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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NORMA MIRANDA,  
Plaintiff

v.

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

Case No. 5:16-cv-01962-GJS

**MEMORANDUM OPINION AND  
ORDER**

**I. PROCEDURAL HISTORY**

Plaintiff Norma Miranda (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying her application for Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 11 and 12] and briefs addressing disputed issues in the case [Dkt. 19 (“Pl. Brief”) and Dkt. 26 (“Def. Brief”)]. The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be affirmed.

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<sup>1</sup> Nancy A. Berryhill, the Acting Commissioner of the Social Security Administration, is substituted as the defendant in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.



1 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*,  
2 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is “such relevant  
3 evidence as a reasonable mind might accept as adequate to support a conclusion.”  
4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal citation and quotations  
5 omitted); *see also Hoopai*, 499 F.3d at 1074.

#### 6 IV. DISCUSSION

7 Plaintiff contends that the ALJ erred by: (1) failing to adequately consider the  
8 severity of Plaintiff’s fibromyalgia; (2) rejecting the opinion of an examining  
9 physician; and (3) rejecting Plaintiff’s pain and symptom testimony. [Pl.’s Br. at 4-  
10 12.]

##### 11 A. Plaintiff’s Fibromyalgia

12 Plaintiff claims the ALJ failed to properly evaluate her fibromyalgia as a  
13 severe impairment. [Pl. Brief at 5-7.]

14 At step two of the sequential analysis, the claimant bears the burden to show  
15 the existence of medically determinable impairments that have more than a minimal  
16 effect on the ability to perform work-related activities. 20 C.F.R. §  
17 416.920(a)(4)(ii); *see also Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996).  
18 An impairment or combination of impairments may be found “‘not severe’ only if  
19 the evidence establishes a slight abnormality that has ‘no more than a minimal effect  
20 on an individual’s ability to work.’” *Smolen*, 80 F.3d at 1290 (quoting Social  
21 Security Ruling (“SSR”) 85-28); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.  
22 1988).

23 Fibromyalgia “is a complex medical condition characterized primarily by  
24 widespread pain in the joints, muscles, tendons, or nearby soft tissues that has  
25 persisted for at least 3 months.” SSR 12-2p, 2013 WL 3104869 at \*2. As there are  
26 no laboratory tests to confirm a diagnosis of fibromyalgia, “[t]he condition is  
27 diagnosed ‘entirely on the basis of the patients’ reports of pain and other  
28 symptoms.’” *Revels v. Berryhill*, 874 F.3d 648, 656 (9th Cir. 2017) (quoting

1 *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004)).

2 SSR 12-2p directs how claims of fibromyalgia should be evaluated. *See*  
3 *Revels*, 874 F.3d at 662 (explaining that in evaluating a claim of fibromyalgia, “the  
4 medical evidence must be construed in light of fibromyalgia’s unique symptoms and  
5 diagnostic methods, as described in SSR 12-2P and *Benecke*”). To establish that  
6 fibromyalgia is a medically determinable impairment, the claimant must show that  
7 an acceptable medical source (licensed physician): (1) diagnosed fibromyalgia and  
8 (2) provided evidence to satisfy the diagnostic criteria set forth in either the 1990  
9 American College of Rheumatology Criteria for the Classification of Fibromyalgia  
10 (“1990 Criteria”) or the 2010 American College of Rheumatology Preliminary  
11 Diagnostic Criteria (“2010 Criteria”). SSR 12-2p, 2013 WL 3104869 at \*2-3  
12 (noting that a physician’s diagnosis of fibromyalgia alone is not sufficient; the  
13 “evidence must document that the physician reviewed the claimant’s medical history  
14 and conducted a physical exam”).

15 Under the 1990 Criteria, the medical evidence must show: 1) “a history of  
16 widespread pain . . . that has persisted . . . for at least 3 months;” 2) at least 11  
17 positive tender points, found bilaterally and above and below the waist; and 3)  
18 evidence that other disorders which could cause the symptoms were excluded. *Id.* at  
19 \*3 (footnotes omitted).

20 Under the 2010 Criteria, the medical evidence must show: 1) a history of  
21 widespread pain; 2) repeated manifestations of six or more fibromyalgia symptoms,  
22 signs, or co-occurring conditions, “especially manifestations of fatigue, cognitive or  
23 memory problems (‘fibro fog’), waking unrefreshed, depression, anxiety disorder, or  
24 irritable bowel syndrome;” and 3) evidence that other disorders which could cause  
25 the symptoms were excluded. *Id.* (footnotes omitted).

26 In the decision, the ALJ noted that Plaintiff alleged fibromyalgia as part of  
27 her disability claim, but concluded that fibromyalgia was not a severe, medically  
28 determinable impairment. [AR 25-26.] Plaintiff argues in her brief that she was

1 diagnosed with fibromyalgia and that the medical evidence satisfies the diagnostic  
2 criteria of SSR 12-2p. [Pl. Brief at 6-7; AR 224-25, 228-29.] Plaintiff's argument,  
3 however, is not supported by the record.

4 First, Plaintiff does not cite to a diagnosis of fibromyalgia from a physician or  
5 acceptable medical source. SSR 12-2p, 2013 WL 3104869 at \*2. Instead, Plaintiff  
6 refers to the report of an examining physician, Dr. Khuram Sial, which references  
7 Plaintiff's complaint of fibromyalgia and indicates that Plaintiff was assessed with a  
8 widespread pain index ("WPI") score of 18 and a symptom severity scale ("SS")  
9 score of 6. [Pl. Brief at 6.] But Dr. Sial did not diagnose fibromyalgia. Rather, Dr.  
10 Sial diagnosed Plaintiff with myofascial pain syndrome, cervicgia, and lumbago.  
11 [AR 223, 227, 232.] There is also no indication in the record that any other  
12 physician diagnosed Plaintiff with fibromyalgia.<sup>2</sup> That fibromyalgia was mentioned  
13 in the medical records or reported by Plaintiff does not constitute a diagnosis from a  
14 medically acceptable source, as required by SSR 12-2p. *See, e.g., Jordon v.*  
15 *Berryhill*, No. 2:16-CV-00322, 2017 WL 6816694, at \*9 (E.D. Tenn. Nov. 30,  
16 2017) ("Fibromyalgia simply appearing on records without more or Plaintiff  
17 reporting she has the condition does not constitute a diagnosis as required by  
18 Section I of SSR 12-2p.").

19 Second, Plaintiff has not provided evidence from an acceptable medical  
20 source to satisfy the 1990 Criteria or the 2010 Criteria. While Dr. Sial's report  
21 indicates that the widespread pain requirement of both the 1990 Criteria and the  
22 2010 Criteria is satisfied, there is insufficient medical evidence to satisfy all of the  
23 remaining criteria. The record contains no indication that a physician conducted a  
24 physical examination of tender points or that a physician ruled out other disorders as  
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26  
27 <sup>2</sup> A medical record from November 2014 shows that Plaintiff reported fibromyalgia  
28 during an examination, but the physician diagnosed Plaintiff with diabetes (no  
complication Type I or II), generalized weakness, osteoporosis, and unspecified  
osteoarthritis. [AR 186.]

1 causing Plaintiff's symptoms, as required by the 1990 Criteria. SSR 12-2p, 2013  
2 WL 3104869 at \*3. As for the 2010 Criteria, while Dr. Sial's reports indicates that  
3 Plaintiff manifests some fibromyalgia symptoms, signs or co-occurring conditions  
4 (i.e., fatigue, waking unrefreshed, and various somatic symptoms), there is no  
5 indication in the record that disorders that could cause these manifestations were  
6 excluded. [AR 229]; see SSR 12-2p, 2013 WL 3104869 at \*3. As noted, Dr. Sial  
7 diagnosed Plaintiff with myofascial pain syndrome, cervicgia, and lumbago, and  
8 not fibromyalgia. [AR 223, 227, 232.]

9 Accordingly, the ALJ's determination that Plaintiff does not have a medically  
10 determinable, severe impairment of fibromyalgia is supported by substantial  
11 evidence.

#### 12 **B. Examining Physician**

13 Plaintiff contends the ALJ erroneously rejected the opinion of the examining  
14 internist, Dr. Bahaa Girgis. [Pl. Brief at 7-9.] Plaintiff argues that the ALJ  
15 improperly discounted Dr. Girgis' finding that Plaintiff would need to make  
16 "frequent stops" for about "10 minutes per hour" when walking and standing. [AR  
17 27, 182.]

18 An ALJ must provide clear and convincing reasons supported by substantial  
19 evidence in rejecting the uncontradicted opinion of an examining physician, *Bayliss*  
20 *v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005), and specific and legitimate  
21 reasons supported by substantial evidence to reject the contradicted opinion of an  
22 examining physician, *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).  
23 However, an ALJ is not required to accept an opinion of a treating physician, or any  
24 other medical source, if it is conclusory, brief, and not supported by clinical  
25 findings. See *Tonapetvan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). If the  
26 record as a whole does not support the medical source's opinion, the ALJ may reject  
27 that opinion. See *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th  
28 Cir. 2004).

1 Dr. Girgis conducted an internal medicine evaluation of Plaintiff in October  
2 2014. [AR 178-83.] He found that Plaintiff's conditions included: morbid obesity  
3 status post gastric bypass surgery; peripheral neuropathy; thyroid cancer status post  
4 total thyroidectomy; diabetes mellitus Type II, well controlled; multiple bone pain;  
5 and chronic back pain. [AR 182.] Dr. Girgis determined that Plaintiff was able to  
6 lift and carry 50 pounds occasionally and 25 pounds frequently, sit 6 hours in an 8-  
7 hour workday, and stand and walk 6 hours in an 8-hour workday with "frequent  
8 stops about 10 minutes per hour." [AR 182.]

9 The ALJ agreed with Dr. Girgis' opinion to the extent it was consistent with  
10 an RFC for medium work, but disagreed with Dr. Girgis' finding that Plaintiff  
11 would need frequent stops of 10 minutes per hour while standing and walking. [AR  
12 27, 182.] The ALJ reasonably rejected this limitation because it was not well  
13 supported by Dr. Girgis's own findings on examination. [AR 27]; *see Bayliss*, 427  
14 F.3d at 1216 (finding discrepancy between a physician's notes, recorded  
15 observations, and opinions and the physician's assessment of claimant's limited  
16 ability to stand and walk was a clear and convincing reason for rejecting the  
17 opinion); *see also Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003) (affirming  
18 ALJ's rejection of physician's assessment of claimant's functional limitations as  
19 unsupported by physician's treatment notes). The ALJ observed that Dr. Girgis  
20 found no evidence of joint deformity or effusion or swelling in the lower extremities  
21 and reported that Plaintiff had a normal gait and normal coordination. [AR 27, 180-  
22 82.] While Plaintiff notes that Dr. Girgis reported decreased sensation to vibration  
23 and touch in both Plaintiff's lower extremities which may be associated with  
24 peripheral neuropathy [Pl. Brief at 8], Dr. Girgis stated that Plaintiff's sensory exam  
25 was otherwise grossly intact and equal bilaterally. [AR 182.] In addition, Dr. Girgis  
26 reported that Plaintiff "walks and moves easily," was "able to change position and  
27 get on and off the examining table without difficulty," displayed grossly normal  
28 range of motion in the bilateral hips, knees, and ankles, and had normal reflexes

1 bilaterally, good tone with good active motion, no atrophy or fasciculation, strength  
2 of 5/5 throughout, no focal motor deficits, no tenderness to palpation to the midline  
3 and paraspinal areas of the back, negative straight leg raising test at 90 degrees  
4 (seated and supine positions), and only a mildly decreased range of motion in the  
5 back (flexion to 88 degrees and lateral bending to 30 degrees). [AR 180-82.]  
6 Further, Dr. Girgis found that Plaintiff could climb, stoop, kneel, crouch, and crawl  
7 without limit. [AR 183.] Thus, the ALJ’s conclusion that Dr. Girgis’ recorded  
8 observations and opinions regarding Plaintiff’s capabilities conflict with the  
9 assessed limitation that Plaintiff would need frequent breaks of about 10 minutes for  
10 every hour of standing and walking is supported by substantial evidence. [AR 180-  
11 83.] Such a conflict was a specific and legitimate reason for discounting Dr. Girgis’  
12 opinion. *See Bayliss*, 427 F.3d at 1216; *Connett*, 340 F.3d at 875; *see also*  
13 *Tonapetvan*, 242 F.3d at 1149; *Batson*, 359 F.3d at 1195. Although Plaintiff  
14 disagrees with the ALJ’s conclusion, “the ALJ is the final arbiter with respect to  
15 resolving ambiguities in the medical evidence.” *Tommasetti v. Astrue*, 533 F.3d  
16 1035, 1041 (9th Cir. 2008); *see Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
17 2002) (“Where the evidence is susceptible to more than one rational interpretation,  
18 one of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.”).

### 19 **C. Plaintiff’s Pain and Symptom Testimony**

20 Plaintiff contends that the ALJ failed to provide sufficient reasons for  
21 discounting her subjective symptom testimony. [Pl. Brief at 9-12.] For the reasons  
22 discussed below, the ALJ did not err.

23 Once a disability claimant produces evidence of an underlying physical or  
24 mental impairment that could reasonably be expected to produce the symptoms  
25 alleged and there is no affirmative evidence of malingering, the ALJ must offer  
26 “specific, clear and convincing reasons” to reject the claimant’s testimony. *Brown-*  
27 *Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015); *Smolen*, 80 F.3d at 1284. The  
28 ALJ must identify what testimony is not credible and what evidence discredits the



1 testimony. *See Treichler v. Comm’r, Soc. Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th  
2 Cir. 2014); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). But if the ALJ’s  
3 assessment of the claimant’s testimony is reasonable and is supported by substantial  
4 evidence, it is not the Court’s role to “second-guess” it. *Rollins v. Massanari*, 261  
5 F.3d 853, 857 (9th Cir. 2001).

6 Plaintiff testified that she was unable to work due to pain throughout her  
7 body, headaches, and weakness in her bones. [AR 26, 605-07, 609.] She  
8 complained that she “can’t really do anything,” spends her days lying down (about  
9 five hours) or sitting, and does not exercise, prepare meals, drive, vacuum, do  
10 laundry, shop for groceries, or help her three children get to or from school. [AR  
11 26, 608-11, 613-16.] Plaintiff claimed that she has difficulty sleeping and is unable  
12 to stand more than 5 minutes, sit more than an hour, lift more than a plastic cup,  
13 walk more than “a little bit,” or eat without vomiting. [AR 26, 609, 611, 613, 616-  
14 17.]

15 The ALJ found Plaintiff’s medically determinable impairments could  
16 reasonably be expected to cause her alleged symptoms, but Plaintiff’s statements  
17 concerning intensity, persistence and limiting effects of the symptoms were not  
18 entirely credible. [AR 26-28.] The ALJ first indicated that the medical evidence of  
19 record did not support the level of limitation alleged by Plaintiff. [AR 27-28.] A  
20 lack of supporting objective medical evidence is a factor which may be considered  
21 in evaluating a claimant’s credibility, provided it is not the sole factor. *Bunnell v.*  
22 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). The ALJ noted there were no  
23 documented findings of weakness on a sustained basis, joint swelling, or deformity  
24 and Plaintiff had normal motor strength, reflexes, and gait. [AR 27-28, 180-82.]  
25 The ALJ also cited a lack of any diffuse muscle atrophy despite Plaintiff’s claim that  
26 she leads an inactive lifestyle that consists primarily of lying down or sitting all day.  
27 [AR 28, 180-82, 608-11, 615-16.] The ALJ found that while Plaintiff complained  
28 that she vomits after eating and is unable to hold down food, she has been described

1 as “well nourished” and has maintained a relatively stable weight since undergoing  
2 gastric bypass surgery in 2013. [AR 26-28, 180, 221, 245-46, 252, 254, 256, 261,  
3 611.] It was thus appropriate for the ALJ to conclude the objective medical  
4 evidence did not support Plaintiff’s allegations of disabling physical limitations.

5 Second, the ALJ cited Plaintiff’s minimal treatment for her musculoskeletal  
6 complaints. [AR 28.] The ALJ noted that the record contained no recommendation  
7 for surgical intervention and that Dr. Sial actually advised Plaintiff to maintain  
8 normal daily activities and avoid prolonged bed rest. [AR 28, 232.] “Evidence of  
9 ‘conservative treatment’ is sufficient to discount a claimant’s testimony regarding  
10 severity of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007)  
11 (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)); *see also Meanel*  
12 *v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints  
13 where plaintiff’s “claim that she experienced pain approaching the highest level  
14 imaginable was inconsistent with the ‘minimal, conservative treatment’ that she  
15 received”).

16 Finally, the ALJ found that Plaintiff has a spotty work history, suggesting that  
17 her lack of employment is related to her preference not to work, rather than her  
18 claimed inability to work. [AR 28, 83-84.] Evidence of a poor work history is a  
19 clear and convincing reason to discredit a claimant’s credibility. *Thomas*, 278 F.3d  
20 at 958-59 (upholding ALJ’s negative credibility determination because, among other  
21 factors, plaintiff’s “work history was spotty, at best” and she “has shown little  
22 propensity to work in her lifetime”); *see* 20 C.F.R. § 416.929(c)(3) (an ALJ may  
23 consider a claimant’s prior work record when assessing credibility). Plaintiff’s  
24 earnings report demonstrates that Plaintiff had no earnings in 2002, 2003, 2004,  
25 2006, and 2010, and very limited earnings in 2000, 2001, 2005, 2007, 2008, 2009,  
26 and 2012. [AR 83.] Thus, the ALJ properly considered Plaintiff’s work history in  
27 discounting her credibility. *See Thomas*, 278 F.3d at 958-59.

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Accordingly, the Court concludes that the ALJ provided specific, clear and convincing reasons, supported by substantial evidence, for finding Plaintiff's testimony less than fully credible.

**V. CONCLUSION**

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

**IT IS ORDERED.**

DATED: February 14, 2018

  
\_\_\_\_\_  
GAIL J. STANDISH  
UNITED STATES MAGISTRATE JUDGE