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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARIA ANNE RUBIO,	)	Case No. CV 14-6230-PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
CAROLYN W. COLVIN,	)	
Acting Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	

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I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying her application for Disability Insurance Benefits ("DIB"). She claims that the Administrative Law Judge ("ALJ") erred when she: (1) concluded that Plaintiff's fibromyalgia and chronic fatigue were not severe impairments; (2) failed to consider all of Plaintiff's impairments singly and in combination; and (3) discredited hers and her husband's testimony. For the following reasons, the Court finds that the ALJ did not err and affirms her decision.

1 II. SUMMARY OF PROCEEDINGS

2 In January 2011, Plaintiff applied for DIB, alleging that she had  
3 been disabled since December 2008, due to neurological problems,  
4 fibromyalgia, Parkinson's disease (maybe), diabetes, blurry vision,  
5 depression, and "high temp." (Administrative Record ("AR") 127, 162.)  
6 Her application was denied initially and on reconsideration and she  
7 requested and was granted a hearing before an ALJ. (AR 68, 72, 76-81,  
8 85-89, 91-93.) In August 2012, she appeared with counsel and  
9 testified at the hearing. (AR 37-67.) Thereafter, the ALJ issued a  
10 decision denying benefits. (AR 18-30.) Plaintiff appealed to the  
11 Appeals Council, which denied review almost two years later. (AR 1-  
12 11, 15-16.) Plaintiff then filed the instant action.

13 III. ANALYSIS

14 A. The Credibility Determination

15 Plaintiff testified that she had been suffering from constant  
16 pain in her shoulders, neck, arms, and side since 2007. (AR 46, 57.)  
17 She also testified that she experienced severe fatigue--to such an  
18 extent that she would sleep until four or five in the afternoon--from  
19 2009 through March 2012, when she "woke up" after doing holistic  
20 meditation. (AR 51-52.) Plaintiff explained that she was currently  
21 sleeping until 11:00 a.m. (AR 52.) According to Plaintiff, she  
22 needed to rest for 45 minutes after doing any sort of activity, like  
23 making lunch. (AR 53, 55.) She claimed that she needed to empty her  
24 bladder every 45 minutes and that she would "leak" a little when she  
25 felt the urgency to urinate. (AR 55-56.) She also testified that her  
26 pain prevented her from walking further than the corner of her block  
27 and standing for longer than a couple of minutes and that she used a  
28 walker to get around. (AR 58-59.)

1 The ALJ found that Plaintiff's obesity, history of right shoulder  
2 surgery, and asthma were severe impairments that could reasonably be  
3 expected to cause her alleged symptoms but concluded that she was not  
4 entirely credible. (AR 23, 28.) Plaintiff claims that the reasons  
5 the ALJ gave in support of the credibility finding were inadequate.  
6 For the following reasons, the Court disagrees.

7 ALJs are tasked with judging a claimant's credibility. *Andrews*  
8 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). In doing so, they can  
9 rely on ordinary credibility techniques. *Smolen v. Chater*, 80 F.3d  
10 1273, 1284 (9th Cir. 1996). Where there is no evidence of  
11 malingering, however, they can only reject a claimant's testimony for  
12 specific, clear, and convincing reasons that are supported by  
13 substantial evidence in the record. *Garrison v. Colvin*, 759 F.3d 995,  
14 1014-15 (9th Cir. 2014).

15 The ALJ discounted Plaintiff's testimony that she was practically  
16 unable to stand and walk because it was contradicted by the medical  
17 evidence. (AR 28.) The ALJ pointed out that, in examinations in  
18 April 2009, October 2009, April 2010, and April 2011, the doctors  
19 reported that Plaintiff's gait was steady and intact and that she  
20 could walk without an assistive device. (AR 28, 210, 217, 942, 1060.)  
21 In fact, in April 2010, consultative examiner Michael Wallack  
22 described her as "extremely agile" and noted that she moved about in a  
23 "brisk" manner.<sup>1</sup> (AR 942.) The ALJ also pointed to a July 2011 note  
24 in which Plaintiff's doctor declined to put her on disability because,  
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26 <sup>1</sup> At the April 2011 examination, Dr. Wallack reported that  
27 Plaintiff moved slowly, with her legs far apart, but opined that her  
28 gait appeared to be forced. (AR 1058.) In both April 2010 and April  
2011, however, he found that she could stand or walk for at least six  
hours. (AR 945, 1061.)

1 among other things, there were conflicting diagnoses for her  
2 rheumatological ailments. (AR 248.)

3 The ALJ was entitled to consider the medical evidence in  
4 evaluating Plaintiff's testimony, see, e.g., *Osenbrock v. Apfel*, 240  
5 F.3d 1157, 1165-66 (9th Cir. 2001) (upholding ALJ's credibility  
6 determination based in part on the fact that the medical evaluations  
7 revealed little evidence of the disabling abnormality alleged by  
8 claimant), and, as she noted, it contradicted Plaintiff's testimony.

9 The ALJ also questioned Plaintiff's testimony because it was  
10 inconsistent with other statements she had made. (AR 28.) This, too,  
11 is a legitimate reason for disputing a claimant's testimony and is  
12 partially supported by the evidence. *Smolen*, 80 F.3d at 1284.  
13 Plaintiff claimed in her disability application that she stopped  
14 working because of her conditions. (AR 162.) But she told an  
15 examining psychiatrist that she was laid off because of a conflict  
16 with her boss. (AR 162, 764.) She later told the same psychiatrist  
17 that she stopped working because she sent an inappropriate email to a  
18 colleague. (AR 1052.) Plaintiff testified at the administrative  
19 hearing that she was fired for missing too much work to attend  
20 doctors' appointments. (AR 41-42.) The ALJ was entitled to consider  
21 these inconsistencies when evaluating Plaintiff's testimony.<sup>2</sup>

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22  
23 <sup>2</sup> The ALJ noted other inconsistent statements. (AR 28.) For  
24 example, in March 2010, Plaintiff reported that she was able to drive.  
25 (AR 763.) In June 2011, she said that she could not drive "at all."  
26 (AR 177.) Given the passage of time, however, things could have  
27 changed and, therefore, these statements may not actually evidence  
28 untruthfulness. Similarly, Plaintiff's general testimony that between  
2009 and 2012 she slept all day (AR 42, 51-52), was not necessarily  
inconsistent with statements she made to her doctors that she  
sometimes exercised or cooked. (AR 525, 941, 1293.) In August 2008,  
for example, Plaintiff told Dr. Wonil Lee that she felt tired all the

1 The ALJ noted that Plaintiff reported taking a trip to Israel,  
2 Egypt, and Jordan in May and/or June 2011, which the ALJ found to be  
3 inconsistent with Plaintiff's claimed disabilities. (AR 28-29, 1271,  
4 1272.) The Court agrees. It was reasonable for the ALJ to conclude  
5 that if Plaintiff was capable of traveling from California to the  
6 Middle East for vacation she was not as limited as she claimed to be.  
7 See, e.g., *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008)  
8 (holding ALJ properly discounted claimant's testimony of pain and  
9 limitation partly on basis of travel abroad).

10 The ALJ found that Plaintiff's daily activities, which included  
11 making lunch and dinner occasionally, taking her daughter to martial  
12 arts twice a week, and going to the doctor regularly, showed that she  
13 was not as limited as she claimed to be. (AR 28.) The Court finds  
14 that the limited nature of these activities combined with the fact  
15 that Plaintiff claimed that she needed to rest for 45 minutes after  
16 completing them does not undermine her credibility. See *Orn v.*  
17 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (rejecting ALJ's reliance on  
18 claimant's daily activities where they did not contradict his  
19 testimony or show that he could transfer these abilities to a work  
20 setting).

21 Finally, the ALJ found that Plaintiff received only conservative  
22 treatment for her allegedly disabling conditions. (AR 29.) Though  
23 this is a legitimate reason for questioning a claimant's testimony,  
24 see *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) (noting

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26 time and had difficulty getting up in the morning, but also reported  
27 keeping physically active doing yoga and exercises. (AR 779.) These  
28 statements did not necessarily undermine Plaintiff's subsequent  
testimony.

1 conservative treatment, including use of only over-the-counter  
2 medication to control pain, supported discounting claimant's testimony  
3 regarding pain), it is not supported by substantial evidence. The ALJ  
4 focused on records from January and February 2011 to reach this  
5 conclusion. These records showed that neurologist Ravin Jain provided  
6 only medication--Cymbalta, Lyrica, and Aspirin--for Plaintiff's  
7 complaints of fatigue and weakness. (AR 29, 1086-1106.) Yet, as the  
8 ALJ noted, Plaintiff was complaining about a number of other ailments,  
9 including left-sided radiculopathy, bladder suspension, leiomyomata  
10 (uterine fibroids), an ankle sprain, a tear in her shoulder tendon,  
11 and asthma, over an extended period of time. (AR 23, 26.) Plaintiff  
12 underwent right shoulder repair in February 2010, bladder surgery in  
13 May 2010, and uterine surgery in December 2010, as well as a  
14 hysterectomy and removal of the Fallopian tube in September 2011. (AR  
15 26, 967-68, 977-79, 1136-37, 1318.) She also testified that she  
16 received epidural injections in her shoulder and back. (AR 57.) The  
17 Court does not consider these treatments as conservative. As for  
18 Plaintiff's treatment for fibromyalgia and chronic fatigue by Dr.  
19 Jain, there is no evidence in the record that suggests that  
20 Plaintiff's treatment should have been more aggressive. For these  
21 reasons, the Court rejects the ALJ's finding that Plaintiff's  
22 treatment was conservative and that that conservative treatment  
23 indicated that she was not as impaired as she claimed.<sup>3</sup>

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24  
25 <sup>3</sup> The ALJ may have believed that Plaintiff's treatment was  
26 conservative based on Dr. Jain's note in January 2011 that  
27 "conservative therapy" had been recommended for Plaintiff's chiari  
28 malformation (AR 1088), a condition in which brain tissue extends into  
the spinal canal, potentially affecting balance and coordination. See  
<http://www.mayoclinic.org/diseases-conditions/chiari-malformation/basics/symptoms/con-20031115>.

1 In the end, the Court concludes that, of the ALJ's five reasons  
2 for rejecting Plaintiff's testimony, three are clear and convincing  
3 and two are not. On balance, the Court finds that the three reasons  
4 that are supported by the record are enough to uphold the ALJ's  
5 finding. See *Carmickle v. Comm'r, Soc. Sec.*, 533 F.3d 1155, 1162-63  
6 (9th Cir. 2008) (holding error is harmless if substantial evidence  
7 remains to support the ALJ's credibility conclusion). For that  
8 reason, it is affirmed.

9 Plaintiff also contends that the ALJ erred in rejecting her  
10 husband's testimony. He testified that his wife's condition had  
11 greatly deteriorated since 2008. (AR 62-65.) There is no merit to  
12 this claim.

13 ALJs are required to assess the credibility of the lay witnesses  
14 and may reject lay witness testimony for reasons that are germane to  
15 the witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).  
16 The ALJ rejected the husband's testimony in part because his  
17 allegations were inconsistent with the medical evidence. (AR 29.)  
18 This is a germane reason for rejecting lay testimony, see *Bayliss v.*  
19 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005), and it is supported by  
20 substantial evidence in the record. Plaintiff's husband testified,  
21 essentially, that he knew that Plaintiff was in pain because she said  
22 so and because it took her a long time to walk from place to place.  
23 That testimony was contradicted, however, by the consultative  
24 examiner's April 2010 report that Plaintiff could move unassisted in a  
25 brisk fashion and evidently without pain. (AR 942.) As such, the  
26 ALJ's rejection of the husband's testimony will be affirmed.

1 B. The Residual Functional Capacity Determination

2 The ALJ concluded that Plaintiff had the residual functional  
3 capacity to perform a full range of medium work but had to avoid  
4 concentrated exposure to dust, fumes, and chemicals. (AR 25.)  
5 Plaintiff contends that the ALJ erred by failing to consider all of  
6 her impairments, both severe and non-severe, including her pain,  
7 restless leg syndrome, incontinence, uterine complaints, chronic  
8 fatigue, and hearing loss. (Joint Stip. at 9-12.) The Court finds  
9 that the ALJ's failure to include these ailments in the residual  
10 functional capacity finding was not error.

11 In formulating the residual functional capacity, the ALJ need not  
12 perform a function-by-function analysis; rather, she need only include  
13 those limitations that are supported by objective evidence in the  
14 record. *Bayliss*, 427 F.3d at 1217. The mere existence of an  
15 impairment does not by itself constitute evidence of a functional  
16 limitation. See, e.g., *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d  
17 1219, 1228-29 (9th Cir. 2009) (rejecting claimant's argument that a  
18 severe impairment "must correspond to limitations on a claimant's  
19 ability to perform basic work activities.").

20 Plaintiff contends that the ALJ erred when she found at step two  
21 that Plaintiff's fibromyalgia and chronic fatigue were not severe  
22 impairments because no doctor had ever evaluated her for them or  
23 confirmed that she suffered from them. The Agency appears to concede  
24 that the ALJ erred in not including these conditions at step two.  
25 (Joint Stip. at 7.) The issue that remains is whether the error was  
26 harmless. See *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).  
27 The Court finds that it was. Plaintiff alleges that her fibromyalgia  
28 leads to decreased sensation in her hands and contributes to pain and



1 weakness in standing and walking. (Joint Stip. at 2, 7.) The ALJ  
2 considered whether Plaintiff could stand, walk, and grip and, relying  
3 on the opinion of Dr. Wallack, concluded that she could. (AR 25-29,  
4 942-46, 1058-62.) Dr. Wallack's opinion constituted substantial  
5 evidence to support the ALJ's finding. See *Orn*, 495 F.3d at 632  
6 (holding independent clinical findings of examining doctor constitute  
7 substantial evidence). The ALJ was justified then in not including  
8 those claimed ailments in the residual functional capacity  
9 determination. See *Bayliss*, 427 F.3d at 1217. Likewise, even  
10 assuming that the ALJ erred in finding that Plaintiff's chronic  
11 fatigue was not a severe impairment, there was no objective evidence  
12 in the record to support Plaintiff's allegation that she needed to  
13 take additional breaks or take long naps throughout the day. As such,  
14 the ALJ was entitled to disregard it. *Id.*<sup>4</sup>

15 The ALJ considered Plaintiff's osteoarthritis and degenerative  
16 spine disease, which, Plaintiff alleged, caused her constant pain in  
17 her back and side and limited her ability to stand and walk. (Joint  
18 Stip. at 9; AR 57-59.) The ALJ noted that a cervical spine MRI and  
19 lumbar spine X-rays in 2008 showed only slight abnormalities (AR 207,  
20 964), but that EMG and NCV studies in 2009 and 2010 showed moderate  
21 radiculopathy in the cervical and lumbar spine. (AR 26-27, 262, 292.)  
22 Nevertheless, an April 2010 MRI of Plaintiff's lumbar spine was  
23 unremarkable and February 2011 EMG/NCV studies revealed no evidence of  
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25 <sup>4</sup> In April 2009, Dr. Fawaz Al Faisal treated Plaintiff for her  
26 sleep disorder. His neurological examination was unremarkable,  
27 however, and his assessment of "excessive daytime somnolence, rule out  
28 narcolepsy" appears to have been based entirely on Plaintiff's  
allegations. (AR 610-12.) A May 2009 polysomnogram revealed  
decreased sleep efficiency but no evidence of sleep apnea or  
narcolepsy. (AR 396.)

1 lumbar or cervical radiculopathy, myopathy, or neuropathy. (AR 27,  
2 319-20, 423, 426.) As a result, the ALJ did not err in relying on Dr.  
3 Wallack's opinion that Plaintiff would be able to stand or walk for up  
4 to six hours a day.

5 The ALJ did not expressly consider whether Plaintiff's restless  
6 leg syndrome, uterine issues, or hearing impairment would impose any  
7 functional limitations. As a general matter, though the ALJ was  
8 required to consider all of the evidence, she was not required to  
9 address each piece of it in her decision. See *Howard ex rel. Wolff v.*  
10 *Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (holding ALJ is not  
11 required to discuss every piece of evidence so long as the decision is  
12 supported by substantial evidence). In any case, the Court finds  
13 that, even assuming that the ALJ should have discussed these claimed  
14 impairments, any error was harmless. Plaintiff did not allege that  
15 she suffered from any particular restrictions or limitations as a  
16 result of restless leg syndrome or her uterine surgery. Dr. Arash  
17 Horizon opined that restless leg syndrome exacerbated Plaintiff's  
18 fibromyalgia (AR 1285), but he did not explain how that translated  
19 into functional restrictions. Furthermore, following Plaintiff's  
20 September 2011 hysterectomy, her gynecologist reported in February  
21 2012 that she had made a full recovery. (AR 1318.) Although  
22 Plaintiff complained at the August 2012 hearing that she continued to  
23 suffer from bleeding, she testified that she treated it with  
24 injections every three months and did not claim that it limited her  
25 ability to work. (AR 44, 46.)

26 As for Plaintiff's hearing loss, the record contains a September  
27 2011 letter from Dr. Warren Line, who found that Plaintiff had  
28 moderate hearing loss in both ears, which was not disabling. (AR

1 1312.) The transcript from the administrative hearing does not  
2 reference Plaintiff having any problem hearing, nor did she raise the  
3 issue at any time. Thus, the Court cannot conclude that the ALJ erred  
4 in failing to include hearing issues in the residual functional  
5 capacity finding.

6 Finally, Plaintiff argues that the ALJ failed to consider  
7 limitations imposed by her incontinence. (Joint Stip. at 10-11.)  
8 Here, again, the Court sides with the Agency. Plaintiff, who was 48  
9 at the time of the administrative hearing, has suffered from  
10 incontinence since she was 17 years old. (AR 953-54.) Despite this  
11 fact, she held down jobs throughout her lifetime, including jobs in  
12 human resources from 1992-2008. (AR 136-48, 186-87.) As she  
13 concedes, her incontinence played no role in her being fired from her  
14 last job as the human resources manager in 2008. (AR 41-42.)

15 After applying for benefits, Plaintiff was interviewed by Agency  
16 staff and asked what conditions limited her ability to work. (AR  
17 162.) She did not list incontinence. (AR 162.) After the Agency  
18 initially denied her application, she moved for reconsideration,  
19 explaining why she disagreed with the Agency's decision denying her  
20 application. (AR 91.) Again, she did not raise incontinence. (AR  
21 91.) Plaintiff appeared with counsel at the administrative hearing  
22 and testified that she senses an urgency to urinate every 45 minutes  
23 to an hour and experiences a "leak or two" in connection with this  
24 urgency. (AR 55-56.) Thereafter, the vocational expert testified  
25 that a hypothetical person with the same education and work history as  
26 Plaintiff could perform her past work in human resources. (AR 66.)  
27 When given an opportunity to question the vocational expert about  
28

1 Plaintiff's ability to perform these jobs, counsel elected not to ask  
2 about Plaintiff's incontinence. (AR 66-67.)

3 Plaintiff now argues that the ALJ erred when she failed to  
4 consider how Plaintiff's incontinence impacted her residual functional  
5 capacity. The Court does not find this argument persuasive. The  
6 record suggests that Plaintiff's incontinence did not interfere with  
7 her work ability to work for 31 years nor did Plaintiff claim that it  
8 did. Thus, the ALJ did not err in failing to include it in the  
9 residual functional capacity assessment. This is true even in light  
10 of the fact that Plaintiff testified that her condition had worsened  
11 in recent years. (AR 55.) First, the ALJ questioned Plaintiff's  
12 testimony, finding it to be less than credible, and there was minimal  
13 objective evidence to support her claim of worsening problems with  
14 incontinence. Second, even assuming that her testimony was true, she  
15 has not convinced this Court that her need to rush to the bathroom  
16 once every 45-60 minutes to relieve herself would interfere with her  
17 ability to be a human resources manager and nothing she has presented  
18 here suggests that it would.

19 IV. CONCLUSION

20 For these reasons, the Agency's decision is affirmed and the case  
21 is dismissed with prejudice.

22 IT IS SO ORDERED.

23 DATE: March 16, 2016

24   
25 PATRICK J. WALSH  
26 UNITED STATES MAGISTRATE JUDGE

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