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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARIANNE ORTIZ,	)	1:08cv01431 DLB
	)	
	)	
Plaintiff,	)	ORDER REGARDING PLAINTIFF’S
	)	SOCIAL SECURITY COMPLAINT
v.	)	
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	

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**BACKGROUND**

Plaintiff Marianne Ortiz (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for supplemental security income pursuant to Title XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Dennis L. Beck, United States Magistrate Judge.<sup>1</sup>

**FACTS AND PRIOR PROCEEDINGS<sup>2</sup>**

Plaintiff filed her application on April 26, 2006, alleging disability since November 20, 1987, due to manic depression, back pain, heel spurs and stomach ulcers. AR 76-78. After being

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<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. On November 3, 2008, the action was reassigned to the Honorable Dennis L. Beck for all purposes.

<sup>2</sup> References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 denied initially and on reconsideration, Plaintiff requested a hearing before an Administrative  
2 Law Judge (“ALJ”). AR 52, 61-65, 67-71. ALJ Robert Evans held a hearing on October 18,  
3 2007, and denied benefits on November 1, 2007. AR 15-24, 30-40. On March 14, 2008, the  
4 Appeals Council denied review. AR 8-12.

5 Plaintiff was first granted benefits in June 1989. AR 55-57. On August 10, 1999, an ALJ  
6 found that Plaintiff’s disability continued. AR 43-47. Pursuant to another continuing disability  
7 review in 2005, an ALJ found that Plaintiff’s disability had ceased. AR 15.

#### 8 Hearing Testimony

9 \_\_\_\_\_ALJ Evans held a hearing on October 18, 2007, in Palmdale, California. Plaintiff  
10 appeared with her advocate, Diana Wade. Mr. Goldfarb, a vocational expert, also appeared but  
11 did not testify. AR 30.

12 Plaintiff testified that she had not worked in the past 15 years and had been on SSI from  
13 1987 through 2005. AR 33. Plaintiff explained that her benefits were not terminated because  
14 she had improved, but rather because she failed to make an appointment to turn in her bank  
15 statement. Plaintiff did not re-file for reinstatement within one year because she was trying to  
16 find an attorney and had no transportation from North Edwards to the Social Security office. AR  
17 38. She has not looked for work since her benefits were terminated because she has no  
18 transportation, and because of pain in her back, heel spurs and an inability to stand up for a long  
19 time. AR 34-35.

20 Plaintiff stated that she was disabled because of manic depression, hallucinations, obesity,  
21 high blood pressure and because she forgets things. AR 34. She explained that whether she  
22 could perform a job where she could sit all day depends on how her back feels. AR 35.

23 Plaintiff has not been to a doctor since her benefits were terminated because she lost her  
24 Medi-Cal insurance and there are no free clinics near where she lives. AR 36. She is supporting  
25 herself on food stamps and has not paid rent or utility bills. AR 36.

#### 26 Medical Record

27 \_\_\_\_\_On August 5, 2006, Plaintiff saw Doojin Kim, M.D., for a consultive orthopedic  
28 evaluation. She complained of bilateral feet pain, explaining that she used to get monthly

1 cortisone injections but has not received any since she lost her insurance. She reported that she  
2 gets pain from her heel spurs two to three times per week, lasting for 30 to 40 minutes, and rated  
3 the pain at a 10 out of 10. Plaintiff reported that she lives with a friend and heats up cans of  
4 soup. AR 177.

5 On physical examination, Plaintiff was described as obese but had no difficulty getting  
6 out of her chair, ambulating to the examination room, getting on and off the examination table  
7 and getting into and out of the supine position. She could do finger-nose, fine finger movements  
8 and toe tap bilaterally. Her tip toe, heel and tandem gaits were normal. Range of motion testing  
9 was normal and there were no abnormalities of any joints. Dr. Kim applied pressure to the soles  
10 of both feet without any elicitation of a pain response. Motor strength, muscle tone and bulk  
11 were normal. Sensation and reflexes were also normal. AR 178-179.

12 Dr. Kim diagnosed bilateral feet pain and noted that no heel spurs could be found on  
13 examination. A pain response to pressure was also absent, though it is fairly typical of heel  
14 spurs. Dr. Kim opined that Plaintiff could stand and walk, with normal breaks, without  
15 restriction, and could sit without restriction. She could lift and carry 50 pounds frequently and  
16 100 pounds occasionally. Plaintiff had no further limitations. AR 179-180.

17 \_\_\_\_\_ Plaintiff saw Greg Hirokawa, Ph.D., for a consultive examination on August 13, 2006.  
18 Plaintiff reported feeling depressed and anxious. She also complained that she had trouble  
19 sleeping, has a learning disability, gets upset easily, has mood swings and has difficulty  
20 concentrating. Plaintiff reported depression since she was a teenager that worsened in 1990  
21 when her mother died. She denied any history of psychosis or psychiatric hospitalization.  
22 Plaintiff was not currently receiving mental health treatment. AR 171-172.

23 On mental status examination, Plaintiff appeared disheveled with poor eye contact. Her  
24 stream of mental activity was slow and articulation at times appeared “mechanical (mild).” She  
25 denied auditory or visual hallucinations and there was no evidence of delusional thinking. Her  
26 mood was depressed and affect restricted. Plaintiff reported her sleep as poor and her appetite as  
27 fair. Her intellectual functioning appeared to be within the borderline range. Her recent memory  
28 was intact but her past memory appeared slightly impaired due to her inability to recall certain

1 events throughout her life. She was able to name three presidents and the governor of California,  
2 but was unable to name the capital of California, stating that it was “Washington.” Plaintiff’s  
3 concentration was adequate. Plaintiff reported doing some laundry, “straightening up,” and  
4 heating up food in a can. On a typical day, she reads the newspaper and magazines, listens to the  
5 radio, heats up something to eat, drinks soda water, sometimes visits a friend and watches  
6 television. She did not enjoy anything, had few friends and was not involved in church or a  
7 social club. AR 172-175.

8 Dr. Hirokawa diagnosed depressive disorder, not otherwise specified, rule out learning  
9 disability and generalized anxiety disorder. Her current GAF was 61. Her symptoms of  
10 depression and anxiety were within the mild range and her communications skills were fair.  
11 There was a fair likelihood of her mental condition improving in the next 12 months. Dr.  
12 Hirokawa opined that Plaintiff was not capable of managing her funds. Her ability to remember  
13 locations and work-like procedures was good, as was her ability to understand, remember and  
14 carry out very short and simple instructions. Her ability to remember and understand detailed  
15 instructions was fair. Her abilities to maintain attention and concentration for extended periods,  
16 accept instructions, perform activities within a schedule, complete normal workdays without  
17 interruption, and interact with co-workers and the public were good. Her social judgment and  
18 awareness of socially appropriate behavior were fair, as was her ability to function  
19 independently. Plaintiff’s ability to withstand the stressors of work and deal with changes was  
20 fair. AR 175-176.

21 On August 25, 2006, State Agency physician C. H. Dudley, M.D., completed a  
22 Psychiatric Review Technique form. He determined that a residual functional capacity (“RFC”)  
23 assessment was necessary. In rating Plaintiff’s functional limitations, he opined that Plaintiff  
24 was mildly restricted in activities of daily living and maintaining social functioning. She had  
25 moderate difficulties in maintaining concentration, persistence and pace. Dr. Dudley noted that  
26 the results from Plaintiff’s May 1999 psychological evaluation were still valid, but her additional  
27 physical/mental impairments do not impose significant work related instructions. Plaintiff  
28 retained the ability to perform simple, repetitive tasks, with no other restrictions. AR 151-163.

1 Dr. Dudley also completed a Mental Residual Functional Capacity form. He found that  
2 Plaintiff was moderately limited in her ability to understand, remember and carry out detailed  
3 instructions. Based on the evidence, he determined that Plaintiff retained the ability to  
4 understand, remember and carry out simple instructions, maintain adequate concentration,  
5 persistence and pace for simple tasks, complete a normal workday/workweek without significant  
6 interruptions from psychologically based symptoms, interact appropriate with supervisors, co-  
7 workers and the public, and adapt to the requirements of a normal workplace. AR 165-167.

#### 8 ALJ's Findings

9 Prior to discussing Plaintiff's current application, the ALJ stated that he would not reopen  
10 Plaintiff's cessation denial. He explained that the evidence demonstrates that she is not mentally  
11 retarded and does not have degenerative disc disease "as was misapprehended in the prior  
12 applications." AR 18. He also decided not to adopt the prior ALJ's decision under *Chavez v.*  
13 *Bowen* because the material evidence shows that Plaintiff does not have a severe mental or  
14 physical impairment. AR 19.

15 In reviewing her current application, the ALJ determined that Plaintiff had the medically  
16 determinable impairments of chronic bilateral foot pain and depression. Nonetheless, Plaintiff  
17 retained the ability to perform simple, unskilled work and therefore did not have an impairment  
18 or combination of impairments that significantly limited her ability to perform basic work  
19 activities. He therefore found Plaintiff's impairments non-severe at step two and denied her  
20 claim for disability. AR 20-24.

#### 21 SCOPE OF REVIEW

22 Congress has provided a limited scope of judicial review of the Commissioner's decision  
23 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,  
24 the Court must determine whether the decision of the Commissioner is supported by substantial  
25 evidence. [42 U.S.C. 405](#) (g). Substantial evidence means "more than a mere scintilla,"  
26 [Richardson v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v.](#)  
27 [Weinberger, 514 F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is "such relevant evidence as a  
28 reasonable mind might accept as adequate to support a conclusion." [Richardson, 402 U.S. at](#)

1 [401](#). The record as a whole must be considered, weighing both the evidence that supports and  
2 the evidence that detracts from the Commissioner’s conclusion. [Jones v. Heckler, 760 F.2d 993,](#)  
3 [995 \(9th Cir. 1985\)](#). In weighing the evidence and making findings, the Commissioner must  
4 apply the proper legal standards. *E.g.*, [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#).  
5 This Court must uphold the Commissioner’s determination that the claimant is not disabled if the  
6 Secretary applied the proper legal standards, and if the Commissioner’s findings are supported by  
7 substantial evidence. *See* [Sanchez v. Sec’y of Health and Human Serv., 812 F.2d 509, 510 \(9th](#)  
8 [Cir. 1987\)](#).

### 9 REVIEW

10 In order to qualify for benefits, a claimant must establish that he is unable to engage in  
11 substantial gainful activity due to a medically determinable physical or mental impairment which  
12 has lasted or can be expected to last for a continuous period of not less than 12 months. [42](#)  
13 [U.S.C. § 1382c](#) (a)(3)(A). A claimant must show that he has a physical or mental impairment of  
14 such severity that he is not only unable to do her previous work, but cannot, considering his age,  
15 education, and work experience, engage in any other kind of substantial gainful work which  
16 exists in the national economy. [Quang Van Han v. Bowen, 882 F.2d 1453, 1456 \(9th Cir. 1989\)](#).  
17 The burden is on the claimant to establish disability. [Terry v. Sullivan, 903 F.2d 1273, 1275 \(9th](#)  
18 [Cir. 1990\)](#).

19 In an effort to achieve uniformity of decisions, the Commissioner has promulgated  
20 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20](#)  
21 [C.F.R. §§ 404.1520](#) (a)-(f), 416.920 (a)-(f) (1994).<sup>3</sup> Applying this process in this case, the ALJ  
22 found that Plaintiff: (1) had not engaged in substantial gainful activity since the alleged onset of  
23 her disability; but (2) does not have an impairment or a combination of impairments considered  
24 “severe” based on the requirements in the [Regulations \(20 CFR §§ 416.920\(b\)\)](#).

25 Here, Plaintiff argues that the ALJ improperly analyzed the medical evidence in  
26 determining that she did not have a severe impairment at step two.

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<sup>3</sup>All references are to the 2002 version of the Code of Federal Regulations unless otherwise noted.

1 **DISCUSSION**

2 \_\_\_\_\_ Plaintiff contends that the ALJ erred by determining, at step two, that her mental  
3 impairment was not severe. Specifically, she argues that the ALJ erred in addressing the  
4 opinions of consultive examiner Dr. Hirokawa and State Agency physician Dr. Dudley.

5 \_\_\_\_\_ Plaintiff bears the burden of proving that she is disabled. [Meanel v. Apfel, 172 F.3d 1111,](#)  
6 [1114 \(9th Cir. 1999\); 20 C.F.R. § 404.1512.](#) A person is disabled if her impairments are severe  
7 and meet the durational requirement of twelve months. [20 C.F.R. §§ 404.1505, 404,1520\(a\).](#) A  
8 severe impairment is one that significantly limits the physical or mental ability to perform basic  
9 work activities. [20 C.F.R. § 404.1520\(c\).](#) Examples of basic work activities include carrying out  
10 simple instructions, responding appropriately to usual work situations, dealing with changes in a  
11 routine work setting, and performing ordinary physical functions like walking and sitting. [20](#)  
12 [C.F.R. § 404.1521\(b\).](#)

13 “An impairment ... may be found not severe only if the evidence establishes a slight  
14 abnormality that has no more than a minimal effect on an individual’s ability to work.” [Webb v.](#)  
15 [Barnhart, 433 F.3d 683, 686 \(9th Cir.2005\)](#) (internal quotation omitted). The Commissioner has  
16 stated that “[i]f an adjudicator is unable to determine clearly the effect of an impairment or  
17 combination of impairments on the individual’s ability to do basic work activities, the sequential  
18 evaluation should not end with the not severe evaluation step.” [Id.](#); SSR 85-28.

19 Here, the ALJ found that Plaintiff’s mental impairment did not significantly limit her  
20 ability to perform basic work activities and was therefore non-severe. In doing so, he first  
21 discussed Dr. Hirokawa’s consultive examination results and his opinion that Plaintiff’s abilities  
22 to perform basic work-related activities were “good.” AR 21. For example, Dr. Hirokawa found  
23 that Plaintiff’s ability to understand, remember and carry out very short and simple instructions  
24 was good, as were her abilities to maintain attention and concentration for extended periods,  
25 accept instructions, perform activities within a schedule, complete normal workdays without  
26 interruption, and interact with co-workers and the public. Plaintiff’s ability to remember  
27 locations and work-like procedures was good. Her social judgment and awareness of socially  
28 appropriate behavior was fair, as was her ability to function independently. Plaintiff’s abilities

1 withstand the stressors of work, deal with changes and function appropriately were fair.  
2 Plaintiff's social judgment and awareness of socially appropriate behavior was fair. AR 175-176.

3 Based mainly on Dr. Hirokawa's examination, the ALJ determined that Plaintiff's mental  
4 impairment was non-severe. In doing so, he chose to give more weight to Dr. Hirokawa, who  
5 examined Plaintiff, than to Dr. Dudley, the non-examining State Agency physician. The ALJ set  
6 forth Dr. Dudley's findings, which included moderate restrictions in maintaining concentration,  
7 persistence and pace. AR 21. Indeed, the opinion of an examining physician is entitled to  
8 greater weight than the opinion of a nonexamining physician. [Pitzer v. Sullivan, 908 F.2d 502,](#)  
9 [506 \(9th Cir.1990\)](#); [Gallant v. Heckler, 753 F.2d 1450 \(9th Cir.1984\)](#). Although he rejected Dr.  
10 Dudley's opinion as to Plaintiff's ability to maintain concentration, he noted that Dr. Dudley  
11 agreed that Plaintiff could perform simple, repetitive tasks. AR 21.

12 Therefore, based on the *only* mental health evidence in the record, the ALJ reasonably  
13 concluded that Plaintiff's impairment was not a significant limitation on her ability to perform  
14 basic work activity. The ALJ was entitled to rely on Dr. Hirokawa's findings in doing so.  
15 [Tonapetyan v. Halter, 242 F.3d 1144, 1149 \(9th Cir. 2001\)](#) (consultive examiner's opinion is  
16 substantial evidence).

17 Insofar as Plaintiff contends that the ALJ ignores and rejects these opinions, her argument  
18 is without merit. The ALJ specifically stated that he gave more weight to Dr. Hirokawa's  
19 opinion as to Plaintiff's abilities to maintain concentration, persistence and pace. AR 21.  
20 Plaintiff's argument that the ALJ ignored the findings of Dr. Hirokawa and Dr. Dudley appears to  
21 be based on her interpretation of the evidence, which she believes supports a finding of severity.  
22 However, the Court must uphold the ALJ's decision where, as here, the evidence is susceptible to  
23 more than one rational interpretation. [Magallanes v. Bowen, 881 F.2d 747, 750 \(9th Cir. 1989\)](#).

24 Plaintiff's reliance on Dr. Hirokawa's diagnosis that she was "operating in the range of  
25 borderline intellectual functioning" does not change this result. Opening Brief, at 8. Dr.  
26 Hirokawa did not diagnose borderline intellectual functioning, but rather stated that a learning  
27 disability needed to be ruled out. AR 175-176. In any event, a diagnosis does not equate to a  
28 disability. [Key v. Heckler, 754 F.2d 1545, 1549 \(9th Cir. 1985\)](#).



1 Plaintiff also points to a May 1999 psychological examination in support of her argument.  
2 Citing Dr. Dudley’s notation that this examination is “still valid,” she contends that her  
3 intellectual functioning places her in the “mildly retarded range.” Opening Brief, at 8. This  
4 report is not in the record, however, and does not speak to the relevant time period. Even if this  
5 report was properly before the Court, the ALJ correctly relied on Dr. Hirokawa’s opinions as to  
6 Plaintiff’s abilities, as discussed above, to support his step two finding.

7 **CONCLUSION**

8 Based on the foregoing, the Court finds that the ALJ’s decision is supported by  
9 substantial evidence in the record as a whole and is based on proper legal standards.  
10 Accordingly, this Court DENIES Plaintiff’s appeal from the administrative decision of the  
11 Commissioner of Social Security. The clerk of this Court is DIRECTED to enter judgment in  
12 favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff,  
13 Marianne Ortiz.

14  
15 IT IS SO ORDERED.

16 **Dated: September 22, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE