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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DONNA R. ANAYA,  
Plaintiff

v.

NANCY A. BERRYHILL<sup>1</sup>, Acting  
Commissioner of Social Security,  
Defendant.

Case No. 5:16-CV-01199-GJS

**MEMORANDUM OPINION AND  
ORDER**

**INTRODUCTION**

Plaintiff Donna R. Anaya appeals from the Commissioner’s denial of Social Security Disability Benefits (“DIB”). Plaintiff alleges disability since March 30, 2011, based on pain and physical limitations due to lower back and knee problems and obesity. [Dkt. 17 (“Joint Stipulation”) at 2.] Plaintiff also alleged mental impairments due to affective mood disorder, but does not challenge the Administrative Law Judge’s (“ALJ”) decision that her mental disorder is not severe. The ALJ held a hearing on August 20, 2014, and issued an unfavorable decision on

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<sup>1</sup> The Court notes that Nancy A. Berryhill became the Acting Commissioner of the Social Security Administration on January 23, 2017. Accordingly, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court orders that the caption be amended to substitute Nancy A. Berryhill for Carolyn W. Colvin as the defendant in this action.

1 November 19, 2014. Plaintiff appealed to the District Court, and both parties  
2 consented to proceed before Magistrate Judge David Bristow. [Dkt. 11, 12.] The  
3 case was later transferred to the undersigned Magistrate Judge and the parties again  
4 consented. [Dkt. 19, 20.]

5 The parties present two issues for review: (1) whether the ALJ's residual  
6 functional capacity ("RFC") assessment is supported by substantial evidence; and  
7 (2) whether the ALJ's credibility determination is supported by substantial evidence.  
8 In order to avoid repetition and for additional reasons, the Court addresses these  
9 issues in a different order than did the parties. For the reasons set forth below, the  
10 Court AFFIRMS the decision of the ALJ.

#### 11 **ADMINISTRATIVE DECISION UNDER REVIEW**

12 The ALJ found that Plaintiff has the severe impairments of obesity and  
13 arthritis of the knees. [AR 48.] He also noted that the evidence of record showed  
14 that Plaintiff has a baker's cyst in the knees and a history of injuries to her lower  
15 back, knees, and shoulders, but that these latter impairments are non-severe. [AR  
16 48.] The ALJ also found that Plaintiff does not have an impairment or combination  
17 of impairments that meets or medically equals a listed impairment. Given these  
18 findings and upon review of the evidence, the ALJ determined that Plaintiff has the  
19 RFC to perform medium work, except as follows:

20 [S]he can lift and carry 50 pounds occasionally and 25  
21 pounds frequently; push and pull within the weight  
22 limitations specified, stand/walk for 6 hours in an 8-hour  
23 workday; sit for 6 hours in an 8-hour workday; can  
frequently climb ramps, stairs, and ladders; cannot climb  
ropes or scaffolding; can frequently stoop, balance,  
crouch, crawl, and kneel.

24 [AR 50.]

25 In assessing Plaintiff's testimony and her RFC, the ALJ summarized the  
26 medical evidence of record and opinions of two examining physicians, Dr. Vincente  
27 Bernabe, D.O., a Board Certified Orthopedist, Azizollah Karamlou, M.D., an  
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1 internal medicine specialist, as well as the treatments notes of physical therapy  
2 sessions Plaintiff had in 2013 and 2014, additional doctor visits, and the opinions of  
3 State agency reviewing medical consultants, among other evidence. [AR 51-55.] In  
4 sum, eight physicians all concurred in finding that Plaintiff was capable of  
5 performing work at the medium exertional level, and many objective tests taken  
6 during the relevant period, some of which are highlighted below, supported this  
7 assessment.

8 Based on the RFC above, a vocation expert testified that Plaintiff was capable  
9 of performing her past relevant work as a retail floor manager.

### 10 GOVERNING STANDARD

11 Under 42 U.S.C. § 405(g), this Court reverses only if the Commissioner’s  
12 “decision was not supported by substantial evidence in the record as a whole or if  
13 the [Commissioner] applied the wrong legal standard.” *Molina v. Astrue*, 674 F.3d  
14 1104, 1110 (9th Cir. 2012). Substantial evidence is “such relevant evidence as a  
15 reasonable mind might accept as adequate to support a conclusion,” and “must be  
16 ‘more than a mere scintilla,’ but may be less than a preponderance.” *Id.* at 1110-11;  
17 *see Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation and  
18 quotations omitted). This Court “must consider the evidence as a whole, weighing  
19 both the evidence that supports and the evidence that detracts from the  
20 Commissioner’s conclusion.” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996,  
21 1002 (9th Cir. 2015) (internal citation omitted). If “the evidence is susceptible to  
22 more than one rational interpretation, we must uphold the [Commissioner’s]  
23 findings if they are supported by inferences reasonably drawn from the record.”  
24 *Molina*, 674 F.3d at 1111.

25 Even if Plaintiff shows the Commissioner committed legal error, “[r]eversal  
26 on account of error is not automatic, but requires a determination of prejudice.”  
27 *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012). “[T]he burden of showing  
28 that an error is harmful normally falls upon the party attacking the agency’s

1 determination.” *Molina*, 674 F.3d at 1111 (citing *Shinseki v. Sanders*, 556 U.S. 396,  
2 409 (2009)). And “[w]here harmfulness of the error is not apparent from the  
3 circumstances, the party seeking reversal must explain how the error caused harm.”  
4 *McLeod v. Astrue*, 640 F.3d 881, 887 (9th Cir. 2011).

5 Courts have “affirmed under the rubric of harmless error where the mistake  
6 was nonprejudicial to the claimant or irrelevant to the ALJ’s ultimate disability  
7 conclusion.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.  
8 2006). In sum, “ALJ errors in social security cases are harmless if they are  
9 ‘inconsequential to the ultimate nondisability determination’ and...a reviewing court  
10 cannot consider [an] error harmless unless it can confidently conclude that no  
11 reasonable ALJ, when fully crediting the testimony, could have reached a different  
12 disability determination.” *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10,  
13 2015) (internal citation and quotations omitted). Ultimately, “[t]he nature of [the]  
14 application [of the harmless error doctrine] is fact-intensive—no presumptions  
15 operate and [the Court] must analyze harmlessess in light of the circumstances of  
16 the case.” *Id.* (internal citation and quotations omitted).

## 17 DISCUSSION

### 18 I. The ALJ’s Determination That Plaintiff Was Not Fully Credible Is 19 Supported By At Least One Clear And Convincing Reason.

20 “Where, as here, an ALJ concludes that a claimant is not malingering, and  
21 that she has provided objective medical evidence of an underlying impairment  
22 which might reasonably produce the pain or other symptoms alleged, the ALJ may  
23 reject the claimant’s testimony about the severity of her symptoms only by offering  
24 specific, clear and convincing reasons for doing so.” *Brown-Hunter v. Colvin*, 806  
25 F.3d 487, 492-93 (9th Cir. 2015) (internal citation and quotations omitted). Even if  
26 “the ALJ provided one or more invalid reasons for disbelieving a claimant’s  
27 testimony,” if he “also provided valid reasons that were supported by the record,”  
28 the ALJ’s error “is harmless so long as there remains substantial evidence

1 supporting the ALJ's decision and the error does not negate the validity of the ALJ's  
2 ultimate conclusion." *Molina*, 674 F.3d at 1115 (internal citation and quotations  
3 omitted).

4 "The ALJ may consider many factors in weighing a claimant's credibility,  
5 including (1) ordinary techniques of credibility evaluation, such as the claimant's  
6 reputation for lying, prior inconsistent statements concerning the symptoms, and  
7 other testimony by the claimant that appears less than candid; (2) unexplained or  
8 inadequately explained failure to seek treatment or to follow a prescribed course of  
9 treatment; and (3) the claimant's daily activities." *Tomasetti v. Astrue*, 533 F.3d  
10 1035, 1039 (9th Cir. 2008) (internal citation and quotations omitted); *see also*  
11 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002) (explaining that  
12 acceptable bases for credibility determination include (1) the claimant's reputation  
13 for truthfulness; (2) inconsistencies in the claimant's testimony or between his  
14 testimony and conduct; (3) claimant's daily living activities; (4) claimant's work  
15 record; and (5) testimony from physicians or third parties concerning the nature,  
16 severity, and effect of claimant's condition).

17 Plaintiff contends that the ALJ failed to properly credit her subjective  
18 complaints of pain and inability to work contained in both her testimony at the  
19 hearing and an Exertional Questionnaire completed in June 2012. [Joint Stipulation  
20 at 12; AR 50.]. The ALJ found her credibility "diminished," although he did not  
21 discount her allegations of pain entirely, taking them into consideration in  
22 constructing her RFC. [AR 51, 54.] The ALJ gave the following reasons for  
23 discounting Plaintiff's testimony and allegations of pain, each of which is  
24 challenged by Plaintiff as not rising to the level of "specific and legitimate" reasons:

25 • ***Inconsistencies In Plaintiff's Statements***

26 Although Plaintiff testified that she stopped working because she could not  
27 bend, stoop, or stand long enough to perform her job due to pain, the evidence "also  
28 reveal[ed] that the claimant stopped working because she was tired of the cold and

1 snow so she moved from Big Bear to Riverside.” [AR 51, citing Ex. 8F (AR 348).]  
2 She also admitted that she received unemployment compensation after her alleged  
3 disability onset date. The ALJ noted that “this reflects negatively on the claimant’s  
4 credibility because in California, in order to receive unemployment benefits, the  
5 claimant needs to attest that she is physically able to work, ready and willing to  
6 accept work, and must be actively looking for work each week benefits are  
7 claimed.” [AR 51.] The ALJ thus based his credibility determination, at least in  
8 part, on these two inconsistencies. While the Court agrees with Plaintiff that receipt  
9 of unemployment benefits alone (and without additional reasons like those presented  
10 below) would not likely constitute a sufficient inconsistency to discount her  
11 testimony, the Court finds here that the ALJ’s identification of multiple  
12 inconsistencies is a specific and legitimate reason supported by substantial evidence.

13 • ***Activities Of Daily Living At Odds With Total Disability***

14 While Plaintiff reported that she did not usually walk more than 100 yards,  
15 can only lift up to 10 pounds, and suffers from pain, numbness, weakness, and  
16 fatigue, she also revealed that: she walks her dog, shops for groceries on her own,  
17 dusts, does the dishes, and lives independently. She drives herself, and goes on  
18 outings to visit her daughter and grandchildren, and told a therapist she provided  
19 childcare to her grandchildren. [AR 51 (ALJ’s opinion); 350, 545, 559 (examples of  
20 supporting evidence).] She reported excellent relationships with family and friends.  
21 [AR 51].

22 Of course, an ALJ may consider “whether the claimant engages in daily  
23 activities inconsistent with the alleged symptoms.” *Molina*, 504 F.3d at 1040  
24 (internal citation omitted). And even if Plaintiff has some difficulties in performing  
25 these activities, they may nevertheless be grounds for discrediting a plaintiff’s  
26 claims of totally disabling impairments. *Turner v. Comm’r Social Sec.*, 613 F.3d  
27 1217, 1224-25 (9th Cir. 2010). An ALJ should address whether the Plaintiff’s daily  
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1 activities translate into the work environment. *Orn v. Astrue*, 495 F.3d 625, 639  
2 (9th Cir. 2007) (internal citation and quotations omitted).

3 In finding that Plaintiff’s reported activities of daily living were inconsistent  
4 with a finding of disability, the ALJ specifically noted that (1) being able to care for  
5 her pets, “which requires regular attention and some physical effort,” and (2) “some  
6 of the physical and mental abilities and social interactions required in order to  
7 perform” the other activities she described, are “the same as those necessary for  
8 obtaining and maintaining employment.” [AR 51.] The ALJ’s analysis of  
9 Plaintiff’s activities of daily living thus provided a second specific and legitimate  
10 reason to discount her testimony of debilitating pain and limitations.

11 • ***The Lack Of Record Evidence Supporting Plaintiff’s Claims Of Total***  
12 ***Disability Supports The ALJ’s Credibility Determination***

13 The ALJ also found Plaintiff’s allegations of debilitating pain not credible in  
14 light of the medical evidence. [AR 51]. He noted, *inter alia*, that she had multiple  
15 physical examinations with findings of normal gait; that she sought treatment for  
16 general medical care in October 2011 and did not complain about back or other  
17 musculoskeletal problems [AR 51, citing Ex 6F at 3-4 (AR 333-334)]; that  
18 consulting physicians conducted objective tests that found normal range of motion,  
19 no muscular atrophy, and full strength and reflexes [AR 52, citing Ex 7F (AR 338,  
20 et seq.); Ex 11 F (AR 375 et seq.)]. While lack of support in medical records for a  
21 plaintiff’s allegations of debilitating pain will not alone suffice to discount his or her  
22 testimony, the ALJ may consider such lack of objective evidence as a factor in the  
23 credibility analysis. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The ALJ  
24 properly did so in this case.

25 Given that the Court has found that at least two of the reasons given by the  
26 ALJ for finding Plaintiff’s credibility “diminished” are specific and legitimate,  
27 which are further supported by a third – and only one is necessary – the Court will  
28 not address the remaining reason (conservative treatment) set forth in the ALJ’s

1 opinion. Plaintiff’s contention that the ALJ impermissibly discounted her testimony  
2 does not provide a basis for reversal of the Commissioners finding that she is not  
3 disabled.

4 **II. The ALJ’s Residual Functional Capacity Assessment Is Supported By**  
5 **Substantial Evidence**

6 Plaintiff argues that the ALJ did not properly evaluate the medical evidence in  
7 assessing her RFC. As noted above, if “the evidence is susceptible to more than one  
8 rational interpretation, [the Court] must uphold the [Commissioner’s] findings if  
9 they are supported by inferences reasonably drawn from the record.” *Molina*, 674  
10 F.3d at 1111. In this case, all four physicians that examined Plaintiff or reviewed  
11 her records, and a plethora of objective tests on which the physicians relied, support  
12 the physical functional limitations of medium exertion RFC determined by the ALJ.  
13 [AR 91-92; 105-106; 342-343; 377-379.] Plaintiff cites to isolated tests and medical  
14 record entries that support more restrictive limitations, but does not present any  
15 medical opinions to the contrary. Thus, while Plaintiff does not appreciate the  
16 conclusion the ALJ made after review of the evidence, the ALJ’s rational  
17 interpretation must be credited here absent some reason to disregard the substantial  
18 evidence he cited.

19 Plaintiff’s primary attack on the evidence cited by the ALJ is her argument  
20 that one of the physicians who examined her, Dr. Bernabe, has settled medical  
21 malpractice claims in the past and has cases presently pending, and, therefore, his  
22 opinion and those of reviewing physicians who relied, in part, on his opinion,  
23 “cannot be substantial evidence to support the ALJ’s RFC assessment.” [Joint  
24 Stipulation at 5, n. 2.] The Court finds this argument distasteful and disingenuous.  
25 As the Commissioner notes, Dr. Bernabe’s license is current and in good standing.<sup>2</sup>  
26 And Plaintiff does not even attempt to explain how or why the results of objective

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28 <sup>2</sup> The Court takes judicial notice of this fact from the State of California’s BreEZe  
Online Services database of professional licenses, located at [www.breeze.ca.gov](http://www.breeze.ca.gov).



1 tests conducted by Dr. Bernabe and his observations of her abilities should be  
2 discounted based on alleged malpractice in unrelated, unnamed, and undescribed  
3 cases. Moreover, Dr. Bernabe’s opinion did not “infect” *all* of the other opinions—  
4 and the substantial evidence on which they were rendered —that support the ALJ’s  
5 RFC determination.

6 Although not captioned as a separate argument, Plaintiff also contends that  
7 the ALJ erred at step two of the sequential evaluation process in finding that her low  
8 back impairment was not a severe impairment. [Joint Stipulation at 6.] While the  
9 Court believes that the ALJ did not err in this regard, any error that may have been  
10 committed is harmless.

11 At step two of the sequential evaluation process, a plaintiff has the burden to  
12 present evidence of medical signs, symptoms, and laboratory findings that establish  
13 a medically determinable physical or mental impairment that is severe and can be  
14 expected to result in death or last for a continuous period of at least 12 months.  
15 *Ukolov v. Barnhart*, 420 F.3d 1002, 1004-05 (9th Cir. 2005) (citing 42 U.S.C. §§  
16 423(d)(3), 1382c(a)(3)(D)); *see* 20 C.F.R. §§ 404.1520, 404.1509). Substantial  
17 evidence supports an ALJ’s determination that a claimant is not disabled at step two  
18 when “there are no medical signs or laboratory findings to substantiate the existence  
19 of a medically determinable physical or mental impairment.” *Ukolov*, 420 F.3d at  
20 1004-05 (citing SSR 96-4p). An impairment may never be found on the basis of the  
21 claimant’s subjective symptoms alone. *Id.* at 1005.

22 Step two is “a de minimis screening device [used] to dispose of groundless  
23 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). Applying the  
24 applicable standard of review to the requirements of step two, a court must  
25 determine whether an ALJ had substantial evidence to find that the medical  
26 evidence clearly established that the claimant did not have a medically severe  
27 impairment or combination of impairments. *Webb v. Barnhart*, 433 F.3d 683, 687  
28 (9th Cir. 2005); *see also Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)

1 (“Despite the deference usually accorded to the Secretary’s application of  
2 regulations, numerous appellate courts have imposed a narrow construction upon the  
3 severity regulation applied here.”). An impairment or combination of impairments  
4 is “not severe” if the evidence established only a slight abnormality that had “no  
5 more than a minimal effect on an individual’s ability to work.” *Webb*, 433 F.3d at  
6 686 (internal citation omitted).

7 Even if an ALJ errs by finding one or more of a plaintiff’s alleged  
8 impairments nonsevere, such error is harmless if he nevertheless considers the  
9 impairments when determining the plaintiff’s RFC at step four. *See Lewis v. Astrue*,  
10 498 F.3d 909, 911 (9th Cir. 2007) (failure to address particular impairment at step  
11 two harmless if ALJ fully evaluated claimant’s medical condition in later steps of  
12 sequential evaluation process); *see also Stout*, 454 F.3d at 1055 (ALJ’s error  
13 harmless when “inconsequential to the ultimate nondisability determination”).

14 In this case, the ALJ determined that Plaintiff’s back problems were not  
15 severe, but clearly took Plaintiff’s claims of pain and medical records related to her  
16 alleged back problems into account in determining Plaintiff’s RFC. *See, e.g.*, [AR  
17 52 (discussing Plaintiff’s physical therapy in 2013, noting both reported  
18 improvement with medication and multiple office visits “in which the claimant did  
19 not specify any particular complaint with respect to her musculoskeletal  
20 impairments”)]; [AR 52 (x-ray of the spine in 2013 “only showed minimal  
21 degenerative spondylosis)]; [AR 53 (symptoms, including back pain, “improved  
22 with moving around”)]; [AR 53 (ALJ took claimant’s weight, “including the impact  
23 on her ability to ambulate” in considering her functional limitations)]; [AR 54 (ALJ  
24 added limitations over and above physicians’ opinions that she could perform a full  
25 range of medium work based on Plaintiff’s complaints of pain and other  
26 assessments).] The ALJ thus not only found, based on substantial evidence, that  
27 Plaintiff’s back impairment did not impact her ability to work sufficiently to warrant  
28 consideration as “severe,” but he nevertheless considered Plaintiff’s symptoms in

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sufficient detail in crafting Plaintiff's RFC. As a result, any possible error was harmless.

**CONCLUSION**

For all of the foregoing reasons, **IT IS ORDERED** that the decision of the Commissioner finding Plaintiff not disabled is **AFFIRMED**.

**IT IS SO ORDERED.**

DATED: January 24, 2018



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GAIL J. STANDISH  
UNITED STATES MAGISTRATE JUDGE