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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

OFELIA DE LA CRUZ,

) 1:09cv01222 DLB

Plaintiff,

) ORDER REGARDING PLAINTIFF'S
) SOCIAL SECURITY COMPLAINT

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

BACKGROUND

Plaintiff Ofelia De La Cruz (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) 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 Dennis L. Beck, United States Magistrate Judge.

FACTS AND PRIOR PROCEEDINGS¹

Plaintiff filed her applications for DIB and SSI in April 2006. She alleged disability since August 15, 2001, due to a lower back injury and pain throughout the body. AR 145-52. After

¹ References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 Plaintiff's applications were denied initially and on reconsideration, she requested a hearing
2 before an Administrative Law Judge ("ALJ"). AR 78-82, 86-90, 92. On February 26, 2008, ALJ
3 Christopher Larsen held a hearing. AR 25-55. He denied benefits on June 21, 2008. AR 11-24.
4 The Appeals Council denied review on May 13, 2009. AR 1-5.

5 Hearing Testimony

6 ALJ Larsen held a hearing in Fresno, California, on February 26, 2008. Plaintiff
7 appeared with her attorney, Melissa Proudian, and a Spanish interpreter. Vocational expert
8 ("VE") Jose L. Chaparro also appeared and testified. AR 17, 27.

9 Plaintiff was born in 1969. She is five feet tall and weighs 142. She recently lost over
10 100 pounds. The doctor requested that she lose weight for back and neck surgery. AR 30-31.

11 Plaintiff is married. She has four children, ages 17, 13, 9 and 7. She drives them to
12 school in the morning and they come back on the bus. AR 31-32.

13 Plaintiff completed the sixth grade in Mexico. She did not get a GED or diploma in the
14 United States. She cannot read or write in English. She can hardly speak or understand any
15 English. If she was lost, she could not ask for, or understand, directions in English. She can read
16 and write in Spanish. She has not had vocational training. AR 33-34.

17 Plaintiff testified that she last worked on August 16, 2001. She was sorting tomatoes. It
18 was a three-month seasonal job. She worked full-time during the season for more than 10 years.
19 The heaviest weight she lifted was 20 pounds. She was injured on the job, falling and hurting her
20 back, neck and legs. She went to work the following day, but did not continue after that. She
21 has been in medical treatment since August 17, 2001, and has an ongoing Workers'
22 Compensation case. AR 34-37.

23 Plaintiff does not feel that she could do any job eight hours a day, five days a week
24 because she has a lot of pain in her lower back, neck and legs, both of her knees hurt and she has
25 pain in the bones of her legs. She has pain in her back radiating down to her legs. Her pain is an
26 8 on a scale of 1 to 10. Cold or movement aggravate it. AR 36-38.

1 Plaintiff testified that the longest she can sit is an hour. She can stand around an hour.
2 She has a cane. Dr. Fontana, a physical therapist, prescribed it in 2001. She can walk about a
3 block with the cane. AR 38-41.

4 Plaintiff testified that since she got hurt, she has not picked up anything heavy. The
5 heaviest thing she lifts is her purse, which is less than 10 pounds. She never lifts anything over
6 10 pounds. AR 41-42.

7 Plaintiff's pain medication takes away the pain in her back completely, but it causes her
8 to feel dizzy and sleepy enough to lie down. She lies down once or twice a day for one to three
9 hours. She has been doing that since 2006. AR 42-43. Plaintiff takes Vicodin. She wears a
10 Lidoderm patch everyday, either in the daytime or the nighttime. She has had physical therapy,
11 but it did not help. A doctor wanted to give her injections for pain, but her insurance said no.
12 She has been seen for possible surgery of her back. A doctor in Fresno told her that he did not
13 recommend surgery and she would be worse off. The weight loss helped her for the leg pain, but
14 not her lower back. She is going to see a surgeon in Los Angeles, but has not made an
15 appointment. AR 43-45.

16 Plaintiff testified that she can reach overhead with either arm to get something out of a
17 cupboard. She can reach at shoulder height with either arm, but every movement bothers her
18 lower back. She did not know if she could bend over and pick something up off the ground. She
19 has not done it. AR 45.

20 Plaintiff testified that her daughter or husband help her put on clothes. She can bathe
21 herself, but tries not to make too much movement. She can keep her mind on something for 5 or
22 10 minutes. She would have to take an hour break before she could go back to concentrating for
23 another 5 to 10 minutes. With all the pills, she gets a lot of depression. AR 45-46.

24 Plaintiff says she hardly eats anymore. She goes to Weight Watchers and doesn't eat as
25 much or make food. Her daughter does the cleaning. Plaintiff always has pain in her legs. She
26 has pain in her neck three or four days a week. AR 46-47.

1 The VE also responded to questions from the ALJ. The VE testified that Plaintiff's past
2 job as an agricultural produce sorter is light, unskilled work. As performed, it was medium
3 work. Plaintiff's work as a fruit harvest worker is medium and unskilled. AR 47-49.

4 For the first hypothetical, the ALJ asked the VE to assume a worker of Plaintiff's age,
5 education and work experience. This person could stand and walk a total of two hours in an
6 eight hour day, but must have a cane. This person could sit a total of four hours in eight hour
7 day. The VE testified that this person could not perform Plaintiff's past relevant work or any
8 other work. AR 50.

9 For the second hypothetical, the ALJ asked the VE to assume a worker of Plaintiff's age,
10 education and work experience. This person could lift and carry 10 pounds occasionally, less
11 than 10 pounds frequently, could stand and walk a total of 2 hours with a cane and could sit a
12 total of 6 hours in an 8 hour day. This person could never climb ladders, ropes or scaffolds. She
13 could occasionally stoop, balance, kneel, crouch, crawl and climb ramps or stairs. She must
14 avoid concentrated exposure to hazards. She occasionally could work overhead with bilateral
15 arms and hands. The VE testified that with these limitations, the hypothetical worker could not
16 perform Plaintiff's past relevant work. AR 50.

17 Assuming no English, the VE believed there were other jobs she could perform in the
18 regional or national economy. There were several classifications. Each one of the jobs was
19 probably a low number, but in combination, there were about 4,000 jobs in California and about
20 39,800 jobs nationally. For example, one job is bench hand, which is sedentary, unskilled with
21 100 to 200 jobs in California and 1,200 nationally. Another job is crystal attacher, which is
22 sedentary, unskilled with 100 to 200 jobs in California and 1,200 nationally. There is nut sorter,
23 which is sedentary, unskilled with 100 to 200 jobs in California and 1,100 nationally. AR 50-51.

24 Plaintiff's attorney asked the VE to assume the second hypothetical and add the need for
25 breaks during the day of a one hour maximum and concentration in increments of 5 to 10 minutes
26 with an hour break in between. The VE testified that all jobs would be eliminated by either of
27 the limitations. The VE's testimony was consistent with the Dictionary of Occupational Titles
28 and Selected Characteristics of Occupations. AR 52.

1 Medical Record

2 On September 20, 2001, Frank A. Fontana, D.C., a chiropractor, completed a Doctor's
3 First Report of Occupational Injury or Illness. Plaintiff reported that she was walking, fell, did
4 the splits and landed on her knees. Dr. Fontana diagnosed cervical sprain or strain, cervical
5 vertebral subluxation, thoracic sprain/strain and thoracic subluxation. He requested authorization
6 for an MRI, nerve conduction tests and videofluoroscopy. AR 231. Plaintiff continued to
7 receive treatment from Dr. Fontana between October 2001 and May 2002. AR 214-30.

8 A November 2001 videofluoroscopy of the lumbar spine was negative for obvious signs
9 of gross fractures, dislocations and/or aberrant kinematic motion. Plaintiff had Grade I to Grade
10 II spondylolisthesis of L5 on S1, and a possible pars defects suggested at L5. AR 185-85.

11 On December 2, 2001, Plaintiff underwent a biomechanical analysis with
12 videofluoroscopy. At the C5 vertebral level, she had a loss of motion segmental integrity rated at
13 25% impairment for the cervical-thoracic spine. She had laxity and/or compromization of the
14 posterior supportive soft tissue structures and capsular structures at the C2/C3 level. She also
15 had ligamentous and capsular laxity at multiple levels. AR 187-88.

16 On December 12, 2001, Brendan V. McAdams, M.D., a board certified orthopaedic
17 surgeon and qualified medical evaluator, completed an orthopaedic evaluation. Plaintiff reported
18 that since her fall, she had been treating only with a chiropractor. She chiefly complained of pain
19 in the back with some pain going to the bottom of her feet. She also had pain in both knees and
20 increased discomfort in the groin area. AR 198-99.

21 On physical examination, Plaintiff gave the impression of being in a considerable amount
22 of pain by walking with cane with a rather shuffling gait, bent over and somewhat dragging her
23 left leg. She sat throughout the interview appearing comfortable. She "would not move her back
24 in any way, shape or form of flexion, extension, lateral bending and lateral rotation." She would
25 not walk on the heels and toes. She would not squat down. When asked to sit on the table, it
26 took her a full minute to get up onto it. In trying to do straight leg raising, she would not raise
27 the leg more than two inches off the table. She was not asked to assume the prone position
28 because "she was so corpulent that it would be extremely difficult to get her to move onto her

1 abdomen.” She was assisted to a sitting position and “miracle of miracles with the lady sitting
2 both upright with both legs fully extended, she had no complaint.” AR 199-200.

3 Dr. McAdams reviewed Plaintiff’s records, noting that an initial incident report stated
4 that she slipped and fell to the knees and Madera Community Hospital described a contusion
5 of the knee bilaterally. Dr. McAdams’ final diagnosis was “Malingering.” He opined that she
6 was “vastly over exaggerating her amount of pain and totally manipulating the physical
7 examination. She is easily confused and clearly shows that she is manipulating the exam.” Dr.
8 McAdams found “no reason whatsoever to continue any kind of treatment” and no reason that
9 Plaintiff “should be suffering the amount of discomfort she is alleging with such a[] minimal
10 injury.” AR 201-02.

11 On January 5, 2002, Donald D. Taylor, Jr., D.C., completed a QME exam at the request
12 of Plaintiff’s attorney. Plaintiff reported that while at work on August 16, 2001, she slipped and
13 fell, landing on both knees, almost doing the splits with her legs. She returned back to work that
14 day and the next. On the third day, she was unable to work because of too much pain. She was
15 sent to Madera Community Hospital, where x-rays showed no acute fracture or dislocation of the
16 thoracic and lumbar spine. She had mild osteopenia and spina bifida occulta of L5. AR 178-79.

17 On examination, Plaintiff had sharp pain in her lower back during all ranges of motion,
18 flexion/extension, lateral bending and rotation. Straight leg raising was 65 degrees on the left
19 and 80 degrees on the right. Deep tendon reflexes were normal. She had positive patellar
20 grinding bilaterally. She exhibited difficulty during attempted heel toe walking and was unable
21 to squat and recover. Tests for inconsistencies revealed none in orthopaedic testing, but she
22 exhibited and reported lower back pain during standing head compression, which was an
23 inappropriate response. Dr. Taylor diagnosed acute lumbar sprain/strain and acute bilateral knee
24 pain with accompanying myofascial pain in the lower extremities. He estimated that she would
25 probably need to be off work three to four more months. AR 180-82.

26 A MRI of the lumbar spine taken on January 7, 2002, showed bilateral spondylolysis of
27 the pars interarticularis of L5, with Grade 1 anterior spondylolisthesis and bilateral foraminal
28 encroachment at L5-S1 in association. AR 193.

1 On March 14, 2002, Dr. McAdams reiterated his final diagnosis of malingering. He
2 opined that Plaintiff's multiple subjective complaints were not corroborated by any objective
3 findings and "she totally manipulated the examination." AR 195-96.

4 An electrodiagnostic report in April 30, 2002, showed abnormal findings. AR 205-10. A
5 subsequent electrodiagnostic report completed by a board certified physician in September 2003
6 was normal. AR 241-45.

7 On October 8, 2002, Michael J. Esposito, M.D., an orthopedic surgeon and qualified
8 medical evaluator, completed an Initial Comprehensive Orthopedic Consultation. On
9 examination, Plaintiff did not appear to be in acute distress. She ambulated with a normal gait
10 and arose from a chair using a mild upper extremity assist. She got on and off the examination
11 table with some difficulty. During examination of her dorsolumbosacral spine and lower
12 extremities, she stood in an upright position and flexed with her hands to approximately her mid
13 femurs, with poor effort. Her right and left lateral bending was markedly restricted to 10 degrees,
14 but was dependent on effort. Dr. Esposito diagnosed Plaintiff with lumbar grade 1
15 spondylolisthesis at L5-S1 level with associated lumbar facet syndrome, bilateral knee contusions
16 with medial compartment osteoarthritis of both knees, status post open reduction internal fixation
17 of the left mid shaft femur fracture and cervical degenerative disc disease at C5-C6 region with
18 mild cervical degenerative disc disease. He recommend that Plaintiff take Vioxx for her neck,
19 low back and bilateral knee symptoms, but her subjective complaints and the objective findings
20 did not warrant surgical intervention. AR 263-71.

21 On November 21, 2002, Merlin C. Smith, M.D., an orthopedic surgeon, completed a
22 Qualified Medical Examination. AR 345. Dr. Smith diagnosed Plaintiff with
23 musculoligamented strain of the lumbosacral spine, grade 1 spondylolisthesis at L5 on S1
24 associated with bilateral spondylosis, per MRI, and chondromalacia patella bilaterally associated
25 with synovitis on the left side. Dr. Smith opined that Plaintiff was precluded from heavy lifting
26 and from repetitive bending and stooping to prevent low back symptoms. She also was
27 precluded from going up and down stairs, squatting or kneeling to prevent left knee pain. She
28 did not appear to be a candidate for vocational rehabilitation. AR 345-51.

1 On December 5, 2002, Dr. Smith opined that Plaintiff had a permanent impairment, but
2 could return to her usual job with restrictions. AR 344.

3 On January 18, 2003, Norman Y. Otsuka, M.D., a board certified orthopedic surgeon and
4 qualified medical examiner, diagnosed Plaintiff with cervical spine, lumbar spine and bilateral
5 knee strain. He characterized her subjective complaints in cervical spine as frequent and slight.
6 He characterized her low back pain as constant slight and her bilateral knee pain as occasional
7 slight moderate. On examination, she walked with an antalgic gait and was unable to walk on
8 her toes, heels and squat. Straight leg raising was positive. She had four positive Waddell's
9 signs. Dr. Otsuka opined that Plaintiff had a disability to her neck and back that would preclude
10 very heavy lifting. She had a disability to her bilateral knees that would preclude running,
11 jumping and repetitive squatting and kneeling. AR 233-40.

12 On August 12, 2003, Plaintiff saw Dr. Esposito for a reevaluation of her condition. She
13 continued to complain of persistent pain in her low back, with radiating pain to both legs. She
14 also complained of bilateral knee pain. She was to continue with non-steroidal anti-
15 inflammatory medication. She did not wish to have an epidural cortisone injection. AR 259-62.

16 On September 10, 2003, Plaintiff saw Dr. Esposito for complaints of increasing pain in
17 her low back and left leg. She had marked deficiencies and an inability to ambulate with
18 increasing left leg pain and associated weakness. She complained of left leg radiculitis. Dr.
19 Esposito recommended a pain management referral for an epidural steroid series of injections.
20 AR 255-58.

21 On January 27, 2004, Dr. Esposito completed a Secondary Treating Physician's
22 Supplemental Orthopedic Report. He did not feel that Plaintiff was a surgical candidate. He
23 recommended that she avoid performing overhead activities, heavy lifting, repetitive bending and
24 stooping, and prolonged weightbearing activities. She also should avoid repetitive squatting,
25 kneeling and climbing activities. AR 246-51.

26 On August 15, 2004, Plaintiff reported to John Arakelian, D.C., that her lower back pain
27 was occasionally minimal while sitting and intermittently slight while walking, standing, and
28 squatting. Her lower back pain was constantly severe while bending at the waist, climbing stairs,

1 kneeling and crawling. It was frequently moderate when twisting her back and while lifting from
2 her waist to her shoulders. AR 309.

3 Electronic muscle testing of Plaintiff's lower extremities on August 18 and October 11,
4 2004, were abnormal. AR 281-86, 304-07. Range of motion studies dated September 23, 2004,
5 showed lumbar spine range of motion at less than 85% of normal range. AR 289.

6 On December 9, 2004, Dr. Smith prepared a supplemental report. He opined that
7 additional records seemed to verify that Plaintiff felt the need for ongoing chiropractic treatment
8 and that she was continuing to have considerable pain in her knee and back. AR 341-43.

9 On September 6, 2005, Robert E. Lieberon, M.D., a neurological surgeon, completed an
10 agreed medical-legal evaluation. Plaintiff was described as a fit-appearing, but somewhat
11 overweight woman who walked with a cane in the right hand. She was 5'0" and 262 lbs. Dr.
12 Lieberon noted that examination of the lumbar spine was difficult to test because of pain.
13 Plaintiff essentially was unable to bend or extend. Credibility testing, including Waddell's, was
14 unremarkable.

15 Dr. Lieberon reviewed medical records documenting a spondylolysis with
16 spondylolisthesis and treatment records indicating that Plaintiff was either totally disabled or had
17 no injury whatsoever. Dr. Lieberon reported that a spondylolysis is a fracture and a
18 spondylolisthesis is a slippage secondary to a fracture. He indicated that these fractures are not
19 uncommon in the population and 7-10% of the population has an asymptomatic spondylolysis
20 with spondylolisthesis. He opined that earlier reports of physicians claiming that there was no
21 injury and no need for treatment "seem ill considered at best." The quantity of chiropractic also
22 seemed unusual, because it "is ordinarily of little or no benefit for this problem." Dr. Lieberon
23 found that Plaintiff had been permanent and stationary since November 21, 2002. He diagnosed
24 her with cervical and lumbar disc disease. He opined that she had "probably lost about 75% of
25 her original ability to bend, stoop, lift, push, pull, climb, and perform other activities involving
26 comparable physical effort." The fracture in the back, coupled with her excessive weight, had
27 resulted in a very substantial disability. Dr. Lieberon stated that additional medical care would
28 be required, but before any surgeon would consider an operation, Plaintiff would need to lose

1 approximately 80 to 100 pounds. If the weight loss did not result in improvement, then
2 consideration of a lumbar fusion would be appropriate. Dr. Lieberson concluded that Plaintiff
3 could not return to her usual work, but could perform work of some sort and would be a good
4 candidate for vocational rehabilitation. AR 352-63.

5 On November 17, 2005, Berj Kalamkarian, M.D. evaluated Plaintiff on referral from an
6 attorney. Plaintiff was noted to be 5'2.5" and 242.5 pounds. She rated her pain at 9 out of 10. On
7 examination, she could not tiptoe or heel walk due to pain. On lumbar range of motion, she
8 preferred not to bend or extend due to severe aggravation of pain. On muscle power, there was
9 lack of effort and quite weak to manual evaluation. Dr. Kalamkarian assessed her with
10 discogenic disease of the lumbar and cervical spine. She was not a good candidate for surgery
11 due to being overweight and an appropriate treatment would be epidural steroid injections. She
12 was prescribed Vicodin 5/500 mg for severe pain. AR 383-84. Plaintiff continued with
13 treatment from Dr. Kalamkarian's office between January 5, 2006, and January 18, 2008. AR
14 377-81, 387-96, 399-402, 407-08.

15 On July 7, 2006, Benjamin Chang, M.D., completed a consultative orthopedic
16 examination. On examination, Plaintiff weighed 177 pounds and walked with a mildly antalgic
17 gait with a single point cane. Dr. Chang diagnosed Plaintiff with chronic mechanical low back
18 pain. He opined that she was unable to perform work that required frequent bending and heavy
19 lifting. She could lift and carry 20 pounds occasionally and 10 pounds frequently. She could
20 stand and walk six hours out of an eight hour day with normal breaks. She could sit without
21 restriction. She occasionally could kneel, squat and climb stairs. AR 364-68.

22 On July 18, 2006, I. Ocrant, a state agency medical consultant, completed a Physical
23 Residual Functional Capacity Assessment form. Dr. Ocrant opined that Plaintiff could lift 10
24 pounds occasionally and frequently. She could stand and/or walk at least 2 hours in an 8-hour
25 workday. A medically required hand-held assistive device was necessary for ambulation. She
26 could sit about 6 hours in an 8-hour workday. She could push and/or pull without limitation in
27 her lower extremities, but she was limited in her upper extremities. She occasionally could climb
28 ramps and stairs, but never ladders, ropes or scaffolds. She occasionally could balance, stoop,

1 kneel, crouch and crawl. She was limited bilaterally to occasional overhead work. She had no
2 visual or communicative limitations. She should avoid concentrated exposure to hazards
3 (machinery, heights, etc.). Dr. Ocrant indicated that his opinion was largely consistent with Dr.
4 Lieberman's opinion. AR 369-73.

5 On November 27, 2006, Dr. Kalamkarian indicated that Plaintiff had continuous chronic
6 low back pain not relieved following the loss of 101 pounds. He ordered an MRI of the lumbar
7 spine. AR 374-75. The MRI report dated January 15, 2007, reportedly identified
8 spondylolisthesis with features of bilateral pars defect at L5 with disc herniation and central
9 stenosis at L5-S1. AR 405-06.

10 In April 2007, Dr. Kalamkarian recommended evaluation by a neurosurgeon. AR 403-04.

11 On July 31, 2007, Dr. Kalamkarian's treatment notes reflected receipt of a report from Dr.
12 Watson, a local orthopedic surgeon, dated June 25, 2007. Dr. Watson reportedly felt there may
13 be "some symptom amplification" by Plaintiff, and he was somewhat reluctant to recommend
14 surgery or to obtain a discogram. He felt a repeat MRI was advisable. AR 397-98.

15 On January 15, 2008, Dr. Kalamkarian noted that Plaintiff was awaiting a consult with
16 UCLA and continued to have low back pain radiating to her lower extremities. AR 387-88.

17 ALJ's Findings

18 The ALJ found that Plaintiff met the insured status requirements through June 30, 2006.
19 She had not engaged in substantial gainful activity since August 15, 2001. The ALJ determined
20 that Plaintiff had the severe impairments of lumbar degenerative disk disease, lumbar spine
21 spondylolisthesis and bilateral patella chondromalacia. Despite these impairments, the ALJ
22 found that Plaintiff retained the residual functional capacity ("RFC") to lift/carry 10 pounds
23 occasionally and less than 10 pounds frequently. She could stand or walk a total of two hours in
24 an eight-hour workday while using a cane and could sit a total of six hours in an eight-hour
25 workday. She occasionally could stoop, kneel, balance, crouch, crawl, climb ramps or stairs and
26 work overhead with the upper extremities. She could never climb ladders, ropes or scaffolds and
27 she must avoid concentrated exposure to workplace hazards. The ALJ concluded that Plaintiff
28

1 could not perform any past relevant work, but she could adjust successfully to other work that
2 existed in significant numbers in the national economy. AR 19-23.

3 SCOPE OF REVIEW

4 Congress has provided a limited scope of judicial review of the Commissioner's decision
5 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
6 the Court must determine whether the decision of the Commissioner is supported by substantial
7 evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla,"
8 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a preponderance. Sorenson v.
9 Weinberger, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a
10 reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at
11 401. The record as a whole must be considered, weighing both the evidence that supports and
12 the evidence that detracts from the Commissioner's conclusion. Jones v. Heckler, 760 F.2d 993,
13 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must
14 apply the proper legal standards. *E.g.*, Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).
15 This Court must uphold the Commissioner's determination that the claimant is not disabled if the
16 Commissioner applied the proper legal standards, and if the Commissioner's findings are
17 supported by substantial evidence. *See* Sanchez v. Sec'y of Health and Human Servs., 812 F.2d
18 509, 510 (9th Cir. 1987).

19 REVIEW

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

1 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
2 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20
3 C.F.R. §§ 404.1520 (a)-(g). Applying the process in this case, the ALJ found that Plaintiff: (1)
4 had not engaged in substantial gainful activity since the alleged onset of her disability; (2) has an
5 impairment or a combination of impairments that is considered “severe” (lumbar degenerative
6 disk disease, lumbar spine spondylolisthesis and bilateral patella chondromalacia) based on the
7 requirements in the Regulations (20 CFR §§ 404.1520(c), 416.920(c)); (3) does not have an
8 impairment or combination of impairments which meets or equals one of the impairments set
9 forth in Appendix 1, Subpart P, Regulations No. 4; (4) cannot perform her past relevant work;
10 but (5) can perform jobs that exist in significant numbers in the national economy. AR 19-23.

11 Here, Plaintiff argues that the ALJ (1) failed to give appropriate weight to the opinion of
12 Dr. Lieberon, the worker’s compensation examiner; and (2) failed to properly evaluate her
13 obesity.

14 DISCUSSION

15 A. Evaluation of Worker’s Compensation Physician

16 Plaintiff contends that the ALJ erred by giving substantial, but not controlling, weight to
17 the opinion of Dr. Lieberon, the agreed medical examiner in Plaintiff’s worker’s compensation
18 case. Plaintiff first argues that the ALJ “failed to provide any analysis demonstrating that he
19 even attempted to translate the limitations assessed by [Dr. Lieberon], which are in worker’s
20 compensation terms, into Social Security terminology.” Opening Brief, p. 9. As Plaintiff admits,
21 however, an ALJ’s decision need not contain an explicit “translation,” but should at least indicate
22 that the ALJ recognized the differences between the worker’s compensation scheme and the
23 Social Security scheme, and took those differences into account in evaluating the medical
24 evidence. Desrosiers v. Sec’y of Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988);
25 Booth v. Barnhart, 181 F.Supp.2d 1099, 1106 (C.D.Cal. 2002); Mejia-Raigoza v. Astrue, 2010
26 WL 1797245, *8 (E.D.Cal. May 3, 2010).

27 Here, there is no indication that the ALJ failed to recognize that a distinction exists
28 between the worker’s compensation scheme and the Social Security scheme. In discussing Dr.

1 Lieberman's opinion, the ALJ noted that he examined Plaintiff as a workers' compensation
2 agreed medical examiner. AR 21, 22. The ALJ also acknowledged Dr. Lieberman's opinion that
3 Plaintiff had lost about 75 percent of her ability to bend, stoop, lift, push, pull, or climb. AR 21,
4 352-63. In formulating the RFC, the ALJ concluded that Plaintiff could occasionally stoop,
5 kneel, balance, crouch, crawl, climb ramps or stairs, could occasionally work overhead with the
6 upper extremities and could never climb ladders, ropes or scaffolds. AR 20. Plaintiff does not
7 explain how the resulting RFC is an incorrect "translation" of the limitations assessed by Dr.
8 Lieberman. Further, opinions concerning degrees of disability peculiar to worker's compensation
9 are not conclusive in a Social Security case. 20 C.F.R. §§ 404.1504, 416.904; *Macri v. Chater*,
10 93 F.3d 540, 544 (9th Cir. 1996) (citing *Desrosiers*, 846 F.2d at 576).

11 Rather than identifying the incorrect portions of the RFC, Plaintiff instead suggests that
12 the ALJ should have accepted Dr. Lieberman's opinion that she was disabled, asserting that this
13 view is consistent with Dr. Merlin Smith's assessment that her disability was so severe she could
14 not even attend vocational rehabilitation. Opening Brief, p. 10. There are a number of problems
15 with Plaintiff's argument. First, Dr. Lieberman opined that Plaintiff would be a good candidate
16 for vocational rehabilitation, whereas Dr. Smith did not. AR 350, 363. Second, Plaintiff ignores
17 Dr. Lieberman's finding that she could perform work of some sort and Dr. Smith's indication that
18 she could return to work with restrictions. AR 362, 344; *cf. Mattox v. Astrue*, 2008 WL 761073,
19 *9 (E.D.Cal. Mar. 17, 2008) (physician evaluating plaintiff in worker's compensation case is
20 focused on deciding whether she could return to her past job). Third, a finding of disability
21 under the worker's compensation scheme does not bind the Commissioner. 20 C.F.R.
22 §§404.1504, 416.904. Indeed, an ALJ is "not bound by an expert medical opinion on the
23 ultimate question of disability." *Tomasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); Social
24 Security Ruling ("SSR") 96-5p.

25 Plaintiff next argues that Dr. Lieberman's opinion was consistent with the assessments of
26 the treating doctors at Comprehensive Pain Management. Plaintiff points to findings that up to
27 one month before the hearing, she was assessed with chronic low back pain. Opening Brief, p.
28 11. The cited records reflect Plaintiff's reports of pain and include multiple instances when she

1 refused or preferred not to perform certain actions on examination. AR 376-77, 379, 380-81,
2 383, 391, 399, 403, 406, 407. Plaintiff does not explain how her subjective reports of pain and
3 refusals are consistent with Dr. Lieberman's opinion or are equated with functional limitations as
4 to how long she can sit, stand or walk or how much weight she can lift or carry.

5 Moreover, the ALJ gave the opinions of Plaintiff's treating sources less evidentiary
6 weight because they might be tainted by Plaintiff's lack of credibility. AR 22. An ALJ may
7 reject a treating physician's opinion because it was based on the claimant's discredited subjective
8 complaints. Thomas v. Barnhart, 278 F.3d 948, 957 (9th Cir. 2002); Morgan v. Comm'r of Soc.
9 Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999) (physician's opinion based to a large extent on
10 claimant's own accounts of symptoms and limitations may be disregarded where those
11 complaints have been properly discounted); Fair v. Bowen, 885 F.2d 597, 605 (9th 1989). Here,
12 the ALJ cited the diagnosis of malingering by an orthopedic surgeon. AR 20. The record reflects
13 that in December 2001, Dr. McAdams diagnosed Plaintiff with malingering and found that she
14 manipulated the examination. AR 198-203. Affirmative evidence of malingering will support an
15 adverse credibility finding. See Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006).

16 Plaintiff takes exception with the ALJ's reliance on Dr. McAdams' diagnosis of
17 malingering. Plaintiff contends that Dr. Lieberman found the diagnosis of malingering by Dr.
18 McAdams to be "ill conceived at best" because he was not aware that Plaintiff was suffering
19 from a spinal fracture and did not review x-rays or an MRI. Opening Brief, p. 15. According to
20 the record, Dr. Lieberman did not directly identify Dr. McAdams' diagnosis. Instead, Dr.
21 Lieberman commented that "earlier reports of physicians claiming there was no injury and no
22 need for treatment seem ill considered at best." AR 361. Further, on March 14, 2002, Dr.
23 McAdams reiterated his final diagnosis of malingering and his opinion that Plaintiff "totally
24 manipulated the examination." AR 195-96. This supplemental opinion was rendered after a
25 lumbar MRI showed bilateral spondylolysis of the pars interarticularis of L5, with Grade 1
26 anterior spondylolisthesis. AR 193. The record does not reflect whether or not Dr. McAdams
27 had the opportunity to review the available MRI findings. However, even if the ALJ's reliance
28 on the malingering diagnosis was error, Plaintiff does not challenge the ALJ's other reasons for

1 discounting her subjective complaints. Batson v. Barnhart, 359 F.3d 1190, 1197 (9th Cir. 2004)
2 (upholding ALJ’s credibility determination even though one reason may have been in error).

3 In addition to the malingering diagnosis, the ALJ found subsequent record evidence that
4 Plaintiff exaggerated her symptoms. AR 21. For instance, the ALJ noted that in June 2007, Dr.
5 Kalamkarian reviewed a report from another of Plaintiff’s treating physicians, who felt that
6 Plaintiff was engaging in “symptom amplification.” AR 397. Symptom exaggeration is a valid
7 basis for discounting credibility. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001).

8 Additionally, the ALJ found that Plaintiff answered questions evasively at the hearing.
9 He pointed out that Plaintiff testified she did not know how much she could lift because she
10 never lifted anything and she did not know how long she could sit because she never timed
11 herself. AR 21, 38, 41-42. The ALJ also pointed to Plaintiff’s testimony that she could sit for 20
12 minutes and then subsequent testimony that she could sit 60 minutes. AR 21, 38. Such
13 inconsistencies support an adverse credibility determination. *See, e.g., Tonapetyan*, 242 F.3d at
14 1148 (ALJ may use ordinary techniques of credibility evaluation, such as inconsistent
15 statements); Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir.1991) (ALJ may discredit claimant’s
16 allegations based on inconsistencies in the testimony or on relevant character evidence).

17 Plaintiff has not argued that the ALJ’s additional credibility findings are unsupported or
18 are error. Where, as here, the ALJ has made specific findings justifying a decision to disbelieve
19 an allegation of excess pain, and those findings are supported by substantial evidence in the
20 record, our role is not to second-guess that decision. Fair, 885 F.2d at 604.

21 Plaintiff next argues that the ALJ improperly based her RFC on the opinion of the non-
22 examining state agency medical consultant. Reports of a non-examining physician may serve as
23 substantial evidence when they are supported by other evidence in the record and are consistent
24 with it. *See Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

25 To the extent that Plaintiff suggests that the opinion of the non-examining physician, Dr.
26 Ocrant, is not consistent with Dr. Lieberman’s opinion, this suggestion is unpersuasive. As noted
27 by the ALJ, Dr. Ocrant analyzed the medical opinions in the record. In particular, Dr. Ocrant
28 expressly considered Dr. Lieberman’s opinion regarding a 75% reduction in lifting and posturals

1 and found it “largely consistent.” AR 373. Dr. Ocrant indicated that the only difference was that
2 Dr. Lieberson’s opinion did not note the use of a cane. Based on the cane, Dr. Ocrant opined that
3 additional lifting restrictions would be reasonable. AR 373. Plaintiff does not explain how the
4 opinions of Drs. Ocrant and Lieberson are inconsistent, except to suggest that the ALJ erred by
5 not accepting Dr. Lieberson’s conclusion that Plaintiff was disabled. As discussed above, the
6 ALJ is not bound by an expert medical opinion on the ultimate question of disability. *Tomasetti*,
7 533 F.3d at 1041.

8 Plaintiff next complains that the non-examining physician did not have the opportunity to
9 review the entire medical record, but does not explain how this would change the physician’s
10 opinion.

11 Plaintiff next complains that the MRIs speak for themselves and Plaintiff needs spinal
12 surgery to repair her pars interarticularis. Opening Brief, p. 12. Contrary to Plaintiff’s assertion,
13 the record does not conclusively reflect that Plaintiff needs spinal surgery to repair her pars
14 interarticularis. In fact, the record reflects that Dr. Esposito did not feel that Plaintiff was a
15 surgical candidate, and Dr. Watson, a local orthopedic surgeon, was somewhat reluctant to
16 recommend surgery because of symptom amplification. AR 246-51, 263-71, 397-98. Although
17 Plaintiff was awaiting a consult with UCLA, she had not made an appointment and there was no
18 indication that surgery would be recommended. AR 43-45, 387-88.

19 B. Obesity

20 Plaintiff argues that the ALJ failed to comply with SSR 02-1p when evaluating the effects
21 of obesity on her ability to work. Plaintiff’s argument is without merit. SSR 02-1p directs an
22 ALJ to consider a claimant’s obesity in determining, among other things, whether the impairment
23 is severe and whether the impairment prevents the claimant from doing past relevant work or any
24 other work. The ruling cautions, however, that “we will not make assumptions about the severity
25 or functional effects of obesity combined with other impairments. Obesity in combination with
26 another impairment may or may not increase the severity or functional limitations of the other
27 impairment. We will evaluate each case based on the information in the case record.” SSR 02-1p.
28

1 Plaintiff has not shown how the ALJ failed to comply with SSR 02-1p and the directive that
2 each case be evaluated on the record. Plaintiff presented no evidence of obesity limitations that
3 were overlooked. As Plaintiff points out, Dr. Lieberman considered the effects of Plaintiff's
4 obesity and issued an opinion regarding her ability to bend, stoop, lift, push, pull, and climb. AR
5 362. As discussed above, the ALJ gave substantial weight to Dr. Lieberman's opinion. Plaintiff
6 has not identified any other treatment notes, evidence or testimony addressing her limitations due
7 to obesity that were not considered by the ALJ. *See Burch v. Barnhart*, 400 F.3d 676, 683 (9th
8 Cir. 2005).

9 **CONCLUSION**

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

15
16 IT IS SO ORDERED.

17 Dated: August 4, 2010

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE