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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

LAWANDA TUCKER,	)	No. SACV 12-296-SS
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>MEMORANDUM DECISION AND ORDER</b>
MICHAEL J. ASTRUE,	)	
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	
_____	)	

**I.  
INTRODUCTION**

Plaintiff brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Disability Insurance benefits. Plaintiff lodged her complaint with this Court on February 24, 2012. On April 13, 2012, pursuant to 28 U.S.C. § 636(c), the parties consented to the jurisdiction of the undersigned United States Magistrate Judge. Defendant filed its Answer on July 19, 2012. On August 20, 2012, Plaintiff filed a memorandum in support of her complaint ("Complaint Memo"). Defendant filed a Memorandum in Support

1 of its Answer on September 14, 2012. On October 1, 2012, Plaintiff  
2 filed a Reply. For the reasons stated below, the decision of the  
3 Commissioner is AFFIRMED.

4  
5 **II.**

6 **PROCEDURAL HISTORY**

7  
8 On March 24, 2009, Plaintiff filed an application for Disability  
9 Insurance Benefits ("DIB") claiming that she could not work due to  
10 severe, disabling adjustment disorder with depression, anxiety, and  
11 high blood pressure. (Administrative Record ("AR") 166-173). The  
12 claim was denied by the Agency on July 9, 2009 and again upon  
13 reconsideration on September 11, 2009. (AR 93-94). Plaintiff then  
14 requested a hearing, which was held before an administrative law judge  
15 ("ALJ") on December 15, 2010. (AR 71-92). Plaintiff appeared with  
16 counsel and testified.

17  
18 A vocational expert also testified. On February 24, 2012, the ALJ  
19 issued a decision denying Plaintiff benefits. (AR 27). Plaintiff  
20 sought review of the ALJ's decision before the Appeals Council. (AR  
21 14). On December 30, 2011, the Appeals Council denied Plaintiff's  
22 request for review, rendering the ALJ's decision the final decision of  
23 the Commissioner. (AR 1-6). Plaintiff filed the instant Complaint on  
24 February 24, 2012.

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1 III.

2 FACTUAL BACKGROUND

3  
4 Plaintiff was born on October 9, 1964 and was forty-six years old  
5 at the time of the hearing. (AR 174). She graduated from high school,  
6 has an AA degree in psychology, and has past work experience as a  
7 prison correctional officer and credit clerk. (AR 200, 373).  
8 Plaintiff asserts that she has Post Traumatic Stress Disorder (PTSD),  
9 depression, anxiety, and high blood pressure. (AR 167). Plaintiff's  
10 PTSD, depression, and anxiety began after she suffered a sexual assault  
11 in 1996. (AR 373). Based on a claim of depression, Plaintiff was  
12 approved for state disability retirement benefits on October 9, 1997  
13 and elected to receive \$1,546.18 in monthly benefits. (AR 135-37).  
14

15 Plaintiff returned to work in 2002 and apparently maintained  
16 steady employment for five years, i.e., until 2007. (AR 154, 178).  
17 However, Plaintiff also received retirement benefits as late as  
18 February 1, 2009. (AR 145). Plaintiff ceased working on March 1,  
19 2007, claiming that her disability prevented her from maintaining  
20 employment. (AR 167).  
21

22 According to Plaintiff's medical records, she sought treatment  
23 primarily from Dr. Rosen. (AR 396-474). At various points between  
24 2007 and the filing of Plaintiff's DIB claim, Dr. Rosen examined  
25 Plaintiff for conditions including shingles, possible infertility,  
26 chest pain, dyspnea, wheezing, headaches, dizziness, and problems  
27 balancing. (AR 452, 455, 461, 466-67). Dr. Rosen's reports indicate  
28 that Plaintiff's symptoms where not consistently present during that

1 period. At times, Plaintiff exhibited symptoms of depression, anxiety,  
2 and high irritability. (AR 453, 456, 458). However, during other  
3 examinations, she exhibited neither depression nor anxiety. (AR 450).  
4 On July 27, 2009, at Plaintiff's request, Dr. Rosen reduced the dosage  
5 of Plaintiff's anxiety medication. (AR 332). Dr. Rosen noted that  
6 Plaintiff had "[n]o psychological symptoms" and "no emotional  
7 liability." (AR 447). Further, on November 23, 2009, Plaintiff  
8 discontinued the medication. (AR 445). There is no record of  
9 treatment with Dr. Rosen beyond this point.

10  
11 Because Plaintiff was not receiving psychotherapy for her mental  
12 health complaints when she applied for DIB, the Agency referred her to  
13 Dr. Rajadhyasksha ("examining physician") for psychiatric evaluation.  
14 (AR 23). On June 23, 2009, Dr. Rajadhyasksha diagnosed Plaintiff with  
15 "PTSD, severe, (and) depressive disorder . . . ." (AR 373-75). Dr.  
16 Rajadhyasksha reported that Plaintiff has never been to a psychiatrist.  
17 (Id.). Dr. Rajadhyasksha also reported that Plaintiff presented as  
18 "alert, cooperative, oriented to person, place and time." (374).  
19 Further, Plaintiff "had spontaneous speech [that was] coherent and  
20 relevant" but also presented with a "[m]ood [that was] very depressed,  
21 anxious with tearful affect." (Id.). Dr. Rajadhyasksha noted that  
22 "[h]er concentration was adequate" and that she was able to "stay  
23 focused and was not easily distracted." (Id.). Plaintiff also denied  
24 "current active suicidal or homicidal ideations." (Id.). She appeared  
25 to be of "average" intelligence, evidenced "[good] general knowledge,"  
26 and appeared to "keep up with current events in the United States."  
27 (Id.). She was also "able to do serial sevens and simple calculations  
28 with some difficulty." Her memory was "fair as tested by recall of 3

1 items after 5 minutes," "intact for remote events," and "fair for  
2 recent events." (Id.). Dr. Rajadhyasksha nevertheless concluded that,  
3 at the time of the June 23, 2009 examination, Plaintiff "will have  
4 difficulty getting along with her coworkers, dealing with supervisors  
5 and maintaining a schedule . . . ." (AR 375). However, on July 27,  
6 2009, treating physician Dr. Rosen observed that Plaintiff showed no  
7 psychological symptoms, emotional liability, or sleep disturbances.  
8 Dr. Rosen also reported that Plaintiff's other conditions, including  
9 shingles, wheezing, nausea, osteoarthritis of the knee, and thoracic  
10 spine were "resolved." (AR 446-51).

11  
12 Finally, Dr. Balson ("non-examining physician") prepared a case  
13 analysis on July 7, 2009. Dr. Balson concluded that Plaintiff's  
14 medical records show that she has "no problems with personal care,"  
15 although she has "some difficulty sleeping" and "does not handle stress  
16 well." (AR 388). However, Dr. Balson also concluded that Plaintiff  
17 does not need reminders to take medication, completes household chores  
18 without encouragement, goes out alone, drives, and has good relations  
19 with family and friends. (AR 388). These findings are consistent  
20 with the third party function report completed by Plaintiff's husband.  
21 (AR 194-99). In that report, Plaintiff's husband added that she is  
22 able to pay bills, count change, handle a savings account, and use a  
23 checkbook. (AR 195).

1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3  
4 To qualify for disability benefits, a claimant must demonstrate  
5 a medically determinable physical or mental impairment that prevents  
6 him from engaging in substantial gainful activity<sup>1</sup> and that is expected  
7 to result in death or to last for a continuous period of at least  
8 twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998)  
9 (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the  
10 claimant incapable of performing the work he previously performed and  
11 incapable of performing any other substantial gainful employment that  
12 exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098  
13 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

14  
15 To decide if a claimant is entitled to benefits, an ALJ conducts  
16 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

17  
18 (1) Is the claimant presently engaged in substantial  
19 gainful activity? If so, the claimant is found not  
20 disabled. If not, proceed to step two.

21  
22 (2) Is the claimant's impairment severe? If not, the  
23 claimant is found not disabled. If so, proceed to step  
24 three.

25 (3) Does the claimant's impairment meet or equal one of a

26  
27 <sup>1</sup> Substantial gainful activity means work that involves doing  
28 significant and productive physical or mental duties and is done for pay  
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 list of specific impairments described in 20 C.F.R.  
2 Part 404, Subpart P, Appendix 1? If so, the claimant  
3 is found disabled. If not, proceed to step four.

4 (4) Is the claimant capable of performing his past work?  
5 If so, the claimant is found not disabled. If not,  
6 proceed to step five.

7 (5) Is the claimant able to do any other work? If not, the  
8 claimant is found disabled. If so, the claimant is  
9 found not disabled.

10  
11 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262  
12 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R. §§  
13 404.1520(b) - 404.1520(f)(1) & 416.920(b) - 416.920(f)(1).  
14

15 The claimant has the burden of proof at steps one through four,  
16 and the Commissioner has the burden of proof at step five. Bustamante,  
17 262 F.3d at 953-54 (citing Tackett). If, at step four, the claimant  
18 meets his burden of establishing an inability to perform past work, the  
19 Commissioner must show that the claimant can perform some other work  
20 that exists in "significant numbers" in the national economy, taking  
21 into account the claimant's residual functional capacity,<sup>2</sup> age,  
22 education, and work experience. Tackett, 180 F.3d at 1098, 1100;  
23 Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1).  
24 The Commissioner may do so by the testimony of a vocational expert or  
25 by reference to the Medical-Vocational Guidelines appearing in 20  
26

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27 <sup>2</sup> Residual functional capacity is "what [one] can still do  
28 despite [his] limitations" and represents an "assessment based upon all  
of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the Grids").  
2 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing  
3 Tackett). When a claimant has both exertional (strength-related) and  
4 nonexertional limitations, the Grids are inapplicable and the ALJ must  
5 take the testimony of a vocational expert. Moore v. Apfel, 216 F.3d  
6 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340  
7 (9th Cir. 1988)).

8  
9 **V.**

10 **THE ALJ'S DECISION**

11  
12 The ALJ employed the five-step sequential evaluation process  
13 discussed above. At the first step, the ALJ determined that Plaintiff  
14 had not engaged in substantial gainful activity since the alleged onset  
15 date of March 1, 2007. (AR 22). At the second step, the ALJ found  
16 that Plaintiff has medically determinable severe impairments of PTSD,  
17 depression, and anxiety that have significantly limited Plaintiff's  
18 ability to perform basic work functions within the meaning of 20 C.F.R.  
19 § 404.1521. (AR 19).

20  
21 At the third step, the ALJ found that Plaintiff does not have an  
22 impairment or combination of impairments that meet or medically equal  
23 any of the impairments appearing in the "Listing of Impairments" set  
24 forth in 20 C.F.R. § 404, Subpart P, Appendix 1. (AR 23). The ALJ  
25 noted that this finding is "[c]onsistent with a lack of marked medical  
26 signs or . . . findings representing [twelve continuous months of  
27 disability] . . . ." (Id.).



1 Before proceeding to the fourth step, the ALJ considered  
2 Plaintiff's RFC. In doing so, the ALJ considered all symptoms and the  
3 extent to which the symptoms can be reasonably accepted as consistent  
4 with the record. (AR 24). Plaintiff alleged that she cannot work, has  
5 "severe ongoing symptoms of PTSD . . . that force her to 'go to a dark  
6 place' until she feels like she's 'in a black hole.'" (AR 25). Yet,  
7 as the ALJ observed, Plaintiff has maintained a relatively normal  
8 personal life, as evidenced by her fourteen-year marriage and her  
9 pregnancy in 2010. (Id.). The ALJ also noted that while Plaintiff  
10 describes her daily activities as only "watching TV, eating, and  
11 sleeping," the third-party function report submitted by her husband  
12 evidences that she is able to prepare her own meals and only has  
13 difficulty with large meals. (Id.) (citing AR 192-99). The ALJ  
14 further noted that Plaintiff acknowledged she is capable of "clean[ing]  
15 her bathroom, mak[ing] her bed, [and] go[ing] outside about 3-4 times  
16 a week unaccompanied." (Id.). Additionally, Plaintiff drives a car,  
17 shops for groceries, pays bills, and speaks with her mother and sister  
18 on the phone every other day. (Id.). She can walk three miles at a  
19 time, do the laundry, and attend church services regularly. (Id.).  
20 The ALJ concluded that Plaintiff retained a residual functional  
21 capacity ("RFC") that would allow her to perform "simple routine and  
22 repetitive work tasks in a low-stress work environment-that is, one  
23 with no more than occasional changes in the work setting or decision-  
24 making required." (AR 24). The ALJ also found that Plaintiff "can be  
25 around employees throughout the workday but should not need more often  
26 than occasionally [to] have conversations with them or perform  
27 interpersonal interactions." (Id.).

28

1 At step four, after addressing Plaintiff's functional limitations,  
2 the ALJ determined that Plaintiff "would be unable to return to her  
3 past relevant work . . . ." (AR 26). However, at step five, based on  
4 Plaintiff's RFC and on the testimony of the vocational expert, the ALJ  
5 found that Plaintiff could perform "simple or unskilled work with minor  
6 social interaction adjustment" for twelve continuous months. (AR 24).  
7 Specifically, the ALJ concluded that Plaintiff could perform work  
8 existing in significant numbers in the national economy, such as that  
9 performed by hospital cleaners or warehouse workers. (AR 27). Thus,  
10 the ALJ denied Plaintiff's claim. (Id.).

11  
12 **VI.**

13 **STANDARD OF REVIEW**

14  
15 Under 42 U.S.C. § 405(g), a district court may review the  
16 Commissioner's decision to deny benefits. The court may set aside the  
17 Commissioner's decision when the ALJ's findings are based on legal  
18 error or are not supported by substantial evidence in the record as a  
19 whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)  
20 (citing Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273,  
21 1279 (9th Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir.  
22 1989)).

23  
24 "Substantial evidence is more than a scintilla, but less than a  
25 preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater,  
26 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which  
27 a reasonable person might accept as adequate to support a conclusion."  
28 Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To

1 determine whether substantial evidence supports a finding, the court  
2 must “consider the record as a whole, weighing both evidence that  
3 supports and evidence that detracts from the [Commissioner’s]  
4 conclusion.” Aukland, 257 F.3d at 1035 (citing Penny v. Sullivan, 2  
5 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support  
6 either affirming or reversing that conclusion, the court may not  
7 substitute its judgment for that of the Commissioner. Reddick, 157  
8 F.3d at 720-21 (citing Flaten v. Sec’y, 44 F.3d 1453, 1457 (9th Cir.  
9 1995)).

10  
11 **VII.**

12 **DISCUSSION**

13  
14 Plaintiff contends the ALJ erred for two reasons. She first  
15 claims that the ALJ failed to adequately consider and fairly interpret  
16 the opinions of the treating and examining physicians. (Complaint Memo  
17 at 5-9). Specifically, Plaintiff alleges that the ALJ selectively  
18 cited the medical record and based his conclusions on instances where  
19 Plaintiff’s symptoms were controlled during the relevant time period  
20 rather than those where Plaintiff’s symptoms were present. (Id. at 7).  
21 Plaintiff appears to contend that even though her symptoms were not  
22 always present or severe during the relevant time period, her  
23 underlying conditions were consistently present. (See id. at 8).  
24 Plaintiff also alleges that the ALJ improperly (I) ignored the  
25 examining physician’s finding that Plaintiff “will have difficulty  
26 getting along with her coworkers, dealing with supervisors and  
27 maintaining a schedule at this time,” (id. at 8) (quoting AR 375),  
28

1 and (ii) presented the vocational expert with a hypothetical that  
2 failed to account for such limitations. (Id. at 8-9).

3  
4 Second, Plaintiff contends that the ALJ incorporated an incorrect  
5 legal standard into the hypothetical presented to the vocational  
6 expert. The ALJ asked the vocational expert to exclude from the list  
7 of jobs Plaintiff could perform any "job where an essential function  
8 of the job description would include interacting with the public."  
9 (See Complaint Memo at 11-12; see also AR 8). According to Plaintiff,  
10 the ALJ's hypothetical erroneously used the concept of "essential job  
11 function" instead of the correct standard of "bona fide occupational  
12 qualifications." (Complaint Memo at 10). Specifically, Plaintiff  
13 alleges that because the term "essential function" does not include  
14 non-core job functions "reasonably necessary" for employment in a  
15 particular position, the ALJ's hypothetical was overinclusive of the  
16 jobs Plaintiff is able to perform. (Id.). Plaintiff contends that if  
17 the vocational expert had been asked to identify jobs where interaction  
18 with the public is not a "reasonably necessary" part of the job  
19 description, there would be no jobs that someone with her RFC could  
20 perform. (Complaint Memo at 10-12).

21  
22 **A. The ALJ Provided Clear And Convincing Justification For His**  
23 **Weighing Of The Medical Record**

24  
25 Plaintiff filed for DIB claiming that she could not work due to  
26 severe, disabling adjustment disorder with depression, anxiety, and  
27 high blood pressure. (AR 166-173). However, the ALJ found that  
28 Plaintiff did not have a disability that prevented her from engaging

1 in "simple or unskilled work with minor social interaction adjustment"  
2 for a period of twelve continuous months. (AR 24).

3  
4 When an ALJ evaluates medical evidence, the opinions of treating  
5 physicians are entitled to special weight because the treating  
6 physician is uniquely situated to know and observe the claimant as an  
7 individual. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003).  
8 In contrast, the opinions of examining physicians who have been  
9 retained by the Agency, though still important, are given less weight.  
10 The ALJ may reject the controverted opinion of an examining physician  
11 only for "specific and legitimate reasons that are supported by  
12 substantial evidence." Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d  
13 1155, 1164 (9th Cir. 2008) (quoting Lester v. Chater, 81 F.3d 821, 830-  
14 31 (9th Cir. 1995)). Reports from an examining physician, if supported  
15 by clinical tests and observations upon examination, constitute  
16 substantial medical evidence and may be relied upon by the ALJ in order  
17 to determine the claimant's RFC. Andrews, 53 F.3d at 1041. Where such  
18 reports differ from those of the treating physician, the opinion of the  
19 examining consultive physician may itself be substantial evidence;  
20 however, "[i]t is then solely the province of the ALJ to resolve the  
21 conflict." Id.

22  
23 Here, Plaintiff first contends that her medical records contradict  
24 the ALJ's findings. (Complaint Memo at 5-9). Specifically, she  
25 alleges that the ALJ selectively cited her treating physician's reports  
26 and gave improper weight to the examining physician's June 23, 2009  
27 evaluation. (Id. at 7). She argues that the ALJ should not have  
28 heavily relied on the examining physician's opinion because the

1 examining physician saw Plaintiff just one time, while the treating  
2 physician saw Plaintiff multiple times, including on two occasions  
3 sandwiching the examining physician's examination. (Complaint Memo at  
4 7-8). In sum, Plaintiff contends that the ALJ selectively reviewed her  
5 medical records and based his conclusions on instances where  
6 Plaintiff's symptoms were controlled during the relevant time period  
7 rather than those where her symptoms were present.

8  
9 The treating physician's reports support the ALJ's findings.  
10 Specifically, they do not evidence a disability spanning twelve  
11 continuous months. Instead, the reports affirmatively establish that  
12 Plaintiff's psychological symptoms were not present for twelve  
13 continuous months. As the ALJ accurately noted, while Plaintiff's  
14 treating physician found that Plaintiff exhibited symptoms of  
15 depression, anxiety, and high irritability at various points between  
16 2007 and the filing of Plaintiff's DIB claim, the same physician  
17 reported that her symptoms were not consistently present during that  
18 period. (See AR 22-25; see also AR 450, 453, 456, 458). The following  
19 reports further support the ALJ's findings. On June 7, 2007, roughly  
20 four months after Plaintiff's alleged disability onset date,  
21 Plaintiff's treating physician reported that her "mental status exam  
22 was normal" and that she exhibited "[n]o anxiety, no depression, and  
23 no sleep disturbances." (AR 467). At that time, Plaintiff's treating  
24 physician also reported that Plaintiff was "[n]ot under stress."  
25 (Id.). On November 25, 2008, the treating physician reported that  
26 Plaintiff exhibited anxiety following wildfires that occurred the prior  
27  
28

1 week, but he did not list any other psychological symptoms. (AR 456).<sup>3</sup>  
2 As the ALJ noted, the treating physician also reported as resolved  
3 several previous conditions, including shingles and wheezing. (See  
4 AR 23; see also AR 456-57).

5  
6 On July 17, 2009, Plaintiff saw the treating physician for the  
7 following reasons: "Cough . . . irregular periods. . .nausea . . .  
8 wants to see infertility specialist." (AR 452). The treating  
9 physician reported Plaintiff as having a anxiety disorder, but no  
10 depression. (AR 452-54). He reported Plaintiff as "[n]ot depressed."  
11 (AR 453). On July 27, 2009, the treating physician reported that  
12 Plaintiff exhibited "[n]o pyschological symptoms" and "no emotional  
13 liability." (AR 447). On November 23, 2009, he reported that  
14 Plaintiff again exhibited signs of depression, anxiety, and dysthymia.  
15 (AR 44).

16  
17 Plaintiff has failed to meet her burden of establishing disability  
18 for a continuous period of not less than twelve months. Webb v.  
19 Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (citing Tackett, 180 F.3d  
20 at 1098)). The ALJ provided clear and convincing reasons why the  
21 treating physician's reports do not evidence that Plaintiff's relevant  
22 symptoms were present for the requisite period. The reports instead  
23 show that her symptoms were only sporadically present from the time she  
24 filed for DIB to the time of the ALJ's decision. Accordingly,  
25 Plaintiff's claim fails to the extent Plaintiff alleges the ALJ's

26  
27 \_\_\_\_\_  
28 <sup>3</sup> The Court notes that while depression was not listed on the  
November 25 report, Plaintiff's treating physician discussed depression  
and anxiety with Plaintiff at that time. (AR 457).

1 decision was against the weight of the evidence because the treating  
2 physician's reports evidence a qualifying disability.

3  
4 Second, Plaintiff argues that the ALJ's decision was contrary to  
5 the consultative physician's findings and that those findings were  
6 improperly excluded from the hypothetical provided to the vocational  
7 expert. Specifically, Plaintiff contends that the ALJ ignored the  
8 consultative physician's observation that Plaintiff "'will have  
9 difficulty getting along with her coworkers, dealing with supervisors  
10 and maintaining a schedule at this time.'" (Complaint Memo at 8)  
11 (quoting AR 375). Plaintiff stresses that the consultative physician  
12 diagnosed her with "PTSD, severe, (and) and depressive disorder."  
13 (Complaint Memo at 6) (citing AR 375). However, the ALJ found that  
14 Plaintiff has PTSD, depression, and anxiety that have significantly  
15 limited her ability to perform basic work functions. The ALJ also  
16 incorporated this finding into the RFC. (See AR 24).

17  
18 However, the ALJ properly rejected the examining physician's  
19 finding that Plaintiff would have difficulty maintaining a regular work  
20 schedule, for specific and legitimate reasons. As the ALJ correctly  
21 noted, Plaintiff was not taking any psychotropic drugs at the time of  
22 the consultive examination. (AR 24). Nor was Plaintiff receiving  
23 psychotherapy. (See AR 23; see also AR 440-41, 437). The ALJ also  
24 correctly noted that the treating physician's reports affirmatively  
25 showed Plaintiff inconsistently exhibited symptoms before and after the  
26 consultative examination. (See AR 23; see also AR 447, 450). The ALJ  
27 accurately observed that one month after the examining physician's  
28 examination, Plaintiff's treating physician reported that Plaintiff



1 "demonstrated no psychological symptoms, no emotional liability, and  
2 had no sleep disturbances." (See AR 23; see also AR 447).  
3 Additionally, the ALJ singled out several of Plaintiff's activities  
4 that indicate an ability to maintain a regular work schedule.  
5 "Consistent with her daily activities, e.g., taking care of young  
6 child, driving, shopping, paying bills, managing bank accounts,  
7 regularly attending church services, and maintaining a stable 14 year  
8 marriage, etc., the [ALJ found] that the claimant would have 'mild'  
9 restriction in her daily activities . . . ." (AR 24). The ALJ further  
10 based his opinion the third party function report submitted by  
11 Plaintiff's husband, in which Plaintiff was described as able to make  
12 her own meals, clean her bathroom, make the bed, drive a car, shop for  
13 groceries, pay bills and handle bank accounts, speak to her mother and  
14 sister on the phone every other day, walk up to three miles at a time,  
15 and attend church services. (AR 25-26). The ALJ's findings with  
16 respect to Plaintiff's daily activities are supported by the record.  
17 (See AR 194-99, 388). Such activities indicate that Plaintiff can  
18 maintain a regular schedule.<sup>4</sup> Accordingly, this Court finds that the  
19 ALJ provided specific and legitimate reasons for his weighing of the  
20 medical record and his rejection of the consultative physician's  
21 conclusion that Plaintiff would have difficulty maintaining a work  
22 schedule. See Aukland, 257 F.3d at 1035; see also Reddick, 157 F.3d  
23 at 720-21.

---

27 <sup>4</sup> Although not a basis for this Court's determination, Plaintiff's  
28 having maintained steady employment from 2002 to 2007 also suggests that  
she is able to maintain a regular schedule. (See AR 154, 178).

1           **B.    The ALJ Properly Relied Upon The VE's Testimony**

2  
3           Plaintiff also contends that the ALJ erred in presenting the  
4 vocational expert with a hypothetical that failed to properly describe  
5 Plaintiff's RFC. Specifically, Plaintiff contends that the ALJ  
6 incorporated an incorrect legal standard into the hypothetical  
7 presented to the vocational expert. The ALJ asked the vocational  
8 expert to exclude from the list of jobs Plaintiff could perform any  
9 "job where an essential function of the job description would include  
10 **interacting with the public.**" (See Complaint Memo at 11-12; see also  
11 AR 87). According to Plaintiff, the ALJ's hypothetical erroneously  
12 used the concept of "essential job function" instead of the correct  
13 standard of "bona fide occupational qualifications." (Complaint Memo  
14 at 10). Plaintiff alleges that because the term "essential function"  
15 does not include non-core job functions "reasonably necessary" for  
16 employment in a particular position, the ALJ's hypothetical was  
17 overinclusive of the jobs Plaintiff is able to perform. (Id.).  
18 Plaintiff further alleges that if the vocational expert had been asked  
19 to identify jobs where interaction with the public is not a "reasonably  
20 necessary" part of the job description, there would be no jobs that  
21 someone with her RFC could perform. (Id. at 10-12). The Court  
22 disagrees.

23  
24           In order for the vocational expert's testimony to constitute  
25 substantial evidence, the hypothetical question posed must "consider  
26 all of the claimant's limitations." Andrews, 53 F.3d at 1044.  
27 However, the ALJ is not required to include limitations for which there  
28 was no evidence. See Osenbrock, 240 F.3d at 1164-65 (ALJ not bound to

1 accept as true the restrictions set forth in hypothetical if they were  
2 not supported by substantial evidence). In this case, the ALJ asked  
3 the vocational expert to "assume a person of the claimant's age,  
4 education, and work experience . . . who has no exertional limitations  
5 . . [but] is limited to simple tasks; to work that is low-stress . .  
6 . ." (AR 86-87). Additionally, the hypothetical was restricted to  
7 jobs that may involve being around employees throughout the work day  
8 but would entail "only occasional conversation and interpersonal  
9 interactions." (AR 87). The vocational expert testified that such a  
10 person could work as a hospital cleaner or warehouse worker. (Id.).  
11

12 The record supports the ALJ's first hypothetical. The ALJ  
13 properly noted that Plaintiff is able to make her own meals, clean her  
14 bathroom, make the bed, drive a car, shop for groceries, pay bills and  
15 handle bank accounts, speak to her mother and sister on the phone every  
16 other day, walk up to three miles at a time, and attend church  
17 services. (See AR 25-26; see also 194-99, 388). The ALJ also properly  
18 observed that Plaintiff's medical records only show sporadic depression  
19 and anxiety. As the ALJ noted, Plaintiff's medical records indicate  
20 that Plaintiff had no psychological symptoms at various points after  
21 her claimed onset date. (See AR 24; see also AR 446-51).  
22 Nevertheless, Plaintiff contends that using the "essential function"  
23 language in the hypothetical prompted the vocational expert to testify  
24 that Plaintiff could perform jobs where interaction with the public is  
25 an essential job function, which Plaintiff contends is not supported  
26 by the evidence. (Complaint Memo at 9-11). Plaintiff appears to allege  
27 that if the ALJ asked the vocational expert to exclude jobs where  
28 interaction with the public is reasonably necessary without

1 accommodation (Complaint Memo. at 11-12), there would be no jobs that  
2 someone with Plaintiff's RFC could perform. However, the record does  
3 not show that Plaintiff is incapable of interaction with the public.  
4 Rather, as discussed above, the record shows that Plaintiff interacts  
5 with the public on a regular basis. Accordingly, Plaintiff's claim  
6 fails.

7  
8 Further, Plaintiff's claim would have been denied even if the  
9 vocational expert had been asked to identify jobs where interaction  
10 with the public is not a "reasonably necessary" part of the job  
11 description. In a second hypothetical, the ALJ asked the vocational  
12 expert whether there are any jobs that someone with Plaintiff's  
13 limitations could perform in which interaction with the public is not  
14 a reasonably necessary element of the job. Specifically, the ALJ asked  
15 whether there are "job[s] where a person essentially works alone and  
16 where the supervisor is not supervising them for any more than a third  
17 of the day" that a person with Plaintiff's limitations could perform.  
18 (AR 88). The ALJ clarified that he was thinking of "a person who  
19 cleans at night or performs cleaning services . . . . [that is] not  
20 interacting with people." (AR 88). The vocational expert answered  
21 that such person could perform night shift work as a hospital room  
22 cleaner. (AR 89). Accordingly, even if the ALJ had used a more  
23 restrictive hypothetical, Plaintiff would not be entitled to benefits.  
24 Thus, any arguable error in the first hypothetical was harmless error  
25 and remand would not result in a different outcome for Plaintiff. As  
26 such, no remand is required. Carmickle v. Comm'r, 533 F.3d 1155, 1162  
27 (9th Cir. 2008) (if ALJ's error was inconsequential to the ultimate  
28 nondisability determination, no remand required).

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VIII.  
CONCLUSION

Consistent with the foregoing, IT IS ORDERED that the decision of the Commissioner is AFFIRMED. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment herein on counsel for both parties.

DATED: December 7, 2012.

\_\_\_\_\_/S/\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE