; panic  
5 attacks four or five times a week; crying spells four times a month; and day-long  
6 headaches three or four times a week causing blurred vision. The ALJ found Plaintiff's  
7 allegations are not fully credible because they are inconsistent with her ability to  
8 participate in numerous activities. The ALJ noted that Plaintiff acknowledged she is  
9 capable of washing dishes, taking a shower, reading, doing brain games, using a  
10 computer, watching television, feeding pets, performing personal care, preparing simple  
11 meals, light dusting, washing dishes, driving a car, shopping in stores, talking on the  
12 telephone, walking short distances, and following written instructions. The ALJ also  
13 noted that Plaintiff's allegations of impairment are inconsistent with the medical evidence  
14 of record.

15           Therefore, the ALJ did not err in finding Plaintiff's subjective symptom testimony  
16 less than fully credible.

17           **C.     The ALJ Did Not Err in Weighing Third-Party Reports.**

18           Plaintiff contends that the ALJ committed legal error by discounting third-party  
19 reports. When an ALJ discounts the testimony of lay witnesses, he must give reasons  
20 that are germane to each witness. *Valentine v. Comm'r of Soc. Sec.*, 574 F.3d 685, 693-  
21 94 (9th Cir. 2009).

22           The ALJ considered third-party function reports submitted by Plaintiff's daughter  
23 and granddaughter and found them credible only to the extent they were consistent with  
24 the ALJ's findings based on other evidence. On April 4, 2012, Plaintiff's daughter  
25 reported that Plaintiff's daily activities were: "picks up house, feed cat, watch TV, takes  
26 walk (short), reads." Plaintiff's daughter also reported that Plaintiff was able to prepare  
27 sandwiches, soups, and frozen dinners, do house chores, drive, shop for groceries, go out  
28 alone, pay bills, count change, and use a checkbook. Plaintiff's daughter reported that

1 Plaintiff can understand instructions but gets confused, has trouble concentrating, and has  
2 panic attacks. She also reported that Plaintiff reads, watches television, and plays “brain  
3 games” on an electronic tablet every day, and her reading was improving.

4 On January 15, 2013, Plaintiff’s granddaughter reported that Plaintiff’s daily  
5 activities were: “reads, watches television, talks on the phone, plays games for the brain  
6 on the computer.” Plaintiff’s granddaughter also reported that Plaintiff was able to  
7 prepare microwavable food items, crock pot dinners, soups, and simple sandwiches.  
8 Plaintiff’s granddaughter said Plaintiff cannot cook and bake because she cannot stand  
9 for long periods. Plaintiff’s granddaughter reported Plaintiff can pay bills, count change,  
10 use a checkbook, drive, and understand written instructions, but does not remember  
11 spoken instructions. Plaintiff’s granddaughter also reported that Plaintiff fears leaving  
12 her home and does not handle stress well.

13 The ALJ gave reasons germane to the reports of Plaintiff’s daughter and  
14 granddaughter for discounting those reports. The ALJ found that Plaintiff’s daughter and  
15 granddaughter made allegations similar to those made by Plaintiff, which he found not  
16 fully credible. The ALJ generally observed that lay opinions are less persuasive than the  
17 opinions of medical professionals and the opinions of family members are not unbiased.  
18 The ALJ specifically found that the opinions of Plaintiff’s daughter and granddaughter  
19 are not supported by the clinical or diagnostic medical evidence in the record.

20 In addition, Plaintiff contends the ALJ erred by giving unstated weight to  
21 statements by Defendant’s field office worker and Plaintiff’s former employer.  
22 Defendant’s field officer worker interviewed Plaintiff by telephone and observed that she  
23 had no difficulty with hearing, reading, breathing, understanding, coherency,  
24 concentrating, and talking, but some difficulty answering. He stated that it took her a few  
25 minutes to remember some dates, but “other than that seems ok.” Defendant’s field  
26 office worker’s observations do not support finding Plaintiff is disabled.

1 Plaintiff's employment records include documentation of "mid-year conversation  
2 comments" dated August 5, 2010, which appears to be the equivalent of a performance  
3 review. Under various categories, Plaintiff's supervisor wrote the following comments:

4 Sue is excellent with her customers but she is frequently giving incorrect  
5 information on product and services to the customers. I expect better  
6 productivity and efficiency in 2011.

7 Sue is engaged with the customers and she is very friendly and personable  
8 with all of them.

9 Sue is good at getting vendors in to fix and put up new displays. I would  
10 like to see more department display maintenance from Sue in 2011, i.e.,  
11 cleaning, replacing bulbs, etc.

12 Sue is great with the customers that come to her. She needs to actively seek  
13 her customers. I think Sue would capitalize on a lot of sales if she was  
14 more proactive with the selling process. I feel that Sue does what is needed  
15 day to day and does not go above and beyond to ensure maximized sales.

16 Again, Sue is very engaged with the customers that come to her. I believe  
17 that she does build a good relationship with her customers. She does need  
18 to improve on her resolution of issues in 2011.

19 Sue is extremely knowledgeable with all of the product in cabinets and  
20 countertops. She is familiar with all of the services as well but I would like  
21 to see improvement on credit, SOS, and installs in 2011.

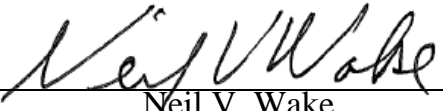
22 Sue is great with her customers but she is continuously having  
23 communication issues with either the installer, customers, or vendors which  
24 cause issues and unhappy customers. She needs to take more time and pay  
25 more attention to detail in the selling process so we don't have mistakes  
26 and issues to resolve.

27 Plaintiff's supervisor's comments do not support finding Plaintiff is disabled.

28 In summary, the ALJ did not err in weighing third-party reports by Plaintiff's  
daughter and granddaughter. To the extent the ALJ should have stated the weight he  
gave to the statements by Defendant's field office worker and Plaintiff's former  
employer, any such error is harmless because they do not support finding Plaintiff is  
disabled.

1 IT IS THEREFORE ORDERED that the final decision of the Commissioner of  
2 Social Security is affirmed. The Clerk shall enter judgment accordingly and shall  
3 terminate this case.

4 Dated this 12th day of December, 2016.

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8 Neil V. Wake  
9 Senior United States District Judge  
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