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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | | |
|---------------------------------|---|-----------------------------|
| MARIA M. VILLAFANA, |) | 1:08cv1954 GSA |
| |) | |
| |) | |
| Plaintiff, |) | ORDER REGARDING PLAINTIFF’S |
| |) | SOCIAL SECURITY COMPLAINT |
| v. |) | |
| |) | |
| MICHAEL J. ASTRUE, Commissioner |) | |
| of Social Security, |) | |
| |) | |
| Defendant. |) | |

BACKGROUND

Plaintiff Maria M. Villafana (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for disability insurance benefits and supplemental security income pursuant to Titles II and 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 Gary S. Austin, United States Magistrate Judge.¹

¹ Both parties consented to the jurisdiction of the United States Magistrate Judge for all purposes.

1 **FACTS AND PRIOR PROCEEDINGS²**

2 Plaintiff filed her application on or about January 18, 2006, alleging disability beginning
3 January 1, 2000, due to back and knee pain, asthma, bronchitis and depression. AR 113, 124-
4 126, 132, 456-63. Her application was denied initially and on reconsideration. AR 113-16, 119-
5 23, 454-55. Thereafter, Plaintiff requested a hearing before an Administrative Law Judge
6 (“ALJ”). AR 45. ALJ Christopher Larsen held a hearing on March 13, 2008, and issued an order
7 denying benefits on June 25, 2008. AR 15-21, 47-96. On September 25, 2008, the Appeals
8 Council denied review. AR 6-8. On December 4, 2008, the Appeals Council granted Plaintiff’s
9 request for an extension of time to file a civil action. AR 4-5.

10 **Hearing Testimony**

11 ALJ Larsen held a hearing on March 13, 2008, in Fresno, California. Plaintiff appeared
12 and was represented by attorney Melissa Proudian. Vocational Expert (“VE”) Judith Najarian
13 also testified. AR 47-96.

14 Plaintiff was born on November 15, 1976. AR 54. She is five feet one inch tall and
15 weighs 177 pounds. AR 54. She is married and currently lives in a home with her husband and
16 her five children who are twelve, ten, eight, six and four years old. AR 55.

17 Plaintiff has a valid California driver’s license and drives approximately two days a week.
18 AR 56. On the other days, Plaintiff gets around by taking the bus. AR 56. She used to drive
19 three times a week, but has limited her driving since February, 2008 due to her dizziness. AR
20 56-57.

21 Plaintiff’s highest grade completed in school was the ninth grade. AR 56. She does not
22 have a GED or a diploma. AR 56. She also does not have any vocational training. AR 57.
23 Plaintiff can read in English, but writes “very little” English. AR 57. When asked if she were
24 home, could she take a note or message for somebody on the phone and write the message down
25 in English, Plaintiff answered that she could not. AR 58. Plaintiff can read and write in Spanish.
26 AR 58.

27
28 ² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 Plaintiff has held several jobs in the last fifteen years. Plaintiff currently works part-time
2 as a noon-time assistant at an elementary school. AR 58. She started that job in February 7,
3 2007 and works two hours a day, approximately three to four days a week. AR 58-59. She
4 currently makes eight dollars an hour. AR 59. Her paychecks range from \$184.00 per month to
5 \$300.00 per month. AR 59. Plaintiff is not required to lift anything at her job. AR 59. Her
6 duties include walking around the school during lunchtime. AR 59. When asked if the school
7 offered her more hours could she or would she be able to do the work, Plaintiff responded “no”
8 due to her back and knee problems. AR 60.

9 From 2004 to 2005, Plaintiff worked full-time on an assembly line for Foster Farms for
10 approximately seven months. AR 60-61. When asked about the heaviest amount of weight she
11 had to lift, Plaintiff answered ten pounds. AR 60-61. She was responsible for cutting the breasts
12 off the chickens before they were packed. AR 61. Plaintiff stopped working for Foster Farms
13 because her supervisor had told her that she “needed to be more at work instead of taking more
14 days off.” AR 61. Plaintiff testified that her doctor always “put [her] off [work] because of [her]
15 back pain.” AR 61.

16 From 2000 to 2001, Plaintiff worked full-time for Mission Foods packing tortillas. AR
17 61. When asked about the heaviest amount of weight she had to lift, Plaintiff answered
18 approximately twelve pounds. AR 61. She was laid off from Mission Foods because “they
19 didn’t want to give [her] maternity leave.” AR 61-62.

20 In 2000, Plaintiff worked as an assembler for approximately three months. AR 62. Prior
21 to the assembler job, Plaintiff worked full-time as a cashier in a fast food restaurant in Rowland
22 Heights, California for a little over three months. AR 62. As a cashier, Plaintiff did not have to
23 lift anything. AR 62. Plaintiff stopped working as a cashier because she moved. AR 63. Prior
24 to the cashier job, Plaintiff worked for McDonald’s for less than three months. AR 63.

25 In 1998, Plaintiff worked as a seasonal farm laborer for approximately two years. AR 63.
26 She worked “two seasons,” approximately four months during each year. AR 63. As a farm
27 laborer, Plaintiff sorted walnuts. AR 63.

1 When asked if she could work at any job eight hours a day, five days a week, and not just
2 at her noontime assistant job, but any jobs, Plaintiff responded “no” because her back and right
3 knee hurt. AR 64. Plaintiff also testified that there were other problems that would prevent her
4 from work including asthma, seizures, thyroid problems, and urination problems. AR 64.

5 With regard to her asthma, Plaintiff testified that it affects her the most. AR 64. She
6 experiences shortness of breath four to five days a week and it typically occurs when she
7 “mov[es] around a lot.” AR 65. Her breathing problems are triggered by many irritants
8 including Clorox bleach, dust, pollen, detergents, ammonia, and extreme hot temperatures. AR
9 68-69. Although she cannot be exposed to Clorox or pollen, she can be exposed to a minimal
10 amount of dust. AR 68.

11 Plaintiff treats her shortness of breath by using an inhaler and when that doesn’t alleviate
12 it, she uses a Nebulizer. AR 65. Plaintiff has a prescription for three inhalers with a Nebulizer,
13 two inhalers and a breathing machine. AR 65-67. She also treats her shortness of breath by
14 sitting down for approximately fifteen to thirty minutes. AR 66. Plaintiff will use a Nebulizer
15 every time she experiences shortness of breath. AR 66. When asked how often she uses a
16 Nebulizer out of a typical seven-day week, Plaintiff responded five days. AR 66. She has used a
17 Nebulizer for approximately a year and a half. AR 66. She also has a low energy level and has
18 to take frequent rests during the day. AR 69-70. She testified that she needs to rest
19 approximately ten hours a week. AR 70.

20 Plaintiff has had to seek emergency treatment for her shortness of breath. AR 67. The
21 last time she went to the emergency room when she experienced shortness of breath was in
22 September of 2007. AR 67. However, Plaintiff was not admitted over night. AR 67. In
23 addition, Plaintiff also sought treatment on an emergency basis at her doctor’s office in 2007 for
24 shortness of breath when her doctor changed her inhaler. AR 67-68.

25 Plaintiff suffers from back pain daily. AR 72. She first started to have back pain in 2000
26 after she sustained an injury when she fell while washing her car and landed on the cement. AR
27 72-73. Plaintiff currently takes liquid Ibuprofen and receives morphine injections to treat her
28 back pain. AR 73-74. However, the last morphine injection she received was approximately

1 four to five months ago. AR 73. Plaintiff has undergone physical therapy for her back pain, but
2 claims it has not helped. AR 74.

3 Plaintiff's back pain affects her ability to function. AR 74. She has trouble bending,
4 lifting and bathing her children. AR 75. She also has difficulty sitting in a chair; the maximum
5 amount of time she can sit is approximately twenty minutes before her back starts to hurt. AR
6 75. In addition, Plaintiff can only stand for thirty minutes at a time due to her back pain. AR 75.
7 Plaintiff claims the heaviest amount of weight she can lift is five pounds. AR 75. When asked
8 about walking, Plaintiff claimed that she could only walk approximately ten to fifteen minutes
9 and then she would have to stop. AR 75. Plaintiff also has difficulties reaching overhead with
10 either arm, however, she does not have any difficulty reaching out in front of her at shoulder
11 height. AR 76. She cannot use her arms on a repetitive basis because "things tend to fall off
12 [her] hand" due to limited strength. AR 76. However, the use of her hands affect her back pain
13 "very little." AR 76. When asked while standing, could she bend over and pick something off
14 the ground and get back up, Plaintiff answered that she could, but it would be very slow and
15 painful. AR 77. She has no scheduled future treatment for her back pain. AR 77.

16 Plaintiff has problems with her right knee; she experiences knee pain daily. AR 77-78.
17 She testified that her knee pain triggers her back pain. AR 78. She treats her pain by taking the
18 liquid Ibuprofen, however, it does not alleviate the pain. AR 78. The knee pain also affects her
19 ability to function. AR 78. She cannot stand for very long on her right leg. AR 79.

20 Plaintiff suffers from urinary problems. She has experienced urinary incontinence since
21 1995. AR 79. She often has "accidents." AR 79. Plaintiff has to urinate frequently and often
22 urinates up to ten times a day. AR 79. She used to take medication to treat her incontinence, but
23 underwent a surgical procedure a year ago to correct the problem. AR. 79-80. However, despite
24 the surgery, she still experiences some loss of urine when she coughs as a result of her asthma.
25 AR 80. Since the surgery, she still has "accidents" approximately three to four times a day. AR
26 81.

27 Plaintiff claims her thyroid affects her balance. AR 83. Approximately three to four
28 months ago, she started experiencing problems with her balance. AR 84. Presently, her balance

1 affects her every day. AR 83. She does not drive because she claims she drives like a “drunk
2 person.” AR 83-84. Plaintiff recently had bloodwork completed to check her thyroid levels, but
3 her balance has never been tested. AR 84.

4 Plaintiff has experienced depression every day for approximately three years. AR 84.
5 Her depression affects her ability to function and she tends to “forget things.” AR 84. It also
6 affects her concentration and her ability to pay attention. AR 84. Plaintiff can only concentrate
7 for about an hour before she gets tired and then would need to take a break for approximately
8 thirty minutes before being able to focus again. AR 85. Afterwards, she would be able to focus
9 for another hour. AR 85.

10 Plaintiff experiences some difficulty in performing household activities. She has
11 difficulty standing, washing dishes, cleaning and cooking because of her back pain. AR 86.
12 However, she does cook twice a day, every day of the week. AR 86. Plaintiff claims that she can
13 only do these activities for twenty minutes, then she would need to sit down and rest for an
14 additional twenty minutes. AR 87. Afterwards, she would be able to go back to what she was
15 doing. AR 87.

16 VE Najarian also testified at the hearing. When asked about Plaintiff’s past work, the VE
17 indicated Plaintiff’s work as a poultry dresser was classified in the Dictionary of Occupational
18 Titles (“DOT”) as light and 2, unskilled; work as a Mexican food maker was classified as light
19 and 2; work as a walnut sorter was classified as light and 2; and work as a fast food cashier was
20 classified as light and 2. AR 89-90.

21 The VE was asked to consider hypothetical questions posed by the ALJ. First, the VE
22 was asked to assume a worker of the Plaintiff’s age, education and work experience who could
23 lift and carry twenty pounds occasionally and ten pounds frequently; stand, walk and sit for six
24 hours out of an eight-hour workday; occasionally climb, balance, stoop, kneel, crouch and crawl;
25 but must avoid concentrated exposure to fumes, dust, odors, gases and poor ventilation; and was
26 only able to understand, remember and carry out simple one or two-step job instructions. AR 91.
27 The VE opined that such an individual would be able to perform Plaintiff’s past relevant work as
28 a poultry cutter and a Mexican food maker, but excluded Plaintiff’s past work as a walnut sorter

1 because of the potential exposure to dust and also as a fast food worker because it requires more
2 than one or two step job instructions. AR 91.

3 Next, the VE was asked to consider the same individual with the same limitations as the
4 first hypothetical, except that this individual could stand and walk for only two hours. AR 91.
5 The VE opined that this individual could not do any of Plaintiff's past relevant work because
6 those jobs require standing. AR 91. However, the VE advised that such a worker could perform
7 other unskilled jobs, including indoor production worker, assembly worker and sedentary
8 cashier/order clerk. AR 92.

9 The VE was asked again to consider the same individual with the same limitations as the
10 first hypothetical, except this individual could stand and walk less than two hours and sit less
11 than six hours. AR 92. The VE advised that there would not be any jobs that this individual
12 could perform. AR 92. The VE was then asked to assume a hypothetical worker who requires in
13 addition to the customary two breaks and meal period, an additional hour of unscheduled breaks
14 throughout the workday on average, some days maybe a little more, some days a little less. AR
15 92. The VE opined that there would be no jobs available for this hypothetical worker. AR 92.

16 After the VE testified, the ALJ asked Plaintiff's attorney if she had any further questions
17 for the VE and she responded that she did not. AR 92. The ALJ then asked the VE if her
18 testimony was consistent with the DOT and Selected Characteristics of Occupations to which the
19 VE answered affirmatively. AR 93. Finally, the ALJ asked if Plaintiff's attorney had anything
20 further to add. AR 93. Plaintiff's attorney explained that Plaintiff suffers from combinations of
21 severe physical impairments, asthma and restrictive airway disease. AR 93. She also stated that
22 Plaintiff has been diagnosed with sciatica, arthritis of the cervical dorsal spine and as a result, she
23 suffers from chronic low back pain and neck pain. AR 93 Plaintiff's counsel also stated that
24 Plaintiff was diagnosed with fibromyalgia, headaches which are migraine in nature, urinary stress
25 incontinence along with an unstable urethra, and a slightly tender uterus. AR 93. In addition,
26 Plaintiff has been diagnosed with a seizure disorder for which she is receiving treatment for. AR
27 93. Plaintiff's counsel finally added that Plaintiff suffers from a severe mental impairment of
28 major depressive disorder recurrent mild versus dysthymic disorder, but takes the position that

1 her physical problems are what primarily affect her ability to function. AR 93. Moreover, an x-
2 ray taken on March 12, 2007 of Plaintiff's lumbar spine from Sequoia Community Medical
3 Centers revealed a slight narrowing in her lumbar spine and a magnetic resonance imaging
4 ("MRI") in April 13, 2007 showed mild disc disease most severe at the L5-S1 level. AR 93-94.
5 Plaintiff's counsel pointed out that in September of 2007, Plaintiff was noted to have
6 degenerative joint disease and throughout her treating records, it was noted that there are
7 complaints of low back pain, pain and sciatica. AR 94. Plaintiff also had significant notations of
8 having to go to her treating sources for the asthma and restrictive airways disease and her
9 bronchitis. AR 94. Plaintiff's counsel testified that the urinary stress incontinency is another
10 non-exertional limitation which would cause her to need additional breaks. AR 94. Plaintiff's
11 counsel requested that the treating sources from Family Care Providers, Sequoia Community
12 Health Centers and Community Medical Centers be given a greater evidentiary weight other than
13 the one-time "CE" evaluation and the non-examining "DDS" doctors. AR 94.

14 **Medical Record**

15 The entire medical record was reviewed by the Court. A summary of the reports and
16 treatment notes is provided below.

17 ***Ekram Michiel, M.D.***

18 On March 11, 2006, board certified psychiatrist Ekram Michiel, M.D., performed a
19 consultative psychiatric examination on Plaintiff. AR 220-222. Plaintiff's chief complaint was
20 depression, but she denies any psychiatric hospitalizations. AR 220. Plaintiff informed Dr.
21 Michiel that she is able to take care of her personal hygiene and that she is able to shop, cook and
22 do household chores as well as drive and walk her children to school. AR 221. The mental
23 status examination indicated that Plaintiff's mood was depressed, however, Dr. Michiel made no
24 abnormal examination findings. AR 221-222. Plaintiff had adequate personal hygiene, her gait
25 and posture were normal, she had no involuntary movements or specific mannerisms, maintained
26 good eye contact throughout the interview, and her speech and general body movements were
27 normal. AR 221. Dr. Michiel diagnosed Plaintiff with depressive disorder not otherwise
28

1 specified, and assessed a Global Assessment of Functioning (“GAF”)³ score of 65 to 70. AR
2 222. Dr. Michiel opined that Plaintiff would be able to interact with coworkers, supervisors and
3 the general public as well as maintain attention and concentration to carry out one or two step
4 simple job instructions. AR 222. However, Plaintiff would be unable to carry out an extensive
5 variety of technical and/or complex instructions. AR 222.

6 ***Tahir Hassan, M.D.***

7 On March 17, 2006, board certified internist Tahir Hassan, M.D., performed a
8 consultative internal medicine examination on Plaintiff. AR 223-228. Plaintiff’s chief
9 complaints were asthma, bronchitis, back pain, knee pain and depression. AR 223. Plaintiff
10 informed Dr. Hassan that she is independent in her activities of daily living. AR 223. Dr.
11 Hassan reported that Plaintiff had good muscle tone, full strength (5/5) in all extremities, and
12 normal sensory findings and reflexes. AR. 227. Dr. Hassan diagnosed Plaintiff with bronchial
13 asthma, stable, back pain, left knee pain, possible osteoarthritis and depression. AR 227. Dr.
14 Hassan concluded that Plaintiff would be able to lift and carry fifty pounds occasionally and
15 twenty-five pounds frequently, limited to her back and knee pain. AR 228. Plaintiff would also
16 be able to stand and walk or sit for six hours in an eight-hour work day with normal breaks and
17 occasionally climb, balance, stoop, crouch, and crawl, but would need to avoid dust, fumes, and
18 poor ventilation. AR 228.

19 ***Family Care Providers***

20 Plaintiff received treatment from Family Care Providers from February 23, 2000 through
21 April 28, 2006. AR 237-317. Her chief complaints were asthma, knee and hand pain. AR 242,
22 244. On August 19, 2006, Plaintiff underwent an electroencephalogram (“EEG”) due to a history
23 of possible nocturnal seizures. AR 312. The EEG results were normal. AR 312.

24
25 ³ A GAF score is a generalized description of the claimant's level of psychological symptoms. *See* DSM-IV
26 at 32 (4th Ed. 2000) (DSM IV). The Commissioner has determined the GAF scale "does not have a direct correlation
27 to the severity requirements in [the Social Security Administration's] mental disorders listings." 65 Fed.Reg. 50,746,
28 50,765 (Aug. 21, 2000). The DSM-IV-TR states a GAF score from 61-70 indicates: “Some mild symptoms (e.g.,
depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g.,
occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful
interpersonal relationships.” DSM-IV at 34.

1 ***MRI Imaging Center***

2 On April 13, 2007, Plaintiff underwent an MRI due to back pain. AR 437. The MRI
3 showed mild disc disease most severe at L5-S1, but no obvious neural foraminal encroachment at
4 any level as well as mild hypertrophy at L3-4, L4-5 and L5-S1. AR 437.

5 ***Sequoia Community Center***

6 Plaintiff received treatment from Sequoia Community Center from October 30, 2006
7 through February 12, 2008. AR 353-390, 410-453. Plaintiff's chief complaints were migraine
8 headaches, depression, back and knee pain. AR 353-390; 410-453. On October 22, 2007,
9 Plaintiff underwent a magnetic resonance angiography ("MRA") and a magnetic resonance
10 venography ("MRV") of the brain which were unremarkable. AR 415.

11 **ALJ's Findings**

12 The ALJ determined that Plaintiff had engaged in substantial gainful activity after her
13 alleged onset date, but not since June 30, 2001. AR 17. The ALJ found that Plaintiff suffered
14 from the severe impairments of depressive disorder NOS, asthma, obesity and lumbar disc
15 disease. AR 18. However, the ALJ determined that none of the severe impairments met or
16 equaled one of the listing impairments. AR 19.

17 Based on his review of the medical evidence, the ALJ determined that Plaintiff retained
18 the residual functional capacity ("RFC") to perform light work, except that she can only
19 occasionally climb, balance, stoop, kneel, crouch, and crawl; must avoid concentrated exposure
20 to fumes, dusts, odors, gases and poor ventilation; and can understand, remember and carry out
21 simple, one or two-step job instructions. AR 19. In reliance on the VE's testimony, the ALJ
22 determined Plaintiff's RFC did not prevent her from performing her past work as a Mexican food
23 maker. AR 20. Thus, the ALJ found that Plaintiff was not disabled. AR 20.

24 **SCOPE OF REVIEW**

25 Congress has provided a limited scope of judicial review of the Commissioner's decision
26 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
27 the Court must determine whether the decision of the Commissioner is supported by substantial
28 evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla,"

1 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*
2 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a
3 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at
4 401. The record as a whole must be considered, weighing both the evidence that supports and
5 the evidence that detracts from the Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993,
6 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must
7 apply the proper legal standards. *E.g.*, *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).
8 This Court must uphold the Commissioner’s determination that the claimant is not disabled if the
9 Secretary applied the proper legal standards, and if the Commissioner’s findings are supported by
10 substantial evidence. *See Sanchez v. Sec’y of Health and Human Serv.*, 812 F.2d 509, 510 (9th
11 Cir. 1987).

12 REVIEW

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

22 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
23 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20
24 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f). Applying this process in this case, the ALJ found
25 that Plaintiff: (1) had engaged in substantial gainful activity after January 1, 2000 (the alleged
26 onset date), but she had not engaged in substantial gainful activity since June 30, 2001; (2) has
27 the following severe impairments of depressive disorder not otherwise specified; asthma; obesity;
28 and lumbar disc disease; (3) does not have an impairment or a combination of impairments that

1 meets or medically equals one of the listed impairments set forth in 20 CFR Part 404, Subpart P,
2 Appendix 1(20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926; (4)
3 retained the RFC to perform light work except that Plaintiff can only occasionally climb, balance,
4 stoop, crouch, and crawl; must avoid concentrated exposure to fumes, dusts, odors, gases, and
5 poor ventilation; and can understand, remember and carry out simple one or two-step job
6 instructions and (5) that Plaintiff was not disabled because she could perform her past relevant
7 work. In doing so, the ALJ found that Plaintiff was not credible given the record as a whole. AR
8 17-20.

9 Here, Plaintiff argues that the ALJ: 1) erred in finding that Plaintiff could return to her
10 past relevant work, 2) and failed to provide clear and convincing reasons to reject Plaintiff's
11 subjective complaints. Plaintiff contends this Court should reverse and order the immediate
12 payments of benefits. In the alternative, Plaintiff requests that the case be remanded for a new
13 hearing.

14 DISCUSSION

15 **A. *Conflict Between the DOT and the VE's Testimony***

16 Plaintiff complains the VE's testimony is inconsistent with the DOT, and therefore, the
17 ALJ erred by failing to provide a reason for deviation from the DOT. More particularly, Plaintiff
18 argues that by limiting her to "simple one and two step job instructions," she could perform only
19 jobs with a reasoning of level one. However, the jobs identified by the VE required a reasoning
20 of level two. (Doc. 18 at 6-8).

21 Defendant contends there is no conflict between the VE's testimony and the DOT, rather,
22 the conflict was generated by Plaintiff. As a result, the ALJ did not err and remand is not
23 required. (Doc. 21 at 5-7).

24 SSR 00-4p states that generally, occupational evidence provided by a VE should be
25 consistent with the occupational information supplied by the DOT. Where there is an apparent
26 conflict, the ALJ must elicit a reasonable explanation for the conflict before relying on the VE to
27 support a determination or decision about whether the claimant is disabled. *See* SSR 00-4p. The
28

1 ALJ may rely on the testimony of a VE over that of the DOT by determining that the explanation
2 given by the VE is reasonable and provides a basis for doing so. *Id.*

3 Although evidence provided by a VE “generally should be consistent” with the DOT,
4 “[n]either the [Dictionary of Occupational Titles] nor the [vocational expert] . . . evidence
5 automatically ‘trumps’ when there is a conflict.” *Massachi v. Astrue*, 486 F.3d 1149, 1153 (9th
6 Cir. 2007) (citing SSR 00-4p). Thus, the ALJ must first determine whether a conflict exists. If it
7 does, the ALJ must then determine whether the VE’s explanation for the conflict is reasonable
8 and whether a basis exists for relying on the expert rather than the DOT. *Id.* Where the ALJ fails
9 to ask the VE if the positions are consistent with the DOT, the Court is unable to determine
10 whether substantial evidence supports the ALJ’s finding at step five. *Id.*

11 Here, the ALJ specifically asked the VE whether her testimony regarding available
12 positions was consistent with the DOT. AR. 93. VE Najarian replied that it was. AR 93. *See*
13 SSR 00-4p. (“Pursuant to SSR 00-4p, the vocational expert’s testimony is consistent with the
14 information contained in the *Dictionary of Occupational Titles*”).

15 In response to the ALJ’s first hypothetical, the VE advised that the hypothetical person
16 could perform Plaintiff’s past work as a poultry cutter⁴ and a Mexican food maker (DOT
17 520.687-046). AR 91. In addition, the VE also identified three other unskilled positions in
18 response to the first hypothetical: indoor production work (DOT 685.687-014), assembly worker
19 (DOT 734.687-034), and order clerk (DOT 209.567-014). AR 92. Plaintiff complains “simple
20 one and two step job instructions” limit her to those with a reasoning level of one, but not greater
21 than one. Because the Mexican food maker job has a reasoning level greater than one, Plaintiff
22 contends the ALJ erred and remand is required. (Doc. 18 at 6-8). However, as pointed out by
23 the Commissioner, courts within the Ninth Circuit have consistently held that a limitation
24 regarding simple or routine instructions encompasses a reasoning level of one *and* two.⁵

25
26 ⁴The ALJ noted that although the VE indicated that an individual with Plaintiff’s RFC could perform the job
as a poultry dresser, that work did not meet the definition of past relevant work.

27 ⁵Reasoning at level two involves applying “common sense understanding to carry out detailed but
28 uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from
standardized situations.”

1 In *Meissl v. Barnhart*, 403 F.Supp.2d 981, 983-985 (C.D. Cal. 2005), the Central District
2 of California held that a limitation to simple and repetitive tasks was consistent with level two
3 reasoning positions as provided for in the DOT. In that case, the claimant was limited to ‘simple
4 tasks performed at a routine or repetitive pace.’ *Id.*, at 982. The court explained that while the
5 Social Security regulations provided only two categories of abilities with regard to understanding
6 and remembering instructions - “short and simple” and “detailed” or “complex” - the DOT has
7 six gradations for measuring that ability. *Id.*, at 984. The *Meissl* court held that to

8 equate the Social Security regulations use of the term “simple” with its use in the
9 DOT would necessarily mean that all jobs with a reasoning level of two or higher
10 are encapsulated within the regulations’ use of the word “detail.” Such a
“blunderbuss” approach is not in keeping with the finely calibrated nature in
which the DOT measures a job’s simplicity.

11 *Meissl v. Barnhart*, 403 F.Supp.2d at 984. The use of the term “uninvolved” and “detailed” in
12 the DOT qualifies the term and refutes any attempt to equate the SSR use of the term “detailed”
13 with its use in the DOT. *Id.* The court found a claimant’s RFC must be compared with the
14 DOT’s reasoning scale. Level one reasoning requires slightly less than simple tasks that are in
15 some way repetitive. An example of a level one reasoning job would include the job of counting
16 cows as they come off a truck. The court in *Meissl* determined that a limitation to simple
17 repetitive tasks is not inconsistent with positions requiring level two reasoning. *Id.*

18 The indoor production worker and the assembly worker involve reasoning at level one;
19 neither is not in conflict with the ALJ’s limitation to simple one and two step job instructions.
20 *Meissl v. Barnhart*, 403 F.Supp.2d at 984. The reasoning level for the Mexican food maker job
21 involves a level two reasoning and thus is also not in conflict with the ALJ’s limitation to simple
22 one and two step job instructions. *Meissl v. Barnhart*, 403 F.Supp.2d at 984. While the order
23 clerk (DOT 209.567-014) involves a reasoning level three, remand is not necessary. The
24 positions of indoor production worker and assembly worker combine to provide a regional job
25 total of 12,087.⁶ These numbers constitute a significant number of available jobs. *Barker v.*
26 *Secretary of Health & Human Servs.*, 882 F.2d 1474, 1478 (9th Cir. 1989) (finding that 1266
27

28 ⁶To obtain a national figure, the regional totals are divided by nine. See AR 92.

1 jobs in the Los Angeles/Orange County are were considered significant); *see also Moncada v.*
2 *Chater*, 60 F.3d 521, 524 (9th Cir. 1995); *Martinez v. Heckler*, 807 F.2d 771, 775 (9th Cir.
3 1986).

4 Plaintiff also contends that since she is unable to write in English and all of the jobs
5 contained in the DOT require a language ability of level one, on remand the ALJ should
6 specifically include this limitation in the hypothetical question posed to the VE at step five. (Doc.
7 18 at 8.) This argument lacks merit because Plaintiff has already performed the job as a Mexican
8 food maker and there is no evidence in the record that indicates her writing ability has diminished
9 since she has ceased working. Moreover, the record includes numerous forms completed by
10 Plaintiff herself that demonstrate an ability to write in English. *See* AR 143-152, 161, 173-180,
11 181-185.

12 **A. *Plaintiff's Credibility***

13 Next, Plaintiff challenges the ALJ's rejection of her subjective limitations. Specifically,
14 Plaintiff contends the ALJ erred when he did not mention her complaints of chronic migraines
15 even though her complaints are supported by the medical record. In doing so, the ALJ must
16 provide clear and convincing reasons for the rejection. (Doc. 18 at 8-10).

17 Defendant responds that the ALJ found Plaintiff's subjective allegations not credible for
18 several reasons which were properly supported in the record. In addition, Defendant claims that
19 Plaintiff provides no actual argument as to why the ALJ's credibility analysis cannot withstand
20 judicial scrutiny on the basis of a single impairment that was not the basis of Plaintiff's
21 applications for disability benefits or her subjective testimony. Thus, Plaintiff's cursory argument
22 is without merit. (Doc. 21 at 7-8).

23 The ALJ is required to make specific findings assessing the credibility of plaintiff's
24 subjective complaints. *Cequerra v. Secretary of HHS*, 933 F.2d 735 (9th Cir. 1991). "An ALJ is
25 not 'required to believe every allegation of disabling pain' or other non-exertional impairment,"
26 *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007) (citation omitted). In rejecting the complainant's
27 testimony, "the ALJ must identify what testimony is not credible and what evidence undermines
28 the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (quoting *Varney v.*

1 *Secretary of Health and Human Services*, 846 F.2d 581, 584 (9th Cir. 1988)). Pursuant to Ninth
2 Circuit law, if the ALJ finds that the claimant’s testimony as to the severity of her pain and
3 impairments is unreliable, the ALJ must make a credibility determination with findings
4 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit
5 claimant’s testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). “The ALJ may
6 consider at least the following factors when weighing the claimant’s credibility: ‘[claimant’s]
7 reputation for truthfulness, inconsistencies either in [claimant’s] testimony or between [her]
8 testimony and [her] conduct, [claimant’s] daily activities, [her] work record, and testimony from
9 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
10 [claimant] complains.” *Id.* (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)).
11 “If the ALJ’s credibility finding is supported by substantial evidence in the record, we may not
12 engage in second-guessing.” *Id.*

13 Here, the ALJ gave specific, clear and convincing reasons for finding Plaintiff’s subjective
14 allegations not credible. The ALJ based his credibility finding on the fact that there were
15 inconsistencies between Plaintiff’s testimony and the medical evidence, that Plaintiff was able to
16 manage a large family despite her subjective limitations, that she had expressly informed her
17 doctor that she wanted to return to work, as well as Plaintiff’s allegation that she lost her job over
18 a maternity leave issue. AR 20. The ALJ stated the following:

19 I have given little weight to Ms. Villafana’s testimony regarding her limitations. She
20 stated she cannot lift over 5 pounds, stand more than 30 minutes at a time, walk more than
21 10 to 15 minutes before resting, or sit more than 20 minutes at a time. She said she needs
22 to rest for about an hour and a half daily due to low energy. Because of depression, she
23 can reportedly focus only for an hour, then needs a 30 minute break. On the other hand,
24 she also completed two Function Reports indicating she manages to care for a large family
25 in spite of her subjective complaints (Exhibits 3E, 10E). It appears from her testimony she
26 lost her job in 2001 over a maternity leave issue. She subsequently had another child in
27 April, 2003 (Exhibit 15F, p. 13). In fact, in October, 2006, she told her treating doctor she
28 had increased stress with five children and wanted to go back to work (Exhibit 13F, p. 16),
which suggests her current situation at home may be more difficult than working is. The
record also includes a third-party Function Report completed by a friend (Exhibit 17E).
While these two statements repeat Ms. Villafana’s subjective complaints, they also confirm
Ms. Villafana’s wide range of daily activities in spite of them. Under the circumstances, I
do not find Ms. Villafana’s subjective symptoms and limitations sufficiently reliable to
impose further limitation beyond those supported by the medical evidence. AR 20.

1 In evaluating Plaintiff's credibility, the ALJ made specific findings identifying the
2 testimony and evidence relied upon. It is clear he did not arbitrarily discredit her testimony.
3 *Thomas v. Barnhart*, 278 F.3d at 958. Thus, the ALJ's findings support his conclusion that
4 Plaintiff was not credible with regard to her subjective limitations.

5 Plaintiff further contends that the ALJ erred when he did not specifically address her
6 chronic migraines despite the fact that they were supported in her treatment records. Here,
7 Plaintiff alleged disability due to back and knee pain, asthma, bronchitis and depression. She did
8 not allege disability due to migraine headaches. AR 97, 105, 113, 132, 220, 223. At the hearing,
9 the ALJ specifically asked Plaintiff what would prevent her from working a job eight hours a day,
10 five days a week. Plaintiff responded that her back and knee pain, asthma, seizures, thyroid
11 problems, and frequent urination would prevent her from working. AR 64. When questioned
12 further if there was anything else that would prevent her from working, Plaintiff answered "no."
13 AR 64. However, later during the hearing, Plaintiff testified that depression also affected her
14 ability to function. AR 84. Plaintiff never mentioned migraines as a disabling condition at the
15 hearing. AR 47-96. In making his findings, the ALJ gave specific reasons why Plaintiff's right
16 leg and knee problems, frequent urination, and seizures did not constitute severe impairments.
17 AR 18. In addition, the ALJ addressed Plaintiff's testimony regarding her dizziness and poor
18 balance in which he also properly explained why those impairments did not constitute severe
19 impairments. AR 18. Plaintiff neither alleged disability due to migraine headache in her
20 application for disability benefits nor before the ALJ at the hearing. Thus, she has failed to meet
21 her burden. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990) (The burden is on the claimant
22 to establish disability). In sum, the ALJ's findings are supported by substantial evidence and are
23 free of legal error.

CONCLUSION

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2 Based on the foregoing, the Court finds that the ALJ’s decision is supported by substantial
3 evidence in the record as a whole and is based on proper legal standards. Accordingly, this Court
4 DENIES Plaintiff’s appeal from the administrative decision of the Commissioner of Social
5 Security. The Clerk of this Court is DIRECTED to enter judgment in favor of Defendant Michael
6 J. Astrue, Commissioner of Social Security and against Plaintiff, Maria M. Villafana.

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8 IT IS SO ORDERED.

9 **Dated: March 29, 2010**

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/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE