

1 Administrative Law Judge (“ALJ”). AR 39, 73-77, 80-84. ALJ James Berry held a hearing on
2 July 24, 2007, and issued a decision denying benefits on August 16, 2007. AR 14-29, 43-70.
3 The Appeals Council denied review on February 25, 2010. AR 4-7.

4 Hearing Testimony

5 ALJ Berry held a hearing on July 24, 2007, in Fresno, California. Plaintiff appeared with
6 her attorney, Jeffrey Milam, and testified with the help of an interpreter. Vocational expert
7 (“VE”) Jose Chaparro also appeared and testified. AR 43.

8 Plaintiff testified that she was born in Laos in 1958. AR 47. She does not hear well and
9 wears hearing aides in both ears. AR 47. Plaintiff is married and lives with her husband, who
10 works, and 5 of her children. AR 48. The youngest child living with her is 6. Plaintiff came to
11 the United States from Thailand, though she does not remember when, and is not a citizen of this
12 country. AR 49. Plaintiff does not know what her husband does for work, only that he works
13 “in a company.” AR 50.

14 Plaintiff did not go to school in Thailand or the United States. She understands some of
15 the words in the Hmong Bible, but does not read or write in English. AR 50. Plaintiff worked
16 once in the United States for two weeks. She has never had a driver’s license and her youngest
17 sister often takes her places. AR 51, 52.

18 Plaintiff did not believe that she could work at any job because she has a “lot of worries, a
19 lot of issues in [her] head and can’t really think of what [she] needs to do.” AR 52. Plaintiff
20 takes medication for this and sees a mental health doctor. AR 52. When asked what she worries
21 about, Plaintiff testified that her ears don’t work well and she has a lot of illnesses. She also has
22 problems with her back. AR 53. Her worries affect her sleep and eating and sometimes make
23 her think that she wants to die. AR 54.

24 Plaintiff goes to church with her family once a week and her children read the Bible to
25 her. When she’s at church, she does not visit with people because of the issues in her head. AR
26 54. Plaintiff went to the last Hmong New Year celebration but there was nothing for her to do
27 and she stayed by herself. AR 55.

1 Plaintiff explained that her back pain hurts all the time and that she has difficulty moving.
2 The pain spreads to her shoulders and seems like it prevents her from breathing. Plaintiff
3 thought that she could be on her feet for about 30 minutes at one time and sit for about 60
4 minutes at once. She can carry less than a half gallon of milk. AR 55-57. She could walk past
5 about 3 or 4 houses before needing to stop. AR 61. Plaintiff thought that she could concentrate
6 for about 10 minutes at a time. AR 58.

7 Plaintiff takes medicine everyday but it does not really help the pain. She also lies down
8 to help with the pain and when the medication makes her drowsy, about 7 to 8 times per day.
9 She said she lies down more than she stands during the day. AR 57-58. When she lies down,
10 she uses ice and Ben-Gay. Her daughter gives her massages. AR 59. She also tries Asian
11 methods of treatment. AR 60.

12 Plaintiff's children do most of the housework and her husband does the cooking. Plaintiff
13 cannot do these things because if she bends to sweep the floor, she passes out or would be badly
14 hurt. AR 59.

15 For the first hypothetical, the ALJ asked the VE to assume a person of Plaintiff's age,
16 who was illiterate and had no past relevant work experience. This person could lift and carry 20
17 pounds occasionally, 10 pounds frequently, and sit, stand and walk for 6 hours each. This person
18 would need to avoid exposure to unprotected heights and dangerous moving machinery. This
19 person could perform simple, repetitive tasks and maintain attention, concentration, persistence
20 and pace. This person could adapt to usual changes in the work setting, adhere to safety rules
21 and relate and interact with others. This person would need to avoid exposure to loud noise. The
22 VE testified that this person could perform the light positions of flower picker, housekeeping
23 cleaner and tier. AR 63-64.

24 For the second hypothetical, the ALJ asked the VE to assume that this person could lift
25 and carry less than 10 pounds, sit for one hour, stand for 30 minutes and walk less than one
26 block. This person would need to lie down 7 or 8 times a day for an indeterminate amount of
27 time and would have difficulty maintaining concentration for more than a 10 minute span. The
28 VE testified that this person could not perform any work. AR 64.

1 Plaintiff's attorney asked the VE to add the following limitations to the first hypothetical:
2 a fair ability to understand and remember very short and simple instructions, a poor ability to
3 remember detailed instructions, a poor ability to maintain attention and concentration, a fair
4 ability to accept instructions from supervisors and respond appropriately, a poor ability to sustain
5 an ordinary routine without special supervision, a poor ability to complete a normal workday or
6 workweek without interruption at a constant pace, a poor ability to interact with coworkers and a
7 poor ability to deal with various changes in the work setting. This person would also have a
8 moderate likelihood of emotionally deteriorating in the workplace. The VE testified that this
9 person could not work. AR 65.

10 Plaintiff's attorney also asked the VE to add the following limitations to the first
11 hypothetical: this person can stand and walk for 0 to 2 hours and would be unable to stand erect.
12 This person could sit for 4 to 6 hours but cannot sit in an erect fashion. This person would need
13 a walker if she planned on walking long distances or on uneven terrain. She could lift 10 to 20
14 pounds bilaterally. This person could not perform prolonged bending, stooping or crouching and
15 would be limited to frequent reaching, handling and fingering. The VE testified that this person
16 could not work. AR 66.

17 Plaintiff's attorney next asked the VE to assume that this person had a sedentary residual
18 functional capacity with visual limitations. This person could perform simple, repetitive tasks.
19 The VE testified that the light positions identified in the original hypothetical would not be
20 available. AR 67.

21 Plaintiff's attorney also asked the VE to assume that this person could perform simple,
22 repetitive tasks, lift 20 pounds occasionally and 10 pounds frequently, stand and walk for 6 hours
23 and sit for 6 hours. This person could not drive because of a limited field of vision and had to
24 avoid concentrated exposure to fumes, dust, odors, gases and poor ventilation. This person also
25 needed to avoid hazards. The VE testified that this person could perform the positions of flower
26 picker, housekeeping cleaner and tier. AR 67-68. If this person could not be around a lot of
27 background noise, she could not perform the tier position but could perform the positions of
28 flower picker and housekeeping cleaner. AR 69.

1 Medical Record

2 X-rays of Plaintiff's left foot taken on July 1, 2003, showed an undisplaced fracture
3 involving the base of the fifth metatarsal. AR 178.

4 From July 24, 2003, through August 25, 2005, Plaintiff received chiropractic treatment
5 for neck and back pain and headaches. At her initial visit in July 2003, she reported that she had
6 left hip pain after a trip and fall in June 2003. AR 142. In April 2005, she reported that she fell
7 and hit her head on the wall. She reported a dull, radiating pain and was taking Advil. AR 135-
8 143.

9 On April 26, 2005, Plaintiff reported falling and hitting her head after tripping on
10 something. AR 206. X-rays of her cervical spine performed on April 27, 2005, showed mild
11 levoscoliosis that was likely due to muscle spasm. There were no other significant abnormalities.
12 AR 173. X-rays of her thoracic spine showed mild dextroscoliosis centered at T6. AR 174.

13 On September 8, 2005, Plaintiff saw Greg Hirokawa, M.D., for a psychiatric evaluation.
14 Plaintiff complained of feeling depressed and anxious, with poor sleep. She cries easily and
15 occasionally thinks about suicide. Plaintiff primarily stays home and suffers fatigue, loss of
16 interest, poor concentration and forgetfulness. She also reported hearing loss, vision problems
17 and feeling worthless. Plaintiff reported that she forgets to take her medicine and also
18 complained of flashbacks of when she was in her home country and the problems with the war.
19 She came to the United States in approximately 1975 and reported that she has been depressed
20 for a long time. Plaintiff has a 4 year old son with various medical problems, including a past
21 heart operation. AR 144.

22 Plaintiff denied prior mental health treatment and denied psychiatric hospitalizations. On
23 mental status examination, Plaintiff's hygiene was fair, her eye contact was poor and her facial
24 expression was sad. Thought content was appropriate and she denied auditory or visual
25 hallucinations. Her mood was depressed and her affect was tearful. Plaintiff reported poor sleep
26 and appetite. She did not know the date and her intellectual functioning appeared to be in the
27 below average range. Recent and past memory was intact. She did not know why the moon
28 looked larger than the stars or why food is refrigerated. She could not perform simple

1 calculations but she could perform a simple, two-step command. Plaintiff does not perform
2 household chores because she is forgetful and has left food on the stove before. During a typical
3 day, she stays home, takes care of her child and feels depressed. AR 145-147.

4 Dr. Hirokawa diagnosed major depressive disorder, recurrent, moderate, and post
5 traumatic stress disorder. There was no evidence of exaggerating and there did not appear to be
6 any inconsistencies during the evaluation. Her inability to perform certain segments of the
7 examination appeared to be reflective of cultural and educational issues rather than cognitive
8 deficits. The likelihood of her condition improving over the next 12 months was fair with
9 treatment, poor without treatment. Her attitude towards seeking employment is poor and she had
10 no prior work history. AR 148.

11 Dr. Hirokawa opined that Plaintiff had a fair ability to understand and remember very
12 short and simple instructions, a poor ability to understand and remember detailed instructions, a
13 poor ability to maintain attention and concentration, a fair ability to accept instructions from
14 supervisors and respond appropriately, a poor ability to sustain an ordinary routine without
15 special supervision, a poor ability to complete a normal workday or workweek without
16 interruption at a consistent pace, a poor ability to interact with coworkers and a poor ability to
17 deal with various changes in the work setting. She would also have a moderate likelihood of
18 emotionally deteriorating in the workplace. AR 148-149.

19 On September 12, 2005, Plaintiff had x-rays of her lumbosacral spine taken. The images
20 revealed questionable lumbarization of L6 versus 5 lumbar-shaped vertebral bodies and small
21 riblets at T12. There were no compression deformities or malalignment. The images also
22 showed questionable early degenerative changes of the left SI joint. AR 156.

23 On September 17, 2005, Plaintiff saw Pedram Enayati, M.D., for a consultive physical
24 examination. She complained of severe depression, a history of multiple syncopal episodes over
25 the past 2 years and a history of severe back and spine pain for the past 5 to 6 months. Plaintiff
26 reported that during one episode, she fell and fractured her left fifth metatarsal. She reported
27 another episode where she fell and hit her head and had to be hospitalized due to an altered
28 mental status. Plaintiff stated that she has seen multiple physicians for this problem but they

1 have not found a cause of her falls. She also explained that her constant, chronic back pain
2 began after a falling episode in which she fell and injured her back. The pain does not radiate
3 and is much worse when she lies down on her back. As to her depression, Plaintiff reported that
4 she is on multiple medications that slightly help her symptoms, though she continues to have
5 severe anhedonia and is unable to take pleasure in any activities. She denied suicidal ideations
6 and admitted to worsening forgetfulness. Plaintiff does not cook and occasionally needs help
7 from her husband when dressing and showering. AR 150-151.

8 On examination, Plaintiff appeared severely depressed during the entire history and
9 physical. She constantly cried and when asked why, she stated that it was mostly due to the pain
10 in her back. Her affect was very flat and she did not make good eye contact. Plaintiff had
11 decreased range of motion in her neck and tenderness to palpation of the cervical spine, thoracic
12 spine and lumbar spine. She also had paraspinal tenderness on both the right and left. There was
13 evidence of clubbing in Plaintiff's bilateral hands, but no edema, and evidence of bilateral
14 atrophy of her thighs. There was tenderness to palpation in the muscles of her bilateral upper
15 extremities and tenderness to palpation of the left foot fifth metatarsal bone. Pulses were +4 in
16 all extremities. Plaintiff had extreme difficulty raising from a sitting position and exhibited
17 difficulty sitting on the examination table. When asked to stand erect, she could not do so for
18 more than 3 seconds due to pain in her back. She has to lean forward in order to stand in a
19 comfortable stance. Range of motion in her spine was decreased and straight leg raising was
20 negative bilaterally. There was no evidence of joint swelling or joint tenderness on examination
21 of the bilateral hands, wrists or elbows. Plaintiff had 4/5 muscle strength in her bilateral
22 extremities with decreased muscle bulk in her bilateral upper extremities and bilateral thighs.
23 Sensory examination and deep tendon reflexes were normal. AR 152-154.

24 Dr. Enayati diagnosed severe depression, low back pain and cervical spine tenderness and
25 a history of syncopal episodes with unknown cause. He believed that she could stand and walk
26 for 0 to 2 hours, but could not stand erect. She could sit for 4 to 6 hours, but could not sit erect.
27 Plaintiff would need a walker if she planned on walk long distances or on uneven terrain. She
28 could lift and carry 10 to 20 pounds bilaterally. Plaintiff could not perform prolonged bending,

1 stooping or crouching and would be limited to frequent reaching, handling and fingering. Dr.
2 Enayati believed that Plaintiff would need medical follow-up for her left foot, her lumbar and
3 cervical spine, and for possible neuropathy secondary to cervical or lumbar impingement. AR
4 154-155.

5 A bone density test performed on May 5, 2005, suggested osteopenia. AR 200-201.

6 From May 2005 through December 2005, Plaintiff complained of pain in her back, neck
7 and right shoulder. In September 2005, Plaintiff cried during the examination and was diagnosed
8 with depression. AR 189, 193-199.

9 On December 9, 2005, State Agency physician O. Nawar, M.D., completed a Physical
10 Residual Functional Capacity Assessment. He opined that Plaintiff could lift 20 pounds
11 occasionally, 10 pounds frequently, stand and/or walk for about 6 hours and sit for about 6 hours.
12 Plaintiff had to avoid driving because of her limited far acuity and field of vision. She also had
13 to avoid concentrated exposure to fumes, etc., and hazards. AR 232-239. This opinion was
14 affirmed on October 6, 2006. AR 239.

15 On December 20, 2005, State Agency physician Evangeline Murillo, M.D., completed a
16 Psychiatric Review Technique Form. She opined that Plaintiff had mild restrictions in activities
17 of daily living, mild difficulties in maintaining social functioning and mild difficulties in
18 maintaining concentration, persistence or pace. AR 211-224. In a Mental Residual Functional
19 Capacity Assessment, Dr. Murillo opined that Plaintiff would have moderate limitations in her
20 ability to understand, remember and carry out detailed instructions. Plaintiff could sustain
21 simple, repetitive tasks with adequate pace and persistence. She could also adapt and relate to
22 coworkers and supervisors. AR 225-227. This opinion was affirmed on October 17, 2006, by
23 State Agency physician Archimedes Garcia, M.D. AR 227.

24 On January 18, 2006, Plaintiff continued to complain of back pain, neck pain and right
25 shoulder pain. Plaintiff was calm and not in distress, but appeared withdrawn. AR 186.

26 Plaintiff was seen at Kings Winery Medical Clinic on January 27, 2006. She complained
27 of right shoulder pain and neck pain after a recent fall. She denied dizziness at the time of the
28 fall and reported a similar episode in April 2005. On examination, she had decreased range of

1 motion in her right shoulder and could not turn her neck fully to either side. Plaintiff was
2 diagnosed with a right shoulder strain/sprain, syncope, osteopenia and allergy/heartburn. AR
3 185.

4 On February 7, 2006, Plaintiff underwent an EEG based on her history of syncopal
5 episodes. The EEG was normal. AR 158.

6 Plaintiff returned to Kings Winery Medical Clinic on February 22, 2006. She complained
7 of pain in the back of her neck, upper back, legs and shoulders, as well as headaches and stomach
8 aches. On examination, Plaintiff had tenderness to palpation of her lower back, the back of her
9 neck and her right shoulder. She had decreased range of motion in her right shoulder. Plaintiff
10 was diagnosed with osteopenia, right shoulder pain, low back pain, asthma, gastritis, migraine
11 headaches and a cold. AR 185.

12 On March 11, 2006, Plaintiff complained of coughing, chest pain, headaches and back
13 pain. She was active and not in distress. She was diagnosed with probable pneumonia/bronchitis
14 and given medication. AR 180.

15 Plaintiff was seen at Kings Winery Medical Center on March 25, 2006, for mental health
16 treatment. Plaintiff looked “down in the dumps” and reported poor sleep, low energy and lack of
17 interest. She had a depressed mood, with blunted affect. Plaintiff was almost tearful and
18 complained of forgetfulness. She was diagnosed with somatoform disorder, not otherwise
19 specified, and was taking Paxil and Trazadone. AR 276.

20 On March 28, 2006, Plaintiff saw Ko Fang, Ph.D., at Fresno County Mental Health.
21 Plaintiff reported depression since 1986, with worsening since 2000. She reported feeling
22 overwhelmed and anxious and described a prior suicide attempt by hanging. Dr. Fang noted that
23 Plaintiff’s depression and anxiety were severe. Her cognitive performance was severely impaired
24 and he considered her a “severe” danger to herself. AR 240-244.

25 In May and June 2006, Plaintiff began reporting right arm pain. AR 272, 274. In July
26 2006, Plaintiff was in no acute distress, though she seemed sad. AR 272.

27 Plaintiff received mental health treatment at Kings Winery Medical Clinic on June 3,
28 2006. She reported that her medication was helpful until it wore off and she was told that she

1 was supposed to take the medication twice a day. Plaintiff was depressed with a blunted affect.
2 Her medications were changed. AR 273.

3 A July 22, 2006, x-ray of Plaintiff's right elbow was normal. AR 271.

4 In September 2006, Plaintiff reported right elbow pain, numbness in her right arm and
5 pain in her upper and lower back. AR 269, 270. Her back was tender to palpation and Plaintiff
6 appeared sad. AR 269.

7 Plaintiff continued to complain of back, neck and shoulder pain in October, November
8 and December 2006. AR 266, 269.

9 On November 3, 2006, Plaintiff saw her provider for mental health treatment. The notes
10 are difficult to read, but it appears that she was depressed, with a blunted, tearful affect. Plaintiff
11 reported auditory hallucinations. She was diagnosed with major depressive disorder, recurrent,
12 and somatoform disorder, not otherwise specified. Her medications included Zyprexa, Effexor
13 and Trazadone. AR 267.

14 Plaintiff received mental health care on January 13, 2007, at Kings Winery Medical
15 Clinic. She reported that her medications helped during the daytime, though she heard voices
16 and saw things. Wellbutrin and Risperdal were added to her medications. AR 265.

17 Plaintiff was seen at Kings Winery Medical Clinic in January and February 2007. She
18 complained of back, shoulder and stomach pain. Examination of her abdomen was benign and
19 her neck was supple. AR 264.

20 A February 2007 CT scan showed a normal appendix, normal kidneys and a normal
21 bladder. AR 262-263.

22 From March 2007 through July 2007, Plaintiff continued to complain of back pain,
23 shoulder pain and headaches. Plaintiff was in no acute distress and showed no abnormalities
24 during this time. AR 250-253, 258-261.

25 An audiogram performed on May 1, 2007, revealed bilateral moderate to severe
26 sensorineural hearing loss. AR 244-245.

27 Plaintiff returned for mental health treatment at Kings Winery Medical Clinic on June 8,
28 2007. Plaintiff had a depressed mood and blunted affect. Plaintiff reported that her son normally

1 drops off his baby at the house, but last week he did not drop the baby off and Plaintiff continued
2 to hear a baby cry. Plaintiff was taking Zyprexa, Trazadone, Celexa and lithium carbonate. AR
3 252.

4 On July 17, 2007, Dr. Fang completed a Mental Impairment Questionnaire. He stated
5 that he has seen Plaintiff 1-2 times per month since October 2005. Plaintiff was taking numerous
6 medications, including Celexa, Zyprexa, lithium carbonate, Trazodone and Soma. As clinical
7 findings, Dr. Fang listed impaired memory and judgment, poor concentration, and poor reality
8 testing and concrete thinking. Plaintiff had no insight and was very tangential. Her prognosis
9 was poor.

10 Dr. Fang believed that Plaintiff was seriously limited in, but not precluded from,
11 understanding, remembering and carrying out very short and simple instructions and maintaining
12 socially appropriate behavior. She was unable to meet competitive standards in maintaining
13 attention for two hour segments, maintaining regular attendance, making simple work-related
14 decisions, performing at a consistent pace, asking simple questions or requesting assistance,
15 accepting instructions and responding appropriately to criticism, getting along with coworkers,
16 responding appropriately to changes in the work setting, being aware of normal hazards, dealing
17 with the stress of semi-skilled or skilled work, interacting appropriately with the general public
18 and adhering to basic standards of neatness and cleanliness. Plaintiff had no useful ability to
19 remember work-like procedures, sustain an ordinary routine, work in coordination with others,
20 complete a normal work day or work week and deal with normal stress. She also had no useful
21 ability to understand, remember and carry out detailed instructions or to set realistic goals, travel
22 in an unfamiliar place or use public transportation. AR 287-290.

23 Dr. Fang estimated that Plaintiff had a low IQ. He also noted that Plaintiff's psychiatric
24 condition exacerbated her experience of pain and/or other physical symptoms. Plaintiff had
25 marked limitations in activities of daily living, maintaining social functioning and in
26 concentration, persistence or pace. He noted that Plaintiff had 4 or more repeated episodes of
27 decompensation. AR 290-292.

1 ALJ's Findings

2 The ALJ determined that Plaintiff had the severe impairments of mild scoliosis of the
3 spine, bilateral hearing loss, syncope, somatoform disorder and major depressive disorder. AR
4 19. Despite these impairments, the ALJ determined that Plaintiff retained the residual functional
5 capacity ("RFC") to lift and carry 20 pounds occasionally, 10 pounds frequently, and sit, stand
6 and walk for 6 hours each. Plaintiff would be precluded from activities requiring exposure to
7 unprotected heights, dangerous moving machinery and concentrated exposure to loud noise. She
8 could perform simple, repetitive tasks, maintain attention, concentration, persistence and pace,
9 adapt to usual changes in the work setting, adhere to safety rules and relate and interact with
10 others. AR 20. With this RFC, the ALJ determined that Plaintiff could perform the positions of
11 flower picker, housekeeper/cleaner and tier. AR 28.

12 **SCOPE OF REVIEW**

13 Congress has provided a limited scope of judicial review of the Commissioner's decision
14 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
15 the Court must determine whether the decision of the Commissioner is supported by substantial
16 evidence. [42 U.S.C. 405](#) (g). Substantial evidence means "more than a mere scintilla,"
17 [Richardson v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v.](#)
18 [Weinberger, 514 F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is "such relevant evidence as a
19 reasonable mind might accept as adequate to support a conclusion." [Richardson, 402 U.S. at](#)
20 [401](#). The record as a whole must be considered, weighing both the evidence that supports and
21 the evidence that detracts from the Commissioner's conclusion. [Jones v. Heckler, 760 F.2d 993,](#)
22 [995 \(9th Cir. 1985\)](#). In weighing the evidence and making findings, the Commissioner must
23 apply the proper legal standards. *E.g.*, [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#).
24 This Court must uphold the Commissioner's determination that the claimant is not disabled if the
25 Secretary applied the proper legal standards, and if the Commissioner's findings are supported by
26 substantial evidence. *See* [Sanchez v. Sec'y of Health and Human Serv., 812 F.2d 509, 510 \(9th](#)
27 [Cir. 1987\)](#).

1 **REVIEW**

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

11 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
12 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20](#)
13 [C.F.R. §§ 404.1520](#) (a)-(f), 416.920 (a)-(f). Applying this process in this case, the ALJ found
14 that Plaintiff: (1) had not engaged in substantial gainful activity since the alleged onset of her
15 disability; (2) has an impairment or a combination of impairments that is considered “severe”
16 (mild scoliosis of the spine, bilateral hearing loss, syncope, somatoform disorder and major
17 depressive disorder) based on the requirements in the [Regulations \(20 CFR §§ 416.920\(b\)\)](#); (3)
18 does not have an impairment or combination of impairments which meets or equals one of the
19 impairments set forth in Appendix 1, Subpart P, Regulations No. 4; (4) has no past relevant
20 work; but (5) could perform a significant number of jobs in the national economy. AR 19-28.

21 Here, Plaintiff argues that the ALJ (1) improperly analyzed the medical evidence; (2)
22 improperly rejected Plaintiff’s allegations; (3) improperly rejected the lay witness testimony; (4)
23 erred in relying on the VE’s testimony; and (5) failed to propound a complete hypothetical to the
24 VE.

1 **DISCUSSION**

2 A. Plaintiff's Credibility

3 As the ALJ's credibility analysis impacts other issues, the Court will address this issue
4 first. Plaintiff contends that the ALJ failed to set forth legitimate reasons for rejecting her
5 testimony.

6 In [Orn v. Astrue, 495 F.3d 625, 635 \(9th Cir. 2007\)](#), the Ninth Circuit summarized the
7 pertinent standards for evaluating the sufficiency of an ALJ's reasoning in rejecting a claimant's
8 subjective complaints:

9 An ALJ is not "required to believe every allegation of disabling pain" or other
10 non-exertional impairment. See [Fair v. Bowen, 885 F.2d 597, 603 \(9th Cir.1989\)](#).
11 However, to discredit a claimant's testimony when a medical impairment has been
12 established, the ALJ must provide "specific, cogent reasons for the disbelief." [Morgan,](#)
13 [169 F.3d at 599](#) (quoting [Lester, 81 F.3d at 834](#)). The ALJ must "cit[e] the reasons why
the [claimant's] testimony is unpersuasive." *Id.* Where, as here, the ALJ did not find
"affirmative evidence" that the claimant was a malingerer, those "reasons for rejecting the
claimant's testimony must be clear and convincing." *Id.*

14 Social Security Administration rulings specify the proper bases for rejection of a
15 claimant's testimony. . . An ALJ's decision to reject a claimant's testimony cannot be
16 supported by reasons that do not comport with the agency's rules. See 67 Fed.Reg. at
17 57860 ("Although Social Security Rulings do not have the same force and effect as the
18 statute or regulations, they are binding on all components of the Social Security
19 Administration, ... and are to be relied upon as precedents in adjudicating cases."); see
20 [Daniels v. Apfel, 154 F.3d 1129, 1131 \(10th Cir.1998\)](#) (concluding that ALJ's decision at
step three of the disability determination was contrary to agency regulations and rulings
and therefore warranted remand). Factors that an ALJ may consider in weighing a
claimant's credibility include reputation for truthfulness, inconsistencies in testimony or
between testimony and conduct, daily activities, and "unexplained, or inadequately
explained, failure to seek treatment or follow a prescribed course of treatment." [Fair,](#)
[885 F.2d at 603](#); see also [Thomas, 278 F.3d at 958-59](#).

21 The ALJ began his credibility analysis by explaining that despite her severe complaints,
22 the record contained little objective support. For instance, although Plaintiff had an extensive
23 history of complaints of back and neck pain, the x-rays showed only mild scoliosis and early
24 degenerative changes. Although Plaintiff had muscle spasms on rare occasions, her
25 examinations generally revealed only tenderness to palpation. AR 25. The ALJ also notes
26 Plaintiff's unsupported allegations of hospitalization due to an altered mental state and her
27 exaggerated behavior during the consultive examination. AR 25.
28

1 The ALJ is entitled to cite a lack of objective evidence so long as it is not the sole basis
2 for rejecting a claimant's testimony. [*Lester v. Chater*, 81 F.3d 821, 834 \(9th Cir. 1996\)](#). In this
3 regard, the ALJ correctly noted the lack of evidence supporting a claimed hospitalization and
4 Plaintiff's exaggerations. However, as Plaintiff points out, the ALJ found that Plaintiff suffered
5 from the severe impairment of somatoform disorder. The ALJ recognizes that "her psychiatric
6 care provider notes indicate she has a somatoform disorder, which would explain her
7 unsupported pain complaints." AR 25. The Court agrees that citing a lack of objective evidence,
8 in light of the ALJ's finding that there was a psychological reason for her complaints of pain, was
9 improper. The ALJ next cites inconsistencies in Plaintiff's reports of the origin of her back pain.
10 According to the ALJ, Plaintiff has reported that her back pain began with a motor vehicle
11 accident, a trip and fall where she hit her head and a syncopal episode. AR 25. In her pain
12 questionnaire dated August 28, 2005, Plaintiff reported that her back pain started after a car
13 accident. AR 93. However, less than one month later, she told Dr. Enayati that her back pain
14 began after "a falling episode in which she fell and hit her back." AR 151. Similarly, in April
15 2005, Plaintiff reported that she hurt her back after tripping on something and falling on a
16 concrete surface. AR 206.

17 The ALJ also cites apparent inconsistencies in Plaintiff's reports of suicidal thoughts,
18 though his reasoning is not quite clear. AR 26. He states, "with the exception of two separate
19 notations, the claimant has reported suicidal thoughts, but no intent or attempts; once she
20 declared she had tried to hang herself and another time she said she was going to take pills." AR
21 26. A review of the record indicates that her reports are not necessarily inconsistent, however.²
22 On September 8, 2005, Plaintiff told Dr. Hirokawa that she did not have current suicidal
23 ideations and that she had no history of suicide attempts, though she did say that she occasionally
24 thinks about suicide. AR 144,146. A few days later, Plaintiff told her treating source that she
25 had silver cleaner to kill herself. AR 194. Plaintiff denied suicidal thoughts in October 2005,
26 but in March 2006, she reported a history of trying to hang herself. AR 193, 240. Just over two

27
28 ² The Court also questions whether it is appropriate to question a mentally-impaired claimant's credibility based on her reports of suicidal thoughts and/or attempts.

1 months later, she reported two prior attempts to overdose on pills. AR 273. These reports are
2 not inconsistent enough to legitimately reject Plaintiff’s credibility.

3 The ALJ next notes that during “major evaluations,” Plaintiff reports flashbacks of the
4 war, but this is not a theme of her ongoing mental health treatment. AR 26. Plaintiff reported
5 flashbacks to Dr. Hirokawa in September 2005. She also described nightmares and flashbacks to
6 Dr. Fang during her mental health assessment in March 2006. AR 240. The simple fact that she
7 does not appear to continue discussing flashbacks in other treatment notes, however, doesn’t
8 necessarily detract from her credibility.

9 The ALJ also makes an issue of Plaintiff’s place of birth. He explains that Plaintiff
10 reported that she fled from Laos to Thailand, but her residency card indicates that she was born in
11 Thailand. AR 26. There is no record of her residency card, however, and in the evidence before
12 the ALJ, Plaintiff consistently states that she was born in Laos. During the hearing, Plaintiff
13 testified that she was born in Laos and that she brought 5 children with her to the United States
14 from Thailand. AR 47, 49. She told Dr. Hirokawa that she was born in Laos. AR 144.
15 Similarly, Plaintiff told Dr. Fang that she fled to Thailand after hiding for several years in the
16 jungles of Laos. AR 240. After staying in Thai refugee camps for several years, she and her
17 family came to the United States. AR 240. The ALJ’s attempt to question Plaintiff’s credibility
18 based on a single, unclear document that is not in the record is not legitimate.

19 The ALJ goes on to describe Plaintiff’s conservative treatment. For example, Plaintiff
20 has not received treatment consistent with significant degenerative disc disease “such as physical
21 therapy, use of a TENS unit or even strong pain medication.” Nor has Plaintiff been referred to
22 an orthopedic specialist. AR 25. [*Parra v. Astrue*, 481 F.3d 742, 750 \(9th Cir. 2007\)](#) (evidence of
23 “conservative treatment,” such as a claimant’s use of only over-the-counter pain medication, is
24 sufficient to discount a claimant’s testimony regarding severity of an impairment).

25 Plaintiff contends that the ALJ should not have questioned the conservative treatment
26 given Plaintiff’s somatoform disorder, explaining that it would be unreasonable for her
27 physician’s to prescribe her strong medications, etc. The Court agrees. Having determined that
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1 Plaintiff had an explanation for her pain that was not objective in nature, it is inconsistent for the
2 ALJ to now find her not credible based on a lack of more aggressive physical treatment.

3 Finally, the ALJ sets out Plaintiff's daily activities and compares them to her severe
4 allegations. For example, Plaintiff attends church once a week, attended the Hmong New Year
5 celebration and reads the Bible with her children. Plaintiff also reported taking care of her
6 youngest child, who was six years old at the time of the hearing. She also told one examiner that
7 she has a disabled child at home. Plaintiff's function report indicates that she is able to dust, do
8 dishes and very light household chores. AR 26.

9 The Court questions whether such activities are substantial enough to find that Plaintiff's
10 allegations are not credible. In any event, given that the majority of the ALJ's analysis of
11 Plaintiff's subjective complaints is not supported, a citation to her scant activities does not
12 bolster the analysis.

13 While the ALJ does cite certain legitimate reasons to question Plaintiff's credibility, a
14 majority of the analysis is simply unsupported. The Court finds that the ALJ's credibility
15 analysis is not supported by substantial evidence or free from legal error.

16 B. Analysis of Medical Opinions

17 Plaintiff first argues that the ALJ erred in rejecting the opinions of her treating
18 psychologist, Dr. Fang, and consultive examiners Dr. Hirokawa and Dr. Enayati.

19 Cases in this circuit distinguish among the opinions of three types of physicians: (1) those
20 who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant
21 (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining
22 physicians). As a general rule, more weight should be given to the opinion of a treating source
23 than to the opinion of doctors who do not treat the claimant. [Orn v. Astrue, 495 F.3d 625, 631](#)
24 [\(9th Cir.2007\)](#); [Winans v. Bowen, 853 F.2d 643, 647 \(9th Cir.1987\)](#). At least where the treating
25 doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and
26 convincing" reasons. [Baxter v. Sullivan, 923 F.2d 1391, 1396 \(9th Cir.1991\)](#). Even if the
27 treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this
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1 opinion without providing “specific and legitimate reasons” supported by substantial evidence in
2 the record for so doing. [Murray v. Heckler, 722 F.2d 499, 502 \(9th Cir.1983\)](#).

3 The opinion of an examining physician is, in turn, entitled to greater weight than the
4 opinion of a nonexamining physician. [Pitzer v. Sullivan, 908 F.2d 502, 506 \(9th Cir.1990\)](#);
5 [Gallant v. Heckler, 753 F.2d 1450 \(9th Cir.1984\)](#). As is the case with the opinion of a treating
6 physician, the Commissioner must provide “clear and convincing” reasons for rejecting the
7 uncontradicted opinion of an examining physician. [Pitzer, 908 F.2d at 506](#). And like the opinion
8 of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor,
9 can only be rejected for specific and legitimate reasons that are supported by substantial evidence
10 in the record. [Andrews v. Shalala, 53 F.3d 1035, 1043 \(9th Cir.1995\)](#).

11 The opinion of a nonexamining physician cannot, by itself, constitute substantial evidence
12 that justifies the rejection of the opinion of either an examining physician or a treating physician.
13 [Pitzer, 908 F.2d at 506 n. 4](#); [Gallant, 753 F.2d at 1456](#). In some cases, however, the ALJ can
14 reject the opinion of a treating or examining physician, based in part on the testimony of a
15 nonexamining medical advisor. E.g., [Magallanes v. Bowen, 881 F.2d 747, 751-55 \(9th](#)
16 [Cir.1989\)](#); [Andrews, 53 F.3d at 1043](#); [Roberts v. Shalala, 66 F.3d 179 \(9th Cir.1995\)](#). For
17 example, in *Magallanes*, the Ninth Circuit explained that in rejecting the opinion of a treating
18 physician, “the ALJ did not rely on [the nonexamining physician's] testimony alone to reject the
19 opinions of Magallanes's treating physicians....” [Magallanes, 881 F.2d at 752](#) (emphasis in
20 original). Rather, there was an abundance of evidence that supported the ALJ’s decision: the ALJ
21 also relied on laboratory test results, on contrary reports from examining physicians, and on
22 testimony from the claimant that conflicted with her treating physician's opinion. *Id.* at 751-52.

23 *Plaintiff’s Physical RFC*

24 In finding Plaintiff capable of modified light work, the ALJ adopted the opinion of State
25 Agency Dr. Nawar over that of consultive examiner Dr. Enayati. Dr. Enayati believed that
26 Plaintiff (1) could stand and/or walk for 0-2 hours, but could not stand erect; (2) could sit for 4-6
27 hours, but could not sit erect; (3) could lift and 10 to 20 pounds; (4) could not perform prolonged
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1 bending, stooping or crouching; and (5) would be limited to frequent reaching, handling and
2 fingering. AR 154-155.

3 In rejecting his opinion, which would have prevented the performance of any work, the
4 ALJ explained that it was “obvious that the claimant exaggerated her symptoms at the time of the
5 evaluation.” AR 27. Similarly, the ALJ found that Dr. Enayati’s severe restrictions were not
6 supported by the objective evidence.³

7 Indeed, many of Plaintiff’s claims to Dr. Enayati were not supported by the record. For
8 example, she reported that she was once hospitalized due to an altered mental status, but there
9 was no record of any such hospitalization. In fact, just a few days prior, Plaintiff denied any
10 psychiatric hospitalizations to Dr. Hirokawa. AR 145.

11 Plaintiff also reported that her pain was much worse when she lies down on her back, but
12 she testified that she lies down during the day more than she stands, about 7 to 8 times per day.
13 AR 57-58. During her examination, Plaintiff had extreme difficulty raising from a sitting
14 position, exhibited difficulty sitting on the examination table and was unable to stand erect for
15 more than 3 seconds. As the ALJ noted, there are no similar observations of such extreme
16 physical limitations in any treatment notes, nor were similar symptoms seen at the hearing. AR
17 25. In fact, although Plaintiff continued to complain of pain in her back and neck, neither her
18 physical examinations nor diagnostic testing revealed findings that would suggest such drastic
19 problems. While Dr. Enayati did make certain objective findings, it was reasonable for the ALJ
20 to conclude that the findings would not support such a restrictive RFC. [Magallenes v. Bowen,](#)
21 [881 F.2d 747, 751 \(9th Cir. 1989\)](#) (a lack of supporting clinical findings is also a valid reason for
22 rejecting a treating physician's opinion).

23 Plaintiff contends that Dr. Enayati would have noted exaggerations had Plaintiff been
24 exaggerating to the extent suggested by the ALJ. Yet his failure to do so does not prohibit the
25 ALJ from comparing his severe restrictions to the evidence in the record. Plaintiff points to the

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27 ³ Insofar as Plaintiff faults the ALJ for rejecting Dr. Enayati’s opinion based on the lack of a treating source
28 statement, it is not clear from the ALJ’s analysis that he cited this as a reason for rejecting the opinion. Rather, it
appears to the Court the ALJ was simply stating a fact by explaining that Plaintiff’s “treating care providers have
provided no opinions as to her physical functional capacity.” AR 27.

1 fact that Dr. Enayati performed his own examination and found “significant abnormalities such
2 as limited cervical range of motion, bilateral thigh atrophy, and limited range of motion of
3 Plaintiff’s lumbar spine and hips and shoulders.” Reply, at 3. Again, however, while there may
4 have been certain objective findings, the ALJ was entitled to conclude that such findings did not
5 support Dr. Enayati’s severe physical restrictions.

6 In rejecting Dr. Enayati’s opinion, the ALJ adopted the opinion of State Agency physician
7 Dr. Nawar. AR 27. The opinion of a non-examining physician may be accepted as substantial
8 evidence if it is supported by other evidence in the record and is consistent with it. [Lester v.](#)
9 [Chater, 81 F.3d 821, 830-831 \(9th Cir. 1995\)](#). In other words, there must be substantial
10 evidence, other than the non-examining physician’s opinion, to support the rejection of contrary
11 conclusions by the treating and/or examining source. [Andrews v. Shalala, 53 F.3d 1035, 1043](#)
12 [\(9th Cir. 1995\)](#).

13 As discussed above, the ALJ identified several legitimate reasons to reject Dr. Enayati’s
14 opinion as unsupported for reasons unrelated to Dr. Nawar’s contrary opinion. Moreover, the
15 ALJ explained that Dr. Nawar’s opinion was consistent with his RFC analysis, which included a
16 thorough analysis of the medical evidence. AR 22-27. Indeed, Dr. Nawar also reviewed the
17 medical evidence and concluded that he could not find “strong evidence of significant
18 pathology.” AR 230. The x-rays were “not impressive” and there was no supportive evidence
19 for Dr. Enayati’s “overly restrictive” opinion. AR 230.

20 In October 2006, State Agency physician Sadda Reddy, M.D., reviewed the recent
21 evidence in assessing Dr. Nawar’s opinion. AR 210. Dr. Reddy noted that treating notes from
22 January 2006 indicated an essentially normal examination, with no motor or sensory deficit and a
23 non-tender back. AR 210. While treatment notes from February 2006 reveal tenderness in the
24 low back, back of neck and right shoulder, notes from March 2006 indicate that Plaintiff was
25 active and in no acute distress. [Thomas v. Barnhart, 278 F.3d 947, 957 \(9th Cir. 2002\)](#) (“[t]he
26 opinions of non-treating or non-examining physicians may also serve as substantial evidence
27 when the opinions are consistent with independent clinical findings or other evidence in the
28 record.”).

1 Plaintiff suggests that the ALJ gave Dr. Nawar’s opinion significant weight not because it
2 was supported by the record, but because it was the only remaining medical opinion. Plaintiff’s
3 belief that it was not supported is based, however, on her own interpretation of the evidence and
4 it does not invalidate the ALJ’s contrary, yet supported, conclusion. [Magallanes v. Bowen, 881](#)
5 [F.2d 747, 750 \(9th Cir. 1989\).](#)

6 The ALJ’s analysis of the opinions relating to Plaintiff’s physical impairments was
7 supported by substantial evidence and free of legal error.

8 *Plaintiff’s Mental RFC*

9 In finding Plaintiff capable of performing simple, repetitive tasks, maintain attention,
10 concentration, persistence and pace, adapt to usual changes in the work setting, adhere to safety
11 rules and relate and interact with others, the ALJ gave little weight to Dr. Hirokawa, the
12 examining physician, and Dr. Fang, Plaintiff’s treating source. AR 20, 27. Both Dr. Hirokawa
13 and Dr. Fang assigned mental limitations that would have prevented work. Instead, the ALJ
14 “gave weight” to the opinion of State Agency physician Dr. Murillo, which he found to be
15 consistent with his analysis of the evidence.

16 The ALJ first explained that he rejected Dr. Hirokawa’s opinion because it rested mainly
17 on Plaintiff’s subjective complaints. AR 27. The Court has found, however, that the ALJ did not
18 properly reject Plaintiff’s subjective complaints and the Court therefore cannot reject Dr.
19 Hirokawa’s opinion on this basis.

20 The ALJ next explains that his opinion was “somewhat internally contradictory.” AR 27.
21 For example, although Dr. Hirokawa believes that Plaintiff has a “fair” ability to understand and
22 remember very short and simple instructions, Plaintiff was able to perform a simple two step
23 command. AR 27, 147-148. The Court questions, though, whether this is actually inconsistent.
24 Dr. Hirokawa also believes that Plaintiff has a poor ability to maintain attention and
25 concentration, though he found that Plaintiff’s concentration for conversation was adequate
26 during the examination. AR 27, 147-148. The Court also questions whether concentration
27 sufficient to converse during an examination translates into the ability to maintain attention and
28 concentration throughout the workday.

1 Based on the above, the Court finds that the ALJ did not set forth specific and legitimate
2 reasons to reject Dr. Hirokawa’s opinion.

3 The ALJ next explained why he rejected Dr. Fang’s severe restrictions. He first noted
4 that Dr. Fang did not provide any treatment notes to support his opinions. AR 27. In fact,
5 although Dr. Fang stated that he treated Plaintiff 1 to 2 times per month since October 2005, the
6 record contained only an initial mental health assessment performed by Dr. Fang in March 2006.
7 AR 240-243. Plaintiff suggests that the ALJ should have requested Dr. Fang’s records. At the
8 very least, given the importance of a treating source’s opinion, the ALJ should have at least
9 inquired about the records at the hearing prior to using it as a basis for rejecting the opinion.

10 The ALJ next notes that Plaintiff’s treating care provider, rather than mental health,
11 prescribed her medications. AR 27. Plaintiff argues that this is improper, as Dr. Fang is a
12 psychologist and cannot prescribe medications. Regardless of whether Dr. Fang can or cannot
13 prescribe medications, he specifically states in March 2006 that Plaintiff was taking medications
14 prescribed by a psychiatrist. AR 241. He also states in July 2007 that Plaintiff’s medications
15 were prescribed by both a psychiatrist and a family doctor. AR 287. It was therefore incorrect
16 for the ALJ to suggest that Plaintiff’s mental impairments were somehow less severe because she
17 received her medications from a general practitioner.

18 The ALJ also explains that Dr. Fang’s limitations “appear to be contrary” to Plaintiff’s
19 own admitted level of daily functioning. AR 27. For example, earlier in his opinion, the ALJ
20 cited Plaintiff’s testimony, both at the hearing and in the function report, that she could dust, do
21 dishes, perform very light chores, attend church weekly and read the Bible with her children. AR
22 26. The ALJ also observed that Plaintiff was able to pay attention during the hearing. AR 26-27.
23 As discussed earlier in this decision, the Court questions whether these activities are sufficiently
24 “contrary” to Dr. Fang’s limitations.

25 Finally, elsewhere in his opinion, the ALJ explains that despite Dr. Fang’s statement that
26 Plaintiff has had multiple episodes of decompensation, he does not identify what events he refers
27 to and there is nothing in the record showing emergency medical treatment. AR 27.

1 Given the importance of the treating source’s opinion and the ALJ’s numerous errors in
2 his analysis, the Court cannot conclude that the ALJ’s analysis of Dr. Fang’s opinion was
3 supported by substantial evidence. As a result, the Court cannot determine whether the ALJ
4 properly adopted State Agency physician Dr. Murillo’s opinion.

5 Based on the above, the Court finds that the ALJ’s analysis of the medical evidence
6 relating to Plaintiff’s mental impairment was not supported by substantial evidence or free of
7 legal error.

8 C. Lay Witness Testimony

9 Plaintiff next contends that the ALJ failed to properly consider the statement of her
10 husband, Chao Lor.

11 “In determining whether a claimant is disabled, an ALJ must consider lay witness
12 testimony concerning a claimant’s ability to work.” [Bruce v. Astrue, 557 F.3d 1113 \(9th Cir.](#)
13 [2009\)](#) (citing [Stout v. Comm’r, 454 F.3d 1050, 1053 \(9th Cir.2006\)](#)); see also [20 C.F.R. §§](#)
14 [404.1513\(d\)\(4\), \(e\)](#). Such testimony is competent evidence and “cannot be disregarded without
15 comment.” *Id.* (citing [Nguyen v. Chater, 100 F.3d 1462, 1467 \(9th Cir.1996\)](#)). If an ALJ
16 disregards the testimony of a lay witness, the ALJ must provide reasons that are germane to each
17 witness. Further, the reasons “germane to each witness” must be specific. [Stout, 454 F.3d at](#)
18 [1054](#) (explaining that “the ALJ, not the district court, is required to provide specific reasons for
19 rejecting lay testimony”).

20 The ALJ explained that Mr. Lor’s Third Party Report was very similar to Plaintiff’s
21 testimony. He rejected the report, however, because (1) Mr. Lor had a financial advantage to
22 establish his wife’s disability; and (2) it was unsupported by a bulk of the record. AR 26.

23 Plaintiff argues that the ALJ’s rejection of Mr. Lor’s testimony on the basis that he is
24 financially interested is improper. Plaintiff is correct and such rejections are contrary to recent
25 Ninth Circuit case law. Generally, the fact that a lay witness is a family member is not grounds
26 for rejecting the testimony absent specific evidence of bias. [Valentine v. Comm’r of Soc. Sec.](#)
27 [Admin., 574 F.3d 685, 694 \(9th Cir.2009\)](#). The ALJ cites no such specific evidence here.

1 The ALJ also rejects Mr. Lor’s testimony because it was almost identical to Plaintiff’s
2 testimony. “Her husband’s report almost mirrors her report and was completed on the same day
3 and likely the same time.” AR 26. However, as this Court has invalidated the ALJ’s analysis of
4 Plaintiff’s subjective complaints, the ALJ cannot rely on this to reject Mr. Lor’s complaints.

5 Finally, the ALJ found that Mr. Lor’s statements were unsupported by the record. Based
6 on the Court’s finding that the ALJ did not properly analyze a large portion of the evidence, the
7 Court cannot find that the ALJ’s statement was supported by substantial evidence.

8 The ALJ’s treatment of Mr. Lor’s testimony was therefore not supported by substantial
9 evidence or free of legal error.

10 D. Conflict with Dictionary of Occupational Titles

11 Plaintiff next contends that the ALJ erred in relying on the VE’s testimony because he
12 failed to confirm that the testimony complied with the Dictionary of Occupational Titles
13 (“DOT”).

14 The ALJ must determine whether the positions cited by the VE are consistent with the
15 DOT. The ALJ must then determine whether the VE’s explanation for the conflict is reasonable
16 and whether there exists a basis for accepting the VE’s testimony over the information contained
17 in the DOT. [Massachi v. Astrue, 486 F.3d 1149, 1153 \(9th Cir. 2007\)](#) (citing SSR 00-4p).

18 Where a claimant is illiterate, the ALJ must “definitively explain the deviation.” See [Pinto v.](#)
19 [Massanari, 249 F.3d 840, 847 \(9th Cir. 2001\)](#). In *Pinto*, the Ninth Circuit explained:

20 The ability to communicate is an important skill to be considered when
21 determining what jobs are available to a claimant. Illiteracy seriously impacts an
22 individual’s ability to perform work-related functions such as understanding and
23 following instructions, communicating in the workplace, and responding appropriately to
24 supervision. These are all factors that Social Security Ruling No. 96-8p requires an ALJ
25 to consider when determining whether a claimant has the residual functional capacity to
26 perform past relevant work. **Here the ALJ, although noting Pinto’s limitation in both
27 his findings of fact and hypothetical to the vocational expert, failed to explain how
28 this limitation related to his finding that Pinto could perform her past relevant work
as generally performed.** See SSR 82-62.

Id. at 846-847 (emphasis added).

Plaintiff’s argument is based on the language requirements for the three positions
identified. Each has a Language Level of 1, which requires the ability to recognize 2,500 words,

1 read at a rate of 95-120 words per minute and speak simple sentences. Based on the ALJ's
2 finding that Plaintiff is illiterate and cannot communicate in English, Plaintiff contends that there
3 was an unexplained conflict.

4 The Court agrees. Although the ALJ states in his decision that the VE's testimony is
5 consistent with the DOT, there is absolutely no discussion of the conflict at the hearing. AR 28.
6 The ALJ did not determine whether a conflict existed, nor did he request an explanation for the
7 conflict. Where the ALJ fails to ask the VE if the positions are consistent with the DOT, the
8 Court is unable to determine whether substantial evidence supports the ALJ's finding at step five.
9 [Massachi, 486 F.3d at 1153.](#)

10 Defendant urges the Court to uphold the ALJ's finding because the result would not have
11 changed based on the application of the Medical Vocational Guidelines. The Court declines to
12 undertake such an analysis where the ALJ specifically found that Plaintiff's ability to perform the
13 full range of work was impeded by additional limitations. AR 35. [Desrosiers v. Secretary of](#)
14 [Housing and Health Services, 846 F.2d 573, 577 \(9th Cir. 1988\).](#)

15 Accordingly, the ALJ's finding at step five is not supported by substantial evidence and is
16 not free of legal error.

17 E. Complete Hypothetical

18 Finally, Plaintiff contends that the ALJ failed to propound a complete hypothetical
19 because his RFC failed to include accommodations related to the step two finding. Specifically,
20 Plaintiff argues that the RFC failed to take into account the ALJ's determination that Plaintiff
21 had moderate limitations in social functioning and moderate limitations in concentration,
22 persistence and pace.

23 Plaintiff argues that by definition, a "severe" impairment causes significant limitation and
24 must therefore impact the RFC finding. The Ninth Circuit has flatly rejected this argument,
25 however. In [Bray v. Comm'r Soc. Sec., 554 F.3d 1219 \(9th Cir. 2009\)](#), the plaintiff made a
26 similar argument, contending that a finding at step two that her adjustment disorder was severe
27 required a corresponding limitation in her RFC. The Court rejected the argument, stating, "Bray
28 offers no authority to support the proposition that a severe mental impairment must correspond to

1 limitations on a claimant’s ability to perform basic work activities.” [Bray, 554 F.3d at 1128-](#)
2 [1129](#).

3 Moreover, the RFC included a finding that Plaintiff could perform simple, repetitive
4 tasks, which takes into consideration a moderate limitation in concentration, persistence and
5 pace. *Stubbs-Danielson v. Astrue*, [539 F.3d 1169, 1174 \(9th Cir. 2008\)](#) (an ALJ’s assessment of a
6 claimant adequately captures restrictions related to concentration, persistence, or pace where the
7 assessment is consistent with restrictions identified in the medical testimony).

8 The ALJ’s hypothetical, only insofar as it did not include limitations based on the ALJ’s
9 moderate findings at step two, was supported by substantial evidence and free of legal error.

10 F. Remand

11 Section 405(g) of Title 42 of the United States Code provides: “the court shall have the
12 power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying,
13 or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.”
14 In social security cases, the decision to remand to the Commissioner for further proceedings or
15 simply to award benefits is within the discretion of the court. [McAllister v. Sullivan, 888 F.2d](#)
16 [599, 603 \(9th Cir. 1989\)](#). “If additional proceedings can remedy defects in the original
17 administrative proceedings, a social security case should be remanded. Where, however, a
18 rehearing would simply delay receipt of benefits, reversal and an award of benefits is
19 appropriate.” *Id.* (citation omitted); *see also Varney v. Sec. of Health & Human Serv., 859 F.2d*
20 [1396, 1399 \(9th Cir.1988\)](#) (“Generally, we direct the award of benefits in cases where no useful
21 purpose would be served by further administrative proceedings, or where the record has been
22 thoroughly developed.”).

23 Here, the ALJ’s failure to properly analyze Plaintiff’s subjective complaints impacted the
24 ALJ’s overall decision. In remanding this action, the Court is *not* suggesting that Plaintiff should
25 have been found disabled. On remand, the ALJ should properly analyze Plaintiff’s subjective
26 complaints and conduct further proceedings, if necessary. The ALJ should also analyze the
27 medical evidence and lay witness testimony in accordance with this decision. Finally, the ALJ
28 should ensure that the step four and five findings are supported and consistent with the DOT.

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RECOMMENDATION

Based on the foregoing, the Court finds that the ALJ’s decision is not supported by substantial evidence and is not based on proper legal standards. Accordingly, the Court RECOMMENDS that Plaintiff’s appeal from the administrative decision of the Commissioner of Social Security be GRANTED and that JUDGMENT be entered for Plaintiff Pao Mee Xiong and against Defendant Michael J. Astrue.

This Findings and Recommendation will be submitted to the Honorable Anthony W. Ishii pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within thirty (30) days after being served with this Findings and Recommendation, the parties may file written objections with the court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

IT IS SO ORDERED.

Dated: August 1, 2011

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE