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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARIA ELENA AVILA,

CASE NO. 1:09-cv-02139-SMS

Plaintiff,

v.

ORDER AFFIRMING AGENCY’S
DENIAL OF BENEFITS AND ORDERING
JUDGMENT FOR COMMISSIONER

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

_____ /

Plaintiff Maria Elena Avila seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits under Title II of the Social Security Act (42 U.S.C. § 301 *et seq.*) (the “Act”). The matter is currently before the Court on the parties’ cross-briefs, which were submitted, without oral argument, to the Honorable Sandra M. Snyder, United States Magistrate Judge.¹ Following a review of the complete record and applicable law, this Court finds the decision of the Administrative Law Judge (“ALJ”) to be supported by substantial evidence in the record as a whole and based on proper legal standards. Accordingly, this Court affirms the Commissioner’s determination.

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¹ Both parties consented to the jurisdiction of a United States Magistrate Judge (Docs. 9 & 10).

1 **I. Administrative Record**

2 **A. Procedural History**

3 On June 30, 2005, Plaintiff filed an application under Title II for a period of disability and
4 disability insurance benefits beginning April 30, 2005. The claims were initially denied on March
5 9, 2007. Plaintiff requested a hearing on May 1, 2007.

6 Plaintiff appeared and testified at a hearing on July 15, 2008. In a decision dated
7 September 3, 2008, Administrative Law Judge Michael J. Kopicki denied Plaintiff's application.
8 On October 2, 2009, the Appeals Council affirmed the ALJ's decision. On November 24, 2009,
9 Plaintiff filed her complaint in this Court.

10 **B. Factual Record**

11 Plaintiff (born March 20, 1957) was an administrative assistant for Bank of America for
12 over 27 years. She stopped working upon her hospitalization on April 15, 2005. Plaintiff
13 initially alleged that her heart surgery and emotional problems, which caused weakness,
14 shortness of breath, seizures, and her ensuing heart condition prevented her from returning to
15 work.

16 Since early 2005, Plaintiff has experienced multiple health issues, including seizures,
17 cirrhosis of the liver, diabetes mellitus, intracranial hemorrhage, aortic valve stenosis with valve
18 replacement, pneumonia, congestive heart failure, hypothyroidism, anemia, obesity, recovery
19 from alcoholism, gynecologic difficulties, and depression. She incurred broken ribs and a
20 fractured spleen in a car accident. Because Plaintiff's appeal addresses only her claim of
21 debilitating sleep apnea, however, this opinion considers only the facts relevant to this disorder.

22 Internist Steven Stoltz, M.D., evaluated Plaintiff for the agency on November 20, 2005.
23 Although Plaintiff still exhibited symptoms of an auto accident two weeks before in which she
24 broke multiple ribs, her chronic medical conditions were well-controlled. Plaintiff herself was
25 unable to drive because of her seizure disorder. She told Stoltz that her single most severe factor
26 at that time was depression. Stoltz recommended that the agency arrange for a psychiatric
27 consultation. Because Plaintiff apparently did not complain of sleep apnea, Stoltz did not
28 address it.

1 Psychologist William A. Spindell, Ph.D., evaluated Plaintiff for the agency on May 5,
2 2006. He described a well groomed and well informed, but tearful, woman. Her memory was
3 good. Her affect was flat and she was depressed. Spindell found that Plaintiff tested as having
4 borderline intellectual function but opined that her intellectual functioning was depressed from
5 the residuals of open heart surgery and her seizure disorder. Spindell opined:

6 [Plaintiff] at age 49 has had a significant medical history. She worked for Bank of
7 America for 30 years. After her car accident and aneurysm she went back to
8 work, but only for a few days. She is confused by the details of her work. She is
9 now the mother of a 17-year-old and finds herself easily accomplishing her
10 [activities of daily living], but very slowly. She does shop, but has the assistance
11 of a friend. She has a difficult time now in the labor market. She could be a risk
12 to herself and others in the workplace. She could handle her own benefit funds if
13 eligible for benefits.

14 AR 283.

15 Again, because Plaintiff apparently did not report sleep apnea to Spindell, he did not address it.

16 On May 15, 2006, Plaintiff's marriage and family therapist, Judith Finer described
17 Plaintiff as "struggling with depressed mood, irritability, daily crying spells, and low self-worth."
18 AR 293. On the same date, Yoshimura noted that Plaintiff had persistent depression. Despite
19 medication, Plaintiff continued to experience break-through seizures. Neither Finer nor
20 Yoshimura addressed sleep apnea.

21 A diagnosis of sleep apnea is first noted in Plaintiff's medical records on June 30, 2008,
22 when Plamen V. Yosifov, M.D., reported moderate sleep apnea and recommended CPAP
23 titration. Yosifov's diagnosis was based on a single night's use of a home sleep study device.
24 On July 1, 2008, Plaintiff was advised that she met the diagnostic criteria for sleep apnea and
25 directed to make an appointment for a two- to three-night study in the sleep laboratory of The
26 Permanente Medical Group.

27 At the July 15, 2008 hearing, Plaintiff testified that she suffered from fatigue and an
28 inability to concentrate for more than about fifteen minutes. She described her lack of
concentration as losing interest in the task at hand because she was unable to understand it. She
slept poorly and had pounding headaches nearly every day. In addition, a side effect of the
Dilantin-Keppra prescribed to control her seizures was exhaustion and an inability to focus.

1 Plaintiff testified that she had maintained the same daily routine for several years. She
2 slept poorly, awakened at 7:00 a.m. to take medication and feed her cats, then returned to sleep
3 until about 9:30 a.m. She then got up and performed light housework. She again needed to rest
4 at about 1:00 or 2:00 p.m., when she took a one-and-a-half- to two-hour nap. She sometimes fell
5 asleep again for about an hour after taking her 5:00 p.m. medication.

6 She enjoyed sketching and painting, attended AA meetings, and sometimes talked to
7 friends on the phone. Plaintiff watched little television, which put her to sleep, and read at night
8 to go to sleep. She briefly attended an adult school computer class from 10:00 to 12:00 a.m., but
9 stopped attending since she could not concentrate and would “go home and sleep.”

10 Plaintiff’s daughter would not permit Plaintiff to watch her infant grandson because of
11 her propensity to doze off unexpectedly. Plaintiff admitted that because she had recently found
12 herself snoring when her daughter allowed her to briefly watch the baby while her daughter ran a
13 quick errand, she was afraid to babysit despite her desire to do so.

14 In response to the ALJ’s question about how she could have concentrated in her job while
15 still an alcoholic but could not concentrate now, Plaintiff explained that her difficulty focusing
16 seemed to be the result of the combination of her medical and emotional issues, her giving up
17 alcohol and ending her abusive marriage, and her teen-aged daughter’s rejection. Plaintiff’s
18 sleeping problems and frequent headaches seemed to be interrelated. When she told her doctors
19 she had difficulty concentrating, they referred Plaintiff to the sleep lab.

20 **II. Discussion**

21 **A. Legal Standards**

22 To qualify for benefits, a claimant must establish that he or she is unable to engage in
23 substantial gainful activity because of a medically determinable physical or mental impairment
24 which has lasted or can be expected to last for a continuous period of not less than twelve
25 months. 42 U.S.C. § 1382c (a)(3)(A). A claimant must demonstrate a physical or mental
26 impairment of such severity that he or she is not only unable to do his or her previous work, but
27 cannot, considering age, education, and work experience, engage in any other substantial gainful

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1 work existing in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir.
2 1989).

3 To encourage uniformity in decision making, the Commissioner has promulgated
4 regulations prescribing a five-step sequential process for evaluating an alleged disability. 20
5 C.F.R. §§ 404.1520 (a)-(f); 416.920 (a)-(f). The process requires consideration of the following
6 questions:

7 Step one: Is the claimant engaging in substantial gainful activity? If so, the
8 claimant is found not disabled. If not, proceed to step two.

9 Step two: Does the claimant have a “severe” impairment? If so, proceed to
10 step three. If not, then a finding of not disabled is appropriate.

11 Step three: Does the claimant’s impairment or combination of impairments
12 meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,
13 App. 1? If so, the claimant is automatically determined disabled.
14 If not, proceed to step four.

15 Step four: Is the claimant capable of performing his past work? If so, the
16 claimant is not disabled. If not, proceed to step five.

17 Step five: Does the claimant have the residual functional capacity to perform
18 any other work? If so, the claimant is not disabled. If not, the
19 claimant is disabled.

20 *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir. 1995).

21 ALJ Kopicki found that Plaintiff had not engaged in substantial gainful activity since the
22 alleged onset date of April 30, 2005. Her severe impairments included seizures, depression,
23 history of valve replacement, and history of intracranial hemorrhage. Additional nonsevere
24 impairments included alcohol abuse in sustained remission, apnea, cirrhosis (possible), and
25 diabetes mellitus, all of which had minimal effect on Plaintiff’s ability to perform work
26 activities. The ALJ concluded that none of Plaintiff’s impairments met or equaled an
27 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. Plaintiff was unable to perform
28 her past work as a bank customer service representative. She was, however, able to perform
other jobs that existed in significant numbers in the national economy.

26 **B. Scope of Review**

27 Congress has provided a limited scope of judicial review of the Commissioner’s decision
28 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,

1 a court must determine whether substantial evidence supports the Commissioner’s decision. 42
2 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla” (*Richardson v.*
3 *Perales*, 402 U.S. 389, 402 (1971)), but less than a preponderance. *Sorenson v. Weinberger*, 514
4 F.2d 1112, 1119 n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might
5 accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The record as a
6 whole must be considered, weighing both the evidence that supports and the evidence that
7 detracts from the Commissioner’s decision. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).
8 In weighing the evidence and making findings, the Commissioner must apply the proper legal
9 standards. *See, e.g., Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
10 uphold the ALJ’s determination that the claimant is not disabled if the ALJ applied the proper
11 legal standards, and if the ALJ’s findings are supported by substantial evidence. *See Sanchez v.*
12 *Secretary of Health and Human Services*, 812 F.2d 509, 510 (9th Cir. 1987).

13 **C. Plaintiff’s Sleep Apnea**

14 As previously noted, Plaintiff’s sole contention on appeal is that the ALJ failed to
15 categorize her sleep apnea as a severe impairment and to conclude that it resulted in her total
16 disability. Although Plaintiff raises several ill-conceived arguments why the ALJ should have
17 found her sleep apnea disabling, she cannot overcome the insufficient evidence relating to her
18 sleep apnea claims.

19 The record does not even mention sleep apnea until June 29, 2008, more than three years
20 after Plaintiff contended she had become disabled. Even then, the evidence is equivocal:
21 Plaintiff used a home sleep study device for a single night, after which Yosifov opined that she
22 had moderate sleep apnea and recommended that she undergo a more thorough sleep study
23 consisting of two or three nights in the sleep lab. Two weeks later, Plaintiff testified that she was
24 referred for a sleep apnea evaluation because of her complaints that she was unable to sleep and
25 to concentrate. That is the only evidence in the record regarding sleep apnea.

26 **1. Plaintiff’s Credibility**

27 Emphasizing Plaintiff’s testimony about her fatigue and inability to concentrate, Plaintiff
28 contends that the ALJ erred in minimizing the credibility of Plaintiff’s testimony regarding her

1 sleep apnea. The Commissioner responds that Plaintiff has confused her testimony recounting
2 her symptoms with medical opinions about her residual functional capacity.

3 An ALJ is not “required to believe every allegation of disabling pain” or other non-
4 exertional requirement. *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007), quoting *Fair v. Bowen*,
5 885 F.2d 597, 603 (9th Cir. 1989). But if he or she decides to reject a claimant’s testimony after a
6 medical impairment has been established, the ALJ must make specific findings assessing the
7 credibility of the claimant’s subjective complaints. *Ceguerra v. Secretary of Health and Human*
8 *Services*, 933 F.2d 735, 738 (9th Cir. 1991). “[T]he ALJ must identify what testimony is not
9 credible and what evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834,
10 quoting *Varney v. Secretary of Health and Human Services*, 846 F.2d 581, 584 (9th Cir. 1988).
11 He or she must set forth specific reasons for rejecting the claim, explaining why the testimony is
12 unpersuasive. *Orn*, 495 F.3d at 635. See also *Robbins v. Social Security Administration*, 466
13 F.3d 880, 885 (9th Cir. 2006). The credibility findings must be “sufficiently specific to permit the
14 court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas v.*
15 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

16 When weighing a claimant’s credibility, the ALJ may consider the claimant’s reputation
17 for truthfulness, inconsistencies in claimant’s testimony or between her testimony and conduct,
18 claimant’s daily activities, claimant’s work record, and testimony from physicians and third
19 parties about the nature, severity and effect of claimant’s claimed symptoms. *Light v. Social*
20 *Security Administration*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ may consider “(1) ordinary
21 techniques of credibility evaluation, such as claimant’s reputation for lying, prior inconsistent
22 statements concerning the symptoms, and other testimony by the claimant that appears less than
23 candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a
24 prescribed course of treatment; and (3) the claimant’s daily activities.” *Tommasetti v. Astrue*,
25 533 F.3d 1035, 1039 (9th Cir. 2008), quoting *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996). If
26 the ALJ’s finding is supported by substantial evidence, the Court may not second-guess his or her
27 decision. *Thomas*, 278 F.3d at 959.

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1 The Ninth Circuit has summarized the applicable standard:

2 [T]o discredit a claimant’s testimony when a medical impairment has been
3 established, the ALJ must provide ““specific cogent reasons for the disbelief.””
4 *Morgan*, 169 F.3d [595,] 599 [9th Cir. 1999] (quoting *Lester*, 81 F.3d at 834). The
5 ALJ must “cit[e] the reasons why the [claimant’s] testimony is unpersuasive.” *Id.*
6 Where, as here, the ALJ did not find “affirmative evidence” that the claimant was
7 a malingerer, those “reasons for rejecting the claimant’s testimony must be clear
8 and convincing.” *Id.* Social Security Administration rulings specify the proper
9 bases for rejection of a claimant’s testimony . . . An ALJ’s decision to reject a
10 claimant’s testimony cannot be supported by reasons that do not comport with the
11 agency’s rules. *See* 67 Fed.Reg. at 57860 (“Although Social Security Rulings do
12 not have the same force and effect as the statute or regulations, they are binding
13 on all components of the Social Security Administration, . . . and are to be relied
14 upon as precedent in adjudicating cases.”); *see Daniels v. Apfel*, 154 F.3d 1129,
15 1131 (10th Cir. 1998) (concluding the ALJ’s decision at step three of the disability
16 determination was contrary to agency rulings and therefore warranted remand).
17 Factors that an ALJ may consider in weighing a claimant’s credibility include
18 reputation for truthfulness, inconsistencies in testimony or between testimony and
19 conduct, daily activities, and “unexplained, or inadequately explained, failure to
20 seek treatment or follow a prescribed course of treatment.” *Fair*, 885 F.2d at 603;
21 *see also Thomas*, 278 F.3d at 958-59.

22 *Orn*, 495 F.3d at 635.

23 Plaintiff did not testify specifically about sleep apnea beyond stating that her physicians
24 referred her to the sleep laboratory in response to her complaints of difficulty to concentrate.
25 Plaintiff’s testimony never directly tied her sleepiness and difficulty concentrating to sleep apnea.
26 In fact, she specifically attributed many of her symptoms to other causes, including medication
27 and life stressors.

28 In any event, the ALJ thoughtfully explained in great detail his reasons for discounting
Plaintiff’s credibility, contrasting the apparent severity of Plaintiff’s recent medical history with
her ability to continue to do work, perform housework, exercise at Curves, care for her personal
needs, attend real estate classes, and perform light housework, laundry and cooking. The ALJ
acknowledged the fatigue that accompanied Plaintiff’s activities but concluded that Plaintiff
retained the residual functional capacity to perform light work. His determination was supported
by substantial evidence.

2. Obesity

In support of her claim that her sleep apnea was a severe impairment, Plaintiff contends
that her medical records established that she was severely obese. Obesity was removed from the

1 listing of impairments in 1999. Thereafter, obesity may still enter into a multiple impairment
2 analysis, but “only by dint of its impact upon the claimant’s musculoskeletal, respiratory, or
3 cardiovascular system.” *Celay v. Halter*, 332 F.3d 1177, 1181 n. 1 (9th Cir. 2003). An ALJ need
4 only include obesity in a multiple impairment analysis if it is “clear from the record that [the
5 plaintiff’s] obesity . . . could exacerbate [his] reported illnesses.” *Id.* at 1182. The multiple
6 impairment analysis need not include obesity if the record is silent regarding (1) whether and
7 how the claimant’s obesity might have exacerbated his other medical conditions and (2) whether
8 and how the claimant’s obesity negatively affected his ability to work. *Burch v. Barnhart*, 400
9 F.3d 676, 682 (9th Cir. 2005).

10 A claimant must present evidence that reasonably alerts the ALJ that his or her obesity
11 exacerbates her other symptoms. *Edwards-Alexander v. Astrue*, 336 Fed.Appx. 634, 637 (9th Cir.
12 2009). “The fact that obesity is a risk factor for other impairments does not mean that
13 individuals with obesity necessarily have any of these impairments.” SSR 02-01p.

14 Even when an individual is morbidly obese, and his or her obesity affects his or her other
15 impairments, he or she may still be able to perform basic work activities despite his or her
16 impairments alone or in combination. *Papen v. Comm’r of Social Security Admin.*, 349
17 Fed.Appx. 205, 207 (9th Cir. 2009). When the claimant failed to set forth evidence establishing
18 that his obesity combined with other impairments increased the severity of his limitations, the
19 ALJ did not err in failing to consider it. *Hoffman v. Astrue*, 266 Fed.Appx. 623, 625 (9th Cir.
20 2008). To require an ALJ to address obesity when the claimant did not raise the issue before him
21 would eviscerate the claimant’s burden of proving a medically determined impairment. *Bowser*
22 *v. Commissioner of Social Security*, 121 Fed.Appx. 231, 236-37 (9th Cir. 2005). In the absence of
23 sufficient evidence, the ALJ may not make assumptions about the severity of a claimant’s obesity
24 or its effect on other impairments. SSR 02-01p. *See also Burch*, 400 F.3d at 683 (finding that
25 the plaintiff’s obesity did not significantly limit her ability to perform work).

26 Although represented by counsel, Plaintiff never raised the obesity issue below. Nothing
27 in the record identifies Plaintiff’s obesity itself as creating a functional limitation that prevents
28 Plaintiff for engaging in any activity. Although the medical notes of various physicians recorded

1 Plaintiff's weight and sometimes identified her as obese, no physician opined that Plaintiff's
2 obesity created or exacerbated her sleep apnea. No physician tied Plaintiff's obesity to her sleep
3 apnea. *Contrast this case with Glass v. Barnhart*, 163 Fed.Appx. 470, 472 (9th Cir. 2006) (expert
4 witness testified that the claimants functional capacity was limited by the combination of morbid
5 obesity (450 pounds) and knee problems).

6 The ALJ did not err in failing to address Plaintiff's obesity as a factor in her sleep apnea.

7 **3. Physicians' Opinions**

8 Plaintiff confuses Yosifov's tentative diagnosis of moderate sleep apnea with an opinion
9 that sleep apnea constitutes a severe impairment. Identifying Yosifov as a treating physician
10 cannot overcome the insufficient evidence of the diagnosis and any effect it might have on
11 Plaintiff's ability to engage in substantial gainful activity.

12 Physicians render two types of opinions in disability cases: (1) medical, clinical opinions
13 regarding the nature of the claimant's impairments and (2) opinions on the claimant's ability to
14 perform work. *See Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The regulations
15 provide that medical opinions be evaluated by considering (1) the examining relationship; (2) the
16 treatment relationship, including (a) the length of the treatment relationship or frequency of
17 examination, and the (b) nature and extent of the treatment relationship; (3) supportability; (4)
18 consistency; (5) specialization; and (6) other factors that support or contradict a medical opinion.
19 28 C.F.R. § 404.1527(d).

20 Three types of physicians may offer opinions in social security cases: "(1) those who
21 treat[ed] the claimant (treating physicians); (2) those who examine[d] but d[id] not treat the
22 claimant (examining physicians); and (3) those who neither examine[d] nor treat[ed] the claimant
23 (nonexamining physicians)." *Lester*, 81 F.3d at 830. A treating physician's opinion is generally
24 entitled to more weight than the opinion of a doctor who examined but did not treat the claimant,
25 and an examining physician's opinion is generally entitled to more weight than that of a non-
26 examining physician. *Id.* The Social Security Administration favors the opinion of a treating
27 physician over that of nontreating physicians. 20 C.F.R. § 404.1527; *Orn*, 495 F.3d at 631. A
28 treating physician is employed to cure and has a greater opportunity to know and observe the

1 patient. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). Nonetheless, a treating
2 physician’s opinion is not conclusive as to either a physical condition or the ultimate issue of
3 disability. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

4 Yusifov offered no more than an initial diagnostic opinion, intended to be supplemented
5 by more controlled and extended testing and observation in the sleep lab. Although Yusifov was
6 intended to become a treating physician, Yusifov’s short-term relationship with Plaintiff reduces
7 the weight to which that opinion is entitled. In fact, the record does not clearly indicate whether
8 Plaintiff and Yusifov had actually met before he reviewed the results of the at home sleep
9 evaluation. As such, although Yusifov was a specialist in treating sleep disorders, his initial
10 diagnosis was no more than tentative, intended to be confirmed and refined by additional study.
11 In light of the early stage of investigation of Plaintiff’s apparent sleep apnea, it is not surprising
12 that neither Yusifov nor any other physician rendered an opinion on whether or how sleep apnea
13 affected Plaintiff’s residual functional capacity.

14 “The mere existence of an impairment is insufficient proof of disability.” *Matthews v.*
15 *Shalala*, 10 F.3d 678, 680 (9th Cir. 1993). A plaintiff bears the burden of producing medical
16 evidence establishing the existence of an impairment, its severity, and how it affects the
17 plaintiff’s functioning. 20 C.F.R. § 404.1512 (c). Plaintiff having failed to meet her burden of
18 proof, substantial evidence supported the ALJ’s recognizing Plaintiff’s sleep apnea as an
19 additional nonsevere impairment.

20 **III. Conclusion and Order**

21 Plaintiff appealed the Commissioner’s decision solely on the basis of a last minute
22 diagnosis of sleep apnea. By the time of the hearing, two weeks after the diagnosis, sleep
23 apnea’s existence as an impairment, its severity, and how it affected the plaintiff’s functioning
24 was undetermined, and Plaintiff failed to meet her burden of proving that sleep apnea disabled
25 her. As a result, the ALJ properly treated the diagnosis as sleep apnea as a nonsevere
26 impairment.

27 The Court finds that the ALJ applied appropriate legal standards and that substantial
28 credible evidence supported the ALJ’s determination that Plaintiff was not disabled.

1 Accordingly, the Court hereby DENIES Plaintiff's appeal from the administrative decision of the
2 Commissioner of Social Security. The Clerk of Court is DIRECTED to enter judgment in favor
3 of the Commissioner and against Plaintiff.

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5 IT IS SO ORDERED.

6 **Dated: July 1, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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