

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

GABRIELA ENRIQUEZ,

Plaintiff,

vs.

MICHAEL J. ASTRUE,  
Commissioner of the Social  
Security Administration,

Defendant.

No. CIV 07-338-TUC-CKJ

**ORDER**

On February 2, 2009, Magistrate Judge Charles R. Pyle issued a Report and Recommendation [Doc. # 18] in which he recommended that Plaintiff’s Motion for Summary Judgment [Doc. # 12] be denied and Defendant’s Motion for Summary Judgment [Doc. # 15] be granted. On February 20, 2009, Plaintiff Gabriela Enriquez (“Enriquez”) filed Objections to Report and Recommendation. The Commissioner has not filed a response.

*Magistrate Judge’s Recitation of the Procedural and Factual History*

No objections having been made to the magistrate judge’s recitation of the procedural and factual history, the Court adopts those recitations.

*Standard of Review*

The findings of the Commissioner are meant to be conclusive, 42 U.S.C. §§ 405(g), 1383(c)(3), and a decision to overturn a denial of benefits is appropriate only if the denial “is not supported by substantial evidence or [if the denial] is based on legal error.” *Matney v.*

1 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992), *citations omitted*; *Massachi v. Astrue*, 486 F.3d  
2 1149 (9th Cir. 2007). “Substantial evidence is such relevant evidence as a reasonable mind  
3 might accept as adequate to support a conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th  
4 Cir. 2007). The standard is less than a “preponderance of the evidence” standard. *Matney*,  
5 981 F.2d at 1019. Further, a denial of benefits is to be set aside if the Commissioner has  
6 failed to apply the proper legal standards in weighing the evidence even though the findings  
7 may be supported by substantial evidence. *Frost v. Barnhart*, 314 F.3d 359, 367 (9th Cir.  
8 2002). Indeed, this Court must consider both evidence that supports, and evidence that  
9 detracts from, the conclusion of the Administrative Law Judge (“ALJ”). *Frost*, 314 F.3d at  
10 366-67.

#### 11 12 *Medically Determinable Impairment*

13 Enriquez asserts the ALJ either determined that Enriquez had a medically  
14 determinable impairment (that could reasonably cause her alleged symptoms) or the ALJ’s  
15 decisions are inconsistent because the ALJ determined that Enriquez’ description of her  
16 symptoms were not fully credible. The Commissioner asserted, in his Memorandum in  
17 Support of Defendant’s Motion for Summary Judgment and in Opposition to Plaintiff’s  
18 Motion for Summary Judgment (“Opposition”), that the ALJ conducted a proper analysis of  
19 the medical and opinion evidence and of Enriquez’ credibility. The magistrate judge  
20 determined that the ALJ’s determinations were not inconsistent. In addressing Enriquez’  
21 claim that the ALJ unnecessarily addressed Enriquez’ credibility, the magistrate judge stated  
22 that Enriquez had not offered any statutory or case law authority to support her position.  
23 Enriquez asserts that the standard is set forth in the regulations and it is unclear what  
24 authority the magistrate judge found missing.

25 While the Ninth Circuit has affirmed a finding of a lack of impairment without  
26 considering credibility, *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005), Enriquez has not  
27 pointed to any Ninth Circuit authority that states that credibility may not be considered in  
28

1 determining whether there is a medical impairment. *Compare Craig v. Chater*, 76 F.3d 585  
2 (4th Cir. 1996) (assessment of credibility of subjective claims of pain should only be  
3 undertaken if it is determined claimant has an identifiable medical impairment). However,  
4 the Ninth Circuit has stated “once the claimant produces objective medical evidence of an  
5 underlying impairment, an adjudicator may not reject a claimant’s subjective complaints  
6 based solely on a lack of objective medical evidence to fully corroborate the alleged severity  
7 of pain.” *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991); *see also Ortez v. Shalala*,  
8 50 F.3d 748 (9th Cir. 1995). The court further stated that once “the claimant establishes a  
9 medical impairment reasonably likely to be the cause of the pain, the Secretary directs the  
10 ALJ to consider ‘all of the available evidence’ because the Secretary recognizes that ‘pain  
11 is subjective and not susceptible to measurement by reliable techniques.’” *Bunnell*, 947 F.2d  
12 at 346, *citing* SSR 88-13.<sup>1</sup> The Ninth Circuit case law indicates that the medical impairment  
13 is to be considered prior to a consideration of credibility, but the case law does not prohibit  
14 an earlier consideration. *See e.g., Lingenfelter v. Astrue*, 504 F.3d 1028 (9th Cir. 2007).  
15 However, the relevant regulation states that the finding that an “impairment(s) could  
16 reasonably be expected to produce [the claimant’s] pain or other symptoms does not involve  
17 a determination as to the intensity, persistence, or functionally limiting effects of [the  
18 claimant’s] symptoms.” 20 C.F.R. § 404.1529(b). The regulation also provides that, “[w]hen  
19 the medical signs or laboratory findings show that [the claimant has] a medically  
20 determinable impairment(s) that could reasonably be expected to produce [the claimant’s]  
21 symptoms, such as pain, [the Social Security Administration will] *then* evaluate the intensity  
22 and persistence of [the claimant’s] symptoms so that [the Administration] can determine how  
23 [the claimant’s] symptoms limit [the claimant’s] capacity for work.” 20 C.F.R. §  
24 404.1529(c). Although the Ninth Circuit has not specifically stated that credibility is not to

---

25  
26 <sup>1</sup>Deference is given to SSRs. *Bunnell*, 947 F.2d at 346 n. 3. However, they are  
27 considered with caution and will not be upheld if their application will produce a result that  
28 is inconsistent with statutes and regulations. *Id.*

1 be considered before a determinable medical impairment decision is made, the regulations  
2 make that sequence clear.

3 In this case, the ALJ stated that the “medical evidence presented does not establish  
4 any impairment or impairments which resulted in more than minimal or slight abnormalities  
5 or caused more than a minimal effect upon her ability to work.” Administrative Record  
6 (“AR”), p. 28. A claimant’s credibility is to be considered in determining whether the  
7 impairment is more than minimal in severity. 20 C.F.R. § 404.1529(c). The ALJ also stated:

8 Through her last insured date, the claimant did not have an underlying medically  
9 determinable impairment(s) that could reasonably cause the pain or other symptoms  
10 alleged. The evidence does not show that her symptoms were fully credible, and she  
11 was not precluded from engaging in substantial gainful activity.

12 AR, p. 28. The ALJ considered Enriquez’ credibility in making her determination that  
13 Enriquez did not have a medical impairment. This consideration was error.

14 Case law considering this error is limited. In *Bradley v. Barnhart*, 463 F.Supp.2d 577,  
15 581-83 (S.D.W.Va. 2006), the court remanded the matter because the ALJ failed to consider  
16 the threshold question of whether there was a determinable medical impairment prior to  
17 considering the credibility of claimant’s subjective allegations. However, that decision was  
18 based on *Craig* in which the Fourth Circuit had specifically set forth procedures to follow.

19 In this case, the Commissioner asserted, in his Opposition, that the ALJ had properly  
20 analyzed Enriquez’ credibility and, therefore, did not assert that any error was harmless.  
21 Moreover, the Commissioner did not respond to Enriquez’ objections. Courts, “to protect  
22 due process, must be particularly vigilant and must hold agencies, such as the Social Security  
23 Administration, to a strict adherence to both the letter and the spirit of their own rules and  
24 regulations.” *Call v. Heckler*, 647 F.Supp. 560, 561 (1986), citing *Powell v. Heckler*, 789  
25 F.2d 176 (3rd Cir. 1986). Although the Court agrees with the magistrate judge that the  
26 findings of the ALJ are not inconsistent, the Court must determine if the error is harmless.

27 The harmless error rule applies to the review of administrative decisions regarding  
28 disability. See *Batson v. Commissioner of SSA*, 359 F.3d 1190, 1196 (9th Cir. 2004)

1 (applying harmless error standard). However, a decision of an agency cannot be affirmed  
2 “on a ground that the agency did not invoke in making its decision.” *Stout v. Commissioner*,  
3 SSA, 454 F.3d 1050, 1054 (9th Cir. 2006), *quoting Pinto v. Massanari*, 249 F.3d 840, 547  
4 (9th Cir. 2001). The Court agrees with the magistrate judge that the ALJ’s finding that  
5 Enriquez was not credible in her symptoms does not change the fact that the ALJ specifically  
6 made a finding that Enriquez did not have an underlying medically determinable impairment.  
7 The ALJ’s error was harmless.

8  
9 *Testimony of Toomajian – Controlling Weight*

10 Enriquez asserts the ALJ erred in giving controlling weight to the opinion of Armon  
11 H. Toomajian, M.D. (“Dr. Toomajian”).<sup>2</sup> The magistrate judge agreed, but determined that  
12 Dr. Toomajian’s opinion was supported and consistent with other evidence in the record and  
13 it could serve as substantial evidence. The magistrate judge found that the “fact that the ALJ  
14 stated she gave Dr. Toomajian’s opinion controlling weight did not change the fact that the  
15 ALJ’s reliance on Dr. Toomajian’s testimony over Dr. Smith’s testimony was supported by  
16 substantial evidence in the record.” Report and Recommendation, p. 16, ll. 5-7.

17 Enriquez asserts that, to accept the recommendation of the magistrate judge would  
18 involve the weighing of Dr. Toomajian’s testimony under the proper legal standard by the  
19 Court in the first instance because the ALJ apparently did not realize that she was not  
20 required to accept Dr. Toomajian’s testimony. Enriquez asserts that it is not appropriate for  
21 this Court to weigh Dr. Toomajian’s testimony under the proper legal standard when the ALJ  
22 did not. Indeed, Enriquez asserts that “[l]ong-standing principles of administrative law  
23 require [the Court] to review the ALJ’s decision based on the reasoning and factual findings  
24 offered by the ALJ – not *post hoc* rationalizations that attempt to intuit what the adjudicator

25 \_\_\_\_\_  
26 <sup>2</sup>The regulations only provide that a treating physician’s opinion may be given  
27 controlling weight. *See* 20 C.F.R. § 404.1527(d)(2). The ALJ did not give controlling  
28 weight to the opinion of treating physician Karen Smith, M.D. (“Dr. Smith”).

1 may have been thinking.” *Bray v. Commissioner of SSA*, 554 F.3d 1219, 1225 (9th Cir.  
2 2009). Enriquez argues that an ALJ’s error was harmless only if the Court “can confidently  
3 conclude that no reasonable ALJ, when” not making the same error as the ALJ herein,  
4 “would have reached a different disability determination.” *Stout*, 454 F.3d at 1056. Enriquez  
5 asserts that “a reasonable ALJ who did not believe that he or she was required to adopt Dr.  
6 Toomajian’s testimony could have instead agreed with treating physician Dr. Smith that  
7 Enriquez was unable to work at her date last insured.” Objections, p. 11; *see also Orn v.*  
8 *Astrue*, 495 F.3d 625 (9th Cir. 2007) (discussing factors in determining weight to be given  
9 medical opinions). Indeed, Enriquez asserts that Dr. Toomajian may have improperly  
10 required Enriquez’ functional limitations to be corroborated by contemporaneous medical  
11 evidence in making his opinion.<sup>3</sup> *See* SSR 83-20 (“In some cases, it may be possible, based  
12 on the medical evidence to reasonably infer that the onset of a disabling impairment(s)  
13 occurred some time prior to the date of the first recorded medical examination, e.g., the date  
14 the claimant stopped working”); Enriquez’ asserts the ALJ erred in not ascertaining whether  
15 Dr. Toomajian indeed required such evidence to reach an opinion of a disabling impairment.  
16 *See* 20 C.F.R. § 404.944 (ALJ is to fully look into the issues); *see also Armstrong v.*  
17 *Commissioner of SSA*, 160 F.3d 587 (9th Cir. 1998), *citation omitted* (ALJ is “to call upon  
18 the services of a medical advisor and to obtain all evidence which is available to make the  
19 determination”)

20 The Court disagrees with Enriquez that a reasonable ALJ, when not making the same  
21 error as the ALJ herein, may have reached a different result. Initially, the Court considers  
22 that Enriquez’ interpretation of Dr. Toomajian’s testimony does not alter the fact that he did  
23 not state that he required Enriquez’ functional limitations to be corroborated by  
24

---

25 <sup>3</sup>Dr. Toomajian, when asked if he agreed with Dr. Smith that the claimant was  
26 disabled as of December 1999, testified, “Well I know if I could find some medical evidence  
27 in the records I might agree with her. But from what I saw I don’t agree with that.” AR, p.  
28 587.

1 contemporaneous medical evidence in making his opinion. The Court also consider that  
2 “[d]ecisions based on multiple errors, harmless or otherwise, put the Court in the improper  
3 position of fact-finder and promote remand or reversal based on cumulative error.”  
4 *Dickinson v. Commissioner, SSA*, 2008 WL 5423366 n. 9 (D.Id. 2008); *see also Renaudette*  
5 *v. Astrue*, 482 F.Supp.2d 121 (D.Mass. 2007) (cumulative factual errors and misstatements  
6 undermined confidence that evidence was fully and fairly considered or that the decision was  
7 supported by substantial evidence). However, where the evidence presented to the ALJ (and  
8 submitted to this Court on review) clearly establishes that Enriquez only began consistently  
9 complaining of lupus symptoms after December 1999, the Court “can confidently conclude  
10 that no reasonable ALJ, when” not making the same error as the ALJ herein, “would have  
11 reached a different disability determination.” *Stout*, 454 F.3d at 1056.<sup>4</sup> Additionally,  
12 although the ALJ gave controlling weight to Dr. Toomajian’s opinion, this Court can  
13 confidently find the ALJ’s findings are supported by substantial evidence in the record as a  
14 whole. *Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir. 1985) (The limited role of the court  
15 is to ensure that the “Secretary’s findings are [not] based upon legal error [and are] supported  
16 by substantial evidence in the record as a whole.”). The Court finds the error of the ALJ to  
17 be harmless.

18  
19 *Testimony of Smith*

20 Enriquez asserts that substantial evidence does not support the ALJ’s step-two  
21 decision because the ALJ did not give the required clear and convincing reasons for rejecting  
22 the retrospective opinions of treating rheumatologist Dr. Smith. In evaluating evidence to  
23 determine whether a claimant is disabled, the opinions of treating physicians are entitled to  
24 great weight. *Curry v. Sullivan*, 925 F.2d 1127, 1129 (9th Cir. 1989). Where a treating  
25

---

26 <sup>4</sup>The Court notes that the magistrate judge summarized at length Enriquez’ medical  
27 records that pre-dated Enriquez’ date of last insured.

1 physician's opinion contradicts the opinion of an examining or consulting physician, there  
2 must be "specific and legitimate reasons' supported by substantial evidence in the record"  
3 to reject a treating physician's opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996),  
4 quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Where the treating  
5 physician's opinion is not contradicted, the opinion may be rejected as long as clear and  
6 convincing reasons are given. *Montijo v. Secretary of HHS*, 729 F.2d 599, 601 (9th Cir.  
7 1984).

8 In this case, Dr. Toomajian's opinion contradicted Dr. Smith's opinion. The Court  
9 agrees with the magistrate judge that the ALJ set forth specific and legitimate reasons  
10 supported by substantial evidence in the record to reject Dr. Smith's opinion.<sup>5</sup> The ALJ  
11 found that Dr. Smith's opinion was inconsistent with medical records prior to December 31,  
12 1999, and that the retrospective opinion was based on Enriquez' subjective statements. The  
13 ALJ also noted that Dr. Smith's notes from May 2001 stated Enriquez' symptoms had been  
14 present only since August 2000. The Court agrees with the magistrate judge that Dr. Smith's  
15 assertion that Enriquez was "disabled by lupus prior to December 31, 1999, is not supported  
16 by the record. The ALJ did not err in rejecting Dr. Smith's retrospective opinion." Report  
17 and Recommendation, p. 18, ll.11-13.

#### 18 19 *Credibility of Enriquez*

20 Enriquez objects to the magistrate judge's failure to address the credibility of  
21 Enriquez.<sup>6</sup> However, the Ninth Circuit has stated:

22 [T]o discredit a claimant's testimony when a medical impairment has been  
23 established, the ALJ must provide "specific, cogent reasons for the disbelief." The  
24 ALJ must "cit[e] the reasons why the [claimant's testimony is unpersuasive." Where,  
as here, the ALJ did not find "affirmative evidence" that the claimant was a

---

25 <sup>5</sup>The Court disagrees with Enriquez' assertion that the ALJ was required to state clear  
26 and convincing reasons for rejecting Dr. Smith's opinion.

27 <sup>6</sup>The magistrate judge found that the ALJ's credibility finding was irrelevant.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

malingerer, those “reasons for rejecting the claimant’s testimony must be clear and convincing.”

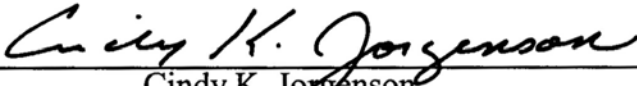
*Orn*, 495 F.3d at 635, *citations omitted*. Where, as here, the ALJ did not find that a medical impairment has been established, it is not clear what standard should be applied in reviewing an ALJ’s reasons for rejecting a claimant’s testimony. The Court does not find it appropriate to assume, as Enriquez argues, that the ALJ found a medical impairment solely because the ALJ addressed Enriquez’ credibility. Such a conclusion would directly contradict the finding as stated by the ALJ: “Through her last insured date, the claimant did not have an underlying medically determinable impairment(s) that could reasonably cause the pain or other symptoms alleged.” AR, p. 28. Rather, the Court finds review is not appropriate because, as previously stated, the ALJ’s consideration of Enriquez’ credibility is harmless error.

Accordingly, after an independent review, IT IS ORDERED:

1. The Report and Recommendation [Doc. # 18] is ADOPTED;
2. Plaintiff’s Motion for Summary Judgment [Doc. # 12] is DENIED;
3. Defendant’s Cross-Motion for Summary Judgment [Doc. # 15] is GRANTED;
4. The decision of the ALJ is AFFIRMED;
5. Judgment is awarded in favor of Defendant and against Plaintiff, and;
6. The Clerk of the Court shall enter judgment in this case and shall then close

its file in this matter.

DATED this 26th day of March, 2009.

  
Cindy K. Jorgenson  
United States District Judge