

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

EVA J. SHULTZ,)	Case No. EDCV 16-2565-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	AFFIRMING COMMISSIONER
)	
NANCY A. BERRYHILL, Acting)	
Commissioner of Social)	
Security, ¹)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying her applications for Social Security disability insurance benefits ("DIB") and supplemental security income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties' Joint Stipulation, filed September 18, 2017, which the Court has taken under submission without oral argument. For the reasons stated below,

¹ Nancy A. Berryhill is substituted in as the correct Defendant. See Fed. R. Civ. P. 25(d).

1 the Commissioner's decision is affirmed.

2 **II. BACKGROUND**

3 Plaintiff was born in 1953. (Administrative Record ("AR")
4 89, 121, 131.) She completed college (AR 291) and worked as a
5 substitute teacher (AR 90-91, 282, 291).

6 On May 29, 2012, Plaintiff applied for DIB and SSI, alleging
7 that she had been unable to work since April 28, 2012, because of
8 scoliosis, cellulitis, asthma, rosea, allergies, hernia, spine
9 injury, lower-back pain, arthritis, bad knees, damage to her
10 esophagus and stomach "due to medication," and Crohn's disease.²
11 (AR 121, 131, 256-64.) After her applications were denied
12 initially and on reconsideration (see AR 168-69, 173-81, 185-89),
13 she requested a hearing before an Administrative Law Judge (AR
14 191). A hearing was held on August 11, 2014, at which Plaintiff,
15 who was represented by counsel, testified. (See AR 83-100.) The
16 hearing stopped early (see AR 99-100), and the ALJ sent follow-up
17 interrogatories to a vocational and a medical expert (AR 330-43,
18 673-94). They responded on October 14, 2014,³ and August 23,

19
20 ² Plaintiff previously applied for DIB on October 20, 2009.
21 (See AR 34, 104.) The application was denied, and the decision
22 was affirmed by an ALJ on February 15, 2011. (See AR 34, 104-
23 14.) The denial was affirmed by the district court on December
24 19, 2013. (AR 170-72); Schultz v. Colvin, No. EDCV 12-0989-JPR,
25 2013 WL 6732879 (C.D. Cal. Dec. 19, 2013). The ALJ here found
26 that Plaintiff had demonstrated changed circumstances since that
27 final decision, however (AR 34-35), and thus the Chavez
28 presumption does not apply. See Lester v. Chater, 81 F.3d 821,
827-28 (9th Cir. 1995) (as amended Apr. 9, 1996) (citing Chavez
v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988)). Defendant does not
contend otherwise.

³ The vocational expert also submitted an almost identical
second response on October 27, 2014, which differed in that it
suggested light occupations rather than the sedentary occupations
suggested in the first. (AR 340-43.)

1 2014, respectively. (AR 336-39, 686-94.) Plaintiff objected to
2 the vocational expert's opinion (AR 350) and requested a
3 supplemental hearing to address the medical expert's opinion (AR
4 327-28), which the ALJ apparently declined to hold.⁴ In a
5 written decision issued December 4, 2014, the ALJ found Plaintiff
6 not disabled. (AR 34-49.) Plaintiff sought Appeals Council
7 review (AR 30), which was denied on September 27, 2016 (AR 14-
8 18). This action followed.

9 **III. STANDARD OF REVIEW**

10 Under 42 U.S.C. § 405(g), a district court may review the
11 Commissioner's decision to deny benefits. The ALJ's findings and
12 decision should be upheld if they are free of legal error and
13 supported by substantial evidence based on the record as a whole.
14 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
15 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
16 evidence means such evidence as a reasonable person might accept
17 as adequate to support a conclusion. Richardson, 402 U.S. at
18 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
19 It is more than a scintilla but less than a preponderance.
20 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
21 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
22 substantial evidence supports a finding, the reviewing court
23 "must review the administrative record as a whole, weighing both
24 the evidence that supports and the evidence that detracts from
25 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,

27
28 ⁴ Although Plaintiff raised the ALJ's failure to acknowledge
her responses before the Appeals Council (AR 348-49), she has
abandoned the issue here (see generally J. Stip.).

1 720 (9th Cir. 1998). "If the evidence can reasonably support
2 either affirming or reversing," the reviewing court "may not
3 substitute its judgment" for the Commissioner's. Id. at 720-21.

4 **IV. THE EVALUATION OF DISABILITY**

5 People are "disabled" for purposes of receiving Social
6 Security benefits if they are unable to engage in any substantial
7 gainful activity owing to a physical or mental impairment that is
8 expected to result in death or has lasted, or is expected to
9 last, for a continuous period of at least 12 months. 42 U.S.C.
10 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
11 1992).

12 A. The Five-Step Evaluation Process

13 The ALJ follows a five-step evaluation process to assess
14 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4),
15 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
16 1995) (as amended Apr. 9, 1996). In the first step, the
17 Commissioner must determine whether the claimant is currently
18 engaged in substantial gainful activity; if so, the claimant is
19 not disabled and the claim must be denied. §§ 404.1520(a)(4)(i),
20 416.920(a)(4)(i).

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

27 If the claimant has a "severe" impairment or combination of
28 impairments, the third step requires the Commissioner to

1 determine whether the impairment or combination of impairments
2 meets or equals an impairment in the Listing of Impairments set
3 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
4 disability is conclusively presumed. §§ 404.1520(a)(4)(iii),
5 416.920(a)(4)(iii).

6 If the claimant's impairment or combination of impairments
7 does not meet or equal an impairment in the Listing, the fourth
8 step requires the Commissioner to determine whether the claimant
9 has sufficient residual functional capacity ("RFC")⁵ to perform
10 her past work; if so, she is not disabled and the claim must be
11 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
12 has the burden of proving she is unable to perform past relevant
13 work. Drouin, 966 F.2d at 1257. If the claimant meets that
14 burden, a prima facie case of disability is established. Id. If
15 that happens or if the claimant has no past relevant work, the
16 Commissioner then bears the burden of establishing that the
17 claimant is not disabled because she can perform other
18 substantial gainful work available in the national economy.
19 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.
20 That determination comprises the fifth and final step in the
21 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
22 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

25
26 ⁵ RFC is what a claimant can do despite existing exertional
27 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper
28 v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
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 B. The ALJ's Application of the Five-Step Process

2 At step one, the ALJ found that Plaintiff had not engaged in
3 substantial gainful activity since April 28, 2012, the alleged
4 onset date. (AR 37.) At step two, he concluded that Plaintiff
5 had severe impairments of "obesity; borderline high blood
6 pressure; osteoarthritis; and degenerative disc disease." (AR
7 37-38.) At step three, he determined that Plaintiff's
8 impairments did not meet or equal a listing. (AR 38.) At step
9 four, the ALJ found that Plaintiff had the RFC to "perform the
10 full range of medium work." (AR 38-42.) Based on the vocational
11 expert's opinion (see AR 330, 336-39), the ALJ concluded that
12 Plaintiff could perform past relevant work as an "[e]lementary
13 school teacher," DOT 092.227-010, 1991 WL 646895. (AR 42-43.)
14 At step five, he alternatively determined that she could perform
15 other jobs that existed in significant numbers in the national
16 economy. (Id.) Indeed, given Plaintiff's RFC for a full range
17 of medium work, the ALJ noted, the Grids dictated a finding of
18 "not disabled." (AR 43.) Accordingly, he found Plaintiff not
19 disabled. (AR 43-44.)

20 **V. DISCUSSION**

21 Plaintiff argues that the ALJ improperly rejected the
22 opinion of cardiologist Harvey Alpern, a consulting medical
23 expert. (J. Stip. at 4-9, 12.) As discussed below, the ALJ
24 properly evaluated the medical-opinion evidence. Accordingly,
25 remand is not warranted.

26 A. Applicable Law

27 Three types of physicians may offer opinions in Social
28 Security cases: those who directly treated the plaintiff, those

1 who examined but did not treat the plaintiff, and those who did
2 neither. Lester, 81 F.3d at 830. A treating physician's opinion
3 is generally entitled to more weight than an examining
4 physician's, and an examining physician's opinion is generally
5 entitled to more weight than a nonexamining physician's. Id.;
6 see §§ 404.1527, 416.927.⁶ But "the findings of a nontreating,
7 nonexamining physician can amount to substantial evidence, so
8 long as other evidence in the record supports those findings."
9 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996) (per curiam)
10 (as amended).

11 The ALJ may disregard a physician's opinion regardless of
12 whether it is contradicted. Magallanes v. Bowen, 881 F.2d 747,
13 751 (9th Cir. 1989); see Carmickle v. Comm'r, Soc. Sec. Admin.,
14 533 F.3d 1155, 1164 (9th Cir. 2008). When a physician's opinion
15 is not contradicted by other medical-opinion evidence, however,
16 it may be rejected only for "clear and convincing" reasons.
17 Magallanes, 881 F.2d at 751; Carmickle, 533 F.3d at 1164 (citing
18 Lester, 81 F.3d at 830-31). When it is contradicted, the ALJ
19

20 ⁶ Social Security regulations regarding the evaluation of
21 opinion evidence were amended effective March 27, 2017. When, as
22 here, the ALJ's decision is the final decision of the
23 Commissioner, the reviewing court generally applies the law in
24 effect at the time of the ALJ's decision. See Lowry v. Astrue,
25 474 F. App'x 801, 804 n.2 (2d Cir. 2012) (applying version of
26 regulation in effect at time of ALJ's decision despite subsequent
27 amendment); Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647
28 (8th Cir. 2004) ("We apply the rules that were in effect at the
time the Commissioner's decision became final."); Spencer v.
Colvin, No. 3:15-CV-05925-DWC, 2016 WL 7046848, at *9 n.4 (W.D.
Wash. Dec. 1, 2016) ("42 U.S.C. § 405 does not contain any
express authorization from Congress allowing the Commissioner to
engage in retroactive rulemaking"). Accordingly, citations to 20
C.F.R. §§ 404.1527 and 416.927 are to the versions in effect from
August 24, 2012, to March 26, 2017.

1 must provide only "specific and legitimate reasons" for
2 discounting it. Carmickle, 533 F.3d at 1164 (citing Lester, 81
3 F.3d at 830-31). The weight given a treating or examining
4 physician's opinion, moreover, depends on whether it is
5 consistent with the record and accompanied by adequate
6 explanation, among other things. §§ 404.1527(c)(3)-(6);
7 416.927(c)(3)-(6). Those factors also determine the weight
8 afforded the opinions of nonexamining physicians.

9 §§ 404.1527(e); 416.927(e). The ALJ considers findings by state-
10 agency medical consultants and experts as opinion evidence. Id.

11 Furthermore, "[t]he ALJ need not accept the opinion of any
12 physician . . . if that opinion is brief, conclusory, and
13 inadequately supported by clinical findings." Thomas v.
14 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); accord Batson v.
15 Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

16 An ALJ need not recite "magic words" to reject a physician's
17 opinion or a portion of it; the court may draw "specific and
18 legitimate inferences" from the ALJ's opinion. Maqallanes, 881
19 F.2d at 755. The Court must consider the ALJ's decision in the
20 context of "the entire record as a whole," and if the "evidence
21 is susceptible to more than one rational interpretation," the
22 ALJ's decision should be upheld." Ryan v. Comm'r of Soc. Sec.,
23 528 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted).

24 B. Relevant Background

25 1. *Dr. Alpern*

26 On August 23, 2014, medical expert Dr. Alpern filled out a
27 medical-source statement regarding Plaintiff's ability to do
28 physical work-related activities. (AR 686-94.) He opined that

1 Plaintiff could "[f]requently" lift and carry "[u]p to 10 lbs"
2 and "[o]ccasionally" lift and carry "11 to 20 lbs." (AR 686.)
3 She could sit, stand, and walk for "2" hours "[a]t [o]ne [t]ime"
4 without interruption; sit for "6" hours "[t]otal in an 8 hour
5 work day"; and stand and walk for "2" hours "[t]otal in an 8 hour
6 work day." (AR 687.) She did not "require the use of a cane to
7 ambulate" (id.) and could "[f]requently" operate foot controls
8 with both of her feet (AR 688). She could "[f]requently" use
9 both hands for reaching, handling, fingering, feeling, pushing,
10 and pulling. (Id.) Dr. Alpern stated that Plaintiff could
11 "[o]ccasionally" climb stairs, ramps, ladders, or scaffolds;
12 balance; stoop; kneel; crouch; or crawl. (AR 689.) None of her
13 impairments affected her hearing or vision (id.), but she could
14 only "[o]ccasionally" "tolerate exposure to" unprotected heights,
15 moving mechanical parts, or dust, odors, fumes, or pulmonary
16 irritants (AR 690).

17 Dr. Alpern also opined that Plaintiff could do all of the
18 following: "perform activities like shopping"; "travel without a
19 companion for assistance"; "ambulate without a wheelchair, walker
20 or 2 canes or 2 crutches"; "walk a block at a reasonable pace on
21 rough or uneven surfaces"; "use standard public transportation";
22 "climb a few steps at a reasonable pace with the use of a single
23 hand rail"; "prepare a simple meal [and] feed . . . herself";
24 "care for [her] personal hygiene"; and "sort, handle, or use
25 paper/files." (AR 691.) He diagnosed her with obesity,
26 degenerative joint and disc disease,⁷ asthma, and high blood

27
28 ⁷ He noted, however, that there was "no radiological
support" for either. (AR 692.)

1 pressure. (AR 692.)

2 The form Dr. Alpern filled out asked in eight different
3 places what "particular medical or clinical findings" supported
4 the assessment or limitations and how; Dr. Alpern left each such
5 question blank. (AR 686-91.) He also left blank a question
6 asking whether "any other work-related activities . . . are
7 affected by any impairments." (AR 691.)

8 2. *State-agency physicians*

9 In August 2012, state-agency medical consultant Dr. H. Han
10 reviewed Plaintiff's medical records. (AR 121-40.) He found
11 Plaintiff's only severe impairment to be discogenic and
12 degenerative back disorder. (AR 126, 136.) He opined that she
13 had the following exertional limitations: she could "lift and/or
14 carry" 50 pounds "occasionally" and 25 pounds "frequently";
15 "[s]tand and/or walk" for "[a]bout 6 hours in an 8-hour workday";
16 sit for "[a]bout 6 hours in an 8-hour workday"; and "[p]ush
17 and/or pull" an "[u]nlimited" amount aside from her lifting and
18 carrying restrictions. (AR 127, 137.) He also found that she
19 had the RFC to perform her past relevant work as a substitute
20 teacher as "[a]ctually [p]erformed." (AR 128-29, 138-39.)

21 In April 2013, state-agency medical consultant Dr. N.
22 Tsoulos reviewed Plaintiff's medical records. (AR 144-67.) He
23 found that Plaintiff had the following severe impairments: spine
24 disorders, asthma, inflammatory arthritis, diseases of the
25 esophagus, and inflammatory bowel disease. (AR 151, 163.) He
26 further found the same exertional limitations and capacity to
27 perform her past relevant work as Dr. Han. (AR 152-54, 164-66.)
28 His review showed that "the objective findings [did] not fully

1 support [Plaintiff's] alleged degree of functional impairment."
2 (AR 150, 162.)

3 3. *Medical records*

4 Plaintiff's medical records consist largely of appointments
5 with family physician Gita Tavassoli from 2011 through 2014.⁸
6 The earliest notes available date to March 2011, when Plaintiff
7 reported experiencing left-knee pain and right-hand numbness.⁹
8 (AR 392-93.) She was prescribed Gabapentin¹⁰ for her numbness
9 and Motrin for her pain. (*Id.*) In May 2011, Plaintiff
10 complained of lower-back pain at a level of "4/10" and stated
11 that she was "unable to sit or stand longer than one hour," but
12 upon examination her back showed "[n]ormal [c]urvature" and
13 "[f]ull [range of motion]." (AR 390.) A nerve conduction study
14 performed in June 2011 concluded that "[n]erve conductions of
15 both upper extremities [were] normal." (AR 382-83.) At follow-
16 up appointments with Dr. Tavassoli in January and March 2012,
17 Plaintiff reported "[no] pain" and "no new complaints." (AR 366-
18 67.) In June 2012, Plaintiff described her pain as "0/10," and
19 Dr. Tavassoli stated that her cellulitis was "resolved with
20 keflex"¹¹ and assessed her with "chronic" diarrhea secondary to a

22 ⁸ The ALJ gave "little weight" to Dr. Tavassoli's opinions
23 (AR 41), a finding Plaintiff has not challenged on appeal.

24 ⁹ The ALJ found Plaintiff "less than fully credible" (AR
25 39), which she has not challenged on appeal.

26 ¹⁰ Gabapentin is used to treat nerve pain. Gabapentin,
27 Drugs.com, <https://www.drugs.com/gabapentin.html> (last updated
28 Nov. 7, 2017).

¹¹ Keflex is an antibiotic used to treat skin infections,
among other things. See Keflex, Drugs.com, <https://www.drugs.com/keflex.html> (last updated Apr. 18, 2017).

1 food allergy. (AR 355.) She was referred for a barium enema¹²
2 and prescribed Claritin, Nexium,¹³ albuterol sulfate,¹⁴ and
3 Flovent.¹⁵ (AR 355, 357.)

4 In July 2012, bilateral radiographs of Plaintiff's ankles,
5 knees, and shoulders showed that although "[t]here [was]
6 narrowing" of the joints "consistent with osteoarthritis,"
7 "[t]here [was] no radiographic evidence of bony erosion." (AR
8 415-16, 422, 426-27.) Radiographs of her right and left hands
9 were "unremarkable," with "[n]o acute osseous abnormality." (AR
10 420-21.) She also had radiographs of her thoracic spine, which
11 showed "[m]ild dextroscoliosis" and "[m]ultilevel discogenic
12 disease with thoracic spondylosis" (AR 423); her cervical spine,
13 which showed "mild degenerative disc disease" (AR 428); and her
14 lumbrosacral spine, which showed "[m]ultilevel discogenic disease
15 and lumbar spondylosis" (AR 429). That same month, she underwent
16 a barium enema, which showed "scattered colonic diverticular,"
17

18 ¹² A barium enema is an x-ray of the large intestine. See
19 Barium Enema, WebMD, [https://www.webmd.com/digestive-disorders/
barium-enema#1](https://www.webmd.com/digestive-disorders/barium-enema#1) (last visited Mar. 13, 2018).

20 ¹³ Nexium treats stomach and esophagus problems by
21 decreasing the amount of acid made by the stomach. See Nexium
22 Capsule, Delayed Release, WebMD, [https://www.webmd.com/drugs/
2/drug-20536/nexium-oral/details](https://www.webmd.com/drugs/2/drug-20536/nexium-oral/details) (last visited Mar. 13, 2018).

23 ¹⁴ Albuterol treats wheezing and shortness of breath caused
24 by asthma. See Albuterol Sulfate, WebMD, [https://www.webmd.com/
drugs/2/drug-4872-3008/albuterol-sulfate-inhalation/
albuterol-salbutamol-solution-inhalation/details](https://www.webmd.com/drugs/2/drug-4872-3008/albuterol-sulfate-inhalation/albuterol-salbutamol-solution-inhalation/details) (last visited
25 Mar. 13, 2018).

26 ¹⁵ Flovent controls and prevents symptoms caused by asthma
27 by reducing swelling of the airways in the lungs to make
breathing easier. See Flovent Aerosol, WebMD, [https://
28 www.webmd.com/drugs/2/drug-13522/flovent-inhalation/details](https://www.webmd.com/drugs/2/drug-13522/flovent-inhalation/details) (last
visited Mar. 13, 2018).

1 "mild diminished caliber of the sigmoid color," and "mild
2 irregularity and fold thickening of the inferior wall of the
3 transverse colon." (AR 417.) In August 2012, Plaintiff
4 complained of pain at "3/10," and Dr. Tavassoli referred her to a
5 "GI clinic for [a] colonoscopy" and again assessed her with
6 "chronic" diarrhea. (AR 475-76.) Her prescribed medications
7 remained the same. (AR 476.) In October 2012, Plaintiff
8 described her pain as "4/10." (AR 460-61.)

9 In February 2013, Plaintiff stated that her pain was at
10 "0/10" (AR 443), but by March 2013, she complained of pain at
11 "8/10"; Dr. Tavassoli assessed her barium enema as "[a]bnormal,"
12 with "loose stool and no constipation," and again referred her to
13 "GI." (AR 430-31, 516.) In April 2013, Plaintiff complained of
14 left-hip pain at "2/10," but Dr. Tavassoli observed both hips to
15 have a "[f]ull range of motion" and "no joint deformity, heat,
16 swelling, erythema or effusion." (AR 514.) In May 2013,
17 Plaintiff was prescribed physical therapy for her left-shoulder
18 pain. (AR 511.) In July 2013, a radiograph of Plaintiff's left
19 shoulder showed "[n]o acute osseous abnormality" and "[n]o
20 significant degenerative change." (AR 487-88, 661.) In August
21 2013, Plaintiff described her knee pain as "6/10." (AR 499-500.)
22 She also showed signs of edema, which Dr. Tavassoli prescribed
23 hydrochlorothiazide to treat.¹⁶ (AR 500.) In September 2013,
24 her right knee showed "no effusion" or "displaced fracture" and
25 only a "minimal irregularity to the medial tibial spine." (AR

26
27 ¹⁶ Hydrochlorothiazide reduces extra fluid in the body. See
28 Hydrochlorothiazide, WebMD, <https://www.webmd.com/drugs/2/drug-5310/hydrochlorothiazide-oral/details> (last visited Mar. 13, 2018).

1 487, 659.) Dr. Tavassoli advised using an ice pack and getting
2 rest. (AR 497.) In October 2013, Plaintiff described her hip
3 and right-shoulder pain as "7/10." (AR 490-91.) Though Dr.
4 Tavassoli noted that her "[r]ight shoulder [had] tenderness[and]
5 moderate pain [with] motion" and an x-ray of it showed "mild
6 arthritis," Plaintiff "refuse[d] any intervention" aside from
7 occupational therapy. (AR 491.) Dr. Tavassoli further
8 recommended "[M]otrin as needed" for her hip pain. (Id.) Later
9 that month, Plaintiff's hip joints "appear[ed] unremarkable" but
10 also demonstrated "[i]liac wing enthesopathy." (AR 486, 657-58.)
11 In November 2013, Plaintiff described her pain as "9/10," and her
12 left pelvis was "tender" on the lateral hip joint; Dr. Tavassoli
13 referred her to physical therapy. (AR 620.) In December 2013,
14 Dr. Tavassoli diagnosed Plaintiff with arthritis and advised her
15 to use a "heating patch on [her] back" and to "cont[inue]
16 [M]otrin as needed." (AR 617.)

17 Plaintiff's remaining musculoskeletal physical exams in the
18 record – from late 2013 to late 2014 – showed "[n]ormal range of
19 motion, muscle strength, and stability in all extremities with no
20 pain on inspection." (See AR 529 (May 2014), 608 (Apr. 2014),
21 611 (Feb. 2014), 614 (Jan. 2014), 617 (Dec. 2013), 663 (May
22 2014), 699 (Sept. 2014), 707 (Aug. 2014). But see AR 729 (Oct.
23 2014: "[l]umbar spine has tenderness".) In February 2014, a
24 radiograph of her right shoulder demonstrated "no acute fracture
25 dislocation," "normal" soft tissues, and "[n]o acute
26 abnormality." (AR 660.) In April 2014, Plaintiff complained of
27 right-knee pain but "refuse[d] any steroid injection" as
28 treatment. (AR 608.)

1 C. Analysis

2 The ALJ gave "little weight" to Dr. Alpern's opinion and
3 "some weight" to the opinions of Drs. Han and Tsoulos. (AR 41-
4 42.) None of the doctors had examined Plaintiff. Plaintiff
5 argues that the ALJ improperly rejected Dr. Alpern's opinion.
6 (J. Stip. at 4-9.) The ALJ discounted Dr. Alpern's opinion
7 because the functional limitations he assessed were "too limiting
8 based on the medical evidence of record"; Plaintiff "received
9 routine and conservative treatment"; and "Dr. Alpern did not have
10 the benefit of personally observing and examining [Plaintiff]."
11 (AR 41.) Because Dr. Alpern's opinion was contradicted, the ALJ
12 was required to provide a "specific and legitimate" reason for
13 rejecting it. See Carmickle, 533 F.3d at 1164. He did so.

14 1. *Medical evidence of record*

15 Plaintiff contends that the ALJ "improperly rejected Dr.
16 Alpern's assessment of the medical evidence" and "substitute[d]
17 his . . . own interpretation of the medical evidence for the
18 opinion of [Dr. Alpern]." (J. Stip. at 5-6.)

19 Inconsistency with the objective medical evidence can be a
20 specific and legitimate reason for rejecting a medical-source
21 opinion. See Kohansby v. Berryhill, 697 F. App'x 516, 517 (9th
22 Cir. 2017) (upholding inconsistency with medical-opinion evidence
23 as specific and legitimate reason for rejecting medical opinion
24 (citing Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir.
25 2008))). Further, the ALJ may discount a physician's opinion
26 when it is conclusory, brief, and unsupported by the objective
27 medical evidence. Batson, 359 F.3d at 1195; Matney ex rel.
28 Matney v. Sullivan, 981 F.2d 1016, 1019 (9th Cir. 1992) (citing

1 Magallanes, 881 F.2d at 751). Dr. Alpern indicated that
2 Plaintiff could lift and carry 10 pounds frequently and 20 pounds
3 occasionally and could sit for six hours, stand for two hours,
4 and walk for two hours total in an eight-hour workday. (AR 686-
5 87.) He did not provide any explanation for those findings,
6 however, despite being specifically asked what "particular
7 medical or clinical findings" supported his assessment. (See
8 id.)

9 The ALJ noted that the "functional limitations . . . [were]
10 too limiting based on the medical evidence of record." (AR 41.)
11 He cited the lack of "diagnostic imaging . . . reveal[ing]
12 significant findings such as neuropathy or nerve root
13 impingement" (AR 41 (citing AR 382, 423, 428)) and Plaintiff's
14 "physical examinations show[ing] full range of motion of the
15 upper and lower extremities, normal muscle strength and normal
16 stability" (AR 40 (citing AR 482-83, 514, 529, 605, 608, 611,
17 614, 617, 640, 663, 699, 702, 707, 712, 718-19)). Indeed,
18 Plaintiff's diagnostic exams consistently demonstrated either
19 unremarkable or mild results. (See, e.g., AR 382-83 ("normal"
20 nerve conduction study), 415-16 (signs of osteoarthritis in
21 ankles, but "no radiographic evidence of bony erosion"), 417
22 (barium enema finding "mild irregularity"), 420-21
23 ("unremarkable" results with "[n]o acute osseous abnormality" in
24 hands), 422 (signs of osteoarthritis in knees, but "no
25 radiographic evidence of bony erosion"), 423 ("[m]ild
26 dextroscoliosis" and "[m]ultilevel discogenic disease with
27 thoracic spondylosis" in thoracic spine), 426-27 (signs of
28 osteoarthritis in shoulders, but "no radiographic evidence of

1 bony erosion"), 428 ("mild degenerative disc disease" in cervical
2 spine), 486 ("hip joints appear unremarkable" despite impression
3 of iliac wing enthesopathy), 487-88 ("[n]o acute osseous
4 abnormality" or "significant degenerative change" in left
5 shoulder), 659 ("[n]o displaced fracture" or "effusion" in right
6 knee), 660 ("[n]o acute abnormality [in] right shoulder").) To
7 the extent Plaintiff was diagnosed with degenerative disc disease
8 and osteoarthritis, objective findings show it was "mild." (See
9 AR 415-16, 422, 426-28.) Moreover, her physical exams
10 consistently were "normal" (e.g., AR 718-19), showing "stability
11 in all extremities with no pain on inspection" (AR 529 (May
12 2014), 608 (Apr. 2014), 611 (Feb. 2014), 614 (Jan. 2014), 617
13 (Dec. 2013), 663 (May 2014), 699 (Sept. 2014), 707 (Aug.
14 2014)).¹⁷

15 Plaintiff also contends that the ALJ erred by giving more
16 weight to the opinions of the state-agency medical consultants
17 than he did to Dr. Alpern's opinion, even though Dr. Alpern "had
18 the opportunity to review . . . more recent records and assessed
19 a more restrictive [RFC] as a result." (J. Stip. at 7.) The
20 additional evidence reviewed by Dr. Alpern belies his more
21 restrictive RFC, however. In the 16 months between when Dr.
22 Tsoulos evaluated Plaintiff's medical records, in April 2013, and

23
24 ¹⁷ The ALJ concluded that Plaintiff's asthma – which Dr.
25 Alpern included among his diagnoses (AR 692) – was not a severe
26 impairment because it was "under control" during the relevant
27 period (AR 42), a finding Plaintiff has not challenged on appeal.
28 Thus, to the extent any of the limitations assessed by Dr. Alpern
allegedly resulted from her asthma – something the Court cannot
tell because Dr. Alpern did not provide any explanation for his
findings – the limitations are inconsistent with the medical
evidence as determined by the ALJ and not challenged by
Plaintiff.

1 when Dr. Alpern submitted his opinion, in August 2014, Plaintiff
2 showed relative improvement. Most of her musculoskeletal
3 physical exams from late 2013 until the date of the ALJ's
4 decision showed a "[n]ormal range of motion, muscle strength, and
5 stability in all extremities with no pain on inspection." (See,
6 e.g., AR 529, 608, 611, 614, 617, 663, 699, 707.) Notes from her
7 physical- and occupational-therapy sessions during that time also
8 showed improvement. For example, in April 2014, Plaintiff was
9 improving and "able to reach behind [her] back." (AR 525.) By
10 May 2014, she reported "50% improvement" of her right shoulder
11 from therapy and stated that she was "able to reach above [her]
12 head for items," which she had "previously [been] unable [to
13 do]." (AR 521); see Stone v. Heckler, 761 F.2d 530, 532 (9th
14 Cir. 1985) (holding that most recent medical report only most
15 probative when plaintiff's "condition was progressively
16 deteriorating"); Young v. Heckler, 803 F.2d 963, 968 (9th Cir.
17 1986) (per curiam) (holding that ALJ not required to afford
18 greater weight to most recent medical report because condition
19 "improved" rather than deteriorated).

20 Thus, that Dr. Alpern's opinion was inconsistent with the
21 objective medical evidence was a specific and legitimate reason
22 for rejecting it. See Kohansby, 697 F. App'x at 517.

23 2. *Routine and conservative treatment*

24 The ALJ also discounted Dr. Alpern's opinion because
25 Plaintiff had "received routine and conservative treatment . . .
26 which suggest[ed] that her conditions [did] not cause significant
27 symptoms and functional limitations." (AR 41.) Conservative
28 treatment can constitute a specific and legitimate reason to

1 discount a physician's opinion. See Hanes v. Colvin, 651 F.
2 App'x 703, 705 (9th Cir. 2016) (finding that ALJ permissibly
3 discounted physician's opinion based in part on plaintiff's
4 conservative treatment).

5 Plaintiff's musculoskeletal pain in her back, hips, knees,
6 and shoulders was treated almost entirely with ibuprofen (see,
7 e.g., AR 491 ("motrin as needed" for hip pain), 515 (Motrin
8 prescribed)), ice packs and rest (see, e.g., AR 497 ("wrapping
9 and cold/ice pack" for knee pain)), and physical and occupational
10 therapy (see, e.g., AR 511 (physical therapy for left-shoulder
11 pain), 514 (same for left-hip pain), 611 ("refer to [occupational
12 therapy]" for left-shoulder pain)). Narcotics were never
13 prescribed. The Motrin seemingly helped manage Plaintiff's
14 conditions, as she often reported zero or similarly low levels of
15 pain (see, e.g., AR 503 (July 2013: 0/10), 514 (Apr. 2013: 2/10),
16 529 (May 2014: 0/10), 563 (Feb. 2013: 0/10), 584 (Jan. 2014:
17 0/10), 588 (Dec. 2013: 3/10), 590 (Oct. 2013: 1-2/10), 593 (Oct.
18 2013: 0/10), 600 (June 2013: 0/10), 611 (Feb. 2014: 0/10), 617
19 (Dec. 2013: 2/10), 646 (Mar. 2013: 3/10), 707 (Aug. 2014: 0/10),
20 729 (Oct. 2014: 0/10), 732 (Sept. 2014: 0/10), 745 (Dec. 2014:
21 3/10)); cf. Warre v. Comm'r of Soc. Sec. Admin., 439 F.3d 1001,
22 1006 (9th Cir. 2006) ("Impairments that can be controlled
23 effectively with medication are not disabling for the purpose of
24 determining eligibility for SSI benefits."), and to the extent
25 she complained of higher levels of pain, the ALJ found her to be
26 "less than fully credible" (see AR 39), which she has not
27 challenged. Plaintiff's diarrhea was treated with Nexium and her
28 asthma with albuterol and Flovent (see, e.g., AR 355, 611), and

1 the ALJ found neither impairment severe, which Plaintiff also has
2 not challenged on appeal.

3 Plaintiff's physical- and occupational-therapy sessions also
4 decreased her symptoms. In early 2012, she "responded well to
5 all [therapy]," she "tolerated treatment well," and "[b]oth [her]
6 strength and endurance [were] improved." (AR 402-03.) At
7 occupational therapy in May 2014, she "report[ed] 50% improvement
8 of [her right] shoulder" and increased range of motion. (AR
9 521.) The ALJ thus properly characterized Plaintiff's treatment
10 as conservative. See Pruitt v. Astrue, No. CV 11-8158-E, 2012 WL
11 2006150, at *2 (C.D. Cal. June 5, 2012) (Motrin is conservative
12 treatment); Thomas v. Astrue, No. EDCV 10-01550-JEM, 2011 WL
13 4529599, at *4 (C.D. Cal. Sept. 30, 2011) (same); Tommasetti, 533
14 F.3d at 1040 (describing physical therapy as conservative).
15 Accordingly, Plaintiff's conservative treatment was a specific
16 and legitimate reason for the ALJ to discount Dr. Alpern's
17 opinion. See Hanes, 651 F. App'x at 705.

18 3. *Lack of personal observance*

19 Finally, the ALJ also noted that Dr. Alpern "did not have
20 the benefit of personally observing and examining [Plaintiff]." (AR 41.)
21 The ALJ is responsible for resolving conflicts in
22 medical testimony and ambiguities in the evidence, Magallanes,
23 881 F.2d at 750, and the lack of an examining or treating
24 relationship was an appropriate consideration in doing so, see
25 §§ 404.1527(c), 416.927(c). That Dr. Alpern reviewed Plaintiff's
26 medical records without personally observing or examining her was
27 a specific and legitimate reason to give his opinion "little
28 weight." (AR 41); see Paden v. Berryhill, No. EDCV 16-02457-JEM,

1 2017 WL 6509231, at *5 (C.D. Cal. Dec. 20, 2017) (holding that
2 ALJ'S rejection of nonexamining physician's opinion in part
3 because he did not personally examine plaintiff was specific and
4 legitimate reason). Plaintiff objects that in the context of
5 this case that reason was "[i]nconsistent with the ALJ's own
6 logic" because the state-agency doctors also did not examine
7 Plaintiff. (J. Stip. at 7.) But the ALJ gave their opinions
8 only "some weight" (AR 41-42) and would not have been wrong to
9 discount them on that basis as well.

10 Accordingly, the ALJ did not err in assessing the medical-
11 opinion evidence. Substantial evidence therefore supports the
12 ALJ's decision. As such, remand is not warranted.¹⁸ See Stubbs-

13
14 ¹⁸ As Plaintiff points out (J. Stip. at 8-9), the ALJ likely
15 erred by finding at step four that her past work as an elementary
16 school teacher was past relevant work (see AR 42). "A job
17 qualifies as past relevant work only if it involved substantial
18 gainful activity," and "low earnings shift[] the step-four burden
19 of proof from the claimant to the Commissioner." Lewis v. Apfel,
20 236 F.3d 503, 515 (9th Cir. 2001); cf. §§ 404.1565, 416.965. The
21 monthly substantial-gainful-activity minimum was \$500 for the 15
22 years before Plaintiff's alleged onset date. See Substantial
23 Gainful Activity, Soc. Sec. Admin., <https://www.ssa.gov/oact/cola/sga.html> (last visited Mar. 13, 2018). Plaintiff apparently
24 worked once a week earning \$110 a day, totaling \$440 a month (AR
25 291), which falls below the monthly amount. (At the hearing,
26 Plaintiff appeared to testify that she last worked "two partial
27 days" a week. (AR 89.) In any event, none of Plaintiff's annual
28 earnings showed substantial gainful activity. (See AR 269-75.))
As an initial matter, this argument is likely waived because
Plaintiff never raised it during the administrative proceedings.
(See AR 83-100, 347-49); Sims v. Apfel, 530 U.S. 103, 107, 112
(2000); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (as
amended); Shaibi v. Berryhill, ___ F.3d ___, No. 15-16849, 2017 WL
7798666, at *6 (9th Cir. Aug. 22, 2017) (as amended Feb. 28,
2018). Further, any error was harmless because the ALJ made
alternative findings at step five, noting that "[b]ased on a
[RFC] for the full range of medium work" and "considering
[Plaintiff's] age, education, and work experience," the Medical-
Vocational Guidelines directed a finding of "not disabled." (AR
42-43.)

1 Danielson v. Astrue, 539 F.3d 1169, 1174 (9th Cir. 2008).

2 **VI. CONCLUSION**

3 Consistent with the foregoing and under sentence four of 42
4 U.S.C. § 405(g),¹⁹ IT IS ORDERED that judgment be entered
5 AFFIRMING the Commissioner's decision, DENYING Plaintiff's
6 request for remand, and DISMISSING this action with prejudice.

7
8 DATED: March 15, 2018



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

26 _____
27 ¹⁹ 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."