

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

JENNIFER JONES,	)	Case No. CV 16-1823-JPR
	)	
Plaintiff,	)	
	)	<b>MEMORANDUM DECISION AND ORDER</b>
v.	)	<b>AFFIRMING COMMISSIONER</b>
	)	
NANCY A. BERRYHILL, Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
<hr/>	)	

**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner’s final decision denying her application for 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 June 30, 2017, 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 1981. (Administrative Record ("AR")  
3 211.) She has a college degree in botany and biochemistry. (AR  
4 85, 228.) She has worked as a university laboratory technician  
5 and a teaching assistant. (AR 228.)

6 On March 26, 2013, Plaintiff filed an application for SSI,  
7 alleging she had been disabled since April 1, 2010 (AR 211),  
8 because of a crushed leg, depression, bipolar disorder, and  
9 schizotypal personality disorder (see AR 135). After her  
10 application was denied initially and upon reconsideration (AR  
11 135, 168), she requested a hearing before an Administrative Law  
12 Judge (AR 146). A hearing was held on November 26, 2014, at  
13 which Plaintiff, who was represented by counsel, testified, as  
14 did her father and a vocational expert. (AR 80-108.) In a  
15 written decision issued on January 16, 2015, the ALJ found  
16 Plaintiff not disabled. (AR 64-79.) Plaintiff requested review  
17 and submitted additional medical evidence. (See AR 15-29, 45,  
18 47-63.) On June 22, 2016, the Appeals Council denied review,  
19 finding that the additional evidence did not provide a basis for  
20 changing the ALJ's decision. (AR 1-7.) The council ordered that  
21 the new evidence be made part of the administrative record.  
22 (AR 6.) This action followed.

23 **III. STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), a district court may review the  
25 Commissioner's decision to deny benefits. The ALJ's findings and  
26 decision should be upheld if they are free of legal error and  
27 supported by substantial evidence based on the record as a whole.  
28 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra

1 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial  
2 evidence means such evidence as a reasonable person might accept  
3 as adequate to support a conclusion. Richardson, 402 U.S. at  
4 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).  
5 It is more than a scintilla but less than a preponderance.  
6 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.  
7 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
8 substantial evidence supports a finding, the reviewing court  
9 "must review the administrative record as a whole, weighing both  
10 the evidence that supports and the evidence that detracts from  
11 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
12 720 (9th Cir. 1998). "If the evidence can reasonably support  
13 either affirming or reversing," the reviewing court "may not  
14 substitute its judgment" for the Commissioner's. Id. at 720-21.

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

16 People are "disabled" for purposes of receiving Social  
17 Security benefits if they are unable to engage in any substantial  
18 gainful activity owing to a physical or mental impairment that is  
19 expected to result in death or has lasted, or is expected to  
20 last, for a continuous period of at least 12 months. 42 U.S.C.  
21 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.  
22 1992).

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

24 The ALJ follows a five-step sequential evaluation process to  
25 assess whether a claimant is disabled. 20 C.F.R.  
26 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.  
27 1995) (as amended Apr. 9, 1996). In the first step, the  
28 Commissioner must determine whether the claimant is currently

1 engaged in substantial gainful activity; if so, the claimant is  
2 not disabled and the claim must be denied. § 416.920(a)(4)(i).

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

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

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

---

24  
25 <sup>1</sup> RFC is what a claimant can do despite existing exertional  
26 and nonexertional limitations. § 416.945; see Cooper v.  
27 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The  
28 Commissioner assesses the claimant's RFC between steps three and  
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)  
(citing § 416.920(a)(4)).

1 If that happens or if the claimant has no past relevant  
2 work, the Commissioner then bears the burden of establishing that  
3 the claimant is not disabled because she can perform other  
4 substantial gainful work available in the national economy.  
5 § 416.920(a)(4)(v); Drouin, 966 F.2d at 1257. That determination  
6 comprises the fifth and final step in the sequential analysis.  
7 § 416.920(a)(4)(v); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d  
8 at 1257.

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

10 At step one, the ALJ found that Plaintiff had not engaged in  
11 substantial gainful activity since March 26, 2013, the  
12 application date. (AR 69.) At step two, he concluded that she  
13 had only one severe medically determinable impairment: "fracture  
14 of the left lower extremity." (Id.) He also found that she had  
15 a medically determinable mental impairment, mood disorder, but  
16 concluded that it was "nonsevere." (Id.) At step three, he  
17 found that she did not have an impairment or combination of  
18 impairments falling under a Listing, "specifically consider[ing]  
19 listing 1.06." (AR 70.)

20 At step four, the ALJ found that Plaintiff had the RFC to  
21 perform a limited range of light work: she could "lift and/or  
22 carry up to 20 pounds occasionally and 10 pounds frequently,"  
23 "stand and/or walk no more than four hours in an eight-hour  
24 workday," "sit without restriction," and "frequently perform  
25 pushing or pulling with the upper extremities." (Id.) She  
26 "require[d] a cane for long-distance ambulation"; could  
27 "occasionally climb, balance, kneel and crawl"; and "should avoid  
28 jobs requiring more than occasional negotiation of uneven

1 terrain, unprotected heights, or the climbing of ladders, ropes  
2 or scaffolds." (AR 70-71.) Based on the VE's testimony, the ALJ  
3 concluded that she could not perform any past relevant work. (AR  
4 73.) At step five, however, given her "age, education, work  
5 experience, and [RFC]," he determined that she could successfully  
6 perform numerous light and sedentary jobs available in the  
7 national economy. (AR 74-75.) Thus, the ALJ found Plaintiff not  
8 disabled. (AR 75.)

## 9 **V. DISCUSSION**

10 Plaintiff argues that the ALJ erred in (1) evaluating the  
11 credibility of her subjective symptom statements, (2) denying the  
12 applicability of Listing 1.06 to her leg impairment, and (3)  
13 finding her mental impairment nonsevere. (See J. Stip. at 4.)  
14 For the reasons discussed below, the ALJ did not err.

### 15 A. The ALJ Properly Assessed the Credibility of 16 Plaintiff's Subjective Symptom Statements

17 The ALJ found that Plaintiff's statements "concerning the  
18 intensity, persistence and limiting effects" of her physical and  
19 mental symptoms were "not entirely credible." (AR 71.)  
20 Plaintiff argues that this finding was improper because the ALJ  
21 failed to sufficiently support it. (See J. Stip. at 16-22.) The  
22 ALJ, however, based his credibility assessment on clear and  
23 convincing reasons. Accordingly, remand is not warranted.

#### 24 1. Applicable law

25 An ALJ's assessment of the credibility of a claimant's  
26 allegations concerning the severity of her symptoms is entitled  
27 to "great weight." See Weetman v. Sullivan, 877 F.2d 20, 22 (9th  
28 Cir. 1989) (as amended); Nyman v. Heckler, 779 F.2d 528, 531 (9th

1 Cir. 1985) (as amended Feb. 24, 1986). “[T]he ALJ is not  
2 ‘required to believe every allegation of disabling pain, or else  
3 disability benefits would be available for the asking, a result  
4 plainly contrary to 42 U.S.C. § 423(d)(5)(A).’” Molina v.  
5 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (quoting Fair v.  
6 Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

7 In evaluating a claimant’s subjective symptom testimony, the  
8 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d  
9 at 1035-36; see also SSR 96-7p, 1996 WL 374186 (July 2, 1996).<sup>2</sup>  
10 “First, the ALJ must determine whether the claimant has presented  
11 objective medical evidence of an underlying impairment [that]  
12 could reasonably be expected to produce the pain or other  
13 symptoms alleged.” Lingenfelter, 504 F.3d at 1036. If such  
14 objective medical evidence exists, the ALJ may not reject a  
15 claimant’s testimony “simply because there is no showing that the  
16 impairment can reasonably produce the degree of symptom alleged.”  
17 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in  
18 original).

19 If the claimant meets the first test, the ALJ may discredit  
20 the claimant’s subjective symptom testimony only if she makes  
21 specific findings that support the conclusion. See Berry v.  
22 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or  
23 affirmative evidence of malingering, the ALJ must provide “clear  
24 and convincing” reasons for rejecting the claimant’s testimony.

---

25  
26 <sup>2</sup> Social Security Ruling 16-3p, 2016 WL 1119029, effective  
27 March 28, 2016, rescinded SSR 96-7p, which provided the framework  
28 for assessing the credibility of a claimant’s statements. SSR  
16-3p was not in effect at the time of the ALJ’s decision in this  
case, however.

1 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as  
2 amended); Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d 1090,  
3 1102 (9th Cir. 2014). The ALJ may consider, among other factors,  
4 (1) ordinary techniques of credibility evaluation, such as the  
5 claimant’s reputation for lying, prior inconsistent statements,  
6 and other testimony by the claimant that appears less than  
7 candid; (2) unexplained or inadequately explained failure to seek  
8 treatment or to follow a prescribed course of treatment; (3) the  
9 claimant’s daily activities; (4) the claimant’s work record; and  
10 (5) testimony from physicians and third parties. Rounds v.  
11 Comm’r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as  
12 amended); Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
13 2002). If the ALJ’s credibility finding is supported by  
14 substantial evidence in the record, the reviewing court “may not  
15 engage in second-guessing.” Thomas, 278 F.3d at 959.

16 2. Relevant background

17 a. *Physical limitations*

18 In 2010, Plaintiff fractured her left femur in a car crash  
19 and also sustained several fractures of her right leg. (AR 526.)  
20 Though the record contains no documentation of treatment before  
21 March 2012 (see AR 71), the fractures apparently required  
22 multiple rounds of surgery (see AR 526). In July 2012, she was  
23 diagnosed with nonunion of the left-leg fracture and underwent  
24 corrective surgery. (AR 441-42.) Following the surgery, in  
25 October 2012 she was able to walk and stand for “3-5 minutes”  
26 without assistance (AR 384), and in May 2013 she could “ambulate  
27 short distances [without] pain” (AR 310). Medical imaging  
28 throughout 2013 indicated that the fracture was healing but that



1 union was still incomplete despite stable hardware. (See, e.g.,  
2 AR 307 (May 2013), 544 (Dec. 2013).) By 2014, medical imaging  
3 indicated that the fractured femur was healing and had normal  
4 alignment, intact hardware, and "delayed union." (AR 602 (May  
5 2014), 604-05 (Mar. 2014), 608-09 (Jan. 2014).)

6 In her June 7, 2013 Adult Function Report, Plaintiff  
7 indicated that standing was painful (AR 242), and in her November  
8 20, 2013 Disability Report she stated that she could "no longer  
9 do things around the house like basic chores" (AR 274). Her  
10 report indicated, however, that she had no problem with personal  
11 care and could prepare her own meals, wash dishes, go outside  
12 "once or twice a week," use public transportation, and walk "a  
13 few blocks" with crutches. (AR 243-45, 247.) She also crocheted  
14 and played music throughout the day. (AR 246.)

15 In September 2013, Plaintiff was examined by consulting  
16 internist Ulin Sargeant. (AR 526-30.) She reported difficulty  
17 walking and said she used crutches "all the time," "for  
18 everything even getting up from her bed." (AR 526.) She also  
19 reported that she did "not take any medications for the  
20 discomfort because she [did] not think that they help[ed] at  
21 all," and she was "not getting any intervention," including any  
22 treatment, cortisone injections, or physical therapy. (Id.)

23 Dr. Sargeant observed that with crutches she walked at a  
24 normal pace. (AR 527.) But when he asked her to walk or stand  
25 without crutches, she refused. (Id.) She also refused to flex  
26 her left knee beyond 10 degrees in a supine position but  
27 demonstrated a flexion of 90 degrees in a sitting position. (AR  
28 529.) Dr. Sargeant concluded that despite reported "discomfort

1 in her lower extremities," Plaintiff had "fairly good function"  
2 walking with crutches, could even walk "briskly with [them]," and  
3 was "able to do a lot of activities more than [he] thought that  
4 she could." (Id.) He assessed that she was "able to lift and  
5 carry 20 pounds occasionally and 10 pounds frequently"; was "able  
6 to walk and stand four hours out of an eight-hour workday"; had  
7 "no restrictions" sitting; "should use a cane for long  
8 distances"; was "able to walk on uneven terrain, climb ladders,  
9 and work at heights occasionally"; and was "able to climb,  
10 balance, kneel, and crawl occasionally." (AR 530.)

11 Dr. Pamela Ombres, a consulting physician<sup>3</sup> who reviewed  
12 Plaintiff's medical records in October 2013, noted that a few  
13 days after her exam with Dr. Sargeant, Plaintiff "called in  
14 stating she was nervous at [the] exam and told them she uses  
15 crutches all the time[, but] she uses crutches about 50% of [the]  
16 time, mostly out of the house" and not while at home. (AR 114.)  
17 Dr. Ombres found that Plaintiff was "capable of a sedentary RFC."  
18 (AR 117.) She could "[s]tand and/or walk (with normal breaks)  
19 for a total of[] 2 hours," could "[s]it (with normal breaks) for  
20 a total of[] [a]bout 6 hours in an 8-hour workday," and required  
21 a "[c]rutch for long distance[s]." (Id.)

22 Dr. M. Gleason, a consulting doctor,<sup>4</sup> reviewed Plaintiff's  
23

---

24 <sup>3</sup> Dr. Ombres has a specialty code of "28," indicating  
25 "[o]phthalmology." (AR 109); see Program Operations Manual  
26 System (POMS) DI 24501.004, U.S. Soc. Sec. Admin. (May 5, 2015),  
27 <https://secure.ssa.gov/poms.nsf/lnx/0424501004>.

28 <sup>4</sup> Dr. Gleason has a specialty code of "35," indicating  
"[p]lastic surgery." (AR 121); see Program Operations Manual  
System (POMS) DI 24501.004, U.S. Soc. Sec. Admin. (May 5, 2015),  
<https://secure.ssa.gov/poms.nsf/lnx/0424501004>.

1 medical records in February 2014 and reaffirmed her sedentary  
2 RFC. (AR 131.) Dr. Gleason noted that she could "[s]tand and/or  
3 walk (with normal breaks) for a total of[] 4 hours," could "[s]it  
4 (with normal breaks) for a total of[] [a]bout 6 hours in an 8-  
5 hour workday," and required a "[c]rutch for long distance[s]."  
6 (AR 129-30.)

7 At a December 2013 appointment, Plaintiff was found to have  
8 "normal" range of motion and "flexion/extension" in her left  
9 knee, and she was advised to practice walking with one crutch.  
10 (AR 545; see also AR 558.) In January 2014, she demonstrated  
11 normal range of motion in her left leg and was able to move her  
12 knee 130 degrees (AR 609); she also "request[ed] a note stating  
13 it's ok to swim" (AR 543). And at a March 2014 appointment, she  
14 demonstrated "full" range of motion in her left knee and reported  
15 walking two miles without pain (though she also reported walking  
16 two blocks with some pain around the same time). (AR 605.)

17 At her November 26, 2014 hearing, Plaintiff testified that  
18 she still had difficulty standing and walking. (AR 84.)  
19 Although she could stand and clean dishes at home for "short  
20 periods of time . . . pain free," she felt pain whenever she  
21 walked any distance "without [her] crutches." (Id.) She  
22 testified that she did not feel pain when seated (AR 90) but also  
23 testified that sitting for "more than an hour" was hard (AR 91).  
24 She indicated that she applied for "dishwasher jobs," "server  
25 jobs," and "clerical positions" but was not hired because she  
26 lacked relevant experience. (See AR 84-85.)

27 Plaintiff lived with her father, mother, and brother. (AR  
28 99.) Her father testified at the hearing. (AR 94.) He stated

1 that Plaintiff did some household chores, such as vacuuming,  
2 cleaning dishes, and laundry. (AR 95.) But the majority of his  
3 testimony concerned her mental health. (See AR 94-100.)<sup>5</sup>

4 b. *Mental limitations*

5 The record contains no psychiatric or mental-health records  
6 from before 2012 despite an alleged disability onset date of  
7 April 2010. (See AR 71.) Plaintiff's medical records, however,  
8 indicate that she had undergone regular treatment for mental-  
9 health problems since at least 2008. (See AR 497.) Throughout  
10 2012 and 2013, Plaintiff attended regular therapy sessions with  
11 clinical psychologist Joyce Handler. (AR 500-10.) During those  
12 sessions, Plaintiff discussed her history of psychiatric  
13 hospitalizations, suicidal episodes, and feelings of depression.  
14 (Id.) She reported acting violently toward her mother and  
15 brother, whom she identified as sources of her anger.<sup>6</sup> (See,  
16 e.g., AR 504 (in September 2012 she "became very angry [at her  
17 mother] and started throwing things around . . . [and] biting  
18

---

19 <sup>5</sup> Plaintiff in passing criticizes the ALJ's rejection of her  
20 father's hearing testimony. (See J. Stip. at 20-22.) His  
21 testimony was given "some weight" by the ALJ, but only "insofar  
22 as it corroborate[d]" Plaintiff's symptom statements. (AR 73.)  
23 As discussed below, because the ALJ found Plaintiff's symptom  
24 statements not fully credible (id.), a finding supported by  
25 substantial evidence in the record, the ALJ's partially adverse  
26 treatment of her father's testimony was not in error.

27 <sup>6</sup> Indeed, her mother was apparently at least sometimes a  
28 difficult person. She refused to participate in a family therapy  
session in October 2012 because she was "very angry" at Plaintiff  
and believed she was "destroy[ing]" their home. (AR 505.) That  
same month, Plaintiff was hospitalized for a violent episode, and  
when her mother came to visit, she was "very demanding and  
intrusive," "cursing and threatening staff," and "had to be  
escorted out twice." (AR 399.)

1 her," and in October 2012 she "reported becoming violent during  
2 an argument with her brother".) Nonetheless, Plaintiff also  
3 reported "connecting with people at church," "volunteering to  
4 help with gardening at the church," going "shopping with a new  
5 friend she met at the church," feeling "very badly about her  
6 violent behavior," seeming "more motivated than ever to stop,"  
7 and realizing "she had been paranoid." (AR 507-08.)

8 In March 2013, shortly before the application date, she was  
9 admitted to the hospital for inpatient treatment for having  
10 suicidal "plan[s] to hang herself or overdose on medications."  
11 (AR 319-34.) She reported having a history of bipolar disorder  
12 and major depressive disorder. (AR 323.) She also said she had  
13 been noncompliant with her medications and felt "like she  
14 need[ed] a medication change." (Id. (Plaintiff did not feel that  
15 Prolixin<sup>7</sup> or Trileptal<sup>8</sup> was working, and she stopped taking  
16  
17  
18  
19  
20  
21  
22

---

23 <sup>7</sup> Prolixin is the name-brand version of fluphenazine, an  
24 antipsychotic medication used to treat schizophrenia and such  
25 psychotic symptoms as hallucinations, delusions, and hostility.  
26 See Fluphenazine, MedlinePlus, <https://medlineplus.gov/druginfo/meds/a682172.html> (last updated July 15, 2017).

27 <sup>8</sup> Trileptal is the name-brand version of oxcarbazepine, an  
28 anticonvulsant used to treat seizures and bipolar disorder. See  
Oxcarbazepine, MedlinePlus, <https://medlineplus.gov/druginfo/meds/a601245.html> (last updated Jan. 15, 2016).

1 Depakote,<sup>9</sup> Topamax,<sup>10</sup> Zyprexa,<sup>11</sup> and Risperdal<sup>12</sup> because of their  
2 side effects); see also AR 374 (Plaintiff was noted in January  
3 2013 to "frequently change her [medication] regimen" on her  
4 own.) Plaintiff was given new medications (AR 324), and her  
5 treatment records throughout the rest of 2013 indicated she was  
6 stable and compliant with the medication. (See, e.g., AR 622  
7 (Dec. 2013), 623 (Oct. 2013), 624 (Sept. 2013); see also AR 561  
8 (Nov. 2013), 563 (Aug. 2013), 565 (July 2013), 567 (Apr. 2013).)  
9 Treatment records throughout 2014 demonstrated the same. (See,  
10 e.g., AR 613 (Oct. 2014), 615 (July 2014), 617 (May 2014), 619  
11 (Mar. 2014), 620 (Feb. 2014), 621 (Jan. 2014).) Plaintiff was  
12 apparently not hospitalized at any point between the application  
13 date and the ALJ's decision.

14 In her June 2013 function report, Plaintiff indicated that  
15

---

16 <sup>9</sup> Depakote is the name-brand version of valproic acid, an  
17 anticonvulsant used to treat mania. See Valproic Acid,  
18 MedlinePlus, <https://medlineplus.gov/druginfo/meds/a682412.html>  
(last updated July 15, 2017).

19 <sup>10</sup> Topamax is the name-brand version of topiramate, an  
20 anticonvulsant used to treat seizures, prevent migraines, and  
21 manage alcohol dependence. See Topiramate, MedlinePlus,  
<https://medlineplus.gov/druginfo/meds/a697012.html> (last updated  
22 Jan. 15, 2015).

22 <sup>11</sup> Zyprexa is the name-brand version of olanzapine, an  
23 atypical antipsychotic used to treat the symptoms of  
24 schizophrenia and bipolar disorder. See Olanzapine, MedlinePlus,  
<https://medlineplus.gov/druginfo/meds/a601213.html> (last updated  
25 June 15, 2017).

26 <sup>12</sup> Risperdal is the name-brand version of risperidone, an  
27 atypical antipsychotic used to treat the symptoms of  
28 schizophrenia, mania, and such other behavioral problems as  
aggression. See Risperidone, MedlinePlus, [https://  
medlineplus.gov/druginfo/meds/a694015.html](https://medlineplus.gov/druginfo/meds/a694015.html) (last updated July 15,  
2017).

1 her "suicidal issues" impaired her concentration. (AR 242.) She  
2 stated, however, that she was able to pay bills, handle savings  
3 accounts, count change, use a checkbook, and go to church weekly.  
4 (AR 245-46.) She took part in church "to the fullest extent."  
5 (AR 246.) She indicated that she spent time with others talking  
6 on the phone. (AR 246-47.) She also reported that she was  
7 capable of paying attention "long enough to work," which was "no  
8 different since [her 2010] car crash." (AR 247.)

9 In October 2013, Plaintiff was examined by consulting  
10 psychiatrist Thaworn Rathana-Nakintara. (AR 533-37.) Plaintiff  
11 reported having "suicidal feeling[s]" and a history of "bipolar  
12 disorder, depression, schizotypal personality disorder, and  
13 schizoaffective disorder since 2008." (AR 533.) She also  
14 reported having a history of psychiatric hospitalizations and  
15 nonhospital psychiatric treatment, and she said she was on  
16 medication and currently seeing a psychologist and psychiatrist.  
17 (AR 534.) She reported "feeling better since she was discharged  
18 from the hospital eight months [earlier]." (AR 536.) Dr.  
19 Rathana-Nakintara noted that Plaintiff had "adequate self-care  
20 skills," did "household chores," "manage[d] her own money with  
21 some help," and could "go places by herself sometimes." (AR  
22 535.) She was also responsive during the examination, maintained  
23 good eye contact, and was alert and oriented. (Id.) Dr.  
24 Rathana-Nakintara diagnosed Plaintiff with mood disorder. (AR  
25 536.) Plaintiff demonstrated "no difficulties in maintaining  
26 social functioning," "no difficulties focusing and maintaining  
27 attention," and "no difficulties in concentration, persistence  
28 and pace." (AR 537.) Dr. Rathana-Nakintara concluded that she

1 would have "no limitations performing simple and repetitive  
2 tasks"; "no limitations performing detailed and complex tasks";  
3 "no difficulties [performing] work activities on a consistent  
4 basis without special or additional supervision"; "no limitations  
5 completing a normal workday or workweek due to her mental  
6 condition"; "no limitations accepting instructions from  
7 supervisors and interacting with coworkers and with the public";  
8 and "no difficulties [handling] the usual stresses, changes and  
9 demands of gainful employment." (Id.) Dr. Rathana-Nakintara  
10 also noted that Plaintiff was "vulnerable to becom[ing] depressed  
11 when she [was] very stressed" in her personal relationships but  
12 "not at work." (Id.)

13 Also at this time Plaintiff's medical records were reviewed  
14 by consulting psychologist W. Miller Logan, who concluded that  
15 she was not disabled. (AR 113-15, 118-20.) Dr. Logan found that  
16 she was moderately limited in her "ability to interact  
17 appropriately with the general public," "accept instructions and  
18 respond appropriately to criticism from supervisors," "get along  
19 with coworkers or peers without distracting them or exhibiting  
20 behavioral extremes," and "maintain socially appropriate  
21 behavior." (AR 118.) But Dr. Logan also found that she had no  
22 limitations with "understanding and memory" or "sustained  
23 concentration and persistence" (id.), and she was able to  
24 "perform a full range of work activity from a cognitive  
25 standpoint but would need a work setting where interactions with  
26 coworkers, supervisors, and the public are brief and task  
27 focused." (AR 119.) These findings were reaffirmed by Dr. D.  
28 Funkenstein, another consulting psychologist who reviewed



1 Plaintiff's medical records, in February 2014. (AR 127-28, 131-  
2 33.)

3 At her November 2014 hearing, Plaintiff testified that she  
4 was "very uncomfortable being around people" and had difficulty  
5 working with others. (AR 84.) She felt that others "click[ed]  
6 their pens" and coughed at her (id.), which caused her stress (AR  
7 89). She testified that she recently took a Spanish class at a  
8 local community college, where she noticed others "pen clicking"  
9 and felt like she was being sexually harassed (she was not  
10 touched by other people but got "these strange tingly feelings").  
11 (AR 87-88.) Plaintiff attended the class for four months for  
12 approximately three hours a week and was "very careful" not to  
13 miss class. (Id.) She worked with others on group projects and  
14 received an "A+" in the course.<sup>13</sup> (AR 87-89.)

15 Plaintiff's father testified that because of school, she was  
16 "leaving the house fairly frequently." (AR 97.) He noted that  
17 she talked about "problems with students clicking pens" (id.) and  
18 that after interacting with people outside the family, she  
19 frequently reflected that she did not feel she "fit in" or would  
20 "know what to say" (AR 96-97). He also testified that while she  
21 had "never been a particularly social person[,] she interacted  
22 well with others" and was a self-motivated "super achiever." (AR  
23 96, 98.)

### 24 3. Analysis

25 Plaintiff argues that the ALJ failed to specifically and  
26 sufficiently support his determination that her testimony was

---

27  
28 <sup>13</sup> Although Plaintiff stated she took only one class (AR 87-  
88), her father testified that she also took typing (AR 97).

1 only partially credible. (J. Stip. at 16.) Though she points to  
2 medical evidence that supports her testimony (see id. at 16-18,  
3 20-21), the substantial weight of the evidence looking at the  
4 record as a whole undermines Plaintiff's statements regarding  
5 both her physical and mental functional limitations. Moreover,  
6 when the record would support a decision either way, a reviewing  
7 court may not substitute its judgment for the Commissioner's.  
8 Reddick, 157 F.3d at 720-21.

9 The ALJ identified three reasons why he found Plaintiff not  
10 fully credible: (1) the "extent" of her reported limitations was  
11 "not fully supported by the objective evidence of record" (AR  
12 73); (2) her activities of daily living were inconsistent with  
13 her reported functional limitations (AR 71); and (3) her periods  
14 of "symptom exacerbation are associated with periods of poor  
15 medication compliance" (AR 73). Each was a legally sufficient  
16 reason for discounting her credibility.

17 a. *Reported limitations inconsistent with*  
18 *objective evidence*

19 First, the ALJ properly found some of Plaintiff's symptom  
20 statements lacking in credibility and unsupported by the record,  
21 as to both her physical and mental functioning. As identified by  
22 the ALJ, Plaintiff alleged that she had "difficulty with  
23 standing/walking due to her leg impairment." (AR 71.) At her  
24 hearing, she testified that she walked with crutches, would feel  
25 pain while standing or walking, and had a "hard time sitting for  
26 long." (AR 90-91.)

27 Plaintiff's medical records, however, indicated that her  
28 condition was improving and not disabling. As the ALJ noted,

1 "[m]edical imaging" in early 2014 showed "stable alignment of the  
2 femur," "intact hardware," and "stable overall alignment." (AR  
3 73 (citing AR 602, 604, 608).) Indeed, medical examinations  
4 throughout 2013 and 2014 showed that her left-femur fracture was  
5 healing despite a delayed union, her hardware was consistently  
6 intact and stable, and her left knee's range of motion had  
7 increased to full capacity. (See, e.g., AR 307, 602.) She was  
8 able to walk and stand for "3-5 minutes" without assistance in  
9 October 2012 (AR 384), could "ambulate short distances [without]  
10 pain" in May 2013 (AR 310), and – based on the September 2013  
11 medical opinion of Dr. Sargeant, to which the ALJ gave "great  
12 weight" (AR 73) and which Plaintiff does not directly challenge –  
13 could walk, stand, and sit effectively. (AR 530.) Even though  
14 Plaintiff told Dr. Sargeant she could not walk at all without  
15 crutches (AR 526), she shortly thereafter acknowledged that she  
16 had not told Dr. Sargeant the truth and used crutches only "50%  
17 of [the] time" (AR 114). This admission casts in a suspect light  
18 Plaintiff's refusal to even attempt walking without crutches for  
19 Dr. Sargeant or to flex her knee for him.

20 Moreover, Plaintiff's physical abilities continued to  
21 improve following her July 2012 surgery. By March 2014, she  
22 achieved full range of motion in her left leg and had requested a  
23 note approving her to swim, further demonstrating her increased  
24 mobility. (AR 543, 605; see also AR 545, 609.) She reported  
25 walking two miles without pain. (AR 605.) Though she appears to  
26 have sometimes reported pain in her left leg (see, e.g., AR 84,  
27 242, 536), her medical records indicated that she could  
28 occasionally walk with lessening or no pain (see, e.g., AR 310,

1 530, 605). As the ALJ noted (AR 72), Plaintiff also reported  
2 that she did not take medication for the pain or seek treatment  
3 or therapy, evidence which itself suggests that her pain  
4 testimony was properly discounted (see AR 526). See Molina, 674  
5 F.3d at 1113 (holding that "ALJ may properly rely on 'unexplained  
6 or inadequately explained failure . . . to follow a prescribed  
7 course of treatment'" to discount claimant's credibility (quoting  
8 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)); Beck  
9 v. Astrue, 303 F. App'x 455, 458 (9th Cir. 2008) (upholding  
10 adverse credibility determination when plaintiff "failed to  
11 follow a recommended treatment plan"). Finally, when reviewed by  
12 two consulting physicians, her medical records showed that she  
13 needed a "[c]rutch" for long-distance ambulation and could  
14 otherwise sit, stand, and walk. (AR 117, 129-30.) Plaintiff's  
15 medical records therefore provide substantial evidence supporting  
16 the ALJ's finding that her physical-symptom statements were not  
17 fully credible. See Carmickle v. Comm'r, Soc. Sec. Admin., 533  
18 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical  
19 record is a sufficient basis for rejecting the claimant's  
20 subjective testimony."); Burch v. Barnhart, 400 F.3d 676, 681  
21 (9th Cir. 2005) ("Although lack of medical evidence cannot form  
22 the sole basis for discounting pain testimony, it is a factor  
23 that the ALJ can consider in his credibility analysis.").

24 The ALJ also properly found Plaintiff's mental-symptom  
25 statements not fully credible and unsupported by the record. As  
26 identified by the ALJ, Plaintiff alleged that she had "impaired  
27 concentration as a result of her mental health symptoms." (AR  
28 71.) She testified at her hearing that she had "a lot of trouble

1 focusing" (AR 92-93), and in her function report she specified  
2 that her concentration was impaired because of her "suicidal  
3 issues" (AR 242). These statements, however, were inconsistent  
4 with Plaintiff's medical records and activities.

5 After a formal psychiatric examination in October 2013, Dr.  
6 Rathana-Nakintara concluded that Plaintiff had "no difficulties  
7 focusing[,] maintaining attention," or "concentrat[ing]." (AR  
8 537.) She was capable of performing both simple and complex  
9 tasks, and she had "no limitations" on her ability to complete a  
10 "normal workday or workweek" because of her mental condition  
11 (id.), which was diagnosed as mood disorder (AR 536). Plaintiff  
12 challenges Dr. Rathana-Nakintara's opinion as "incomplete,"  
13 claiming that it failed to address her other "personality  
14 disorder" diagnoses. (J. Stip. at 37.) But the ALJ correctly  
15 found that Dr. Rathana-Nakintara's evaluation was corroborated by  
16 both the examination itself and the record as a whole. (AR 73);  
17 see Thomas, 278 F.3d at 957; accord Batson v. Comm'r of Soc. Sec.  
18 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). During the  
19 examination, for example, Plaintiff completed "serial sevens  
20 subtraction . . . down from 100 to two," which she did "with no  
21 mistake at all." (AR 535.) She did "the same on serial threes  
22 subtraction" and "was able to spell the word 'world' forward and  
23 backward easily." (Id.) Similarly, Dr. Rathana-Nakintara  
24 observed that Plaintiff exhibited "no difficulty interacting with  
25 the clinic staff or [herself]," contributing to the conclusion  
26 that she had "no difficulties in maintaining social functioning."  
27 (AR 537.) The ALJ accordingly afforded "great weight" to Dr.  
28 Rathana-Nakintara's findings. (AR 73.) Plaintiff's mental-

1 symptom allegations were therefore not supported by her medical  
2 records. See Carmickle, 533 F.3d at 1161 ("Contradiction with  
3 the medical record is a sufficient basis for rejecting the  
4 claimant's subjective testimony."); Burch, 400 F.3d at 681.

5 Her activities, too, showed that her concentration was not  
6 impaired. She received an A+ in her Spanish class (AR 87), which  
7 included group projects, and spent long periods playing music and  
8 crocheting (AR 246). In her function report, she admitted being  
9 capable of paying attention "long enough to work," and she said  
10 her attention span was "no different" than before the alleged  
11 disability onset date. (AR 247.) Her function report also  
12 indicated that she was capable of paying bills and handling  
13 savings accounts (AR 245), which was corroborated by Dr. Rathana-  
14 Nakintara's psychiatric evaluation (see AR 535). Plaintiff was  
15 also found to have no limitations with "understanding and memory"  
16 or "sustained concentration and persistence" by Drs. Logan and  
17 Funkenstein, consulting psychologists who reviewed her medical  
18 records and found her not disabled. (AR 118, 131-32.) Thus,  
19 Plaintiff's reported limitations with focus and concentration  
20 were unsupported by the record, and the ALJ properly discounted  
21 her credibility in this regard. See Carmickle, 533 F.3d at 1161;  
22 Burch, 400 F.3d at 681.

23 b. *Daily activities*

24 As the ALJ found (AR 71) and as discussed briefly above,  
25 Plaintiff's symptom statements were also undermined by her  
26 contradictory reports of engaging in "activities including self-  
27 care, housework, errands (including use of public  
28 transportation), and social and leisure activities" (id.). An

1 ALJ may properly discount the credibility of a plaintiff's  
2 subjective symptom statements when they are inconsistent with her  
3 daily activities. See Molina, 674 F.3d at 1112 (ALJ may  
4 discredit claimant's testimony when "claimant engages in daily  
5 activities inconsistent with the alleged symptoms" (citing  
6 Lingenfelter, 504 F.3d at 1040)). "Even where those [daily]  
7 activities suggest some difficulty functioning, they may be  
8 grounds for discrediting the claimant's testimony to the extent  
9 that they contradict claims of a totally debilitating  
10 impairment." Id. at 1113.

11 Despite Plaintiff's allegations of pain while standing and  
12 walking, both she and her father testified that she could engage  
13 in a range of housework, including cleaning dishes, doing  
14 laundry, and vacuuming. (AR 84, 95, 244.) She and her father  
15 also stated that she could regularly and independently travel to  
16 church and school (AR 97, 245-46), and she indicated that she had  
17 no problems with personal care, preparing her own meals, or using  
18 public transportation (AR 243-45). Her father testified that she  
19 left the house "fairly frequently." (AR 97.)

20 Her allegations of difficulty sitting (see, e.g., AR 91)  
21 were similarly contradicted by her statements that she did not  
22 feel pain when seated (AR 90) and spent her days "sitting longer"  
23 while crocheting and playing music (AR 246). Medical records  
24 further corroborated her ability to stand, walk, and sit. (See,  
25 e.g., AR 117, 129-30, 530, 605.) She also attended school for  
26 four months, never missing a class, and received an A+ in the  
27 course. (AR 87-89.) She apparently took a second class, typing.  
28 (AR 97.) Thus, the record contains substantial evidence of

1 Plaintiff's functional activity, undermining her physical-symptom  
2 statements and supporting the ALJ's adverse credibility  
3 determination. See Matthews v. Shalala, 10 F.3d 678, 679-80 (9th  
4 Cir. 1993) (upholding ALJ's finding that claimant's pain  
5 testimony was undermined by his housecleaning, "including  
6 vacuuming and dishwashing"; light gardening; shopping; and  
7 attending school three days a week, "an activity which is  
8 inconsistent with an alleged inability to perform all work").

9 Moreover, to the extent Plaintiff alleges disability because  
10 she was unable to be around others, the record shows otherwise.  
11 Dr. Rathana-Nakintara indicated that she had "no difficulties in  
12 maintaining social functioning," had "no limitations . . .  
13 interacting with coworkers and with the public," and experienced  
14 stress in personal relationships rather than at work. (AR 537.)  
15 Plaintiff testified to working with others in group projects as  
16 part of her Spanish class, which she did successfully given the  
17 "A+" she received in the course. (AR 87-89.) Her father, too,  
18 testified that she interacted well with others despite her self-  
19 reported difficulty with such interactions. (AR 96-98.)  
20 Plaintiff reported spending time with others by talking on the  
21 phone, going to church weekly, and taking part in church "to the  
22 fullest extent" (AR 246),<sup>14</sup> activities which she had also

---

23  
24 <sup>14</sup> Plaintiff contends that the church "could not deal with  
25 her." (J. Stip. at 21 (citing AR 498, 509).) AR 498 states only  
26 that Plaintiff reported that her church activities "elevate her  
27 mood." AR 509 states only that she stopped going to the Mormon  
28 Church and was trying out other religions. On AR 508, Plaintiff  
reported that the pastor of her church did not have as much time  
to spend with her as she wanted, and she "felt bad but  
understands." That hardly equates to the church being "unable to  
deal with her."



1 reported to her therapist, Dr. Handler (AR 507-08 (Plaintiff  
2 connected with people at church, volunteered, and went shopping  
3 with a friend from church)). Thus, both her medical records and  
4 demonstrated activities of daily living undermined Plaintiff's  
5 statements that she was unable to work, concentrate, or be around  
6 others. See Womeldorf v. Berryhill, 685 F. App'x 620, 621 (9th  
7 Cir. 2017) (upholding ALJ's discounting of plaintiff's  
8 credibility in part because his activities of daily living "were  
9 not entirely consistent with his claimed inability to engage in  
10 social interactions").

11 c. *Noncompliance with treatment and medications*

12 The ALJ specifically noted how Plaintiff's instances of  
13 exacerbated mental-health issues were "associated with periods of  
14 poor medication compliance." (AR 73; see also AR 323, 374.) For  
15 example, during Plaintiff's March 2013 hospitalization, she  
16 reported being noncompliant with her depression medication. (AR  
17 323.) Thereafter, during the relevant period, she reported  
18 compliance with her medication (see, e.g., AR 561), and no  
19 subsequent instances of hospitalization occurred. In fact, no  
20 psychiatric records during the relevant period substantiated  
21 Plaintiff's claims of impaired concentration caused by mental-  
22 health problems. See Warre v. Comm'r of Soc. Sec. Admin., 439  
23 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be  
24 controlled effectively with medication are not disabling for the  
25 purpose of determining eligibility for SSI benefits.").

26 For all these reasons, the ALJ's adverse credibility  
27 determination of Plaintiff's symptom statements is supported by  
28 substantial evidence. Plaintiff is therefore not entitled to

1 remand on this ground.<sup>15</sup>

2 B. The ALJ Properly Found that Plaintiff's Physical  
3 Impairment Did Not Meet or Equal Listing 1.06,  
4 "Fracture of a Femur"

5 Plaintiff argues that the ALJ erred in finding that her  
6 impairment did not fall under Listing 1.06 because her medical  
7 records "establish incomplete union" of her left femur fracture.  
8 (J. Stip. at 5.) As discussed below, however, the ALJ did not  
9 err.

10 1. Applicable law

11 At step three of the disability evaluation process, the ALJ  
12 must evaluate the claimant's impairments to see if they meet or  
13 medically equal any of those in the Listings. See  
14 § 416.920(a)(4)(iii); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th  
15 Cir. 1999). Listed impairments are those that are "so severe  
16 that they are irrebuttably presumed disabling, without any  
17 specific finding as to the claimant's ability to perform his past  
18 relevant work or any other jobs." Lester, 81 F.3d at 828 (citing  
19 § 404.1520(d)).

20 The claimant has the initial burden of proving that an  
21 impairment meets or equals a Listing. Molina, 674 F.3d at 1110;

---

23 <sup>15</sup> The ALJ may have erred in finding Plaintiff's treatment  
24 with antipsychotic medication to be "conservative." (AR 73.)  
25 But even if the ALJ was wrong, see, e.g., Childress v. Colvin,  
26 No. EDCV 14-0009-MAN, 2015 WL 2380872, at \*14 (C.D. Cal. May 18,  
27 2015) (finding treatment of prescription antidepressants,  
28 prescription antipsychotics, and talk therapy not properly  
characterized as conservative), he did not err in concluding that  
it was largely effective. Moreover, as discussed above, the ALJ  
gave other legally sufficient reasons for partially discounting  
Plaintiff's credibility.

1 Burch, 400 F.3d at 683 (citing Swenson v. Sullivan, 876 F.2d 683,  
2 687 (9th Cir. 1989)). "To meet a listed impairment, a claimant  
3 must establish that he or she meets each characteristic of a  
4 listed impairment relevant to his or her claim." Tackett, 180  
5 F.3d at 1099 (emphasis in original). "To equal a listed  
6 impairment, a claimant must establish symptoms, signs and  
7 laboratory findings 'at least equal in severity and duration' to  
8 the characteristics of a relevant listed impairment, or, if a  
9 claimant's impairment is not listed, then to the listed  
10 impairment 'most like' the claimant's impairment." Id. (quoting  
11 § 404.1526 (emphasis in original)). Medical equivalence,  
12 moreover, "must be based on medical findings"; "[a] generalized  
13 assertion of functional problems is not enough to establish  
14 disability at step three." Id. at 1100 (citing § 404.1526).

15 An ALJ "must evaluate the relevant evidence before  
16 concluding that a claimant's impairments do not meet or equal a  
17 listed impairment." Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir.  
18 2001). The ALJ need not, however, "state why a claimant failed  
19 to satisfy every different section of the listing of  
20 impairments." Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th  
21 Cir. 1990). The ALJ does not err by discussing the evidence  
22 supporting his conclusion only in other sections of his decision.  
23 See id. at 1200-01 (finding no error when ALJ failed to state or  
24 discuss evidence supporting conclusion that claimant's  
25 impairments did not satisfy Listing but "made a five page,  
26 single-spaced summary of the record"); Lewis, 236 F.3d at 513  
27 (ALJ required "to discuss and evaluate the evidence that supports  
28 his or her conclusion," but no error when ALJ does not "do so

1 under the heading 'Findings'). Moreover, the ALJ "is not  
2 required to discuss the combined effects of a claimant's  
3 impairments or compare them to any listing in an equivalency  
4 determination, unless the claimant presents evidence in an effort  
5 to establish equivalence." Burch, 400 F.3d at 683.

6 An ALJ's decision that a claimant did not meet a Listing  
7 must be upheld if it was supported by "substantial evidence."  
8 See Warre, 439 F.3d at 1006. Substantial evidence is "more than  
9 a mere scintilla but less than a preponderance; it is such  
10 relevant evidence as a reasonable mind might accept as adequate  
11 to support a conclusion." Sandgathe v. Chater, 108 F.3d 978, 980  
12 (9th Cir. 1997) (per curiam) (citing Andrews v. Shalala, 53 F.3d  
13 1035, 1039 (9th Cir. 1995)). When evidence is susceptible of  
14 more than one rational interpretation, the Court must uphold the  
15 ALJ's conclusion. Id.

16 Listing 1.06 requires the following:

17 Fracture of the femur, tibia, pelvis, or one or more of  
18 the tarsal bones. With:

19 A. Solid union not evident on appropriate medically  
20 acceptable imaging and not clinically solid; and

21 B. Inability to ambulate effectively, as defined in  
22 1.00B2b, and return to effective ambulation did not occur  
23 or is not expected to occur within 12 months of onset.

24 20 C.F.R. pt. 404, subpt. P, app. 1 § 1.06.

25 The "[i]nability to ambulate effectively" is the "extreme  
26 limitation of the ability to walk." Id. § 1.00(B)(2)(b)(1). The  
27 impairment must prevent "independent ambulation without the use  
28 of a hand-held assistive device(s) that limits the functioning of

1 both upper extremities." Id. "[I]neffective ambulation"  
2 includes "the inability to walk without the use of . . . two  
3 crutches or two canes." Id. § 1.00(B)(2)(b)(2).

4           2.   Relevant background

5           Plaintiff was involved in a car accident in 2010 and  
6 underwent several rounds of surgery for fractures in her left and  
7 right legs. (See AR 526.) In July 2012, the fracture in her  
8 left femur was diagnosed as a nonunion, and she underwent  
9 corrective surgery. (AR 441-42.) In October 2012 she  
10 demonstrated independent ambulation and the ability to stand for  
11 "3-5 minutes" (AR 384), and in March 2013 – when she filed her  
12 SSI application – she could walk "short distances [without] pain"  
13 (AR 310). Medical imaging throughout 2013 indicated that  
14 Plaintiff's left-leg fracture was healing but continued to  
15 exhibit nonunion despite stable hardware. (See, e.g., AR 307,  
16 544.) In 2014, medical imaging showed "delayed union" of the  
17 femur, with normal alignment and intact hardware. (AR 602, 604-  
18 05, 608-09.)

19           Plaintiff's examination with Dr. Sargeant in September 2013  
20 showed that she ambulated effectively with crutches, but she  
21 refused to even attempt to walk without them (see AR 527-30)  
22 despite recent reports that she was able to do so at least  
23 briefly, as noted above (see, e.g., AR 310, 384). Plaintiff  
24 later admitted that she had not told the truth to Dr. Sargeant  
25 when she said she needed crutches "for everything" (AR 526) and  
26 in fact used them only 50 percent of the time (AR 114). Dr.  
27 Sargeant found that Plaintiff should walk with a cane for long  
28 distances but otherwise was unimpeded in walking for up to four

1 hours a day. (AR 530.) Physical examinations in 2013 and 2014  
2 showed continued improvement to the point of "full weight  
3 bearing" (AR 609) and indicated that she could walk at least  
4 short distances without pain and only occasionally required one  
5 crutch. (AR 545, 605.) Consulting physicians Ombres and  
6 Gleason, after reviewing her medical records, also found that  
7 Plaintiff should walk with a "[c]rutch for long distances" but  
8 otherwise had no walking limitations for up to two to four hours  
9 a day. (AR 117, 129-30.)

10 3. Analysis

11 The ALJ properly concluded that Plaintiff failed to  
12 establish that her leg impairment met or equaled Listing 1.06.  
13 Specifically, he found that "[w]hile the record does document  
14 nonunion of the claimant's femur in medical imaging, the evidence  
15 does not show an inability [to] ambulate effectively or an  
16 expectation of inability to ambulate within 12 months." (AR 70.)

17 Plaintiff's medical records indicate that her left-leg  
18 fracture did not result in a solid union. (See AR 307, 544, 602,  
19 608-09.) The ALJ considered this in his decision, stating that  
20 the "record does document nonunion of the claimant's femur in  
21 medical imaging." (AR 70.) Thus, to the extent Plaintiff argues  
22 that the ALJ did not find nonunion (see J. Stip. at 6-9), remand  
23 is unwarranted. Substantial evidence in the record supports the  
24 ALJ's finding that solid union of her left-leg fracture was not  
25 evident.

26 But the ALJ also found that Plaintiff did not present  
27 evidence showing "an inability [to] ambulate effectively." (AR  
28

1 70.) This finding is supported by substantial evidence.<sup>16</sup>  
2 Though the record contains reports of leg pain from Plaintiff  
3 (see, e.g., AR 84, 242, 536), ample evidence establishes that she  
4 could walk effectively. In September 2013, she admitted that she  
5 used crutches only 50 percent of the time (AR 114), and Dr.  
6 Sargeant assessed that to walk long distances she needed only a  
7 cane (AR 530). By January 2014, she was expected to be fully  
8 weight bearing in four to six weeks. (AR 609.) Indeed, in March  
9 of that year she reported walking two miles without pain. (AR  
10 605.) She and her father also reported that she engaged in  
11 activities supporting the inference that she could walk  
12 effectively, such as completing household chores like vacuuming  
13 and going to school and church. (See, e.g., 95, 243-45.) Thus,  
14 substantial evidence supports the conclusion that Plaintiff could  
15 walk effectively.<sup>17</sup> See Warre, 439 F.3d at 1006.

16 Moreover, during her September 2013 physical examination,  
17 when she was asked to walk without crutches, she refused, saying  
18 that she needed crutches "for everything." (AR 526-27.) She  
19 then called in admitting that she had lied and that she needed  
20 crutches only 50 percent of the time. (AR 114.) Indeed,  
21

---

22 <sup>16</sup> Plaintiff seems to argue only that she was unable to  
23 ambulate effectively "through at least December 23, 2013" (J.  
24 Stip. at 9), apparently conceding that no evidence shows she  
25 couldn't after that date. March 2013, the application date, to  
December of the same year is less than the 12 months necessary to  
show disability.

26 <sup>17</sup> Plaintiff undermines her own argument by acknowledging  
27 that she could walk with only one crutch. (See J. Stip. at 9.)  
28 While walking only with the assistance of two crutches qualifies  
under Listing 1.06 (see 20 C.F.R. pt. 404, subpt. P, app. 1  
§ 1.00(B)(2)(b)(2)), walking with one crutch does not, see id.

1 Plaintiff had earlier told her doctors she could walk three to  
2 five minutes and "short distances" without pain. (AR 310 (May  
3 2013), 384 (Oct. 2012).) Thus, substantial evidence supports the  
4 ALJ's finding that Plaintiff failed to provide evidence  
5 establishing her inability to ambulate effectively. See Huizar  
6 v. Astrue, No. CV 11-7246-PLA, 2012 WL 3631526, at \*7 (C.D. Cal.  
7 Aug. 23, 2012) (finding that plaintiff did not demonstrate  
8 inability to ambulate effectively because there was no "evidence  
9 in the record to support . . . that in order to ambulate at all,  
10 she requires two canes, or any other assistive device that limits  
11 the functioning of both upper extremities").

12 Remand is therefore unsupported on this ground.

13 C. The ALJ Properly Found Plaintiff's Mental Impairment  
14 Nonsevere

15 Plaintiff argues that the ALJ failed to properly evaluate  
16 her "longitudinal mental impairment," including depression,  
17 bipolar disorder, schizotypal personality disorder, and  
18 schizoaffective disorder. (J. Stip. at 28.) For the reasons  
19 discussed below, however, the ALJ did not err. Moreover, any  
20 error was harmless.

21 1. Applicable law

22 The step-two inquiry is "a de minimis screening device to  
23 dispose of groundless claims." Smolen, 80 F.3d at 1290. The  
24 claimant has the burden to show that she has one or more "severe"  
25 medically determinable impairments that can be expected to result  
26 in death or last for a continuous period of at least 12 months,  
27 as demonstrated by evidence in the form of signs, symptoms, or  
28 laboratory findings. See §§ 416.905, 416.920(a)(4)(ii); Ukolov



1 v. Barnhart, 420 F.3d 1002, 1004-05 (9th Cir. 2005); Bowen v.  
2 Yuckert, 482 U.S. 137, 146 n.5 (1987). A medically determinable  
3 impairment is "severe" if it "significantly limits [the  
4 claimant's] physical or mental ability to do basic work  
5 activities."<sup>18</sup> § 416.920(c); see also § 416.921(a). "An  
6 impairment or combination of impairments may be found 'not severe  
7 only if the evidence establishes a slight abnormality that has no  
8 more than a minimal effect on an individual's ability to work.'" Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting  
9 Smolen, 80 F.3d at 1290 (emphasis in original)). A court must  
10 determine whether substantial evidence in the record supported  
11 the ALJ's finding that a particular impairment was not severe.  
12 Davenport v. Colvin, 608 F. App'x 480, 481 (9th Cir. 2015)  
13 (citing Webb, 433 F.3d at 687); see also Kent v. Astrue, 335 F.  
14 App'x 673, 674 (9th Cir. 2009) (same). Moreover, a step-two  
15 error is harmless when the ALJ considered any resulting  
16 limitations later in the sequential evaluation process, at step  
17 four. See Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007) (as  
18 amended); Bickell v. Astrue, 343 F. App'x 275, 278 (9th Cir.  
19 2009).

## 21 2. Additional relevant background

22 Plaintiff's recent medical records, submitted for the first  
23 time to the Appeals Council, indicated that she was compliant  
24 with her medications and regularly reported "doing alright."  
25

---

26 <sup>18</sup> "Basic work activities" include, among other things,  
27 "[p]hysical functions such as walking, standing, sitting,  
28 lifting, pushing, pulling, reaching, carrying, or handling" and  
"[c]apacities for seeing, hearing, and speaking." § 416.922(b);  
accord Yuckert, 482 U.S. at 141.

1 (See, e.g., AR 54 (Apr. 2016), 56 (Jan. 2016), 57 (Dec. 2015), 58  
2 (Nov. 2015), 59 (Sept. 2015), 60 (July 2015), 61 (May 2015), 62  
3 (Apr. 2015), 63 (Feb. 2015).) Plaintiff was evaluated in June  
4 2015 by psychiatrist Than Myint.<sup>19</sup> (AR 18-29.) Dr. Myint  
5 apparently did not conduct a formal psychiatric examination at  
6 the time but found that Plaintiff had "extreme" limitations  
7 understanding, remembering, and carrying out instructions (AR 18)  
8 and "difficulty with interpersonal relationships" and  
9 "concentrating and focusing due to intrusive thoughts" (AR 22-  
10 23). Dr. Myint also found, however, that she could respond  
11 appropriately to supervision, coworkers, and work pressures in a  
12 work setting (AR 18) and was competent to manage funds on her own  
13 (AR 24).

### 14 3. Analysis

15 The ALJ properly found that Plaintiff had a medically  
16 determinable mental impairment, mood disorder, but that it caused  
17 no more than "minimal limitation" and therefore was not severe.  
18 (AR 69-70.) Substantial evidence supports that determination, as  
19 discussed below. And any error in not identifying any other  
20 mental impairments at step two was harmless because the ALJ  
21

---

22 <sup>19</sup> The record contains treatment notes from Dr. Myint dating  
23 at least as far back as 2012. (See, e.g., AR 303.) The record  
24 also contains medication-support documentation signed by Dr.  
25 Myint since at least 2011. (See, e.g., AR 290-91, 518, 612, 625-  
26 26.) Though the majority of those records are illegible (see,  
27 e.g., AR 292-303, 519-23, 613-24), those that can be read  
28 indicate that Plaintiff was regularly compliant with her  
medications (see, e.g., AR 292 (May 2013), 293 (Apr. 2013), 295  
(Feb. 2013), 296 (Jan. 2013), 302 (May 2012), 519 (Jan. 2014),  
520 (Dec. 2013), 521 (Oct. 2013), 522 (Sept. 2013), 523 (July  
2013), 613 (Oct. 2014), 615 (July 2014), 617 (May 2014), 619  
(Mar. 2014), 620 (Feb. 2014), 621 (Jan. 2014).)

1 thoroughly discussed and considered all of Plaintiff's mental  
2 limitations.

3 As a preliminary matter, Plaintiff argues that the evidence  
4 submitted for the first time to the Appeals Council supports her  
5 position that her mental conditions were severe. (J. Stip. at  
6 39-40.) Social Security Administration regulations "permit  
7 claimants to submit new and material evidence to the Appeals  
8 Council and require the Council to consider that evidence in  
9 determining whether to review the ALJ's decision, so long as the  
10 evidence relates to the period on or before the ALJ's decision."  
11 Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th  
12 Cir. 2012); see also § 416.1470(b). "[W]hen the Appeals Council  
13 considers new evidence in deciding whether to review a decision  
14 of the ALJ, that evidence becomes part of the administrative  
15 record, which the district court must consider when reviewing the  
16 Commissioner's final decision for substantial evidence." Brewes,  
17 682 F.3d at 1163; accord Taylor v. Comm'r of Soc. Sec. Admin.,  
18 659 F.3d 1228, 1232 (9th Cir. 2011); see also Borrelli v. Comm'r  
19 of Soc. Sec., 570 F. App'x 651, 652 (9th Cir. 2014) (remand  
20 necessary when "reasonable possibility" exists that "the new  
21 evidence might change the outcome of the administrative  
22 hearing").

23 Medical examinations that take place after the ALJ's  
24 decision may still relate to a claimant's conditions "during the  
25 relevant time period." Handy v. Colvin, No. CV 14-02149-SH, 2014  
26 WL 4895678, at \*3 (C.D. Cal. Sept. 30, 2014). In such a case,  
27 the Appeals Council errs by dismissing the evidence solely  
28 because it is dated after the ALJ's decision. See id.; see also

1 Baccari v. Colvin, No. EDCV 13-2393 RNB, 2014 WL 6065900, at \*2  
2 (C.D. Cal. Nov. 13, 2014) (finding fact that claimant submitted  
3 evidence to Appeals Council that was "generated after the ALJ's  
4 decision . . . is not dispositive of whether the evidence was  
5 chronologically relevant"). This is especially true when the  
6 condition is "chronic" or relatively "longstanding." See  
7 Baccari, 2014 WL 6065900, at \*2; Bergmann v. Apfel, 207 F.3d  
8 1065, 1070 (8th Cir. 2000) (finding that posthearing evidence  
9 required remand because it concerned deterioration of "relatively  
10 longstanding" impairment).

11 As the Appeals Council found (AR 2), the new evidence  
12 submitted to it did not relate to the relevant time period – from  
13 Plaintiff's March 26, 2013 application date to January 16, 2015,  
14 the date of the ALJ's decision – and thus did not bear on the  
15 severity determination made by the ALJ. Plaintiff admitted that  
16 the "new evidence . . . may not relate back in time to the period  
17 adjudicated by [the] ALJ." (AR 16.) Indeed, the new records  
18 reflect Plaintiff's stability and compliance with medication  
19 since February 2015 (see, e.g., AR 54, 56-63) and provide an  
20 additional psychiatric evaluation completed in June 2015 (AR 18-  
21 24). The latter is written in the present tense, indicating that  
22 it assesses Plaintiff's limitations as of June 2015, five months  
23 after the ALJ's decision. (Id.); see also Serna v. Berryhill,  
24 No. SA CV 17-0394-E, 2017 WL 4142295, at \*5 (C.D. Cal. Sept. 18,  
25 2017) (upholding ALJ who discounted medical opinion written in  
26 present tense and which did not state that it applied  
27 retrospectively (citing Lombardo v. Schweiker, 749 F.2d 565, 567  
28 (9th Cir. 1984) (per curiam)); Lewis v. Colvin, No. 12CV2073 AJB

1 (RBB), 2013 WL 4517252, at \*26 (S.D. Cal. Aug. 21, 2013) (holding  
2 that medical opinion in present tense and making no reference to  
3 relevant time period provided no basis for reversing ALJ's  
4 decision or remanding). Indeed, the evaluation nowhere indicates  
5 that it related back to the relevant time period. Bales v.  
6 Berryhill, 688 F. App'x 495, 496 (9th Cir. 2017) (holding new  
7 evidence not relevant when it did "not indicate that [it]  
8 relate[d] back to the relevant period"); see also Vincent ex rel.  
9 Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984)  
10 ("After-the-fact psychiatric diagnoses are notoriously  
11 unreliable.").

12 Moreover, the evaluation is undermined by inconsistencies  
13 internally and with the record, and it accordingly "does not  
14 change the fact that substantial evidence supports the ALJ's  
15 decision." Kohansby v. Berryhill, \_\_ F. App'x \_\_, No. 14-35926,  
16 2017 WL 3971459, at \*2 (9th Cir. Sept. 8, 2017). First, Dr.  
17 Myint assessed only "extreme" and "marked" limitations in  
18 Plaintiff's cognitive and social functioning, and yet the  
19 evaluation also found Plaintiff capable of responding  
20 appropriately to supervision, coworkers, and work pressures in a  
21 work setting (see AR 18-19) and stated that she could handle her  
22 own funds (AR 24). Second, the evaluation stated that Plaintiff  
23 was completely unable to concentrate or stay focused (AR 29), yet  
24 she received an A+ in a community-college Spanish course (AR 87)  
25 and acknowledged that her alleged disability had not affected her  
26 ability to pay attention (AR 247). Third, Plaintiff's noted  
27 extreme limitations are unsupported by Dr. Myint's own treatment  
28 notes, which just document medication support and her regular

1 compliance with medication. (See, e.g., AR 54-63.) Fourth, Dr.  
2 Myint apparently treated Plaintiff since 2011 (see AR 21), and  
3 his evaluation appears to rely on an earlier history of  
4 hospitalizations occurring outside the relevant application  
5 period (id.). Thus, as noted by the Appeals Council, the new  
6 evidence did not impact the ALJ's findings regarding Plaintiff  
7 during the relevant period. (AR 2.)

8 As discussed by the ALJ, "the evidence of record dating from  
9 the period at issue [did] not support a finding that the claimant  
10 [had] consistently experienced more than minimal work-related  
11 functional limitation as a result of any mental health  
12 symptomatology." (AR 69-70.) Plaintiff's medical records showed  
13 that despite a prior history of psychiatric hospitalization,  
14 suicidal ideation, and associated periods of "poor medication  
15 compliance" (AR 70; see also, e.g., AR 319-34, 497, 500-10),  
16 regular treatment and medication stabilized her condition. For  
17 example, Plaintiff was seen throughout 2013 and 2014 and  
18 consistently reported "doing alright," being "stable," and  
19 complying with her medication. (See, e.g., AR 561 (Nov. 2013),  
20 563 (Aug. 2013), 565 (July 2013), 567 (Apr. 2013), 613 (Oct.  
21 2014), 615 (July 2014), 617 (May 2014), 619 (Mar. 2014), 620  
22 (Feb. 2014), 621 (Jan. 2014), 622 (Dec. 2013), 623 (Oct. 2013),  
23 624 (Sept. 2013).) Moreover, as recognized by the ALJ (AR 69-  
24 70), the record contains no evidence of psychiatric  
25 hospitalization during the relevant period. See Davenport, 608  
26 F. App'x at 481 (affirming ALJ's determination that claimant's  
27 mental impairments were not severe during relevant period in part  
28 because treatment notes indicated that claimant's "depression and

1 anxiety were either mild or improved with treatment"). And as  
2 previously discussed, Plaintiff's activities of daily living  
3 confirmed that any mental impairment was not severe. Finally, in  
4 her October 2013 psychiatric evaluation, Dr. Rathana-Nakintara  
5 found Plaintiff capable of social functioning, focusing, and  
6 maintaining attention. (AR 537.) She was assessed as having "no  
7 limitations" in her psychological work-related functions (see  
8 id.; see also AR 70), and those findings were confirmed by the  
9 opinions of consulting psychologists Logan and Funkenstein (AR  
10 119, 132), which were afforded "significant weight" by the ALJ  
11 (see AR 73). The record therefore provides substantial evidence  
12 that Plaintiff's mental condition improved and was not severe  
13 during the relevant period. See Fry v. Comm'r Soc. Sec., No.  
14 2:15-cv-2023-KJN (PS), 2017 WL 999459, at \*3 (E.D. Cal. Mar. 15,  
15 2017) (holding that ALJ did not err in finding Plaintiff's  
16 plantar fasciitis not severe in part because condition had  
17 improved before relevant period), appeal filed, No. 17-15701 (9th  
18 Cir. Apr. 12, 2017).

19 Even had the ALJ erred in his severity determination, the  
20 error was likely harmless. In assessing Plaintiff's RFC, the ALJ  
21 considered and discussed Plaintiff's mental functioning at  
22 length. (See AR 71-73.) Thus, any error at step two was  
23 harmless. See Lewis, 498 F.3d at 911; Bickell, 343 F. at 278.  
24 Moreover, the VE testified that a person possessing the RFC  
25 assessed by the ALJ but also limited to only "occasional contact  
26 with supervisors, coworkers and the public" could still perform  
27 numerous jobs available in the economy, including many of those  
28 cited by the ALJ in his decision. (See AR 104; see also AR 75.)


1 Thus, any error in the ALJ's step-two determination was harmless  
2 for this additional reason. See Bickell, 343 F. at 278; Lewis,  
3 498 F.3d at 911; Tommasetti, 533 F.3d at 1038 (error is harmless  
4 when it is "inconsequential to the ultimate nondisability  
5 determination"); cf. Heston v. Comm'r of Soc. Sec., 245 F.3d 528,  
6 536 (6th Cir. 2001) (finding error harmless when ALJ did not  
7 discuss opinion of treating physician but VE took relevant  
8 limitations into consideration anyway).

9 Thus, for all these reasons, Plaintiff is not entitled to  
10 remand on this ground.

11 **VI. CONCLUSION**

12 Consistent with the foregoing and under sentence four of 42  
13 U.S.C. § 405(g),<sup>20</sup> IT IS ORDERED that judgment be entered  
14 AFFIRMING the Commissioner's decision, DENYING Plaintiff's  
15 request for remand, and DISMISSING this action with prejudice.

16  
17 DATED: October 13, 2017

  
\_\_\_\_\_  
JEAN ROSENBLUTH  
U.S. Magistrate Judge

18  
19  
20  
21  
22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>20</sup> That sentence provides: "The [district] court shall have  
28 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."