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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATIVIDAD S. APODACA,)	Case No. CV 11-10111-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	AFFIRMING THE COMMISSIONER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security disability insurance benefits (“DIB”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties’ Joint Stipulation, filed August 23, 2012, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is affirmed and this action is dismissed.

II. BACKGROUND

Plaintiff was born on February 3, 1968. (Administrative

1 Record ("AR") 82.) She has an 11th-grade education. (AR 87,
2 359.) From 1999-2001, Plaintiff worked as a crossing guard; from
3 1999-2003 and 2005-07 she worked for various employers as a cook
4 helper; from 2004-07 she worked as a babysitter; and from 2007-08
5 she worked for EZ Lube as a store laborer, performing different
6 functions. (AR 98, 361-62, 375-76, 380.) On November 30, 2007,
7 Plaintiff injured her spine and neck after slipping and falling
8 at work, though she apparently continued to work for some time
9 afterward. (AR 65 (worker's compensation compromise and release
10 form, noting November 30, 2007, as disability start date), 82
11 (noting "alleged onset date" of November 30, 2007), 361
12 (explaining that Plaintiff tried to work for "a couple of months"
13 after injury).)¹

14 On April 26, 2010, Plaintiff filed a DIB application,
15 alleging that she had been unable to work since November 30,
16 2007, because of neck and back injuries, knee pain, a head
17 injury, and shoulder pain. (AR 82-86.) After Plaintiff's
18 application was denied, she requested a hearing before an
19 Administrative Law Judge ("ALJ"). (AR 35.) A hearing was held
20 on March 17, 2011, at which Plaintiff appeared and testified on
21 her own behalf. (AR 353-94.) Plaintiff's boyfriend, Christopher
22 Villasenor, and Vocational Expert ("VE") Freeman Leeth also
23 testified. (AR 374-94.) In a written decision issued on March
24 25, 2011, the ALJ determined that Plaintiff was not disabled.

26
27 ¹At the hearing, Plaintiff claimed that she was injured on
28 July 31, 2007. (AR 359.) The evidence in the record, however,
indicates that she was injured on November 30, 2007. (See AR 65,
82.)

1 (AR 17-28.) On October 6, 2011, the Appeals Council denied
2 Plaintiff's request for review. (AR 7-9.) This action followed.

3 **III. STANDARD OF REVIEW**

4 Pursuant to 42 U.S.C. § 405(g), a district court may review
5 the Commissioner's decision to deny benefits. The ALJ's findings
6 and decision should be upheld if they are free from legal error
7 and are supported by substantial evidence based on the record as
8 a whole. § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91
9 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481
10 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such
11 evidence as a reasonable person might accept as adequate to
12 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter
13 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than
14 a scintilla but less than a preponderance. Lingenfelter, 504
15 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,
16 882 (9th Cir. 2006)). To determine whether substantial evidence
17 supports a finding, the reviewing court "must review the
18 administrative record as a whole, weighing both the evidence that
19 supports and the evidence that detracts from the Commissioner's
20 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
21 1996). "If the evidence can reasonably support either affirming
22 or reversing," the reviewing court "may not substitute its
23 judgment" for that of the Commissioner. Id. at 720-21.

24 **IV. THE EVALUATION OF DISABILITY**

25 People are "disabled" for purposes of receiving Social
26 Security benefits if they are unable to engage in any substantial
27 gainful activity owing to a physical or mental impairment that is
28 expected to result in death or which has lasted, or is expected

1 to last, for a continuous period of at least 12 months. 42
2 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
3 (9th Cir. 1992).

4 A. The Five-Step Evaluation Process

5 The ALJ follows a five-step sequential evaluation process in
6 assessing whether a claimant is disabled. 20 C.F.R.
7 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th
8 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the
9 Commissioner must determine whether the claimant is currently
10 engaged in substantial gainful activity; if so, the claimant is
11 not disabled and the claim is denied. § 404.1520(a)(4)(i). If
12 the claimant is not engaged in substantial gainful activity, the
13 second step requires the Commissioner to determine whether the
14 claimant has a "severe" impairment or combination of impairments
15 significantly limiting her ability to do basic work activities;
16 if not, a finding of not disabled is made and the claim is
17 denied. § 404.1520(a)(4)(ii). If the claimant has a "severe"
18 impairment or combination of impairments, the third step requires
19 the Commissioner to determine whether the impairment or
20 combination of impairments meets or equals an impairment in the
21 Listing of Impairments ("Listing") set forth at 20 C.F.R. Part
22 404, Subpart P, Appendix 1; if so, disability is established and
23 benefits are awarded. § 404.1520(a)(4)(iii). If the claimant's
24 impairment or combination of impairments does not meet or equal
25 an impairment in the Listing, the fourth step requires the
26 Commissioner to determine whether the claimant has sufficient
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1 residual functional capacity ("RFC")² to perform her past work;
2 if so, the claimant is not disabled and the claim must be denied.
3 § 404.1520(a)(4)(iv). The claimant has the burden of proving
4 that she is unable to perform past relevant work. Drouin, 966
5 F.2d at 1257. If the claimant meets that burden, a prima facie
6 case of disability is established. Id. If that happens or if
7 the claimant has no past relevant work, the Commissioner then
8 bears the burden of establishing that the claimant is not
9 disabled because she can perform other substantial gainful work
10 in the economy. § 404.1520(a)(4)(v). That determination
11 comprises the fifth and final step in the sequential analysis.
12 Id.; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

13 B. The ALJ's Application of the Five-Step Process

14 At step one, the ALJ found that Plaintiff had not engaged in
15 any substantial gainful activity since April 1, 2008.³ (AR 22.)
16 At step two, the ALJ concluded that Plaintiff had the severe
17 impairments of lower back and neck pain secondary to degenerative
18 disc disease and obesity. (Id.) At step three, the ALJ

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20 ²RFC is what a claimant can still do despite existing
21 exertional and nonexertional limitations. 20 C.F.R. § 404.1545;
22 see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

23 ³The ALJ's decision states that Plaintiff's alleged
24 disability onset date was April 1, 2008. (AR 20.) It is unclear
25 why the ALJ chose that date, as her alleged onset date appears to
26 have been November 30, 2007. (AR 82; see also AR 359 (ALJ
27 stating that he "[doesn't] know where [April 1, 2008] date came
28 from".) Plaintiff does not argue, however, that the ALJ's
determination of the alleged onset date was error. (See J. Stip.
at 2 (noting that ALJ determined alleged onset date to be "April
1, 2008," but not alleging that date was error).) Thus, the
Court will not address that issue. See Greger v. Barnhart, 464
F.3d 968, 973 (9th Cir. 2006) (issues not raised before the
district court are waived).

1 determined that Plaintiff's impairments did not meet or equal any
2 of the impairments in the Listing. (Id.) At step four, the ALJ
3 found that Plaintiff retained the RFC to perform a range of
4 medium work⁴ with the additional limitations that Plaintiff
5 can perform work that does not require climbing ladders,
6 ropes or scaffolds, or crawling; and no more than
7 occasional stooping or crouching. [Plaintiff] is
8 precluded from performing overhead work, and can posture
9 her neck in a static position for no more than 10 minutes
10 (i.e., without an opportunity to otherwise flex, extend
11 or rotate her neck while remaining on task).

12 (AR 22-23.) Based on the VE's testimony, the ALJ concluded that
13 Plaintiff was able to perform her past work as a child monitor.

14 (AR 26.) In the alternative, the ALJ found that Plaintiff could
15 also perform the jobs of parking-lot booth attendant, security
16 guard, labeler/ticketer, sorter, stuffer, and assembler. (AR 26-
17 27.) The ALJ concluded that jobs existed in significant numbers
18 in the national economy that Plaintiff could perform. (AR 27.)
19 Accordingly, the ALJ determined that Plaintiff was not disabled.

20 (AR 27-28.)

21 **V. DISCUSSION**

22 Plaintiff alleges that the ALJ erred in (1) determining that
23 she could perform jobs that may involve overhead reaching and (2)

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26 ⁴"Medium work" is defined as involving "lifting no more than
27 50 pounds at a time with frequent lifting or carrying of objects
28 weighing up to 25 pounds." 20 C.F.R. § 404.1567(c). The
regulations further specify that "[i]f someone can do medium
work, we determine that he or she can also do sedentary and light
work," as defined in § 404.1567(a)-(b). Id.

1 failing to properly consider Plaintiff's testimony regarding her
2 subjective symptoms. (J. Stip at 4.)

3 A. The ALJ Did Not Err in Failing to Inquire Further About
4 a Potential Conflict Between the Dictionary of
5 Occupational Titles and the VE's Testimony Because No
6 Conflict Existed

7 Plaintiff contends that the ALJ erred in determining she
8 could perform the jobs the VE identified because he did not first
9 inquire about a potential conflict between her testimony and the
10 Dictionary of Occupational Titles ("DOT"). (J. Stip. at 5-12.)
11 Plaintiff asserts that an unresolved conflict existed because the
12 jobs the VE testified Plaintiff could perform are all described
13 in the DOT as requiring a level of reaching ranging from
14 "occasional" to "constant" and may include overhead reaching,
15 whereas the ALJ found that Plaintiff was "precluded from
16 performing overhead work." (J. Stip. at 5-12.) As explained
17 below, Plaintiff misapprehends the phrase "overhead work."
18 Because the ALJ did not find that Plaintiff's ability to reach
19 was impaired, no conflict existed between the VE's testimony and
20 the DOT.

21 1. Applicable law

22 An ALJ must ask a hypothetical question to a VE that is
23 based on medical assumptions supported by substantial evidence in
24 the record and that reflects all of the plaintiff's limitations.
25 Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995). When a VE
26 provides evidence about the requirements of a job, the ALJ has a
27 responsibility to ask about "any possible conflict" between that
28 evidence and the DOT. See SSR 00-4p, 2000 WL 1898704, at *4;

1 Massachi v. Astrue, 486 F.3d 1149, 1152-54 (9th Cir. 2007)
2 (holding that application of SSR 00-4p is mandatory). An ALJ's
3 failure to do so is procedural error, although the error is
4 harmless if no actual conflict existed or the VE provided
5 sufficient evidence to support the conclusion. Id. at 1154 n.19.

6 The Court must consider the ALJ's decision in the context of
7 "the entire record as a whole"; if the "evidence is susceptible
8 to more than one rational interpretation, the ALJ's decision
9 should be upheld." Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194,
10 1198 (9th Cir. 2008) (internal quotation marks omitted).

11 2. Relevant facts

12 During the hearing, the ALJ posed the following hypothetical
13 to the VE:

14 For the first hypothetical, assume a person of the
15 claimant's age, education, work experience, and skill
16 set; who is able to perform light work as defined in the
17 regulations, including exerting up to 20 pounds of force
18 occasionally, and/or up to 10 pounds of force frequently,
19 and/or a negligible amount of force constantly, to move
20 objects. This person can stand, and walk, and/or sit up
21 to six hours in an eight-hour workday with normal breaks.
22 This person would perform work that did not require the
23 climbing of ladders, ropes, and scaffolds; not require
24 crawling; and no more than occasional stooping or
25 crouching. . . . This person would be precluded from
26 performing overhead work. Additionally, this person
27 would perform work that did not require the static
28 posturing of the neck, in other words, keeping the neck

1 and head in a static, steadfast position, for more than
2 10 minutes at a time.

3 (AR 381-82 (emphasis added).) The VE responded that Plaintiff
4 could perform the jobs of "parking lot booth attendant,"
5 "unarmed, unskilled security guard positions," and "some labeler
6 or . . . ticketer positions." (AR 382-83.)

7 The ALJ then posed a second hypothetical:

8 For the second hypothetical, assume everything in the
9 first hypothetical, except this person would be limited
10 to the performance of sedentary work as defined in the
11 regulations, including exerting up to 10 pounds of force
12 occasionally and/or a negligible amount of force
13 frequently to move objects, including the human body. In
14 addition, this person would perform work that did not
15 require more than two hours of standing and walking in an
16 eight-hour workday with normal breaks.

17 (AR 383.) The VE responded that, based on the limitation to
18 sedentary work and the limitation to "two hours . . . of standing
19 and walking" and "the static of the neck," Plaintiff could not
20 perform any work. (Id.) The ALJ later clarified with respect to
21 that hypothetical that the neck movement restriction meant that
22 the person "cannot . . . keep their head in one position, for
23 more than 10 minutes," but "within 10 minutes, or after 10
24 minutes, the person can rotate their neck, flex, or extend their
25 neck[,] and go back to what they were doing" without having to
26 get up or leave the workstation. (AR 386-89.) The VE then found
27 that Plaintiff could perform the sedentary jobs of "sorter,"
28 "stuffer," and "assembler." (AR 389-90.)

1 The ALJ also posed a third hypothetical:

2 [F]or the third hypothetical, assume everything in the
3 first hypothetical, except we're at the medium exertion
4 level . . . which is, an individual who can exert up to
5 20 to 50 pounds of force occasionally, and/or 10 to 20
6 pounds of force frequently, and/or greater than
7 negligible, up to 10 pounds of force, constantly, to move
8 objects. All of the other criteria would remain the
9 same, including standing and walking up to six hours in
10 an eight-hour workday with normal breaks.

11 (AR 384.) Based on that hypothetical, the VE found that
12 Plaintiff could perform her past relevant work as a "babysitter .
13 . . both as generally and actually performed." (AR 384-85.)

14 At the close of the VE's testimony, the ALJ asked him
15 whether any of his testimony "conflict[ed] with or diverge[d]
16 from the information in the Dictionary of Occupational Titles."

17 (AR 392.) The VE answered that it did not. (Id.) In his
18 written opinion, the ALJ found that "[p]ursuant to SSR 00-4p, the
19 vocational expert's testimony is consistent with the information
20 contained in the Dictionary of Occupational Titles." (AR 27.)

21 3. Analysis

22 Based on the VE's testimony, the ALJ found that Plaintiff
23 could perform the jobs of child monitor, parking-lot booth
24 attendant, security guard, labeler/ticketer, sorter, stuffer, and
25 assembler. (AR 26-27.) The DOT states that the child monitor
26 position requires reaching "Occasionally - Exists up to 1/3 of
27 the time." DOT 301.677-010, 1991 WL 672652. The jobs of
28 parking-lot attendant, security guard, stuffer, and assembler all

1 require reaching "Frequently - Exists from 1/3 to 2/3 of the
2 time." DOT 915.473-010, 1991 WL 687865 (parking-lot attendant);
3 DOT 372.667-034, 1991 WL 673100 (security guard); DOT 731.685-
4 014, 1991 WL 679811 (stuffer); DOT 713.687-018, 1991 WL 679271
5 (assembler). The jobs of labeler/ticketer and sorter require
6 reaching "Constantly - Exists 2/3 or more of the time." DOT
7 229.587-018, 1991 WL 672150 (labeler/ticketer); DOT 734.687-082,
8 1991 WL 679966 (sorter). Reaching is defined as "extending the
9 hands and arms in any direction." SSR 85-15, 1985 WL 56857, at
10 *7 (emphasis added). Plaintiff argues that the reaching
11 requirements of all the aforementioned jobs conflict with the
12 ALJ's finding that she was "precluded from performing overhead
13 work," because reaching involves reaching in "any direction,"
14 including overhead. (J. Stip. at 5-12.)

15 Plaintiff's argument fails because the ALJ did not preclude
16 Plaintiff from performing "overhead reaching" - instead, he
17 precluded her from performing "overhead work." Viewed in the
18 context of the evidence as a whole, see Ryan, 528 F.3d at 1198,
19 the ALJ most reasonably intended to preclude Plaintiff from doing
20 jobs that require nearly constant upward gazing and extension of
21 the neck to perform work above the head, such as a tree trimmer
22 or window washer.

23 This interpretation is consistent with the medical evidence,
24 which showed that Plaintiff had a neck injury and pain when fully
25 extending the neck (see, e.g., AR 212; 236-43; 244-51; 253; 254-
26 57; 268-70; 321), but did not show that she could never reach
27 overhead. (See AR 212 (noting that "[the] range of motion of
28 [Plaintiff's] head at the neck is limited due to pain at the

1 extremes of movement especially when looking up and down or with
2 moving side to side"); AR 341, 344 (noting that Plaintiff's RFC
3 restricted her to "limited" "overhead lifting" and that she could
4 do some overhead reaching).) It is also consistent with
5 Plaintiff's statement to her doctor that when EZ Lube placed her
6 in a job that involved a great deal of window washing she could
7 not work because of the steady "looking up and reaching up on
8 high windows." (AR 289.)

9 The interpretation of "work" to mean "jobs" rather than
10 "reaching" also comports with principles of word use and grammar.
11 In the sentence immediately following his use of the phrase
12 "overhead work," the ALJ listed a number of movements that
13 Plaintiff could never perform. Had he intended to say that
14 Plaintiff could perform no reaching, he more likely would have
15 simply inserted the word "reaching" into that list. Indeed, the
16 undersigned has read dozens of Social Security decisions, and
17 ALJs regularly prescribe limitations of various kinds on
18 "reaching" or "overhead reaching." See, e.g., Hill v. Astrue,
19 688 F.3d 1144, 1148 (9th Cir. 2012) (noting that ALJ's RFC placed
20 limit on overhead "reach[ing]"); Mondragon v. Astrue, 364 F.
21 App'x 346, 348 (9th Cir. 2010) (same). The use of the phrase
22 "overhead work" was surely intended to mean something else. In
23 many places in the Social Security regulations, the Commissioner
24 himself has used "work" to mean "job" or "jobs." See, e.g., 20
25 C.F.R. § 404.1520(f) (using "past relevant work" to mean prior
26 job); Petsch v. Astrue, No. 11-CV-00925(F), 2012 WL 3313553, at
27 *8 n. 6 (W.D.N.Y. July 19) (noting that § 404.1567(c) defines
28 "medium work" as "jobs that require" certain functions), accepted

1 by 2012 WL 3314821 (W.D.N.Y. Aug. 13, 2012). Finally, the Court
2 doubts that any dictionary lists "reaching" as a synonym for
3 "work," but many define the latter word as meaning "job." See,
4 e.g., Work Definition, The Free Dictionary,
5 <http://www.thefreedictionary.com/work> (last visited Sept. 24,
6 2012) (defining work (n.) as "[a] job; employment").

7 According to the DOT descriptions, none of the jobs the ALJ
8 found that Plaintiff could perform appear to involve doing work
9 above the head. Thus, interpreting the ALJ's findings in the
10 manner most consistent with the medical evidence and other
11 principles of construction, no conflict existed between the VE's
12 testimony and the DOT and the ALJ was not required to inquire any
13 further. Reversal is therefore not warranted on this basis.

14 B. The ALJ Did Not Improperly Discount Plaintiff's
15 Subjective Symptom Testimony

16 Plaintiff next argues that the ALJ "improperly assessed her
17 subjective symptom testimony" in evaluating her RFC. (J. Stip.
18 at 18.) According to Plaintiff, her testimony alleging she was
19 incapable of performing all but the most basic of activities was
20 consistent with the medical evidence and thus the ALJ should not
21 have discounted it. (Id. at 18-25.) Reversal is not warranted
22 on this basis, however, because the ALJ made specific findings as
23 to Plaintiff's credibility that were consistent with the medical
24 evidence of record.

25 1. Applicable law

26 An ALJ's assessment of pain severity and claimant
27 credibility is entitled to "great weight." See Weetman v.
28 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779

1 F.2d 528, 531 (9th Cir. 1986). When the ALJ finds a claimant's
2 subjective complaints not credible, the ALJ must make specific
3 findings that support the conclusion. See Berry v. Astrue, 622
4 F.3d 1228, 1234 (9th Cir. 2010). Absent affirmative evidence of
5 malingering, the ALJ must give "clear and convincing" reasons for
6 rejecting the claimant's testimony. Lester, 81 F.3d at 834. If
7 the ALJ's credibility finding is supported by substantial
8 evidence in the record, the reviewing court "may not engage in
9 second-guessing." Thomas v. Barnhart, 278 F.3d 947, 959 (9th
10 Cir. 2002).

11 2. Relevant facts

12 In August 2010, Plaintiff filled out a Function Report
13 describing her subjective symptoms. (AR 107-15.) In it she
14 alleged that she needed to rest every 10 to 15 minutes because
15 her back and neck started to hurt (AR 107, 110, 112, 115); she
16 could not comb her hair, shave, dress herself, use the toilet, or
17 prepare food without help (AR 108-09); she could lift no more
18 than five pounds and "will hurt after" in her back and neck (AR
19 112); and she could not read or write for longer than five
20 minutes at a time because her back and neck would start to hurt
21 (AR 111-12, 115). But she also stated that she was able to
22 "cook, clean, [and] take [her son] to school" (AR 108); wash
23 dishes and do "one or two loads" of laundry "every day" (AR 109);
24 "go out every day [to] sit at [the] park or try to walk" "half a
25 block" before needing to rest (AR 110, 112); and do her own
26 grocery shopping (AR 110). Her hobbies included "bike rid[ing],
27 cards, sight [seeing], and swim[ming]" as well as going to
28 "parks" and "church" "once a week when I feel OK," though she

1 "can't ride [too] long" or "read longer [than] 5 min" without
2 pain. (AR 111.) She stated that she took several prescription
3 pain medications but "every pain med got me sick." (AR 114.)

4 At the hearing Plaintiff testified that she felt she could
5 not work because

6 I'm constantly in pain when I'm sitting down, when I'm
7 standing up, when I'm doing anything. I can't really do
8 anything. And then, I'm constantly in pain. I can't
9 think right when I'm in pain. And then, when I'm taking
10 the pills, I'm constantly like sleepy, sick, where I
11 can't, can't function right. When I'm out, I can't even
12 take the pills, because I've got to constantly think,
13 right? And do things.

14 (AR 363.) She further testified that she could take the
15 medication only at night because of the side effects. (AR 363-
16 64.) She stated that she had pain "directly in the lower back
17 and around my neck," and "when I'm shopping, I can't even shop .
18 . . I can't stay too long in a store." (AR 364.) Plaintiff
19 stated that she used Vicodin for pain management and that she had
20 tried injections but "[i]t gave me a side effect of bleeding" so
21 she "couldn't do that again." (AR 364-65.) She also stated that
22 she got headaches but that they were controlled with the same
23 pain medication she took for her neck and back. (AR 356.) She
24 testified that she "did not want to" have surgery for her
25 injuries because she knew other people who had had similar
26 surgeries and had not gotten better. (AR 366-67.) She stated
27 that her back pain was helped by doing exercises that stretched
28 her back. (AR 368-69.) She also testified that she was

1 "constantly in pain" in her neck "just by sitting up," and that
2 "the only time I feel good" is "[w]hen I'm [lying] down." (AR
3 369.) She stated that during the day she "tr[ies] to [lie] down"
4 and "get up, take walks," but exercising makes her pain "worse."
5 (AR 370.)

6 Plaintiff described her daily activities as follows:

7 Wash a couple of dishes, make sure my son goes to
8 school, make a few phone calls here and there, do things
9 - take care of the bills I need to take care of, call
10 around, try to do it through credit card[.] . . . Take
11 walks and stuff. I just take a walk down the street or
12 something. . . . Try to take walks. I try not to stay
13 indoors too much.

14 (AR 371.) She stated that she generally spends "a few hours"
15 each day "out walking around." (Id.) She further stated that
16 she "sometimes" cooks for her son and does laundry. (AR 372.)

17 In his written decision the ALJ noted that he had considered
18 Plaintiff's hearing testimony as well as the testimony of her
19 boyfriend, Villasenor, and the third-party report submitted by
20 Plaintiff's friend Lucy Guegera.⁵ (AR 23; see AR 116-23 (third-
21 party report); AR 4-23 (Plaintiff's and Villasenor's hearing
22 testimony).) He then analyzed the objective medical evidence.
23 (AR 24-26.)

24 The ALJ first noted that records from Dr. Augusto Rodriguez
25 dated "around the alleged onset date" (they were dated March 24,
26 2008) showed that Plaintiff "primarily complained of only neck

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28 ⁵Plaintiff does not contest the ALJ's evaluation of
Villasenor's and Guegera's testimony. (See J. Stip. at 18-25.)

1 pain," and "[c]linical findings in January 2008 revealed some
2 tenderness in the posterior cervical musculature, decreased range
3 of motion in the neck with extreme movement, and spasm." (AR 24,
4 212.) He further noted that despite Plaintiff's allegations of
5 "significant" neck pain, she received only conservative treatment
6 from Dr. Rodriguez, "including prescription medication and
7 chiropractic therapy." (AR 24, 198, 203, 205.) He also noted
8 that MRIs of her cervical and lumbar spine revealed minimal
9 impairments, and her symptoms improved over time with treatment;
10 "[b]y March 2008, [Plaintiff] had normal ranges of motion in the
11 head and neck." (AR 24, 188, 198, 228-30.)

12 The ALJ next analyzed the notes from Plaintiff's treating
13 physician, Dr. Daniel Capen. (AR 24, 232-99.) Specifically, he
14 observed the following:

15 Contrary to Dr. Rodriguez's records demonstrating
16 gradual, but steady improvement in the claimant's
17 symptoms, on initial evaluation in May 2008 with Dr.
18 Capen, the claimant reported extensive subjective
19 allegations of sharp, stabbing pain in the neck and back,
20 with associated numbness and weakness, amongst other
21 complaints. [(AR 291.)] Clinical findings, however,
22 were positive only for some tenderness and decreased
23 ranges of motion in the cervical and lumbar spine along
24 with some spasm in the cervical spine. [(AR 292.)]
25 Straight-leg raising was negative bilaterally and the
26 claimant demonstrated normal gait. [(AR 292-93.)]
27 Following this initial evaluation, Dr. Capen opined that
28 the claimant should not lift over 10 pounds. While the

1 Administrative Law Judge finds such restriction as
2 extreme and not bolstered by any objective support, Dr.
3 Capen did indicate, however, that the claimant "may
4 continue to work" under such restriction. [(AR 296.)]
5 Moreover, as described below, even if the claimant were
6 given the benefit of the doubt and restricted to
7 sedentary work, which complies with the 10 pound lifting
8 restriction, there are still significant numbers of
9 "other" work, which she may perform, per the vocational
10 expert's testimony.

11 The bulk of Dr. Capen's treating notes indicate
12 similar clinical findings from his initial evaluation,
13 with no indication of worsening of symptoms. Consistent
14 with Dr. Rodriguez's care, the claimant was under
15 conservative treatment with Dr. Capen, including physical
16 therapy, medications for symptoms relief, and the use of
17 a cervical pillow. [(AR 271, 254, 256.)] Although the
18 claimant testifies that her medications cause drowsiness,
19 there are no such complaints documented within Dr.
20 Capen's treatment notes. In the August 2009 permanent
21 and stationary report, Dr. Capen noted that the claimant
22 was not interested in any invasive treatment. She even
23 denied pain management. [(AR 246.)] Given the
24 claimant's extreme allegations of pain and related
25 functional difficulties, denial of such treatment appears
26 inconsistent and suggests that the claimant's symptoms
27 may not be as intense as she has alleged. Dr. Capen's
28 only advice for future medical care was further

1 evaluation of the claimant's complaints of TMJ pain,
2 which subsequent records and hearing testimony have not
3 highlighted as a continuing bothersome condition, and gym
4 and pool membership. [(AR 247.)] In terms of functional
5 limitations, Dr. Capen noted in the August 2009 report
6 that the claimant should be precluded from heavy work
7 activity, overhead activity, and static posturing. [(AR
8 249.)]

9 Following Dr. Capen's permanent and stationary
10 report, the record is relatively silent on further
11 treatment or evaluation for the claimant's neck and back
12 pain. Subsequent, and intermittent, re-evaluations by
13 Dr. Capen revealed no notable changes in physical
14 findings or treatment protocol. [(AR 233, 236.)]

15 (AR 24-25 (citation omitted).)

16 The ALJ then noted that in August 2009, Plaintiff underwent
17 a DMV physical that showed "no acute distress," during which she
18 "made no complaints of any musculoskeletal pain," and
19 "examination of the neck was normal as was her gait." (AR 25,
20 159.) He also noted that in October 2010, Plaintiff underwent a
21 consultative internal medicine evaluation that showed she was in
22 "no acute distress," "demonstrated normal gait with full back
23 range of motion without pain," and "was able to get on and off
24 the examination table without any difficulty and exhibited
25 negative straight-leg raising." (AR 25, 320-21.) He further
26 observed that "[a]lthough there was some pain on full extension
27 of the neck, overall, she had normal cervical range of motion,"
28 and "[e]valuation of the upper and lower extremities was also

1 normal, with no positive findings on sensory examination or motor
2 strength." (AR 25, 321-22.) He noted that the examiner
3 concluded Plaintiff "would be capable of performing the full
4 range of medium work," and "[t]he State Agency medical consultant
5 largely agreed with the consultative examiner's functional
6 assessment, adding only that the claimant would have limited
7 reaching capacity." (AR 25, 322, 338-46.)

8 The ALJ concluded his evaluation of Plaintiff's symptoms as
9 follows:

10 In determining the claimant's residual functional
11 capacity, the Administrative Law Judge has carefully
12 considered all of the objective findings of record, the
13 treating, examining, and reviewing physicians' opinions,
14 the claimant's subjective allegations, as well as the
15 statements and/or testimony of her friend and boyfriend.
16 In doing so, the undersigned has decided to limit the
17 claimant to a less than full range of medium work, the
18 function-by-function details of which are set forth in
19 the above residual functional capacity. The undersigned
20 has incorporated the work restrictions from the most
21 recent functional assessment by treating physician Dr.
22 Capen, as well as the limitations set forth by the
23 consultative examiner and State Agency physician. In
24 consideration of the claimant's extreme allegations of
25 pain and her obesity impairment, per Social Security 02-
26 1p, the undersigned has included additional postural
27 limitations not addressed by any of the treating or
28 examining physicians of record. Accordingly, the

1 residual functional capacity set forth herein is the most
2 restrictive functional assessment ascribed to the
3 claimant, and no medical evidence suggests the need for
4 further limitations.

5 (AR 26 (citations omitted).)

6 3. Analysis

7 The ALJ found that Plaintiff's "statements concerning the
8 intensity, persistence and limiting effects of [her] symptoms are
9 not credible to the extent they are inconsistent with [the ALJ's]
10 residual functional capacity assessment." (AR 24.) Reversal is
11 not warranted based on the ALJ's alleged failure to make proper
12 credibility findings or properly consider Plaintiff's subjective
13 symptoms.

14 Although the medical evidence established that Plaintiff had
15 medically determinable physical impairments that were likely to
16 cause her some pain, the existence of some pain does not
17 constitute a disability if it does not prevent Plaintiff from
18 working. See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)
19 (SSI program "intended to provide benefits to people who are
20 unable to work; awarding benefits in cases of nondisabling pain
21 would expand the class of recipients far beyond that contemplated
22 by the statute."); Thorn v. Schweiker, 694 F.2d 170, 171 (8th
23 Cir. 1982) ("A showing that [claimant] had a back ailment alone
24 would not support a finding that she was disabled unless the
25 limitations imposed by the back ailment prevented her from
26 engaging in substantial gainful activity.").

27 Here, the ALJ made specific, convincing findings in support
28 of his adverse credibility determination. He noted that clinical

1 findings from several doctors revealed only mild impairment in
2 Plaintiff's neck and back; her MRI results revealed only minimal
3 abnormalities; examinations in August 2009 and October 2010
4 revealed that Plaintiff appeared healthy and showed no obvious
5 signs of pain or distress other than "some pain on full extension
6 of the neck"; Plaintiff's symptoms appeared to improve over time
7 with medication and conservative treatment; and several doctors,
8 including Plaintiff's own treating physician, stated that she was
9 able to work. (AR 24-25.) He further correctly noted that when
10 she underwent a DMV physical in August 2009 to try to get her
11 driver's license reinstated, she "presented as healthy appearing,
12 in no acute distress," she "made no complaints of musculoskeletal
13 pain," and "examination of the neck was normal as was her gait."
14 (AR 25.) The ALJ also noted that "even if [Plaintiff] were given
15 the benefit of the doubt and restricted to sedentary work . . .
16 there are still significant numbers of 'other' work, which she
17 may perform." (AR 24.)

18 Plaintiff argues that under Bunnell, 947 F.2d at 345, the
19 ALJ erroneously rejected Plaintiff's subjective pain testimony on
20 the ground that "it lacks support in the objective medical
21 evidence." (J. Stip. at 19.) Bunnell held that "once the
22 claimant produces objective medical evidence of an underlying
23 impairment, an adjudicator may not reject a claimant's subjective
24 complaints based solely on a lack of objective medical evidence
25 to fully corroborate the alleged severity of pain." 947 F.2d at
26 345. Here, the ALJ did not base his opinion "solely" on a lack
27 of objective medical evidence corroborating the severity of
28 Plaintiff's pain. Instead, he properly analyzed what the medical

1 evidence did show (and what it did not) and noted that
2 Plaintiff's MRI and other test results revealed minimal
3 abnormalities, the majority of Plaintiff's symptoms were
4 controlled with medication or other conservative treatment, and
5 several doctors, including Plaintiff's own treating physician,
6 had examined Plaintiff and found her capable of working. (AR 24-
7 25); see Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001)
8 ("While subjective pain testimony cannot be rejected on the sole
9 ground that it is not fully corroborated by objective medical
10 evidence, the medical evidence is still a relevant factor in
11 determining the severity of the claimant's pain and its disabling
12 effects."). The ALJ's reasons in total constituted appropriate
13 bases for discounting Plaintiff's subjective symptom testimony.
14 See, e.g., Williamson v. Comm'r of Soc. Sec., 438 F. App'x 609,
15 610 (9th Cir. 2011) (proper for ALJ to discount plaintiff's
16 testimony when there was evidence plaintiff "exaggerated her
17 symptoms"); Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir.
18 2001) (credibility determination based on, among other things,
19 plaintiff's "tendency to exaggerate" proper when supported by
20 "substantial evidence"); Tommasetti v. Astrue, 533 F.3d 1035,
21 1039 (9th Cir. 2008) (ALJ may infer that claimant's "response to
22 conservative treatment undermines [claimant's] reports regarding
23 the disabling nature of his pain"); Johnson v. Shalala, 60 F.3d
24 1428, 1434 (9th Cir. 1995) (holding that "contradictions between
25 claimant's testimony and the relevant medical evidence" provided
26 clear and convincing reasons for ALJ to reject plaintiff's
27 subjective symptom testimony); Flaten v. Sec'y of Health & Human
28 Servs., 44 F.3d 1453, 1464 (9th Cir. 1995) (ALJ may properly rely

1 on minimal medical treatment); Stubbs-Danielson v. Astrue, 539
2 F.3d 1169, 1175 (9th Cir. 2008) (doctors' opinions finding
3 plaintiff "could perform a limited range of work [] support the
4 ALJ's credibility determination").

5 Plaintiff also argues that the ALJ erred in considering
6 Plaintiff's ability to engage in daily activities as evidence of
7 her lack of credibility. (J. Stip. at 21-22 (citing Vertigan v.
8 Halter, 260 F.3d 1044, 1050 (9th Cir. 2001)).) It does not
9 appear that the ALJ relied on Plaintiff's ability to carry out
10 daily activities in formulating his opinion (see AR 23-26), but
11 even if he had, it would not have been error. When a plaintiff
12 claiming disability is able to spend a substantial part of his or
13 her day performing physical functions that are transferable to a
14 work setting, an ALJ may properly discredit his or her
15 allegations of complete inability to work. See Morgan v. Comm'r
16 of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999). Here,
17 many of the activities Plaintiff acknowledged engaging in are
18 consistent with her past work as a babysitter as well as some of
19 the other jobs identified by the VE. For instance, she
20 acknowledged cooking, cleaning, doing laundry, and taking her son
21 to school. (AR 108-09, 372.)

22 Finally, Plaintiff argues that the ALJ erred in finding that
23 (1) there was no documented evidence in the record that Plaintiff
24 complained her medications made her drowsy and (2) she received
25 only "conservative" treatment for her ailments. (J. Stip. at 22-
26 23.) As to the first contention, the record does contain a
27 notation that Plaintiff "has been working with dizziness and
28 drowsiness because of the medication she is taking." (AR 290.)

1 To the extent the ALJ erred in failing to note that, however, the
2 error was harmless because nothing indicates that Plaintiff's
3 "dizziness and drowsiness" prevented her from working. To the
4 contrary, it appears she was in fact working at the time she
5 complained of dizziness and drowsiness. (See id. (noting that
6 Plaintiff's "hours have been reduced to 20 hour per week" and she
7 "has been working with dizziness and drowsiness").) Moreover, as
8 noted above, the ALJ cited ample other evidence in the record
9 showing that Plaintiff's symptoms were not as severe as she
10 claimed. Thus, reversal is not warranted on this basis.
11 See Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th
12 Cir. 2006) (nonprejudicial or irrelevant mistakes harmless);
13 Carmickle v. Comm'r of Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th
14 Cir. 2008) (holding that when ALJ provides specific reasons for
15 discounting plaintiff's credibility, decision may be upheld even
16 if certain reasons for adverse credibility finding were invalid
17 as long as ALJ's "remaining reasoning and ultimate credibility
18 determination" were supported by substantial evidence (*italics*
19 *omitted*)); Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190,
20 1197 (9th Cir. 2004) ("[I]n light of all the other reasons given
21 by the ALJ for Batson's lack of credibility and his residual
22 functional capacity, and in light of the objective medical
23 evidence on which the ALJ relied, there was substantial evidence
24 supporting the ALJ's decision.").

25 Reversal is also not warranted based on the ALJ's alleged
26 error in noting that Plaintiff received only conservative
27 treatment for her injuries given that she also received epidural
28 shots. (J. Stip. at 22.) As an initial matter, the ALJ was


1 correct in noting that the record showed that conservative
2 treatment appeared to improve Plaintiff's symptoms. (AR 24, 198
3 (noting that "Patient was treated with conservative chiropractic
4 care to the cervical and upper thoracic spine" and "feels much
5 better with the treatment prescribed" and "capable of returning
6 to work"), 188 (noting that Plaintiff "has not been taking
7 medications for several weeks now," "has normal range of motion
8 in the head and neck," and complains only of "pain at the
9 extremes of movement," and prescribing pain medication, "home
10 exercise program," and chiropractic care).) It also appears from
11 the record that Plaintiff received only one set of epidural
12 injections.⁶ (See AR 265-66.) Even assuming epidural injections
13 are not simply further conservative treatment, remand is not
14 required because the remainder of the ALJ's credibility findings
15 were supported by ample evidence in the record. See Carmickle,
16 533 F.3d at 1162; Batson, 359 F.3d at 1197. This Court may not
17 "second-guess" the ALJ's credibility finding simply because the
18 evidence may have been susceptible of other interpretations more
19 favorable to Plaintiff. See Tommasetti, 533 F.3d at 1039.
20 Reversal is therefore not warranted on this basis.

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24 _____
25 ⁶Plaintiff testified that she did not want to continue with
26 the shots because "all that did was make me bleed." (AR 365.)
27 The medical evidence shows that in fact she had "no untoward
28 reactions" to the shots and "tolerated [them] well." (AR 265.)
Plaintiff did seek medical treatment for heavy vaginal bleeding
beginning approximately one month after she received the shots,
but there is no indication in the record that the bleeding was in
any way connected to the shots. (See AR 162-65.)

1 VI. CONCLUSION

2 Consistent with the foregoing, and pursuant to sentence four
3 of 42 U.S.C. § 405(g),⁷ IT IS ORDERED that judgment be entered
4 AFFIRMING the decision of the Commissioner and dismissing this
5 action with prejudice. IT IS FURTHER ORDERED that the Clerk
6 serve copies of this Order and the Judgment on counsel for both
7 parties.

8
9 DATED: September 25, 2012



JEAN ROSENBLUTH
U.S. Magistrate Judge

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26 ⁷This sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."