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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SUSANA LAZOS,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security

Defendant.

No. CV 16-3405-DOC (AGR)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

The court submits this Report and Recommendation to the Honorable David O. Carter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that the Commissioner’s decision be reversed and remanded for (1) reconsideration of Dr. Spayde’s opinion and a sit/stand option; (2) reconsideration of Dr. Caruso-Radin’s opinion that Lazos is limited to simple, two-step instructions; and (3) reconsideration of Dr. Kaiser’s opinion.

I.

PROCEDURAL BACKGROUND

On February 2, 2012, Lazos filed an application for disability insurance benefits and alleged a disability onset date of February 10, 2010. Administrative Record (“AR”) 19. The application was denied initially and on reconsideration. AR 19, 111, 130. Lazos requested a hearing before an Administrative Law Judge (“ALJ”). On October 14, 2014, the ALJ conducted a hearing at which Lazos and a vocational expert testified. AR 54-93. On December 5, 2014, the ALJ issued a decision denying benefits. AR 16-30. On March 22, 2016, the Appeals Council denied the request for review. AR 1-5. On May 17, 2016, Lazos filed this action.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

“Substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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III.

DISCUSSION

A. Disability

A person qualifies as disabled and eligible for benefits “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

B. The ALJ’s Findings

Lazos met the insured status requirements through June 30, 2015. AR 21.

Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹ the ALJ found that Lazos has the severe impairments of back pain status post L4-5 discectomy and fusion (May 2010); morbid obesity; mild left knee patellofemoral joint narrowing; migraine headaches; depressive disorder with anxiety; and psychological factors affecting medical condition. AR 21.

The ALJ found that Lazos has the residual functional capacity (“RFC”) to perform light work except that she is limited to occasional climbing, balancing, stooping, kneeling and crouching. She is precluded from climbing ladders/ropes/scaffolds, crawling, concentrated exposure to extreme cold, heights, heavy machinery or uneven terrain. She is limited to “simple routine tasks with only limited interaction with the public, i.e., only incidental contact.” AR 22. Lazos was unable to perform her past

¹ The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant’s impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1 relevant work, but could perform other jobs that exist in significant numbers in the
2 national economy such as housekeeper and marker, retail. AR 28-30.

3 **C. Opinions of Treating and Examining Physicians**

4 Lazos contends that the ALJ did not properly consider the opinions of the treating
5 and examining physicians.

6 An opinion of a treating physician is given more weight than the opinion of a
7 non-treating physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an
8 uncontradicted opinion of a treating physician, an ALJ must state clear and convincing
9 reasons that are supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d
10 1211, 1216 (9th Cir. 2005). When, as here, a treating physician's opinion is
11 contradicted by another doctor, "the ALJ may not reject this opinion without providing
12 specific and legitimate reasons supported by substantial evidence in the record. This
13 can be done by setting out a detailed and thorough summary of the facts and conflicting
14 clinical evidence, stating his interpretation thereof, and making findings." *Orn*, 495 F.3d
15 at 632 (citations omitted and internal quotations omitted). "When there is conflicting
16 medical evidence, the Secretary must determine credibility and resolve the conflict."
17 *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002) (citation and quotation marks
18 omitted).

19 An examining physician's opinion constitutes substantial evidence when it is
20 based on independent clinical findings. *Orn*, 495 F.3d at 632. An examining
21 physician's uncontradicted opinion may be rejected based on clear and convincing
22 reasons. When an examining physician's opinion is contradicted, it may be rejected for
23 specific and legitimate reasons that are supported by substantial evidence in the record.
24 *Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir. 2008).

25 "The opinion of a nonexamining physician cannot by itself constitute substantial
26 evidence that justifies the rejection of the opinion of either an examining physician or a
27 treating physician." *Ryan v. Comm'r*, 528 F.3d 1194, 1202 (9th Cir. 2008) (citation
28

1 omitted) (emphasis in original). However, a non-examining physician’s opinion may
2 serve as substantial evidence when it is supported by other evidence in the record and
3 is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); see also
4 *Thomas*, 278 F.3d at 957.

5 Lazos argues the ALJ improperly discounted the opinions of a treating orthopedic
6 surgeon (Dr. Spayde), three treating mental health professionals (Dr. Gilbert, Dr.
7 Deamer and Dr. Kaiser), and the examining psychologist, Dr. Wendel. The ALJ instead
8 gave great weight to the state agency review psychologists. AR 28. The ALJ limited
9 Lazos to “simple routine tasks with only limited interaction with the public, i.e., only
10 incidental contact.” AR 22.

11 The state agency review psychologist, Dr. Caruso-Radin, opined that Lazos could
12 perform simple, two-step instructions. AR 125. The ALJ did not include the limitation to
13 two-step instructions in the RFC assessment and did not explain any reason for
14 rejecting that limitation. The error is not harmless. One of the two representative jobs
15 that the ALJ found Lazos could perform – retail marker – involves Level 2 reasoning.
16 AR 29 (DOT 209.587-034). Although a limitation to simple repetitive tasks may be
17 consistent with Reasoning Level Two, *Zavalin v. Colvin*, 778 F.3d 842, 847 (9th Cir.
18 2015), a limitation to two-step instructions may not be consistent with Reasoning Level
19 Two. In *Rounds v. Comm’r SSA*, 807 F.3d 996 (9th Cir. 2015), the Ninth Circuit
20 discussed the six “Reasoning Levels that range from Level One (simplest) to Level Six
21 (most complex).” *Id.* at 1002. Levels One and Two state:

22 Level 1: Apply commonsense understanding to carry out simple one- or
23 two-step instructions. Deal with standardized situations with occasional or
24 no variables in or from these situations encountered on the job.

25 Level 2: Apply commonsense understanding to carry out detailed but
26 uninvolved written or oral instructions. Deal with problems involving a few
27 concrete variables in or from standardized situations.

28 *Id.* at 1002-03 (citation omitted). The ALJ in *Rounds* found that the claimant was limited

1 to, among other things, “one to two step tasks.” *Id.* at 1001. Based on the vocational
2 expert’s testimony, the ALJ concluded that the claimant was capable of performing
3 three representative jobs that required Reasoning Level Two. *Id.* at 1002. The Ninth
4 Circuit found an apparent conflict between the claimant’s residual functional capacity
5 and the demands of Reasoning Level Two. *Id.* at 1003. Because the ALJ had not
6 recognized the apparent conflict, the ALJ had not asked the VE to explain the conflict.
7 The Ninth Circuit remanded the matter for further proceedings. *Id.* at 1003-04. In this
8 case, the ALJ failed to incorporate the state agency review psychologist’s opinion
9 regarding simple, two-step instructions without explanation. The ALJ did not
10 incorporation this limitation in her hypothetical to the vocational expert and there is no
11 explanation for the apparent conflict in the record. The matter should be remanded for
12 reconsideration of Dr. Caruso-Radin’s opinion.

13 The other representative job identified by the ALJ – housekeeper – does involve
14 Level 1 reasoning. AR 29 (DOT 323.687-14 (housekeeper)). However, the court
15 concludes that the ALJ failed to consider Dr. Spayde’s records regarding limitations on
16 prolonged sitting. The vocational expert testified that the housekeeper position did not
17 have a sit/stand option. AR 89. The matter should be remanded for reconsideration of
18 Dr. Spayde’s opinion and a sit/stand option.

19 **1. Dr. Spayde’s Opinions**

20 On February 8, 2010, Lazos was employed as a driver and injured her low back
21 when she bent over to pick up a dialysis patient who had slipped out of his wheelchair.
22 AR 407-08. Lazos argues that the ALJ improperly discounted the opinion of Dr.
23 Spayde, the surgeon who performed her lumbar spine fusion surgery on May 10, 2010.

24 Lazos argues that Dr. Spayde opined that she was temporarily totally disabled
25 (“TTD”) through August 2011, the date of his last report. Dr. Spayde’s reports support
26 TTD status during the period beginning with her injury on February 8, 2010 through
27 approximately September 2010. When Dr. Spayde first saw Lazos in April 2010, she
28 reported frequent to constant, moderate to severe low back pain. Her pain went from

1 her right buttocks down to her right ankle, and her left leg was feeling numb from her
2 knee down to her foot. Her waist was also painful. AR 409. The MRI indicated far
3 right-sided disc herniation at L4-L5 with stenosis, and left paracentral disc herniation at
4 L5-S1 with left foraminal stenosis. AR 414. After the May 10, 2010 surgery, she was
5 using a walker, unable to drive and experienced low back pain as expected. AR 389,
6 393, 420, 422, 430, 688 (May 2010 discharge instructions permitting light activity with
7 no lifting, bending, twisting and requiring use of back brace).

8 However, after that period, Dr. Spayde's reports do not contain the TTD
9 designation. In November 2010, Lazos was "overall doing well." She reported "left
10 groin pain with spreading her legs" and "denie[d] any symptoms down the right leg."
11 She had "mild ongoing lower back discomfort." AR 395. Dr. Spayde kept her off work
12 until the next visit. In January 2011, Dr. Spayde noted that Lazos reported no right leg
13 symptoms and reported tightness of the left groin when she spreads her legs. She had
14 some left peri-incisional and proximal thigh numbness which is improving. Dr. Spayde
15 requested physical therapy. Dr. Spayde checked the box to keep Lazos off work until
16 the next visit. AR 398. In subsequent reports, Dr. Spayde checked the box to keep
17 Lazos off work until the next visit. AR 402, 405, 418, 425.

18 Dr. Spayde's last report on August 24, 2011 indicates that Lazos returned "doing
19 relatively well" with some pain on the left side of the lumbar region next to her incision.
20 She had no symptoms of the right leg. However, there was numbness of the left leg
21 with prolonged sitting and she was having some cramps in her leg. Her motor strength
22 was 5/5 except for 5-/5 left hip flexor. Lumbar spine x-rays indicated that the hardware
23 appears well seated at L4-L5 and solid fusion consolidation in the inter-transverse
24 space. AR 384, 386. She reported feeling "a lot less depressed than she has been in
25 the past." AR 384. "Lazos does not believe she is capable of work, even on a modified
26 basis." *Id.* Dr. Spayde kept her off work until the next visit. *Id.* He did not state that
27 she was temporarily totally disabled, as he had in previous reports.

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1 The ALJ is not bound by a determination under workers compensation rules that
2 a claimant is temporarily totally disabled. 20 C.F.R. § 404.1504.² Although Lazos is
3 correct that the ALJ could not disregard Dr. Spayde’s reports simply because they were
4 generated in workers compensation proceedings, *Booth v. Barnhart*, 181 F. Supp. 2d
5 1099, 1105 (C.D. Cal. 2002), “it is important to distinguish between those portions of the
6 physicians’ reports that represent the physicians’ medical findings and those portions of
7 the reports that represent conclusions as to the claimant’s disability for purposes of
8 worker’s compensation.” *Coria v. Heckler*, 750 F.2d 245, 247 (9th Cir. 1984). Because
9 the tests for Social Security disability and workers’ compensation are different, “the ALJ
10 could reasonably disregard so much of the physicians’ reports as set forth their
11 conclusions as to [the claimant’s] disability for worker’s compensation purposes.” *Id.*
12 “On the other hand, the physicians’ findings, *qua* findings, do not necessarily suffer from
13 similar defects.” *Id.* at 248. “[T]he ALJ should evaluate the objective medical findings
14 set forth in the medical reports for submission with the worker’s compensation claim by
15 the same standards that s/he uses to evaluate medical findings in reports made in the
16 first instance for the Social Security claim, unless there is some reasonable basis to
17 believe a particular report or finding is not entitled to comparable weight.” *Id.*; *e.g.*,
18 *Blanco v. Colvin*, 2016 U.S. Dist. LEXIS 180052, *32 (C.D. Cal. Dec. 29, 2016) (ALJ
19 may properly reject treating physician’s opinion that claimant was temporarily totally
20 disabled).

21 The ALJ noted Dr. Spayde’s observation that Lazos had numbness with
22 prolonged sitting in August 2011 as well as burning discomfort of the left buttock and
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24 ² For claims filed on or after March 27, 2017, the Commissioner “will not provide any
25 analysis in our determination or decision about a decision made by any other
26 governmental agency or a nongovernmental entity about whether you are disabled,
27 blind, employable, or entitled to any benefits. However, we will consider all of the
28 supporting evidence underlying the other governmental agency or nongovernmental
entity’s decision that we receive as evidence in your claim in accordance with §
404.1513(a)(1) through (4).” 20 C.F.R. § 404.1504 (effective March 27, 2017).

1 thigh in April – July 2011. AR 23, 384, 405, 425. The ALJ did not incorporate a
2 sit/stand option in his RFC assessment and did not explain his rejection of Dr. Spayde’s
3 observations. The error does not appear harmless. In November 2011, Lazos was
4 diagnosed with left knee chondromalacia of the patella and muscle weakness. Dr.
5 Horvath observed swelling, tenderness and muscle weakness of the left knee and
6 prescribed a Cho-Pat brace for at risk activities such as walking and going up and down
7 stairs. AR 470, 475. Subsequent treatment records indicate difficulty with prolonged
8 sitting and standing. *E.g.*, AR 476. The ALJ observed that Lazos alternated sitting and
9 standing every 15 minutes approximately. AR 79. It is therefore recommended that the
10 matter be remanded for reconsideration as set forth above.

11 **2. Opinions of Mental Limitations**

12 An ALJ is not precluded from relying on the opinions of nonexamining physicians.
13 *E.g.*, *Dubois v. Colvin*, 649 Fed. Appx. 439, 441-42 (9th Cir. 2016) (ALJ did not err in
14 giving minimal weight to treating and examining psychologists whose opinions were
15 inconsistent with opinions of nonexamining psychologists and claimant’s reported
16 activities).

17 ***Dr. Gilbert***

18 The ALJ gave little weight to Dr. Gilbert’s opinions because (1) she signed her
19 April 2012 diagnostic intake assessment as a summary in March 2014; (2) she opined
20 that Lazos was unable to work since May 2010, two years before she had first seen
21 Lazos; (3) she opined that Lazos had the most extreme limitations in all but four areas
22 in a check off form and had less than 50% efficiency without indicating any reduced
23 intellectual functioning; and (4) her opinions lacked objective support, her purported
24 progress notes reflected complaints about Lazos’ problems with her stepdaughters and
25 physical complaints; and her mental status examination findings were fundamentally
26 flawed. AR 25, 27, 28.

27 The ALJ’s first and second reasons are supported by substantial evidence. The
28 April 2012 diagnostic intake assessment and the March 2014 summary are substantially

1 identical despite Dr. Gilbert's statement in March 2014 that she has seen Lazos once or
2 twice a month since April 2012. *Compare* AR 578-80 with AR 584-86; see AR 587. Dr.
3 Gilbert opined that Lazos was unable to work "since May 2010 surgery," an area
4 outside her expertise. AR 587.

5 The ALJ's third and fourth reasons are also supported by substantial evidence.
6 In March 2014, Dr. Gilbert opined that Lazos had extreme limitations in all areas of
7 functioning except for four areas.³ Dr. Gilbert refers to her report, but the section on
8 mental status findings states that Lazos is oriented, has fair eye contact and has normal
9 speech. Her sentences are goal oriented and no disorder of thought process or thought
10 content was noted. Lazos' verbalizations were without flight of ideas or loose
11 association. Her insight and judgment were fair. Lazos presented as groomed and
12 dressed neatly. Her mood was dysthymic and her affect was sad. AR 585. In October
13 2014, Dr. Gilbert provided clinical notes in a report that repeated the same mental
14 status findings for each encounter: "Patient was oriented to person, place, time, and
15 situation. Patient maintained fair eye contact. Mood is dysthymic and affect is sad."
16 AR 859-88. The ALJ reasonably found that these mental status findings did not support
17 Dr. Gilbert's extreme limitations.

18 The ALJ reasonably found that clinical notes do not support Dr. Gilbert's extreme
19 limitations in mental functioning. Lazos described herself as the "go to person" for her
20 family, including her sisters. AR 860. Lazos and her husband hired a family law
21 attorney for the child custody situation for her twin stepdaughters, and attended
22 mediation. Lazos described various schooling options for the girls and the original

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24 ³ In one assessment of mental functioning dated March 21, 2014, the four areas in
25 which Lazos did not have extreme limitations were interaction with the general public,
26 travel in unfamiliar places, dealing with people in work situations beyond receiving work
27 instructions and being aware of normal hazards. AR 582. In another assessment also
28 dated March 21, 2014, the four areas were interaction with the general public,
maintenance of socially appropriate behavior and adherence to basic standards of
neatness and cleanliness, awareness of normal hazards and travel in unfamiliar places
or use of public transportation. AR 588-89.

1 custody agreement. After the scheduled court hearing on October 2, 2012, Lazos and
2 her husband got custody of both girls. She looked at three potential child therapists for
3 the girls. AR 861, 864, 865, 866, 867, 868. Lazos described the serious behavioral
4 problems that the girls have, and Dr. Gilbert gave her a referral. AR 871-72, 874, 882.
5 The girls, one of whom is physically abusive toward Lazos, increased the stress and
6 aches that Lazos felt. AR 876, 877, 886. She took the girls to school and their
7 appointments, and then her husband complained that she didn't have dinner ready. AR
8 883, 884.

9 To give but one example, Dr. Gilbert opined that Lazos could not understand and
10 remember even short and simple instructions. AR 593. However, in September 2013,
11 Lazos reported that she was frustrated that the carpet at home was not straight, she
12 checked door locks and she straightened pictures. Dr. Gilbert gave her an OCD
13 brochure and told her that she will be given an OCD questionnaire at the next
14 appointment. AR 872. At the next appointment two weeks later, Lazos reported that
15 she not only read the brochure but also did online research. Dr. Gilbert then
16 administered the Yale-Brown Obsessive Compulsive Scale. Lazos scored 38 out of 40,
17 in the extreme range. AR 873. Lazos' ability to read and comprehend the brochure,
18 perform online research on the subject and converse with Dr. Gilbert about it is
19 inconsistent with Dr. Gilbert's extreme opinions.⁴ The ALJ did not err.

20 ***Dr. Deamer***

21 Dr. Deamer is a psychiatrist. AR 27. The ALJ noted that Dr. Deamer indicated
22 the most extreme limitations for Lazos on March 26, 2014 except for four areas. AR 25.
23 The ALJ gave little weight to his opinion because he "opines disability without citing
24 supportive signs and findings." AR 27. The ALJ is correct that the record does not
25 contain treatment notes supporting his extreme findings. The two treatment notes in the
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27 ⁴ Lazos has a ninth grade education. Lazos stated that she did well in school and
28 left school to take care of her sister so that her mother could work. AR 529, 878.

1 record are wholly conclusory. AR 619, 667-68. The absence of supporting treatment
2 notes remains a valid reason to discount a treating physician's opinion. *Tonapetyan v.*
3 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (ALJ need not accept treating physician's
4 opinion unsupported by clinical findings). The case cited by Lazos is not to the
5 contrary. In *Garrison v. Colvin*, 759 F.3d 995 (9th Cir. 2014), the Ninth Circuit affirmed
6 the district court's finding that the ALJ erred in ignoring the treatment records and failing
7 to recognize that the physician's opinions were "therefore entitled to weight that an
8 otherwise unsupported and unexplained check-box form would not merit." *Id.* at 1013
9 (footnote omitted). Here, the ALJ did not ignore the treatment records.⁵

10 ***Dr. Kaiser***

11 The ALJ gave little weight to the May 2011 opinion of Dr. Kaiser because "there is
12 a lack of objective support." AR 28.⁶ The ALJ noted that, on May 16, 2011, Lazos was
13 seen by an orthopedic surgeon, Dr. Chung, who performed a comprehensive qualified
14 medical examination for workers compensation. AR 24, 649. Lazos "ambulates with a
15 normal gait. She is able to walk on her toes and also walk on her heels, but indicates
16 that this elicits pain in her leg and low back." AR 24, 659. She had decreased range of
17 motion and tenderness to palpation over L-3, L-4, L-5 and S-1. Straight leg raising was
18 positive in the supine position. AR 24, 659. Lazos complained of low back pain and
19 occasional pain in the lower extremity that is best described as constant-slight
20 increasing to moderate with frequent bending, stooping and twisting, and with heavy
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23 ⁵ The ALJ concluded that Dr. Deamer's opinion appears to be an assent to Dr.
24 Gilbert's opinions rather than an independent evaluation. AR 28. Lazos argues that
25 there is no basis for the ALJ's speculation that Dr. Deamer's opinion is an assent to Dr.
26 Gilbert's opinions. The court agrees that the ALJ's inference is speculative. Dr. Gilbert
and Dr. Deamer work at different institutions. Nevertheless, Dr. Deamer's opinions
remain unsupported by his treatment notes.

27 ⁶ The letterhead used by Dr. Kaiser had Dr. Curtis' name. The ALJ referred to Dr.
28 Kaiser by Dr. Curtis' name and cited Dr. Kaiser's report. AR 28 (citing Exhibit 17F, AR
627-48).

1 lifting and carrying. AR 662. Based on the subjective complaints and his objective
2 findings, Dr. Chung precluded Lazos from frequent bending, stooping and twisting of the
3 lumbar spine, and from lifting and carrying over 20 pounds on a frequent basis and 25
4 pounds on an occasional basis. AR 24, 663.

5 By contrast, Dr. Kaiser reported that on May 4, 2011, only 12 days earlier, Lazos
6 had “visible abnormality in the form of an altered gait” as well as “what appeared to be
7 physical disablement and an inability to sit for long presumably due to pain and related
8 agitation.” AR 631. She presented as “defensive and guarded due to her depression,
9 anxiety and fatigue caused by physical pain and disability primarily in her back.” AR
10 632. Subsequently, at a December 2011 neurology examination, Lazos was noted to
11 have normal gait, posture and station. AR 478.

12 It is the ALJ’s province to resolve conflicts in the record evidence. *Andrews v.*
13 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ noted that Dr. Kaiser advocated
14 for workers compensation benefits for Lazos. AR 24, 640-41, 721-22. An ALJ may
15 discount the opinion of a treating physician who effectively becomes an advocate for the
16 claimant. *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).

17 However, the ALJ’s assessment that Dr. Kaiser’s opinion lacks objective findings
18 is not supported by substantial evidence. Dr. Kaiser administered several psychological
19 tests. The Beck Depression Inventory score of 44 indicates severe depression. The
20 Beck Anxiety Inventory score of 44 indicates a severe level of anxiety. The Neuroticism
21 Scale Questionnaire scores of 10 in total neuroticism, depression and anxiety placed
22 Lazos in the 98th percentile in each category. The MMPI-2 scores were “highly
23 abnormal.” AR 633. The degree of depression “constituted a rare degree of intense
24 dysfunctional depression.” The elevations in Hypochondriasis and Hysteria correlated
25 with “relatively fixed patterns of abnormal somatization, and failure of psychological
26 insight into psychodynamic mechanisms of conversion of emotional distress into
27 intensified physical symptomatology that may or may not have a physical basis.” AR
28 634. The Psychasthenia scale correlated to “such extremes of anxiety that routine

1 emotional functioning, even simple life tasks, would be compromised.” *Id.* Although the
2 Schizophrenia scale was high, individuals who also have other scale elevations are
3 “rarely schizophrenic.” AR 635. Although an elevated F scale may indicate
4 exaggeration, Lazos also had elevated L and K scales indicating underreporting. AR
5 633. The Forer Structured Sentence Completion Test indicated “her unique state of
6 mind,” such as “I was most depressed when ‘I found out that I had to get surgery for the
7 third time’”; “I was most annoyed when ‘they would pay us for a few hours when we had
8 worked more’”; and “I feel sad about ‘my surgery, pain, everything.’” AR 635.

9 Dr. Kaiser diagnosed Depressive Disorder NOS with anxiety, and psychological
10 factors. AR 639. Dr. Kaiser observed that Lazos became “emotionally unstable and
11 disturbed at the contemplation of an immediate return to work.” AR 640. Dr. Kaiser
12 concluded that Lazos was “too beset by pain and disability, and too depressed and
13 overwhelmed to work. Ms. Lazos needed to work through the emotional symptoms in
14 the further passage of time and supportive psychotherapy prior to attempting to return
15 to any job.” *Id.* Dr. Kaiser and Dr. Curtis concluded that Lazos had TTD status. AR
16 640, 722. Dr. Kaiser recommended once weekly therapy for four months with weekly
17 stress-reduction biofeedback, followed by an assessment as to whether there is any
18 need for further individual therapy. AR 641. Dr. Kaiser recommended group therapy for
19 a period of four to six months to commence after the period of individual therapy and
20 biofeedback. AR 642, 722.

21 The Commissioner’s argument that any error is harmless is rejected. The state
22 agency review psychologists do not appear to have received Dr. Kaiser’s May 2011
23 report and do not comment upon it. AR 95-102, 113-20. On remand, the ALJ should
24 reconsider Dr. Kaiser’s opinion, presumably with the aid of expert opinion.

25 ***Dr. Wendel***

26 Dr. Wendel is an examining psychologist who performed a mental evaluation of
27 Lazos on June 29, 2012. AR 529-32. Lazos presented as clean, cooperative, friendly,
28 distressed, anxious, depressed and near tears. Her effort was good and her attention

1 was alert. She recalled 3/3 items immediately but only 1/3 after a few minutes. She
2 was able to do serial threes and correctly solved a simply financial problem mentally.
3 Her thought process is coherent and she correctly answers when asked a verbal
4 reasoning question. Her thought content has passive suicidal ideation. Her impulse
5 control is adequate. Her insight and judgment are fair. AR 530-31.

6 Dr. Wendel diagnosed major depression NOS with a GAF of 55.⁷ AR 531. He
7 noted that Lazos self reported that she had become reclusive. AR 532. Dr. Wendel
8 found a marked restriction of daily activities due to subjective pain, depression and fear
9 of worsening her condition, and a marked restriction of concentration, persistence and
10 pace on a sustained basis. Dr. Wendel found moderate restriction of social functioning
11 and concluded that Lazos would experience repeated episodes of emotional
12 deterioration in work like situations due to her pain. AR 532.

13 The ALJ gave no weight to Dr. Wendel's opinion because it was inconsistent with
14 his treating notes, internally inconsistent and inconsistent with Lazos' reported activities.
15 AR 25, 28. The state agency review physician, Dr. Young, summarized the
16 inconsistencies. Dr. Young noted the inconsistency between Dr. Wendel's acceptance
17 of Lazos' self reported reclusiveness and Lazos' activities of daily living. In March 2012,
18 Lazos reported that she is able to prepare meals three to four times per week. She
19 helps with folding clothes and washing dishes. She can drive a car. She shops for food
20 approximately once or twice a week for 30 minutes to 1½ hours. She socializes with
21 friends about twice per month and sometimes goes to church. She has no difficulty
22 getting along with family, friends or authority figures. She can follow instructions but
23 has to read them again or ask someone to repeat the instructions. AR 103, 293-96.
24 The ALJ noted that, in March 2012, Lazos' mother reported that Lazos has no need for

26 ⁷ A GAF of 55 indicates "moderate symptoms (e.g., flat affect and circumstantial
27 speech, occasional panic attacks) or moderate difficulty in social, occupational, or
28 school functioning (e.g., few friends, conflict with peers or co-workers)." Diagnostic and
Statistical Manual of Mental Disorders ("DSM-IV") 34 (4th ed. text rev. 2000).

1 special reminders to take medications. Lazos can drive a car, and shop in stores and
2 by computer. Lazos is able to pay bills, count change, handle a savings account and
3 use a check book. Lazos socializes with other people. AR 28, 98.

4 Dr. Young further noted that Dr. Wendel's assessment of marked limitations in
5 concentration, persistence or pace was inconsistent with his own assessment that
6 Lazos' concentration is "sometimes" disrupted by emotionality and she can perform
7 serial threes and correctly solve a simple financial problem mentally. AR 103, 531.

8 Dr. Caruso-Raydin opined that Lazos could perform simple, two-step instructions.
9 AR 125.

10 **B. Hypothetical to Vocational Expert**

11 As discussed above, the ALJ's hypothetical to the vocational expert did not
12 include the limitation to simple, two-step instructions that was found by the state agency
13 review psychologist whose opinion the ALJ appeared to accept. Because this matter is
14 being remanded for reconsideration of opinions of medical sources, the court need not
15 address the hypothetical to the vocational expert at this time.

16 **C. Credibility**

17 "To determine whether a claimant's testimony regarding subjective pain or
18 symptoms is credible, an ALJ must engage in a two-step analysis." *Lingenfelter v.*
19 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, "the ALJ must determine
20 whether the claimant has presented objective medical evidence of an underlying
21 impairment 'which could reasonably be expected to produce the pain or other
22 symptoms alleged.'" *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)
23 (en banc)).

24 Second, when an ALJ concludes that a claimant is not malingering and has
25 satisfied the first step, "the ALJ may 'reject the claimant's testimony about the severity
26 of her symptoms only by offering specific, clear and convincing reasons for doing so.'" *Brown-Hunter v. Colvin*, 798 F.3d 749, 755 (9th Cir. 2015) (citation omitted), *amended*
27 2015 WL 6684997 (Nov. 3, 2015); *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir.
28

1 2014). “A finding that a claimant’s testimony is not credible ‘must be sufficiently specific
2 to allow a reviewing court to conclude the adjudicator rejected the claimant’s testimony
3 on permissible grounds and did not arbitrarily discredit a claimant’s testimony regarding
4 pain.” *Brown-Hunter*, 798 F.3d at 755 (citation omitted). “General findings are
5 insufficient; rather, the ALJ must identify what testimony is not credible and what
6 evidence undermines the claimant’s complaints.” *Id.* (citation omitted).

7 In weighing credibility, the ALJ may consider factors including: the nature,
8 location, onset, duration, frequency, radiation, and intensity of any pain; precipitating
9 and aggravating factors (e.g., movement, activity, environmental conditions); type,
10 dosage, effectiveness, and adverse side effects of any pain medication; treatment,
11 other than medication, for relief of pain; functional restrictions; the claimant’s daily
12 activities; and “ordinary techniques of credibility evaluation.” *Bunnell*, 947 F.2d at 346
13 (citing Social Security Ruling (“SSR”) 88-13) (quotation marks omitted).⁸ The ALJ may
14 consider: (a) inconsistencies or discrepancies in a claimant’s statements; (b)
15 inconsistencies between a claimant’s statements and activities; © exaggerated
16 complaints; and (d) an unexplained failure to seek treatment. *Thomas*, 278 F.3d at
17 958-59.

18 The ALJ found that Lazos’ medically determinable impairments could reasonably
19 be expected to cause the alleged symptoms, but her statements concerning the
20 intensity, persistence and limiting effects of her symptoms were “not entirely credible.”
21 AR 26. The ALJ relied on five reasons: (1) settlement of the workers compensation
22 case in September 2011 included a waiver of future medical coverage, permitting an
23 inference that future medical issues were not expected to be substantial; (2) physical
24 complaints that appear to be exaggerated or isolated; (3) inconsistencies between her
25

26 ⁸ Social Security rulings do not have the force of law. Nevertheless, they “constitute
27 Social Security Administration interpretations of the statute it administers and of its own
28 regulations,” and are given deference “unless they are plainly erroneous or inconsistent
with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 testimony and her reports to physicians; (4) an element of noncompliance with
2 prescribed treatment; and (5) inconsistencies between her testimony and her activities
3 of daily living. AR 26-28.

4 The ALJ's inference that Lazos' future medical issues were not expected to be
5 substantial as of September 2011 based on settlement of the workers compensation
6 case with a waiver of future medical coverage is not unreasonable. This reason is the
7 least significant because it is limited to a particular point in time.

8 The ALJ's finding of exaggeration is supported by substantial evidence. Dr.
9 Kaiser indicated that Lazos' MMPI-2 scores were elevated on Hypochondriasis and
10 Hysteria, and that this would result in "abnormal bodily preoccupations," "chronic
11 manifestations of psychological fatigue, functional pain, weakness and loss of physical
12 stamina" and "conversion of emotional distress into intensified physical symptomatology
13 that may or may not have a physical basis." AR 634. The ALJ could reasonably
14 interpret these findings as an indication that Lazos' mental condition would lead her to
15 exaggerate physical complaints.

16 The ALJ's finding of inconsistencies between Lazos' testimony and her reports to
17 physicians is supported by substantial evidence. The ALJ noted that Lazos testified she
18 has 10-12 migraine headaches per month lasting 1-2 days at a time, and her pain is at
19 10/10 for approximately 20 days per month. AR 27, 64-66. The ALJ noted no
20 indication in the medical record that Lazos reported such debilitating migraines and pain
21 up to 20 days per month. AR 27. The ALJ's review of the records is correct, and Lazos
22 does not appear to contend otherwise.

23 The ALJ's findings of noncompliance with prescribed treatment is supported by
24 substantial evidence. AR 448 (advised to begin progressive daily aerobic exercise
25 program), 468 (advised to use exercise for stress reduction), 472 (recommending low
26 impact exercise program and core strengthening), 475-76, 480 (advised to join water
27 exercise program), 544 (not consistently attending pool exercise program); see *also* AR
28 72-73. The ALJ's reasoning that a person experiencing the highest degree of pain for

1 20 days out of a month would be expected to adhere to medical recommendations is
2 reasonable. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

3 Finally, the ALJ noted inconsistencies between Lazos' testimony in 2014 that she
4 spends her days lying down behind closed doors and closed windows, and her reported
5 daily activities. AR 27-28, 70. The ALJ's reason is supported by substantial evidence.
6 Dr. Gilbert's medical records, for example, indicate that in 2014 Lazos was taking her
7 stepdaughters to and from school and regular psychiatric and therapy appointments.
8 AR 879, 883. As discussed above, Lazos described herself as the "go to person" for
9 her family. Lazos and her husband hired a family law attorney for the child custody
10 situation and attended mediation. After the scheduled court hearing on October 2,
11 2012, Lazos and her husband got custody of both girls. She looked at three potential
12 child therapists for the girls. AR 860, 861, 864, 865, 866, 867, 868. As the ALJ noted,
13 Lazos' previous statements described her daily activities as preparing meals, attending
14 church, shopping and socializing. AR 28, 293-95, 312, 530. The ALJ could properly
15 rely on these activities to discount Lazos' allegations as to how she spends her days.
16 *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012).

17 For these reasons, the ALJ did not err.

18 **D. Lay Witness Statement**

19 "In determining whether a claimant is disabled, an ALJ must consider lay witness
20 testimony concerning a claimant's ability to work." *Stout v. Comm'r*, 454 F.3d 1050,
21 1053 (9th Cir. 2006). "When an ALJ discounts the testimony of lay witnesses, 'he [or
22 she] must give reasons that are germane to each witness.'" *Valentine v. Comm'r*, 574
23 F.3d 685, 694 (9th Cir. 2009) (citation omitted).

24 The Commissioner argues that any error by the ALJ in failing to discuss the
25 statements of Lazos' mother is harmless. The court agrees. The mother's statements
26 are not materially different from Lazos' statements. *Compare* AR 308-16 *with* AR 291-
27 98, 317-25. Because the ALJ provided clear and convincing reasons for discounting
28 Lazos' own complaints, any error is harmless. *Valentine*, 574 F.3d at 694.

