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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 SELINE GUTIERRES, ) No. ED CV 12-00274-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION  
14 ) AND ORDER  
15 v. )  
16 ) (Social Security Case)  
17 MICHAEL J. ASTRUE, )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
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18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and transcript of the record before  
24 the Commissioner. The parties have filed the Joint Stipulation  
25 ("JS"), and the Commissioner has filed the certified Administrative  
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

1 considered Plaintiff's treating physicians' opinions;

2 2. Whether the ALJ properly determined if activities of daily  
3 living establish the ability to perform full-time  
4 competitive substantial gainful activity;

5 3. Whether there is a DOT inconsistency in the ALJ's holding  
6 that Plaintiff can perform the jobs of information clerk,  
7 credit checker, and electronic bench technician; and

8 4. Whether the ALJ properly considered the lay witness  
9 testimony.

10 (JS at 3.)

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12 This Memorandum Opinion will constitute the Court's findings of  
13 fact and conclusions of law. After reviewing the matter, the Court  
14 concludes that the decision of the Commissioner must be affirmed.

15  
16 **INTRODUCTION**

17 **A. Procedural History.**

18 Plaintiff previously filed an application for SSI benefits on  
19 August 11, 2005, which resulted in a determination of non-disability  
20 by an ALJ in a Decision dated February 15, 2008. (See AR, Exhibit  
21 ["Ex."] B1A.) That Decision creates a rebuttable presumption of  
22 continuing non-disability. (See SSR 97-4(9), Chavez v. Bowen, 844 F.2d  
23 691 (9<sup>th</sup> Cir. 1988).)

24 Plaintiff's current application for SSI benefits was filed on May  
25 26, 2009. (AR 9; 102.) After administrative denials, hearings were  
26 held before an ALJ on December 10, 2010 and April 8, 2011. An  
27 unfavorable decision was issued on April 27, 2011. (AR 5-24.) The  
28 Appeals Council denied review (AR 1-4) and Plaintiff commenced this

1 litigation.

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3 I

4 **THE ALJ PROPERLY CONSIDERED THE MEDICAL EVIDENCE**

5 **IN DETERMINING PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY**

6 In the Decision, the ALJ found that Plaintiff has severe  
7 impairments of lupus; failed back syndrome, status post-laminectomy;  
8 obesity; and major depressive disorder. (AR 10.)

9 Plaintiff contends that the ALJ failed to properly consider the  
10 opinions of her treating physicians with regard to her mental state.  
11 She quotes extensively from the ALJ's Decision. (See JS at 3-5.) Her  
12 contention is that the ALJ failed to follow applicable law which  
13 requires that the opinion of treating physicians may not be rejected  
14 without providing specific and legitimate reasons. (See JS at 6,  
15 citing Lester v. Chater, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995).)

16 Plaintiff also attempts to raise the issue of an assertedly  
17 inadequate discussion by the ALJ in a prior Decision of non-disability  
18 filed on February 15, 2008. (See JS at 7-9.)

19 Because of this prior non-disability determination, a continuing  
20 presumption of non-disability attaches and it is Plaintiff's burden  
21 now to prove changed circumstances indicating that she has a greater  
22 disability in order to overcome that presumption. (See Chavez, supra,  
23 844 F.2d at 693.) Here, the ALJ found that there has not been a  
24 showing of change circumstances material to the determination of  
25 disability, and thus, he concluded that the presumption of continuing  
26 non-disability has not been rebutted. (AR 13.)

27 Apart from that legal issue, the record supports the ALJ's  
28 determination of Plaintiff's mental residual functional capacity

1 ("RFC"). Although Plaintiff extensively cites to progress notes from  
2 the Riverside County Department of Mental Health, these are not  
3 opinions of a physician(s). They are simply progress notes, and the  
4 ALJ did evaluate them. He noted that Plaintiff had failed to attend  
5 most of her appointments, and there was evidence of significant  
6 malingering and magnification of symptoms at a psychological  
7 consultative examination ("CE"). (See, infra.) Further, while  
8 Plaintiff extensively cites to GAF scores, such scores are only  
9 snapshots of a person's functioning at a particular moment in time,  
10 and thus do not constitute medical opinions which are sufficient to  
11 document a continuing impairment for purposes of the Social Security  
12 Act. See 65 Fed. Reg. 5746, 5765 (August 21, 2000); McFarland v.  
13 Astrue, 288 Fed. Appx. 357, 359 (9<sup>th</sup> Cir. 2008).

14 As noted, the ALJ significantly relied upon a psychological CE  
15 conducted by Dr. Reznick on January 13, 2011 (AR 357-368), in addition  
16 to a psychiatric CE by Dr. Abejuela from August 20, 2009 (AR 303-309).  
17 (See discussion at AR 17.) Dr. Reznick's report, based upon his  
18 examination, debunks Plaintiff's self-reporting of hallucinations and  
19 hearing voices, noting that Plaintiff appeared to engage in  
20 "deliberately unfavorable impression management, apparently for self-  
21 serving reasons." (AR 364.) Dr. Reznick found that Plaintiff's  
22 allegations as to hallucinations were simply not credible. (AR 358.)  
23 She did not exhibit any signs or symptoms of psychosis or paranoia.  
24 (AR 358.)

25 Finally, Plaintiff's complaint that the ALJ in the previous 2008  
26 Decision failed to adequately address her physician's opinions is  
27 irrelevant to the 2011 Decision which is at issue in this case, other  
28 than that the prior decision is res judicata under Chavez.

1 None of the progress notes cited by Plaintiff provide any opinion  
2 as to Plaintiff's mental RFC. Thus, the Court rejects Plaintiff's  
3 contention that the ALJ failed to adequately consider these progress  
4 notes, and finds no other evidence in the record to undermine the  
5 ALJ's determination of Plaintiff's mental RFC.

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7 **II**

8 **THE ALJ PROPERLY RELIED UPON PLAINTIFF'S**  
9 **ACTIVITIES OF DAILY LIVING IN THE DISABILITY DETERMINATION**

10 In Plaintiff's second issue, she contends the ALJ improperly  
11 relied upon the nature and extent of her activities of daily living  
12 ("ADL") in determining whether she is disabled, and in particular,  
13 contests the assessment of her credibility pertaining to subjective  
14 complaints. (See Discussion in Decision at AR 13.)

15 While Plaintiff cites cases which generally hold that a claimant  
16 need not be completely incapacitated or vegetative to be disabled,  
17 that standard does not comport with the actual ADLs in which Plaintiff  
18 participates, as noted by the ALJ.<sup>1</sup>

19 Here, the ALJ relied upon numerous credibility factors which are  
20 sanctioned by regulation and case law. (See SSR 96-7p, 20 C.F.R. §  
21 416.929(c)(3).) In this case, there are several such factors which  
22 are established by substantial evidence in the record. For one, the  
23 ALJ relied upon evidence that Plaintiff malingered and magnified her  
24 symptoms. (See Decision at AR 17-18, see Benton v. Barnhart, 331 F.3d  
25 1030, 1040 (9<sup>th</sup> Cir. 2003).) As the Court noted in the previous  
26 section, the independent psychological CE, Dr. Reznick, extensively

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28 <sup>1</sup> Plaintiff does not contest that she in fact is capable of  
and participates in these ADLs.

1 commented upon the sub-optimal effort and malingering which Plaintiff  
2 exhibited during her examination; the fact that her allegations of  
3 hallucination lacked credibility; and that she demonstrated no signs  
4 or symptoms of psychosis or paranoia. In addition, the objective  
5 medical evidence in the record does not support Plaintiff's subjective  
6 symptom reporting. There were four independent examining physicians  
7 who each reached the conclusion that Plaintiff was capable of working  
8 with specific limitations. (AR 296, 308-309, 329, 364-368.) An ALJ  
9 may consider a lack of objective medical evidence as one factor in the  
10 credibility determination. See Burch v. Barnhart, 400 F.3d 676, 681  
11 (9<sup>th</sup> Cir. 2005).

12 As the Commissioner also points out, Plaintiff alleged extremely  
13 serious mental disturbance, but failed to seek and follow through with  
14 treatment. For example, she reported to the Riverside mental health  
15 facility in January 2009, but did not return for treatment again until  
16 July of that year. (AR 16, 269-273.) Progress notes indicate that she  
17 failed to keep any of her appointments. (AR 16, 270-272.) This  
18 pattern was repeated later in 2009 (AR 17, 383), and in 2010 she only  
19 sought treatment on a few occasions. (AR 17, 370-379.) These factors  
20 were relevant in the credibility analysis.

21 In sum, the Court finds that substantial evidence supports the  
22 ALJ's credibility determination with regard to Plaintiff's subjective  
23 complaints.

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25 **III**

26 **THERE IS NO DOT INCONSISTENCY BETWEEN THE ALJ'S**  
27 **DETERMINATION OF AVAILABLE WORK AND PLAINTIFF'S RFC**

28 In Plaintiff's third issue, she contends that the ALJ erred in

1 determining work that she can perform (see AR at 19-20) constitutes  
2 reversible error because the three jobs identified by the vocational  
3 expert ("VE"), and adopted by the ALJ, are inconsistent with  
4 Plaintiff's RFC.

5 Plaintiff addresses the first job, identified in the Dictionary  
6 of Occupational Titles ("DOT") as Information Clerk. Plaintiff  
7 asserts that this job requires that she do more than the simple,  
8 repetitive tasks which the ALJ determined are within her RFC. (See AR  
9 at 12.) Specifically, she argues that the job of Information Clerk  
10 requires Reasoning Level Three skills, which are identified as part of  
11 the General Educational Development ("GED") of the job. (See DICOT  
12 Appendix CC, section III.) Thus, Plaintiff asserts that Reasoning  
13 Level Three skills, which require that she be able to "apply common  
14 sense understanding to carry out instructions furnished in written,  
15 oral, or diagramatic form. Deal with problems involving several  
16 concrete variables in or from standardized situations," exceed her  
17 RFC. Plaintiff cites District Court opinions which she contends hold  
18 that a limitation to simple, repetitive tasks is more consistent with  
19 jobs that require either Reasoning Level One or Reasoning Level Two.  
20 (See JS at 23.)

21 With regard to the second job, identified as Credit Checker,  
22 Plaintiff makes the same argument.

23 With regard to the third job, identified as Electronic Bench  
24 Technician, Plaintiff asserts that this job requires that she be  
25 exposed to "toxic chemicals occasionally" (JS at 26), which exceeds  
26 her RFC, which prohibits "concentrated exposure to fumes, odors, dust,  
27 gases and poor ventilation." (AR 12.)

28 Plaintiff's argument that the ALJ erred in identifying these

1 three jobs as within her RFC because of an unexplained deviation  
2 between the requirements of these jobs and Plaintiff's functional  
3 abilities relies upon case law developed in the Ninth Circuit. She  
4 cites Pinto v. Massanari, 249 F.3d 840, 847 (9<sup>th</sup> Cir. 2001), for this  
5 proposition, along with other cases.

6 While Plaintiff correctly cites the legal standard concerning  
7 deviation, her argument fails for factual reasons. In particular with  
8 regard to the unskilled jobs of Information Clerk and Credit Checker  
9 (see DOT §§ 237.367-046), these occupations are classified as  
10 requiring Specific Vocational Preparation ("SVP") of Two. Such  
11 occupations are denominated as unskilled, defined in the Code of  
12 Federal Regulations ("C.F.R.") as work that "needs little or no  
13 judgment to do simple duties that can be learned on the job in a short  
14 period of time." See 20 C.F.R. § 416.968(a). The Commissioner  
15 argues, and the Court agrees, that these requirements are consistent  
16 with simple, repetitive tasks. The VE explained that each of these  
17 occupations were unskilled work. (AR 62-63.) Plaintiff's argument,  
18 however, focuses on the Reasoning Level which is classified under DOT  
19 under the GED categories noted above. Plaintiff focuses on one of the  
20 three GED categories (the three categories are reasoning, mathematics,  
21 and language), which is the category of reasoning. The GED does not  
22 circumscribe particular mental or skill requirements of a particular  
23 job but rather, describes the general educational background which  
24 might make an individual capable of performing a job. Thus, the GED  
25 does not constitute a job description or a job requirement, nor does  
26 it reflect particular mental demands of jobs listed in the DOT.  
27 Instead, it is simply a general description of the educational level  
28 which is expected of someone who is performing a particular job. In



1 this case, Plaintiff completed high school. (AR 28, 71-72.) The  
2 Commissioner is permitted by regulation to utilize a claimant's  
3 numerical grade level to determine educational abilities. See 20  
4 C.F.R. § 416.964(b). Here, Plaintiff's educational background would  
5 indicate an ability in reasoning, arithmetic and language skills to  
6 perform semi-skilled through skilled work. See 20 C.F.R. §  
7 416.964(b)(4).

8 Thus, the Court cannot be limited simply to reasoning level in  
9 determining whether Plaintiff has the functional ability to perform  
10 the identified jobs. Thus, there is no inconsistency between the  
11 identified jobs and the DOT requirements in this case. Indeed, as the  
12 Commissioner notes, several District Court cases have concluded that  
13 where an individual is limited to simple, repetitive tasks, this is  
14 consistent with an ability to perform unskilled work. See Angulo v.  
15 Astrue, 2009 WL 817506, \*2 (E.D. Cal., 2009).

16 In sum, Plaintiff's RFC is not correlated to the DOT's reasoning  
17 level descriptions. RFC and reasoning levels are different concepts,  
18 one measuring a claimant's medical limitations and the other  
19 addressing the appropriate or required level of educational  
20 development for performing a particular job.

21 Brief mention may be made of the remaining job, identified as  
22 Bench Technician (see DOT § 726-687-010). While Plaintiff contends  
23 that this occupation would require exposure to "toxic chemicals  
24 occasionally," Plaintiff's RFC indicates she must avoid exposure to  
25 concentrated fumes, etc. It is not apparent that there is a DOT  
26 inconsistency here, and thus, the Court cannot conclude that the ALJ  
27 erred in that Plaintiff is capable of performing this occupation in  
28 addition to the other two.

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IV

THE ALJ DID NOT IMPROPERLY DISCOUNT

LAY WITNESS TESTIMONY AND EVIDENCE

Plaintiff cites the hearing testimony of her friend, Diana Tourney-Geisen (AR 55-61) and the Third Party Function Report - Adult of Plaintiff's mother, Jeannette Sarris, and contends that the ALJ improperly discounted them. She summarizes the evidence and testimony of these two lay witnesses in the JS. Her legal contention is that the ALJ failed to give reasons germane to each of these witnesses whose testimony he rejected. (See JS at 40, citing Smolen v. Chater, 80 F.3d 1273, 1288-89 (9<sup>th</sup> Cir. 1996).)

The Court finds no merit in this argument, because the ALJ did give germane reasons. He indicated that the statements of these reasons were not consistent with the treatment record. (AR 14-15.) Inconsistency with medical evidence is a valid reason to discount lay witness testimony. See Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9<sup>th</sup> Cir. 2005). The ALJ similarly gave little weight to Plaintiff's own testimony, finding symptom magnification, malingering, and inconsistencies, as the Court has previously summarized.

For the foregoing reasons, the Court finds no merit in Plaintiff's fourth and final issue.

The decision of the ALJ will be affirmed. The Complaint will be dismissed with prejudice.

**IT IS SO ORDERED.**

DATED: November 15, 2012

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/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE