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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CYNDI B.,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of the Social Security
Administration,

Defendant.

Case No. 8:20-cv-01354-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On July 26, 2020, plaintiff Cyndi B. filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking review of a denial of a period of disability and disability insurance benefits (“DIB”). The parties have fully briefed the issues in dispute, and the court deems the matter suitable for adjudication without oral argument.

Plaintiff presents three issues for decision: (1) whether the Administrative Law Judge (“ALJ”) properly considered plaintiff’s subjective symptom testimony;

1 (2) whether the ALJ properly considered the opinion of Drs. Michael Pingol and
2 Zafar Khan; and (3) whether the appointment of former Commissioner of Social
3 Security, Andrew Saul, was constitutional. Mem. in Supp. of Pl.’s Compl. (“P.
4 Mem.”) at 6-25; Pl.’s Notice of New Authority (“Notice”) at 1-2; *see* Def.’s Mem.
5 in Supp. of Answer (“D. Mem.”) at 1-16.

6 Having carefully studied the parties’ memoranda, the Administrative Record
7 (“AR”), and the decision of the ALJ, the court concludes that, as detailed herein,
8 the ALJ properly evaluated plaintiff’s subjective symptom testimony. The ALJ
9 also properly evaluated the opinion of Drs. Pingol and Khan, and any deficiency in
10 analysis was harmless. Finally, the court rejects plaintiff’s constitutional argument
11 as incomplete and contrary to law. The court therefore affirms the decision of the
12 Commissioner denying benefits.

13 II.

14 FACTUAL AND PROCEDURAL BACKGROUND

15 Plaintiff, who was 44 years old on the alleged disability onset date,
16 completed high school. AR at 54, 63. She has past relevant work as an order
17 clerk, home attendant, and administrative clerk. AR at 48.

18 On July 3, 2017, plaintiff filed an application for DIB, alleging an onset date
19 of October 31, 2016. AR at 54-55. Plaintiff claimed she suffered from a bulging
20 disc, uncontrollable diabetes, nerve damage on her left leg, asthma, and high
21 cholesterol. AR at 55. Plaintiff’s application was initially denied on August 31,
22 2017. AR at 79.

23 Plaintiff requested a hearing, which the assigned ALJ held on August 21,
24 2019. AR at 31. Plaintiff, represented by counsel, appeared and testified at the
25 hearing. AR at 36-47. The ALJ also heard testimony from Kristan Cicero, a
26 vocational expert. AR at 48-51. The ALJ denied plaintiff’s claim on October 17,
27 2019. *See* AR at 15-25.

1 Applying the well-established five-step sequential evaluation process, the
2 ALJ found, at step one, that plaintiff had not engaged in substantial gainful activity
3 since October 31, 2016, the alleged onset date. AR at 17.

4 At step two, the ALJ found plaintiff suffered from the following severe
5 impairments: lumbar spine degenerative disc status post bilateral hemilaminectomy
6 at L5-S1; diabetes mellitus with peripheral neuropathy; obesity; right trigger
7 thumb; and asthma. *Id.* The ALJ also found plaintiff suffered from the non-severe
8 impairments of hypertension, hyperlipidemia, fibroids, constipation, splenomegaly,
9 and migraines. AR at 18.

10 At step three, the ALJ found plaintiff's impairments, whether individually or
11 in combination, did not meet or medically equal one of the impairments set forth in
12 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.*

13 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),¹ and
14 determined she had the ability to perform:

15 light work as defined in 20 CFR 404.1567(b) except she can lift and
16 carry 20 pounds occasionally and 10 pounds frequently, stand and
17 walk 6 hours in an 8-hour day, and sit 6 hours in an 8-hour day. She
18 can occasionally climb, balance, stoop, kneel, crouch, and crawl. She
19 can frequently finger with the right upper extremity. She cannot be
20 exposed to atmospheric conditions.

21 AR at 19.

22 The ALJ found, at step four, that plaintiff was capable of performing her
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 nn.5-7 (9th Cir. 1989) (citations omitted). "Between steps three and four of the
27 five-step evaluation, the ALJ must proceed to an intermediate step in which the
28 ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486
F.3d 1149, 1151 n.2 (9th Cir. 2007) (citation omitted).

1 past relevant work as a home attendant and administrative clerk. AR at 23.

2 The ALJ also proceeded to analyze step five in the alternative. The ALJ
3 determined that, considering plaintiff’s age, education, work experience, and RFC,
4 there is a significant number of other jobs in the national economy that plaintiff can
5 perform, including cashier II, marker, or routing clerk. AR at 24-25. The ALJ
6 accordingly concluded plaintiff was not under a disability, as defined in the Social
7 Security Act, at any time from October 31, 2016 through the date of her decision.
8 AR at 25.

9 Plaintiff filed a timely request for review of the ALJ’s decision, but the
10 Appeals Council denied the request for review on May 29, 2020. AR at 1.
11 Accordingly, the ALJ’s decision became the final decision of the Commissioner.

12 III.

13 STANDARD OF REVIEW

14 This court is empowered to review decisions by the Commissioner to deny
15 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
16 Administration (“SSA”) must be upheld if they are free of legal error and
17 supported by substantial evidence. *Mayer v. Massanari*, 276 F.3d 453, 458-59 (9th
18 Cir. 2001) (as amended). But if the court determines the ALJ’s findings are based
19 on legal error or are not supported by substantial evidence in the record, the court
20 may reject the findings and set aside the decision to deny benefits. *Aukland v.*
21 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
22 1144, 1147 (9th Cir. 2001).

23 “Substantial evidence is more than a mere scintilla, but less than a
24 preponderance.” *Aukland*, 257 F.3d at 1035 (citation omitted). Substantial
25 evidence is such “relevant evidence which a reasonable person might accept as
26 adequate to support a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.
27 1998) (citations omitted); *Mayer*, 276 F.3d at 459. To determine whether
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1 substantial evidence supports the ALJ’s finding, the reviewing court must review
2 the administrative record as a whole, “weighing both the evidence that supports
3 and the evidence that detracts from the ALJ’s conclusion.” *Mayes*, 276 F.3d at
4 459. The ALJ’s decision “cannot be affirmed simply by isolating a specific
5 quantum of supporting evidence.” *Auckland*, 257 F.3d at 1035 (internal quotation
6 marks and citation omitted). If the evidence can reasonably support either
7 affirming or reversing the ALJ’s decision, the reviewing court “may not substitute
8 its judgment for that of the ALJ.” *Id.* (internal quotation marks and citation
9 omitted).

10 IV.

11 DISCUSSION

12 A. The ALJ Properly Evaluated Plaintiff’s Testimony

13 Plaintiff argues the ALJ impermissibly rejected her subjective symptom
14 testimony. P. Mem. at 6-17. Specifically, she contends the ALJ failed to provide
15 legally sufficient rationale for rejecting her testimony pertaining to the impairments
16 limiting her ability to do work on a sustained basis. *Id.*

17 The court looks to Social Security Ruling (“SSR”) 16-3p for guidance on
18 evaluating plaintiff’s alleged symptoms. SSR 16-3p rescinded and superseded
19 SSR 96-7p and applies to decisions made on or after March 28, 2016. SSR 16-3p,
20 2017 WL 5180304, at *1 (Oct. 25, 2017). “Although SSRs do not have the same
21 force and effect as statutes or regulations, they are binding on all components of
22 the Social Security Administration.” *Id.* (citing 20 C.F.R. § 402.35(b)(1)).

23 In adopting SSR 16-3p, the SSA sought to “clarify that subjective symptom
24 evaluation is not an examination of an individual’s character.” *Id.* at 2.

25 [SSR 16-3p] makes clear what our precedent already required: that
26 assessments of an individual’s testimony by an ALJ are designed to
27 evaluate the intensity and persistence of symptoms after the ALJ finds
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1 that the individual has a medically determinable impairment(s) that
2 could reasonably be expected to produce those symptoms, and not to
3 delve into wide-ranging scrutiny of the claimant’s character and
4 apparent truthfulness.

5 *Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (cleaned up).

6 To evaluate a claimant’s symptom testimony, the ALJ engages in a two-step
7 analysis. *Christine G. v. Saul*, 402 F. Supp. 3d 913, 921 (C.D. Cal. 2019) (quoting
8 *Trevizo*, 871 F.3d at 678). First, the ALJ must determine whether the claimant
9 produced objective medical evidence of an underlying impairment that could
10 reasonably be expected to produce the symptoms alleged. *Id.* Second, if the
11 claimant satisfies the first step, and there is no evidence of malingering, the ALJ
12 must evaluate the intensity and persistence of the claimant’s symptoms and
13 determine the extent to which they limit her ability to perform work-related
14 activities. *Id.*

15 In assessing intensity and persistence, the ALJ may consider: a claimant’s
16 daily activities; the location, duration, frequency, and intensity of the symptoms;
17 precipitating and aggravating factors; the type, dosage, effectiveness, and side
18 effects of medication taken to alleviate the symptoms; other treatment received;
19 other measures used to relieve the symptoms; and other factors concerning the
20 claimant’s functional limitations and restrictions due to the symptoms. *Id.* (citing
21 20 C.F.R. § 416.929; SSR 16-3p, 2017 WL 5180304, at *4; *Smolen v. Chater*, 80
22 F.3d 1273, 1283-84 & n.8 (9th Cir. 1996)). To reject the claimant’s subjective
23 symptom statements, the ALJ must provide “specific, clear, and convincing”
24 reasons, supported by substantial evidence in the record, for doing so. *Id.* at 921,
25 929.

26 Here, at the first step for evaluating a claimant’s symptom testimony, the
27 ALJ found plaintiff’s medically determinable impairments could reasonably be
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1 expected to cause the symptoms alleged. AR at 20. At the second step, the ALJ
2 discounted plaintiff's testimony concerning the intensity, persistence, and limiting
3 effects of her symptoms as not entirely consistent with the medical evidence and
4 other evidence in the record. *Id.* Because plaintiff cleared step one and the ALJ
5 found no evidence of malingering, the ALJ's reasons for discounting plaintiff's
6 testimony had to be specific, clear, convincing, and supported by substantial
7 evidence.

8 The ALJ provided three reasons for discounting plaintiff's testimony: (1)
9 inconsistency with the medical record; (2) inconsistency with plaintiff's ability to
10 perform some work activities after the alleged onset date; and (3) plaintiff's non-
11 compliance with treatment.

12 **1. Inconsistency With the Medical Evidence**

13 The ALJ first determined that plaintiff's statements about the intensity,
14 persistence, and limiting effects of her symptoms were inconsistent with the
15 medical record. *See* AR at 20-22. Namely, the ALJ found that although the
16 medical evidence reflected consistent complaints of lumbar-spine symptoms, it
17 also showed many normal neurological findings. *See* AR at 20.

18 The ALJ summarized plaintiff's symptom testimony beginning with her
19 allegation that she was unable to work due to her impairments. AR at 19 (citing
20 AR at 173). On an exertion questionnaire from August 5, 2017, plaintiff claimed
21 she could only walk 300 yards and could not lift items due to her back and leg
22 pain. *Id.* (citing AR at 193-94). She was also having a hard time completing
23 activities of daily living ("ADLs") due to her impairments. *Id.* (citing AR at 193-
24 95).

25 The ALJ also provided a thorough summary of the objective record starting
26 with a November 2016 physical examination that revealed plaintiff had 5/5
27 strength, intact sensation, no focal neurological deficits, 2+ reflexes, and normal
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1 gait. AR at 20 (citing AR at 545). In April 2017, an MRI of the lumbar spine
2 showed 3mm broad-based disc protrusion bulge complex at L5-S1 with narrowing
3 of the left intervertebral foramen. *Id.* (citing AR at 321). Despite this finding, a
4 physical examination from June 2017 showed plaintiff had 1+ and symmetric deep
5 tendon reflexes, 4/5 to 4+/5 strength in her lower extremities, and intact sensation.
6 *Id.* (citing AR at 305). In August 2017, an examination revealed plaintiff was non-
7 focal, had normal motor strength in her upper and lower extremities, and had intact
8 sensation. *Id.* (citing AR at 340).

9 In 2018, medical records continued to show plaintiff had 2+ reflexes
10 bilaterally and no motor or sensory deficits. *Id.* (citing AR at 572, 579).
11 Examinations from August and November also showed she had no focal
12 neurological deficits, 5/5 strength in her extremities, and intact sensation. *Id.*
13 (citing AR at 483, 586, 591).

14 The ALJ acknowledged that a November 2018 X-ray of plaintiff's lumbar
15 spine revealed lumbar scoliosis, slight straightening of the lumbar lordosis, and
16 facet joint arthropathy of the lower lumbar spine. *Id.* (citing AR at 348). Further,
17 an MRI of the lumbar spine from November 20 showed disc desiccation and 4mm
18 right posterior paracentral disc protrusion with some right lateral recess narrowing
19 at L5-S1, 2mm left posterolateral disc protrusion with mild left foraminal
20 narrowing, and persistent slight dextroconvex scoliosis of the lumbar spine. *Id.*
21 (citing AR at 350). On January 22, 2019, plaintiff underwent medial branch
22 blocks, sacroiliac joint injections on March 5, and lumbar laminectomy surgery on
23 April 9. *Id.* (citing AR at 798-99, 801-02, 352, 444). These records appear to
24 support plaintiff's claims that she could only walk for 300 yards due to pain, could
25 not lift items, and had a hard time completing activities of daily living. *See* AR at
26 19 (citing AR at 193-95); *Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014)
27 (ALJ must not cherry-pick evidence).

1 Nevertheless, by May 2019, an examination showed she had normal
2 sensation, motor function, balance, gait, and coordination. *See* AR at 21 (citing
3 AR at 806). From May through June, plaintiff underwent physical therapy related
4 to her lumbar surgery. *Id.* (citing AR at 770-85). A June 10 physical examination
5 showed plaintiff had 5/5 strength. *Id.* (citing AR at 444); *see also Celaya v.*
6 *Halter*, 332 F.3d 1177, 1181 (9th Cir. 2003) (ALJ’s finding that symptoms were
7 controlled was clear and convincing reason to reject plaintiff’s testimony).

8 After reviewing all of this objective medical evidence, the ALJ concluded
9 that, overall, plaintiff’s testimony of extreme limitations was inconsistent with the
10 mostly normal findings concerning strength, sensation reflexes, range of motion,
11 coordination, balance, and gait. AR at 22 (citing AR at 545, 305, 340, 572 , 579,
12 483, 586, 591, 603, 354-58, 806). Plaintiff correctly notes that the treatment she
13 pursued, including surgery, was not conservative. *See* P. Mem. at 15. But the
14 court will not second-guess the ALJ’s determination that taking all of the objective
15 medical evidence into account, plaintiff’s overall condition contradicted her claims
16 of extreme incapacity. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
17 (“Where evidence is susceptible to more than one rational interpretation, it is the
18 ALJ’s conclusion that must be upheld.” (citation omitted)).

19 Plaintiff also contends the ALJ failed to connect any specific portions of her
20 testimony to the parts of the record supporting the ALJ’s decision. *See* P. Mem. at
21 12. While the ALJ’s analysis could have been more explicit with respect to
22 describing plaintiff’s testimony, on balance, the ALJ’s juxtaposition of plaintiff’s
23 testimony with the inconsistent medical evidence is sufficiently clear for the court
24 to evaluate. *See Lambert v. Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020) (ALJs are
25 not required to “perform a line-by-line exegesis of the claimant’s testimony, nor do
26 [the regulations] require ALJs to draft dissertations when denying benefits”
27 (citation omitted)). The ALJ did clearly identify an inconsistency between
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1 plaintiff's statement that she stopped working at her most recent job in November
2 2018 because she was unable to walk (AR at 20 (citing AR at 36-37)) and her
3 "medical exams from around that time show[ing] generally normal neurological
4 findings." *Id.* (citing AR at 586, 591 (showing plaintiff had no focal neurological
5 deficits, intact sensation, and moves all extremities without any limitations)).

6 For these reasons, inconsistency with the medical evidence was a specific,
7 clear, and convincing reason, supported by substantial evidence, to discount
8 plaintiff's symptom testimony.

9 **2. Inconsistency With Plaintiff's Ability to Perform Some Work**
10 **Activities After the Alleged Onset Date**

11 Next, although plaintiff claims she has been disabled since October 31,
12 2016, the ALJ noted that she trained for four weeks for a casino banker position
13 and worked at a call center for two months sometime around the end of 2018. *See*
14 AR at 20, 36-37, 154. The Ninth Circuit has held that "continued employment
15 during the claimed disability period indicates that [the claimant] had sufficient
16 functioning for employment during that time frame." *Rothery v. Berryhill*, 684
17 Fed. Appx. 664, 664 (9th Cir. 2017); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir.
18 1996) (finding that ALJ did not err in rejecting plaintiff's testimony based on
19 evidence that he completed a training course and sought work during the claimed
20 disability period). Here, although the work at issue did not constitute substantial
21 gainful activity due to insufficient wages, plaintiff still engaged in gainful work for
22 about three months, two years after she claims she became disabled.

23 Plaintiff testified that she stopped working at the end of 2018 because of
24 excruciating pain that left her unable to walk. *See* AR at 36-37. The Ninth Circuit
25 has cautioned that "[i]t does not follow from the fact that a claimant tried to work
26 for a short period of time and, because of his impairments, *failed*, that he did not
27 then experience pain and limitations severe enough to preclude him from
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1 *maintaining* substantial gainful employment.” *Lingenfelter v. Astrue*, 504 F.3d
2 1028, 1038 (9th Cir. 2007). In such cases, evidence that a claimant tried to work
3 and failed may actually support his or her allegations of disabling pain. *Id.*
4 (citations omitted).

5 *Lingenfelter* is distinguishable here for two reasons. First, in that case, the
6 failed work attempt did not take place during the claimed disability period. *Id.* at
7 1039. Second, the ALJ here specifically found that plaintiff’s claim regarding the
8 reason she stopped working was inconsistent with her medical exams from around
9 that time, which showed generally normal neurological findings. *See* AR at 20;
10 *Nash v. Astrue*, 2008 WL 4279399, at *11 (W.D. Wash. Sept. 12, 2008)
11 (distinguishing *Lingenfelter* because the record did not contain “significant
12 probative evidence that plaintiff was forced to quit working due to his impairments
13 and limitations”).

14 Moreover, plaintiff does not address this particular part of the ALJ’s
15 reasoning. Instead, she appears to confuse this reason with a finding that her
16 testimony was inconsistent with ADLs. *See* P. Mem. at 9-12. But that is a
17 different type of reason, one that the ALJ did not rely on here. *See* AR at 20. The
18 ALJ clearly referred to her “work activities” not her ADLs.

19 Accordingly, inconsistency with performance of some work activities was
20 also a sufficiently specific, clear, and convincing reason to discount plaintiff’s
21 symptom testimony.

22 **3. Plaintiff’s Non-Compliance With Treatment**

23 Finally, the ALJ indicated that plaintiff’s statement regarding her
24 “uncontrollable” diabetes was contrary to the medical records showing that “this
25 lack of control may be due to noncompliance.” AR at 20 (citing AR at 293).
26 Indeed, a record from November 2016 shows that she refused to take her
27 prescribed insulin until after Thanksgiving due to undisclosed side effects. *See* AR
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1 at 293. In response to her provider giving her information about the effects of high
2 blood sugar on vision, concentration, kidneys, blood vessels, and her body in
3 general, she responded “I don’t care!” *See id.* The ALJ did not err in discounting
4 plaintiff’s testimony for this reason because ALJs can consider “unexplained or
5 inadequately explained failure[s] to seek treatment or to follow a prescribed course
6 of treatment.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (internal
7 quotation marks omitted).

8 Failure to seek more aggressive treatment or follow a prescribed course of
9 treatment may not be a convincing reason if the claimant has a good reason for not
10 doing so. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th
11 Cir. 2008). But although plaintiff complained of side effects from her diabetes
12 medication, there is no evidence that the side effects were significant enough for
13 her to be justified in refusing to follow treatment. In fact, it appears they were not,
14 seeing that she was not refusing to ever take the medication, but rather wanted to
15 wait until after the holidays. In any event, elsewhere in her decision, the ALJ also
16 noted that there was no evidence in the record showing that plaintiff’s diabetes
17 resulted in limitations greater than the stated residual functional capacity, and that
18 plaintiff denied symptoms related to diabetes such as dizziness, polyuria,
19 headaches, and numbness. AR at 21 (citing AR 267, 305, 307, 380, 383, 386, 389,
20 391, 393, 395, 397, 402, 481, 543, 577, 805).

21 Accordingly, the court finds the ALJ’s reasons for rejecting plaintiff’s
22 subjective symptom statements to be specific, clear, and convincing. The ALJ did
23 not err in discounting plaintiff’s testimony.

24 **B. The ALJ Properly Considered Drs. Pingol’s and Khan’s Opinion**

25 Plaintiff also argues the ALJ failed to articulate a legally sufficient rationale
26 to reject the opinion of Dr. Michael Pingol and Dr. Zafar Khan. P. Mem. at 17-25.
27 Plaintiff contends substantial evidence does not support the ALJ’s determination
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1 that their opinion is not consistent with the record. *Id.*

2 For applications filed prior to March 27, 2017, SSA regulations
3 implemented a hierarchical system for evaluating medical opinions. On March 27,
4 2017, new regulations became effective, which make several significant changes to
5 the way that ALJs evaluate medical opinions. *See* 20 C.F.R. §§ 404.1520c (new
6 DIB regulations), 416.920c (new SSI regulations). Under the new regulations,
7 ALJs will no longer “defer or give any specific evidentiary weight, including
8 controlling weight, to any medical opinion(s) or prior administrative medical
9 finding(s), including those from [the claimant’s] medical sources.” 20 C.F.R.
10 § 404.1520c(a). Plaintiff filed her DIB application on July 5, 2017, so the March
11 27, 2017 regulations apply to this case.

12 The new regulations establish a new method for evaluating medical opinions
13 and prior administrative medical findings, which requires ALJs to consider five
14 factors: (1) supportability; (2) consistency; (3) relationship with the claimant,
15 including (i) the length of the treatment relationship, (ii) the frequency of
16 examinations, (iii) the purpose of the treatment relationship, (iv) the extent of the
17 treatment relationship, and (v) the examining relationship; (4) specialization; and
18 (5) other factors. 20 C.F.R. § 404.1520c(a)-(c). The ALJ must explain how he or
19 she considered supportability and consistency, which are the two most important
20 factors to determine the persuasiveness of a medical opinion or a prior
21 administrative medical finding. 20 C.F.R. § 404.1520c(b)(2). Generally, the ALJ
22 may, but does not have to, explain how he or she considered the other factors. *Id.*
23 But if the ALJ finds that two or more medical opinions or prior administrative
24 medical findings about the same issue are equally well-supported and consistent
25 with the record, but are not exactly the same, the ALJ must articulate how he or she
26 considered the other remaining factors. 20 C.F.R. § 404.1520c(b)(3). The ALJ’s
27 evaluation of the medical opinions must still be supported by substantial evidence,
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1 which is a highly deferential standard. *See Nunzio D. C. v. Kijakazi*, 2021 WL
2 3849704, at *3 (C.D. Cal. Aug. 27, 2021); 82 Fed. Reg. at 5853 (explaining that
3 courts have focused too much on whether ALJs sufficiently articulated the weight
4 given to treating opinions rather than on “applying the substantial evidence
5 standard of review, which is intended to be highly deferential to [the SSA]”).

6 **1. The Opinion of Drs. Pingol and Khan**

7 Drs. Pingol and Khan cosigned a single opinion dated July 25, 2019. *See*
8 AR at 786-88. They opined that plaintiff could lift and carry only less than ten
9 pounds on an occasional or frequent basis, stand, walk, or sit only less than two
10 hours during an eight-hour workday, and sit or stand for only 20 minutes before
11 having to change positions. AR at 786. She would need to shift at will from
12 sitting, standing, or walking, and would have to walk around five to ten minutes
13 every 20 minutes. AR at 787. She would also need to lie down every 20 to 30
14 minutes during a work shift. *Id.* The doctors formulated these limitations based on
15 her MRI of the lumbar spine showing lumbar stenosis and her reports of worsened
16 pain with prolonged sitting, standing, or walking. *Id.*

17 Drs. Pingol and Khan further opined that plaintiff could only occasionally
18 twist, stoop, bend, crouch, climb stairs, or climb ladders. *Id.* She also has limited
19 pushing and pulling abilities due to her back pain and lumbar stenosis. *Id.* The
20 doctors concluded by opining that her impairments or treatment would cause her to
21 be absent from work more than three times a month. AR at 788.

22 **2. The ALJ’s Findings**

23 The ALJ began her discussion of Drs. Pingol’s and Khan’s opinion by
24 explicitly finding it “less persuasive” than the other opinions of record. AR at 23.
25 The ALJ then discussed the supportability and consistency factors outlined in the
26 new regulations.

27 Regarding supportability, the ALJ noted that Drs. Pingol and Khan
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1 supported their opinion by citing to an MRI of plaintiff's lumbar spine and her
2 reports of back pain. *Id.* (citing AR at 787-88). As for consistency, the ALJ
3 concluded that the opinion was not consistent with the record. *Id.* The ALJ
4 reasoned that plaintiff's physical examinations mostly showed she had normal
5 strength, sensation, reflexes, range of motion, coordination, balance, and gait, all of
6 which supported a restriction to light exertional work. *Id.* (citing AR at 305, 340,
7 355-58, 444, 483, 545, 572, 579, 586, 591, 603, 806). The ALJ also noted that
8 despite her reports of significant pain, her providers rarely documented her
9 showing more than mild distress. *Id.* (citing AR at 285, 305, 308, 340, 354, 380,
10 383, 386, 389, 391, 393, 395, 400, 482, 545, 558, 572, 579, 586, 591, 738, 753,
11 764, 791).

12 Plaintiff counters that the opinion was indeed consistent with the record.
13 She points to her April 2017 and November 2018 MRIs showing a 3mm broad-
14 based disc bulge with narrowing of the left intervertebral foramen and 4mm right
15 posterior paracentral disc protrusion at L5-S1. P. Mem. at 22 (citing AR at 321,
16 350). She also notes that Dr. Khan diagnosed her with L5-S1 stenosis and
17 degenerative disc disease and recommended physical therapy. *Id.* (citing AR at
18 449-50). She also tried narcotics, muscle relaxants, an epidural steroid injection, a
19 facet joint injection, and morphine injections. *Id.* (citing AR at 448, 518, 598).
20 She ultimately underwent lumbar decompression surgery in mid-2019. *See id.*
21 (citing AR at 444, 450).

22 Plaintiff's arguments are not persuasive. Plaintiff primarily challenges the
23 ALJ's findings on consistency. She does not argue that the ALJ failed to consider
24 the evidence she presents. Indeed, the ALJ summarized evidence concerning all of
25 her impairments in her decision (*see* AR at 18, 20-22) and weighed it against
26 examinations that showed mostly normal strength, sensation, reflexes, range of
27 motion, coordination, balance, and gait, as well as no evidence of more than mild
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1 distress. *See Seawood v. Berryhill*, 2020 WL 1624377, at *11 (S.D. Cal. Apr. 2,
2 2020) (“The ALJ is to resolve conflicts in the record and assess the claimant’s
3 functionability based on the record as a whole.” (citing *Tommasetti*, 533 F.3d at
4 1041)). Notably, plaintiff does not address the largely normal findings cited by the
5 ALJ. As such, the ALJ provided substantial evidence to support her finding that
6 the opinion was not consistent with the medical record. *See Aukland*, 257 F.3d at
7 1035 (holding that substantial evidence is more than a mere scintilla).

8 The ALJ’s supportability discussion is not as strong. Defendant points out
9 that while Drs. Pingol and Khan cited the MRI, they failed to cite any other
10 objective findings or otherwise explain the basis for their assessed limitations. D.
11 Mem. at 15. But that is not quite what the ALJ said. *See Connett v. Barnhart*, 340
12 F.3d 871, 874 (9th Cir. 2003) (“We are constrained to review the reasons the ALJ
13 asserts.” (citations omitted)). The ALJ simply identified the one piece of evidence
14 (an MRI) that Drs. Pingol and Khan relied on to support their opinion, and then
15 referenced the evidence of normal examination results. *See* AR at 23. It is implicit
16 in the ALJ’s analysis that the MRI cited in support was insufficient when
17 juxtaposed with all the other evidence in the record cited by the ALJ, but the ALJ
18 fails to explicitly explain “how [she] considered the supportability . . . factor[.]” 20
19 C.F.R. § 404.1520c(b)(2). The new regulations instruct ALJs that “[t]he more
20 relevant the objective medical evidence and supporting explanations presented by a
21 medical source are to support his or her medical opinion[.] . . . the more persuasive
22 the medical opinion[.]” 20 C.F.R. § 404.1520c(c)(1) (explanation of
23 “supportability”). The ALJ here suggests why she found the MRI and reports of
24 back pain to not be relevant enough to support the opinion, but does not clearly
25 articulate her analysis.

26 Although the ALJ’s explanation of her analysis is not ideal, to the extent this
27 constituted error it was harmless. An ALJ’s error is harmless where such error is
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1 inconsequential to the ultimate non-disability determination. *Stout v. Comm’r, Soc.*
2 *Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see also Burch*, 400 F.3d at 679
3 (“A decision of the ALJ will not be reversed for errors that are harmless.”). On
4 remand, the ALJ would have to explain why she found the MRI and reports of
5 back pain to be insufficient to support the opinion at issue. But as previously
6 discussed, the ALJ did weigh that specific evidence against multiple objective
7 records showing largely normal findings. Thus, the court is confident that
8 remanding the matter for a more complete explanation of the supportability factor
9 would not result in a different RFC or disability determination. *See Shinseki v.*
10 *Sanders*, 556 U.S. 396, 409, 129 S. Ct. 1696, 173 L. Ed. 2d 532 (2009) (“[T]he
11 burden of showing that an error is harmful normally falls upon the party attacking
12 the agency’s determination.”).

13 Accordingly, the court finds the ALJ’s analysis of the opinion of Drs. Pingol
14 and Khan does not warrant remand.

15 **C. The Court Rejects Plaintiff’s Vague Constitutional Challenge**

16 On September 8, 2021, more than two months after defendant filed its
17 Memorandum, plaintiff filed a Notice of New Authority. In the Notice, she states
18 that the U.S. Department of Justice’s Office of Legal Counsel issued an opinion on
19 July 8, 2021 that casts significant doubt on the constitutionality of the appointment
20 of the prior Commission of Social Security. Notice at 1. Plaintiff notes that she
21 filed her claim for benefits on July 5, 2017, participated in a hearing on August 21,
22 2019, received the ALJ’s adverse decision on October 11, 2019,² and was denied
23 review by the Appeals Council on May 29, 2020. *Id.* at 2. She indicates that
24 Andrew Saul held the office of Commissioner of Social Security as the sole person
25 dischargeable only for cause between June 17, 2019 and July 11, 2021. *Id.* at 1-2.

26 The court is puzzled by plaintiff’s filing, which does not explain whether she
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28 ² The date of the ALJ’s decision is actually October 17, 2019. *See* AR at 25.

1 is seeking any particular type of relief as a result of the alleged constitutional
2 problem with the former Commissioner’s appointment. Plaintiff had never raised
3 the issue prior to the filing of her Notice. To try to ascertain the nature of
4 plaintiff’s argument, the court reviewed other social security cases in which
5 plaintiff’s counsel also participated and raised the issue. From that it appears
6 plaintiff intended to argue that the Commissioner’s final decision in this case arose
7 from an unconstitutional administrative process. *See, e.g., Dareth T. v. Kijakazi*,
8 2022 WL 671540, at *2 (C.D. Cal. Mar. 7, 2022). Specifically, the allegedly
9 unconstitutional removal provision rendered Saul’s tenure as Commissioner
10 unconstitutional, which in turn tainted his delegation of authority to the assigned
11 ALJ and the Appeals Council to consider and decide plaintiff’s case. *See id.*

12 The court will not address each of the arguments plaintiff’s counsel
13 presented in other cases but not here. The court finds only that it is not convinced
14 plaintiff’s constitutional challenge warrants reversal here, for two reasons. First,
15 the Ninth Circuit recently opined that “the possible invalidity of a restriction on the
16 removal of an official does not render invalid the appointment of the official.” *See*
17 *Toni D. M. v. Kijakazi*, 2022 WL 423494, at *2 (C.D. Cal. Jan. 5, 2022) (citing
18 *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137 (9th Cir. 2021)). Second,
19 plaintiff has not even attempted to show any connection between the allegedly
20 unconstitutional removal clause and the ALJ’s or Appeals Council’s decision
21 denying her benefits. *See id.* at *3 (citing other cases on point); *Dareth T.*, 2022
22 WL 671540, at *3 (same). Accordingly, the court rejects plaintiff’s incomplete
23 constitutional challenge.

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V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered
AFFIRMING the decision of the Commissioner denying benefits, and dismissing
this action with prejudice.

DATED: March 31, 2022



SHERI PYM
United States Magistrate Judge

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