

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

VIRGINIA CHAVEZ,	)	Case No. EDCV 14-1547-JPR
	)	
Plaintiff,	)	
	)	<b>MEMORANDUM OPINION AND ORDER</b>
v.	)	<b>AFFIRMING COMMISSIONER</b>
	)	
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner’s final decision denying her application for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed July 9, 2015, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is affirmed.

1 **II. BACKGROUND**

2 Plaintiff was born in 1958. (Administrative Record ("AR")  
3 176.) She received a master's degree in educational counseling  
4 and worked as an employment-claim aide, census taker, and medical  
5 service technician. (AR 20, 35.)

6 On January 21, 2011, Plaintiff filed applications for DIB  
7 and SSI (AR 176), alleging that she had been unable to work since  
8 January 5, 2010, because of "right leg injury"; tendonitis in  
9 both arms, her right shoulder, and her right leg; and lower- and  
10 upper-back pain (AR 207). After her applications were denied  
11 initially and on reconsideration, she requested a hearing before  
12 an Administrative Law Judge. (AR 75.) A hearing was held on  
13 February 8, 2013, at which Plaintiff, who was represented by  
14 counsel, testified, as did a vocational expert. (AR 33-60.) In  
15 a written decision issued February 22, 2013, the ALJ found  
16 Plaintiff not disabled. (AR 10-21.) On June 5, 2014, the  
17 Appeals Council denied Plaintiff's request for review. (AR 1.)  
18 This action followed.

19 **III. STANDARD OF REVIEW**

20 Under 42 U.S.C. § 405(g), a district court may review the  
21 Commissioner's decision to deny benefits. The ALJ's findings and  
22 decision should be upheld if they are free of legal error and  
23 supported by substantial evidence based on the record as a whole.  
24 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra  
25 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial  
26 evidence means such evidence as a reasonable person might accept  
27 as adequate to support a conclusion. Richardson, 402 U.S. at  
28 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).

1 It is more than a scintilla but less than a preponderance.  
2 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.  
3 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
4 substantial evidence supports a finding, the reviewing court  
5 "must review the administrative record as a whole, weighing both  
6 the evidence that supports and the evidence that detracts from  
7 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
8 720 (9th Cir. 1996). "If the evidence can reasonably support  
9 either affirming or reversing," the reviewing court "may not  
10 substitute its judgment" for that of the Commissioner. Id. at  
11 720-21.

#### 12 **IV. THE EVALUATION OF DISABILITY**

13 People are "disabled" for purposes of receiving Social  
14 Security benefits if they are unable to engage in any substantial  
15 gainful activity owing to a physical or mental impairment that is  
16 expected to result in death or has lasted, or is expected to  
17 last, for a continuous period of at least 12 months. 42 U.S.C.  
18 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.  
19 1992).

##### 20 A. The Five-Step Evaluation Process

21 The ALJ follows a five-step sequential evaluation process to  
22 assess whether a claimant is disabled. 20 C.F.R.  
23 §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821,  
24 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first  
25 step, the Commissioner must determine whether the claimant is  
26 currently engaged in substantial gainful activity; if so, the  
27 claimant is not disabled and the claim must be denied.  
28 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

1 If the claimant is not engaged in substantial gainful  
2 activity, the second step requires the Commissioner to determine  
3 whether the claimant has a "severe" impairment or combination of  
4 impairments significantly limiting her ability to do basic work  
5 activities; if not, the claimant is not disabled and her claim  
6 must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If the claimant has a "severe" impairment or combination of  
8 impairments, the third step requires the Commissioner to  
9 determine whether the impairment or combination of impairments  
10 meets or equals an impairment in the Listing of Impairments  
11 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix  
12 1; if so, disability is conclusively presumed.  
13 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

14 If the claimant's impairment or combination of impairments  
15 does not meet or equal an impairment in the Listing, the fourth  
16 step requires the Commissioner to determine whether the claimant  
17 has sufficient residual functional capacity ("RFC")<sup>1</sup> to perform  
18 her past work; if so, she is not disabled and the claim must be  
19 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant  
20 has the burden of proving she is unable to perform past relevant  
21 work. Drouin, 966 F.2d at 1257. If the claimant meets that  
22 burden, a prima facie case of disability is established. Id.

23 If that happens or if the claimant has no past relevant  
24 work, the Commissioner then bears the burden of establishing that  
25 the claimant is not disabled because she can perform other  
26

---

27 <sup>1</sup> RFC is what a claimant can do despite existing exertional  
28 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper  
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 substantial gainful work available in the national economy.  
2 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.  
3 That determination comprises the fifth and final step in the  
4 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);  
5 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

6 B. The ALJ's Application of the Five-Step Process

7 At step one, the ALJ found that Plaintiff had not engaged in  
8 substantial gainful activity since January 5, 2010, the alleged  
9 onset date. (AR 12.) At step two, she concluded that Plaintiff  
10 had severe impairments of tendonitis, right-knee osteoarthritis,  
11 "history of chondromalacia patella grade III, status post-  
12 surgery," lumbar-disc disease with radiculitis, right-shoulder  
13 impingement, "right carpal tunnel syndrome," adjustment disorder  
14 "with anxious mood," and migraine headaches. (Id.) At step  
15 three, the ALJ determined that Plaintiff's impairments did not  
16 meet or equal a listing. (AR 13.)

17 At step four, the ALJ found that Plaintiff had the RFC to  
18 perform light work with additional restrictions. (AR 14.)  
19 Plaintiff was precluded from repetitive, constant pushing and  
20 pulling with her right lower extremity but could occasionally  
21 bend, stoop, climb steps, balance, kneel, crouch, crawl, and  
22 squat. (Id.) She was precluded from repetitive, constant use of  
23 "the right upper extremity of the right dominant hand." (Id.)  
24 She could occasionally climb ladders, ropes, or scaffolds but was  
25 precluded from working around moving machinery and other hazards.  
26 (Id.) She was to "avoid concentrated exposure to vibration,  
27 extreme temperatures, and walking on uneven terrain." (Id.) She  
28 was also "to avoid jobs that require hypervigilance or intense

1 concentration on a particular task" for which she "could not be  
2 off tasks [sic] even for a briefest amount of time" or for which  
3 "safety might be an issue." (Id.)

4 Based on the VE's testimony, the ALJ concluded that  
5 Plaintiff could perform her past relevant work as an employment-  
6 claim aide, census taker, and medical service technician. (AR  
7 20.) Accordingly, she found her not disabled. (AR 21.)

## 8 **V. DISCUSSION**

9 Plaintiff claims that the ALJ erred in finding that her  
10 impairments did not meet or equal Listing 1.03 and in assessing  
11 her credibility. (J. Stip. at 3.) For efficiency, the Court  
12 addresses Plaintiff's contentions in reverse order.

### 13 A. The ALJ Properly Assessed Plaintiff's Credibility

#### 14 1. Applicable law

15 An ALJ's assessment of symptom severity and claimant  
16 credibility is entitled to "great weight." See Weetman v.  
17 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended); Nyman v.  
18 Heckler, 779 F.2d 528, 531 (9th Cir. 1986) (as amended). "[T]he  
19 ALJ is not 'required to believe every allegation of disabling  
20 pain, or else disability benefits would be available for the  
21 asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A).'"  
22 Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (quoting  
23 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

24 In evaluating a claimant's subjective symptom testimony, the  
25 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d  
26 at 1035-36. "First, the ALJ must determine whether the claimant  
27 has presented objective medical evidence of an underlying  
28 impairment '[that] could reasonably be expected to produce the

1 pain or other symptoms alleged.'" Id. at 1036 (quoting Bunnell  
2 v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). If  
3 such objective medical evidence exists, the ALJ may not reject a  
4 claimant's testimony "simply because there is no showing that the  
5 impairment can reasonably produce the degree of symptom alleged."  
6 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in  
7 original).

8 If the claimant meets the first test, the ALJ may discredit  
9 the claimant's subjective symptom testimony only if she makes  
10 specific findings that support the conclusion. See Berry v.  
11 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or  
12 affirmative evidence of malingering, the ALJ must provide "clear  
13 and convincing" reasons for rejecting the claimant's testimony.  
14 Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir. 2015);  
15 Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th  
16 Cir. 2014); Ghanim v. Colvin, 763 F.3d 1154, 1163 & n.9 (9th Cir.  
17 2014).

18 In assessing a claimant's credibility, the ALJ may consider,  
19 among other factors, (1) ordinary techniques of credibility  
20 evaluation, such as the claimant's reputation for lying, prior  
21 inconsistent statements, and other testimony by the claimant that  
22 appears less than candid; (2) unexplained or inadequately  
23 explained failure to seek treatment or to follow a prescribed  
24 course of treatment; (3) the claimant's daily activities; (4) the  
25 claimant's work record; and (5) testimony from physicians and  
26 third parties. Rounds v. Comm'r Soc. Sec. Admin., 795 F.3d 1177,  
27 1186 (9th Cir. 2015); Thomas v. Barnhart, 278 F.3d 947, 958-59  
28 (9th Cir. 2002). If the ALJ's credibility finding is supported

1 by substantial evidence in the record, the reviewing court "may  
2 not engage in second-guessing." Thomas, 278 F.3d at 959.

3 2. Relevant background

4 In an Exertion Questionnaire completed on February 18, 2011,  
5 Plaintiff stated that her arms hurt when she carried a laundry  
6 basket or held a cell phone "too long." (AR 224-25.) She would  
7 drop her keys and other "normal things" from her hands. (AR  
8 224.) Although she never timed how long she could walk, she  
9 could walk at the mall. (Id.) Plaintiff was able to climb  
10 stairs, but her legs would hurt and her knees would "buckle up"  
11 so that she couldn't "stand in attention." (AR 225.) Plaintiff  
12 washed dishes "on a daily basis" (id.) but could not mop or  
13 vacuum (AR 226). She could drive for 30 to 45 minutes. (AR  
14 225.) In the section asking whether she used any assistive  
15 devices for walking, Plaintiff stated, "Have use[d] crutches to  
16 go to work and cane when my leg hurts a lot," and "Have used a  
17 walker to get to work also." (AR 226.) She also used a splint  
18 on her left arm after an accident in December 2009. (Id.)

19 At the hearing, Plaintiff testified that she fell on the  
20 escalator at work and twisted her right leg and right arm. (AR  
21 38-39; see AR 311 (injury occurred in Oct. 2009).) In December  
22 2009, she was hit by a car. (AR 39; see AR 507 (car hit  
23 Plaintiff's left elbow).) She testified that she had pain in her  
24 right knee, legs, neck, shoulder, back, and wrist (AR 43, 46, 48)  
25 and rated her daily pain eight on a scale of 10 even with pain  
26 medication (AR 43). She stated that she wasn't able to type  
27 because of forearm pain. (AR 47-48.) Wearing a brace "help[ed]  
28 a little bit," but ever since her accident the pain was "so



1 piercing" that she couldn't type. (AR 48.) She later testified,  
2 however, that she could lift her arms overhead (AR 46), reach out  
3 in front (id.), and move her neck up, down, left, and right  
4 without any problems (AR 49). Plaintiff testified that she last  
5 worked at all, two days a month, in October 2010, and that her  
6 most recent full-time work ended in January 2009. (AR 35-37.)  
7 On dates significantly later than that, however, Plaintiff  
8 complained to doctors or other medical providers of stress "at  
9 work." (See, e.g., AR 404 (Plaintiff complaining in March 2011  
10 that "for several months she has been under increased stress at  
11 work as well as through the National Guard"), 544 (complaining in  
12 April 2011 of "feeling harassed by supervisors at both civilian  
13 work at [sic] with Natl Guard").) She acknowledged that she  
14 continued to seek full-time employment after her alleged onset  
15 date. (AR 42.)

16 Plaintiff testified that in October 2011 she had surgery on  
17 her right knee to "take her meniscus out."<sup>2</sup> (AR 46.) She stated  
18 that "it still hurt[]" and was "still painful," "too painful to  
19 even exercise." (Id.) When the ALJ asked her if she ever did  
20 physical therapy for her knees, she said no. (AR 47.)

21 Plaintiff testified that she could stand or walk for an hour  
22 without needing to sit and could sit for a "couple of hours"  
23 before needing to get up. (AR 41.) She needed help lifting  
24 groceries. (Id.) She had a valid driver's license and could  
25

---

26 <sup>2</sup> Meniscus is cartilage that cushions the space between the  
27 bones in the knee. See Knee arthroscopy, MedlinePlus,  
28 <http://www.nlm.nih.gov/medlineplus/ency/article/002972.htm> (last  
updated Jan. 17, 2013). Surgery is used to repair or remove torn  
meniscus. See id.

1 "drive okay." (Id.)

2 Plaintiff further testified that she suffered from severe  
3 migraine headaches about three or four times a month. (AR 49-  
4 50.)<sup>3</sup> She was depressed because she couldn't "function like  
5 [she] did before." (AR 50.)

6 3. Analysis

7 The ALJ found that "[Plaintiff's] allegations concerning the  
8 intensity, persistence and limiting effects of her symptoms  
9 [were] partially credible." (AR 15; see also AR 17 (finding  
10 Plaintiff's allegations "not entirely credible".)) As discussed  
11 below, she provided clear and convincing reasons for doing so.

12 The ALJ found that Plaintiff's alleged symptoms and  
13 limitations were "greater than expected in light of the objective  
14 evidence of record as a whole." (AR 15-16.) Specifically, she  
15 noted that the record contained "no restrictions recommended by  
16 the treating doctor" and "no significant diagnostic findings."  
17 (AR 16.) She summarized the results of numerous x-rays and MRIs  
18 showing mild or unremarkable findings. (AR 18.) For example, a  
19 November 2009 x-ray of her right elbow showed no evidence of  
20 fracture, dislocation, or acute osseous abnormality. (AR 316.)  
21 A December 2009 x-ray of her left elbow after her car accident  
22 showed no fracture or subluxation, bony mineralization within  
23 normal limits, and unremarkable alignment. (AR 384.) A December  
24 2009 MRI of her lower back revealed minor facet arthropathy<sup>4</sup> but

---

25  
26 <sup>3</sup> In September 2012, she apparently told a chiropractor that  
her headaches were "mild . . . with pounding." (AR 567.)

27 <sup>4</sup> Arthropathy is disease affecting a joint. See Stedman's  
28 (continued...)

1 was otherwise unremarkable. (AR 315.) A February 2010 x-ray of  
2 her left shoulder showed no detectable abnormality. (AR 383.) A  
3 May 2010 MRI of her cervical spine revealed small disc  
4 protrusions but no neural impingement. (AR 382.) A July 2010  
5 MRI of her right shoulder showed mild impingement with tendonitis  
6 but no evidence of rotator-cuff tear. (AR 572.)

7 The ALJ also noted that there was "no evidence of atrophy in  
8 [Plaintiff's] evidence as a whole" (AR 16), later citing a  
9 February 2011 treatment note in which one of Plaintiff's treating  
10 physicians observed "no evidence of any obvious muscle atrophy"  
11 in her shoulders, arms, forearms, or hands (AR 17, 373). See  
12 Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (as amended)  
13 (affirming ALJ's discounting of claimant's allegations, including  
14 that claimant "did not exhibit muscular atrophy"); Spurlock v.  
15 Colvin, No. EDCV 14-01521-JEM, 2015 WL 1735196, at \*8 (C.D. Cal.  
16 Apr. 16, 2015) (finding that lack of muscle atrophy is legitimate  
17 consideration in evaluating claimant's credibility). The ALJ was  
18 entitled to consider the lack of objective medical evidence in  
19 assessing Plaintiff's credibility. See Burch v. Barnhart, 400  
20 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence  
21 cannot form the sole basis for discounting pain testimony, it is  
22 a factor that the ALJ can consider in his credibility  
23 analysis."); Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d  
24 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical  
25 record is a sufficient basis for rejecting the claimant's  
26

---

27 <sup>4</sup> (...continued)  
28 Medical Dictionary 150 (27th ed. 2000).

1 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in  
2 determining credibility, ALJ may consider "whether the alleged  
3 symptoms are consistent with the medical evidence").

4 The ALJ also found Plaintiff not entirely credible because  
5 her statements regarding her symptoms and limitations were  
6 "generally . . . inconsistent and unpersuasive." (AR 16.) She  
7 noted that although Plaintiff testified that she had pain in her  
8 right knee, leg, neck, shoulder, back, and wrist (AR 43, 46, 48)  
9 and rated her daily pain eight on a scale of 10 even with pain  
10 medication (AR 43), she also said that she could lift her arms  
11 overhead (AR 46), reach out in front (id.), and move her neck up,  
12 down, left, and right without any problems (AR 49). The ALJ  
13 noted that although Plaintiff alleged that she was depressed and  
14 could not function like she used to, she "did not demonstrate or  
15 manifest any difficulty concentrating during the hearing," and  
16 she "appeared to process the questions without difficulty, and to  
17 respond to the questions appropriately and immediately." (AR 17;  
18 see AR 50.) Moreover, as the ALJ noted, even after her alleged  
19 onset date, Plaintiff held herself out as available for work by  
20 receiving unemployment benefits and applying for jobs. (AR 35-  
21 37, 42.)

22 These inconsistencies were a clear and convincing reason for  
23 discrediting Plaintiff's allegations. See Smolen, 80 F.3d at  
24 1284 (in assessing credibility, ALJ may consider "ordinary  
25 techniques of credibility evaluation," such as prior inconsistent  
26 statements); Carmickle, 533 F.3d at 1161-62 (noting that receipt  
27 of unemployment benefits can undermine claimant's allegations if  
28 she held herself out as available to work); Reyes v. Colvin, No.

1 CV 13-4850-MAN, 2015 WL 349352, at \*7 (C.D. Cal. Jan. 23, 2015)  
2 (finding that ALJ gave clear and convincing reason for  
3 discrediting claimant's testimony when she alleged difficulty  
4 with paying attention but answered questions at hearing "cogently  
5 and rationally without undue hesitation").

6 The ALJ also discredited Plaintiff's allegations because the  
7 record showed that her treatments were "essentially routine and  
8 conservative in nature." (AR 16.) Specifically, the "lack of  
9 more aggressive treatment[,] surgical intervention or even a  
10 referral to a specialist" suggested that her symptoms and  
11 limitations were not as severe as she alleged. (Id.) Although  
12 Plaintiff did in fact see several specialists – two orthopedic  
13 surgeons for her knee, shoulders, elbows, and arms (see AR 372)  
14 and a specialist in physical medicine and rehabilitation for her  
15 neck (see AR 443, 447) – none of them recommended surgery (see AR  
16 371-74, 415-17, 443-48). Plaintiff testified at the hearing that  
17 she had surgery in October 2011 to "take her meniscus out" (AR  
18 46), but the record contains no medical evidence of such a  
19 surgery. Additionally, Plaintiff "responded well" and could  
20 "walk better" after injections to her knee (AR 371-72) and had  
21 "good pain relief" from injections to her neck (AR 443, 447).

22 Although some courts have held that injections do not  
23 constitute conservative treatment, those cases involved claimants  
24 whose pain was treated (generally ineffectively) with a series of  
25 regular injections and more invasive procedures. See, e.g.,  
26 Lapeirre-Gutt v. Astrue, 382 F. App'x 662, 664 (9th Cir. 2010)  
27 (treatment with narcotic pain medication, occipital nerve blocks,  
28 trigger-point injections, and cervical-fusion surgery not

1 conservative); Christie v. Astrue, No. CV 10-3448-PJW, 2011 WL  
2 4368189, at \*4 (C.D. Cal. Sept. 16, 2011) (treatment with  
3 "narcotic pain medication, steroid injections, trigger point  
4 injections, epidural shots, and cervical traction" not  
5 conservative); Samaniego v. Astrue, No. EDCV 11-865 JC, 2012 WL  
6 254030, at \*4 (C.D. Cal. Jan. 27, 2012) (treatment not  
7 conservative when claimant was treated "on a continuing basis"  
8 with steroid and anesthetic "trigger point injections,"  
9 occasional epidural injections, and narcotic medication and  
10 doctor recommended "significantly invasive surgery"); Huerta v.  
11 Astrue, No. EDCV 07-1617-RC, 2009 WL 2241797, at \*4 (C.D. Cal.  
12 July 22, 2009) (treatment by surgery and "a series of epidural  
13 steroid injections into [claimant's] cervical spine" not  
14 conservative). Here, Plaintiff received injections only as  
15 needed and not as part of a regular treatment plan that also  
16 involved more aggressive treatment, like surgery.

17 That Plaintiff received only conservative care was a clear  
18 and convincing basis on which to discount her complaints of  
19 disabling pain. See Tommasetti v. Astrue, 533 F.3d 1035, 1040  
20 (9th Cir. 2008) (that claimant "did not seek an aggressive  
21 treatment plan" and had favorable response to conservative  
22 treatment with physical therapy, transcutaneous-electrical-nerve-  
23 stimulation unit, lumbosacral corset, and anti-inflammatory  
24 medication undermined allegations of disabling impairment);  
25 Parra, 481 F.3d at 751 (evidence of conservative treatment  
26 sufficient to discount claimant's testimony regarding severity of  
27 impairment); Walter v. Astrue, No. EDCV 09-1569 AGR, 2011 WL  
28 1326529, at \*3 (C.D. Cal. Apr. 6, 2011) (ALJ permissibly

1 discredited claimant's allegations based on conservative  
2 treatment consisting of medication, physical therapy, and  
3 injection). Even if the ALJ erred on this basis because  
4 Plaintiff's occasional injections constituted nonconservative  
5 care, any error was harmless given that she provided other,  
6 acceptable reasons for discrediting Plaintiff. See Carmickle,  
7 533 F.3d at 1162-63 (finding error harmless when ALJ cited other  
8 reasons to support credibility determination).

9 The ALJ also discounted Plaintiff's testimony because her  
10 daily activities were "not limited to the extent one would  
11 expect, given the complaints of disabling symptoms and  
12 limitations." (AR 16.) For example, Plaintiff testified that  
13 she was "able to drive okay" and stand for an hour without  
14 needing to sit. (AR 41.) She also indicated in her Exertion  
15 Questionnaire that she could drive for 30 to 45 minutes, walk at  
16 the mall, and wash dishes every day.<sup>5</sup> (AR 224-25.) As the ALJ  
17 noted, "[s]ome of the physical and mental abilities and social  
18 interactions required in order to perform these activities are  
19 the same as those necessary for obtaining and maintaining  
20 employment." (AR 16.) The ALJ was entitled to discredit  
21 Plaintiff's testimony on this basis as well. See Molina, 674  
22 F.3d at 1112 (ALJ may discredit claimant's testimony when  
23 "claimant engages in daily activities inconsistent with the  
24 alleged symptoms" (citing Lingenfelter, 504 F.3d at 1040)); id.  
25 at 1113 (ALJ may discredit claimant's testimony when claimant  
26

---

27  
28 <sup>5</sup> In March 2011, Plaintiff told a psychiatrist that she  
"enjoys going to movies, concerts and yoga." (AR 405.)

1 "reports participation in everyday activities indicating  
2 capacities that are transferable to a work setting").

3 In sum, the ALJ provided clear and convincing reasons for  
4 finding Plaintiff partially credible. Because those findings  
5 were supported by substantial evidence, this Court may not engage  
6 in second-guessing. See Thomas, 278 F.3d at 959. Plaintiff is  
7 not entitled to remand on this ground.

8 B. The ALJ Properly Found that Plaintiff's Impairments Did  
9 Not Meet or Equal Listing 1.03

10 Plaintiff contends that her impairments met or equaled  
11 Listing 1.03 and the ALJ therefore erred in finding that her  
12 impairments did not meet or equal a listing. (J. Stip. at 3-10.)

13 1. Applicable law

14 At step three of the sequential evaluation process, the ALJ  
15 must evaluate the claimant's impairments to see if they meet or  
16 medically equal those in the Listings. See §§ 404.1520(d),  
17 416.920(d); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.  
18 1999). Listed impairments are those that are "so severe that  
19 they are irrebuttably presumed disabling, without any specific  
20 finding as to the claimant's ability to perform his past relevant  
21 work or any other jobs." Lester, 81 F.3d at 828.

22 The claimant has the initial burden of proving that an  
23 impairment meets or equals a listing. See Sullivan v. Zebley,  
24 493 U.S. 521, 530-31 (1990). "To meet a listed impairment, a  
25 claimant must establish that he or she meets each characteristic  
26 of a listed impairment relevant to his or her claim." Tackett,  
27 180 F.3d at 1099 (emphasis in original). "To equal a listed  
28 impairment, a claimant must establish symptoms, signs and



1 laboratory findings 'at least equal in severity and duration' to  
2 the characteristics of a relevant listed impairment, or, if a  
3 claimant's impairment is not listed, then to the listed  
4 impairment 'most like' the claimant's impairment." Id. (quoting  
5 § 404.1526) (emphasis in original). Medical equivalence,  
6 moreover, "must be based on medical findings"; "[a] generalized  
7 assertion of functional problems is not enough to establish  
8 disability at step three." Id. at 1100 (citing § 404.1526).

9 An ALJ "must evaluate the relevant evidence before  
10 concluding that a claimant's impairments do not meet or equal a  
11 listed impairment." Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir.  
12 2001). The ALJ need not, however, "state why a claimant failed  
13 to satisfy every different section of the listing of  
14 impairments." Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
15 Cir. 1990). The ALJ does not err by discussing the evidence  
16 supporting her conclusion only in other sections of her decision.  
17 See id. at 1200-01 (finding no error when ALJ failed to state or  
18 discuss evidence supporting conclusion that claimant's  
19 impairments did not satisfy Listing but "made a five page,  
20 single-spaced summary of the record"); Lewis, 236 F.3d at 512-13  
21 (ALJ required "to discuss and evaluate the evidence that supports  
22 his or her conclusion," but no error when ALJ does not "do so  
23 under the heading 'Findings'"). Moreover, the ALJ "is not  
24 required to discuss the combined effects of a claimant's  
25 impairments or compare them to any listing in an equivalency  
26 determination, unless the claimant presents evidence in an effort  
27 to establish equivalence." Burch, 400 F.3d at 683.

28 An ALJ's decision that a claimant did not meet a listing

1 must be upheld if it was supported by "substantial evidence."  
2 See Warre v. Comm'r of Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th  
3 Cir. 2006). Substantial evidence is "more than a mere scintilla  
4 but less than a preponderance; it is such relevant evidence as a  
5 reasonable mind might accept as adequate to support a  
6 conclusion." Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir.  
7 1997) (per curiam) (citing Andrews v. Shalala, 53 F.3d 1035, 1039  
8 (9th Cir. 1995)). When evidence is susceptible of more than one  
9 rational interpretation, the Court must uphold the ALJ's  
10 conclusion. Id.

11 In order to meet Listing 1.03, a claimant must establish  
12 "[r]econstructive surgery or surgical arthrodesis<sup>6</sup> of a major  
13 weight-bearing joint, with inability to ambulate effectively  
14 . . . and return to effective ambulation did not occur, or is not  
15 expected to occur, within 12 months of onset." 20 C.F.R. pt.  
16 404, subpt. P, app. 1 § 1.03. "[I]nability to ambulate  
17 effectively" means "an extreme limitation of the ability to walk;  
18 i.e., an impairment(s) that interferes very seriously with the  
19 individual's ability to independently initiate, sustain, or  
20 complete activities." Id. § 1.00(B)(2)(b)(1). The claimant must  
21 show that she was unable to "sustain[] a reasonable walking pace  
22 over a sufficient distance to be able to carry out activities of  
23 daily living" – for example, that she required an assistive  
24 device limiting the use of both upper extremities, such as a

---

25  
26 <sup>6</sup> Arthrodesis is the surgical fusion of bones for replacing  
27 or repairing damaged joints. See Osteoarthritis, MedlinePlus,  
28 <http://www.nlm.nih.gov/medlineplus/ency/article/000423.htm> (last  
updated Feb. 8, 2015); see also Stedman's Medical Dictionary,  
supra, at 149.

1 walker, two crutches, or two canes; could not "walk a block at a  
2 reasonable pace on rough or uneven surfaces"; could not use  
3 public transportation; or could not carry out routine walking  
4 activities, "such as shopping and banking." See id.  
5 § 1.00(B)(2)(b)(2).

## 6 2. Analysis

7 In finding that Plaintiff's impairments did not meet or  
8 equal a listing, the ALJ noted that she considered "all the  
9 impairments specifically Listings 1.02, 1.04, and 11.00." (AR  
10 13.) She explained, "No treating or examining physician has  
11 recorded findings equivalent in severity to the criteria of any  
12 listed impairment, nor does the evidence show medical findings  
13 that are the same or equivalent to those of any listed  
14 impairment." (Id.)

15 The ALJ did not err in failing to specifically explain her  
16 step-three finding as to Listing 1.03. As an initial matter,  
17 Plaintiff never argued at the hearing that she met or equaled  
18 Listing 1.03. (See AR 34-35 (Plaintiff's counsel declining to  
19 give opening statement)); Burch, 400 F.3d at 683 (ALJ not  
20 required to discuss whether impairments equal listing unless  
21 claimant "presents evidence in an effort to establish  
22 equivalence"). Moreover, the ALJ's seven-page discussion of the  
23 medical evidence at step four provided adequate factual support  
24 for her finding. (AR 14-20); Gonzalez, 914 F.2d at 1200-01  
25 (finding no error in failure to discuss why claimant's  
26 impairments did not satisfy listing because ALJ's four-page  
27 evaluation of evidence was adequate statement of factual  
28 foundations); Nance v. Colvin, No. CV 13-4633-DFM, 2014 WL

1 3347027, at \*2-3 (C.D. Cal. July 8, 2014) (ALJ did not err in  
2 failing to discuss Listing 1.03 when he found that claimant did  
3 not meet or equal listings 1.02, 1.04, or 3.03 and reviewed  
4 claimant's medical history in detail).

5 Plaintiff's reliance on Marcia v. Sullivan, 900 F.2d 172,  
6 174 (9th Cir. 1990) (J. Stip. at 8-9), is misplaced. As the  
7 Ninth Circuit has observed, "Marcia simply requires an ALJ to  
8 discuss and evaluate the evidence that supports his or her  
9 conclusion; it does not specify that the ALJ must do so under the  
10 heading 'Findings.'" Lewis, 236 F.3d at 513. As discussed, the  
11 ALJ thoroughly discussed the medical evidence in step four.

12 In any event, Plaintiff fails to establish that she had  
13 reconstructive surgery or surgical arthrodesis on a major weight-  
14 bearing joint as required under Listing 1.03. As discussed in  
15 Section V.A, none of Plaintiff's treating physicians recommended  
16 surgery, and the record contains no evidence of the October 2011  
17 meniscus-removal surgery about which Plaintiff testified at the  
18 hearing.<sup>7</sup> In any event, meniscus removal is not equivalent to  
19 knee reconstruction or fusion. See Nance, 2014 WL 3347027, at \*3  
20 (finding that claimant had failed to show that knee arthroscopies  
21 involved reconstruction or surgical arthrodesis because they  
22 appeared to be "minimally invasive" surgeries). Indeed, when  
23 asked by the ALJ if her surgery was a "total knee replacement,"  
24 Plaintiff said no. (AR 46.) Thus, Plaintiff has not shown that  
25 she satisfied Listing 1.03's first requirement.

---

26  
27  
28 <sup>7</sup> Plaintiff did not submit any additional evidence to the  
Appeals Council. (See AR 6.)

1 Plaintiff also fails to establish that she was unable to  
2 walk effectively. After falling and hurting her right knee in  
3 October 2009, Plaintiff was treated with pain medication and  
4 therapy. (See AR 310-13.) A doctor noted that Plaintiff's gait  
5 was normal and that heel and toe walking were normal for both  
6 legs. (AR 312.) Plaintiff did not complain about knee pain  
7 again until November 2010. (See AR 445-47.) John Chase, an  
8 orthopedic surgeon, noted that Plaintiff's right knee "was a new  
9 problem to [him]" and that his earlier treatment notes involved  
10 only Plaintiff's neck and upper extremities. (AR 445.) After  
11 examining her right knee, he indicated, "no objective findings of  
12 abnormality." (AR 446.) On December 29, 2010, Baer Rambach, an  
13 orthopedic surgeon, diagnosed chondromalacia patella<sup>8</sup> grade 3,  
14 treated Plaintiff's right knee with corticosteroid injections,  
15 and advised her to apply an ice pack and take extra-strength  
16 Tylenol, Advil, or Aleve for pain relief. (AR 374.) On February  
17 2, 2011, Dr. Rambach noted that Plaintiff "responded well" to the  
18 injection and could "walk better." (AR 371-72.) She received an  
19 additional injection on March 16, 2011. (AR 371.) The record  
20 does not contain any other medical evidence regarding her right  
21 knee.

22 Although Plaintiff stated in her Exertion Questionnaire that  
23 she had used a walker, crutches, and a cane to get to work, she  
24 also specified that she used them "when [her] leg hurts a lot,"

---

25  
26 <sup>8</sup> Chondromalacia patella is a general term for describing  
27 damage to the cartilage under the kneecap. See Chondromalacia  
28 patella, Mayo Clinic, <http://www.mayoclinic.org/diseases-conditions/chondromalacia-patella/basics/definition/con-20025960?p=1> (last updated Feb. 5, 2013).

1 failing to indicate how often her leg pain required her to use  
2 the devices. (AR 226.) Moreover, no physician prescribed a  
3 walker, cane, or crutches or indicated that Plaintiff needed them  
4 to walk. And as discussed in Section V.A, the ALJ properly found  
5 Plaintiff only partially credible and discounted her allegations  
6 of disabling pain in her right knee. (See AR 15-17.) Such  
7 evidence fails to show that Plaintiff was unable to walk  
8 effectively.

9 Plaintiff argues that the ALJ's RFC finding that she should  
10 "avoid" uneven terrain establishes an inability to walk  
11 effectively. (J. Stip. at 6-7; see AR 14.) But the ALJ found  
12 that Plaintiff should avoid walking on uneven terrain as part of  
13 her work, not that she couldn't do so at all.<sup>9</sup> (AR 14); see  
14 Moreno v. Astrue, 444 F. App'x 163, 164 (9th Cir. 2011) (finding  
15 that claimant's limitation to walking on even terrain did not  
16 establish inability to walk effectively because RFC "did not  
17 state that [claimant] was incapable of walking on uneven  
18 surfaces, only that he should avoid doing so in his employment");  
19 Nance, 2014 WL 3347027, at \*4 (finding that inability to walk on  
20 uneven terrain, by itself, does not establish inability to walk  
21 effectively under Listing 1.03). Further, Plaintiff testified  
22 that she was "able to drive okay" and stand for one hour (AR 41),  
23 and she stated in her Exertion Questionnaire that she could drive  
24 for 30 to 45 minutes, walk at the mall, wash dishes every day,  
25 and go grocery shopping once a week (AR 224-25). Thus, contrary

---

26  
27 <sup>9</sup> As structured, the relevant sentence in the ALJ's decision  
28 actually says that Plaintiff should avoid "concentrated exposure"  
to "walking on uneven terrain," among other things. (AR 14.)

1 to one of the Listing's examples of ineffective ambulation,  
2 Plaintiff was able "to carry out routine ambulatory activities,  
3 such as shopping and banking." 20 C.F.R. pt. 404, subpt. P, app.  
4 1 § 1.00(B)(2)(b)(2).

5 Plaintiff also argues that the ALJ failed to properly  
6 consider her obesity in evaluating whether she met a listing.  
7 (J. Stip. at 7-8.) As a general rule, an ALJ must determine the  
8 effect of a claimant's obesity upon her other impairments and  
9 ability to work. Celaya v. Halter, 332 F.3d 1177, 1182 (9th Cir.  
10 2003); see also SSR 02-1p, 2002 WL 34686281, at \*3-7 (Sept. 12,  
11 2002) (requiring ALJ to consider effects of obesity at several  
12 points in five-step sequential evaluation). An ALJ must  
13 "evaluate each case based on the information in the case record,"  
14 as obesity may or may not increase the severity or functional  
15 limitations of other impairments. SSR 02-1p, 2002 WL 34686281,  
16 at \*6.

17 Here, the ALJ confirmed Plaintiff's height and weight at the  
18 hearing (AR 40), and in her decision she observed that Plaintiff  
19 "has a history of obesity" and that her weight of 160 pounds and  
20 height of five feet resulted in a body-mass index of 31.2 (AR  
21 12). In her step-two finding, she stated that she "ha[d]  
22 considered the potential impact of obesity in causing or  
23 contributing to co-existing impairments." (AR 13.) The ALJ then  
24 concluded that "there [wa]s no evidence of any specific or  
25 quantifiable impact on pulmonary, musculoskeletal, endocrine, or  
26 cardiac functioning." (Id.) Accordingly, she found that  
27 Plaintiff's obesity was not a severe impairment. (Id.) She  
28 further noted that in determining Plaintiff's RFC, she had

1 considered Plaintiff's obesity's "impact on her ability to  
2 ambulate as well as her other body systems." (Id.) Moreover,  
3 except for a passing comment that she had been gaining weight  
4 because her knee pain kept her from exercising (AR 46), Plaintiff  
5 did not present any testimony or other evidence that her obesity  
6 impaired her ability to work (see AR 35-50). For all these  
7 reasons, Plaintiff has not shown that the ALJ failed to consider  
8 her obesity or that she was prejudiced as a result. See Burch,  
9 400 F.3d at 684 (finding that ALJ did not err in failing to  
10 consider obesity at step three because claimant did not point to  
11 "any evidence of functional limitations due to obesity which  
12 would have impacted the ALJ's analysis," and only evidence  
13 relating to obesity was "notes from doctors who observed weight  
14 gain, indicated that [claimant] is obese, and recommended that  
15 she participate in a medically supervised weight loss program.").

16 Plaintiff is not entitled to remand on this ground.  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1 **VI. CONCLUSION**

2 Consistent with the foregoing, and under sentence four of 42  
3 U.S.C. § 405(g),<sup>10</sup> IT IS ORDERED that judgment be entered  
4 AFFIRMING the decision of the Commissioner, DENYING Plaintiff's  
5 request for remand, and DISMISSING this action with prejudice.  
6 IT IS FURTHER ORDERED that the Clerk serve copies of this Order  
7 and the Judgment on counsel for both parties.

8  
9 DATED: October 9, 2015

  
\_\_\_\_\_  
10 JEAN ROSENBLUTH  
11 U.S. Magistrate Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26  
27 \_\_\_\_\_  
28 <sup>10</sup> That sentence provides: "The [district] court shall have  
power to enter, upon the pleadings and transcript of the record,  
a judgment affirming, modifying, or reversing the decision of the  
Commissioner of Social Security, with or without remanding the  
cause for a rehearing."