

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

VERDANA PAULINE THOMAS,  
Plaintiff,  
v.  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
Defendant.

NO. EDCV 13-597 AGR

MEMORANDUM OPINION AND  
ORDER

---

Plaintiff Verdana Pauline Thomas filed this action on April 11, 2013. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 7, 26.) On May 23, 2014, Thomas filed a motion for summary judgment (“MSJ”). (Dkt. No. 23.) On July 30, 2014, the Commissioner filed an opposition and cross-motion for summary judgment (“Opposition”). (Dkt. No. 30.) On August 11, 2014, Thomas filed a reply in support of her motion for summary judgment (“Reply”). (Dkt. No. 31.) The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court reverses the decision of the Commissioner and remands this matter for proceedings consistent with this opinion.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On May 12, 2008, Thomas filed an application for disability insurance  
4 benefits alleging an onset date of October 22, 2007. Administrative Record  
5 (“AR”) 245-49. The application was denied initially and on reconsideration. AR  
6 84-85. Thomas requested a hearing before an Administrative Law Judge  
7 (“ALJ”).<sup>1</sup> AR 109. On January 11, 2012, Thomas appeared at the hearing  
8 without an attorney or representative. AR 72-83. The ALJ continued the hearing  
9 to give Thomas an opportunity to hire an attorney or representative. AR 82. On  
10 March 21, 2012, Thomas appeared with an attorney. The ALJ conducted a  
11 hearing at which Thomas and a vocational expert testified. AR 37-71. On April  
12 11, 2012, the ALJ issued a decision denying benefits. AR 15-31. On November  
13 20, 2012, the Appeals Council denied the request for review. AR 4-9. This action  
14 followed.

15 II.

16 **STANDARD OF REVIEW**

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

22 “Substantial evidence” means “more than a mere scintilla but less than a  
23 preponderance – it is such relevant evidence that a reasonable mind might  
24 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In  
25 determining whether substantial evidence exists to support the Commissioner’s

---

26 <sup>1</sup> On December 1, 2010, an ALJ dismissed the request for hearing as  
27 untimely. AR 15, 86-90. Thomas appealed the determination, and on June 10,  
28 2011, the Appeals Council remanded her case for further proceedings. AR 15,  
91-94.

1 decision, the court examines the administrative record as a whole, considering  
2 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the  
3 evidence is susceptible to more than one rational interpretation, the court must  
4 defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

### 5 III.

## 6 DISCUSSION

### 7 A. Disability

8 A person qualifies as disabled, and thereby eligible for such benefits, "only  
9 if his physical or mental impairment or impairments are of such severity that he is  
10 not only unable to do his previous work but cannot, considering his age,  
11 education, and work experience, engage in any other kind of substantial gainful  
12 work which exists in the national economy." *Barnhart v. Thomas*, 540 U.S. 20,  
13 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

### 14 B. The ALJ's Findings

15 The ALJ found that Thomas met the insured status requirements through  
16 December 31, 2008. AR 17.

17 Following the five-step sequential analysis applicable to disability  
18 determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),<sup>2</sup> the  
19 ALJ found that Thomas did not engage in substantial gainful activity during the  
20 period from her alleged onset date of October 22, 2007 through her date last  
21 insured of December 31, 2008. AR 17.

22 Through the date last insured, Thomas had the severe impairments of left  
23 shoulder impingement syndrome, degenerative disc disease of the lumbar spine,  
24 degenerative joint disease of the lumbar spine, bilateral carpal tunnel syndrome,  
25

---

26 <sup>2</sup> The five-step sequential analysis examines whether the claimant  
27 engaged in substantial gainful activity, whether the claimant's impairment is  
28 severe, whether the 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 diabetes mellitus, hypertension, depression and anxiety. She had the residual  
2 functional capacity (“RFC”) to perform light work, except she could occasionally  
3 bend, stoop and climb stairs with an assistive device; could not kneel, crouch,  
4 crawl or squat; could not climb ladders, ropes or scaffolds; should have a  
5 sit/stand option of approximately 45 minutes to one hour with brief position  
6 changes; should not work at unprotected heights, around moving machinery or  
7 other hazards; should avoid concentrated exposure to vibrations; could frequently  
8 grasp bilaterally but could not repetitively grasp bilaterally; was precluded from  
9 overhead reaching or overhead work with the left upper extremity; and was  
10 limited to simple and routine tasks due to chronic pain and depression. AR 20.  
11 Thomas was unable to perform any past relevant work, but there were jobs that  
12 existed in significant numbers in the national economy that she could have  
13 performed such as parking lot toll collector, ticket taker and electronic worker. AR  
14 29-31.

15 **C. Listing 1.04**

16 Thomas contends that the ALJ erred in finding that she did not meet or  
17 equal Listing 1.04.

18 The claimant bears the burden of demonstrating that his impairments are  
19 equivalent to one of the listed impairments that are so severe as to preclude  
20 substantial gainful activity. *Bowen v. Yuckert*, 482 U.S. 137, 141, 146 n.5, 107 S.  
21 Ct. 2287, 96 L. Ed. 2d 119 (1987). “If the impairment meets or equals one of the  
22 listed impairments, the claimant is conclusively presumed to be disabled. If the  
23 impairment is not one that is conclusively presumed to be disabling, the  
24 evaluation proceeds to the fourth step.” *Id.* at 141; see also *Tackett v. Apfel*, 180  
25 F.3d 1094, 1099 (9th Cir. 1999); 20 C.F.R. §§ 404.1520(a)(4)(iii),  
26 416.920(a)(4)(iii).

27 “The listings define impairments that would prevent an adult, regardless of  
28 his age, education, or work experience, from performing *any* gainful activity, not

1 just 'substantial gainful activity.'" *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S.  
2 Ct. 885, 107 L. Ed. 2d 967 (1990) (quoting 20 C.F.R. § 416.925(a)) (emphasis in  
3 original). "For a claimant to show that his impairment matches a listing, it must  
4 meet *all* of the specified medical criteria. An impairment that manifests only some  
5 of those criteria, no matter how severely, does not qualify." *Id.* at 530 (citation  
6 omitted) (emphasis in original).

7 "To *equal* a listed impairment, a claimant must establish symptoms, signs  
8 and laboratory findings 'at least equal in severity and duration' to the  
9 characteristics of a relevant listed impairment, or, if a claimant's impairment is not  
10 listed, then to the listed impairment 'most like' the claimant's impairment."  
11 *Tackett*, 180 F.3d at 1099 (quoting 20 C.F.R. § 404.1526) (emphasis in original).  
12 "'Medical equivalence must be based on medical findings.' A generalized  
13 assertion of functional problems is not enough to establish disability at step  
14 three." *Id.* at 1100 (quoting 20 C.F.R. § 404.1526). "An ALJ must evaluate the  
15 relevant evidence before concluding that a claimant's impairments do not meet or  
16 equal a listed impairment. A boilerplate finding is insufficient to support a  
17 conclusion that a claimant's impairment does not do so." *Lewis v. Apfel*, 236 F.3d  
18 503, 512 (9th Cir. 2001).

19 Listing 1.04 governs musculoskeletal impairments and requires a claimant  
20 to show a disorder of the spine such as "herniated nucleus pulposus, spinal  
21 arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet  
22 arthritis, vertebral fracture[ ], resulting in compromise of a nerve root (including  
23 the cauda equina) or the spinal cord" with either: "A. Evidence of nerve root  
24 compression characterized by neuro-anatomic distribution of pain, limitation of  
25 motion of the spine, motor loss (atrophy with associated muscle weakness or  
26 muscle weakness) accompanied by sensory or reflex loss and, if there is  
27 involvement of the lower back, positive straight-leg raising test (sitting and  
28 supine);" "B. Spinal arachnoiditis, confirmed by an operative note or pathology

1 report of tissue biopsy, or by appropriate medically acceptable imaging,  
2 manifested by severe burning or painful dysesthesia, resulting in the need for  
3 changes in position or posture more than once every 2 hours;” or “C. Lumbar  
4 spinal stenosis resulting in pseudoclaudication, established by findings on  
5 appropriate medically acceptable imaging, manifested by chronic nonradicular  
6 pain and weakness, and resulting in inability to ambulate effectively.” 20 C.F.R.  
7 Pt. 404, Subpt. P, App. 1, § 1.04.

8 At Step Three, the ALJ found that Thomas did not have an impairment or  
9 combination of impairments that met or equaled a listed impairment. AR 18. The  
10 ALJ specifically considered Listings 1.02, 1.04, 4.00, 9.00, 11.00, 12.04 and  
11 12.06. The ALJ noted that no treating or examining physician had recorded  
12 findings equivalent in severity to the criteria of any listed impairment. The  
13 evidence did not show medical findings that were the same or equivalent to those  
14 of any listed impairment.

15 Thomas contends she met the requirements of Listings 1.04A and 1.04C.  
16 She argues that a December 2007 lumbar spine MRI noted disc protrusions  
17 encroaching upon the nerve roots, degenerative spondylolisthesis, degenerative  
18 disc changes, bilateral neuroforaminal narrowing causing effacement of the nerve  
19 roots, and bilateral facet arthrosis with ligament flava hypertrophy. AR 436-40.  
20 She argues that her gait was antalgic, her straight leg raising was positive, and  
21 she had lumbar tenderness and limited range of motion. AR 349, 470, 702.  
22 Radiation to the left hip and leg was noted. AR 473. Motor and sensory loss  
23 were noted. AR 619. She was prescribed a walker in June 2008. AR 615.

24 Thomas does not demonstrate that she met or equaled Listing 1.04A  
25 through December 31, 2008. On October 24, 2007, Thomas was found to have  
26 normal sensation and reflexes in both legs. AR 24, 702. A treatment note, dated  
27 February 1, 2008, indicated Thomas’ low back pain had decreased. AR 25, 634.  
28 On February 20, 2008, Thomas was found to have negative straight-leg raising

1 test and “motor, sensory, pulses intact.” AR 413. Thomas cites an April 28, 2008  
2 progress report noting “↓ motor, sensory,” yet on March 26, 2008, Thomas was  
3 found to have “full motor, sensory, pulses intact.” AR 619, 628. In July 2008, a  
4 state agency medical consultant noted the lack of evidence of atrophy or muscle  
5 weakness of the lower extremities, and determined Thomas did not meet Listing  
6 1.04. AR 523. An orthopedic evaluation, dated August 14, 2008, revealed  
7 diffuse tenderness and paravertebral muscular spasm across the lumbar spine  
8 from L1 to the sacrum, midline, and over the facet; decreased range of motion;  
9 positive facet compression test with extension and rotation; and positive straight  
10 leg raising at 80 degrees bilaterally. AR 25, 685. The evaluation does not  
11 indicate motor loss accompanied by sensory or reflex loss.

12 Thomas argues that progress notes indicate motor loss and muscle  
13 weakness by indicating difficulty moving from standing to sitting, 4/5 strength in  
14 both feet, 3/5 lower extremity weakness bilaterally, L5 nerve root weakness  
15 bilaterally, and incontinence and bowel dysfunction. Even assuming evidence of  
16 motor loss and muscle weakness, Thomas does not show the required evidence  
17 of accompanying sensory or reflex loss over a period of time.<sup>3</sup> See 20 C.F.R. Pt.  
18 404, Subpt. P, App. 1, § 1.00D (“Because abnormal physical findings may be  
19 intermittent, their presence over a period of time must be established by a record  
20 of ongoing management and evaluation.”). Thomas does not show medical  
21 evidence that her pain was neuro-anatomic and that the pain in the leg or hip  
22 corresponded to a specific compromised nerve root. She argues only that her  
23 pain is “reasonably interpreted as neuro-anatomic.” Reply at 1-2.

24 Thomas does not demonstrate that she met or equaled Listing 1.04C  
25 through December 31, 2008. An October 28, 2007 x-ray of the lumbar spine  
26 showed slight curvature of the upper lumbar spine to the left side and mild

---

27 <sup>3</sup> The evidence indicates that Thomas’ complaints of incontinence and  
28 bowel dysfunction began after the date last insured. AR 883, 887, 898, 919.

1 degenerative changes of the discovertebral joint. AR 24, 709. A December 10,  
2 2007 MRI of the lumbar spine revealed mild spinal canal narrowing, grade I  
3 degenerative spondylolisthesis, mild to moderate degenerative disc changes, and  
4 hypertrophy. AR 24-25, 437. Thomas has not established a disorder of the spine  
5 with lumbar spinal stenosis resulting in pseudoclaudication, established by  
6 findings on appropriate medically acceptable imaging. The Commissioner argues  
7 that Thomas has not shown chronic nonradicular pain and weakness. Thomas  
8 argues the record shows both complaints of nonradicular lower back pain and  
9 pain that radiated to the left hip and leg. Thomas' argument is not persuasive.<sup>4</sup>

10 Thomas argues that even if she did not meet Listing 1.04, she equaled it  
11 because of her left shoulder impingement syndrome, bilateral carpal tunnel  
12 syndrome, diabetes mellitus, hypertension, depression and anxiety. Thomas  
13 offers no theory as to how her impairments combined to equal a listed  
14 impairment. *Lewis*, 236 F.3d at 514 (claimant did not satisfy burden to prove that  
15 he equaled a listing when he "offered no theory, plausible or otherwise, as to how  
16 his [impairments] combined to equal a listed impairment . . . [n]or has he pointed  
17 to evidence that shows that his combined impairments equal a listed  
18 impairment."). Nor did she make such an argument to the ALJ. *See Burch v.*  
19 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005) ("An ALJ is not required to discuss  
20 the combined effects of a claimant's impairments or compare them to any listing  
21 in an equivalency determination, unless the claimant presents evidence in an  
22 effort to establish equivalence.").

23 To the extent Thomas contends a medical expert should have testified on  
24 the issue of equivalency, her contention fails. The ALJ "is responsible for  
25 deciding the ultimate legal question whether a listing is met or equaled." Social  
26

---

27 <sup>4</sup> The court does not address whether Thomas had an inability to ambulate  
28 effectively because she did not establish that she could otherwise meet Listing  
1.04C.



1 Security Ruling (“SSR”) 96-6p.<sup>5</sup> When an ALJ determines that an individual’s  
2 impairment is not equivalent to any listing, the ALJ may satisfy the duty to receive  
3 expert opinion evidence into the record by obtaining the signature of a State  
4 medical consultant on an SSA-831-U5, SSA-832-U5 or SSA-833-U5 form, or by  
5 “various other documents on which medical and psychological consultants may  
6 record their findings.” *Id.* Here, the record contains a Physical Residual  
7 Functional Capacity Assessment completed by Dr. Bitonte, a State medical  
8 consultant, showing that none of Thomas’ alleged impairments met or medically  
9 equaled a listed impairment, including Listing 1.04. AR 27, 516-23. The  
10 requirements of SSR 96-6p have been satisfied.

11 The ALJ evaluated and discussed the medical evidence in detail and  
12 correctly found that Thomas did not meet or equal a listing.<sup>6</sup> AR 18-29. The ALJ  
13 did not err.

#### 14 **D. Weight of Medical Opinion Evidence**

##### 15 1. Treating Physician

16 Thomas contends the ALJ erred in ignoring the opinion of Dr. Payne, her  
17 Qualified Medical Examiner for her workers’ compensation claim.

---

18  
19  
20 <sup>5</sup> Social Security rulings do not have the force of law. Nevertheless, they  
21 “constitute Social Security Administration interpretations of the statute it  
22 administers and of its own regulations,” and are given deference “unless they are  
plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882  
F.2d 1453, 1457 (9th Cir. 1989).

23 <sup>6</sup> See *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990) (“[i]t is  
24 unnecessary to require the Secretary, as a matter of law, to state why a claimant  
25 failed to satisfy every different section of the listing of impairments.”). In  
26 *Gonzalez*, the Ninth Circuit found that the ALJ’s summary of the medical  
27 evidence and the claimant’s testimony was sufficient, even though the ALJ did  
28 not state what evidence supported the conclusion that the impairments did not  
meet or equal the listings. *Id.* at 1200-01. “To require the ALJ’s to improve their  
literary skills in this instance would unduly burden the social security disability  
process.” *Id.* at 1201 (citation omitted); see also *Lewis*, 236 F.3d at 513 (ALJ  
need not discuss and evaluate evidence that supports his or her conclusion under  
a specific heading).

1 An opinion of a treating physician is given more weight than the opinion of  
2 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To  
3 reject an uncontradicted opinion of a medically acceptable treating source, an  
4 ALJ must state clear and convincing reasons that are supported by substantial  
5 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a  
6 treating physician’s opinion is contradicted by another doctor, “the ALJ may not  
7 reject this opinion without providing specific and legitimate reasons supported by  
8 substantial evidence in the record. This can be done by setting out a detailed  
9 and thorough summary of the facts and conflicting clinical evidence, stating his  
10 interpretation thereof, and making findings.” *Orn*, 495 F.3d at 632 (citations and  
11 quotation marks omitted). “When there is conflicting medical evidence, the  
12 Secretary must determine credibility and resolve the conflict.” *Thomas v.*  
13 *Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002).

14 Dr. Payne began treating Thomas in April 2009 for her orthopedic  
15 complaints, at which time he stated she was temporarily totally disabled. AR 660,  
16 671. He declared Thomas permanent and stationary on April 11, 2011 and  
17 assessed status post industrial fall with unstable spine, multilevel spinal stenosis  
18 at L3-L4, L4-L5 and L5-S1, spondylolisthesis at L4-L5 and neck pain. AR 894.  
19 He noted that Thomas was a surgical candidate, except for her morbid fear of  
20 surgery. *Id.* He restricted her to semi-sedentary work, which he described as a  
21 “permanent disability state.” AR 879, 894.

22 The Commissioner argues that the ALJ did not address Dr. Payne’s  
23 records because his assessments were irrelevant to the issue of whether Thomas  
24 was disabled as of December 31, 2008.

25 “The decision of an ALJ fails . . . when the ALJ completely ignores or  
26 neglects to mention a treating physician’s medical opinion that is relevant to the  
27 medical evidence being discussed.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1045  
28 (9th Cir. 2007). Even assuming the ALJ erred in not discussing Dr. Payne’s

1 opinion, any error was harmless because his records would not have changed  
2 the ALJ's ultimate nondisability determination. See *Stout v. Comm'r of Soc. Sec.*  
3 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (ALJ's error harmless where it is  
4 "inconsequential to the ultimate nondisability determination"). Dr. Payne's  
5 records indicate that four months after Thomas' date last insured, there was very  
6 little lumbar spine range of motion, but her gait was normal, she had normal  
7 lumbar lordosis and equivocal Lasegue's, the spinous processes were non-tender  
8 to light and deep palpation in the lumbar spine, there was no sciatic notch or  
9 buttock pain to light and deep palpation, there was no obvious asymmetry or  
10 atrophy to the spine or lower extremities, and sensation was intact according to  
11 the lumbar spine dermatomes to the lower extremities bilaterally. AR 667-68,  
12 670. Dr. Payne's records also document Thomas' continuing refusal to comply  
13 with recommended treatment.

## 14 2. Workers' Compensation Physicians

15 Thomas contends that the ALJ erred in assigning little weight to the  
16 opinions of the workers' compensation physicians.

17 An ALJ "may not disregard a physician's medical opinion simply because it  
18 was initially elicited in a state workers' compensation proceeding, or because it is  
19 couched in the terminology used in such proceedings." *Booth v. Barnhart*, 181 F.  
20 Supp. 2d 1099, 1105 (C.D. Cal. 2002). "Instead, the ALJ must evaluate medical  
21 opinions couched in state workers' compensation terminology just as he or she  
22 would evaluate any other medical opinion." *Id.*

23 The ALJ indicated that she had read and considered the opinions of the  
24 workers' compensation physicians indicating that Thomas was "totally  
25 incapacitated," could not return to her regular and customary work, could not  
26 work, and was to remain off work. AR 27, 390, 394-95, 402, 409-11, 417, 421,  
27 428, 459, 465-66, 472, 474-75, 485, 579, 585, 591, 597, 620, 627. The ALJ  
28 distinguished the disability criteria used in workers' compensation law from the

1 criteria used under the Social Security Act. AR 27. The ALJ noted that an  
2 opinion on an issue reserved to the Commissioner was not entitled to controlling  
3 weight. *Id.* The ALJ noted that the clinical findings in the record were consistent  
4 with a conclusion that Thomas could do work with her RFC. *Id.* The ALJ noted  
5 that the workers' compensation physicians examined Thomas solely in the  
6 context of a workers' compensation claim, which affected their credibility and the  
7 relevance of their opinions. AR 27-28.

8 Thomas argues that the ALJ's rationale would allow wholesale rejection of  
9 the opinions of workers' compensation physicians without considering the content  
10 of those opinions.

11 "[I]t is important to distinguish between those portions of the physicians'  
12 reports that represent the physicians' medical findings and those portions of the  
13 reports that represent conclusions as to the claimant's disability for purposes of  
14 worker's compensation." *Coria v. Heckler*, 750 F.2d 245, 247 (9th Cir. 1984).  
15 Because the tests for Social Security disability and workers' compensation are  
16 different, "the ALJ could reasonably disregard so much of the physicians' reports  
17 as set forth their conclusions as to [the claimant's] disability for worker's  
18 compensation purposes." *Id.* "On the other hand, the physicians' findings, *qua*  
19 findings, do not necessarily suffer from similar defects." *Id.* at 248 (italics in  
20 original). "[T]he ALJ should evaluate the objective medical findings set forth in  
21 the medical reports for submission with the worker's compensation claim by the  
22 same standards that s/he uses to evaluate medical findings in reports made in  
23 the first instance for the Social Security claim, unless there is some reasonable  
24 basis to believe a particular report or finding is not entitled to comparable weight."  
25 *Id.*

26 The ALJ properly considered the findings and opinions of the workers'  
27 compensation physicians. AR 27, 29. The ALJ noted that their findings revealed  
28 radiating pain to both legs, tenderness to palpitations, decreased range of motion,

1 positive straight leg raising, positive deep tendon reflexes, positive Kemps' test,  
2 decreased lower extremity motor, and difficulty changing positions from standing  
3 to sitting. AR 24, 386, 411, 415, 419, 427, 444, 468, 470, 473, 481, 490-92, 494,  
4 572, 578, 584, 590, 602, 605, 615, 619. She noted that Thomas was treated  
5 conservatively with physical therapy, chiropractic treatments, medications and a  
6 walker. AR 24. She noted the treatment was somewhat effective because  
7 Thomas reported improvement. AR 24, 434, 464. The ALJ did not err.

### 8 3. State Agency Physicians

9 Thomas contends the ALJ erred in assigning greater weight to the State  
10 Agency medical consultants than to contradicting treating source records.

11 The State Agency medical consultants all assessed that Thomas could  
12 perform a range of light work, with some differences in the degree of specific  
13 function-by-function limitations. AR 27, 516-23, 645-46, 674-78.

14 Although the ALJ did not completely adopt a single assessment as the  
15 RFC, she gave "some weight" to the opinions of the State Agency medical  
16 consultants. AR 27. "The opinion of a nonexamining physician cannot by itself  
17 constitute substantial evidence that justifies the rejection of the opinion of either  
18 an examining physician *or* a treating physician." *Ryan v. Comm'r of Soc. Sec.*  
19 *Admin.*, 528 F.3d 1194, 1202 (9th Cir. 2008) (citation omitted) (emphasis in  
20 original). However, a non-examining physician's opinion may serve as  
21 substantial evidence when it is supported by other evidence in the record and is  
22 consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); see  
23 *also Thomas*, 278 F.3d at 957. The ALJ found the opinions of the State Agency  
24 medical consultants generally consistent in that they all assessed Thomas as  
25 able to perform a range of work at the light exertional level. The ALJ also found  
26 their opinions reasonable and supported by the record as a whole. The ALJ  
27 adopted only the restrictions that were best supported by the objective evidence  
28 as a whole and Thomas' testimony. AR 27.

1 Thomas argues that other evidence in the record was inconsistent with the  
2 opinions of the non-treating, non-examining physicians. However, evidence in  
3 the record was consistent with the opinions of the State Agency medical  
4 consultants that Thomas could perform an array of light work. For example, in  
5 December 2007, an MRI of the lumbar spine showed mild spinal canal narrowing  
6 and mostly mild degenerative disc changes. AR 24-25, 437. In January 2008,  
7 Thomas had a normal EMG of the lower extremities. AR 25, 358, 523. Four  
8 months after the date last insured, Thomas had a normal gait, equivocal  
9 Lasegue's, and intact sensation. AR 646, 667-68, 670.

10 Thomas argues it was improper for the ALJ to rely on the opinions of the  
11 State Agency medical consultants because they rendered their opinions in July  
12 2008, September 2009, and October 2009, "years before the record was fully  
13 developed." MSJ at 9; AR 516-23, 645-46, 674-78. The State Agency medical  
14 consultants reviewed the significant objective findings in the record from October  
15 2007 through Dr. Payne's evaluation in April 2009. AR 516-23, 645-46, 674-78.  
16 In 2012, Thomas' attorney produced over 600 additional documents from October  
17 2007 through November 2011. AR 683-1302. The majority of the documents are  
18 dated long after the date last insured. The documents include an August 2008  
19 report from Dr. Akmakjian, an orthopedic surgeon. AR 684-86. A State Agency  
20 medical consultant specifically considered a similar report from Dr. Akmakjian,  
21 dated May 15, 2008. AR 490-92, 522. The Kaiser records from 2007 are from  
22 Thomas' October 2007 emergency room visit when she fell and a December  
23 2007 emergency room visit for a cough and shortness of breath. AR 952-79.  
24 The Kaiser records do not contain any relevant objective findings that would have  
25 influenced the opinions of the State Agency medical consultants. The remaining  
26 Kaiser records are from 2010-2011. AR 980-1200. The ALJ properly relied on  
27 the opinions of the State Agency medical consultants. The ALJ did not err.

28

1           **E. RFC Determination**

2           Thomas contends the ALJ's RFC determination was "internally inconsistent  
3 or misleading to the point of misinterpretation." Reply at 7.

4           The RFC determination measures the claimant's capacity to engage in  
5 basic work activities. *Bowen v. New York*, 476 U.S. 467, 471, 106 S. Ct. 2022,  
6 90 L. Ed. 2d 462 (1986). The RFC is a determination of "the most [an individual]  
7 can still do despite [his or her] limitations." 20 C.F.R. § 404.1545(a). It is an  
8 administrative finding, not a medical opinion. 20 C.F.R. § 404.1527(e)(2). The  
9 RFC takes into account both exertional limitations and non-exertional limitations.  
10 The RFC must contain "a narrative discussion describing how the evidence  
11 supports each conclusion, citing specific medical facts (e.g., laboratory findings)  
12 and nonmedical evidence (e.g., daily activities, observations)." SSR 96-8p. The  
13 ALJ must also explain how he or she resolved material inconsistencies or  
14 ambiguities in the record. *Id.* "When there is conflicting medical evidence, the  
15 Secretary must determine credibility and resolve the conflict." *Thomas*, 278 F.3d  
16 947, 956-57 (citation omitted).

17           In pertinent part, the ALJ's RFC determination was that Thomas could  
18 perform light work, except she was limited to occasional bending, stooping, and  
19 climbing stairs with an assistive device, and she could frequently grasp bilaterally.  
20 AR 20.

21           Thomas argues that the ALJ should have been explicit in the RFC if an  
22 assistive device was required only for bending, stooping and climbing of stairs. If  
23 an assistive device was not necessary for all standing and walking, she argues  
24 the ALJ should have provided clear and convincing reasons for rejecting the use  
25 of an assistive device since she has regularly used a walker since 2008. If an  
26 assistive device was necessary for all standing and walking, she argues her RFC  
27 is inconsistent in allowing for frequent grasping bilaterally because she could not  
28

1 grasp a walker for 3/4 of each day and use her hands for grasping for 1/3 to 2/3  
2 of each day.

3 This matter is being remanded for clarification of Thomas' credibility, and in  
4 particular the issue of an assistive device. The ALJ is free to reconsider the RFC  
5 on remand and medical records associated with use of the assistive device.

6 **F. Credibility**

7 Thomas contends the ALJ's credibility finding conflicts with the RFC  
8 finding.

9 "To determine whether a claimant's testimony regarding subjective pain or  
10 symptoms is credible, an ALJ must engage in a two-step analysis." *Lingenfelter*,  
11 504 F.3d at 1035-36. At step one, "the ALJ must determine whether the claimant  
12 has presented objective medical evidence of an underlying impairment 'which  
13 could reasonably be expected to produce the pain or other symptoms alleged.'"  
14 *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)).

15 "Second, if the claimant meets this first test, and there is no evidence of  
16 malingering, the ALJ can reject the claimant's testimony about the severity of her  
17 symptoms only by offering specific, clear and convincing reasons for doing so."  
18 *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). "In making  
19 a credibility determination, the ALJ 'must specifically identify what testimony is  
20 credible and what testimony undermines the claimant's complaints[.]'" *Greger v.*  
21 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted).

22 In weighing credibility, the ALJ may consider factors including: the nature,  
23 location, onset, duration, frequency, radiation, and intensity of any pain;  
24 precipitating and aggravating factors (e.g., movement, activity, environmental  
25 conditions); type, dosage, effectiveness, and adverse side effects of any pain  
26 medication; treatment, other than medication, for relief of pain; functional  
27 restrictions; the claimant's daily activities; and "ordinary techniques of credibility  
28 evaluation." *Bunnell*, 947 F.2d at 346 (citing SSR 88-13) (quotation marks



1 omitted). The ALJ may consider: (a) inconsistencies or discrepancies in a  
2 claimant's statements; (b) inconsistencies between a claimant's statements and  
3 activities; (c) exaggerated complaints; and (d) an unexplained failure to seek  
4 treatment. *Thomas*, 278 F.3d at 958-59.

5 The ALJ found that Thomas' medically determinable impairments could  
6 reasonably be expected to cause the alleged symptoms, and her statements  
7 concerning the intensity, persistence and limiting effects of her symptoms were  
8 credible. AR 21. The ALJ found Thomas credible despite her finding that  
9 Thomas' activities of daily living were not limited to the extent one would expect  
10 given her complaints of disabling symptoms and limitations. The ALJ determined  
11 that Thomas' alleged symptoms and limitations were consistent with the RFC and  
12 did not support a finding of disability. *Id.*

13 Thomas argues that the ALJ's RFC assessment was inconsistent with the  
14 ALJ's finding that her statements concerning the intensity, persistence and  
15 limiting effects of her symptoms were credible. She contends that she testified  
16 that she had radiating pain down into her legs and swollen feet if she sat for too  
17 long; had daily pain at 8/10; could only carry her purse and one additional bag;  
18 could stand for about five minutes at one time before she started having pain;  
19 could walk only three to five steps at a time before having to pause and take a  
20 break; had great difficulty sitting and had to shift positions frequently; did not do  
21 any household chores; had an in-home support services attendant; and had  
22 numbness and tingling in her hand if she tried to write. AR 53-54, 57-58, 64-65.

23 The Commissioner counters that the ALJ's credibility finding does not  
24 conflict with the RFC finding. The Commissioner argues there is no conflict  
25 because the RFC finding relates only to the time period of October 22, 2007 to  
26 December 31, 2008, and Thomas did not testify that she had severe limitations  
27 during that time period. The Commissioner also argues there is no conflict  
28

1 because the ALJ expressly found that Thomas' current condition was partially  
2 due to her conscious decision not to follow recommended treatment.

3 The ALJ noted the impairments and resulting limitations Thomas described  
4 both during the period at issue and at the hearing. AR 21. The ALJ noted  
5 Thomas' allegations of radiating pain from her back to her legs, swollen feet,  
6 muscle spasms in her shoulder, and numbness and tingling in her right hand. AR  
7 20. In her July 16, 2008 Function Report, Thomas stated she has difficulty lifting,  
8 squatting, bending, standing, reaching, walking, sitting, kneeling, climbing stairs,  
9 completing tasks, concentrating, using hands, following spoken instructions, and  
10 handling stress and changes in routine. AR 21, 275-81. She uses a walker,  
11 which was prescribed in May 2008, or a motorized cart. AR 280. Her  
12 impairments affect her sleep. AR 21, 275. She spends most of her day in bed,  
13 watching television and using the internet on her laptop, although she prepares  
14 her own meals, irons clothes for five minutes, attends monthly meetings at a  
15 community center and is able to handle money. AR 21, 274-81. All movement  
16 and activities increase pain. AR 277, 281. When she walks, she does not walk  
17 much past the distance from the handicapped parking area to the door. AR 279.  
18 She gets depressed and has anxiety attacks. AR 281. At the hearing, Thomas  
19 testified that her care provider from in-home support services does all the  
20 housework, but she sometimes picks up her 15-year old great-niece<sup>7</sup> from school,  
21 goes grocery shopping, and goes out to eat and shop with her great-niece. AR  
22 21, 49-52. She testified that she typically uses her walker unless she is "just  
23 going a short distance from my bed." AR 52. She came to the hearing with a  
24 rolling walker with a seat, on which she sat throughout the hearing. AR 21. She  
25 stood on several occasions throughout the 47-minute hearing for about one to  
26 two minutes. *Id.*

---

27  
28 <sup>7</sup> At the hearing, Thomas described the 15-year old as her daughter. AR  
49.

1 While the ALJ expressly found Thomas credible, the RFC does not  
2 appear to include all of the limitations she described. For example, the RFC  
3 includes no provision for use of an assistive device, except when Thomas  
4 occasionally bends, stoops or climbs stairs. AR 20. Even assuming Thomas'  
5 testimony at the hearing does not concern the limitations she experienced from  
6 the October 22, 2007 to December 31, 2008 time period, the July 2008 Function  
7 Report does. If the ALJ rejected some of Thomas' subjective complaints, she  
8 must give clear and convincing reasons for doing so.

9 Remand is appropriate for clarification regarding Thomas' credibility.

10 **IV.**

11 **ORDER**

12 IT IS HEREBY ORDERED that the decision of the Commissioner is  
13 reversed and the matter remanded for further proceedings consistent with this  
14 opinion.

15 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and  
16 the Judgment herein on all parties or their counsel.

17  
18  
19 DATED: September 26, 2014



---

ALICIA G. ROSENBERG  
United States Magistrate Judge