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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CYNTHIA G. YACKS,

Plaintiff,

vs.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

NO. CV 07-280-TUC-RCC (BPV)

REPORT AND RECOMMENDATION

Plaintiff filed this action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. §§ 405(g). The case has been referred to the United States Magistrate Judge pursuant to the Rules of Practice of this Court.

Pending before the Court is a Motion for Summary Judgment filed by Plaintiff on January 15, 2008 (Doc. No. 10), a Responsive Brief in Opposition to Plaintiff’s Motion for Summary Judgment (Doc. No. 13) filed by Defendant on February 12, 2008, and a Reply to Defendant’s Responsive Brief in Opposition to Plaintiff’s Motion for Summary Judgment (Doc. No. 17), filed on March 31, 2008. For the following reasons, the Magistrate Judge recommends that the ALJ’s decision be reversed and the matter remanded for further proceedings consistent with this report.

I. PROCEDURAL HISTORY

Plaintiff filed an Application for Social Security Disability Insurance Benefits (“SSDIB”) under Title II of the Social Security Act (“SSA”) on December 10, 2003, alleging that she had suffered from a disability since August 2003. (Transcript/Administrative Record

1 (“Tr.”) 65-67) Plaintiff alleged she was disabled due to injuries suffered in an industrial
2 incident in 2003, which resulted in a head and neck injury, neck and back pain, and the
3 inability to hold objects. (Tr. 75)

4 The Social Security Administration (SSA) denied Plaintiff's Application initially, and
5 on reconsideration. (Tr. 37-43, 49-51) Plaintiff requested review (Tr. 52) and on September
6 19, 2005, appeared with counsel, and testified at a hearing before Administrative Law Judge
7 (“ALJ”) Milan Dostal. (Tr. 305-352). Michael Yacks, Plaintiff’s husband, and a vocational
8 expert, also testified at the hearing. (Tr. 28-32) The ALJ found Plaintiff was not disabled.
9 (Tr. 18-29) Plaintiff requested review of the decision by the Social Security Administration’s
10 Appeals Council. (Tr. 14) The Appeals Council denied review on April 19, 2007, making
11 the decision of the ALJ the final decision of the Commissioner. (Tr. 5-7) *See* 20 C.F.R. §§
12 404.981. Plaintiff timely filed the instant Complaint in U.S. District Court appealing the
13 Commissioner's final decision (Doc. No. 1).

14 **II. THE COMMISSIONER'S DECISION AND EVIDENCE PRESENTED**

15 A. Plaintiff's Education and Work History

16 Plaintiff was born on November 30, 1961, and was forty-four years old on the ALJ’s
17 decision date. (Tr. 21, 65) She obtained a GED and completed about a year and a half of
18 college. (Tr. 81, 310) Plaintiff's past relevant work consists of floor sales at Wal-Mart,
19 nurses aid in a nursing home, bartending and waitressing, floor sales at Home Depot,
20 cashiering and managing at a store and gas station, sales in a women’s clothing store, and
21 working for Washington Mutual as a home loan clerk. (Tr. 76)

22 B. Plaintiff's Testimony

23 On September 19, 2005, Plaintiff appeared before ALJ Dostal, with an attorney
24 representative. (Tr. 305-52) Exhibits 1A -10F were admitted into evidence. (Tr. 307)
25 Plaintiff testified that the last work she did was as at Home Depot in the design center. (Tr.
26 312) Plaintiff did not have to lift anything more than 20 pounds at Home Depot by herself.
27 (Tr. 313) Prior to Home Depot, Plaintiff worked at Washington Mutual for a few months
28 working with customers directly “straightening out” home loans on the phone. (Tr. 313)

1 Prior to that she managed gas stations acting as cashier/manager. (Tr. 315) Before that, she
2 worked in a consignment clothing store marking and selling clothes. (Tr. 317)

3 Plaintiff testified that she has pain in her upper back mostly, down her arms, and then
4 in the last year, in her hips and lower back. (Tr. 320) Plaintiff testified that on a daily basis
5 she takes her medications, gets out of bed to use the bathroom, and gets back in bed and
6 watches six or seven hours of TV a day. (Tr. 322) She approximates that she spends 22-24
7 hours a day in her room on her bed. (Tr. 324) She doesn't drive and turned in her driver's
8 license when she couldn't turn her head all the way to the left or right. (Tr. 322) Plaintiff
9 has tried cooking, uses a microwave on occasion, but does not dust, sweep, or mop because
10 it hurts and her arms go numb, and she can't stand for that long. (Tr. 322) She experiences
11 her back hurting, throbbing, and spasms, then her arms go numb within a few swipes of the
12 broom, so she returns to rest. (Tr. 324) Her friend comes to her room to visit. (Tr. 323)

13 Plaintiff testified that she is depressed and feels useless because she can't do anything
14 anymore. (Tr. 323) She used to do miniature wax coverings and small bead work but can't
15 do it anymore. (Tr. 323) Her fingertips on her right hand are constantly numb, and if she
16 holds them a certain way, they go totally numb, cold, and she gets sharp electrifying and
17 burning pain down her arm. (Tr. 325) She also drops things. (Tr. 325)

18 Plaintiff testified that a surgeon told her that it would be pointless to have surgery on
19 her vertebra because the discs above and below the problem area would deteriorate anyway.
20 (Tr. 325) Plaintiff testified that she has pain in her hips and her legs get tingly and numb,
21 with pain down to the back of her knee, but not real bad. (Tr. 325-36)

22 Plaintiff testified that her medications help her get out of bed, but not for too long.
23 (Tr. 326) As a side effect she experiences dizziness, and is sleepy and tired, but has not had
24 any nausea. (Tr. 326)

25 Michael Yacks, Plaintiff's husband, testified at the hearing. (Tr. 332) Mr. Yacks
26 testified that a typical day for Plaintiff is spending most of the day in bed sleeping. (Tr. 333)
27 Mr. Yacks testified that Plaintiff gets depressed, tries to do things, but ends up in pain or not
28 being able to grip anything because of the numbness in her arms and fingers. (Tr. 333) Mr.

1 Yacks calls Plaintiff throughout the day to make sure she's okay, and she usually answers.
2 (Tr. 333) Because she doesn't cook, he usually cooks, or they get fast food, but Plaintiff can't
3 sit in a restaurant. (Tr. 333-34) Mr. Yack washes and braids her hair because Plaintiff can't
4 keep her arms up. (Tr. 334)

5 Ruth Van Fleet, a vocational expert, testified in response to questions asked by the
6 ALJ. (Tr. 336) Ms. Van Fleet provided the exertional and skill level involved in Plaintiff's
7 past employment as a nurses aide - medium exertion level, semi-skilled, and with the job
8 specific requirement of lifting up to 100 pounds (which would increase the exertion level to
9 heavy or very heavy); floor sales at Wal-Mart - light exertion level, semi-skilled; bartending
10 and waitressing - light exertion level, semiskilled work, with the job specific requirement of
11 lifting up to 50 pounds (which would increase the exertion level to medium); Home Depot -
12 light exertion level, semiskilled to skilled; and cashier at gas station - light exertion level,
13 semiskilled to skilled, her job specific requirement working at Exxon required lifting 100
14 pounds would increase the exertion level to very heavy; and Washington Mutual Home
15 Loans by phone, sedentary exertion level, semi-skilled.

16 Ms. Van Fleet was presented with the following hypothetical by the ALJ: "...a
17 women who is 43 years of age and has one-and-a-half years of college education and has had
18 the work experience and the educational background that the Claimant ... has. ... [S]he would
19 be only able to lift frequently 10 pounds and 20 pounds on an occasion. And she would be
20 able to sit only about six hours during the workday with normal breaks. She would also need
21 those normal breaks with respect to any walking or standing. ... [T]his hypothetical person
22 can only occasionally climb, occasionally balance, occasionally stoop, occasionally kneel,
23 and should avoid crawling. She has problems with her arms so she should avoid working
24 above shoulder heights. She should also avoid working at unprotected heights ... particularly
25 ladders, ropes, or scaffolds and on or in moving machinery that would cause a hazard to
26 herself or others. ...[She] has some breathing problems so she should avoid working at places
27 where there are excessive amounts of gas, dust, and fumes. [She] ... has pain in various parts
28 of her body, including her head, her neck, her back, her arms and hips with occasionally

1 tingling numbness in both her fingers and legs. ... [Her] pain level is of a slight nature and
2 has a slight effect on her ability to do basic work activities or that condition is or can be
3 controlled by appropriate medication without significant adverse side effects. ... [She] also
4 has some occasional dizziness and tiredness probably due to the medication but it would have
5 a slight effect on her ability to do basic work activities or it could be controlled by
6 appropriate medication without significant adverse side effects. ... [She] also has some mental
7 problems in the form of depression and anxiety with some decrease in memory, which would
8 have a slight effect on her ability to do basic work activities, or that condition is or could be
9 controlled by appropriate medication without significant adverse side effects. Based on that
10 hypothetical, could that hypothetical person with all those problems be able to do any of the
11 past work that was done by Claimant?" (Tr. 341-42) Ms. Fan Fleet responded that the
12 hypothetical person could return to the position such as the design center in Home Depot, or
13 Walmart. (Tr. 342-43) Additionally, if the numbness in her hands would not be such that
14 she'd still be able to perform working home loans by phone, then she could probably return
15 to a position such as that. (Tr. 343)

16 The ALJ then proposed a second hypothetical, with all the same factors, except "the
17 pain is more severe. And it would be normally of a moderate nature and would normally
18 have a moderate effect on her ability to do basic work activities. However, that condition is
19 or still can be controlled by appropriate medication without significant adverse side effects.
20 So could hypothetical person number two with moderate with controlled pain be able to do
21 the work that was done as the design center clerk?" (Tr. 343-44) Ms. Van Fleet responded
22 affirmatively. (Tr. 344)

23 The ALJ then proposed a third hypothetical, with all factors of the first hypothetical,
24 except "now the pain is severe. The pain is so severe that there is no amount of pain
25 medication that'll help alleviate that pain. Or if it does alleviate the pain, then the side effects
26 of the pain medication are so significantly adverse that they would markedly interfere with
27 ability to maintain pace and concentration. So could hypothetical person number three, with
28 severe uncontrolled pain, be able to do any of the past work that was done by the

1 Claimant...?” (Tr. 344) Ms. Van Fleet responded that she would probably be able to secure
2 a job but wouldn’t be able to maintain so it wouldn’t be in a competitive environment. (Tr.
3 345)

4 The ALJ then asked if that was the case, if there were any other kind of work in the
5 national economy that this hypothetical person could do? (Tr. 345) Ms. Van Fleet responded
6 negatively. (Tr. 345)

7 Plaintiff’s attorney proposed a fourth hypothetical, assuming the hypothetical person
8 “has severe stenosis in her neck and that as a result of that it causes her to have numbness in
9 her fingers to where even before she had an industrial accident, she had to give up a job
10 because she could not hold the phone or use the phone in any type of a constant manner or
11 use a keyboard in any type of repetitive manner. And further that she has a problem with
12 muscle lumbar spasm in her back ...[that] various doctors have had found neck spasm, that
13 she continues to have these problems unless she is taking medication and that she is on
14 Oxycodone, methadone, Percocet – or OxyContin, methadone, Percocet, and at times
15 Demerol. She also has, as a result of these, she gets ... very fatigued and sleepy. Assuming
16 those facts, is there any way she can keep any job on a competitive labor market?” (Tr. 346)
17 Ms. Van Fleet stated that the hypothetical person would not be able to maintain work in a
18 competitive labor market. (Tr. 346)

19 Plaintiff’s attorney further asked if the hypothetical person has “[m]uscle spasm that
20 affects her legs and gives her numbness in her legs, makes it difficult for her to sit for long
21 periods or to stand or any type of length of time.... [I]f she sits for any longer than a half hour
22 or 45 minutes, she usually has to go lay down because she’s in muscle spasm pain and having
23 numbness down her legs and that her most comfortable position is reclining. Assuming that,
24 would there be any jobs on a competitive labor market?” The ALJ clarified that this
25 hypothetical included the same factors as hypothetical four except she could only sit and
26 stand for 45 minutes at a time and then has to lie down for 45 minutes. (Tr. 347-48) Ms. Van
27 Fleet responded that she couldn’t do any of her past work and she couldn’t do any other jobs
28 because that would need to be a selective position based on those limitations. (Tr. 348)

1 Ms. Van Fleet further opined that a slight cognitive limitation would not affect her
2 ability to get or keep work. (Tr. 349) Ms. Van Fleet also agreed that dropping items on an
3 ongoing basis would cause a problem with her ability to perform Plaintiff's previous jobs,
4 and would affect her ability to get any jobs in the labor economy. (Tr. 349-50)

5 C. Plaintiff's Medical History - Physical Impairment

6 On August 18, 2003, Plaintiff was examined at El Dorado Hospital's Emergency
7 Department presenting complaints of back pain and arm numbness following heavy lifting
8 at work. (Tr. 161, 163) An MRI was performed on Plaintiff for clinical indications of
9 bilateral arm numbness and pain for greater than one year, getting progressively worse. The
10 MRI showed moderate to severe central spinal stenosis at C6-C7 with severe compromise
11 to the left neural foramen and moderate compromise to the right neural foramen secondary
12 to posterior ridging. (Tr. 166) The examining doctor noted a clinical impression of an acute
13 herniated disk at C6-C7. (Tr. 162)

14 On August 23, 2003, after returning to work, Plaintiff was again seen at El Dorado
15 Hospital's Emergency Department reporting a re-injury with complaints of neck, back, arm
16 and leg pain. (Tr. 158) The examining doctor's clinical impression, after reviewing the MRI
17 taken previously, was an acute herniated disc.

18 Jack Dunn, M.D., conducted a Neurosurgical Evaluation on Plaintiff, on December
19 17, 2003. (Tr. 172) Dr. Dunn's report indicates that Plaintiff had initially injured herself on
20 July 28, 2003, at work, then re-injured herself on August 21. Dr. Dunn's examination
21 revealed a "decreased range of motion and neck spasm, hypersensitivity in the posterior
22 cervical area and the instrascapular area. ... Tinel's sign over the brachial plexus and the
23 axillary plexus ... decreased but present reflexes in all four extremities. ...No clonus, no
24 Babinski. [with] give-way so it's difficult to get a good assessment of her normal strength
25 and her normal sensation is not reliable. She complains of the pain and dysesthesias going
26 into all five fingers on both hands now. She is able to stand and balance. Negative Romberg
27 but she has trouble balancing on her tiptoes." (Tr. 172-73) Dr. Dunn recommended a collar
28 when she is active and a swimming exercise program, with re-evaluation in six weeks. (Tr.

1 173)

2 On December 31, 2003, Plaintiff was assessed with chronic pain at the Carondelet
3 Medical Group. Paul G. Koss, M.D., with Carondelet Medical Group, submitted a letter to
4 Plaintiff's attorney, opining that his examination revealed mild right hand grip weakness,
5 with concerns that Plaintiff might have cervical radiculopathy and possibly cervical stenosis.
6 Dr. Koss recommended further neurological or neurosurgical evaluation, and prescribed
7 Non-steroidal anti-inflammatory medication and a narcotic analgesic. (Tr. 179) Dr. Koss
8 opined that Plaintiff has been unable to work in any capacity since her work related injuries
9 in June and August 2003, that she had sustained exacerbation of spondylosis of the cervical
10 spine that resulted in neck pain, which radiated to the arms and hands as well as paresthesias
11 in the right hand. (Tr. 179)

12 After presenting to the El Dorado's emergency room on January 20, 2003,
13 complaining of shooting pain, worse with certain positions of her neck, Plaintiff was
14 discharged with a diagnosis of radiculopathy. (Tr. 166-168) Plaintiff was prescribed
15 Percocet, Motrin, and Norflex. (Tr. 168)

16 Lloyd S. Anderson, M.D., completed an Independent Medical Exam of Plaintiff. (Tr.
17 216) Dr. Anderson conducted a physical exam and reviewed Plaintiff's medical records. Dr.
18 Anderson concluded that Plaintiff had recovered from her industrial accident, but the
19 continuation of symptoms following her injury was most likely due to severe spinal stenosis
20 at C6-7, secondary to advanced degenerative changes at that level which antedated the
21 industrial injury. (Tr. 215-16) Dr. Anderson opined that Plaintiff's cervical spondylosis and
22 spinal stenosis at C6-7 prevents her from returning to heavy manual labor or activities, which
23 involve significant or repetitive movements of the head or neck, or working above the
24 shoulder or head level, and that she may require surgical decompression at the C6-7 level.
25 (Tr. 216)

26 Plaintiff was treated by Darrell Jessop, M.D., who specializes in family practice and
27 pain management, from May 2004 to August 2005 (Tr. 23-295) Dr. Jessop initially assessed
28 Plaintiff with cervical radiculopathy; secondary to central spinal stenosis and neuroforaminal

1 stenosis, depression, left TMJ syndrome, and degenerative disc disease C-spine, and
2 prescribed Oxycontin, Methadone, Percocet, and Temazepam for pain, nighttime pain,
3 breakthrough pain, and insomnia. (Tr. 294-95)

4 At Plaintiff's first month follow-up examination with Dr. Jessop, Dr. Jessop reported
5 that pain control had been generally effective, sleep quality was adequate, and Plaintiff
6 denied side effects from the medication. (Tr. 289) In July, 2004, Plaintiff reported more
7 breakthrough pain, and Dr. Jessop adjusted her pain medications accordingly. (Tr. 284) In
8 August, 2004, Plaintiff reported complaints of parasthesias in both legs down to the distal
9 extremities, and that her depression had been worsening over the course of the last three
10 week. (Tr. 278) In September, 2004, Plaintiff reported that she had been experiencing sharp
11 pains in the right shoulder and right hip, which Dr. Jessop believed to be degenerative in
12 etiology, and increased her dosage of Oxycontin. (Tr. 274) In October, Plaintiff reported
13 intermittent tarsalgia bilaterally, and that she was still having considerable pain at night and
14 in the late afternoon. (Tr. 270) Dr. Jessop again increased the dosage of her Oxycontin
15 prescription, and adjusted her medications for insomnia. (Tr. 270) In January, 2005, Plaintiff
16 reported pain in the left and right knee and pain in her hips. (Tr. 255) Dr. Jessop considered
17 the possibility of degenerative changes, but could not confirm the diagnosis with an x-ray
18 investigation because Plaintiff was without insurance and could not afford to pay for an x-
19 ray. (Tr. 255) Dr. Jessop again increased her Oxycontin dosage, and began Plaintiff on
20 Demerol, Medrol and Phenergan for pain, inflammation, and nausea. (Tr. 255) In February,
21 2005, Dr. Jessop noted that Plaintiff was "quite stiff with ambulation; it is particularly
22 difficult for her to get started in the morning." (Tr. 250) Dr. Jessop increased her dosage of
23 Oxycontin, although he noted that he was "getting close to the point where I am beginning
24 to feel uneasy about the dose of medication..." but that a "titration today may be in order."
25 (Tr. 250) In August, 2005 Plaintiff reported continued significant intervals of pain at night.
26 (Tr. 224) Dr. Jessop was reluctant to titrate her Oxycontin dosage any further, instead
27 increasing her evening dosage of Methadone. (Tr. 224)

28 On October 18, 2005, Dr. Jessop submitted a letter to Plaintiff's attorney regarding

1 his management of Plaintiff's chronic pain. (Tr. 297) He noted the diagnosis as listed
2 previously, and, in addition tarsalgia, hypertension, hyperlipidemia, and chronic hip pain
3 secondary to osteoarthritic degeneration. (Tr. 297) Dr. Jessop provided his subjective
4 assessment of Plaintiff, noting that as a result of degenerative processes in the neck, Plaintiff
5 experiences numbness and weakness in the arms and hands, with symptoms worsened with
6 abduction of the upper extremities over the head. (Tr. 297) Dr. Jessop noted that her grip
7 strength and fine motor control was also compromised, making self-care activities extremely
8 difficult. (Tr. 297) Dr. Jesson reported that Plaintiff had also been experiencing radiating
9 lower back pain, extending into the posterior aspect of both legs to the ankles when severe,
10 although Dr. Jessop noted that no radiological tests had been performed to determine the
11 cause of this pain. (Tr. 297) Dr. Jessop summarized Plaintiff's functional capacity as
12 follows:

13 ...personal care is limited. The patient cannot nor should not lift anything over
14 two or three pounds and even this should be limited to only a few times a day.
15 She has been advised not to drive, climb, work around machinery or work in
16 high places. Any repetitive activities involving the upper arms and extremities
17 should be avoided. She is unable to sit or stand for more than 15 minutes at
18 a time. Changes in position would be required to prevent muscular spasm.

18 Cognitive capacity and concentration may be limited and/or compromised as
19 a result of her medications.

20
21 (Tr. 298)

22 Dr. Jessop's overall assessment was that Plaintiff was "effectively disabled and is
23 incapable of performing any meaningful and employable work. She will most likely remain
24 on a medical regimen for her pain which would also limit her employability in terms of the
25 intolerance of controlled substances in the workplace." (Tr. 299)

26 Plaintiff was evaluated by a Disability Determinations Services doctor, Randy Soo
27 Hoo, M.D., on November 1, 2004. Dr. Soo Hoo, noting that radiographs of Plaintiff had
28 been requested but were still pending, concluded that Plaintiff was capable of the following

1 work-related activities:

2 Lift/carry 20 pounds occasionally and 10 pounds frequently. Stand/walk at
3 least six hours per an eight-hour workday. Sit at least six hours per an eight-
4 hour workday. Climb ramps and stairs, never ladders, ropes and scaffolding.
5 No restrictions are noted for balancing and crouching. She can occasionally
6 stoop, kneel and never crawl. She can reach in all directions except for
7 overhead. No restrictions for handling, fingering and feeling. There are no
8 restrictions noted for hearing, seeing, and speaking.

7 (Tr. 183)

8 On November 29, 2004, Plaintiff was evaluated by David Mullon, M.D. (Tr. 39, 186-
9 193) Dr. Mullon reviewed Plaintiff's medical records from Dr. Koss, and El Dorado
10 Hospital, and concluded that Plaintiff could lift and/or carry 20 pounds occasionally, 10
11 pounds frequently; stand and/ or walk and sit with normal breaks for 6 hours in an 8-hour
12 workday; she could climb, balance, stoop, kneel, crouch and crawl occasionally, but could
13 never climb a ladder, rope or scaffolds. (Tr. 187-188) No manipulative limitations were
14 established with the exception of limited reaching in all direction and "frequent" overhead
15 lifting. (Tr. 189) No other limitations were noted except for avoiding concentrated exposure
16 of fumes, odors, dusts, gases, and poor ventilation, and hazards such as machinery, heights,
17 etc. (Tr. 189-90) Dr. Mullon concluded that Plaintiff's symptoms were attributable to a
18 medically determinable impairment, but that the severity or duration of the symptoms were
19 disproportionate to the expected severity or expected duration on the basis of Plaintiff's
20 medically determinable impairments. (Tr. 191)

21 D. Plaintiff's Medical History - Mental Impairment

22 On December 1, 2004, Plaintiff's mental status was evaluated by Paul Tangeman,
23 Ph.D. (Tr. 194-207) Dr. Tangeman, a psychologist, concluded that Plaintiff had no medically
24 determinable psychological impairment, and that no further development was necessary. (Tr.
25 194)

26 E. Lay Testimony

27 Plaintiff's husband, Michael Yacks, submitted an affidavit stating that his wife has
28 tried to take less medication and she was in such severe pain she was crying due to the pain

1 in her neck and back going down her arms and legs, and that if she takes the medication she
2 sleeps much of the time, and if she doesn't take the medication, she doesn't sleep but is in
3 such pain that she cannot function. (Tr. 153-54)

4 F. The Commissioner's Decision

5 On March 23, 2006, the ALJ made the following findings:

- 6 1. The claimant meets the nondisability requirements for a period of disability
7 and Disability Insurance benefits set forth in section 216(i) of the Social
8 Security Act and is insured for benefits through the date of this decision.
- 9 2. The claimant has not engaged in substantial gainful since the alleged onset of
10 disability.
- 11 3. The claimant's back pain, neck pain, hip pain, TMJ syndrome, hypertension,
12 hyperlipidemia, and depression/anxiety impairments are considered "severe"
13 based on the requirements in the Regulations 20 CFR § 404.1520(c)).
- 14 4. These medically determinable impairments do not meet or medically equal one
15 of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
- 16 5. The [ALJ] finds the claimant's allegations regarding her limitations are not
17 totally credible for the reasons set forth in the body of the decision.
- 18 6. Based upon a careful examination of the medical evidence, the testimony of
19 the claimant and all the other evidence in the record, the [ALJ] finds that the
20 claimant retains the following residual functional capacity on a routine and
21 sustained basis to: occasionally lift and carry up to 20 pounds and frequently
22 lift and carry 10 pounds; sit, stand, and walk for 6 hours in an 8-hour workday
23 with normal breaks; occasionally climb, balance, stoop, and kneel; avoid
24 crawling; avoid climbing ladder/rope/scaffolds; avoid work above shoulder
25 heights; avoid work at unprotected heights and around moving machinery; and
26 avoid work with excessive dust, fumes, gases. The claimant has pain in
27 various parts of her body including her head, neck, back, arms (with occasional
28 tingling/numbness on fingers), and hips, which is of moderate-level and would
normally have a moderate effect on her ability to do work-related activities;
however, that pain is controlled by appropriate medication without any
significant adverse side effects. The claimant also has occasional tiredness,
which has a slight effect on her ability to do work-related activities. The
claimant has depression and anxiety with decrease in memory, which have a
slight effect on her ability to do basic work-related activities.
7. The claimant's past relevant work as a floor salesperson, design center clerk,
and home loan clerk did not require the performance of work-related activities
precluded by her residual functional capacity (20 CFR § 404.1565).
8. The claimant's medically determinable impairments do not prevent the
claimant from performing her past relevant work as a floor salesperson, design
center clerk, and home loan clerk. This finding is based upon vocational
expert evidence.
9. The claimant was not under a "disability" as defined in the Social Security
Act, at any time through the date of the decision (20 CFR § 404.1520(f)).

1 (Tr. 30-31)

2 The ALJ noted that, although Plaintiff has medically determinable impairments that
3 could be expected to result in her alleged symptoms and functional limitations, the “medical
4 evidence and other evidence in the record do not entirely substantiate the intensity and
5 persistence of symptoms as alleged by the claimant, nor by the effect her impairments have
6 on her ability to perform work-related activities.” (Tr. 23)

7 The ALJ noted that in terms of functional status related to her mental impairments,
8 the evidence showed a slight restriction of activities of daily living, slight difficulties in
9 maintaining social functioning, and slight difficulties in maintaining concentration,
10 persistence and pace. (Tr. 23)

11 The ALJ commented that Dr. Jessop’s treatment notes from May 2004 through August
12 2005 indicated that throughout her treatment, Plaintiff’s pain control was “generally
13 effective” on her analgesic regimen; that she had no side effects from her medications; and
14 that she was satisfied with her current treatment. She constantly appeared well-groomed and
15 in mild distress, and her gait was entirely normal requiring no assistive device. Her sleep
16 quality was adequate and bowel function was normal. Her daily physical functioning was
17 adequate, and her mental status was normal. Plaintiff was treated in the emergency room on
18 August 19, 2003 for upper back and right upper extremity pain secondary to a work-related
19 injury in July 2003. The attending physician noted that the claimant’s quality and severity
20 of pain was dull and moderate. On August 23, 2003, when she was seen again at the
21 emergency room with complaints of pain, it was noted that she was still working, and was
22 prescribed pain medication and discharged in stable condition. (Tr. 23) The ALJ indicated
23 that Dr. Jessop noted that Plaintiff had a great deal of improvement in her overall pain level
24 and functionality, and that she was responding by increasing her physical activity level
25 substantially. (Tr. 24-25)

26 The ALJ gave no weight to Dr. Jessop’s opinion in a letter dated October 18, 2005,
27 that she was disabled and unable to work due to her conditions. (Tr. 25) The ALJ rejected
28 the opinion as conclusory and unsupported by the medical evidence of record, and also noted

1 that the letter appeared to contain inconsistencies, which rendered his opinion less
2 persuasive. (Tr. 25)

3 The ALJ found Plaintiff's testimony as to the severity of her pain and limitations to
4 be "extreme as to appear implausible." (Tr. 25) Noting that Plaintiff's husband testified
5 similar to the Plaintiff, the ALJ found the allegations of pain and side effects from her
6 medication, as well as her severe depression to be inconsistent with the treatment records,
7 and that her allegations were considered not fully credible. (Tr. 25-26) The ALJ noted that
8 Plaintiff's reported limited daily activities are considered to be outweighed by the other facts
9 previously discussed, that she has received treatment for her allegedly disabling impairment,
10 but that it had been essentially routine and/or conservative in nature, and that Plaintiff had
11 been generally successful in controlling her symptoms. (Tr. 26) Additionally, although
12 Plaintiff testified that she had side effects from the use of her medications, the treatment
13 records did not support this finding. (Tr. 26)

14 The ALJ also found the residual functional capacity conclusions reached by the state
15 disability doctors also supported a finding of "not disabled", although they were non-
16 examining, and their opinions did not deserve as much weight as an examining or treating
17 physician. (Tr. 26) The ALJ also found that the opinions of Drs. Dunn, Anderson and Soo
18 Hoo also supported a finding of "not disabled."

19 The ALJ found Plaintiff retained the residual functional capacity as noted in ¶ 6,
20 *supra*. (Tr. 26) Relying on the vocational expert's testimony, the ALJ found that the
21 Plaintiff was capable of performing her past relevant work as a floor salesperson, design
22 center clerk, and home loan clerk, and therefore was not under a disability as defined in the
23 Social Security Act at any time through the date of the decision. (Tr. 27-28)

24 G. Additional Evidence Presented to the Appeals Council

25 Following the adverse decision by the ALJ, the Plaintiff submitted a letter of
26 contention, raising several errors in the ALJ's decision to the Appeals Council, however, no
27 further medical evidence was submitted. (Tr. 8, 300-304) The Appeals Council denied
28 review without comment. (Tr. 8-10)

1 **III. ISSUES**

2 A. Plaintiff's Position

3 Plaintiff asserts that the ALJ erred by (1) rejecting Plaintiff's doctors' opinions
4 contrary to law; (2) improperly rejecting Plaintiff's testimony as not credible; (3) posing an
5 incomplete hypothetical to the vocational expert. Plaintiff submits that the decision of the
6 Commissioner should be reversed, and Plaintiff found disabled.

7 B. Defendant's Position

8 Defendant contends that the ALJ (1) properly assessed Plaintiff's RFC; (2) properly
9 assessed Plaintiff's credibility; and (3) properly determined that Plaintiff did not establish
10 that she could no longer perform her past work.

11 **IV. DISCUSSION**

12 A. Standard of Review

13 An individual is entitled to Title II Social Security Disability Insurance benefits
14 ("SSDIB") if the individual is insured for those benefits, has not attained retirement age, has
15 applied for those benefits, and is disabled. 42 U.S.C. § 423(a)(1). The definition of
16 disability is the "inability to engage in any substantial gainful activity by reason of any
17 medically determinable physical or mental impairment which can be expected to result in
18 death or which has lasted or can be expected to last for a continuous period of not less than
19 12 months." 42 U.S.C. § 423(d)(1)(A).

20 The Ninth Circuit has stated that "a claimant will be found disabled only if the
21 impairment is so severe that, considering age, education, and work experience, that person
22 cannot engage in any other kind of substantial gainful work which exists in the national
23 economy." *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993) (quoting *Marcia v. Sullivan*,
24 900 F.2d 172, 174 (9th Cir. 1990)).

25 The claimant has the burden to establish a prima facie case showing an inability to
26 engage in previous occupations. *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).
27 The burden then shifts to the Commissioner to show that other substantial work, for which
28 the claimant is qualified, exists in the national economy. *Id.* (citing *Hall v. Secretary of*

1 *HEW*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Cox v. Califano*, 587 F.2d 988, 990 (9th Cir.
2 1978)).

3 The court will set aside a denial of benefits only if the Commissioner's findings are
4 based on legal error or are not supported by substantial evidence in the record as a whole.
5 *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984) (citing *Sample v. Schweiker*, 694 F.2d
6 639, 642 (9th Cir.1982), *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir.1982)); 42
7 U.S.C. § 405(g)). In determining whether there is substantial evidence, the Court must
8 consider the evidence as a whole, weighing both the evidence that supports and the evidence
9 that detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th
10 Cir. 1985).

11 Substantial evidence is "more than a scintilla," *Richardson v. Perales*, 402 U.S. 389,
12 401 (1971), but "less than a preponderance." *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
13 n.10 (9th Cir. 1975); *Desrosiers v. Secretary of Health and Human Servs.*, 846 F.2d 573,
14 576 (9th Cir. 1988). Substantial evidence is "'such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion.'" *Richardson*, 402 U.S. at 401 (quoting
16 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

17 The Commissioner, not the court, is charged with the duty to weigh the evidence,
18 resolve material conflicts in the evidence and determine the case accordingly. Reviewing
19 courts must consider the evidence that supports as well as detracts from the examiner's
20 conclusion. *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975). Moreover, "if the
21 evidence can support either outcome, the court may not substitute its judgment for that of the
22 ALJ." *Matney v. Sullivan*, 981 F.2d 1016,1019 (9th Cir. 1992).

23 Disability claims are evaluated pursuant to a five-step sequential process. 20 C.F.R.
24 §§404.1520, 416.920; *Baxter v. Sullivan*, 923 F.2d 1391, 1395 (9th Cir. 1991). The first step
25 requires a determination of whether the claimant is engaged in substantial gainful activity.
26 20 C.F.R. §§ 404.1520(b). If so, then the claimant is not disabled under the Act and benefits
27 are denied. *Id.* If the claimant is not engaged in substantial gainful activity, the ALJ then
28 proceeds to step two which requires a determination of whether the claimant has a medically

1 severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c). In making a
2 determination at step two, the ALJ uses medical evidence to consider whether the claimant's
3 impairment more than minimally limits or restricts the claimant's physical or mental ability
4 to do basic work activities. *Id.* If the ALJ concludes that the impairment is not severe, the
5 claim is denied. *Id.* Upon a finding of severity, the ALJ proceeds to step three which
6 requires a determination of whether the impairment meets or equals one of several listed
7 impairments that the Commissioner acknowledges are so severe as to preclude substantial
8 gainful activity. 20 C.F.R. §§ 404.1520(d); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the
9 claimant's impairment meets or equals one of the listed impairments, then the claimant is
10 presumed to be disabled and no further inquiry is necessary. If a decision cannot be made
11 based on the claimant's then current work activity or on medical facts alone because the
12 claimant's impairment does not meet or equal a listed impairment, then evaluation proceeds
13 to the fourth step. The fourth step requires the ALJ to consider whether the claimant has
14 sufficient residual functional capacity ("RFC") to perform past work. 20 C.F.R. §§
15 404.1520(e). If the ALJ concludes that the claimant has RFC to perform past work, then the
16 claim is denied. *Id.* However, if the claimant cannot perform any past work due to a severe
17 impairment, then the ALJ must move to the fifth step, which requires consideration of the
18 claimant's RFC to perform other substantial gainful work in the national economy in view
19 of claimant's age, education, and work experience. 20 C.F.R. §§ 404.1520(f). At step five,
20 in determining whether the claimant retained the ability to perform other work, the ALJ may
21 refer to Medical Vocational Guidelines ("grids") promulgated by the SSA. *Desrosiers*, 846
22 F.2d at 576-577. The grids are a valid basis for denying claims where they accurately
23 describe the claimant's abilities and limitations. *Heckler v. Campbell*, 461 U.S. 458, 462, n.5
24 (1983). However, because the grids are based on exertional or strength factors, where the
25 claimant has significant nonexertional limitations, the grids do not apply. *Penny*, 2 F.3d at
26 958-959; *Reddick v. Chater*, 157 F.3d 715, 729 (9th Cir. 1998). Where the grids do not apply,
27 the ALJ must use a vocational expert in making a determination at step five. *Desrosiers*, 846
28 F.2d at 580.

1 A denial of Social Security benefits will be set aside if the Commissioner fails to
2 apply proper legal standards in weighing the evidence even though the findings may be
3 supported by substantial evidence. *Winans v. Bowen*, 853 F.2d 643, 644 (9th Cir. 1987).
4 When the ALJ has applied an incorrect legal standard in reaching a decision, we must
5 remand unless, as a matter of law, the result could not be affected. *See NLRB v. Enterprise*
6 *Assoc.*, 429 U.S. 507, 522 n.9 (1977); *Sagebrush Rebellion, Inc. V. Hodel*, 790 F.2d 760, 765
7 (9th Cir. 1986) (agency may rely on harmless error rule only when its mistake had no bearing
8 on the substance of the decision).

9 B. Analysis - Rejection of Treating Physician's Opinion

10 The Ninth Circuit distinguishes among the opinions of three types of physicians: (1)
11 those who treat the claimant (treating physicians); (2) those who examine but do not treat
12 the claimant (examining physicians); and (3) those who neither examine nor treat the
13 claimant (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), as
14 amended (Apr. 9, 1996).

15 "By rule, the Social Security Administration favors the opinion of a treating physician
16 over non-treating physicians." *See Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.2007) (citing
17 C.F.R. § 404.1527). "Generally, a treating physician's opinion carries more weight than an
18 examining physician's, and an examining physician's opinion carries more weight than a
19 reviewing physician's." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (citing
20 *Lester*, 81 F.3d at 830; 20 C.F.R. § 404.1527(d). In addition, the regulations give more
21 weight to opinions that are explained than to those that are not and more weight to the
22 opinions of specialists concerning matters relating to their specialty over that of
23 nonspecialists. *Holohan*, 246 F.3d at 1202 (citing 20 C.F.R. §§ 404.1527(d)(5) and
24 404.1527(d)(3)). Under the regulations, if a treating physician's medical opinion is supported
25 by medically acceptable diagnostic techniques and is not inconsistent with other substantial
26 evidence in the record, the treating physician's opinion is given controlling weight. *Id.*
27 (citing 20 C.F.R. S 404.1527(d)(2); Social Security Ruling (SSR) 96-2p).

28 More weight is given to a treating physician's opinion than to the opinion of a

1 nontreating physician because a treating physician "is employed to cure and has a greater
2 opportunity to know and observe the patient as an individual." *Andrews v. Shalala*, 53 F.3d
3 1035, 1041 (9th Cir. 1995) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (quoting
4 *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987))). "Likewise, greater weight is
5 accorded to the opinion of an examining physician than a non-examining physician."
6 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)(citing 20 C.F.R. § 416.927(d)(1);
7 *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990).

8 The ALJ may reject the opinion of a treating physician, whether or not controverted;
9 however, the ALJ may reject an uncontroverted opinion of a treating physician only for clear
10 and convincing reasons. *Andrews*, 53 F.3d at 1041. To meet this burden, the ALJ must set
11 out a detailed and thorough summary of the facts and conflicting clinical evidence, state his
12 interpretation of the facts and evidence, and make findings. *Magallanes v. Bowen*, 881 F.2d
13 747, 751 (9th Cir. 1989). To reject the opinion of a treating physician which conflicts with
14 that of an examining physician, the ALJ must "'make findings setting forth specific,
15 legitimate reasons for doing so that are based on substantial evidence in the record.'" "
16 *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir.1987), (quoting *Sprague*, 812 F.2d at 1230);
17 see also *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.1983) (adopting this rule). "The ALJ
18 can meet this burden by setting out a detailed and thorough summary of the facts and
19 conflicting clinical evidence, stating his interpretation thereof, and making findings." *Cotton*
20 *v. Bowen*, 799 F.2d 1403, 1408 (9th Cir.1986).

21 Although an ALJ is not bound by the uncontroverted opinions of a treating physician
22 on the ultimate issue of disability, the ALJ must set out clear and convincing reasons for
23 doing so. *Reddick v. Chatter*, 157 F.3d 715, 725 (1998). A treating physician's opinion on
24 disability, if controverted, can be rejected only with specific and legitimate reasons supported
25 by substantial evidence in the record. *Lester*, 81 F.3d at 830. In the absence of other
26 evidence to undermine the credibility of a medical report, the purpose for which the report
27 was obtained does not provide a legitimate basis for rejecting it. *Reddick*.157 F.3d at 726.

28 The Social Security Administration has explained that an ALJ's finding that a treating

1 source medical opinion is not well-supported by medically acceptable evidence or is
2 inconsistent with substantial evidence in the record means only that the opinion is not entitled
3 to controlling weight, not that the opinion should be rejected. See *Orn*, 495 F.3d at 632
4 (citing § 404.1527). Treating source medical opinions are still entitled to deference and, in
5 many cases, will be entitled to the greatest weight and should be adopted, even if it does not
6 meet the test for controlling weight." *Orn*, 495 F.3d at 632; see also *Murray v. Heckler*, 722
7 F.2d 499, 502 (9th Cir.1983) ("If the ALJ wishes to disregard the opinion of the treating
8 physician, he or she must make findings setting forth specific, legitimate reasons for doing
9 so that are based on substantial evidence in the record.")

10 The ALJ provided two reasons for rejecting Dr. Jessop's disability opinion, that the
11 opinion was "conclusory and unsupported by the medical record" and that the letter appeared
12 to contain inconsistencies. Although an ALJ need not accept the opinion of any physician,
13 including a treating physician, if that opinion is brief, conclusory and inadequately supported
14 by clinical findings, see *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002), the ALJ did
15 not support her contention that Dr. Jessop's opinion was not supported by the medical record
16 with an interpretation of conflicting medical evidence supported by substantial evidence in
17 the record.

18 The ALJ, however, provided specific examples of the reported inconsistencies
19 between Dr. Jessop's disability report and his treatment notes: "For instance, throughout the
20 claimant's treatment ..., the doctor repeatedly noted that the claimant had no side effects from
21 her medications. Yet, the doctor now indicates that the claimant has somnolence and fatigue
22 as side effects. He even noted, throughout the claimant's treatment, that her sleep was
23 adequate. He also indicated in the letter that the claimant's personal care was limited, that
24 she had significant physical limitations, and that her cognitive capacity/concentration was
25 limited and/or compromised as a result of her medications. Yet, throughout her treatment,
26 there was no indication of same. In fact the doctor repeatedly noted that the claimant's daily
27 functioning was adequate, that her gait was entirely normal requiring no assistive device, that
28 her mental status was normal, and that her physical examinations continued to remain

1 unchanged from her previous evaluations It was even noted at one point that she
2 experienced a great deal of improvement in her overall pain level and functionality and was
3 responding by increasing her physical activity level substantially” (Tr. 25)

4 Additionally, the ALJ opined that “the possibility always exists that a doctor may
5 express an opinion in an effort to assist a patient with whom he or she sympathizes for one
6 reason or another. Another reality which should be mentioned is that patients can be quite
7 insistent and demanding in seeking supportive notes or reports from their physicians, who
8 might provide such a note in order to satisfy their patient’s requests and avoid unnecessary
9 doctor/patient tension. While it is difficult to confirm the presence of such motives, they are
10 more likely in situations where the opinion in question departs substantially from the rest of
11 the evidence of record, as in the current case.” (Tr. 25)

12 The ALJ’s concern over the possibility that Dr. Jessop’s opinion might lack credibility
13 because the opinion letter was solicited by Plaintiff’s attorney is not supported by the record
14 in this case. Furthermore, “the mere fact that a medical report is provided at the request of
15 counsel or, more broadly, the purpose for which an opinion is provided, is not a legitimate
16 basis for evaluating the reliability of the report.” *Reddick v. Chater*, 157 F.3d 715, 726 (9th
17 Cir. 1998); see also *Lester*, 81 F.3d at 833 (“The treating physician's continuing relationship
18 with the claimant makes him especially qualified to evaluate reports from examining doctors,
19 to integrate the medical information they provide, and to form an overall conclusion as to
20 functional capacities and limitations, as well as to prescribe or approve the overall course of
21 treatment.”). There is, however, a sufficient basis to accept the ALJ’s ultimate decision to
22 reject the disability opinion as “[e]vidence of the circumstances under which the report was
23 obtained and its consistency with other records, reports, or findings could ... form a legitimate
24 basis for evaluating the reliability of the report.” *Reddick v. Chater*, 157 F.3d 715, 726 (9th
25 Cir. 1998). Where medical testimony is conflicting it is the ALJ's role to determine
26 credibility and to resolve the conflict. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.1982).
27 The reasons given are specific and legitimate, and supported by substantial evidence, as the
28 ALJ pointed to concrete examples of inconsistencies between the letter and Dr. Jessop’s own

1 treatment notes. Thus, the ALJ did not err in rejecting Dr. Jessop's ultimate opinion that
2 Plaintiff was disabled and unable to work due to her condition.

3 C. Plaintiff's Credibility

4 "An ALJ is not required to believe every allegation of disabling pain or other
5 nonexertional impairment." *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007) (internal
6 quotation marks and citation omitted). When a medical impairment has been established,
7 however, the ALJ must provide "specific, cogent reasons for the disbelief" and may not
8 discredit a claimant's testimony as to subjective symptoms merely because they are
9 unsupported by objective evidence. *Lester*, 81 F.3d at 834. While an ALJ is responsible for
10 determining the credibility of a claimant, an ALJ cannot reject a claimant's testimony without
11 giving clear and convincing reasons. *Holohon v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
12 2001) (citing *Reddick*, 157 F.3d at 722.) In addition, the ALJ must specifically identify the
13 testimony she or he finds not to be credible and must explain what evidence undermines the
14 testimony. *Id.* The findings made in rejecting the pain complaints must be specific to provide
15 the court enough information to determine that the ALJ did not reject the claim arbitrarily,
16 but based his decision on permissible factors. *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir.
17 1995); *Bunnell v. Sullivan*, 947 F.2d 341, 345- 46 (9th Cir.1991) (en banc). The evidence
18 upon which the ALJ relies must be substantial. *Id.* In assessing the claimant's credibility,
19 the ALJ may consider ordinary techniques of credibility evaluation, such as the claimant's
20 reputation for lying, prior inconsistent statements about the symptoms, and other testimony
21 from the claimant that appears less than candid; unexplained or inadequately explained
22 failure to seek or follow a prescribed course of treatment; the claimant's daily activities; the
23 claimant's work record; observations of treating and examining physicians and other third
24 parties; precipitating and aggravating factors; and functional restrictions caused by the
25 symptoms. *Smolen*, 80 F.3d at 1284. *See also Robbins*, 466 F.3d at 884 ("To find the
26 claimant not credible, the ALJ must rely either on reasons unrelated to the subjective
27 testimony (*e.g.*, reputation for dishonesty), on conflicts between his testimony and his own
28 conduct; or internal contradictions in that testimony.")

1 D. Analysis - Plaintiff's Credibility

2 The ALJ concluded that the Plaintiff has medically determinable impairments that
3 could be expected to result in her alleged symptoms and functional limitations (Tr. 23), but
4 stated the following reasons for rejecting the Plaintiff's testimony regarding the severity of
5 her pain and limitations (Tr. 25-26).

6 1. *Daily Activities*

7 The ALJ rejected Plaintiff's testimony regarding her limitation in daily activities to
8 be "outweighed by the other factors discussed in this decision." (Tr. 26) The ALJ provided
9 no examples of what other evidence would outweigh Plaintiff's testimony, and, as there was
10 no evidence of malingering, the ALJ failed to specifically identify the testimony she finds
11 not to be credible and specifying what evidence undermines the testimony. *Hollohan, supra*.
12 Thus, this Court finds that the ALJ's reasons for rejecting Plaintiff's testimony is not
13 supported by clear and convincing evidence as to her daily activities.

14 2. *Treatment history*

15 The ALJ noted that the second reason for rejecting the Plaintiff's allegations was that
16 Plaintiff's treatment had been "essentially routine and/or conservative in nature, and has been
17 generally successful in controlling her symptoms [as noted previously in the ALJ's opinion]."
18 An ALJ may permissibly infer that pain is not as limiting as reported when there is evidence
19 of minimal or conservative treatment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (2008)
20 (citing *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999); *Parra v. Astrue*, 481 F.3d 742,
21 750-51 (9th Cir. 2007)).

22 Although an unexplained or inadequately explained failure to seek treatment may be
23 the basis for an adverse credibility finding, a claimant's failure to receive medical treatment
24 during the period when the claimant had no medical insurance cannot support an adverse
25 credibility finding. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007).

26 Initially, Dr. Jessop, Plaintiff's treating physician, mentioned that it might be "quite
27 possible that neural blockade or other such interventions may be of benefit...however, these
28 are not possible at this time as the patient cannot afford them and she has no insurance." (Tr.

1 295) After Dr. Jessop began treatment of Plaintiff with pain medications, he noted that
2 Plaintiff “continues to do well on their current analgesic regimen” and did not refer Plaintiff
3 for further diagnostics and/or consults. (Tr. 224-25,)

4 Upon review of the records, Dr. Jessop’s in particular, despite his initial consideration
5 of the use of a neural blockade, there was no recommendation that Plaintiff would have
6 benefitted from more aggressive treatment, and no indication that Plaintiff could not avail
7 herself of recommended interventions due to lack of insurance. Although one examining
8 doctor had reported that Plaintiff might require surgical decompression at the C6-7 level (Tr.
9 216), Dr. Dunn, who saw Plaintiff for a Neurosurgical Evaluation, considered Plaintiff’s
10 degenerative disease and foraminal and central stenosis, and recommended Plaintiff wear a
11 collar when she is active, and pursue a swimming exercise program, and did not recommend
12 surgical intervention. (Tr. 173)

13 Thus, there is substantial evidence to support the ALJ’s conclusion that pain is not as
14 limiting as reported when there is evidence of minimal or conservative treatment.

15 3. *Inconsistent and unpersuasive description of symptoms*

16 The ALJ states as a third reason for discrediting Plaintiff, that “[t]he description of the
17 symptoms and limitations which the claimant has provided throughout the record has
18 generally been inconsistent and unpersuasive.” (Tr. 26) Again, the ALJ failed to identify
19 specifically what descriptions provided by the Plaintiff were inconsistent and unpersuasive.
20 *Hollohan, supra.*

21 4. *Medication Side Effects*

22 The ALJ states as another reason for rejecting Plaintiff’s credibility that Plaintiff has
23 testified that she has side effects from the use of her medications, but the treatment records
24 show different as noted in the records obtained from Dr. Jessop. (Tr. 26) The Plaintiff
25 testified at the hearing that her medications make her “sleepy and tired”; that “[e]very once
26 in a while” she gets dizzy when she stands up, or she missteps and trips. (Tr. 326) The
27 medication does not cause her to have any nausea. (Tr. 326) Plaintiff is not sure if it is the
28 pain, the medication, or her depression which causes her to be so sleepy and tired. (Tr. 326)

1 Plaintiff does experience dry mouth, and she has trouble with her memory, as a result of side
2 effects caused by the medication. (Tr. 326-25)

3 Dr. Jessop's treatment records, on the other hand, noted that Plaintiff's daily physical
4 functioning was adequate, and that Plaintiff denied side effects from her medication. (Tr.
5 225) There is substantial evidence in the record to support the ALJ's conclusion that her
6 testimony regarding side effects from the medication is inconsistent with her treatment
7 records. (Tr. 26)

8 In sum, though the ALJ failed to support her reasons for finding Plaintiff not credible
9 based on Plaintiff's description of daily activities and inconsistent and unpersuasive
10 description of symptoms, the ALJ properly supported her assertions that Plaintiff's treatment
11 has been essentially routine and/or conservative in nature, and has been generally successful
12 in controlling her symptoms, and that Plaintiff's testimony as to side effects differs from
13 what the treatment records demonstrate, as noted in the records obtained from Dr. Jessop.
14 The ALJ's properly supported assertions for finding Plaintiff not credible are supported by
15 substantial evidence, are clear and convincing, and .

16 E. Hypothetical Proposed to Vocational Expert

17 The testimony of a vocational expert cannot constitute substantial evidence to support
18 an ALJ's findings if the hypothetical does not include allegations of persistent disabling pain
19 that are supported by the medical evidence. *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir.
20 1984). The ALJ proposed a hypothetical in which Plaintiff's pain, moderate in nature, is
21 "controlled by appropriate medication without significant adverse side effects." (Tr. 343)
22 The vocational expert clarified, as she had with the previous hypothetical, that the ALJ
23 intended to hypothesize that everything could be controlled with appropriate medications.
24 (Tr. 344)

25 The testimony of the vocational expert in this case cannot constitute substantial
26 evidence to support the ALJ's findings because the vocational expert's testimony in a
27 disability benefits proceeding "is valuable only to the extent that it is supported by medical
28 evidence." *Gallant v. Heckler* 753 F.2d 1450, 1456 (9th Cir. 1984) (quoting *Sample v.*

1 *Schweiker*, 694 F.2d 639, 643-44 (9th Cir.1982)). The hypothetical proposed to the
2 vocational expert, whose determinations the ALJ relied on, was based on the ALJ's incorrect
3 determination of Plaintiff's residual functional capacity ("RFC") as to the limiting effects of
4 pain. The ALJ determined that Plaintiff had pain in various parts of her body, which "is of
5 moderate-level and would normally have a moderate effect on her ability to do work-related
6 activities; however, *that pain is controlled by appropriate medication* without any significant
7 adverse side effects." (Tr. 26)(emphasis added) There is no basis in the record for the ALJ
8 to reject all of Plaintiff's allegations of pain. Although this Court agrees that the ALJ
9 properly discredited Dr. Jessop's ultimate opinion as to disability, over one year of treatment
10 records from Dr. Jessop make evident that Plaintiff's pain was not "controlled" as the ALJ
11 used that term in both her determination of the RFC and the hypothetical proposed to the
12 vocational expert. Dr. Jessop's treatment notes from May and June, 2004, indicate that,
13 when she first began seeing him, her pain level was a 6 of 10, averaging 6 of 10 over her first
14 month of treatment. (Tr. 289) For several months after treatment, her pain increased to 7 out
15 of 10, and Dr. Jessop responded accordingly by increasing/changing her medications. (Tr.
16 264, 268, 271, 274, 278, 285) At the beginning of January, 2005, Plaintiff reported that her
17 "good days outnumber the bad" and that her pain was a 6 out of 10. (Tr. 260) By the end of
18 January, 2005, Plaintiff's pain increased, and she was again at a 7 out of 10 on the pain scale,
19 and remained at that level for another month. (Tr. 250, 255) By the end of February, 2005,
20 her pain level had again been reduced to a 6 out of 10, and remained at that level for another
21 month. (Tr. 243, 247) By April, 2005, Plaintiff was reporting pain of 4 out of 10. (Tr. 239)
22 In May, it again returned to 6 out of 10. (Tr. 234) In June, Plaintiff reported an average pain
23 level of 4 out of 10 over the last month, and in July, rising again to 5 out of 10. (Tr. 226,
24 231) Finally, in the last treatment record from Dr. Jessop, she reported a pain level of 4 out
25 of 10, with "significant intervals of pain at night." (Tr. 224) Throughout Dr. Jessop's
26 treatment of Plaintiff, he reported that Plaintiff "continues to do well on their current
27 analgesic regime." (Tr. 224-289) To the extent the ALJ interpreted this to mean that
28 Plaintiff's pain was controlled, that statement is taken entirely out of context with the rest of

1 Dr. Jessop's treatment records which indicate a constant level of pain which from time to
2 time increases or decreases slightly, and is at best a 4 out of 10. Furthermore, for the time
3 period for which records are available, there does not appear to be a plateau in the level of
4 pain reached by Plaintiff for a given change in her medication. In other words, Plaintiff
5 maintained her pain level (or experienced temporary fluctuations, both higher and lower, and
6 slight in nature) at ever increasing dosages of medications. There is no indication from the
7 record that Plaintiff reached a completely satisfactory, static condition, in which no further
8 changes in her pain medications were required. In fact, Dr. Jessop explained to Plaintiff
9 during her initial assessment that "complete freedom from pain may not be possible" and that
10 the goal was "an improvement in daily functional ability and a decrease in pain." (Tr. 295)
11 To the extent Plaintiff's pain was minimized, she was, in fact, doing well on her regime.
12 This did not mean, however, that she was "pain free", and this was never the goal for
13 Plaintiff with her pain treatment.

14 The assumption in the hypothetical that Plaintiff's pain "was controlled with
15 medication" is not supported by the record, and the opinion of the vocational expert is
16 therefore meaningless. Here the vocational expert was instructed to assume that Plaintiff's
17 pain, which would have been moderate without medication, was controlled with medications
18 with no side effects. The medical record simply does not support this. Even with
19 medication, Plaintiff's pain was at best a 4 out of 10, and more often than not, was a 7 out
20 of 10. This is not what the ALJ conveyed with her description of Plaintiff's pain in the
21 hypothetical. The ALJ implied that Plaintiff had no limitations whatsoever, or at best, only
22 limitations of a slight nature, caused by her pain. This is inconsistent with Plaintiff's
23 treatment records.

24 F. Remand/Reverse

25 The district court has discretion to remand for further proceedings or to award
26 benefits. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir.1989). Remand for an award of
27 benefits is appropriate where:

28 (1) the ALJ failed to provide legally sufficient reasons for rejecting the

1 evidence; (2) there are no outstanding issues that must be resolved before a
2 determination of disability can be made; and (3) it is clear from the record that
3 the ALJ would be required to find the claimant disabled were such evidence
4 credited.

5 *Benecke v. Barnhart*, 379 F.3d 587, 593, (9th Cir. 2004) (citations omitted). Where the test
6 is met, "we will not remand solely to allow the ALJ to make specific findings...Rather we
7 take the relevant testimony to be established as true and remand for an award of benefits."
8 *Id.* (citations omitted); *see also Lester*, 81 F.3d at 834.

9 The ALJ erred in determining that Plaintiff's pain was controlled by medication. The
10 vocational expert testified that Plaintiff would not be able to work if she experienced severe
11 pain, or pain that was only controlled by medications that resulted in side effects that were
12 so significantly adverse that they would interfere with Plaintiff's ability to maintain pace and
13 concentration. This third hypothetical, however, does not accurately describe Plaintiff's pain
14 as reported by Dr. Jessop.

15 The fourth hypothetical included limitations regarding Plaintiff's ability to use her
16 fingers, and additional problems with muscle lumbar spasm and neck spasm. (Tr. 345-46)
17 Additionally, the hypothetical included a number of medications Plaintiff was taking and the
18 resulting side effect of fatigue and sleepiness. (Tr. 346) The vocational expert then assumed
19 that the fourth hypothetical was similar to the third hypothetical. (*Id.*) This assumption was
20 not accurate, however, in that the fourth hypothetical did not address Plaintiff's level of pain
21 in addition to functional limitations associated with her finger numbness and back and neck
22 spasms. Although not entirely evident, it appears that the vocational expert adopted the
23 limitations of the third hypothetical in addition to the limitations proposed by the fourth
24 hypothetical, and thus the vocational expert was not provided an accurate depiction of
25 Plaintiff's level of pain with the use of medication.

26 The ALJ failed to provide an accurate hypothetical to the vocational expert, and thus
27 the ALJ's decision to deny benefits is not supported by substantial evidence in the record.
28 The Magistrate Judge recommends that the appropriate remedy is to remand the case to the

1 Commissioner of Social Security with instruction to require the ALJ to propose a
2 hypothetical that takes into consideration the level of pain Plaintiff experiences with the use
3 of medication, along with relevant side effects, as Dr. Jessop's treatment records indicate,
4 taking such further evidence as is required to determine Plaintiffs eligibility for benefits
5 under the current law, and making appropriate findings consistent with this report.

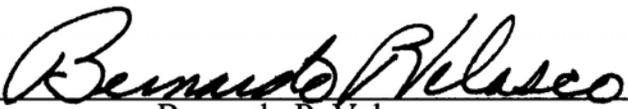
6 **V. RECOMMENDATION**

7 For the foregoing reasons, it is the recommendation of this Court that the District
8 Judge, after his independent review and consideration, GRANT Plaintiff's Motion for
9 Summary Judgment (Doc. No. 10), and remand the case for further proceedings consistent
10 with this report.

11 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
12 ten days after being served with a copy of this Report and Recommendation. A party may
13 respond to another party's objections within ten days after being served with a copy thereof.
14 Fed.R.Civ.P. 72(b). If objections are filed, the parties should use the following case number:
15 **CV 07-280-TUC-RCC.**

16 If objections are not timely filed, then the parties' right to *de novo* review by the
17 District Court may be deemed waived. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
18 1121 (9th Cir.) (*en banc*).

19 DATED this 27th day of January, 2009.

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22 _____
23 Bernardo P. Velasco
24 United States Magistrate Judge
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