



1 dispute, and the court deems the matter suitable for adjudication without oral  
2 argument.

3 Plaintiff presents four disputed issues for decision: (1) whether the  
4 Administrative Law Judge (“ALJ”) properly considered the relevant medical  
5 evidence of record when assessing plaintiff’s residual functional capacity (“RFC”);  
6 (2) whether the ALJ properly assessed plaintiff’s credibility; (3) whether the ALJ  
7 properly considered lay witness testimony; and (4) whether the ALJ properly  
8 considered and developed the vocational evidence and issues at step five.  
9 Plaintiff’s Memorandum in Support of Complaint (“P. Mem.”) at 3-14;  
10 Defendant’s Memorandum in Support of the Answer (“D. Mem.”) at 3-12.

11 Having carefully studied the parties’ moving and opposing papers, the  
12 Administrative Record (“AR”), and the decision of the ALJ, the court concludes  
13 that, as detailed herein, the ALJ properly assessed plaintiff’s RFC, the ALJ  
14 provided clear and convincing reasons to discount plaintiff’s credibility, the ALJ  
15 gave specific and germane reasons for discounting the statements of a lay witness,  
16 and the ALJ did not err at step five. Consequently, the court affirms the decision  
17 of the Commissioner denying benefits.

18 **II.**

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Plaintiff, who was fifty-nine years old on her SSI application date, has two  
21 years of college education. AR at 218, 223. She has past relevant work as a fish  
22 roe processor, housekeeper, and fish cleaner. *Id.* at 49-50, 215-217, 224.

23 On December 17, 2013 and January 13, 2014, plaintiff filed applications for  
24 SSI and DIB benefits, respectively, due to chronic obstructive pulmonary disease,  
25 hypertension, hepatitis C, back pain, and anxiety, initially alleging an onset date of  
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1 disability in both applications of September 1, 2013.<sup>1</sup> *Id.* at 189, 192, 218, 222.

2 The applications were denied initially and upon reconsideration, after which  
3 plaintiff filed a request for a hearing. *Id.* at 109-110, 118-119, 124-125, 130-132.

4 On April 22, 2015, the ALJ held a hearing. *Id.* at 32-54. Plaintiff appeared  
5 and testified at the hearing. *Id.* at 34-48. The ALJ also heard testimony from Troy  
6 L. Scott, a vocational expert (“VE”). *Id.* at 48-53. In a written decision dated May  
7 15, 2015, the ALJ denied plaintiff’s claim for benefits. *Id.* at 12-26.

8 Applying the well-known five-step sequential evaluation process, the ALJ  
9 found, at step one, that plaintiff had not engaged in substantial gainful activity  
10 since December 17, 2013, the application date. *Id.* at 17.

11 At step two, the ALJ found plaintiff suffered from the following severe  
12 impairment: chronic obstructive pulmonary disease (“COPD”). *Id.*

13 At step three, the ALJ found plaintiff’s impairment did not meet or  
14 medically equal one of the listed impairments set forth in 20 C.F.R. part 404,  
15 Subpart P, Appendix 1 (the “Listings”). *Id.* at 21.

16 The ALJ then assessed plaintiff’s RFC,<sup>2</sup> and determined that plaintiff had the  
17 RFC to perform medium work, with the limitation that plaintiff must avoid  
18 concentrated exposure to pulmonary or respiratory irritants. *Id.*

19 The ALJ found, at step four, that plaintiff was not capable of performing her  
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21 <sup>1</sup> The ALJ considered the date the initial application was filed – December 17,  
22 2013 – as the alleged date of disability because SSI is not payable prior to the  
23 month following the month in which the application was filed. AR at 22 (citing 20  
24 C.F.R. § 416.335).

25 <sup>2</sup> Residual functional capacity is what a claimant can do despite existing  
26 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-  
27 56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step evaluation,  
28 the ALJ must proceed to an intermediate step in which the ALJ assesses the  
claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151  
n.2 (9th Cir. 2007).

1 past relevant work as a fish roe processor, housekeeper, or fish cleaner, after  
2 comparing plaintiff's RFC with the physical and mental demands of the past  
3 relevant work based on the testimony of the VE. *Id.* at 23-24.

4 At step five, the ALJ found there were jobs that existed in significant  
5 numbers in the national economy that plaintiff could perform, including hand  
6 packager, packing machine operator, and warehouse worker. *Id.* at 24-25.

7 Consequently, the ALJ concluded that plaintiff has not been under a  
8 disability as defined by the Social Security Act ("Act" or "SSA"), since December  
9 17, 2013. *Id.* at 25.

10 Plaintiff filed a timely request for review of the ALJ's decision on July 2,  
11 2015, which the Appeals Council denied. *Id.* at 6-10. The ALJ's decision stands  
12 as the final decision of the Commissioner.

### 13 III.

#### 14 STANDARD OF REVIEW

15 This court is empowered to review decisions by the Commissioner to deny  
16 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security  
17 Administration must be upheld if they are free of legal error and supported by  
18 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)  
19 (as amended). But if the court determines that the ALJ's findings are based on  
20 legal error or are not supported by substantial evidence in the record, the court may  
21 reject the findings and set aside the decision to deny benefits. *Aukland v.*  
22 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242  
23 F.3d 1144, 1147 (9th Cir. 2001).

24 "Substantial evidence is more than a mere scintilla, but less than a  
25 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such  
26 "relevant evidence which a reasonable person might accept as adequate to support  
27 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276  
28

1 F.3d at 459. To determine whether substantial evidence supports the ALJ’s  
2 finding, the reviewing court must review the administrative record as a whole,  
3 “weighing both the evidence that supports and the evidence that detracts from the  
4 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be  
5 affirmed simply by isolating a specific quantum of supporting evidence.”  
6 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th  
7 Cir. 1998)). If the evidence can reasonably support either affirming or reversing  
8 the ALJ’s decision, the reviewing court “may not substitute its judgment for that  
9 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th  
10 Cir. 1992)).

#### 11 IV.

#### 12 DISCUSSION

##### 13 A. The ALJ’s RFC Assessment Is Supported by Substantial Evidence

14 Plaintiff first argues the ALJ improperly determined plaintiff’s RFC. P.  
15 Mem. at 3-5; D. Mem. at 3-6. Specifically, plaintiff contends that: (1) the ALJ  
16 failed to properly consider particular opinions rendered by state agency reviewing  
17 physicians, Dr. R. Masters and Dr. C. Scott, on behalf of the Social Security  
18 Administration; (2) the RFC assessment does not adequately consider plaintiff’s  
19 lumbar spinal condition; and (3) the RFC assessment does not account for  
20 plaintiff’s cardiac condition. P. Mem. at 3-5.

21 In determining whether a claimant has a medically determinable impairment,  
22 among the evidence the ALJ considers is medical evidence. 20 C.F.R. §  
23 404.1527(b). In evaluating medical opinions, the regulations distinguish among  
24 three types of physicians: (1) treating physicians; (2) examining physicians; and  
25 (3) non-examining physicians. 20 C.F.R. § 404.1527(c), (e); *Lester v. Chater*, 81  
26 F.3d 821, 830 (9th Cir. 1995) (as amended). “Generally, a treating physician’s  
27 opinion carries more weight than an examining physician’s, and an examining  
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1 physician's opinion carries more weight than a reviewing physician's." *Holohan v.*  
2 *Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 404.1527(c)(1)-(2).

3 If a treating physician's opinion is uncontradicted, the ALJ must provide  
4 clear and convincing reasons for giving it less weight. *Lester*, 81 F.3d at 830. If  
5 the treating physician's opinion is contradicted by other opinions, the ALJ must  
6 provide specific and legitimate reasons supported by substantial evidence for  
7 rejecting it. *Id.* Likewise, the ALJ must provide specific and legitimate reasons  
8 supported by substantial evidence in rejecting the contradicted opinions of  
9 examining physicians. *Id.* at 830-31. The opinion of a non-examining physician,  
10 standing alone, cannot constitute substantial evidence. *Widmark v. Barnhart*, 454  
11 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v. Comm'r*, 169 F.3d 595, 602 (9th  
12 Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d 813, 818 n.7 (9th Cir. 1993).

13 **1. Dr. R. Masters' Findings**

14 On August 4, 2014, Dr. R. Masters, a state agency non-examining physician,  
15 reviewed plaintiff's medical records and assessed her RFC. AR at 55-66. The ALJ  
16 gave "significant" weight to Dr. Masters' opinion and discussed the findings. *Id.*  
17 at 23. Among other findings, Dr. Masters ultimately concluded plaintiff would be  
18 limited to performing medium exertional work with additional environmental and  
19 postural limitations, including avoiding concentrated exposure to extreme cold,  
20 exposure to hepatotoxins, and moderate exposure to fumes, odors, dusts, gases, and  
21 hazards. *Id.* at 63-64. Dr. Masters determined plaintiff could perform her past  
22 relevant work as a housecleaner. *Id.* at 65-66.

23 **2. Dr. C. Scott's Findings**

24 On September 12, 2014, Dr. C. Scott, also a state agency non-examining  
25 physician, performed another assessment of plaintiff's RFC. *Id.* at 82-93. The  
26 ALJ also gave "significant" weight to Dr. Scott's opinion and findings. *Id.* at 23.  
27 Dr. Scott noted plaintiff was limited to medium exertional work with certain  
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1 postural limitations. *Id.* at 90-91. With regard to environmental limitations, Dr.  
2 Scott found plaintiff should avoid moderate exposure to fumes, odors, dusts, and  
3 gases; specifically, this conclusion was based on plaintiff’s need to avoid  
4 hepatotoxins and inhalants. *Id.* at 91-92. Dr. Scott opined no limitations based on  
5 temperature. *Id.* at 91. Dr. Scott also ultimately concluded that plaintiff had the  
6 RFC to perform past relevant work. *Id.* at 93.

7 **3. The ALJ’s Findings**

8 The ALJ noted both doctors’ findings that plaintiff was limited to medium  
9 exertional work with additional environmental and postural limitations; however,  
10 despite giving significant weight to the state agency physicians’ assessments, the  
11 ALJ determined the objective medical evidence in the record did not support a  
12 finding of postural limitations. *Id.* at 23. Plaintiff argues the ALJ failed to  
13 properly consider relevant medical evidence rendered by the state agency  
14 physicians. P. Mem. at 3. Specifically, plaintiff argues the ALJ failed to  
15 adequately discuss plaintiff’s environmental limitations resulting from even  
16 moderate exposure to pulmonary irritants, hazards, and hepatotoxins, and to the  
17 extreme cold. *Id.* at 3-4. Plaintiff also argues the ALJ failed to adequately  
18 consider her lumbar spinal and cardiac conditions. *Id.* at 5.

19 “It is not necessary to agree with everything an expert witness says in order  
20 to hold that his testimony contains ‘substantial evidence.’” *Magallanes v. Bowen*,  
21 881 F.2d 747, 755 (9th Cir. 1989) (quoting *Russell v. Bowen*, 856 F.2d 81, 83 (9th  
22 Cir. 1988) (internal citations omitted)). The ALJ was not required to discuss  
23 evidence in the record that is not probative as to the RFC. *See Vincent ex rel.*  
24 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (“The [Commissioner]  
25 . . . need not discuss all evidence presented . . . Rather, [the Commissioner] must  
26 explain why significant probative evidence has been rejected.” (citation and  
27 internal quotation marks omitted)).

1 Here, the ALJ provided a detailed summary of the objective medical  
2 evidence pertaining to plaintiff's assessments alongside a discussion of plaintiff's  
3 subjective testimony and treatment records for her COPD. AR at 21-23. The ALJ  
4 noted several inconsistencies both in plaintiff's statements and her conduct that  
5 cast doubt on plaintiff's claimed limitations. In particular, the ALJ found the  
6 medical evidence did not support a finding that plaintiff's COPD rendered her  
7 disabled.

8 The ALJ accorded the postural limitations opined by the state agency  
9 physicians little weight because they were not supported by "the findings of the  
10 record as a whole." *Id.* at 23. The ALJ noted that plaintiff engaged in physical  
11 daily activities, such as cooking, cleaning, doing laundry, and managing personal  
12 care tasks, despite her alleged impairments. *Id.* at 22; *see id.* at 245. Thus, to the  
13 extent the ALJ rejected any physician's conclusions, the ALJ provided sufficient  
14 grounds for rejecting the postural limitations plaintiff raises here. *See Magallanes*,  
15 881 F.2d at 755 (ALJ need not state "I reject the treating physician's opinions  
16 because . . ." so long as the record reveals specific, legitimate inferences that may  
17 be drawn from ALJ's opinion justifying decision not to adopt physician's opinion).

18  
19 Plaintiff chiefly argues the ALJ erred by not explaining why he failed to  
20 include the state agency physicians' conclusions restricting plaintiff from even  
21 moderate exposure to pulmonary irritants and extreme cold temperatures in his  
22 RFC determination. P. Mem. at 4. While stating he gave "significant weight" to  
23 Dr. Masters' and Dr. Scott's assessments, the ALJ only restricted plaintiff from  
24 *concentrated* exposure to pulmonary or respiratory irritants. AR at 21, 23. But in  
25 faulting the ALJ for not fully adopting every limitation found by Dr. Masters and  
26 Dr. Scott, plaintiff ignores that the state agency physicians' findings only carry  
27 weight to the extent they are supported by other evidence in the record. *See* 20  
28



1 C.F.R. § 416.927(c)(3); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002)  
2 (“The opinions of non-treating or non-examining physicians may also serve as  
3 substantial evidence when the opinions are consistent with independent clinical  
4 findings or other evidence in the record.”).

5 Here, the objective medical evidence supported precluding plaintiff from  
6 only concentrated exposure to pulmonary irritants. *See Vincent*, 739 F.2d at  
7 1394-95 (ALJ “need not discuss *all* evidence presented” but rather “must explain  
8 ‘why significant probative evidence has been rejected.’”). To the extent the ALJ  
9 rejected the agency physicians’ respiratory conclusions, the ALJ provided  
10 sufficient grounds for rejecting the limitations plaintiff raises here. *See*  
11 *Magallanes*, 881 F.2d at 755. Specifically, as the ALJ noted, x-rays indicate that  
12 plaintiff’s lungs were well-expanded, and physical examinations showed normal  
13 respiratory functions, oxygen saturation was normal, and spirometry testing  
14 revealed only mild obstruction that improved with treatment. AR at 23, 324-325,  
15 332, 334, 370-71, 386, 389, 394, 396, 503-504. As a result, the ALJ did not err in  
16 rejecting the non-examining physicians’ suggested restriction that plaintiff avoid  
17 even moderate exposure to pulmonary irritants where such restriction is not  
18 supported by other evidence in the record. *See Chaudhry v. Astrue*, 688 F.3d 661,  
19 671 (9th Cir. 2012); *see also Bray v. Astrue*, 554 F.3d 1219, 1228 (9th Cir. 2009).

20 As for temperature restrictions, the state agency physicians reached different  
21 conclusions for plaintiff’s limitations against extreme cold. Specifically, Dr.  
22 Masters found these limitations, while Dr. Scott did not, making them inconsistent.  
23 *See Morgan*, 169 F.3d at 603 (rejecting reported medical evidence due to internal  
24 inconsistencies in report). Because of these different conclusions, the state agency  
25 physicians’ opinions in this regard are undermined and may be rejected. *See Bray*,  
26 554 F.3d at 1228. Under *Morgan*, the demonstrated inconsistency between the two  
27 physicians’ conclusions here provides a basis for the ALJ to reject plaintiff’s  
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1 suggested limitation against extreme cold.

2       Next, plaintiff argues the ALJ failed to account for alleged back pain and  
3 cardiac conditions in the RFC determination. P. Mem. at 5. Despite plaintiff's  
4 claim, the ALJ properly considered plaintiff's alleged cardiac conditions.  
5 Specifically, the ALJ acknowledged the medical records indicating plaintiff's  
6 complaints of chest pain, but noted the diagnostic testing revealed merely mild  
7 findings, no evidence of ischemia, and a subsequent myocardial perfusion scan that  
8 showed normal findings with an ejection fraction of seventy-three percent. AR at  
9 18; *see id.* at 318, 333, 519, 553.

10       Similarly for plaintiff's alleged back pain or lumbar spinal condition, the  
11 medical record fails to support plaintiff's subjective complaints. Although plaintiff  
12 complained of back pain in her applications, she did not testify back pain was a  
13 disabling condition at the hearing before the ALJ. *Id.* at 34-48. Additionally, the  
14 state agency assessments indicate plaintiff had not alleged back pain at prior  
15 examinations in January 2014 and April 2014. *Id.* at 60, 62, 72, 74-75. Dr.  
16 Masters' review stated there was no mention of evaluation or treatment for spinal  
17 pathology as of August 2014. *Id.* at 73. Plaintiff argues, however, the ALJ should  
18 have further developed the record with respect to plaintiff's back pain, pointing to  
19 a CT scan conducted on September 23, 2014 showing degenerative disc disease in  
20 the lumbar spine. P. Mem. at 5; *see* AR at 517. The ALJ has a duty to develop the  
21 record further only "when there is ambiguous evidence or when the record is  
22 inadequate to allow for proper evaluation of the evidence." *Mayes*, 276 F.3d at  
23 459-60; *see Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). Given that the  
24 September 2014 CT scan was conducted in response to a complaint of abdominal  
25 pain and the record is devoid of complaints of back pain, this single CT scan did  
26 not create ambiguity in the record so as to trigger the ALJ's duty to obtain  
27 additional medical evidence. *See Muro v. Astrue*, 2013 WL 327468, at \*2 (C.D.  
28

1 Cal. Jan. 29, 2013) (one possible reference to degenerative joint disease failed to  
2 trigger ALJ's duty to develop the record); *Grissom v. Astrue*, 2009 WL 1309506,  
3 at \*5 (C.D. Cal. May 8, 2009) (single reference to possible history of mental health  
4 treatment did not trigger duty to further develop the record where claimant offered  
5 no other evidence of such treatment).

6 In short, plaintiff has not shown the ALJ's ultimate RFC determination is  
7 unsupported by substantial evidence or that the ALJ failed to properly evaluate the  
8 medical evidence. The ALJ thus properly determined plaintiff's RFC level to be  
9 medium, with only a limitation against concentrated exposure to pulmonary or  
10 respiratory irritants.

11 **B. The ALJ Properly Considered Plaintiff's Credibility**

12 Second, plaintiff argues the ALJ erred in evaluating plaintiff's credibility. P.  
13 Mem. at 6-10. Specifically, plaintiff contends the ALJ failed to identify which of  
14 plaintiff's statements he found not credible, failed to properly consider her  
15 subjective complaints, and failed to properly assess her credibility. *Id.*

16 The ALJ must make specific credibility findings supported by the record.  
17 Social Security Rule 96-7p, 1996 WL 374186, at \*2. To determine whether  
18 testimony concerning symptoms is credible, the ALJ engages in a two-step  
19 analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the  
20 ALJ must determine whether a claimant produced objective medical evidence of an  
21 underlying impairment ““which could reasonably be expected to produce the pain  
22 or other symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d  
23 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of  
24 malingering, an “ALJ can reject the claimant's testimony about the severity of her  
25 symptoms only by offering specific, clear and convincing reasons for doing so.”  
26 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Benton v. Barnhart*, 331  
27 F.3d 1030, 1040 (9th Cir. 2003).

1            “[A]n ALJ does not provide specific, clear, and convincing reasons for  
2 rejecting a claimant’s testimony by simply reciting the medical evidence in support  
3 of his or her residual functional capacity determination.” *Brown-Hunter v. Colvin*,  
4 806 F.3d 487, 489 (9th Cir. 2015). To permit a meaningful review of the ALJ’s  
5 credibility determination, the ALJ must “specify which testimony she finds not  
6 credible, and then provide clear and convincing reasons, supported by evidence in  
7 the record, to support that credibility determination.” *Id.* The ALJ may consider  
8 several factors in weighing a claimant’s credibility, including: (1) ordinary  
9 techniques of credibility evaluation such as a claimant’s reputation for lying; (2)  
10 the failure to seek treatment or follow a prescribed course of treatment; and (3) a  
11 claimant’s daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.  
12 2008); *Bunnell*, 947 F.2d at 346-47.

13            At the first step, the ALJ here found that plaintiff’s medically determinable  
14 impairments could reasonably be expected to cause the symptoms alleged. AR at  
15 22. At the second step, because the ALJ did not find any evidence of malingering,  
16 the ALJ was required to provide clear and convincing reasons for discounting  
17 plaintiff’s credibility. The ALJ discounted plaintiff’s credibility because: (1)  
18 objective medical evidence was inconsistent with plaintiff’s subjective complaints;  
19 (2) plaintiff’s activities of daily living were inconsistent with her alleged  
20 symptoms; and (3) plaintiff’s work history was sporadic. *Id.* at 22-23.

21            As an initial matter, contrary to plaintiff’s argument, the ALJ did specify  
22 those portions of plaintiff’s testimony he found to be not entirely credible:

23            At the hearing, the claimant testified she was disabled because of her  
24 alleged chronic obstructive pulmonary disease. The claimant alleged  
25 symptoms including shortness of breath and fatigue. She stated she  
26 has had difficulty breathing for the past couple of years. She stated  
27 treatment for her alleged impairments included use of an inhaler. The  
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1 claimant further claimed she was limited as follows: she was able to  
2 walk not more than half of one block; stand for no more than thirty  
3 minutes; and sit for one hour. She stated she had to lie down six to  
4 seven hours each day. . . .

5 . . . . The claimant's statements in [the] function report are of  
6 the same general nature as the subjective complaints from the  
7 claimant's testimony. The claimant stated she was unable to work due  
8 to her chronic obstructive pulmonary disease.

9 *Id.* at 21-22.

### 10 **1. Objective Medical Evidence**

11 The ALJ found the severity of plaintiff's alleged symptoms and limitations  
12 to be greater than expected based on the objective medical evidence in the record.  
13 *Id.* at 22-23. The lack of supporting medical evidence alone cannot suffice as the  
14 basis for discounting plaintiff's pain testimony. *See Burch v. Barnhart*, 400 F.3d  
15 676, 681 (9th Cir. 2005). But the lack of such evidence can be considered as a  
16 factor in an ALJ's credibility analysis. *See id.*; *see also Rollins v. Massanari*, 261  
17 F.3d 853, 857 (9th Cir. 2001) (lack of corroborative objective medical evidence  
18 may be one factor in evaluating credibility).

19 The ALJ here extensively discussed how plaintiff's COPD did not amount to  
20 a disability in light of chest x-rays that showed plaintiff's lungs were well-  
21 expanded and clear, a pulse oximetry that showed plaintiff's C2 saturation to be  
22 normal, and findings of generally normal physical examinations of plaintiff's  
23 respiratory system. AR at 23; *see id.* at 323-324, 332, 334, 370-371, 386, 389,  
24 394. The ALJ also considered a spirometry test that showed plaintiff's impairment  
25 was improving, despite a mild obstruction, after a bronchodilator. *Id.* at 23; *see id.*  
26 at 396-404. This evidence constitutes a clear and convincing reason for  
27 discounting plaintiff's credibility given her complaints of severe limitations.

1 Plaintiff does not really dispute the adequacy of this reason, but instead  
2 argues it is not sufficient on its own. But as discussed below, the ALJ gave  
3 additional reasons for discounting plaintiff’s credibility.

4 **2. Daily Activities**

5 The ALJ also found plaintiff less credible because the account of her daily  
6 activities was inconsistent with her alleged limitations. AR at 22; *see Tommasetti*,  
7 533 F.3d at 1039 (inconsistency between a claimant’s alleged symptoms and his  
8 daily activities may be a clear and convincing reason to find a claimant less  
9 credible); *Bunnell*, 947 F.2d at 346-47 (same). In a February 20, 2014 Function  
10 Report, plaintiff stated she could do household chores including doing laundry,  
11 ironing, cleaning up, and cooking while also managing her personal care tasks. AR  
12 at 22, 243-251. Based on these findings, the ALJ determined plaintiff was capable  
13 of performing daily activities at a normal level, which is inconsistent with her  
14 alleged impairments. *Id.* at 22 (“It appears that despite her alleged impairments,  
15 she engaged in a normal level of daily activity . . .”).

16 Plaintiff disputes the ALJ’s finding that she was able to engage in normal  
17 daily activities. Plaintiff points to a progression in her symptoms – and resulting  
18 changes in her daily activities – after the submission of the Function Report in  
19 February 2014. P. Mem. at 6-7. Specifically, plaintiff notes that she experienced  
20 increased depression, difficulty breathing, and difficulty walking longer distances  
21 in an August 2014 written appeal. *See* AR at 274. Plaintiff also referred to  
22 increasing reliance on a friend to assist with her chores and cooking. *Id.* at 278.  
23 By November 2014, plaintiff noted she no longer cooked or worked around the  
24 house due to exacerbated shortness of breath. *Id.* at 289. At the hearing, plaintiff  
25 testified she could not walk farther than three blocks even on a “good day.” *Id.* at  
26 43. Further, plaintiff stated she generally spent “six or seven hours” lying down  
27 during an average workday. *Id.* at 44.

1           The ALJ’s reference to plaintiff’s daily activities as a basis for his credibility  
2 determination does not appear to account for these reported changes in plaintiff’s  
3 condition occurring after the Function Report was submitted. Notably, the  
4 Function Report initially indicated plaintiff merely needed occasional  
5 encouragement to complete her chores (*id.* at 245; *see also id.* at 254), whereas  
6 plaintiff later revealed her friend had to help her do chores because plaintiff “got  
7 winded very easy.” *Id.* at 278. Moreover, plaintiff’s testimony that she spends six  
8 or seven hours on an average workday lying down is unlikely to be considered part  
9 of an individual’s normal level of daily activity. In light of plaintiff’s diminished  
10 ability to independently perform her chores, cook, or have sustained activity levels,  
11 it appears the ALJ mischaracterized plaintiff’s record of daily activities as  
12 “normal.” *See Saunders v. Astrue*, 433 F. Appx. 531, 533-34 (9th Cir. 2011) (ALJ  
13 erred in discrediting claimant’s testimony on basis of daily activities where  
14 cooking was limited to sandwich-making and frozen food, children assisted  
15 plaintiff with household chores, and claimant required rest after any activity); *see*  
16 *also Reddick v. Chater*, 157 F.3d 715, 723 n.1 (9th Cir. 1998) (noting that limited  
17 cooking, cleaning, and shopping are not indicative of an ability to engage in  
18 sustained work activity).

19           As a result, the ALJ erred in finding plaintiff less credible based on her daily  
20 activities.

21           **3. Work History**

22           The final reason the ALJ gave for his negative credibility determination was  
23 based on plaintiff’s sporadic work history prior to her alleged disability onset date.  
24 *Id.* at 22. An ALJ is required to consider a claimant’s work history when assessing  
25 credibility. *See* 20 C.F.R. § 404.1529(c)(3). Evidence of a poor work history is a  
26 clear and convincing reason to discredit plaintiff’s credibility. *Thomas*, 278 F.3d at  
27 959 (upholding ALJ’s negative credibility determination because, among other  
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1 factors, plaintiff’s “work history was spotty, at best” and she “has shown little  
2 propensity to work in her lifetime”).

3 Here, the ALJ cites to evidence in the record demonstrating that plaintiff had  
4 lengthy gaps in her work history. AR at 22. Specifically, the record shows  
5 plaintiff had no earnings between 1976-1984 and 1987-2006. *Id.* at 214-217.  
6 These periods of sporadic work history occurred many years before the alleged  
7 disability onset date that plaintiff claims in 2013, indicating plaintiff’s work history  
8 was spotty, as in *Thomas*. Plaintiff argues it was unfair for the ALJ to discount  
9 plaintiff’s credibility on this basis, since he failed to raise the issue with her. P.  
10 Mem. at 8. This is incorrect. The ALJ raised plaintiff’s gaps in her earning history  
11 at the hearing, and plaintiff explained she spent those years collecting scrap metal.  
12 AR at 39. Thus, the ALJ properly evaluated plaintiff’s credibility in light of her  
13 sporadic work history, which predated the alleged disability onset date.

14 In sum, not all of the reasons the ALJ provided for discounting plaintiff’s  
15 credibility were clear and convincing. The ALJ erred in mischaracterizing  
16 plaintiff’s daily activities as “normal” without taking into account subsequent  
17 changes in her activities. But such error is harmless, as the ALJ identified other  
18 sufficient clear and convincing reasons to discredit plaintiff. *See Batson v.*  
19 *Comm’r*, 359 F.3d 1190, 1195-97 (9th Cir. 2004) (ALJ erred in relying on one of  
20 several reasons in support of an adverse credibility determination, but such error  
21 was harmless because the ALJ’s remaining reasons and ultimate credibility  
22 determination were adequately supported by substantial evidence in the record).  
23 The ALJ noted the disparity between the objective medical evidence and the  
24 alleged severity of plaintiff’s symptoms and limitations as an important factor,  
25 which in combination with plaintiff’s meager work history provides sufficient clear  
26 and convincing support for the adverse credibility determination. Thus, the ALJ’s  
27 error would not “negate the validity” of his ultimate credibility finding, and the  
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1 ALJ's decision remains "legally valid, despite such error." *See Carmickle v.*  
2 *Comm'r*, 533 F.3d 1155, 1162 (9th Cir. 2008) (internal quotation marks and  
3 citation omitted).

4 **C. The ALJ Properly Considered the Testimony of a Lay Witness**

5 Plaintiff also argues the ALJ committed legal error by failing to adequately  
6 consider the statements of Cindy Wheatcraft, plaintiff's friend and lay witness,  
7 regarding plaintiff's symptoms and ability to work. P. Mem. at 10-11. The ALJ  
8 noted that what Wheatcraft stated in a February 21, 2014 Third Party Function  
9 Report was generally consistent with plaintiff's subjective complaints, including  
10 plaintiff's COPD, lack of energy, and difficulty breathing. AR at 22; *see id.* at  
11 252-260.

12 The ALJ rejected Wheatcraft's testimony on the following grounds: (1)  
13 Wheatcraft's statements were consistent with plaintiff's subjective complaints,  
14 which the ALJ found unreliable for the reasons discussed above; (2) a lay person's  
15 opinion on a diagnosis or severity of plaintiff's symptoms is "far less persuasive on  
16 those same issues than medical opinions"; (3) by virtue of her relationship with  
17 plaintiff, she "had an emotional motivation to support" plaintiff; and (4) her  
18 statements "are not supported by the clinical or diagnostic medical evidence" in the  
19 record. *Id.* at 22.

20 "[L]ay testimony as to a claimant's symptoms or how an impairment affects  
21 ability to work *is* competent evidence and therefore *cannot* be disregarded without  
22 comment." *Stout v. Comm'r*, 454 F.3d 1050, 1053 (9th Cir. 2006) (internal  
23 quotation marks, ellipses, and citation omitted); *see Smolen*, 80 F.3d at 1288; *see*  
24 *also* 20 C.F.R. §§ 404.1513(d)(4), 416. 913(d)(4) (explaining that the  
25 Commissioner will consider all evidence from "non-medical sources[,] " including  
26 "spouses, parents and other caregivers, siblings, other relatives, friends, neighbors,  
27 and clergy"). The ALJ may only discount the testimony of lay witnesses if he  
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1 provides specific “reasons that are germane to each witness.” *Dodrill v. Shalala*,  
2 12 F.3d 915, 919 (9th Cir. 1993); *see Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.  
3 2001) (“Lay testimony as to a claimant’s symptoms is competent evidence that an  
4 ALJ must take into account, unless he or she expressly determines to disregard  
5 such testimony and give reasons germane to each witness for doing so.”).

6 The first reason the ALJ listed for discounting Wheatcraft’s statements was  
7 proper. The ALJ rejected Wheatcraft’s statements because they were similar to  
8 plaintiff’s own subjective complaints, and thus suffered from similar credibility  
9 problems, which is a specific and germane reason to discount Wheatcraft’s  
10 testimony. *See Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir.  
11 2009) (finding ALJ’s rejection of lay witness testimony, based in part on the same  
12 reasons for discounting the plaintiff’s own allegations, constituted “germane  
13 reasons” for rejecting lay witness’s testimony). In addition, “[w]here lay witness  
14 testimony does not describe any limitations not already described by the claimant,  
15 and the ALJ’s well-supported reasons for rejecting the claimant’s testimony apply  
16 equally well to the lay witness testimony,” any error by the ALJ in discounting the  
17 lay witness testimony is harmless. *Molina v. Astrue*, 674 F.3d 1115, 1117 (9th Cir.  
18 2012).

19 The ALJ’s second stated reason – Wheatcraft is not a medical professional –  
20 was not a proper reason to discount it. Although an ALJ may reject lay testimony  
21 if it conflicts with medical evidence, he may not discount this testimony solely on  
22 the basis that it is lay testimony. *See Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th  
23 Cir. 1987) (explaining that an ALJ is required to consider the testimony of a lay  
24 witness); *see also Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). A lay  
25 witness is “not disqualified from rendering an opinion” on how the plaintiff’s  
26 condition affects his or her ability to work simply because the witness is not a  
27 medical expert. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). Thus, the  
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1 ALJ erred in stating Wheatcraft’s lay status alone was a basis for discounting her  
2 testimony.

3 In addition, the ALJ’s rejection of Wheatcraft’s testimony on the ground  
4 that, as plaintiff’s friend, she had an “emotional motivation” to support her  
5 “amount[s] to a wholesale dismissal of the testimony of all [lay] witnesses as a  
6 group and therefore does not qualify as a reason germane to” Wheatcraft. *Smolen*,  
7 80 F.3d at 1289; *see Dodrill*, 12 F.3d at 919 (“friends and family members in a  
8 position to observe a claimant’s symptoms and daily activities are competent to  
9 testify”); *Valentine*, 574 F.3d at 694 (“[R]egardless of whether they are interested  
10 parties, friends and family members in a position to observe a claimant’s symptoms  
11 and daily activities are competent to testify as to [his or] her conditions.” (internal  
12 quotations and citation omitted)); *Sprague*, 812 F.2d at 1232 (“Descriptions by  
13 friends and family members in a position to observe a claimant’s symptoms and  
14 daily activities have routinely been treated as competent evidence.”). The ALJ’s  
15 rejection of Wheatcraft’s testimony simply because of her status as plaintiff’s  
16 friend was improper.

17 Finally, the ALJ found Wheatcraft’s statements, like plaintiff’s, “are not  
18 supported by the clinical or diagnostic medical evidence.” AR at 22. This was,  
19 like the first reason, a specific reason germane to Wheatcraft for rejecting her  
20 testimony. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (citing  
21 *Lewis*, 236 F.3d at 511) (inconsistency with medical evidence is a germane reason  
22 for discrediting the testimony of a lay witness).

23 Although two of the reasons given by the ALJ for rejecting the lay testimony  
24 were not valid, the others were, rendering his error harmless. *See Molina*, 674 F.3d  
25 at 1117. Accordingly, the ALJ properly rejected Wheatcraft’s lay witness  
26 testimony.

1 **D. The ALJ Did Not Err at Step Five**

2 Finally, plaintiff argues the ALJ erred at step five of the sequential  
3 evaluation process. P. Mem. at 11-14. Specifically, plaintiff contends there was  
4 not substantial evidence to support the ALJ's step five finding because plaintiff's  
5 impairments preclude her from performing the occupations identified by the VE,  
6 and in any event the VE provided defective testimony regarding the number of  
7 occupations. *Id.*

8 At step five, the burden shifts to the Commissioner to show that the claimant  
9 retains the ability to perform other gainful activity. *Lounsbury v. Barnhart*, 468  
10 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a claimant is not  
11 disabled at step five, the Commissioner must provide evidence demonstrating other  
12 work exists in significant numbers in the national economy that the claimant can  
13 perform, given his or her age, education, work experience, and RFC. 20 C.F.R. §  
14 404.1512(f). The Commissioner may satisfy this burden through the testimony of  
15 a VE. *Lounsbury*, 468 F.3d at 1114.

16 In response to a hypothetical that includes the limitations the ALJ found  
17 credible, a VE may testify as to "(1) what jobs the claimant, given his or her  
18 [RFC], would be able to do; and (2) the availability of such jobs in the national  
19 economy." *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). "A VE's  
20 recognized expertise provides the necessary foundation for his or her testimony."  
21 *Bayliss*, 427 F.3d at 1218. Accordingly, VE testimony is substantial evidence. *See*  
22 *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995) ("[T]he ALJ was within his  
23 rights to rely solely on the vocational expert's testimony.") (quoting *Conn v. Sec'y*,  
24 51 F.3d 607, 610 (6th Cir. 1995)). But where the VE testimony is fundamentally  
25 flawed, remand is appropriate. *See, e.g., Farias v. Colvin*, 519 Fed. Appx. 439,  
26 440 (9th Cir. 2013) (remand required where VE provided employment data for a  
27 different occupation than the one he opined claimant could perform).

1 ALJs routinely rely on the Dictionary of Occupational Titles (“DOT”) “in  
2 evaluating whether the claimant is able to perform other work in the national  
3 economy.” *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations  
4 omitted); *see also* 20 C.F.R. § 404.1566(d)(1) (DOT is a source of reliable job  
5 information). The DOT is the rebuttable presumptive authority on job  
6 classifications. *Johnson*, 60 F.3d at 1435.

7 At the April 22, 2015 hearing, the ALJ asked the VE to consider a  
8 hypothetical scenario where an individual closely approaching retirement age with  
9 a high school education and the same past work as plaintiff could do work at the  
10 medium exertional level, while needing to avoid concentrated exposure to  
11 pulmonary or respiratory irritants. AR at 51. The VE testified that such a person  
12 would be able to perform the jobs of hand packager (DOT 920.587-018), packing  
13 machine operator (DOT 920.685-078), and warehouse worker (DOT 922.687-058).  
14 *Id.* at 52. The VE testified there were approximately 169,000 positions nationally  
15 for hand packagers, 170,000 positions nationally for packing machine operators,  
16 and 500,000 positions nationally for warehouse workers. *Id.* at 52. Additionally,  
17 the ALJ asked a second hypothetical scenario involving a similar person who  
18 would also need to take unscheduled breaks in addition to normally scheduled  
19 breaks lasting up to an hour, while also missing three to four days of work each  
20 week. *Id.* The VE testified that such an individual would not be able to perform  
21 any job as stated in the DOT. *Id.*

22 Plaintiff’s representative had an opportunity to cross examine the VE. *Id.* at  
23 53. The representative first inquired if a hypothetical individual who would miss  
24 approximately three days each month would be available to receive a full-time  
25 position in the national economy, to which the VE answered, “No.” *Id.* Then  
26 plaintiff’s representative asked if a hypothetical person who would be “off task  
27 approximately 15 to 20 percent of the day” would have full-time positions  
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1 available in the national economy, to which the VE again answered in the negative.

2 *Id.*

3 Plaintiff first contends the ALJ erred in its step five determination because  
4 there was not substantial evidence that plaintiff could perform the occupations  
5 identified by the VE, in light of plaintiff's alleged physical and mental  
6 impairments. P. Mem. at 11-12. As discussed above, the ALJ properly determined  
7 plaintiff had the RFC to perform medium work, while avoiding concentrated  
8 exposure to pulmonary and respiratory irritants. AR at 21. With her step five  
9 argument, plaintiff additionally contends the ALJ should have considered the VE's  
10 testimony that no work would be available for an individual requiring unscheduled  
11 work breaks of up to one hour, who is absent three to four days per month, or who  
12 is off task 15-20% of the time. But plaintiff offers no reason why the ALJ should  
13 have incorporated these limitations into plaintiff's RFC so as to make the VE's  
14 testimony in this regard relevant. And indeed, the ALJ detailed his reasons for  
15 finding no mental limitations, including the findings of plaintiff's examining  
16 psychologist, Dr. William C. Prince, who noted plaintiff was not impaired in  
17 performing consistent work activities, maintaining regular attendance in the  
18 workplace, or completing a normal workday or workweek due to a psychiatric  
19 condition. AR at 18-20; *see id.* at 377. The ALJ may reject restrictions not  
20 supported by substantial evidence in the record. *See Osenbrock v. Apfel*, 240 F.3d  
21 1157, 1164-65 (9th Cir. 2001). Thus, the ALJ properly excluded from  
22 consideration plaintiff's alleged restrictions stemming from physical or mental  
23 impairments that were unsupported by the objective medical evidence. *See Stubbs-*  
24 *Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008) (rejecting claimant's  
25 contention that ALJ erred at step five by failing to account for her limitations in the  
26 ALJ's hypothetical where claimant "simply restates" a prior RFC argument).

27 Plaintiff additionally contends the VE provided defective testimony. P.  
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1 Mem. at 13. Specifically, plaintiff argues the VE erred in testifying there were  
2 500,000 “occupations” for warehouse workers (DOT 922.687-058). *Id.* But as  
3 defendant points out (D. Mem. at 10), plaintiff’s argument is inconsistent with the  
4 hearing transcript, which shows the VE testified there were 500,000 “positions” in  
5 the national economy rather than “occupations.” AR at 52. But assuming plaintiff  
6 means to challenge the VE’s testimony that there were 500,000 such positions,  
7 plaintiff has failed to show the VE erred. Plaintiff’s interpretation of the Job  
8 Browser Pro report plaintiff attaches as Exhibit C is insufficient reason to question  
9 the validity or accuracy of the VE’s testimony. *See Cardone v. Colvin*, 2014 WL  
10 1516573, at \*5 (C.D. Cal. Apr. 18, 2014) (“plaintiff’s lay assessment of the raw  
11 vocational data derived from Job Browser Pro does not undermine the reliability of  
12 the VE’s opinion”); *Vera v. Colvin*, 2013 WL 6144771, at \*22 (C.D. Cal. Nov. 21,  
13 2013) (“lay assessment of the data derived from . . . Job Browser Pro does not  
14 undermine the reliability of the VE’s testimony” where the plaintiff “failed to  
15 introduce any VE opinion interpreting the data from those sources and the  
16 significance of the information reflected on the various reports is not entirely  
17 clear”); *Valenzuela v. Colvin*, 2013 WL 2285232, at \*4 (C.D. Cal. May 23, 2013)  
18 (rejecting plaintiff’s assessment, in part, because it “was unaccompanied by any  
19 analysis or explanation from a vocational expert or other expert source to put the  
20 raw data into context”).

21           Moreover, even if the VE erred in testifying to 500,000 warehouse worker  
22 positions, the VE also testified to 169,000 hand packager and 170,000 packing  
23 machine operator positions. AR at 52. Ninth Circuit case law has held that these  
24 amounts meet the statutory standard in light of 20 C.F.R. § 416.966(b). *See*  
25 *Gutierrez v. Comm’r*, 740 F.3d 519, 528-29 (9th Cir. 2014) (affirming ALJ’s  
26 decision that 25,000 jobs constitutes a “significant number” of national jobs); *see*  
27 *also Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995) (per curiam) (64,000  
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1 nationwide jobs are significant). Therefore, any error by the ALJ in considering  
2 the alleged VE misstatement would at most constitute harmless error at step five.  
3 *See Rushing v. Astrue*, 360 Fed. Appx. 781, 783 (9th Cir. 2009) (holding ALJ's  
4 step five errors were harmless) (citing *Burch*, 400 F.3d at 679).

5 Because the ALJ properly determined plaintiff's RFC, substantial evidence  
6 supports the ALJ's step five determination that plaintiff could perform jobs that  
7 exist in significant numbers in the national economy.

8 V.

9 **CONCLUSION**

10 IT IS THEREFORE ORDERED that Judgment shall be entered  
11 AFFIRMING the decision of the Commissioner denying benefits, and dismissing  
12 this action with prejudice.

13  
14  
15 DATED: October 31, 2016



16  
17 SHERI PYM  
United States Magistrate Judge