



## BACKGROUND

1  
2 Plaintiff is a 54 year-old female who applied for Social Security Disability Insurance  
3 benefits on June 11, 2015, and Supplemental Security Income benefits on June 19, 2015,  
4 alleging disability beginning May 1, 2014. (AR 11.) The ALJ determined that Plaintiff has not  
5 engaged in substantial gainful activity since May 1, 2014, the alleged onset date. (AR 14.)

6 Plaintiff's claims were denied initially on September 21, 2015, and on reconsideration on  
7 December 15, 2015. (AR 11.) Plaintiff filed a timely request for hearing, which was held before  
8 Administrative Law Judge ("ALJ") Alan J. Markiewicz on December 14, 2017, in Orange,  
9 California. (AR 11.) Plaintiff appeared and testified at the hearing and was represented by  
10 counsel. (AR 11.) Vocational expert ("VE") Joseph H. Torres also appeared and testified at  
11 the hearing. (AR 11.)

12 The ALJ issued an unfavorable decision on February 27, 2018. (AR 11-20.) The  
13 Appeals Council denied review on April 9, 2019. (AR 1-4.)

## DISPUTED ISSUES

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15 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as  
16 grounds for reversal and remand:

- 17 1. Whether the ALJ gave proper consideration to Plaintiff's symptom and limitation  
18 testimony.
- 19 2. Whether the final decision has the support of substantial evidence on the sitting  
20 required of telemarketers or the standing/walking required of cashiers.
- 21 3. Whether substantial evidence supports the classification of telephone solicitor as  
22 past relevant work.

## STANDARD OF REVIEW

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24 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
25 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
26 Chater, 80 F.3d 1273 , 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
27 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
28 based on the proper legal standards).

1 Substantial evidence means “more than a mere scintilla,’ but less than a  
2 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v.  
3 Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a  
4 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at  
5 401 (internal quotation marks and citation omitted).

6 This Court must review the record as a whole and consider adverse as well as  
7 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where  
8 evidence is susceptible to more than one rational interpretation, the ALJ’s decision must be  
9 upheld. Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).  
10 “However, a reviewing court must consider the entire record as a whole and may not affirm  
11 simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882  
12 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495  
13 F.3d 625, 630 (9th Cir. 2007).

#### 14 THE SEQUENTIAL EVALUATION

15 The Social Security Act defines disability as the “inability to engage in any substantial  
16 gainful activity by reason of any medically determinable physical or mental impairment which  
17 can be expected to result in death or . . . can be expected to last for a continuous period of not  
18 less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has  
19 established a five-step sequential process to determine whether a claimant is disabled. 20  
20 C.F.R. §§ 404.1520, 416.920.

21 The first step is to determine whether the claimant is presently engaging in substantial  
22 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging  
23 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,  
24 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or  
25 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not  
26 significantly limit the claimant’s ability to work. Smolen, 80 F.3d at 1290. Third, the ALJ must  
27 determine whether the impairment is listed, or equivalent to an impairment listed, in 20 C.F.R.  
28 Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d at 746. If the impairment

1 meets or equals one of the listed impairments, the claimant is presumptively disabled. Bowen,  
2 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the  
3 claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir.  
4 2001). Before making the step four determination, the ALJ first must determine the claimant's  
5 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is "the most [one] can  
6 still do despite [his or her] limitations" and represents an assessment "based on all the relevant  
7 evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the  
8 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),  
9 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

10 If the claimant cannot perform his or her past relevant work or has no past relevant work,  
11 the ALJ proceeds to the fifth step and must determine whether the impairment prevents the  
12 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864,  
13 869 (9th Cir. 2000). The claimant bears the burden of proving steps one through four,  
14 consistent with the general rule that at all times the burden is on the claimant to establish his or  
15 her entitlement to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established  
16 by the claimant, the burden shifts to the Commissioner to show that the claimant may perform  
17 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support  
18 a finding that a claimant is not disabled at step five, the Commissioner must provide evidence  
19 demonstrating that other work exists in significant numbers in the national economy that the  
20 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.  
21 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and  
22 entitled to benefits. Id.

### 23 THE ALJ DECISION

24 In this case, the ALJ determined at step one of the sequential process that Plaintiff has  
25 not engaged in substantial gainful activity since May 1, 2014, the alleged onset date. (AR 14.)

26 At step two, the ALJ determined that Plaintiff has the following medically determinable  
27 severe impairments: osteoarthritis; history of internal derangement of the meniscus of the right  
28

1 knee; degenerative disc disease of the lumbar spine; and series of foot deformities, including  
2 status/post surgery malunion of the first metatarsal head. (AR 14.)

3 At step three, the ALJ determined that Plaintiff does not have an impairment or  
4 combination of impairments that meets or medically equals the severity of one of the listed  
5 impairments. (AR 14.)

6 The ALJ then found that Plaintiff has the RFC to perform light work as defined in 20 CFR  
7 §§ 404.1567(b) and 416.967(b) with the following limitations:

8 Claimant can lift and carry 20 pounds occasionally and 10 pounds frequently.

9 She can stand and walk for 4 hours in an 8-hour workday; can sit for 6 hours in  
10 an 8-hour workday, but cannot climb ladders, ropes, or scaffolds. She can  
11 occasionally climb ramps and stairs and frequently balance. She can  
12 occasionally stoop, kneel, crouch and crawl.

13 (AR 14-18.) In determining the above RFC, the ALJ made a determination that Plaintiff's  
14 subjective symptom allegations were "not entirely consistent" with the medical evidence and  
15 other evidence of record. (AR 15.)

16 At step four, the ALJ found that Plaintiff is able to perform her past relevant work as a  
17 telephone solicitor. (AR 18-19.) The ALJ also found at step five that, considering Claimant's  
18 age, education, work experience and RFC, there are jobs that exist in significant numbers in  
19 the national economy that Claimant can perform, including the job of cashier movie theater.  
20 (AR 19-20.)

21 Consequently, the ALJ found that Claimant is not disabled within the meaning of the  
22 Social Security Act. (AR 20.)

### 23 **DISCUSSION**

24 The ALJ decision must be affirmed. The ALJ properly discounted Plaintiff's subjective  
25 symptom allegations. The ALJ's RFC is supported by substantial evidence. The ALJ's  
26 determination that Plaintiff could perform her past relevant work or alternative jobs in the  
27 national economy is supported by substantial evidence.

1 **I. THE ALJ’S RFC IS SUPPORTED BY SUBSTANTIAL EVIDENCE**

2 Plaintiff contends that the ALJ erred in discounting Plaintiff’s subjective symptom  
3 allegations. The Court disagrees.

4 **A. Relevant Federal Law**

5 The ALJ’s RFC is not a medical determination but an administrative finding or legal  
6 decision reserved to the Commissioner based on consideration of all the relevant evidence,  
7 including medical evidence, lay witnesses, and subjective symptoms. See SSR 96-5p; 20  
8 C.F.R. § 1527(e). In determining a claimant’s RFC, an ALJ must consider all relevant evidence  
9 in the record, including medical records, lay evidence, and the effects of symptoms, including  
10 pain reasonably attributable to the medical condition. *Robbins*, 446 F.3d at 883.

11 The test for deciding whether to accept a claimant’s subjective symptom testimony turns  
12 on whether the claimant produces medical evidence of an impairment that reasonably could be  
13 expected to produce the pain or other symptoms alleged. *Bunnell v. Sullivan*, 947 F.2d 341,  
14 346 (9th Cir. 1991); see also *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *Smolen*, 80  
15 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant’s testimony on the  
16 severity of symptoms merely because they are unsupported by objective medical evidence.  
17 *Reddick*, 157 F.3d at 722; *Bunnell*, 947 F.2d at 343, 345. If the ALJ finds the claimant’s pain  
18 testimony not credible, the ALJ “must specifically make findings which support this conclusion.”  
19 *Bunnell*, 947 F.2d at 345. The ALJ must set forth “findings sufficiently specific to permit the  
20 court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas v.*  
21 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002); see also *Rollins v. Massanari*, 261 F.3d 853, 857  
22 (9th Cir. 2001); *Bunnell*, 947 F.2d at 345-46. Unless there is evidence of malingering, the ALJ  
23 can reject the claimant’s testimony about the severity of a claimant’s symptoms only by offering  
24 “specific, clear and convincing reasons for doing so.” *Smolen*, 80 F.3d at 1283-84; see also  
25 *Reddick*, 157 F.3d at 722. The ALJ must identify what testimony is not credible and what  
26 evidence discredits the testimony. *Reddick*, 157 F.3d at 722; *Smolen*, 80 F.3d at 1284.

1           **B.     Analysis**

2           Plaintiff claims she is unable to work due to bunions and musculoskeletal issues. (AR 15.)  
3 She alleges that she is unable to stand for long periods because of pain and swelling in her  
4 right ankle, leg, and foot. (AR 15.) The ALJ did find that Plaintiff had the medically  
5 determinable severe impairments of osteoarthritis, derangement of right knee meniscus,  
6 degenerative disc disease of the lumbar spine, and foot deformities. (AR 14.) Notwithstanding  
7 these impairments, the ALJ assessed Plaintiff with a reduced range of light work RFC. (AR 14-  
8 15.) The ALJ also determined that Plaintiff could perform her past relevant work as a  
9 telephone solicitor (AR 18) and a full range of other alternative sedentary jobs in the national  
10 economy (AR 19, 20). Consequently, the ALJ concluded that Plaintiff was not disabled from  
11 the alleged onset date of May 1, 2014, through the date of decision on February 27, 2018. (AR  
12 20.)

13           In determining Plaintiff's RFC, the ALJ concluded that Plaintiff's medically determinable  
14 impairments reasonably could be expected to cause the alleged symptoms. (AR 15.) The ALJ,  
15 however, also found that Plaintiff's statements regarding the intensity, persistence, and limiting  
16 effects of these symptoms were "not entirely consistent" with the medical evidence and other  
17 evidence of record. (AR 15.) Because the ALJ did not make any finding of malingering, he  
18 was required to provide clear and convincing reasons supported by substantial evidence for  
19 discounting Plaintiff's subjective symptom allegations. Smolen, 80 F.3d at 1283-84;  
20 Tommasetti v. Astrue, 533 F.3d at 1035, 1039-40 (9th Cir. 2008). The ALJ did so.

21           First, the ALJ found that Plaintiff's subjective allegations were inconsistent with the  
22 objective medical evidence. (AR 15-16, 17, 18.) An ALJ is permitted to consider whether there  
23 is a lack of medical evidence to corroborate a claimant's alleged symptoms so long as it is not  
24 the only reason for discounting a claimant's credibility. Burch v. Barnhart, 400 F.3d 676, 680-  
25 81 (9th Cir. 2005). Plaintiff had bunionectomies on both feet but appeared to heal "without any  
26 problems." (AR 16.) She healed well and had no complaints per several medical visits. (AR  
27 17.) There is little evidence of treatment of her foot impairments in 2016 and 2017. (AR 16,  
28 17.) With respect to Plaintiff's knees, there was only mild medial joint space narrowing and no

1 evidence of joint instability. (AR 17.) With respect to her spine, MRIs showed only mild  
2 degenerative changes and some advanced degenerative disc disease. (AR 17.) The ALJ  
3 gave weight to the opinion of the State agency reviewing physician that Plaintiff can perform  
4 light work. (AR 15.) The ALJ found this opinion consistent with the “generally minimal  
5 objective findings.” (AR 16.) Plaintiff does not present any medical opinions challenging the  
6 ALJ’s RFC, nor any meaningful argument that the objective medical evidence does not support  
7 the ALJ’s RFC.

8         Second, the ALJ found that Plaintiff’s minimal or conservative treatment was  
9 inconsistent with Plaintiff’s alleged symptoms. (AR 17, 18.) Conservative treatment is a valid  
10 basis for discounting a claimant’s subjective symptom allegations. Tommasetti, 533 F.3d at  
11 1039-40. The Commissioner notes that Plaintiff chose epidural injections over surgery. (AR  
12 18.) Injections, however, are not considered conservative treatment. See Arthur C. v. Saul,  
13 2019 WL 5420445, at \*4 (C.D. Cal. Oct. 23, 2019) (collecting cases); Garrison v. Colvin, 759  
14 F.3d 995, 1015 n.20 (9th Cir. 2014) (“[W]e doubt that epidural steroid shots to the neck and  
15 lower back qualify as ‘conservative’ medical treatment”). Here, however, there were but two  
16 injections in April and June 2016. (AR 18, 474, 477.) These two close in time injections do not  
17 alter the fact that Plaintiff’s overall treatment on the whole was conservative. Cuellar v. Saul,  
18 2020 WL 1234187, at \*5 (C.D. Cal. Mar. 13, 2020).

19         Third, the ALJ found that Plaintiff did not always follow treatment recommendations.  
20 (AR 18.) An ALJ may consider an unexplained or inadequately explained failure to seek  
21 treatment or follow a treatment regimen in evaluating subjective symptoms. Tommasetti, 533  
22 F.3d at 1039. Here, the ALJ noted that Plaintiff delayed X-rays and was not using the Richie  
23 brace as required for treatment of her right ankle. (AR 16, 18, 394.) She came back for a  
24 treatment visit in two weeks rather than one week as she was supposed to do. (AR 16, 18.)<sup>1</sup>

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26         <sup>1</sup> The ALJ also found that Plaintiff was inconsistent in reporting on smoking and vaping. The  
27 issue is fairly minor and insufficient to establish that Plaintiff’s subjective symptoms regarding her  
28 medical impairments were not credible. The ALJ implicitly agrees. (JS 14.) Nonetheless, the  
error is harmless because the ALJ provided other valid reasons for discounting Plaintiff’s  
subjective symptom allegations. Carmickle v. Comm’r Soc. Sec. Admin., 533 F.3d 1155, 1162-63

1 Plaintiff disagrees with the ALJ's evaluation of the evidence, but it is the ALJ's  
2 responsibility to resolve conflicts in the medical evidence and ambiguities in the record.  
3 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the ALJ's interpretation of the  
4 record is reasonable, as it is here, it should not be second-guessed. Rollins, 261 F.3d at 857;  
5 Thomas, 278 F.3d at 954 ("Where the evidence is susceptible to more than rational  
6 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be  
7 upheld.").

8 The ALJ discounted Plaintiff's subjective symptom allegations for clear and convincing  
9 reasons supported by substantial evidence. The ALJ's RFC is supported by substantial  
10 evidence.

## 11 **II. PLAINTIFF IS CAPABLE OF PERFORMING PAST RELEVANT 12 WORK OR ALTERNATIVE JOBS IN THE NATIONAL ECONOMY**

13 The ALJ assessed Plaintiff with a reduced range of light work RFC. (AR 14.) She can  
14 stand and walk for 4 hours in an 8 hour workday and sit for 6 hours. (AR 14.) With the above  
15 RFC, the ALJ determined at step four of the sequential process that Plaintiff can perform her  
16 past relevant work as a telephone solicitor (DOT 299.357-014), which is sedentary skilled work.  
17 (AR 18.) The ALJ also found that there are other jobs in the national economy she can  
18 perform. (AR 19.) Thus, at step five of the sequential process the ALJ found that Plaintiff  
19 could perform the job of cashier movie theater (DOT 211.462-010), which is light semi-skilled  
20 work. (AR 20.)

21 Plaintiff challenges whether the telephone solicitor job can be performed within the ALJ's  
22 RFC. Based on online vocational data, Plaintiff contends that the job requires sitting  
23 continually, more than the six hours the ALJ's RFC permits. The Court rejects this argument,  
24 which is contradicted by Social Security rulings, Social Security regulations, the Dictionary of  
25 Occupational Titles ("DOT"), Ninth Circuit rulings, and the VE's assessment. Social Security  
26 Ruling 83-10\*5 provides that for sedentary jobs sitting should generally total 6 hours of an 8  
27 hour workday with periods of standing and walking no more than 2 hours. SSR 83-10 is

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28 (9th Cir. 2008).

1 consistent with Social Security regulations, which also provide that “[j]obs are sedentary if  
2 walking and standing are required only occasionally and other sedentary criteria are met.” 20  
3 C.F.R. § 404.1567(a). The regulations further provide that terms such as “sedentary” have the  
4 same meaning as they have in the DOT. 20 C.F.R. § 404.1567. The DOT states that  
5 sedentary jobs involve sitting most of the time and that jobs are sedentary if walking and  
6 standing are required only “occasionally” (up to 1/3 of the time for an 8 hour day). DOT, App.  
7 C, 1991 WL 688702 (Jan. 1, 2016).

8 The Ninth Circuit has confirmed these requirements. Aukland v. Massanari, 257 F.3d  
9 1033, 1035 (9th Cir. 2001) (sitting should generally total approximately 6 hours of an 8 hour  
10 workday). The telephone solicitor job fits within the above parameters. DOT 299.357-014.  
11 Despite Plaintiff’s contention that the telephone solicitor job may require more than six hours  
12 sitting, the DOT code for the job contains the same requirements as above, i.e., that walking  
13 and standing are required only occasionally, which would leave 6 hours for sitting. Plaintiff also  
14 does not consider breaks, other duties, and the fact that telephone solicitation calls could be  
15 made standing rather than sitting.

16 The VE, moreover, testified that Plaintiff can perform the job as generally performed per  
17 the DOT within the RFC, including the limitation to six hours sitting. (AR 60.) Plaintiff does not  
18 identify any conflict between the VE’s testimony and the DOT. The VE is not required to  
19 address conflicts with vocational data other than the DOT. The VE’s recognized expertise  
20 provides the necessary foundation for his or her testimony and “no additional foundation is  
21 necessary”. Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). The ALJ’s determination  
22 that Plaintiff can perform her past relevant work as a telephone solicitor as that job is generally  
23 performed is supported by substantial evidence. Plaintiff failed to meet her burden to  
24 demonstrate she cannot perform her past relevant work as a telephone solicitor.

25 Based on the testimony of the VE (AR 60-61), the ALJ also found at step five of the  
26 sequential evaluation that Plaintiff could perform the job of cashier movie theater (DOT  
27 211.426-010). (AR 20.) Because the ALJ’s RFC imposes a four hour limit on standing and  
28 walking, the VE eroded the job numbers by 90%, which still left 32,000 jobs nationally. See

1 Gutierrez v. Colvin, 740 F.3d 519, 527-29 (9th Cir. 2014) (25,000 jobs nationally is a significant  
2 number). Plaintiff contends that the Bureau of Labor Statistics' data shows that cashiers stand  
3 and walk more than 4 hours, but the VE took that into consideration when eroding the job  
4 category by 90%.

5 Plaintiff, moreover, never addresses the ALJ's step five determination that she can do "a  
6 generally full range of unskilled sedentary jobs." (AR 20.) As an example, the VE testified that  
7 Plaintiff would be able to perform the sedentary, unskilled job of lens installer (DOT 713.687-  
8 026). (AR 61.) This occupation is available nationally at the rate of 105,000 jobs. (AR 61.)  
9 This alone is a significant number of jobs. Plaintiff makes no challenge to the VE's testimony  
10 as to this occupation. Therefore, any error in the VE's testimony regarding the telephone  
11 solicitor or cashier occupations would be harmless. Carmickle, 533 F.3d at 1162-63.

12 Accordingly, the ALJ's step five finding that there are significant jobs in the national  
13 economy that Plaintiff can perform (AR 19-20) is supported by substantial evidence.

14 \* \* \*

15 The ALJ's nondisability determination is supported by substantial evidence and free of  
16 legal error.

17 **ORDER**

18 IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the  
19 Commissioner of Social Security and dismissing this case with prejudice.

20  
21 DATED: June 22, 2020

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*/s/ John E. McDermott*  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE