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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AQELA AKBARY,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.

) NO. SACV 10-00793-MAN  
)  
)  
) MEMORANDUM OPINION  
)  
) AND ORDER  
)  
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)

Plaintiff filed a Complaint on June 17, 2010, seeking review of the denial of plaintiff's application for supplemental security income ("SSI"). On July 27, 2010, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation ("Joint Stip.") on February 14, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner requests that his decision be affirmed or, alternatively, remanded for further administrative proceedings. (Joint Stip. at 5, 7-8, 11, 16-17.)

1 On October 4, 2011, this Court issued a minute order ("Minute  
2 Order") requesting supplemental briefing by both parties. The  
3 Commissioner filed a Response to the Minute Order on October 21, 2011,  
4 and plaintiff filed a Response on October 24, 2011 ("Plaintiff's  
5 Response"). On November 17 and 24, 2011, the parties participated in  
6 telephonic conferences with the Court, and the Court thereafter took the  
7 parties' Joint Stip. and supplemental briefing under submission.  
8

9 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**  
10

11 On February 19, 2004, plaintiff filed an application for SSI.  
12 (Administrative Record ("A.R.") 72-73, 256.) Plaintiff, who was born on  
13 December 8, 1962 (A.R. 20),<sup>1</sup> claims to have been disabled since January  
14 14, 2004 (A.R. 9), due to anxiety, depression, and various aches and  
15 pains.<sup>2</sup> (A.R. 12-15, 257-58; Joint Stip. at 2.) Plaintiff has no  
16 apparent past relevant work experience. (A.R. 20-21.)  
17

18 After the Commissioner denied plaintiff's claim initially and upon  
19 reconsideration (A.R. 256), plaintiff requested a hearing (A.R. 47, 55-  
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21 <sup>1</sup> On the date the application was filed, plaintiff was 41 years  
22 old, which is defined as a younger individual. (A.R. 20; *citing* 20  
C.F.R. § 416.963.)

23 <sup>2</sup> In her decision, the Administrative Law Judge notes that:

24 In addition to allegations of mental problems, [plaintiff]  
25 alleges she has pain in her lower back and left leg, has  
migraine headaches, dizziness and asthma; and cannot lift with  
26 her right hand due to having broken her wrist. [Plaintiff]  
reports that her pain is constant, especially in terms of her  
27 back with pain spreading to her upper back at time and  
headaches. She also reports she is fatigued all the time.

28 (A.R. 12; internal citations omitted.)

1 56). On September 25, 2006, plaintiff, who was represented by counsel,  
2 appeared and testified with the assistance of interpreter Jayla Rochan  
3 at a hearing before Administrative Law Judge Helen E. Hesse (the "ALJ").  
4 (A.R. 318-357.) Medical expert Joseph Malancharvil, vocational expert  
5 Stephen Berry, and plaintiff's daughter, Zermina Akbary, also testified.  
6 (*Id.*) On October 27, 2006, the ALJ denied plaintiff's claims (A.R. 256-  
7 61), and the Appeals Council subsequently denied plaintiff's request for  
8 review of the ALJ's decision (A.R. 306-09). On June 12, 2007, plaintiff  
9 sought review in this Court, which remanded the case for further  
10 proceedings in an August 14, 2008 Order ("Remand Order"). (A.R. 452-  
11 65.)

12  
13 On February 27, 2009, the Appeals Council effectuated the Court's  
14 Remand Order and remanded the matter to the ALJ for further actions  
15 consistent with the Remand Order. (A.R. 310-11.) The Appeals Council  
16 also directed that plaintiff have an opportunity for a supplemental  
17 hearing and that a subsequent, duplicative SSI application, filed by  
18 plaintiff on January 29, 2008, be consolidated with the remanded case.  
19 (*Id.*) On September 1, 2009, plaintiff, who was represented by an  
20 attorney and assisted by Pashto interpreter Kasem Gardizi, testified  
21 before the ALJ at a supplemental hearing. (A.R. 421-51.) Medical  
22 expert Sami Nafsoosi, vocational expert Alan Ey, and plaintiff's  
23 daughter, Zarmina Akbary, also testified. (*Id.*) On March 24, 2010, the  
24 ALJ denied plaintiff's claims. (A.R. 9-22.) That decision is now at  
25 issue in this action.

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1                                   **SUMMARY OF ADMINISTRATIVE DECISION**

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3           The ALJ found that plaintiff has not engaged in substantial gainful  
4 activity since February 19, 2004, her application date. (A.R. 11.) The  
5 ALJ determined that plaintiff has the following severe impairments:  
6 "somatoform disorder not otherwise specified; anxiety disorder not  
7 otherwise specified, mild; and depressive disorder not otherwise  
8 specified." (*Id.*) The ALJ also determined that plaintiff does not have  
9 an impairment or a combination of impairments that meets or equals one  
10 of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1  
11 (20 C.F.R. § 416.920(d), 416.925, 416.926). (A.R. 15.)  
12

13           After reviewing the record, the ALJ determined that plaintiff has  
14 the residual functional capacity ("RFC") to perform a full range of work  
15 at all exertional levels with the following nonexertional limitations:  
16 "[plaintiff] can perform moderately complex tasks, up to four steps,  
17 requiring no hypervigilance [sic]; and she should not be in charge of  
18 safety operations of others." (A.R. 16.)  
19

20           The ALJ determined that plaintiff has no past relevant work  
21 experience and, therefore, transferability of job skills is not an  
22 issue. (A.R. 20-21.) Having considered plaintiff's age, education,  
23 work experience, RFC, and the testimony of the vocational expert, the  
24 ALJ found that jobs exist in the national economy that plaintiff could  
25 perform, including dining room attendant, hand packager, and laundry  
26 laborer. (A.R. 21.) Accordingly, the ALJ concluded that plaintiff has  
27 not been under a disability, as defined in the Social Security Act,  
28 since February 19, 2004, the date her SSI application was filed. (A.R.

22.)

### STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The "evidence must be more than a mere scintilla but not necessarily a preponderance." *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute substantial evidence, only those 'reasonably drawn from the record' will suffice." *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006)(citation omitted).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." *Desrosiers v. Sec'y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988); see also *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. *Burch v.*

1 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
2 review only the reasons stated by the ALJ in his decision "and may not  
3 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
4 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
5 the Commissioner's decision if it is based on harmless error, which  
6 exists only when it is "clear from the record that an ALJ's error was  
7 'inconsequential to the ultimate nondisability determination.'" Robbins  
8 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(*quoting* Stout v.  
9 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d  
10 at 679.

## 11 12 DISCUSSION

13  
14 Plaintiff claims that the ALJ: (1) failed to comply with the  
15 Remand Order; and (2) improperly considered the treating doctors'  
16 opinions regarding plaintiff's inability to work. (Joint Stip. at 3.)  
17

### 18 **I. The Alleged Failure To Comply With The Remand Order Does Not** 19 **Warrant Remand.**

20  
21 It is well established that an ALJ must comply with a district  
22 court's remand order. Sullivan v. Hudson, 490 U.S. 877, 886, 109 S. Ct.  
23 2248, 104 L. Ed. 2d 941 (1989)(noting that "[d]eviation from the court's  
24 remand order in the subsequent administrative proceedings is itself  
25 legal error, subject to reversal on further judicial review"). However,  
26 as with other errors, an ALJ's failure to comply with a court's remand  
27 order is subject to a harmless error analysis. See Burch, 400 F.3d at  
28 679 ("A decision of the ALJ will not be reversed for errors that are

1 harmless"); *Juarez v. Astrue*, 2011 U.S. Dist. LEXIS 96220, at \*6 (C.D.  
2 Cal. Aug. 26, 2011)(applying harmless error analysis to ALJ's failure to  
3 comply with a court's remand order); *Banquet v. Astrue*, 2011 U.S. Dist.  
4 LEXIS 6879, at \*12 (C.D. Cal. Jan. 24, 2011)(same); *Fuller v. Astrue*,  
5 2010 U.S. Dist. LEXIS 122676, at \*6 (D. Ariz. Nov. 5, 2010)(same).

6  
7 In its Remand Order, dated August 14, 2008, this Court noted that:

8  
9 As the ALJ recognized that [p]laintiff needed to see a  
10 culturally-appropriate doctor to obtain a proper disability  
11 determination, the ALJ should have ensured that a suitable  
12 examination was obtained. Once the ALJ was made aware that  
13 [p]laintiff failed to receive the requisite follow-up  
14 treatment, the ALJ should have met **her burden** of developing  
15 the record.

16  
17 (A.R. 462-63; emphasis in original.) Accordingly, the Court remanded  
18 the matter so that the ALJ could develop properly the record regarding  
19 plaintiff's claimed mental impairment. (A.R. 452-64.)

20  
21 Prior to the issuance of the Remand Order, however, plaintiff  
22 received a psychiatric evaluation from consultative examiner Ernest A.  
23 Bagner, M.D., a board eligible psychiatrist, apparently in connection  
24 with plaintiff's subsequent, January 29, 2008 SSI application. (A.R.  
25 310.) Dr. Bagner diagnosed plaintiff with depressive disorder, not  
26 otherwise specified, and opined that plaintiff would be "significantly  
27 better" with psychiatric treatment. (A.R. 384-85.) Based on his  
28 assessment of plaintiff, Dr. Bagner concluded that plaintiff would have:

1 "no limitations interacting with supervisors, peers or the public,"  
2 "zero to mild limitations maintaining concentration and attention and  
3 completing tasks"; "mild limitations completing complex tasks and  
4 completing a normal workweek without interruption"; and "mild to  
5 moderate limitations handling normal stresses at work."<sup>3</sup> (A.R. 385.)  
6

7 Following the issuance of this Court's Remand Order, the Appeals  
8 Council vacated the ALJ's March 24, 2010 decision, remanded the matter  
9 for further proceedings consistent with the Remand Order, and directed  
10 that plaintiff's subsequent, duplicative SSI application be consolidated  
11 with the remanded case. (A.R. 310-11.)  
12

13 In her post-remand decision, the ALJ notes that the Appeals  
14 Council, pursuant to the Remand Order, "directed [her] to fully and  
15 fairly develop the record regarding [plaintiff]'s mental impairment."  
16 (A.R. 9.) The ALJ also notes that, while plaintiff "has not been under  
17 the care of any mental health professional since her treatment at  
18 Windstone Behavioral Health in 2006," she did have "a complete  
19 psychiatric evaluation [in March 2008] while this case was pending at  
20 the District Court." (*Id.*) That psychiatric evaluation "was completed  
21 with the help of Jaleh Roshan, an interpreter." (A.R. 382.)  
22

23 Plaintiff argues that the ALJ failed to comply with the Remand  
24 Order, because she did not develop the record and obtain a proper  
25

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26 <sup>3</sup> Although the ALJ afforded Dr. Bagner's opinion great weight,  
27 the ALJ accorded "greater weight" to the opinion of medical expert  
28 Joseph Malancharuvil, Ph.D., a psychologist, because his assessment was  
"more consistent with the record as a whole and accord[ed] [plaintiff]  
every reasonable benefit of the doubt." (A.R. 18.)



1 consultative examination from a culturally sensitive and/or appropriate  
2 doctor for plaintiff, as directed. (Joint Stip. at 3-5.) Based on the  
3 record before the Court, there is no evidence to indicate that Dr.  
4 Bagner was not a culturally sensitive and/or appropriate doctor or that  
5 there was anything deficient about Dr. Bagner's examination and  
6 diagnosis of plaintiff. Dr. Bagner's psychiatric evaluation of  
7 plaintiff was completed with the help of a female interpreter, which, as  
8 the Commissioner properly asserts, indicates that efforts were made to  
9 obtain appropriate linguistic and/or cultural reference in completing  
10 plaintiff's examination.<sup>4</sup> Accordingly, while it appears that the  
11 directives of the Remand Order may have not been followed precisely,  
12 plaintiff does not allege, and the Court cannot find, that Dr. Bagner's  
13 interpreter-assisted, psychiatric evaluation of plaintiff was inadequate  
14 and/or prejudiced plaintiff in any way. Indeed, beyond alleging,  
15 without any evidentiary support, that Dr. Bagner was not a culturally  
16 appropriate and/or sensitive doctor, plaintiff alleges no error in Dr.  
17 Bagner's psychiatric evaluation of plaintiff.<sup>5</sup> As such, any error  
18 committed by the ALJ in not complying fully with the Remand Order was  
19 harmless and does not constitute a ground for reversal.

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23 <sup>4</sup> Although the spelling is slightly different, it appears that  
24 plaintiff was assisted by the same interpreter who assisted her at the  
25 September 25, 2006 hearing. Plaintiff neither asserted any objection to  
the use of the interpreter at that hearing nor gave any indication that  
the interpretation provided was inadequate or incorrect.

26 <sup>5</sup> In fact, in Plaintiff's Response, it was noted that plaintiff  
27 "has not been able to find a treating physician that speaks her  
28 language" and that "having a culturally-sensitive physician at a  
[consultative examination] . . . would be impractical and expensive."  
(Plaintiff's Response at pp. 1-2.)

1 **II. The ALJ Committed No Reversible Error In Considering The Opinions**  
2 **Of Plaintiff's Treating Physicians Regarding Plaintiff's Alleged**  
3 **Inability To Work.**  
4

5 It is the responsibility of the ALJ to analyze evidence and resolve  
6 conflicts in medical testimony. Magallanes v. Bowen, 881 F.2d 747, 750  
7 (9th Cir. 1989). In the hierarchy of physician opinions considered in  
8 assessing a social security claim, "[g]enerally, a treating physician's  
9 opinion carries more weight than an examining physician's, and an  
10 examining physician's opinion carries more weight than a reviewing  
11 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.  
12 2001); 20 C.F.R. § 416.927(d).  
13

14 The opinions of treating physicians are entitled to the greatest  
15 weight, because the treating physician is hired to cure and has a better  
16 opportunity to observe the claimant. Magallanes, 881 F.2d at 751. When  
17 a treating physician's opinion is not contradicted by another physician,  
18 it may be rejected only for "clear and convincing" reasons. Lester v.  
19 Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another  
20 doctor, a treating physician's opinion may only be rejected if the ALJ  
21 provides "specific and legitimate" reasons supported by substantial  
22 evidence in the record. *Id.* It is well established that "[w]hen a  
23 treating physician's opinion is contradicted . . . , the ALJ must assess  
24 its persuasiveness in light of specified factors, including the 'length  
25 of the treatment relationship and the frequency of examination;' the  
26 'nature and extent of the treatment relationship;' and the treating  
27 opinion's consistency 'with the record as a whole.'" Aranda v. Comm'r  
28 SSA, 405 Fed. Appx. 139, 141 (9th Cir. 2010)(*quoting* Orn, 495 F.3d at

1 631).

2  
3 "The opinion of a nonexamining physician cannot by itself  
4 constitute substantial evidence that justifies the rejection of the  
5 opinion of . . . a treating physician." Lester, 81 F.3d at 831; see  
6 also Pitzer v. Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990)(finding  
7 that the nonexamining physician's opinion "with nothing more" did not  
8 constitute substantial evidence). However, "[w]here the opinion of the  
9 claimant's treating physician is contradicted, and the opinion of a  
10 nontreating source is based on independent clinical findings that differ  
11 from those of the treating physician, the opinion of the nontreating  
12 source may itself be substantial evidence." Andrews, 53 F.3d at 1041.  
13 Independent clinical findings include "(1) diagnoses that differ from  
14 those offered by another physician and that are supported by substantial  
15 evidence, or (2) findings based on objective medical tests that the  
16 treating physician has not herself considered." Orn, 495 F.3d at 632  
17 (internal citations omitted).

18  
19 An ALJ "has a special duty to fully and fairly develop the record  
20 and to assure that claimant's interests are considered." Brown v.  
21 Heckler, 713 F.2d 441, 443 (9th Cir. 1983). Pursuant to 20 C.F.R. §  
22 416.912(e), the Administration "will seek additional evidence or  
23 clarification from your medical source when the report from your medical  
24 source contains a conflict or ambiguity that must be resolved, [or] the  
25 report does not contain all the necessary information . . . ." See  
26 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996)(noting that "[i]f  
27 the ALJ thought he needed to know the basis of [the doctor's] opinions  
28 in order to evaluate them, he had a duty to conduct an appropriate

1 inquiry").

2  
3 Plaintiff contends that the ALJ improperly rejected the opinions of  
4 plaintiff's treating physicians -- to wit, Dr. Charles J. Barbanel, Dr.  
5 Daniel N. Blum, and Dr. Emmanuel O. Fashakin. (Joint Stip. at 3, 8-11.)  
6 Specifically, plaintiff claims that the ALJ failed to give specific and  
7 legitimate reasons for rejecting their opinions regarding plaintiff's  
8 alleged inability to work. (*Id.* at 3, 10-11.)

9  
10 Dr. Barbanel

11  
12 In an August 20, 2003 letter, Charles J. Babanel, a psychiatrist,  
13 stated the following: "[Plaintiff] is a patient under my care at the  
14 above named facility. She is suffering from a Major Depression. She is  
15 unable to work at this time. If you have any questions, please feel  
16 free to contact me . . . ." (A.R. 103.)

17  
18 In her decision, the ALJ summarized Dr. Barbanel's brief August 20,  
19 2003 letter. (A.R. 18-19.) The ALJ stated that she could not assign  
20 any weight to his opinion, because it is "conclusory, without any  
21 objective basis supporting his opinion, and without any indication as to  
22 [plaintiff]'s functional abilities. Furthermore, Dr. Barba[n]el's  
23 statement is not supported by objective evidence elsewhere in the record  
24 and the determination of disability is a matter reserved to the  
25 Commissioner." (*Id.*)

26  
27 Contrary to plaintiff's contention, the ALJ gave specific and  
28 legitimate reasons for giving no weight to the opinion of Dr. Barbanel.

1 As the ALJ correctly noted, Dr. Barbanel's four sentence letter is  
2 conclusory, lacks objective support, and contains no opinion regarding  
3 plaintiff's abilities. Further, Dr. Barbanel's opinion that plaintiff  
4 is "disabled" is not binding on the ALJ. Ukolov v. Barnhart, 420 F.3d  
5 1002, 1004 (9th Cir. 2005)("Although a treating physician's opinion is  
6 generally afforded the greatest weight in disability cases, it is not  
7 binding on an ALJ with respect to the existence of an impairment or the  
8 ultimate determination of disability")(internal quotations and citations  
9 omitted); 20 C.F.R. § 416.927(e)(1)("We are responsible for making the  
10 determination or decision about whether you meet the statutory  
11 definition of disability . . . . A statement by a medical source that  
12 you are 'disabled' or 'unable to work' does not mean that we will  
13 determine that you are disabled'"); Boardman v. Astrue, 286 Fed. App'x  
14 397, 399 (9th Cir. 2008)("ALJ is correct that a determination of a  
15 claimant's ultimate disability is reserved to the Commissioner, and that  
16 a physician's opinion on the matter is not entitled to special  
17 significance").

18  
19 Moreover, as the Commissioner properly notes, Dr. Barbanel's  
20 "opinion" predates plaintiff's alleged disability onset date, and, thus,  
21 it is of limited relevance. Carmickle v. Comm'r, Soc. Sec. Admin., 533  
22 F.3d 1155, 1165 (9th Cir. 2008)(noting that "[m]edical opinions that  
23 predate the alleged onset of disability are of limited relevance").  
24 Accordingly, for the aforementioned reasons, the ALJ committed no  
25 reversible error in assigning no weight to the opinion of Dr. Barbanel.

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1        Dr. Blum

2  
3        In a September 15, 2003 "Physician's Employability Report,"  
4 plaintiff's internist, Daniel N. Blum, M.D., noted that plaintiff's  
5 current diagnosis is anxiety, with an onset date of November 2002. (A.R.  
6 110.) In that report, Dr. Blum advised that plaintiff should have a  
7 "psych consult for counseling." (*Id.*) With respect to work, Dr. Blum  
8 opined that plaintiff "can't function well enough to perform job duties  
9 at this time due to emotional distress." (*Id.*)

10  
11        After summarizing Dr. Blum's report, the ALJ afforded it no weight,  
12 because: (1) "Dr. Blum's statements are . . . without any objective  
13 basis"; (2) "Dr. Blum's opinion is not supported by his own treating  
14 records, which suggest his report was made based on sympathy rather than  
15 objectivity"; and (3) "the determination of disability is an issue that  
16 is reserved to the Commissioner." (A.R. 19.)

17  
18        The ALJ provided specific and legitimate reasons supported by  
19 substantial evidence for rejecting Dr. Blum's opinion. First, as the  
20 ALJ properly noted, there is no objective evidence supporting Dr. Blum's  
21 statements. Second, Dr. Blum's opinion is not supported by his own  
22 treating records. For example, prior to his September 15, 2003  
23 treatment note, there appears to be only one treatment note, dated April  
24 28, 2003, which notes that plaintiff has "+ anxiety" and that a "psych  
25 consult" was discussed. (A.R. 204.) This brief reference to  
26 plaintiff's anxiety and possible need for a psychiatric consultation,  
27 however, does not support, or provide a solid basis for, his September  
28 15, 2003 opinion that plaintiff is unable to perform work due to

1 emotional distress.<sup>6</sup> Third, as noted *supra*, Dr. Blum's finding of  
2 disability is not binding on the ALJ and, as the ALJ properly  
3 recognized, is a matter ultimately reserved to her. Lastly, as with Dr.  
4 Barbanel, Dr. Blum's opinion is of limited relevance, because it  
5 predates plaintiff's alleged disability onset date. As such, the ALJ  
6 committed no reversible error in rejecting the opinion of Dr. Blum.

7  
8 Dr. Fashakin  
9

10 In a November 15, 2004 "Physician's Employability Report,"  
11 plaintiff's treating doctor, Emmanuel O. Fashakin, M.D., noted that  
12 plaintiff's current diagnoses include dizziness, syncope, anxiety,  
13 depression, and low back pain. (A.R. 235.) Dr. Fashakin also noted  
14 that plaintiff was to start taking Paxil and Zyprexa. (*Id.*) Dr.  
15 Fashakin reported that plaintiff "has episodes of dizziness . . . and  
16 sudden attacks of blackouts." (*Id.*) In reference to work, Dr. Fashakin  
17 noted that plaintiff "needs [a] psychiatric evaluation [and] follow-up,"  
18 and, until that is completed, he does not "see [plaintiff] being able to  
19 perform any work." (*Id.*)  
20

21  
22 <sup>6</sup> In finding Dr. Blum's opinion to be not supported by his  
23 treatment notes, the ALJ noted that Dr. Blum's report appears to be  
24 "based on sympathy rather than objectivity." (A.R. 19.) In his  
25 September 15, 2003 treatment note, Dr. Blum noted, *inter alia*, that  
26 plaintiff is "stress[ed]," "anxious," "tearful," "req[uires]  
27 disability," "can't function," has "5 children," "no husband," and is  
28 the "sole supporter" in her family. (A.R. 204.) Based on a review of  
Dr. Blum's treatment notes, it is certainly plausible that his finding  
of disability was based on sympathy for plaintiff. However, even  
assuming that the ALJ erred in opining that Dr. Blum's report was  
motivated by sympathy, the ALJ provided other specific and legitimate  
reasons for rejecting Dr. Blum's opinion which are supported by  
substantial evidence in the record. Accordingly, any error committed by  
the ALJ with respect to her reference to "sympathy" was harmless.

1 Plaintiff alleges that there is no indication that the ALJ  
2 considered Dr. Fashakin's November 15, 2004 "opinion" -- to wit, that  
3 plaintiff is unable to perform any work. (Joint Stip. at 9-11.) As an  
4 initial matter, and as discussed in detail *supra*, Dr. Fashakin's opinion  
5 that plaintiff is unable to work is an opinion on a matter reserved to  
6 the Commissioner and, thus, not given any "special significance." 20  
7 C.F.R. § 416.927(e). Notwithstanding this fact, the ALJ did address  
8 plaintiff's alleged inability to work. In pertinent part, although the  
9 ALJ did not specifically mention Dr. Fashakin's November 15, 2004  
10 Report, the ALJ noted that "[i]n terms of [plaintiff]'s alleged  
11 inability to work, the record does not contain evidence which shows that  
12 [plaintiff] is functionally unable to work. Indeed, the medical  
13 evidence regarding [plaintiff]'s alleged disabling mental impairments is  
14 sparse and is fully consistent with [her RFC determination]." (A.R.  
15 17.) As the ALJ properly notes, the record, which includes the  
16 treatment notes of Dr. Fashakin, does not include any evidence  
17 supporting plaintiff's functional inability to work. Accordingly, to  
18 the extent the ALJ erred in not rejecting specifically Dr. Fashakin's  
19 November 15, 2005 statement that plaintiff is unable to work, any such  
20 error was harmless in view of the ALJ's determination that the medical  
21 record provides no evidence to support such a finding.<sup>7</sup>

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22  
23 <sup>7</sup> Moreover, although not mentioned by plaintiff, the ALJ did  
24 reference Dr. Fashakin's later treatment notes. For example, with  
25 respect to plaintiff's dizziness and reports of syncope, the ALJ noted  
26 that while Dr. Fashakin reported that plaintiff "has had various  
27 episodes of syncope[,] [a]ll work[up] ha[s] been negative." (A.R. 14;  
28 internal quotation marks omitted.) In addition, the ALJ noted that a  
later treatment note from Dr. Fashakin stated that "[plaintiff]'s workup  
for syncope had been negative." (*Id.*) The ALJ also noted that Dr.  
Fashakin had prescribed plaintiff Zyprexa and Zoloft and that plaintiff  
later reported that the Zoloft was helping her. (A.R. 18.)  
Accordingly, while the ALJ did not reference Dr. Fashakin's November 15,  
2004 report specifically, she did reference and discuss the findings in



1       Accordingly, for the aforementioned reasons, the ALJ committed no  
2 reversible error in considering the opinions of plaintiff's treating  
3 physicians.

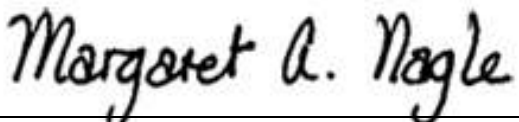
4  
5                                   **CONCLUSION**  
6

7       For the foregoing reasons, the Court finds that the Commissioner's  
8 decision is supported by substantial evidence and is free from material  
9 legal error. Neither reversal of the Commissioner's decision nor remand  
10 is warranted.

11  
12       Accordingly, IT IS ORDERED that Judgment shall be entered affirming  
13 the decision of the Commissioner of the Social Security Administration.  
14 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of  
15 this Memorandum Opinion and Order and the Judgment on counsel for  
16 plaintiff and for the Commissioner.

17  
18                   **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
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20 DATED:   January 30, 2012

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                                  MARGARET A. NAGLE  
                                  UNITED STATES MAGISTRATE JUDGE  
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28 later reports, none of which contained an opinion regarding plaintiff's  
inability to work.