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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEE A. R.,

Plaintiff,

v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security

Defendant.

No. CV 18-3315-AGR

MEMORANDUM OPINION AND
ORDER

Plaintiff¹ filed this action on April 20, 2018. On January 8, 2019, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The court has taken the matter under submission without oral argument.² Having reviewed the entire file, the court reverses in part the decision of the Commissioner for the period June 2, 2009 through August 12, 2010 and remands for reconsideration of Plaintiff’s disability for a

¹ Plaintiff’s name has been partially redacted in compliance with Fed. R. Civ. P. 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

² Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 14, 15.)

1 closed period of benefits during that same time frame. In all other respects, the
2 decision of the Commissioner is affirmed.

3 I.

4 **PROCEDURAL BACKGROUND**

5 On July 22, 2009, Plaintiff filed an application for disability insurance benefits and
6 supplemental security income benefits. In both applications, Plaintiff alleged an onset
7 date of August 31, 2006. Administrative Record (“AR”) 107. The applications were
8 denied initially and upon reconsideration. AR 96-99. Plaintiff requested a hearing
9 before an Administrative Law Judge (ALJ). On September 15, 2011, the ALJ conducted
10 a hearing at which Plaintiff and a vocational expert (“VE”) testified. AR 46-66. On
11 October 26, 2011, the ALJ issued a decision denying benefits. AR 104-21. On October
12 31, 2012, the Appeals Council granted the request for review, vacated the hearing
13 decision and remanded the case to the ALJ to reconsider nontreating source opinion
14 and explain the weight given to such evidence; further evaluate the Plaintiff’s mental
15 impairments in accordance with the special technique; further consider Plaintiff’s
16 residual functional capacity; and, if warranted, obtain supplemental evidence from a VE.
17 AR 122-26.

18 On remand from the Appeals Council, the ALJ conducted a hearing on April 8,
19 2013 at which Plaintiff testified. AR 67-83. On May 15, 2013, the ALJ issued a decision
20 denying benefits. AR 10-28. On November 19, 2014, the Appeals Council denied the
21 request for review. AR 1-6. On October 29, 2015, this court issued an Order of
22 Remand pursuant to the stipulation of the parties, which provided that on remand the
23 ALJ would reevaluate the medical evidence, including all medical source opinion
24 evidence concerning physical and mental impairments, and explain the weight given to
25 the opinion evidence, including the opinion of Dr. Franco. AR 715-26.

26 On remand, the ALJ conducted a hearing on May 18, 2017 at which the Plaintiff
27 and a VE testified. AR 642-72. On August 22, 2017, the ALJ issued a decision denying
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1 benefits. AR 613-29. On March 8, 2018, the Appeals Council denied the request for
2 review. AR 604-08. This action followed.

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4 **II.**

5 **STANDARD OF REVIEW**

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

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

19 **III.**

20 **DISCUSSION**

21 **A. Disability**

22 A person qualifies as disabled, and thereby eligible for such benefits, "only if his
23 physical or mental impairment or impairments are of such severity that he is not only
24 unable to do his previous work but cannot, considering his age, education, and work
25 experience, engage in any other kind of substantial gainful work which exists in the
26 national economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed.
27 2d 333 (2003) (citation omitted).

1 **B. The ALJ's Findings**

2 The ALJ found that Plaintiff met the insured status requirements through March
3 31, 2013. AR 619. The relevant period is June 4, 2009 through the date of the ALJ's
4 decision.³ AR 617.

5 Following the five-step sequential analysis applicable to disability determinations,
6 *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),⁴ the ALJ found that
7 Plaintiff has the severe impairments of remote history of two brain aneurysms
8 status/post two clipping procedures; migraine headaches; cognitive disorder;
9 depressive disorder not otherwise specified; and possible seizure activity. AR 619.
10 Plaintiff has the residual functional capacity ("RFC") to perform work at all exertional
11 levels except that she is limited to occasionally carrying out complex instructions;
12 making judgments on complex work related decisions; and understanding and
13 remembering complex instructions. The ALJ noted, however, that the outcome of the
14 case would not change even if Plaintiff were limited to light or medium work. AR 620.
15 Plaintiff is unable to perform any past relevant work. AR 627. There are jobs that exist
16 in significant numbers in the national economy that Plaintiff can perform such as fast
17 food worker, grocery bagger and mail clerk/sorter. AR 628-29.

18 **C. Examining Physician**

19 Plaintiff contends that the ALJ erred in discounting the opinion of the examining
20 psychologist, Dr. Wendel, dated October 8, 2009.

21 An examining physician's opinion constitutes substantial evidence when it is
22 based on independent clinical findings. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir.

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24 ³ The decision denying a previous application was res judicata for the period through
25 June 3, 2009. AR 84-95, 100-03.

26 ⁴ The five-step sequential analysis examines whether the claimant engaged in
27 substantial gainful activity, whether the claimant's impairment is severe, whether the
28 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 2007). When an examining physician's opinion is contradicted, "it may be rejected for
2 'specific and legitimate reasons that are supported by substantial evidence in the
3 record.'" *Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citation omitted).
4 "The opinion of a nonexamining physician cannot by itself constitute substantial
5 evidence that justifies the rejection of the opinion of either an examining physician or a
6 treating physician." *Ryan v. Comm'r*, 528 F.3d 1194, 1202 (9th Cir. 2008) (citation and
7 emphasis omitted). However, a non-examining physician's opinion may serve as
8 substantial evidence when it is supported by other evidence in the record and is
9 consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). "When
10 there is conflicting medical evidence, the Secretary must determine credibility and
11 resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002) (citation
12 and quotation marks omitted).

13 Dr. Wendel conducted a mental examination of Plaintiff on October 8, 2009. AR
14 376-79. Plaintiff was friendly and cooperative but strained. She had a flat affect with
15 underlying dysphoria. AR 377. Her memory and concentration were adequate. She
16 was able to remember three items immediately and after a few minutes. After more
17 time passed, she was able to recall two out of the three items. There were no apparent
18 aberrations in her thought content, processes and perception. Her insight and judgment
19 were fair. Dr. Wendel diagnosed depression NOS, rule out cognitive disorder NOS.
20 Her Global Assessment of Functioning ("GAF") score was 59.⁵ Plaintiff had mild
21 restriction in activities of daily living unless she had migraines, and mild difficulties in
22 maintaining social functioning. Dr. Wendel stated that, according to Plaintiff's "own
23 seemingly credible report," she had marked difficulties in concentration, persistence and
24 pace, particularly during headaches. AR 378. Plaintiff would have repeated episodes

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26 ⁵ A GAF of 51-60 indicates moderate symptoms "(e.g., flat affect and circumstantial
27 speech, occasional panic attacks) or moderate difficulty in social, occupational, or school
28 functioning (e.g., few friends, conflicts with peers or co-workers)." American Psychiatric Ass'n,
Diagnostic & Statistical Manual of Mental Disorders 34 (4th ed. text rev. 2000) ("DSM-IV-TR").

1 of emotional deterioration in work-like situations related to migraines, which Plaintiff
2 reported occurred three to four times per month and last for two to three days at a time,
3 and due to depression. AR 376, 379.

4 The ALJ gave less weight to Dr. Wendel's opinion than other medical opinions for
5 three interrelated reasons: (1) Plaintiff had been seeking benefits for some time and
6 appeared to have misled her treating physician about the frequency of migraines after
7 starting Topamax; (2) Plaintiff's activities of daily living and reports to her treating
8 physicians did not support an allegation of migraines lasting two to three days
9 throughout the relevant period; and (3) the opinions of Dr. Franco, Dr. Martin, Dr. Levin
10 and Dr. Loomis were entitled to greater weight.⁶ AR 624-25.

11 The ALJ found it reasonable to assume that Plaintiff "would have significant
12 (marked) difficulty in maintaining concentration, persistence or pace" during migraines.
13 AR 624. The question is whether the ALJ's reasons for discounting Dr. Wendel's
14 opinions about the intensity and duration of Plaintiff's migraines after taking Topamax is
15 supported by substantial evidence.

16 On June 2, 2009, at a neurology consultation four months before Dr. Wendel's
17 opinions, Plaintiff reported having an average headache frequency of 1-2 per month.
18 Her headache was left-side headache with 9/10 pain, nausea and vomiting. Her
19 headache lasted for several hours that day, during which she lay down in a dark room.
20 AR 358. She was prescribed Topamax. AR 361. At the follow-up visit on July 7, 2009,
21 Plaintiff reported no change to her headaches, but her staring episodes had decreased
22 to 1 per month. Headache frequency was 3 mild ones per week and 3 severe ones per
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25 ⁶ Plaintiff argues that the ALJ did not discount Dr. Wendel's opinions based on other
26 doctors' opinions. The ALJ, however, expressly stated that he gave Dr. Wendel's opinions
27 "less weight than I give to the other opinions." AR 624. The ALJ noted that Dr. Franco's
28 critique of Dr. Wendel's opinions "supports my giving less weight to the opinions expressed by
Dr. Wendel than I give to other opinions." AR 625. The ALJ gave greater weight to Dr.
Martin's opinion than to Dr. Franco. AR 626.

1 month with aura, nausea and vomiting. The severe headaches lasted 3-4 days.⁷ Her
2 neurological examination was unchanged. AR 356. The neurologist doubled the
3 dosage of Topamax and told Plaintiff to reduce her use of Vicodin to avoid rebound
4 headaches. AR 356-57. On August 12, 2009, Plaintiff reported to the neurologist that
5 she had 3 headaches per month when she wakes up. She thought the Topamax was
6 starting to help. AR 430. Her neurological examination was normal. AR 431. On
7 August 27, 2009, however, she reported to a different physician that she had severe
8 headaches 3 times per week with nausea and vomiting, and staring episodes 3 times
9 per day, usually 1-2 minutes but up to 5 minutes. AR 436. On October 22, 2009,
10 Plaintiff reported to the neurologist that Topamax decreased staring spells to 3-4 per
11 month but had no effect on headaches. Her neurological and mental status
12 examinations were normal. AR 434.

13 On January 14, 2010, Plaintiff reported she was “doing well.” She had no recent
14 staring spells, and reported 1-2 headaches per week. Her neurological examination
15 was normal, and her memory and speech were normal. Plaintiff was told to maintain a
16 headache log and add daily exercise. Her dosage of Topamax was increased to 100
17 mg. AR 432-33. On March 11, 2010, Plaintiff reported headaches 2-3 times per week,
18 worse with stress. She reported being “under a great deal of financial stress” and
19 “trying to look for a job.” AR 469. Her neurologist increased the Topamax dose to 200
20 mg. AR 470. On July 12, 2010, Plaintiff reported to another physician that she was
21 experiencing hand numbness for months, which started with Topomax, and she was
22 going to see her neurologist next month. AR 533. On August 12, 2010, Plaintiff
23 reported to her neurologist that she had numbness and tingling in her upper extremities
24 when she took 200 mg of Topamax and therefore reduced the dosage to 100 mg.

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26 ⁷ Plaintiff argues that the handwritten notes for the June 2, 2009 consultation contain a
27 notation that she interprets to mean that the headaches last 2-4 days. (JS at 6.) That portion
28 of the handwritten notes was not mentioned in the 4-page typewritten report of the June 2,
2009 consultation. *Compare* AR 358-61 (typewritten report) *with* AR 363 (handwritten note).

1 Topamax had helped with her headaches and that she was down to 1 headache per
2 week. She was looking for a job and wanted to move out of her mother's home. Her
3 neurological and mental status examinations were normal. AR 466. Her neurologist
4 told Plaintiff to increase the Topamax dosage from 100 mg to 150 mg. AR 467.

5 On May 12, 2011, Plaintiff was "doing well and has been event free for the last 1
6 year on Topamax 150 mg a day." AR 463. Plaintiff reported an increase in headaches
7 during the past four weeks, with an average of 1-2 headaches per week. She was
8 taking care of her mother and looking for a job. *Id.* Her neurological examination was
9 "entirely normal." AR 464. She did not show up to neurology appointments in
10 September and December 2011, and her January 2012 examination was normal. AR
11 585 (1/26/12), 586-87. Subsequent medical records indicate her headache had
12 improved with Topamax. AR 978. At times when Plaintiff complained of headache, the
13 headache generally involved pain of 4/10 with medication. Plaintiff reported not having
14 trouble concentrating on things such as reading the newspaper or watching television.
15 AR 1004, 1034. Her cognitive function was intact. AR 976, 980, 984, 989, 993.

16 Dr. Franco reviewed the record in December 2009. AR 380-94. Dr. Franco
17 pointed out that Dr. Wendel indicated marked difficulties for concentration, persistence
18 and pace, yet Plaintiff had adequate concentration/memory at the evaluation and the
19 medical records did not indicate marked impairment in these areas. AR 390.

20 Dr. Martin performed a complete psychological evaluation of Plaintiff on February
21 10, 2016. AR 937-45. Dr. Martin reviewed medical records as well as Dr. Wendel's
22 report. AR 938. Plaintiff reported that she took care of her mother and tried to work as
23 a motel manager simultaneously, but felt it was too much for her to do both jobs.⁸ She
24 is able to do activities of daily living, household chores, fix simple meals, run errands,

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26 ⁸ Medical records in April 2015 indicate Plaintiff was fired after a bout of gastroenteritis put
27 her on bed rest for a few days. AR 1034. Plaintiff testified that she was working 80 hours per
28 month taking care of her mother. AR 650. She would give her mother a shower, get her
dressed, take her to doctor's appointments, run errands, and manage her medications. AR
651.

1 go shopping, and get along well with family and friends. AR 939. Plaintiff's
2 performance on IQ testing was within the borderline range, and her IQ subtest scores
3 ranged from borderline to average. AR 942. Her memory testing was in the impaired
4 range for verbal memory and borderline range for visual memory. AR 941. Her
5 concentration and attention span was fair, her insight and judgment were intact, and her
6 thought process was intact, linear and logical. AR 939.

7 Dr. Martin opined that Plaintiff was unimpaired in her ability to follow simple
8 instructions; follow detailed instructions; maintain adequate pace to perform simple
9 repetitive tasks; interact appropriately with coworkers, supervisors and the public on a
10 regular basis; and adapt to changes, hazards or stressors in a workplace setting. AR
11 942-43. Plaintiff was mildly impaired in her ability to maintain adequate pace to perform
12 complex tasks, maintain adequate concentration/attention, and withstand the stress of a
13 routine workday. AR 942. In March 2016, Dr. Levin, who was board certified in
14 neurology and psychiatry, reviewed medical records and opined that Plaintiff had mild
15 impairments in activities of daily living, social functioning and maintaining concentration,
16 persistence of pace. AR 963, 966, 969-70.

17 In June 2016, Plaintiff's cognitive function was intact, her judgment and insight
18 were good and her mood/affect was full range. AR 976. Plaintiff reported that she
19 planned her wedding for 60 guests in 3½ weeks in 2017. AR 656-57. She did Tai Chi
20 therapy and massage, which helped her migraines. AR 661-62. Plaintiff helps her
21 husband, who is president of the homeowners association and usually has "a pretty
22 good honey do list" with tasks such as calling the HOA members; calling an insurance
23 company; opening the gates for contractors at the building; walking around the complex
24 and reporting violations to her husband. AR 652-53, 656-57. She usually gets up
25 around 9:30 or 10:00 a.m. AR 653. She goes out with her girlfriends for breakfast or
26 lunch. AR 653-54. Her migraines always come in the morning and may wake her up at
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1 3:00 a.m. or 7:00 a.m. It starts with Plaintiff throwing up. AR 662. She did not testify
2 that her migraines lasted days at a time.

3 Dr. Wendel's opinions concerning the intensity and duration of Plaintiff's
4 migraines were based on Plaintiff's reports four months after starting Topamax. The
5 medical records indicate that Plaintiff underwent a period of time during which her
6 dosage of Topamax was adjusted according to her symptoms. Although the issue is a
7 very close one, the medical records indicate that it took over one year to adjust the
8 Topamax dosage to 150 mg, eliminate the side effects and reduce Plaintiff's symptoms
9 to a manageable, functional level. The court therefore reverses in part the decision of
10 the Commissioner for the period June 2, 2009 through August 12, 2010 and remands
11 for reconsideration of Plaintiff's disability for a closed period of benefits during that same
12 time frame.

13 In all other respects, the decision of the Commissioner is affirmed. After August
14 12, 2010, the ALJ could reasonably read the medical records to indicate that the
15 debilitating symptoms and duration of migraines as recited by Dr. Wendel, based on
16 Plaintiff's report, did not persist.

17 **D. Credibility**

18 "To determine whether a claimant's testimony regarding subjective pain or
19 symptoms is credible, an ALJ must engage in a two-step analysis." *Lingenfelter v.*
20 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, "the ALJ must determine
21 whether the claimant has presented objective medical evidence of an underlying
22 impairment 'which could reasonably be expected to produce the pain or other
23 symptoms alleged.'" *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)
24 (en banc)). The ALJ found that Plaintiff's medically determinable impairments could
25 reasonably be expected to cause some of the alleged symptoms. AR 627.

26 Second, when an ALJ concludes that a claimant is not malingering and has
27 satisfied the first step, "the ALJ may 'reject the claimant's testimony about the severity
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1 of her symptoms only by offering specific, clear and convincing reasons for doing so.”
2 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (citation omitted); *Burrell v.*
3 *Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). “A finding that a claimant’s testimony is
4 not credible ‘must be sufficiently specific to allow a reviewing court to conclude the
5 adjudicator rejected the claimant’s testimony on permissible grounds and did not
6 arbitrarily discredit a claimant’s testimony regarding pain.” *Brown-Hunter*, 806 F.3d at
7 493 (citation omitted). “General findings are insufficient; rather, the ALJ must identify
8 what testimony is not credible and what evidence undermines the claimant’s
9 complaints.” *Id.* (citation omitted).

10 The ALJ concluded that Plaintiff’s statements concerning the intensity,
11 persistence and limiting effects of her symptoms were not consistent with the objective
12 medical evidence. AR 627. Although the fact that the objective medical evidence does
13 not support the severity of the subjective allegations cannot form the sole basis for
14 discounting testimony, “it is a factor that the ALJ can consider in his credibility analysis.”
15 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). As discussed above, this reason
16 is supported by ample and substantial evidence during the period after August 12,
17 2010.

18 The ALJ also relied on inconsistencies in Plaintiff’s reports to her neurologist and
19 another physician in 2009. AR 623. This reason is supported by substantial evidence
20 as discussed above. Finally, the ALJ also relied on Plaintiff’s activities of daily living in
21 the record, in her testimony and as reported in the medical source opinions. The ALJ
22 may properly rely on activities of daily living that undermine the severity of the alleged
23 symptoms. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012). This reason is
24 supported by substantial evidence, consisting of Plaintiff’s testimony and her activities of
25 daily living, as described by the ALJ, after August 12, 2010.

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3 **IV.**

4 **ORDER**

5 IT IS HEREBY ORDERED that the decision of the Commissioner is reversed in
6 part for the period June 2, 2009 through August 12, 2010 and the matter is remanded for
7 reconsideration of Plaintiff's disability for a closed period of benefits during that same
8 time frame. In all other respects, the decision of the ALJ is affirmed.

9 DATED: March 26, 2019

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12 ALICIA G. ROSENBERG
13 United States Magistrate Judge
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