

1 153 (1987). In its internal procedures, the Social Security Administration assesses an
2 impairment as “non-severe” if it has no more than a minimal effect on the individual’s
3 ability to do basic work functions. SSR 85-28. This minimalist treatment has received the
4 Courts’ imprimatur. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988); *Smolen v.*
5 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). Thus, the requirement that a claimant have
6 a severe impairment has been transmogrified into a requirement that the claimant have an
7 impairment that is not very severe at all — it simply must have more than a minimal effect
8 on his or her ability to do basic work functions. When the Commissioner rests his decision
9 on the failure to satisfy the severity requirement, that decision, as with any other, must rest
10 on substantial evidence within the record. *Smolen v. Chater, supra*, 80 F.3d at 1289-90.

11 The Administrative Law Judge proceeded through the so-called B criteria
12 found in the regulations governing the Listing of Impairments, and the similar statements
13 found in 20 C.F.R. § 404.1520a. [AR 16] He found only mild limitations in the first three
14 categories — activities of daily living, social functioning, and concentration, persistence
15 and pace — and no episodes of decompensation. Therefore, he determined that Plaintiff’s
16 mental impairment was not severe.

17 The regulations require that “[t]he decision must show the significant history,
18 including examination and laboratory findings, and the functional limitations that were
19 considered in reaching a conclusion about the severity of the mental impairment(s).” 20
20 C.F.R. § 404.1520a(e)(4). As support for his finding that Plaintiff’s limitations were only
21 mild in the first three categories, the Administrative Law Judge cited to isolated portions
22 of Plaintiff’s written function report. Thus, as to activities of daily living, he referenced
23 the portion of the report in which Plaintiff said that she had no difficulty with personal care
24 and that she cared for pets; as to social functioning, he referenced the portion of the report
25 in which Plaintiff said that she was able to shop in stores and that she went outside a couple
26 time a week; and as to concentration, persistence or pace, he referenced the portion of the
27 report in which Plaintiff said that she was able to complete household chores, such as the
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1 laundry and putting dishes into the dishwasher. [AR 16] None of this by itself can stand
2 as substantial evidence.

3 The Administrative Law Judge selected those portions of the function report
4 that appeared to suit his conclusion, but he did not reference others. Under “Information
5 About Daily Activities,” for example, Plaintiff stated, in response to the directive to
6 describe what she did from the time she awoke to the time she went to bed, that she “lay
7 [sic] on couch, sleep, cry.” [AR 188] She also stated that she did not care for anyone else,
8 that previously she could do anything and that her mother and husband helped her in the
9 care of other people or animals. As for social functioning, Plaintiff did say that she
10 shopped in stores, but, in response to the question “how often,” she appeared to say once
11 a month [AR 191], and, when asked directly whether she spent time with others, she said
12 “no;” in terms of places she visited, she listed the doctor and the post office, but only when
13 needed. [AR 192] As for concentration, persistence and pace, it is hard to see how doing
14 laundry and putting dishes into a washer are activities that demonstrate these traits in a way
15 that could be generalized to the workplace but, even if so, there were directly contrary
16 statements in this same report: Plaintiff said that she needed reminders to do things [AR
17 190], and that she could not pay bills, handle a savings account or use a checkbook/money
18 orders because she did not have the patience or concentration to do so. [AR 191]

19 It is error for the Administrative Law Judge to misstate or ignore competent
20 evidence in order to justify a conclusion. *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir.
21 1984). By the same token, the Court must evaluate both the evidence that supports and the
22 evidence that detracts from the Administrative Law Judge’s decision. *Gonzalez v. Sullivan*,
23 914 F.2d 1197, 1200 (9th Cir. 1990). One cannot read the function report in its entirety
24 and come away with the conclusions that the Administrative Law Judge reached based on
25 portions within that report.

26 If the function report had been the sole evidentiary matter referenced in the
27 decision, therefore, the Court would be obligated to reverse and send the matter back for
28 further adjudication as to Plaintiff’s mental impairment. But the Administrative Law Judge

1 also had before him other evidence, including the reports of two examining physicians and
2 one treating physician. The treating physician opined that Plaintiff could perform very
3 little in the way of work-like functions [AR 445-46], while each of the examining
4 physicians found that Plaintiff understated her capabilities and embellished her maladies
5 [AR239, 243-44; AR 498]. The Administrative Law Judge referred to all three physicians,
6 and preferred the opinions of the examining physicians over those of the treating physician.
7 [AR 15-17]

8 The opinion of a treating physician usually is given greater weight than the
9 opinion of other physicians. *Aukland v. Massanari*, 257 F.3d 1033, 1036 (9th Cir. 2001).
10 However, in *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007), the Court of Appeals described
11 the interaction between an opinion from a consultant and an opinion from a treating
12 physician:

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14 When an examining physician relies on the same clinical
15 findings as a treating physician, but differs only in his or her
16 own conclusions, the conclusions of the examining physician are
17 not “substantial evidence.”

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19 495 F.3d at 632. The Court went on to contrast that situation with the situation where the
20 examining physician made his own independent findings, in which case the findings can
21 stand as substantial evidence. The Court then explained that “[i]ndependent clinical
22 findings can be either (1) diagnoses that differ from those offered by another physician and
23 that are supported by substantial evidence . . . or (2) findings based on objective medical
24 tests that the treating physician has not herself considered” *Id.* (citations omitted).

25 Both the examining physicians here administered tests, and obtained results,
26 that the treating physician did not see. Even though their examinations were separated by
27 a period of two years, each examining physician also concluded that Plaintiff was either
28 overstating her case or malingering. Each reached different diagnoses from the treating

1 physician, and each suggested that Plaintiff had the capability to function in the workplace,
2 in some places directly contrary to what Plaintiff had said in her written function report.
3 [AR 500] While the treating physician's opinion usually is owed deference, in this case
4 the Administrative Law Judge acted within his authority in preferring the opinions of the
5 consultants instead.

6 Those opinions, in turn, stand as substantial evidence supporting the finding
7 of non-severity as to Plaintiff's mental condition. They do differ, of course, from
8 Plaintiff's own statements as set forth in her written function report, but the Administrative
9 Law Judge was not required to accept those statements in the face of the contrary medical
10 evidence.

11 In accordance with the foregoing, the decision of the Commissioner is
12 affirmed.

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14 DATED: October 1, 2013

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18 RALPH ZAREFSKY
19 UNITED STATES MAGISTRATE JUDGE
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