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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EVA TOLIS DE TELLEZ,
Plaintiff,
v.
NANCY A BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:17-cv-02918-KES

MEMORANDUM OPINION
AND ORDER

Plaintiff Eva Tolis de Tellez (“Plaintiff”) appeals the final decision of the Social Security Commissioner denying her application for disability insurance benefits (“DIB”). For the reasons discussed below, the Commissioner’s decision is AFFIRMED.

I.
BACKGROUND

Plaintiff filed her DIB application on January 9, 2013, alleging a disability onset date of May 18, 2011. Administrative Record (“AR”) 137-40, 151. An Administrative Law Judge (“ALJ”) conducted a hearing on November 23, 2015, at which Plaintiff, who was represented by an attorney, appeared and testified. AR 39-62. The ALJ issued an unfavorable decision on January 11, 2016. AR 12-38.

1 The ALJ found that Plaintiff suffers from the severe impairments of status
2 post L5-S1 discectomy with residual myofascial pain, and status post right shoulder
3 repair with chronic impingement. AR 17. The ALJ also found that Plaintiff did not
4 have a severe mental impairment, and she did not incorporate any mental
5 limitations in Plaintiff's residual functional capacity ("RFC") assessment. AR 19.

6 Despite Plaintiff's impairments, the ALJ found that she retained the RFC to
7 "lift and carry 10 pounds frequently, 20 pounds occasionally, [and] stand and walk
8 at least four hours in an eight-hour day" with the following additional limitations:
9 "cannot climb ladders, can occasionally climb stairs, balance, stoop, crouch, and
10 crawl, can occasionally reach overhead bilaterally, can occasionally perform gross
11 handling with right upper extremity, no limitations in fine fingering, cannot have
12 concentrated exposure to vibrating tools, cannot work at unprotected heights or
13 operation of hazardous moving machinery." AR 23.

14 Based on this RFC and the testimony of a vocational expert ("VE"), the ALJ
15 found that Plaintiff could not perform her past relevant work of cosmetologist,
16 Dictionary of Occupational Titles ("DOT") 332.271-010 or store manager, DOT
17 185.167-046. AR 30. The ALJ found that Plaintiff had transferable skills from her
18 work as a salon manager of "supervisory, retail trade, merchandising, and sales
19 skills, such as communication, customer service, and information giving." AR 31.
20 With those transferable skills, the ALJ ruled at step five that Plaintiff could perform
21 the semi-skilled occupations of companion, DOT 309.677-010, and case aide, DOT
22 195.367-010. AR 31. The ALJ found alternatively that if Plaintiff were limited to
23 sedentary work instead of light, she could perform the semi-skilled occupation of
24 information clerk, DOT 237.357-022. AR 32. The ALJ therefore concluded that
25 Plaintiff was not disabled. Id.

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II.

PROCEDURES AND STANDARDS

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, the claimant is not disabled 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.

1 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

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

9 If that happens or if the claimant has no past relevant work, the
10 Commissioner then bears the burden of establishing that the claimant is not
11 disabled because he can perform other substantial gainful work available in the
12 national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That
13 determination comprises the fifth and final step in the sequential analysis. Id.
14 §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

15 **C. Standard of Review.**

16 Under 42 U.S.C. § 405(g), a district court may review the Commissioner's
17 decision to deny benefits. The ALJ's findings and decision should be upheld if
18 they are free from legal error and are supported by substantial evidence based on
19 the record as a whole. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389,
20 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
21 evidence means such relevant evidence as a reasonable person might accept as
22 adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v.
23 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less
24 than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
25 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial
26 evidence supports a finding, the reviewing court "must review the administrative
27 record as a whole, weighing both the evidence that supports and the evidence that
28 detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,

1 720 (9th Cir. 1998). “If the evidence can reasonably support either affirming or
2 reversing,” the reviewing court “may not substitute its judgment” for that of the
3 Commissioner. Id. at 720-21.

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

9 III.

10 ISSUES PRESENTED

11 All the issues Plaintiff raises on appeal concern her mental limitations rather
12 than her exertional limitations, as follows:

13 Issue No. 1: Whether the ALJ committed reversible error assessing opinions
14 of examining psychiatrist Peter Dell, M.D.

15 Issue No. 2: Whether the ALJ committed reversible error in assessing
16 opinions of consultative examining psychologist Isadore Wendel, Ph.D.

17 Issue No. 3: Whether the ALJ’s committed reversible error in assessing the
18 opinions of state agency reviewing psychologist Patrice Solomon, Ph.D.

19 Issue No. 4: Whether “the ALJ’s ruling that Plaintiff did not have mental
20 limitations is supported by substantial evidence.”

21 Issue No. 5: Whether the ALJ’s adverse credibility determination is
22 supported by substantial evidence. (Dkt. 16, Joint Stipulation (“JS”) at 3.)
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IV.
DISCUSSION

A. Issue One: The ALJ’s Assessment of Dr. Dell’s Opinions.

1. Rules for Weighing Conflicting Medical Evidence and Determining the Claimant’s RFC.

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, such as Dr. Belen, and (3) those who did not treat or examine the plaintiff. See 20 C.F.R. § 416.927(c); Lester, 81 F.3d at 830. 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, 157 F.3d at 725); Lester, 81 F.3d at 830-31 (citing Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983)).

A claimant’s RFC is the most that claimant can still do despite his or her limitations, and is based on all the relevant evidence in the case record. 20 C.F.R. § 416.945(a); Social Security Ruling (“SSR”) 96-8. In making the RFC determination, the ALJ takes into account those limitations for which there is support in the record. Batson v. Comm’r, 359 F.3d 1190, 1197-98 (9th Cir. 2003).

“The ALJ is the final arbiter with respect to resolving ambiguities in the medical evidence.” Ly v. Colvin, No. 13-1241, 2014 U.S. Dist. LEXIS 135826, at *33 (E.D. Cal. Sep. 24, 2014). The RFC need not parrot the opinion of any particular doctor, but rather, “the ALJ is responsible for translating and incorporating clinical findings into a succinct RFC.” Rounds v. Comm’r of SSA, 807 F.3d 996, 1006 (9th Cir. 2015); see also Stubbs-Danielson v. Astrue, 539 F.3d

1 1169, 1174 (9th Cir. 2008) (discussing the ALJ’s role in weighing conflicting
2 medical evidence and “translating” accepted medical opinions into “concrete
3 restrictions”). Where, for example, a credited medical source opines that the
4 claimant has “mild” or “moderate” difficulties with social interactions, the ALJ
5 must decide whether the RFC should specify that the claimant can perform jobs
6 requiring no, occasional, or frequent contact with members of the public and/or co-
7 workers. Where a credited medical source opines that the claimant has “mild” or
8 “moderate” difficulties maintaining concentration or pace, the ALJ must decide
9 whether the RFC should specify that the claimant can perform work if the reasoning
10 level and/or skill level of the work is low (i.e., “simple” work), if the work
11 environment is “routine” (as opposed to high-stress or fast-paced), if the claimant is
12 permitted to take breaks of specified frequency and duration, etc. Stubbs-
13 Danielson, 539 F.3d at 1174 (holding an RFC of “simple, routine, repetitive
14 sedentary work” adequately captures “moderate” deficiencies in pace).

15 The ALJ’s translation of the medical evidence into concrete functional
16 assessments should be affirmed if the ALJ “applied the proper legal standard and
17 his decision is supported by substantial evidence.” Bayliss v. Barnhart, 427 F.3d
18 1211, 1217 (9th Cir. 2005) (citing Morgan v. Comm’r of the SSA, 169 F.3d 595,
19 599 (9th Cir. 1999) (“Where the evidence is susceptible to more than one rational
20 interpretation, it is the ALJ’s conclusion that must be upheld.”)).

21 **2. Summary of Dr. Dell’s Opinions.**

22 Plaintiff worked as a cosmetologist and manager at a Fantastic Sam’s hair
23 salon for many years. AR 264. In 2010, she slipped on a wet floor, injuring her
24 back and right shoulder. AR 622, 720. She filed a workers’ compensation claim,
25 and she underwent back surgery in 2012 and shoulder surgery in 2013. AR 720.

26 In October 2013, Plaintiff amended her workers’ compensation claim to
27 include a claim for depression and anxiety arising out of chronic pain. AR 697. Dr.
28 Dell, a Panel Qualified Medical Evaluator for the California workers’ compensation

1 system, evaluated Plaintiff twice.

2 Dr. Dell first evaluated Plaintiff on May 6, 2014, and he prepared a lengthy
3 report. AR 616-735. He reviewed her medical history (noting no mental health
4 treatment), discussed sources of stress in her life, administered psychological tests,
5 and ultimately diagnosed Plaintiff as suffering from “an adjustment disorder with
6 depressed mood.” AR 725. He explained that he did not diagnose Plaintiff as
7 having “major depressive disorder,” because “she was slightly exaggerating her
8 symptoms” during the evaluation. AR 726. As for psychiatric symptoms, he
9 recorded that she reported changes in her sleeping and eating habits (such as taking
10 two hours to fall asleep, decreased appetite, and a six-pound weight fluctuation),
11 decreased libido, crying spells, and feelings of worthlessness. AR 721, 726. He
12 gave her a Global Assessment of Functioning (“GAF”) score of 62 because that
13 score “corresponds to mild symptoms and ‘some’ impairment of functioning.” AR
14 726. He found that her mental condition did not cause any “moderate” functional
15 limitations, because she was “active in several areas of her life, such as attending
16 classes at an adult school and performing household duties” AR 726-27.

17 Dr. Dell concluded that Plaintiff’s depressed mood arose out of her physical
18 injuries, and was thus predominantly an industrial injury. AR 728. Regarding her
19 “periods of disability,” Dr. Dell opined as follows:

20 The applicant appears to have been temporarily partially disabled on a
21 psychiatric basis from May 18, 2011, when she went off of work, until
22 the present. The applicant has at no time been totally disabled on a
23 psychiatric basis. Work restrictions for the applicant include that she
24 be allowed to take a 20-minute break whenever she experiences
25 increased symptoms of depression or anxiety.

26 AR 729.

27 Dr. Dell evaluated Plaintiff a second time and issued a final report on
28 February 2, 2015. AR 751-90. He noted that Plaintiff had still not received any

1 therapy, counselling, or psychiatric medication since his 2014 evaluation. AR 761.
2 He completed a lengthy assessment of Plaintiff's functional abilities, all of which
3 he rated as either unimpaired or mildly impaired (i.e., a "1" or "2" on a 5-point
4 scale). Dr. Dell observed that Plaintiff did not exaggerate her symptoms as much
5 during the second evaluation, but he did not change his diagnosis, GAF score, or
6 other findings, including his work restriction. AR 776-78.

7 **3. Plaintiff's Claim of Error Regarding the ALJ's Assessment of Dr.**
8 **Dell's Opinions and Consequent RFC Determination.**

9 The ALJ discussed both of Dr. Dell's reports and gave his opinions "great
10 weight." AR 18-19. The ALJ did not, however, mention the work restriction
11 imposed by Dr. Dell or incorporate into the RFC a requirement that Plaintiff be
12 allowed to take a 20-minute break per a set schedule or whenever she experienced
13 increased symptoms of depression or anxiety. AR 23.

14 At the hearing, Plaintiff's counsel asked the VE whether it would preclude
15 employment if a hypothetical worker with Plaintiff's RFC were permitted "to take
16 20-minute breaks at her discretion throughout that day." AR 61. The VE
17 responded that the question was "not really quantified enough" to answer, because
18 it did not specify how many breaks the hypothetical worker would take. The VE,
19 however, provided a quantified example, testifying that if the hypothetical worker
20 took three 20-minute breaks each 8-hour workday, then that would preclude
21 employment. Id. Counsel did not follow up by eliciting VE testimony concerning
22 the effect on employment opportunities of any other break schedule. Id.

23 On appeal, Plaintiff contends that the ALJ was required either to explain why
24 she rejected Dr. Dell's work restriction regarding 20-minute breaks or incorporate it
25 into the RFC. (JS at 5.) Plaintiff argues that the ALJ's failure to do so affected her
26 decision of non-disability because (1) Dr. Dell's opinion permits "20-minute
27 discretionary work breaks," and (2) the VE testified that if Plaintiff were permitted
28 to take the "breaks identified by Dr. Dell," then there would be no jobs available.

1 (Id.)

2 **4. The ALJ Explained Her Assessment of Dr. Dell’s Opinions, and**
3 **Substantial Evidence Supports Omitting a Work-Preclusive Break**
4 **Requirement from Plaintiff’s RFC.**

5 Plaintiff reads Dr. Dell’s work restriction too broadly. Dr. Dell did not opine
6 that Plaintiff could only work if permitted to take as many 20-minute breaks as she
7 might want. Rather, he imposed as a work restriction that she be allowed to take a
8 20-minute break “whenever she experiences increased symptoms of depression or
9 anxiety.” AR 729, 778. Dr. Dell did not indicate how often he expected Plaintiff to
10 experience “increased symptoms of depression or anxiety” while working, but he
11 rated her ability to complete a normal workday without interruptions from
12 psychologically-based symptoms as only “mildly” impaired. AR 772. Whatever
13 number of breaks Dr. Dell had in mind, it was clearly not a work-preclusive number
14 (such as three breaks every day), because Dr. Dell opined that Plaintiff is not
15 disabled from working “on a psychiatric basis.” AR 778. Workers who, due to
16 psychiatric symptoms, can only work if allowed to take 20-minute breaks whenever
17 they choose, would be unemployable – a common-sense fact that would have been
18 apparent to Dr. Dell. Rather than interpreting Dr. Dell’s reports as having imposed
19 a work-preclusive work restriction, it is far more reasonable to interpret his work
20 restriction as consistent with the other parts of his lengthy reports – all of which
21 conclude that Plaintiff’s psychiatric symptoms, at worst, mildly limit her ability to
22 perform some work-related tasks. See 20 C.F.R. § 404.1520a(d)(1) (“If we rate the
23 degrees of your limitation as “none” or “mild,” we will generally conclude that
24 your [mental] impairment(s) is not severe, unless the evidence otherwise indicates
25 that there is more than a minimal limitation in your ability to do basic work
26 activities.”).

27 While ALJs are required to give specific, legitimate reasons for rejecting
28 relevant medical opinions, they are not required to explain how they translated each

1 relevant medical opinion into an RFC determination. See Estep v. Colvin, No. 15-
2 2647, 2016 U.S. Dist. LEXIS 163699, at *27 (E.D. Cal. Nov. 28, 2016) (“[A]s the
3 Ninth Circuit Court of Appeals has observed, an ALJ may synthesize and translate
4 assessed limitations into an RFC assessment ... without repeating each functional
5 limitation verbatim in the RFC assessment or hypothetical.” (citing Stubbs-
6 Danielson, 539 F.3d at 1173-74)). Here, where Dr. Dell did not quantify how often
7 he expected Plaintiff would experience increased symptoms requiring a 20-minute
8 break, the ALJ did not err in failing to incorporate verbatim this ill-defined work
9 restriction into the RFC. Dr. Dell found only mild mental impairments, which “do
10 not have to be exactly mirrored in the RFC determination.” Phillips v. Colvin, 61
11 F. Supp. 3d 925, 939-40 (N.D. Cal. 2014); Hoopai v. Astrue, 499 F.3d 1071, 1077
12 (9th Cir. 2007) (“We have not previously held mild or moderate depression to be a
13 sufficiently severe non-exertional limitation that significantly limits a claimant’s
14 ability to do work beyond the exertional limitation.”).

15 Regarding the requirement that the ALJ explain her reasons for accepting or
16 rejecting medical evidence, ALJ thoroughly explained why she did not incorporate
17 into the RFC Plaintiff’s work-preclusive interpretation of Dr. Dell’s work
18 restriction. The ALJ explained that the medical evidence (including Dr. Dell’s own
19 evaluations) does not show that Plaintiff’s psychiatric symptoms more than
20 minimally affect her ability to work. (AR 18-22 [explaining why Plaintiff’s mental
21 impairments are not severe].)

22 **B. Issue Two: The ALJ’s Assessment of Dr. Wendel’s Opinions.**

23 **1. Summary of Dr. Wendel’s Opinions and the ALJ’s Reasons for** 24 **Discounting Them.**

25 Plaintiff was examined by consultative psychologist Dr. Wendel on January
26 23, 2014. AR 613-16. Plaintiff told Dr. Wendel that “she hears voices which
27 denigrate her,” “she has suicidal ideation,” she “is not comfortable around people,”
28 and she “does not feel comfortable going out.” Id. Dr. Wendel noted Plaintiff’s

1 claims of “hallucinations” and diagnosed her as suffering from “major depression
2 with psychotic features.” AR 615. This opinion contradicts Dr. Dell who found
3 that Plaintiff did not suffer from major depression or auditory hallucinations and
4 that her description of voices telling her that she does not deserve happiness “was
5 not consistent with true psychotic symptoms” AR 721, 726, 768.

6 Dr. Wendel opined that Plaintiff has moderate difficulties conducting
7 activities of daily living and social interactions. AR 616. Dr. Wendel also found,
8 “Based on her report, the Claimant cannot sustain focus and concentration over a
9 normal work week.” AR 615. These opinions contradict Dr. Dell who found that
10 Plaintiff was either unimpaired or mildly impaired in all functional areas related to
11 daily living, social interactions, and maintaining concentration. AR 771-72.

12 The ALJ gave “little weight” to Dr. Wendel’s opinion for several reasons.
13 AR 19. First, the ALJ found it inconsistent with Plaintiff’s reported activities. Id.
14 Second, the ALJ found that Dr. Wendel relied too heavily on Plaintiff’s subjective
15 complaints rather than her own observations and clinical findings, and that Plaintiff
16 had provided inconsistent information. Id. Third, the ALJ found that Dr. Wendel’s
17 opinions were inconsistent with Plaintiff’s longitudinal mental health records. AR
18 20. Fourth, the ALJ found Dr. Wendel’s report internally inconsistent. Id.

19 **2. The ALJ Gave Specific, Legitimate Reasons for Discounting Dr.**
20 **Wendel’s Opinions.**

21 a. Reason One: Inconsistency with Plaintiff’s Activities.

22 The ALJ characterized Plaintiff and her brother as reporting that Plaintiff
23 “has very little limitation” in her activities of daily living. AR 19. Citing Function
24 Reports completed by Plaintiff and her brother, the ALJ noted that Plaintiff can
25 make meals (including oatmeal, eggs, sandwiches, spaghetti, and Mexican food), go
26 for 20-minute walks, adhere to her medication schedule, do light household
27 cleaning and laundry, go grocery shopping, drive, handle money, and pay bills. AR
28 21, citing AR 164-71 and AR 173-80. What limitations she reported were due to

1 physical pain, not mental impairments. Id. These reported activities are
2 inconsistent with Dr. Wendel’s finding that Plaintiff is “moderately” limited in
3 conducting activities of daily living. AR 616.

4 The ALJ also cited Plaintiff’s reported ability to go out alone, talk to her
5 sisters on the phone, interact with her two adult children, visit her mother often, and
6 attend church weekly. AR 21, citing AR 165, 168, 177. This level of social
7 functioning is inconsistent with Dr. Wendel’s finding that Plaintiff is “moderately”
8 limited in this area. AR 616. Indeed, in her Function Report, Plaintiff did not
9 check the box indicating that her injuries affect her ability to get along with others.
10 AR 169. Thus, the ALJ’s finding of inconsistency between Plaintiff’s activities and
11 Dr. Wendel’s opinions are supported by substantial evidence.

12 b. Reason Two: Overreliance on Plaintiff’s Complaints.

13 Dr. Wendel interviewed Plaintiff, performed a mental status examination,
14 and administered some basic tests of concentration, reasoning, and memory. AR
15 614-15. From this, it appears Dr. Wendel relied heavily, but not exclusively, on
16 Plaintiff’s descriptions of her symptoms and resulting limitations.

17 Plaintiff argues that such reliance is inherent in psychiatric evaluations and
18 therefore not a legitimate reason to discount Dr. Wendel’s opinions. (JS at 19.)
19 Here, however, Dr. Wendel’s heavy reliance on Plaintiff’s own reporting was
20 coupled with evidence that Plaintiff had given Dr. Wendel inconsistent information
21 and exaggerated her symptoms when describing them to Dr. Dell. The ALJ noted
22 that Plaintiff told Dr. Wendel that she is “not comfortable around people,” but also
23 told Dr. Wendel that “she gets along with people.” AR 19, citing AR 614.¹
24 Regarding exaggeration, Dr. Dell administered several standardized tests and
25

26 ¹ The Court notes that Plaintiff apparently told Dr. Wendel in January 2014
27 “that she does not go shopping.” AR 614. In her Function Report from May 2013,
28 Plaintiff reported that she went grocery shopping twice a month. AR 167.

1 explained why he interpreted the discrepant results as revealing symptom
2 exaggeration. AR 710, 725-26.

3 Standing alone, Dr. Wendel's reliance on Plaintiff's subjective complaints
4 alone might not be a legitimate reason to discount Dr. Wendel's opinions in favor
5 of Dr. Dell's. That reliance, however, coupled with the other evidence of record in
6 this case (e.g., Dr. Dell spent more time examining Plaintiff, detected via testing a
7 tendency to exaggerate, and provided opinions regarding Plaintiff's functionality
8 that are more consistent with Plaintiff's reported activities), does provide a specific
9 and legitimate reason for the ALJ to have given more weight to Dr. Dell's opinions
10 than to Dr. Wendel's.

11 c. Reason Three: Inconsistency with Longitudinal Record.

12 ALJs should give more weight to medical opinions that are consistent with a
13 claimant's overall health records. Orn, 495 F.3d at 631.

14 Here, Dr. Wendel opined that Plaintiff would experience "repeated episodes
15 of emotional decompensation in work-like situations secondary to depression and
16 pain" AR 616. At the time of Dr. Wendel's examination, Social Security
17 regulations defined "episodes of decompensation" as "exacerbations or temporary
18 increases in symptoms or signs accompanied by a loss of adaptive functioning as
19 manifested by difficulties in performing activities of daily living, maintaining social
20 relationships, or maintaining concentration, persistence, or pace." Moreno v.
21 Astrue, 2009 U.S. Dist. LEXIS 61281, 2009 WL 2151855, at *14 n.2 (S.D. Cal.
22 July 17, 2009) (quoting 20 C.F.R. § 404, subpt. P, app. 1). The ALJ identified this
23 opinion as inconsistent with Plaintiff's longitudinal mental health record. AR 20.

24 Plaintiff has no documented episodes of decompensation. AR 22, 84.
25 Between her 2011 onset date and her second appointment with Dr. Dell in February
26 2015, she did not receive any therapy or counselling. AR 761. Even without
27 mental health treatment, she conducted activities of daily living more complicated
28 than "simple" work (such as driving and grocery shopping), with her limitations

1 largely attributed to physical pain rather than mental impairments. AR 21 (citing
2 AR 164-72, 241-57). Thus, the ALJ's third specific and legitimate reason is
3 supported by substantial evidence.

4 d. Reason Four: Internal Inconsistency.

5 The ALJ asserted that Dr. Wendel's opinion that Plaintiff has "marked"
6 difficulties with memory and concentration (AR 616) "is not consistent with her
7 half-page summary of test findings, which include the fact that during the memory
8 test, the claimant was able to register 3/3 words immediately." AR 20. In fact, Dr.
9 Wendel stated the results of the memory test as follows: "Registers 3/3 words
10 immediately, but recalls just 1/3 after several minutes." AR 615. Dr. Wendel also
11 said Plaintiff "struggles with simple abstract verbal reasoning questions" and
12 concluded, "Concentration and/or ability to perform cognitive tasks was observed
13 to be poor today." Id.

14 As another purported internal inconsistency, the ALJ contrasted Dr.
15 Wendel's finding that Plaintiff could not sustain focus and concentration over a
16 normal work week with her finding that "claimant had adequate concentration."
17 AR 22. Dr. Wendel characterized Plaintiff's memory as "adequate for interview
18 purposes." AR 615. The fact that Plaintiff could adequately recount to Dr. Wendel
19 her familial, educational, and occupational history (AR 613) is not necessarily
20 inconsistent with Dr. Wendel's finding that Plaintiff's psychological symptoms
21 would preclude her from sustaining concentration over a normal work week.

22 The ALJ's fourth reason is not supported by substantial evidence, but any
23 error is harmless, because the ALJ gave three other legally sufficient reasons.

24 **C. Issue Three: The ALJ's Assessment of Dr. Solomon's Opinions.**

25 **1. Summary of Dr. Solomon's Opinions.**

26 Two agency doctors – Drs. Balson and Solomon – reviewed Plaintiff's
27 records and provided opinions concerning the degree to which her depression and
28 anxiety limited her functional abilities. In May 2013, Dr. Balson opined that

1 Plaintiff had no psychologically-based restrictions on activities of daily living or
2 social functioning, and only mild difficulties maintaining concentration, persistence
3 or pace. AR 70.

4 Dr. Solomon was subsequently asked if she would adopt Dr. Balson's
5 assessment and was given information from Dr. Wendel's report, including "MSS
6 [medical source statement]: unable to sustain focus and concentration over a normal
7 work week." AR 83. In February 2014, Dr. Solomon opined that "MER [medical
8 evidence of record] does not support the severity" of Dr. Wendel's medical source
9 statement. AR 84. Dr. Solomon found that Plaintiff's affective disorder caused
10 "mild" difficulties with activities of daily living and social functioning, and
11 "moderate" difficulties maintaining concentration, persistence or pace. Id. She
12 concluded that Plaintiff "should be capable of simple work adaptation on psych
13 basis." Id.

14 **2. Analysis.**

15 The ALJ rejected Dr. Solomon's opinions, including the limitation to simple
16 work, because "a preponderance of the evidence shows that the claimant has only
17 mild [mental] limitation," and because Dr. Solomon relied too heavily on the
18 discredited opinions of Dr. Wendel concerning Plaintiff's difficulties maintaining
19 concentration, persistence or pace. AR 22.

20 The ALJ correctly concluded that most of the other evidence concerning
21 Plaintiff's mental impairments – e.g., Dr. Balson's initial evaluation, Dr. Dell's two
22 lengthy reports, and Plaintiff's self-reported ability to drive, shop, handle money,
23 visit family, attend church, and maintain a schedule of exercise and chores –
24 showed that Plaintiff's mental impairments did not limit her functional abilities
25 more than mildly. Indeed, the fact that Dr. Solomon's opinions were inconsistent
26 with those of examining physician Dr. Dell would have been sufficient reason to
27 discount Dr. Solomon's opinions. See Lester, 81 F.3d at 830 (noting that
28 examining physician opinion is generally entitled to more weight than that of non-

1 examining physician). Regardless of the degree to which Dr. Solomon relied on
2 Dr. Wendel, the ALJ gave specific, legitimate reasons supported by substantial
3 evidence for rejecting Dr. Solomon’s opinions, including the limitation to simple
4 work.

5 Plaintiff argues that Dr. Solomon opined Plaintiff should be limited to simple
6 work “based on his own opinion that the claimant had mild limitations.” (JS at 21.)
7 In fact, Dr. Solomon opined that Plaintiff had “moderate” difficulties maintaining
8 concentration, persistence or pace. AR 84. Contrary to Plaintiff’s argument, Dr.
9 Solomon’s simple work restriction was not to accommodate merely “mild”
10 limitations.

11 **D. Issue No. 4: The ALJ’s Mental Limitations Findings.**

12 Plaintiff argues that the ALJ’s “ruling that plaintiff did not have mental
13 limitations is [not] supported by substantial evidence.” (JS at 22.) Plaintiff
14 characterizes the ALJ’s opinion as ruling that Plaintiff’s “mental impairment was
15 not severe and that she had no resulting mental limitations.” *Id.*

16 Plaintiff mischaracterizes the ALJ’s opinion. The ALJ did find that
17 Plaintiff’s mental impairment was not severe but also found that it caused “mild”
18 limitations in the functional area of concentration, persistence, and pace. AR 21-
19 22. This finding of mild limitations is supported by the medical opinions of Drs.
20 Balson and Dell, as discussed above. Thus, Plaintiff’s Issue Four fails to show
21 legal error.

22 **E. Issue No. 5: The ALJ’s Credibility Determination.**

23 **1. Rules for Evaluating the Claimant’s Subjective Symptom Testimony.**

24 An ALJ’s assessment of symptom severity and claimant credibility is entitled
25 to “great weight.” *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Nyman v.*
26 *Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). “[T]he ALJ is not required to believe
27 every allegation of disabling pain, or else disability benefits would be available for
28 the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A).” *Molina v.*

1 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (internal quotation marks omitted).

2 If the ALJ finds testimony as to the severity of a claimant’s pain and
3 impairments is unreliable, “the ALJ must make a credibility determination with
4 findings sufficiently specific to permit the court to conclude that the ALJ did not
5 arbitrarily discredit claimant's testimony.” Thomas v. Barnhart, 278 F.3d 947, 958
6 (9th Cir. 2002). In doing so, the ALJ may consider testimony from physicians
7 “concerning the nature, severity, and effect of the symptoms of which [the
8 claimant] complains.” Id. at 959. If the ALJ’s credibility finding is supported by
9 substantial evidence in the record, courts may not engage in second-guessing. Id.

10 In evaluating a claimant’s subjective symptom testimony, the ALJ engages in
11 a two-step analysis. Lingenfelter, 504 F.3d at 1035-36. “First, the ALJ must
12 determine whether the claimant has presented objective medical evidence of an
13 underlying impairment [that] could reasonably be expected to produce the pain or
14 other symptoms alleged.” Id. at 1036. If so, the ALJ may not reject a claimant’s
15 testimony “simply because there is no showing that the impairment can reasonably
16 produce the degree of symptom alleged.” Smolen v. Chater, 80 F.3d 1273, 1282
17 (9th Cir. 1996).

18 Second, if the claimant meets the first test, the ALJ may discredit the
19 claimant’s subjective symptom testimony only if he makes specific findings that
20 support the conclusion. Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010).
21 Absent a finding or affirmative evidence of malingering, the ALJ must provide
22 “clear and convincing” reasons for rejecting the claimant’s testimony. Lester v.
23 Chater, 81 F.3d 821, 834 (9th Cir. 1995); Ghanim v. Colvin, 763 F.3d 1154, 1163
24 & n.9 (9th Cir. 2014). The ALJ must consider a claimant’s work record,
25 observations of medical providers and third parties with knowledge of claimant’s
26 limitations, aggravating factors, functional restrictions caused by symptoms, effects
27 of medication, and the claimant’s daily activities. Smolen, 80 F.3d at 1283-84 &
28 n.8. “Although lack of medical evidence cannot form the sole basis for discounting

1 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.”
2 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

3 The ALJ may also use ordinary techniques of credibility evaluation, such as
4 considering the claimant’s reputation for lying and inconsistencies in his statements
5 or between his statements and his conduct. Smolen, 80 F.3d at 1284; Thomas, 278
6 F.3d at 958-59.²

7 **2. The ALJ’s Evaluation of Plaintiff’s Subjective Symptom Testimony.**

8 The ALJ found Plaintiff’s subjective symptom testimony regarding her
9 mental impairments “not entirely credible” because it was “inconsistent with her
10 activities of daily living” and “weakened by the claimant’s inconsistent statements.”
11 AR 24, 28.

12 Plaintiff argues that her activities are not inconsistent with depression and
13 anxiety so extreme that she can only work with unlimited discretionary 20-minute
14 breaks (a condition that renders her unemployable). (JS at 25.) As explained
15 above, no medical source so opined. Dr. Dell imposed as a work restriction that
16 Plaintiff be allowed to take a 20-minute break “whenever she experiences increased
17 symptoms of depression or anxiety,” which Dr. Dell and the ALJ apparently
18 concluded would not be work preclusive. In any event, taken together, activities
19 that include driving, shopping, eating out, going to church, preparing meals,
20 performing household chores independently, handling money, and adhering to a
21 medication schedule are inconsistent with Plaintiff’s claim of disability arising from

22
23 ² The Social Security Administration (“SSA”) recently published SSR 16-3p,
24 2016 SSR LEXIS 4, Policy Interpretation Ruling Titles II and XVI: Evaluation of
25 Symptoms in Disability Claims. SSR 16-3p eliminates use of the term “credibility”
26 from SSA policy, as the SSA’s regulations do not use this term, and clarifies that
27 subjective symptom evaluation is not an examination of a claimant’s character.
28 Murphy v. Comm’r of Soc. Sec., 2016 U.S. Dist. LEXIS 65189, at *25-26 n.6 (E.D.
Tenn. May 18, 2016). SSR 16-3p took effect on March 28, 2016, and therefore is
not applicable to the ALJ’s January 2016 decision in this case. Id.

1 mental impairment. See Orn, 495 F.3d at 639 (noting that daily activities may be
2 grounds for adverse credibility finding if claimant is able to spend substantial part
3 of day engaged in pursuits involving physical functions that are transferable to
4 work setting).

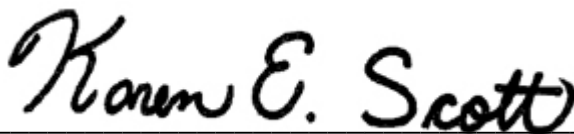
5 As examples of Plaintiff's inconsistent statements, the ALJ pointed out that
6 in her Function Report, Plaintiff stated that she talks to her sisters on the phone
7 and/or visits her mom "every day" (AR 168), but Plaintiff told Dr. Dell that "she
8 isolates herself from friends and family," causing Dr. Dell to note, "she later made
9 statements that contradict this." AR 28, citing AR 168, 758. Dr. Dell noted that
10 Plaintiff visits her mother two or three days per week and they "often go out to eat
11 together." AR 761; compare AR 614 (Plaintiff told Dr. Wendel "she does not feel
12 comfortable going out"). Based on test results, Dr. Dell concluded that Plaintiff
13 was exaggerating her symptoms. AR 710, 725-26. Plaintiff's inconsistent
14 statements concerning the limiting effects of her psychiatric symptoms provide a
15 second, legally sufficient reason supporting the ALJ's adverse credibility
16 determination.

17 V.

18 **CONCLUSION**

19 For the reasons stated above, IT IS ORDERED that judgment shall be
20 entered AFFIRMING the decision of the Commissioner denying benefits.

21
22
23 DATED: February 08, 2018



24 KAREN E. SCOTT
25 United States Magistrate Judge
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27
28