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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONNIE MENDOZA,

Plaintiff,

v.

NANCY A BERRYHILL, Acting Commissioner of Social Security,

Defendant.

Case No. CV-16-02170-KES

MEMORANDUM OPINION AND ORDER

Plaintiff Connie Mendoza appeals the decision of the Commissioner denying her application for Social Security benefits. For the reasons stated below, the Commissioner's decision is affirmed.

I.

BACKGROUND

A. ALJ Martinez's February 2011 Decision Denying Benefits.

In June 2009, Plaintiff filed an application for DIB and SSI. AR 110. She alleged disability beginning on March 6, 2000. AR 110. She appeared at a hearing before administrative law judge ("ALJ") Joel B. Martinez, where she was represented by counsel. AR 42-74, 110. On February 15, 2011, ALJ Martinez issued a decision denying benefits. AR 110-22.

ALJ Martinez found that Plaintiff had the following severe impairments: morbid obesity, asthma, history of seizures, degenerative changes of the lumbar spine, depressive disorder, cognitive disorder, and personality disorder with borderline and dependent traits. AR 113. However, he found that the combination of these impairments did not meet or medically equal one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 ("the Listing"). AR 113.

Regarding her mental impairments, ALJ Martinez found Plaintiff had mild restrictions in activities of daily living; mild difficulties in social functioning; moderate difficulties with regard to concentration; and no episodes of decompensation. AR 114. Because her mental impairments did not cause "at least two 'marked' limitations or one 'marked' limitation and 'repeated' episodes of decompensation, each of extended duration," the ALJ found her mental impairments did not meet or medically equal the criteria of Listing 12.04. AR 113-14.

ALJ Martinez found Plaintiff had the residual functional capacity ("RFC") to perform a limited range of medium work. AR 115. He found that she could engage in postural activities only occasionally; could not climb ladders, ropes, or scaffolds; could not be exposed to heights or hazards; could not have concentrated exposure to fumes or gases; and could perform only simple work, with occasional public contact. AR 115.

ALJ Martinez found Plaintiff was born on December 29, 1957 and therefore qualified as a "younger" individual ages 18-49, on the alleged disability onset date. AR 121. Based on the testimony of a vocational expert, ALJ Martinez opined that Plaintiff could perform medium unskilled work, such as a hand packager, laundry worker, and linen room attendant. AR 122.

Plaintiff sought review by the Appeals Council, but it denied review on February 15, 2011. AR 129-32. Plaintiff then filed an action challenging that decision in this court. See Mendoza v. Comm'r of SSA, Case No. CV-12-00201-AN. This Court affirmed the ALJ's decision on December 21, 2012. AR 133-35.

B. ALJ Urbin's Decision Denying Benefits in October 2014.

On September 4, 2012, Plaintiff filed a new application for SSI. AR 227-35. She did not file a new DIB claim because ALJ Martinez's decision covered the period through her date last insured. AR 23. She alleged a disability onset date of August 29, 2012. AR 227.

A hearing was held before ALJ Richard Urbin on July 3, 2014, at which Plaintiff was represented by counsel. AR 75-106. ALJ Urbin issued a decision denying benefits on October 27, 2014. AR 20-41.

ALJ Urbin gave the prior decision of ALJ Martinez res judicata effect in part, until December 29, 2012. AR 24. ALJ Urbin declined to rely on the prior decision after that date because, as of December 28, 2012, Plaintiff "became a person of advanced age, which constitutes 'changed circumstances.'" Id. Additionally, ALJ Urbin found that Plaintiff established new impairments beginning in July 2013 (mixed urinary incontinence) and April 2014 (bilateral carpal tunnel syndrome, osteoarthrosis of the hands, and hypertension. AR 24, 26, 32. ALJ Urbin therefore concluded: "[B]eginning December 28, 2012, I am not bound by Judge Martinez'[s] overall decision that [Plaintiff] is not disabled, and beginning July 2013, I am not bound by his specific finding regarding [Plaintiff's] residual functional capacity." Id.

ALJ Urbin found that the impairments identified by ALJ Martinez in February 2011—obesity, asthma, a history of seizures, degenerative changes of the lumbar spine, a depressive disorder, a cognitive disorder, and a personality disorder with borderline and dependent traits—continued to be medically determinable impairments and that, in combination, they were severe. AR 32. He found that Plaintiff's new impairments arising after ALJ Martinez's decision—urinary incontinence, bilateral carpal tunnel syndrome, osteoarthrosis of the hands, and hypertension—were not severe. AR 30, 32. He further found that other impairments mentioned in the medical records—fibromyalgia, vertigo, bilateral upper and lower extremity weakness and a sense of imbalance, abdominal pain, and cardiac problems,

and hearing problems—were not medically determinable. AR 30-32.

ALJ Urbin concluded that Plaintiff had the RFC to perform a limited range of medium work as follows. AR 33. She can lift and carry 50 pounds occasionally and 25 pounds frequently; stand and/or walk for 6 of 8 hours; and sit for 6 hours in an 8-hour workday. AR 33. She cannot climb ladders, ropes, or scaffolds, and she cannot work in an environment that involves exposure to heights, hazards or concentrated exposure to fumes or gases. AR 33. In addition, she can perform simple work with occasional public contact. AR 33.

This was nearly the same RFC assigned by ALJ Martinez, except that ALJ Urbin removed the limitation regarding postural maneuvers. Compare AR 33 with AR 115. ALJ Urbin concluded, "[D]espite the change in age category and additional impairments, I find that [Plaintiff's] physical and mental [RFCs] are not further reduced." AR 40.

Based on this RFC and the testimony of a vocational expert, ALJ Urbin concluded that Plaintiff could perform work such as a stock selector/laborer, stores; hand packager; and laundry worker. AR 41.

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The ALJ's findings and decision should be upheld if they are free from legal error and are supported by substantial evidence based on the record as a whole. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding,

the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21.

"A decision of the ALJ will not be reversed for errors that are harmless." Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is harmless if it either "occurred during a procedure or step the ALJ was not required to perform," or if it "was inconsequential to the ultimate nondisability determination." Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006).

A. The Evaluation of Disability.

A person is "disabled" for purposes of receiving Social Security benefits if he is unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted, or is expected to last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). A claimant for disability benefits bears the burden of producing evidence to demonstrate that he was disabled within the relevant time period. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995).

B. The Five-Step Evaluation Process.

The ALJ follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n. 5 (9th Cir. 1996). In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim must be denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

If the claimant is not engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments significantly limiting his ability to do

basic work activities; if not, a finding of not disabled is made and the claim must be denied. Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

If the claimant's impairment or combination of impairments does not meet or equal an impairment in the Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient residual functional capacity ("RFC") to perform his past work; if so, the claimant is not disabled and the claim must be denied. Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant has the burden of proving he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets that burden, a prima facie case of disability is established. Id.

If that happens or if the claimant has no past relevant work, the Commissioner then bears the burden of establishing that the claimant is not disabled because he can perform other substantial gainful work available in the national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That determination comprises the fifth and final step in the sequential analysis. Id. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n. 5; Drouin, 966 F.2d at 1257.

III.

ISSUES PRESENTED

The parties' Joint Stipulation ("JS") presents the following two issues: (1) whether the ALJ properly evaluated the state agency doctors' opinions regarding Plaintiff's mental limitations; and (2) whether the ALJ properly evaluated Dr. Karamlou's opinions. (Dkt. 26 [JS] at 5.)

IV.

DISCUSSION

A. Issue One: Whether the ALJ Properly Evaluated the State Agency Doctors' Opinions Regarding Plaintiff's Mental Limitations.

1. ALJ Martinez's Findings.

In his February 2011 decision, at step three of the five-step disability evaluation analysis, ALJ Martinez found that Plaintiff's mental impairments were not severe. AR 113. He found that Plaintiff had "mild" limitations in social functioning, noting that she "resides with her husband, gets along fair with her friends, neighbors, and others, and attends church," and also that "while at the hearing and when examined by medical professionals [she] communicated clearly by answering questions and providing her case history." AR 114. At step four, ALJ Martinez concluded that Plaintiff's "mental impairments limit her to performing simple work, with occasional public contact," and that these two limitations "account for the claimant's treatment history and alleged difficulty concentrating, using her memory, completing tasks, and with being around others." AR 118.

2. Reports from Non-Examining Physicians Dr. Morgan and Dr. Bilik.

In a December 2012 report, non-examining state agency physician Dr. M. D. Morgan, MD found that Plaintiff had "moderate" difficulties in maintaining social functioning. AR 143. More specifically, Dr. Morgan found Plaintiff had moderate limitations performing the following social interactions:

- Interacting appropriately with the general public.
- Accepting instructions and responding appropriately to criticism from supervisors.
- Getting along with coworkers or peers without distracting them or exhibiting behavioral extremes.

AR 147-48. In the conclusion of his report, Dr. Morgan opined, "Able to complete a normal workday/workweek performing simple repetitive tasks, in a setting that

involves limited contact with others. ALJ Decision of 2/15/11 is adopted[.]" AR 148.

In June 2013, a second mental evaluation was performed by a different non-examining state agency physician, Dr. Harvey Bilik, Psy. D. AR 163-65. Dr. Bilik noted the same "moderate" social interaction limitations as Dr. Morgan and explained, "The claimant can interact appropriately with others, but may benefit from reduced interactions with the public." AR 165. However, Dr. Bilik ultimately concluded, "ALJ [Martinez] not adopted, as benefit of doubt given to [claimant] and somewhat greater limitations in social interaction posited on PRTF [Psychiatric Review Technique Form] and MRFC [Mental Residual Functional Capacity]." AR 165.

3. ALJ Urbin's Findings.

In deciding that Plaintiff did not have a severe impairment at step two of the five-step disability analysis, ALJ Urbin expressly declined to rely on Dr. Bilik's opinion, finding:

> I give less weight to the opinion of the State Agency medical consultant [Dr. Bilik] at Exhibit D6a, p.8 [AR 165]. The medical consultant, a psychologist, considered listings 12.02, 12.04, and 12.06 and determined that the claimant's limitations were as described by Judge Martinez, except that she now had moderate limitations with social functioning. … I find no reason to give the claimant the benefit of the doubt. After being admitted to Arcadia Mental Health Center on March 23, 2012, she was discharged on February 19, 2013 because of non-compliance with treatment, having missed appointments often (Exhibit D4F, pp. 8, 10; see also Exhibit D4F, pp. 11-13, 15, 19, 21, 24, 37, 41). Moreover, although the claimant states that she does not get along with people and never has (see, e.g. Exhibit D5E, p. 6), she is not fully credible.

AR 33. ALJ Urbin discussed the non-examining physicians' opinions again at step four of the analysis, in determining Plaintiff's RFC:

> As for mental limitations, Judge Martinez determined that the claimant could perform simple work with occasional public contact (Exhibit D1A, p. 9). Initially, a State Agency psychiatrist [Dr. Morgan] found no evidence of significant change and adopted this decision (Exhibit D4A, p. 14). On reconsideration, a State Agency psychologist [Dr. Bilik] did not adopt the prior [ALJ's] decision, but found that the claimant could understand, remember, and carry out simple instructions, persist throughout a normal workweek, "may benefit from reduced interactions with the public," and despite some limitations, could adapt to a work environment (Exhibit D6A, pp. 11-13). Even though the State Agency psychologist did not adopt Judge Martinez's earlier decision, the mental [RFC] at Exhibit D6A is consistent with it.
>
> I agree with the State Agency psychiatrist [Dr. Morgan]: there has been no significant change in the claimant's mental condition. She did not really pursue counseling, and she continues to take Prozac, the same medication she was taking when Judge Martinez decided her case (Exhibit D1A, p. 12). Even if I relied on the opinion of the State Agency psychologist [Dr. Bilik], the result is the same: the claimant can perform simple work with occasional public contact.

AR 39.

4. Analysis.

Plaintiff disagrees with Dr. Morgan's conclusion that his own findings were consistent with the RFC assessed by ALJ Martinez for two reasons. (JS at 6-7.) First, Plaintiff argues that Dr. Morgan's findings indicate "an increase in severity" from "mild" to "moderate." (Id.) Second, Plaintiff argues that ALJ Martinez "assessed social functioning limitations only against contact with the general public," whereas

Dr. Morgan "assessed social functioning limitations against coworkers, supervisors as well as the general public." (Id. at 7.)

Because of these differences, Plaintiff argues, ALJ Urbin erred in finding that there had been no significant change in Plaintiff's mental condition since the prior ALJ decision, because ALJ Urbin "failed to recognize that Dr. Morgan offered functional limitations that are different than what … ALJ [Martinez] had assessed." (Id. at 8-9, citing AR 39.) Plaintiff also argues that ALJ Urbin "effectively failed to provide any explanation for omitting Dr. Morgan's medical source statements" in violation of Social Security Rulings ("SSRs") 96-6p and 96-8p. (JS at 10.)

a. There is substantial evidence to support ALJ Urbin's finding that there had been no change in Plaintiff's mental limitations since ALJ Martinez's decision.

"The principles of res judicata apply to administrative decisions, although the doctrine is applied less rigidly to administrative proceedings than to judicial proceedings." Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988). The earlier finding of nondisability creates a presumption that the claimant continued to be able to work after that date. Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995), as amended (Apr. 9, 1996); see also Miller v. Heckler, 770 F.3d 845, 848 (9th Cir. 1985). However, a claimant may defeat that presumption by showing "changed circumstances," such as "[a]n increase in the severity of the claimant's impairment," which "would preclude the application of res judicata." Lester, 81 F.3d at 827; see also Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1173 (9th Cir. 2008); Chavez, 844 F.2d at 693. "In addition, the Commissioner may not apply res judicata where the claimant raises a new issue, such as the existence of an impairment not considered in the previous application." Lester, 81 F.3d at 827. "Although the first ALJ's RFC findings are entitled to 'some res judicata consideration,' … the Chavez presumption does not prohibit a subsequent ALJ from considering new medical information and making an updated RFC determination." Alekseyevets v. Colvin, 524 F. App'x 341,

344 (9th Cir. 2013) (finding ALJ did not err by "revising Appellant's RFC based on recent medical evaluations and results"); see also Miglioretto v. Colvin, No. 13-36047, --- F. App'x ---, 2017 WL 65396, at *1 (9th Cir. Jan. 6, 2017) ("The ALJ properly determined that neither Miglioretto's new nor existing impairments altered the original RFC, and that there had been no legally significant change in age category, so as to overcome the presumption of continuing non-disability.").

In the present case, notwithstanding Dr. Morgan and Dr. Bilik's use of the term "moderate" to describe Plaintiff's social limitations (as opposed to the term "mild," used by ALJ Martinez), both Dr. Morgan and Dr. Bilik ultimately concluded that Plaintiff was able to work as long as she had limited interactions with the public. Dr. Morgan opined that Plaintiff was "[a]ble to complete a normal workday/workweek performing simple repetitive tasks, in a setting that involves limited contact with others." AR 148. Dr. Bilik opined that Plaintiff "can interact appropriate with others, but may benefit from reduced interactions with the public." AR 165.

Moreover, even aside from these opinions, there was substantial evidence in the record to support ALJ Urbin's finding that Plaintiff's mental limitations had not changed since February 2011, when ALJ Martinez's decision issued. As discussed at some length by ALJ Urbin, Plaintiff was taking the same medications for her depression and was non-compliant with therapeutic treatment:

> [Plaintiff] was referred to Arcadia Mental Health, and she had an intake evaluation on March 23, 2012 (Exhibit D4F, p. 6 [AR 404]). A social worker diagnosed a depressive disorder and her Global Assessment of Function (GAF) was estimated at 60 (Exhibit D4F, p. 8 [AR 406]). Throughout the records from this source, [Plaintiff's] scores on self-reports suggested severe depression (see, e.g. Exhibit D4F, pp. 18, 23 [AR 416, 421]).
>
> At Arcadia, [Plaintiff] attended counseling sessions only; she received medication through her primary care physician at El Monte

Comprehensive Health Center (see, e.g., Exhibit D4F, p. 24 [AR 422]). On August 22, 2012, [Plaintiff's] primary care physician at El Monte … Dr. Than Ma, diagnosed depression and prescribed Prozac and Atarax (Exhibit D1F, p. 24 [AR 364, prescribing 20 mg of Prozac and 25 mg of Atarax]). Subsequent records confirm ongoing medication support.…

After her intake on March 23, 2012, [Plaintiff] missed her first session on April 5, 2012 and she forgot to attend a session on April 11, 2012 (Exhibit D4F, pp. 36, 37 [AR 434-35]). She finally attended her first session on May 1, 2012. At that time, she had not had a medication review since 2010 and was relying on refills of Prozac and Ambien, which she said were not effective in reducing her symptoms. (Exhibit D4F, p. 35 [AR 433]). [Plaintiff] subsequently missed an appointment for no reason on July 17, 2012; she explained that she does not trust therapy because she had it in the past and it did not help[[1]] (Exhibit D4F, p. 41 [AR 439; see also AR 433]). She finally had her second session on August 7, 2012 (Exhibit D4F, p. 25 [AR 423]). She missed a session on August 30, 2012 because of conflicting appointments (Exhibit D4F, p. 24 [AR 422]) and she had her third session on September 11, 2012 (Exhibit D3F, p. 23 [AR 421]). After another missed appointment due to conflicts with another appointment, [Plaintiff] missed an appointment for no reason on October 9, 2012 (Exhibit D4F, pp. 21, 22 [AR 419-20]). In October 2012, [Plaintiff] missed an appointment because she was sick, and she missed another

[1] At the hearing, Plaintiff testified that "the counseling would make [her] more stressed out than it did help [her]" because the counselor "would make [her] reminisce in certain things as a child and it would make [her] more depressed." AR 83.

appointment …[2] (Exhibit D4F, pp. 19, 20 [AR 417-18]). She had her fourth session on October 30, 2012 (Exhibit D4F, p. 18 [AR 416]) and she missed all subsequent appointments (Exhibit D4F, pp. 11-15 [AR 409-13]). [Plaintiff] was discharged from Arcadia Mental Health on February 19, 2013 because of non-compliance with treatment (Exhibit D4F, p. 10 [AR 408]). As noted, between March 23, 2012 and October 30, 2012, she attended only four sessions, and she missed all sessions scheduled for November and December 2013, and for January 2014.

Consistent with a decreased need for treatment, during depression screenings at El Monte … in November 2012 and February 2013, [Plaintiff] denied having little interest or pleasure in activities, and she denied feeling down, depressed or hopeless (Exhibit D5F, pp. 30, 103 [AR 469, 542]). However, in April and November 2013, she endorsed these symptoms. (Exhibit D5F, p. 38 [AR 477]; Exhibit D8F, p. 14 [AR 594]). In November 2013, [Plaintiff] described increased forgetfulness, but on a "mini" mental status examination, she scored 27 out of a possible 30 points (Exhibit D8F, p. 15 [AR 595]; see also Exhibit D8F, pp. 1, 9 [AR 581, 590]).

. . .

[Plaintiff] testified that she has problems with memory and simply forgot about the appointments. She states that she asked staff at Arcadia … to call her to remind her of appointments, but this was not done. She states that by contrast, staff at El Monte … provided her with a calendar, it is effective, and [Plaintiff] keeps her appointments.

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[2] ALJ Urbin states that Plaintiff missed the second October 2012 appointment "for no reason," but the cited record states that she missed the appointment due to a scheduled MRI. AR 417.

(Testimony [AR 83]). [Plaintiff's testimony is not accurate. As early as November 2012, [Plaintiff] confirmed with the therapist at Arcadia … that she had an appointment book and was following advice to enter appointments in the book. (Exhibit D4F, p. 14 [AR 412]). Yet, she missed all subsequent appointments (Exhibit D4F, pp. 10-13 [AR 408-11]).

[¶] As for [Plaintiff's] allegation that counseling at Arcadia … dealt too much with past life events and actually worsened her mental symptoms, the records from Arcadia show that at the first session, [Plaintiff] discussed her long history of depression. On one subsequent occasion, the social worker "assisted client to complete new problem solving worksheet with prompts and confrontation." (Exhibit D4F, p. 23 …, p. 35 [AR 421, 433].) However, at other sessions, [Plaintiff] was encouraged to do activities that would make her feel good (Exhibit D4F, pp. 13, 14, 18, 19, 25 [AR 411-12, 416-17, 423), use relaxation techniques (Exhibit D4F, p. 15 [AR 413]), and use an appointment book (Exhibit D4F, p. 23 [AR 421]). There is evidence that she resisted working on her problem-solving worksheet (Exhibit D4F, p. 23 [AR 421]). It seems to me that in her sworn testimony, [Plaintiff] mischaracterized her approach to mental health treatment.

AR 27-28.

The Court finds that, notwithstanding the portions of Dr. Morgan's report to which Plaintiff refers, Plaintiff's longitudinal treatment record for depression—as accurately summarized supra by ALJ Urbin—contains substantial evidence to support ALJ Urbin's finding that Plaintiff's mental status had not changed since ALJ Martinez's decision.

b. ALJ Urbin did not violate SSRs 96-6p and 96-8p.

SSR 96-6p provides that ALJs "are not bound by findings made by State

agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions." SSR 96-6p, 1996 WL 374180, at *2. The ruling further provides, "[T]he opinions of State agency medical and psychological consultants … can be given weight only insofar as they are supported by the evidence in the case record…." Id. SSR 96-8p, 1996 WL 374184 concerns how an ALJ assesses the RFC of a claimant.

ALJ Urbin's decision is not contrary to either of these rulings. As recounted above, ALJ Urbin discussed the opinions of Dr. Morgan and Dr. Bilik, and explained the weight given to each opinion. Thus, there is no legal error.

B. Issue Two: Whether ALJ Urbin Properly Evaluated the Opinion of Examining Physician Dr. Azizollah Karamlou.

1. Dr. Karamlou's Opinion.

Dr. Karamlou, an internist, examined Plaintiff in December 2012. AR 384. He noted that her past medical history was "significant for seizure disorder, bronchial asthma, numbness in the left side of the body, and borderline hypertension," and that she was "currently taking lorazepam, Vistaril, fluoxetine, amitriptyline, and albuterol inhaler." AR 385. These appear to have been self-reported by Plaintiff, as Dr. Karamlou also noted that "there is no background information for review." AR 388. Dr. Karamlou "considered" the following diagnoses:

1. History of mental conditions, deferred for psychiatric evaluation.
2. Bronchial asthma, under treatment.
3. Low back pain syndrome, with low intensity pain.
4. Questionable seizure disorder, received Topamax in the past with no seizure activity for the past one year. She is not taking Topamax presently.

AR 388. He also noted, "The claimant has subjectively stated that she has numbness on the left side of the body. However, it cannot be substantiated objectively." AR 387.

During his physical examination of Plaintiff, Dr. Karamlou found that Plaintiff was able to generate 10 pounds of force using her right hand and 0 pounds of force using her left hand. AR 385. He found that she had "few rhonchi and crackles in both lung fields, with no wheezing." AR 386. He found she did not need an assistive device for ambulation; that she had a normal range of motion in the cervical spine; and that she had "local tenderness" in the lumbar spine, but with "no evidence of muscle spasm or radiculopathy" and normal range of motion. AR 386-87. He found she had normal range of motion in the shoulders, elbows, wrists, hands, hips, knees, and ankles. AR 387.

Dr. Karamlou ultimately concluded that Plaintiff had the following physical limitations:

> [S]he should be limited to standing and/or walking for six hours in an eight-hour workday with normal breaks in between. She should be limited to sitting for six hours in an eight-hour workday with normal breaks. She is able to perform pushing and pulling occasionally. She is able to perform crawling, bending, kneeling and balancing occasionally. She is not able to walk on uneven terrain, climb ladders or work at unprotected heights. Lifting and carrying should be limited to 20 pounds occasionally and 10 pounds frequently. There are no restrictions for fine and gross manipulative movements of both hands. There are no restrictions for hearing. The claimant has blurry vision. The claimant should not be exposed to extremes of temperature, dusts, and chemicals due to chronic asthma. The claimant needs no assistive device for ambulation. Her mental conditions are deferred for psychiatric evaluation.

AR 388-89.

2. ALJ Urbin's Findings.

ALJ Urbin considered Dr. Karamlou's opinion but decided to give it little

weight, as follows:

> For several reasons, I give little weight to this opinion, and rely instead on the prior [ALJ's] decision. As noted, Dr. Karamlou diagnosed only subjective, unsubstantiated numbness, which cannot be the basis for functional limitations (20 CFR … 416.929(b); SSR 96-4p). The other impairments considered by Dr. Karamlou (back pain, questionable seizures, and asthma) were considered by Judge Martinez, and there is no evidence that those impairments had worsened as of the time of Dr. Karamlou's examination. For example, the doctor considered back pain, but he documented an unremarkable clinical examination. He also considered a history of "questionable" seizures, but he also noted that the claimant had not suffered a seizure in two years. As for asthma, the doctor documented "a few rhonchi and crackles in both lung fields, with no wheezing (Exhibit D2F, p. 3 [AR 386]). The evidence before Judge Martinez included a report showing no rhonchi, rales or wheezing (Exhibit D1A pp. 10-11 [AR 116-17]). However, the treatment history does not suggest true worsening. Dr. Karamlou did not review medical records (Exhibit D2F, p. 5 [AR 388]); thus, he was unaware of the claimant's treatment history. Judge Martinez considered the claimant's asthma treatment and concluded that she should avoid pulmonary irritants, but that that asthma did not impose further limitations (Exhibit D1A, p. 11 [AR 117]). The current level of treatment the claimant requires for asthma (see my discussion under Findings #2 and #3 above) is similar to the treatment documented in the records considered by Judge Martinez (Exhibit D1A, pp. 10-11 [AR 116-17]). For all of these reasons, under Chavez Acquiescence Ruling, I adopt the prior [ALJ's] decision over that of Dr. Karamlou.

AR 38-39.

In Findings #2 and #3, ALJ Urbin discussed Plaintiff's treatment for asthma as follows:

> With the consultative examiner in December 2012, [Plaintiff] reported frequent attacks of asthma, treated with an albuterol inhaler (Exhibit D2F, p. 1 [AR 384]). However, the medical evidence does not corroborate frequent attacks. In one of the few clinical notes that addresses asthma, in January 2014, [Plaintiff] reported a one-week history of cough and shortness of breath, improved with a nebulizer machine; the diagnosis was bronchitis (Exhibit D8F, p. 9 [AR 589]). Otherwise, the records generally focus on other complaints.

AR 27.

3. Analysis.

Plaintiff argues that the ALJ failed to provide legally sufficient reasons for rejecting Dr. Karamlou's opinion. (JS at 27.) Plaintiff argues that, because Dr. Karamlou opined that Plaintiff should be limited to light work, adopting his opinion would render Plaintiff disabled under Medical Vocational Guideline Rule 202.04. (JS at 23.)

In deciding how to resolve conflicts between medical opinions, the ALJ must consider that there are three types of physicians who may offer opinions in Social Security cases: (1) those who directly treated the plaintiff, (2) those who examined but did not treat the plaintiff, and (3) those who did not treat or examine the plaintiff. See 20 C.F.R. § 404.1527(c); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (as amended on April 9, 1996). A treating physician's opinion is generally entitled to more weight than that of an examining physician, which is generally entitled to more weight than that of a non-examining physician. Lester, 81 F.3d at 830. Thus, the ALJ must give specific and legitimate reasons for rejecting a treating physician's opinion in favor of a non-treating physician's contradictory opinion or an examining physician's opinion in favor of a non-examining physician's opinion. Orn v. Astrue,

495 F.3d 625, 632 (9th Cir. 2007) (citing Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998)); Lester, 81 F.3d at 830-31 (citing Murray v. Heckler, 722 F.2d 499, 502 (9th Cir.1983)). However, "[t]he ALJ need not accept the opinion of any physician … if that opinion is brief, conclusory, and inadequately supported by clinical findings." Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); accord Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001).

ALJ Urbin rejected Dr. Karamlou's opinion for two reasons: (1) functional limitations cannot be based on unsubstantiated numbness, per Social Security regulations; and (2) Plaintiff's back pain, seizures, and asthma were considered by ALJ Martinez, and there was no evidence these conditions had worsened since then. AR 38-39.

a. Numbness.

As to the first reason ALJ Urbin gave for assigning Dr. Karamlou's opinion little weight, Plaintiff argues that her "subjective complaint of left-sided weakness was not considered by Dr. Karamlou." (JS at 23-24.) Plaintiff appears to be arguing that, because of this, it was error for ALJ Urbin to reject Dr. Karamlou's opinion on this basis. However, ALJ Urbin was merely reviewing the possible medical bases for the functional limitations assessed by Dr. Karamlou. ALJ Urbin is correct that, without evidence of a medically determinable impairment that could reasonably be expected to cause the numbness, Plaintiff's numbness cannot be the basis of functional limitations. See 20 C.F.R. § 416.929(b) ("Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect your ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment(s) is present.").

b. Asthma.

Plaintiff stipulates "that the medical evidence does not document much change in regards to [Plaintiff's] back pain and seizure disorder between the two [ALJ] decisions." (JS at 24.) However, Plaintiff argues that "the current treatment records

document an increase in the severity of [Plaintiff's] asthma" since ALJ Martinez's decision. (JS at 26.) Plaintiff argues that, due to this worsening in her asthma, she is able to perform "light work at most" because "her symptoms of shortness of breath would create a hazardous situation where she may simply drop a 50-pound object, thereby potentially causing serious injury to herself." (JS at 26-27).

In his February 2011 decision, ALJ Martinez made the following findings regarding Plaintiff's asthma:

> For the claimant's asthma, the [RFC] provides that the claimant not have concentrated exposure to fumes or gases. The claimant testified that she received inhaler treatment in an emergency room one year ago and was prescribed Advair (Exhibit 2E). Finding #5, thus, accounts for any limitations associated with the claimant's asthma. Dr. Maze [examining physician] reported that the claimant's lungs were clear to auscultation, and that she had no wheezes, rales, or rhonchi (Exhibit 12F, p. 4). Chest x-rays, from March and April 2009, showed no acute pulmonary abnormality or any significant problems (Exhibit 18F, p. 16, 21). In addition, the record contains no evidence of the claimant receiving any in-patient hospitalization for her asthma in the past year. The record fails to support any additional limitations.

AR 116-17.

Plaintiff directs the Court to several treatment records allegedly demonstrating that Plaintiff's asthma worsened after ALJ Martinez's decision. Several of these records are from October and November 2010, prior to ALJ Martinez's February 2011 decision. Plaintiff argues that, even though ALJ Martinez could have considered some of these records, "the severity of [Plaintiff's] condition … could not be accepted [by ALJ Martinez] since this same severity had not lasted for at least 12 months." (JS at 25 n.6, citing 20 C.F.R. § 416.909.) In the interest of thoroughness, the Court has reviewed all of the records cited by Plaintiff, to determine whether they

show that Plaintiff's asthma worsened.

On October 23, 2010, Plaintiff sought treatment for wheezing, chest congestion, and a dry cough. AR 495. The doctor diagnosed "acute exacerbation of asthma," and prescribed Albuterol MDI, Advair diskus, Flonase nasal spray, Doxycycline 100 mg for 10 days, and Phernagen DM. Id. Plaintiff also received an Albuterol nebulizer treatment. Id.

About a month later, on November 15, 2010, Plaintiff visited the El Monte walk-in clinic. AR 499. The initial intake nurse noted that Plaintiff complained shortness of breath, and also of dizziness, depression, and mid-chest pressure. AR 499. However, the examining doctor did not note shortness of breath: "Patient came for feeling anxiety, headache, [and] chest pain after verbal quarrel with her husband. No physical abuse as per patient. Was given hotline number for support. No suicidal ideation." AR 500. An examination of Plaintiff's lungs revealed that they were clear, with no wheezes or rhonchi. Id. Although Plaintiff was given refills of her Advair and Albuterol for her asthma, this visit does not appear to have been occasioned by an asthma attack.

Seven months later, on June 16, 2011, Plaintiff visited the El Monte clinic complaining of shortness of breath. AR 347. The doctor who examined her lungs found no rales, rhonchi, or wheezing. Id. She was given a second nebulizer treatment, and the doctor noted that her "lung sounds [were] better after 2nd nebulizer tx [treatment]." Id. The doctor prescribed 750 mg of levofloxacin, 10 ml of Robitussin, 10 mg of prednisone, and refills for Tylenol, Advair, and Albuterol MDI. Id.

Plaintiff returned to the El Monte clinic about two weeks later, on June 29, 2011. AR 352. She complained of, among other things, "asthma attack with sob [shortness of breath] and wheezing[,] no[t] much improve[d] even with Advair diskus. [H]ad several attack[s] at night and has to use inhaler more frequently." Id. She was diagnosed with bronchial asthma. Id. Her dosage of Advair diskus was

increased, and she was directed to continue with Albuterol. Id.

About five months later, on November 19, 2011, Plaintiff visited the pharmacy for an Albuterol inhaler refill and "was told that [she] needed to see [an] MD[.] Per pt [patient], she had few wheezing esp night time [and] slight sob [shortness of breath]. … [N]o cough. [N]o fever." AR 359. Plaintiff was given a third nebulizer treatment and reported that she "felt much better" afterwards. AR 358-59. She received a refill of her Albuterol inhaler but was told to stop taking Advair. AR 359. Thus, Plaintiff's reason for initiating this visit appears to have been merely to obtain a medication refill, and she reported only "slight" shortness of breath. She also responded positively to the nebulizer treatment.

Overall, these records do not show an increase in the severity of Plaintiff's asthma since ALJ Martinez's decision. Over a one-year period, Plaintiff sought treatment for her asthma five times, but these were mostly for medication refills. She also responded well to the nebulizer treatment. The RFC assessed by ALJ Urbin included a limitation that Plaintiff not experience "concentrated exposure to fumes or gases." AR 33. Plaintiff cites no authority or record evidence supporting her assertion that she would "simply drop a 50-pound object" due to shortness of breath. (JS at 26.)

V.

CONCLUSION

Based on the foregoing, IT IS ORDERED that judgment shall be entered AFFIRMING the decision of the Commissioner denying benefits.

DATED: April 05, 2017

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge