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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHERYL HOGLE,	)	NO. EDCV 09-00129-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on February 2, 2009, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On March 10, 2009, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 7, 2009, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the alternative, remanding the matter for further administrative proceedings; and defendant seeks an order affirming the Commissioner's decision. The Court has taken the parties' Joint Stipulation under submission without oral argument.



1 merits, noting that *res judicata* did not apply because there was a  
2 change in plaintiff's age category since the previous application (the  
3 "2006 Decision"). (A.R. 213-19.) On September 8, 2006, after the  
4 Appeals Council denied plaintiff's request for review of the ALJ  
5 Fortune's decision, plaintiff initiated proceedings in this District  
6 Court to appeal the 2006 Decision. (A.R. 432.) This Court reversed the  
7 Commissioner on the bases that ALJ Fortune: improperly disregarded the  
8 opinion of plaintiff's therapist; did not properly evaluate plaintiff's  
9 credibility; and failed to consider the side effects of plaintiff's  
10 medications. (A.R. 436-44.) This Court remanded the matter for further  
11 proceedings consistent with its decision. (A.R. 445-46.)  
12

13 On August 5, 2008, plaintiff, who was represented by counsel,  
14 testified at a hearing before Administrative Law Judge Joseph D.  
15 Schloss. (A.R. 512-28.) Abbe May, a vocational expert, and Dr. William  
16 Soltz, a medical expert, also testified. (*Id.*) On September 16, 2008,  
17 Administrative Law Judge Jay E. Levine (the "ALJ") denied plaintiff's  
18 application upon remand. (A.R. 412-19.) The ALJ incorporated the 2006  
19 Decision by reference and stated that it remained the decision of record  
20 as supplemented by his decision. (A.R. 413.) The Appeals Council  
21 subsequently denied plaintiff's request for review. (Joint Stipulation  
22 ("Joint Stip.") at 2.)  
23

#### 24 **SUMMARY OF ADMINISTRATIVE DECISION**

25

26 The ALJ found that plaintiff had not engaged in substantial gainful  
27 activity since April 15, 2004, the protected application filing date.  
28 (A.R. 414.) The ALJ determined that plaintiff had the severe

1 impairments of: noninsulin dependent diabetes mellitus; controlled  
2 hypertension; anxiety disorder, not otherwise specified; and depressive  
3 disorder, not otherwise specified. (*Id.*) The impairments did not meet  
4 or equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P,  
5 Appendix 1. (A.R. 415.)

6  
7 The ALJ determined that plaintiff had the residual functional  
8 capacity ("RFC") to:

9  
10 perform light work as defined in 20 [C.F.R.] 416.967(b) except  
11 stand-walk frequently, i.e., six out of eight-hours with  
12 customary breaks, stand or walk frequently, occasional  
13 climbing, stooping, kneeling, crouching, and crawling, no  
14 exposure to temperature extremes or hazards such as  
15 unprotected heights or dangerous moving machinery, frequent  
16 handling and fingering, no rapid conveyor belt type or other  
17 fast paced work, routine repetitive tasks, entry level work,  
18 and work involving things rather than people.

19  
20 (A.R. 416-17.) The ALJ found that plaintiff was unable to perform any  
21 of her past relevant work. (A.R. 418.) Considering plaintiff's age,  
22 education, work experience, and RFC, as well as relying on testimony  
23 from the vocational expert, the ALJ found that jobs existed in the  
24 national economy that plaintiff can perform, including laundry sorter,  
25 labeler-packer, and mail clerk-sorter. (A.R. 418-19.)

26  
27 Accordingly, the ALJ concluded that plaintiff was not disabled, as  
28 defined in the Social Security Act, since April 15, 2004. (A.R. 419.)



1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
3 the Commissioner's decision if it is based on harmless error, which  
4 exists only when it is "clear from the record that an ALJ's error was  
5 'inconsequential to the ultimate nondisability determination.'" Robbins  
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
8 at 679.

## 10 DISCUSSION

11  
12 Plaintiff alleges the following four issues: (1) whether the ALJ  
13 properly considered the type, dosage, and side effects of plaintiff's  
14 medications; (2) whether the ALJ properly considered plaintiff's  
15 obesity; (3) whether the ALJ properly considered the treating  
16 physician's opinion; and (4) whether the ALJ properly considered  
17 plaintiff's testimony concerning her treatment for depression. (Joint  
18 Stip. at 2-3.)

### 20 I. There Is No Reversible Error With Respect To The ALJ's 21 Consideration Of The Side Effects Of Plaintiff's Medications.

22  
23 Plaintiff contends that the ALJ failed to consider the type,  
24 dosage, and side effects of plaintiff's medications. Specifically,  
25 plaintiff argues that: her prescribed Zoloft made her sleepy;  
26 unspecified medications caused her to sustain weight gain; she  
27 complained of decreased energy and insomnia; and the ALJ misrepresented  
28 her medical record. (Joint Stip. at 3-4.)

1 Pursuant to Social Security Ruling ("SSR") 96-7p, an ALJ must  
2 consider the "type, dosage, effectiveness, and side effects of any  
3 medication the individual takes or has taken to alleviate pain or other  
4 symptoms." However, an ALJ need only consider those medication side  
5 effects that have a "'significant impact on an individual's ability to  
6 work.'" Erickson v. Shalala, 9 F.3d 813, 817-18 (9th Cir. 1993)  
7 (citation omitted).

8  
9 The claimant "bears the burden of proving that a medication's side  
10 effects are disabling." Short v. Astrue, 648 F. Supp. 2d 1185, 1191  
11 (C.D. Cal. 2009); see also Thomas v. Barnhart, 278 F.3d 947, 960 (9th  
12 Cir. 2002)(rejecting claim that administrative law judge improperly  
13 excluded the side effects of medication, because there was no objective  
14 evidence that the claimant's medications caused the side effects she  
15 alleged and her testimony in this respect properly was found to be not  
16 credible); Miller v. Heckler, 770 F.2d 845, 849 (9th Cir. 1985)  
17 (rejecting challenge to administrative law judge's finding that  
18 claimant's medications did not preclude him from working, when claimant  
19 did not produce any "clinical evidence showing that narcotics use  
20 impaired his ability to work," and thus, he did not meet his burden of  
21 proving that his claimed impairment was disabling). The ALJ is not  
22 obligated to consider a claimant's allegations of side effects when the  
23 claimant has "provided no evidence to support this claim other than a  
24 statement in his daily activities questionnaire." Hopkins v. Astrue,  
25 227 Fed. Appx. 656, 2007 WL 1120146, at \*1 (9th Cir. 2007). This is so  
26 because "'a claimant's self-serving statements may be disregarded to the  
27 extent they are unsupported by objective findings.'" *Id.* (quoting Nyman  
28 v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985)). Even "passing mentions

1 of the side effects" in some medical records would be insufficient in  
2 the absence of evidence of side effects "severe enough to interfere with  
3 [a claimant's] ability to work." Osenbrock v. Apfel, 240 F.3d 1157,  
4 1164 (9th Cir. 2001).

5  
6 On May 25, 2004, plaintiff stated in her Disability Report that her  
7 prescription medicine, Zoloft, made her sleepy.<sup>1</sup> (A.R. 296.) However,  
8 six months later, on November 22, 2004, plaintiff stated in her  
9 Disability Report - Appeal that she experienced no side effects from any  
10 of her medications, including Zoloft. (A.R. 312.) The medical evidence  
11 is consistent with that representation, as several medical reports  
12 repeatedly note that plaintiff had no complaints of side effects from  
13 her medications, which included Zoloft. (See, e.g., A.R. 383 - report  
14 dated April 23, 2005, 385 - illegible report date, 467 - report dated  
15 April 7, 2006.) It appears that, as of June 2007, plaintiff stopped  
16 taking Zoloft.<sup>2</sup> Even if -- and this is far from clear -- Zoloft caused  
17 drowsiness sufficient to functionally limit plaintiff's ability to work  
18 for some period of time that ended prior to November 22, 2004, the  
19 record indicates that plaintiff did not experience any such side effect  
20 for the requisite 12 month durational requirement.<sup>3</sup> See 42 U.S.C. §  
21 1382c(a)(3)(A). Accordingly, notwithstanding the Court's prior remand  
22

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1 Plaintiff also reported that her other medications caused no side  
effects. (A.R. 296.)

25 2 In June 2007, plaintiff complained to her treating physician that  
26 she did "not feel that Zoloft works." (A.R. 463.) The prescriptions  
27 listed in the physician's notes from that date onward do not include  
Zoloft. (A.R. 457, 460-63.)

28 3 The period of disability commenced no earlier than April 15, 2004.  
(A.R. 414.)



1 order, the ALJ did not err with respect to his consideration of any side  
2 effect plaintiff experienced based on Zoloft.<sup>4</sup>

3  
4 With respect to plaintiff's contention that "weight gain" is a side  
5 effect of her medication that the ALJ should have addressed, plaintiff  
6 testified, in August 2008, that she weighed 196 pounds and had gained  
7 "[a]bout 40 pounds" in the prior couple of years due to her medication.  
8 (A.R. 521-22.) Plaintiff's medical records reveal, however, that  
9 plaintiff's weight has been consistent throughout the relevant period,  
10 and plaintiff has weighed approximately 200 pounds since 2002. (See,  
11 e.g., A.R. 130, 367, 381, 460-66, 522.) Thus, contrary to plaintiff's  
12 testimony, the evidence clearly demonstrates that weight gain was not a  
13 side effect of her medications. Significantly, plaintiff does not  
14 challenge the ALJ's finding that her testimony concerning serious  
15 medication side effects was not credible. (A.R. 416.)

16  
17 Plaintiff's contentions that the ALJ misrepresented the medical  
18 record and failed to consider other relevant evidence, such as  
19 plaintiff's increased dosage for certain medications and her complaints  
20 of "decreased energy" and "insomnia" are all red herrings. (Joint Stip.  
21 at 4.) As plaintiff acknowledged, her treating physician increased her  
22 medication dosages to control her diabetes. (A.R. 457, 521.) Although  
23 increases in dosages of medication can indicate that an impairment has  
24 worsened or is out of control, plaintiff fails to identify any  
25 limitations, symptoms, or side effects from the increased dosages and

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26  
27 4 The ALJ *did* address the June 2007 medical note of plaintiff's  
28 treating physician and correctly observed that plaintiff's complaint  
about Zoloft was that it was ineffective, not that it was causing her  
adverse side effects. (A.R. 416.)

1 fails to establish that any such limitations, symptoms, or side effects  
2 are severe enough to interfere with her ability to work. Further,  
3 plaintiff did not take medications from June 2007, through February  
4 2008. (A.R. 462.) Thus, the fact that the physician had to increase  
5 and re-adjust plaintiff's dosages can be reasonably attributed to  
6 plaintiff's nearly year long lack of treatment.

7  
8 Plaintiff's June 2007 complaint to her physician of decreased  
9 energy and insomnia appears to relate to plaintiff's general health and  
10 claimed impairments, rather than to side effects of her medications.  
11 (See A.R. 463.) There is no evidence whatsoever that any of plaintiff's  
12 medications caused her to experience decreased energy or insomnia. She  
13 did not so testify at any of her hearings, and as noted above, she  
14 indicated "none" when asked to identify medication side effects in her  
15 disability reports. (A.R. 23-42, 296, 312, 519-24.) Moreover, the ALJ  
16 acknowledged plaintiff's June 2007 complaint of decreased energy and  
17 insomnia and further observed that plaintiff's physician prescribed  
18 Trazadone to aid her sleep in June 2007, and June 2008. (A.R. 414,  
19 *citing* A.R. 457 and 463.)

20  
21 Finally, the ALJ did not misrepresent the medical record when he  
22 wrote that, in July 2007, plaintiff's treating physician prescribed for  
23 her both Cymbalta and Trazadone, "but there is only a prescription for  
24 Trazadone noted by July 2008." (A.R. 414.) Reading the ALJ's sentence  
25 in proper context, including with his record citations to A.R. 457 and  
26 463, it is clear that the ALJ was referring to the fact that the list of  
27 medications set forth in the physician's June 2008 note did not include  
28 Cymbalta. The ALJ did not misstate the record.

1           There is no basis for finding that the ALJ committed error in  
2 connection with the consideration of the side effects of plaintiff's  
3 medication.

4  
5 **II. The ALJ Properly Considered Plaintiff's Obesity.**

6  
7           Obesity is no longer, nor was it at the time of the ALJ's decision,  
8 a listed impairment. See Revised Medical Criteria for Determination of  
9 a Disability, Endocrine System and Related Criteria, 64 F.R. 46122  
10 (effective October 25, 1999) (delisting 9.09, "Obesity," from Appendix 1,  
11 Subpart P of Part 404, the listing of impairments). Although obesity is  
12 not a listed impairment, as a general rule, an ALJ must determine the  
13 effect of a claimant's obesity upon her other impairments and ability to  
14 work. Celaya v. Halter, 332 F.3d 1177, 1182 (9th Cir. 2003); see also  
15 SSR 02-01p (requiring an ALJ to consider the effects of obesity at  
16 several points in the five-step sequential evaluation). An ALJ must  
17 "evaluate each case based on the information in the case record," as  
18 obesity may or may not increase the severity or functional limitations  
19 of other impairments. SSR 02-01p.

20  
21           As discussed above, since 2002, when plaintiff, who is five foot  
22 six inches, filed her first application for SSI, she weighed  
23 approximately 200 pounds. (A.R. 130.) Plaintiff argues that the ALJ  
24 failed to consider the impact of plaintiff's obesity at the "various  
25 stages of the disability determination process." (Joint Stip. at 9.)  
26 Plaintiff specifically contends that the ALJ failed to consider the  
27 impact of her obesity in making the step two and three determinations.  
28 (*Id.*) Plaintiff is wrong.

1 In the proceedings before the Commissioner, neither plaintiff nor  
2 her attorney claimed that plaintiff's obesity constituted a disabling  
3 impairment. Rather, plaintiff repeatedly claimed to be disabled as a  
4 result of four asserted impairments -- diabetes, hypertension, anxiety  
5 disorder, and a depressive disorder -- and the ALJ found, at step two,  
6 that plaintiff has those four impairments, and they are severe. (See  
7 A.R. 84, 292, 391-409, 414, 512-28.) Plaintiff presented no evidence  
8 that her obesity exacerbates her other impairments, limits her  
9 functioning, or impairs her ability to work, whether alone or in  
10 combination with her four impairments. The only medical evidence  
11 plaintiff provided concerning her obesity was treatment notes  
12 recommending that she lose weight prior to the alleged disability period  
13 (A.R. 134), but nothing that discussed any limitations her obesity  
14 imposed upon her. Given the lack of any medical evidence that  
15 plaintiff's obesity exacerbated her impairments or resulted in any  
16 functional limitation, as well as the failure of plaintiff -- a  
17 represented claimant -- to claim to be disabled based on obesity,  
18 whether as an impairment or a source of functional limitations, the  
19 ALJ's failure to address plaintiff's obesity at step two was not error.  
20 See Burch, 400 F.3d at 682 (finding no reversible error, notwithstanding  
21 the ALJ's failure to consider obesity at step two, because, as in this  
22 case, there was no evidence that plaintiff's obesity exacerbated other  
23 impairments and plaintiff was represented by counsel).

24

25 The ALJ also did not err in failing to address plaintiff's obesity  
26 at step three. "An ALJ is not required to discuss the combined effects  
27 of a claimant's impairments or compare them to any listing in an  
28 equivalency determination, unless the claimant presents evidence in an

1 effort to establish equivalence." Burch, 400 F.3d at 683; see also  
2 Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001)(rejecting claimant's  
3 argument that the ALJ failed to adequately explain his finding that his  
4 impairments did not equal a listing, in part, because claimant failed to  
5 proffer a theory as to how the impairments equaled a listing).  
6 Plaintiff has neither pointed to any evidence of any functional  
7 limitations due to her obesity nor identified evidence showing that her  
8 impairments met or equaled any listing. See Burch, 400 F.3d at 682  
9 (stating that the ALJ did not commit reversible error by failing to  
10 consider plaintiff's obesity at step three when there was no evidence of  
11 functional limitations due to plaintiff's obesity). Indeed, plaintiff  
12 did not even specify which listing she purportedly met or equaled, much  
13 less proffer a theory of how she equaled a listing based on the  
14 combination of her impairments and obesity. See *id.* at 683 (affirming  
15 the district court's assertion that plaintiff "'bears the burden of  
16 proving that . . . she has an impairment listed in Appendix 1 of the  
17 Commissioner's regulations'"); see also Swenson v. Sullivan, 876 F.2d  
18 683, 687 (9th Cir. 1987)(holding that a claimant carries the initial  
19 burden of proving a disability).

20  
21 Further, the ALJ's decision reflects that he considered plaintiff's  
22 obesity in his RFC determination. In his decision, the ALJ expressly  
23 incorporated the 2006 Decision and stated that it remained the decision  
24 of record as supplemented by his 2008 Decision. (A.R. 413.) In the  
25 2006 Decision, ALJ Fortune considered the Internal Medical Evaluation  
26 written by Dr. Rocely Ella-Tamayo, who examined plaintiff in May 2004.  
27 (A.R. 217, 365-69.) Taking into consideration, among other things,  
28 plaintiff's *weight*, diabetes, and high blood pressure, Dr. Ella-Tamayo

1 opined that plaintiff had no significant functional limitations. (A.R.  
2 367-69.) Despite this finding, ALJ Fortune determined that plaintiff  
3 should be restricted to light work with only occasional stooping and  
4 crawling. (A.R. 216.) ALJ Levine imposed further restrictions in his  
5 RFC assessment, limiting plaintiff to occasional climbing, kneeling, and  
6 crouching and no rapid conveyor belt type or other fast paced work.  
7 (A.R. 416-17.) Based on the ALJ's inclusion of limitations beyond those  
8 found by the examining physician, the Court finds that the ALJ  
9 considered plaintiff's obesity in his RFC determination.<sup>5</sup>

10  
11 The ALJ did not commit reversible error, because in view of the  
12 evidence presented, he was not required to give further consideration to  
13 plaintiff's obesity.<sup>6</sup>

14  
15 5 To the extent that the ALJ did not explicitly refer to plaintiff's  
16 obesity in his RFC determination, the Court finds that omission, if  
17 error at all, to be harmless. The ALJ's analysis expressly incorporated  
18 Dr. Ella-Tamayo's medical opinion that plaintiff had no significant  
19 functional limitations, which was reached after the examining physician  
20 considered plaintiff's diabetes, high blood pressure, and obesity.  
21 Moreover, plaintiff has not proffered any evidence that her obesity has  
22 limited her ability to function and/or work, or has exacerbated any  
23 other medical ailment from which she suffers. See Burch, 400 F.3d at  
24 683-84 (finding the ALJ's failure to consider obesity was not reversible  
25 error, where there was no evidence that claimant's obesity limited her  
26 functioning, and the only evidence related to obesity was doctor's  
27 observation of weight gain, notation of obesity, and recommendation that  
28 claimant participate in weight loss program).

6 The present case is distinguishable from the Ninth Circuit's  
23 decision in Celaya, *supra*. In that case, the Ninth Circuit held that,  
24 despite the claimant's failure to raise obesity as a disabling factor,  
25 the ALJ erred in determining the effect of the claimant's obesity upon  
26 her other impairments and ability to work, because:

26 [f]irst, it was raised implicitly in [claimant]'s report of  
27 symptoms. Second, it was clear from the record that  
28 [claimant]'s obesity was at least close to the listing  
29 criterion, and was a condition that could exacerbate her  
30 reported illnesses. Third, in light of [claimant's] pro se  
31 status, the ALJ's observation of [claimant] and the

1 **III. The ALJ Properly Considered The Treating Physician's Notes.**

2  
3 It is the responsibility of the ALJ to resolve conflicts in medical  
4 testimony and analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750  
5 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
6 assessing a social security claim, "[g]enerally, a treating physician's  
7 opinion carries more weight than an examining physician's, and an  
8 examining physician's opinion carries more weight than a reviewing  
9 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
10 2001); 20 C.F.R. § 416.927(d)(1)-(2). The opinions of treating  
11 physicians are entitled to the greatest weight because the treating  
12 physician is hired to cure and has a better opportunity to observe the  
13 claimant. Magallanes, 881 F.2d at 751. Where a treating physician's  
14 opinion is not contradicted by another physician, it may be rejected  
15 only for "clear and convincing" reasons. Lester v. Chater, 81 F.3d 821,  
16 830 (9th Cir. 1995) (as amended). Where contradicted by another doctor,  
17 the ALJ may not reject the opinion of a treating physician without  
18 providing "specific and legitimate" reasons supported by substantial  
19 evidence in the record. *Id.*

20  
21 \_\_\_\_\_  
information on the record should have alerted him to the need  
to develop the record in respect to her obesity.

22 Celaya, 332 F.3d at 1182. The Court further noted that "[t]he ALJ's  
23 exclusion of obesity from his analysis [wa]s error in that he was  
24 addressing an illiterate, unrepresented claimant who very likely never  
25 knew that she *could* assert obesity as a partial basis for her  
26 disability." *Id.*(emphasis in original). Unlike the claimant in Celaya,  
27 plaintiff is not "extremely obese" and was represented by counsel in her  
28 proceedings before the Commissioner, as well as here. This case is more  
akin to the situation considered by the Ninth Circuit in Burch, *supra*,  
in which no reversible error was found. Moreover, and critically, the  
medical record suggests that the only factor that has exacerbated  
plaintiff's condition is not her weight -- which has remained at  
approximately 200 pounds since 2002 -- but rather, her failure, at  
times, to take her prescribed medication. See discussion *infra*.

1 Dr. Sean R. Thomas, a general practitioner, has been plaintiff's  
2 treating physician since 2006. (See, e.g., A.R. 467.) The record  
3 indicates that Dr. Thomas saw plaintiff five times between April 2006,  
4 and June 2007 (A.R. 463-67), and began treating her again in February  
5 2008 (A.R. 462). Dr. Thomas' notes reflect that plaintiff was being  
6 treated for diabetes, hypertension, and depression. (See, e.g., A.R.  
7 457, 462.) At each of plaintiff's examinations, someone at Dr. Thomas'  
8 office took and noted plaintiff's weight, blood pressure, and blood  
9 sugar level. (See, e.g., *id.*) Dr. Thomas did not render any opinions  
10 about plaintiff's limitations, physical or mental.

11  
12 Plaintiff contends that the ALJ failed to properly consider Dr.  
13 Thomas' opinion regarding her hypertension. (Joint Stip. at 9-10, 12.)  
14 Plaintiff further argues that the ALJ misleadingly represents that  
15 plaintiff's hypertension is controlled. (*Id.* at 13.)

16  
17 Plaintiff's argument is flawed. The ALJ did not consider Dr.  
18 Thomas' opinion regarding plaintiff's hypertension, because there was no  
19 opinion to consider. Treatment notes, in general, are not medical  
20 opinions. See 20 C.F.R. 416.927(a)(2) ("Medical opinions are statements  
21 from physicians . . . that reflect judgments about the nature and  
22 severity of your impairment(s), . . . what you can still do despite  
23 impairment(s), and your physical or mental restrictions."). Here, the  
24 treatment notes do not provide any indication of Dr. Thomas' opinions  
25 regarding plaintiff's impairments or limitations. With regard to  
26 plaintiff's hypertension in particular, the notes simply contain a  
27 nurse's notation of plaintiff's blood pressure reading at each visit.



1 The ALJ's determination that plaintiff's hypertension is severe  
2 clearly demonstrates that the ALJ considered Dr. Thomas' notes. (A.R.  
3 414.) The ALJ's finding that plaintiff's hypertension is controlled was  
4 based on his analysis of the evidence and is not misleading or  
5 inaccurate. See Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)  
6 ("the ALJ must develop the record and interpret the medical evidence").  
7 Plaintiff is correct that from February 2008, through May 2008, she had  
8 several high blood pressure readings. (A.R. 457, 460-62.) Plaintiff,  
9 however, conveniently omits some pertinent facts: (1) her hypertension  
10 was well-controlled when she was on her medications prior to June 2007  
11 (see, e.g., A.R. 367, 380-81); (2) she did not take any blood pressure  
12 medication from June 2007, through February 2008 (A.R. 462); and (3)  
13 plaintiff's last blood pressure reading in June 2008, after four months  
14 of medication, was 122/82 (A.R. 456). The ALJ reasonably concluded that  
15 plaintiff's hypertension is controlled with medication. See Burch, 400  
16 F.3d at 679 ("Where evidence is susceptible to more than one rational  
17 interpretation, it is the ALJ's conclusion that must be upheld.").

18  
19 Accordingly, the ALJ properly considered the treating physician's  
20 notes.

21  
22 **IV. It Was Not Reversible Error For The ALJ To Characterize Plaintiff's**  
23 **Treatment For Depression As Erratic.**

24  
25 Plaintiff alleges that the ALJ failed to provide clear and  
26 convincing reasons for rejecting her testimony regarding her lack of  
27 treatment for depression. (Joint Stip. at 16-18.) Specifically,  
28 plaintiff contends that the ALJ "unfairly interpreted [her] testimony in

1 terms most unfavorable to her and then rejected it based upon his own  
2 speculative and unsupported inferences and assumptions." (*Id.* at 17.)  
3 Although somewhat awkwardly framed as a credibility issue, it appears  
4 that plaintiff's actual argument is that the ALJ improperly relied on  
5 his alleged mischaracterization of her testimony about the treatment she  
6 has received for her depression as the basis for concluding that her  
7 mental impairments do not render her unable to work. Even as so  
8 liberally construed, the Court does not find reversible error.

9  
10       Once a disability claimant produces objective evidence of an  
11 underlying impairment that is reasonably likely to be the source of her  
12 subjective symptom(s), all subjective testimony as to the severity of  
13 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885  
14 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.  
15 1991)(*en banc*); see also 20 C.F.R. § 416.929(a) (explaining how pain and  
16 other symptoms are evaluated). "[U]nless an ALJ makes a finding of  
17 malingering based on affirmative evidence thereof, he or she may only  
18 find an applicant not credible by making specific findings as to  
19 credibility and stating clear and convincing reasons for each."  
20 Robbins, 466 F.3d at 883. The factors to be considered in weighing a  
21 claimant's credibility include: (1) the claimant's reputation for  
22 truthfulness; (2) inconsistencies either in the claimant's testimony or  
23 between the claimant's testimony and her conduct; (3) the claimant's  
24 daily activities; (4) the claimant's work record; and (5) testimony from  
25 physicians and third parties concerning the nature, severity, and effect  
26 of the symptoms of which the claimant complains. See Thomas, 278 F.3d  
27 at 958-59; see also 20 C.F.R. § 416.929(c).

1 In her application papers, plaintiff stated that she has panic  
2 attacks around people and poor concentration and memory. (A.R. 292,  
3 313.) At the August 5, 2008 hearing, plaintiff testified that she has  
4 anxiety attacks in public and has poor concentration, but she has not  
5 had any breakdowns and is not suicidal. (A.R. 522-23.) From 2004,  
6 through the date of the decision<sup>7</sup>, the medical records indicate that  
7 plaintiff saw a psychiatrist or mental health specialist fewer than ten  
8 times, all in 2004. (A.R. 354-64.) From 2006, to 2008, plaintiff saw  
9 a general practitioner, but no mental health specialist. (A.R. 456-67.)  
10 Plaintiff testified that she did not see a mental health specialist and  
11 could not "get any help for [her] depression," because there are no  
12 services available where she lives. (A.R. 520.) The medical records  
13 also indicate that plaintiff did not take any medications from June  
14 2007, through February 2008, because she did not have insurance. (A.R.  
15 462.)

16  
17 In reaching his determination that plaintiff had the severe mental  
18 impairments of anxiety disorder, not otherwise specified, and depressive  
19 disorder, not otherwise specified, the ALJ noted that plaintiff's  
20 "erratic treatment," as well as her lack of episodes of decompensation  
21 when not on psychotropic medication, might lead to the reasonable  
22 conclusion that plaintiff did not suffer from a severe mental  
23 impairment. (A.R. 414-15.) Despite his doubts, the ALJ ultimately  
24 concluded that plaintiff *did* suffer from the severe mental impairments  
25 of depression and anxiety based on the testimony of the medical expert

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26  
27 <sup>7</sup> Although plaintiff alleged an inability to work since December 31,  
28 1996 (A.R. 292), the decision focuses on a period from April 15, 2004,  
the protective filing date, through the date of the decision. (A.R.  
419.)

1 and plaintiff's "somatic complaints." (A.R. 415) The ALJ included the  
2 limitations set forth by the medical expert in his RFC determination,  
3 including precluding plaintiff from working at unprotected heights,  
4 around dangerous moving machinery, and on fast-paced work. (A.R. 416-  
5 17, 518.) The ALJ also limited plaintiff to routine, repetitive, entry  
6 level work and "work involving things rather than people." (A.R. 417.)  
7

8 Plaintiff's argument hinges on the ALJ's characterization of her  
9 medical treatment for her depression as "erratic." (A.R. 415.) The  
10 term "erratic" is accurate in that plaintiff did not have consistent  
11 treatment for her depression but, read in the light most favorable to  
12 plaintiff, also could be interpreted to imply that plaintiff purposely  
13 failed to seek treatment when, in fact, she explained that there are no  
14 mental health specialists in her area. (A.R. 520.) Even if the Court  
15 were to assume that the ALJ intended such an implication, however, any  
16 such implication did not affect the ultimate disability determination,  
17 because the ALJ did not rely on a lack of and/or "erratic" treatment as  
18 a basis for discounting plaintiff's subjective symptoms.<sup>8</sup> Instead, the  
19 reason the ALJ did not fully credit plaintiff's subjective complaints  
20 was the lack of consequences and problems that arose during plaintiff's  
21 period of non-treatment. The ALJ specifically noted that, in the year  
22 plaintiff underwent no treatment and failed to take any psychotropic  
23 medication, she experienced no episodes of decompensation or side  
24

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25 8 While lack of treatment can be a factor in credibility  
26 determinations, when a plaintiff provides a good explanation for the  
27 inconsistent treatment, the ALJ cannot reject the symptom testimony on  
28 that basis. Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996). Even  
assuming that the ALJ improperly cited plaintiff's lack of treatment as  
a clear and convincing reason for rejecting her testimony, such error is  
harmless for the reasons cited above. See Burch, 400 F.3d at 679.

1 effects. (A.R. 415-17.) Indeed, plaintiff testified that she never had  
2 any "breakdowns" as a result of her depression. (A.R. 522.) The  
3 absence of problems, both while plaintiff was under psychiatric  
4 treatment and while she received no treatment, rather than the lack of  
5 treatment itself, is a valid reason for discounting plaintiff's  
6 subjective symptoms. See, e.g., Burch, 400 F.3d at 681 (affirming the  
7 ALJ's reasons for rejecting plaintiff's testimony, including the fact  
8 that plaintiff had no episodes of decompensation); Collins v. Astrue,  
9 2009 WL 1202891, at \*5 (C.D. Cal. Apr. 27, 2009) (finding the ALJ  
10 properly discounted plaintiff's credibility regarding the severity of  
11 her mental impairments in part because she had no episodes of  
12 decompensation).

13  
14 Further, the ALJ provided other clear and convincing reasons to  
15 discount plaintiff's statements "concerning the intensity, persistence  
16 and limiting effects of [her] symptoms . . . to the extent they are  
17 inconsistent with" the RFC assessment. (A.R. 417.) First, the ALJ  
18 stated that plaintiff did not testify to any serious limitation to her  
19 daily activities imposed by her depression and anxiety, except that she  
20 was nervous in public. (A.R. 417, 522.) While "[t]he Social Security  
21 Act does not require that [plaintiff] be utterly incapacitated to be  
22 eligible for benefits," Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.  
23 1989), if the level of the activity is inconsistent with the alleged  
24 limitations, such activities can have a bearing on a plaintiff's  
25 credibility. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). The  
26 ALJ noted that plaintiff performed housework and took care of her two  
27 granddaughters on a daily basis while her daughter attended school and  
28

1 worked.<sup>9</sup> (A.R. 416-17.) See Morgan v. Comm'r, 169 F.3d 595, 600 (9th  
2 Cir. 1999)(affirming the ALJ's reasons for rejecting plaintiff's  
3 credibility, which included plaintiff's ability to occasionally provide  
4 child care services). The ALJ further noted that there was no evidence  
5 that plaintiff "had any decompensation related to what amounts to the  
6 daily stress of being a child care provider." (A.R. 416.)

7  
8 Second, the ALJ found that the medical record did not support  
9 plaintiff's subjective complaints. (A.R. 417-18.) The ALJ stated that  
10 the medical records do not provide any consistent evidence of psychotic  
11 symptoms. (A.R. 417.) The ALJ noted that plaintiff's treating  
12 physician did not indicate any marked functional limitations and never  
13 referred plaintiff for more aggressive treatment by a specialist. (A.R.  
14 415.) The ALJ also relied on the testimony of Dr. Soltz, a medical  
15 expert who reviewed plaintiff's entire medical record and course of  
16 treatment, in concluding that, while plaintiff suffered from some sort  
17 of depressive and anxiety disorder, there were no signs of psychosis.<sup>10</sup>  
18 (A.R. 417-18, 516.)

19  
20  
21 9 In plaintiff's July 16, 2004 Mental Residual Functional Capacity  
22 Assessment, it was noted that plaintiff was living with her daughter and  
23 helping her with her newborn. (A.R. 334.) Additionally, at the August  
24 5, 2008 hearing, plaintiff testified that she babysits her grandchildren  
25 when her daughter is at work and in school. (A.R. 522.)

26 10 Although not given as a reason for discounting plaintiff's  
27 testimony, and therefore not relied upon here, the Court also notes that  
28 plaintiff's testimony regarding her weight gain was inconsistent with  
her medical records. Thomas, 278 F.3d at 958-59 (stating that an ALJ  
may consider a claimant's testimony and actual conduct in a credibility  
analysis). As discussed *supra*, plaintiff testified that she gained  
forty pounds in the last couple of years as a side effect of her  
medications. (A.R. 521-22.). Plaintiff's medical records show that  
this statement is false. Plaintiff has weighed approximately 200 pounds  
since 2002. (See A.R. 130.)

1 Each of the above reasons is clear and convincing and, thus, the  
2 ALJ properly rejected plaintiff's testimony concerning her subjective  
3 symptoms. Accordingly, plaintiff's complaint regarding the ALJ's  
4 characterization of her treatment for depression as "erratic" does not  
5 serve as any basis for finding reversible error.

6  
7 **CONCLUSION**  
8

9 For the foregoing reasons, the Court finds that the Commissioner's  
10 decision is supported by substantial evidence and is free from material  
11 legal error. Neither reversal of the Commissioner's decision nor remand  
12 is warranted.

13  
14 Accordingly, IT IS ORDERED that Judgment shall be entered affirming  
15 the decision of the Commissioner of the Social Security Administration.  
16 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of  
17 this Memorandum Opinion and Order and the Judgment on counsel for  
18 plaintiff and for defendant.

19  
20 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

21 DATED: September 30, 2010

22   
23 \_\_\_\_\_  
24 MARGARET A. NAGLE  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28