

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARSHA E. MORRIS,

CASE NO. 1:10-cv-01365-SMS

Plaintiff,

v.

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

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

\_\_\_\_\_/

Plaintiff Marsha Morris, by her attorneys, Frailing, Rockwell, Kelly & Duarte, seeks judicial review of the 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. Following review of the record as a whole and applicable law, this Court affirms the agency’s determination to deny benefits to Plaintiff.

**I. Administrative Record**

**A. Procedural History**

On April 5, 2007, Plaintiff filed for disability insurance benefits, alleging disability beginning January 1, 2006. Her claim was denied initially on August 9, 2007, and upon reconsideration on February 8, 2008. On April 2, 2008, Plaintiff timely requested an administrative hearing. Plaintiff appeared and testified at a hearing on September 1, 2009. On

1 January 11, 2010, Administrative Law Judge Daniel G. Heely denied Plaintiff's application.  
2 Plaintiff appealed to the Administrative Council, which denied her request for review. On July  
3 28, 2010, Plaintiff filed her District Court complaint.

4 **B. Agency Record**

5 Following completion of high school, Plaintiff (born October 1, 1944) completed two  
6 years at Modesto Junior College and worked as a legal secretary for Madera County from 1966  
7 until she retired in 1998. Thereafter, she managed a video rental store until it closed on March 31,  
8 2006. She was not employed thereafter.

9 Plaintiff testified that she was no longer able to work because of severe varicose veins and  
10 "migraine-type headaches." Her ailments included clinical depression, agoraphobia, and  
11 obsessive compulsive disorder. She represented herself as suicidal and schizophrenic. She took  
12 Paxil, which kept her depression "at a tolerable level," and the generic equivalent of Inderal.  
13 Plaintiff last saw a psychologist or other mental health doctor in 1997.

14 Plaintiff, who never married and had no children, lived with 12 cats. Her only hobbies  
15 were watching television and putting around the yard, trimming bushes or raking leaves. She  
16 did as little housework as was necessary, attributing her disinterest in cleaning to her depression.  
17 Nonetheless, she reported on her adult function report that she watched television, read, ate,  
18 reviewed her mail, paid her bills, cared for her cats, dumped garage, watered the lawn, worked in  
19 the yard, talked on the phone, cleaned house, did her own laundry, went shopping, and ran  
20 errands. Plaintiff did volunteer office work for her church. She drove to church and to the store.

21 Because Plaintiff sometimes had difficulty sleeping, she had developed irregular sleep  
22 habits, sleeping at varying times for varying durations.

23 In a third-party adult function report, Plaintiff's long-time friend, E. Joyce Bell, reported  
24 that Plaintiff took care of her own home, her finances, and personal hygiene, and was able to cook  
25 for herself. Bell commented that, had the video-store owner not been a friend, Plaintiff would not  
26 have been able to keep that job because she was frequently tardy and often missed work due to  
27 illness.

28 ///

1 The Psychiatric Medical group treated Plaintiff's depression in the 1980's and again in the  
2 late 1990's. On August 1, 1997, M.J. Hetnal, M.D., diagnosed:

3 Axis I: Major depression of recurrent type.  
4 Dysthymia.  
To rule out obsessive compulsive disorder.

5 Axis II: Deferred.

6 Axis III: Moderate obesity and headaches.

7 Axis [IV]: Moderate.

8 Axis V: 55-60.

9 AR 185.<sup>1</sup>

10 Hetnal commented that Plaintiff was doing better since she was off work and taking Paxil.  
11 Hetnal referred Plaintiff for individual therapy. (The record includes no evidence that Plaintiff  
12 ever sought or received therapy.)

13 Plaintiff received medical care from Kaiser Permanente physicians from November 9,  
14 2004, through May 19, 2009. Diagnoses included depression, ventricular premature beats, uterine  
15 fibroid, varicose veins, restless leg syndrome, lumbar strain, and fear of heights. Prescriptions  
16 included Paxil and Inderil. Plaintiff's physician, James Stanton, M.D., opined that because of her  
17 back pain, she could frequently lift up to ten pounds, occasionally lift up to twenty pounds, and  
18 lift twenty to fifty pounds somewhere between occasionally and never. She could frequently carry  
19 up to ten pounds, occasionally carry up to twenty pounds, and never carry more than twenty  
20 pounds. In an eight-hour work day, Plaintiff could sit four hours, stand two hours, and walk two  
21 hours. Stanton opined that Plaintiff's postural activities were limited by her fear of heights. She  
22 could occasionally reach, handle, feel, and push or pull, and frequently hear and speak. Heights,

---

24 <sup>1</sup> The Global Assessment of Functioning (GAF) scale may be used to report an individual's overall  
25 functioning on Axis V of the diagnosis. American Psychiatric Association, Diagnostic and Statistical Manual of  
26 Mental Disorders at 32 (4<sup>th</sup> ed., Text Revision 2000) ("DSM IV TR"). It considers "psychological, social, and  
27 occupational functioning on a hypothetical continuum of mental health-illness," excluding "impairment in  
functioning due to physical (or environmental) limitations." *Id.* at 34. The first description in the range indicates  
symptom severity; the second, level of functioning. *Id.* at 32. In the case of discordant symptom and functioning  
scores, the final GAF rating always reflects the worse of the ratings. *Id.* at 33.

28 GAF 55-60 is top half of the range GAF 51-60, which indicates "Moderate symptoms (e.g., flat affect and  
circumstantial speech, occasional panic attack) OR moderate difficulty is social, occupational, or school functioning  
(e.g., no friends, unable to keep a job)." *Id.* at 34.

1 temperature extremes, and dust, fumes, odors and smoke were limited. Because of her  
2 depression, Plaintiff did not tolerate stressful situations.

3 On July 2, 2007, Kamyar Madani, M.D. provided an internal medicine evaluation as an  
4 agency consultant. The doctor diagnosed depression, varicose veins, and migraine headaches.  
5 Madani opined that Plaintiff could walk and stand about six hours of an eight-hour workday, with  
6 some slight limitation from, left knee pain, decreased range of motion, and varicose veins. Sitting  
7 was not limited. She did not need any assistive device. Because of her body size and overall  
8 strength she could lift fifty pounds occasionally and 25 pounds frequently. Her varicosities  
9 limited her ability to bend, stoop, and crouch. Plaintiff had no manipulative, visual,  
10 communicative, or environmental limitations.

11 Agency consultant Philip M. Cushman, Ph.D., provided Plaintiff's psychological  
12 evaluation. Although she appeared to be of average to high-average intelligence, her refusal to  
13 follow Cushman's directions irritated him. Her snide comments, tone and manner tried his  
14 patience. Her irritability and focus on her many medical problems made the interview difficult.

15 Cushman administered Trails A and B, Bender Gestalt II, WAIS-III, and Wechsler  
16 Memory Scale. The WAIS-III revealed high-average visual motor abilities but a relative  
17 weakness in arithmetic. Although Plaintiff demonstrated an ability to do multiple digit addition  
18 and subtraction as well as multiplication and division, she made many errors, indicated her dislike  
19 for the task, and requested paper and pencil with which to do the calculations. Her highest scores  
20 were in simple repetitive tasks measuring visual-motor abilities. The Trails results suggested that  
21 Plaintiff had normal thinking speed but did poorly on more complex tasks that she considered  
22 trivial. The Bender test revealed good problem solving abilities. Her memory scores were  
23 slightly lower than her intelligence scores but indicated no deficits. Cushman diagnosed:

24	Axis I:	300.4 296.3	Dysthymic Disorder, early onset Major depressive disorder, moderate severity
25			
26	Axis II:	R/O 301.4	Obsessive-Compulsive Personality Disorder
27	Axis III:		No diagnosis

28 ///

1 Axis IV: Psychosocial stressors: Unemployment, limited family support

2 Axis V: GAF: 55

3 AR 230.

4 Cushman recommended that Plaintiff seek more aggressive treatment, including  
5 psychotherapy and medication. He summarized:

6 Ms. Morris does appear capable of performing detailed, complex, simple, and  
7 repetitive tasks in a vocational setting. She will, however, have difficulties with  
8 regular attendance and consistent participation because of mood and interpersonal  
9 issues. She is capable of working a normal workday and work week, but will have  
10 difficulties maintaining this for any significant length of time. Special or  
11 additional supervision would be needed in the area of helping her manage  
12 interpersonal relationships. She is capable of following simple verbal instructions  
13 from supervisors, and even complex instructions. She will most likely run into  
14 difficulties getting along with supervisors, coworkers, and the general public. She  
15 will have difficulties dealing with the usual stressors encountered in a competitive  
16 work environment.

12 AR 231.

13 On July 19, 2007, E.B. Aquino-Caro completed the psychiatric review technique. She  
14 opined that Plaintiff demonstrated affective and anxiety-related disorders, specifically depression  
15 and Post Traumatic Stress Disorder. Aquino-Caro opined that Plaintiff demonstrated no  
16 restriction of activities of daily living and no repeated episodes of decompensation. She had mild  
17 difficulties in maintaining concentration, persistence, and pace, and mild difficulties in  
18 maintaining social functioning. On the Mental Residual Functional Capacity Assessment,  
19 Aquino-Caro concluded that Plaintiff had no significant limitations except for moderate  
20 limitations in the ability to understand, remember, and carry out detailed instructions.

21 On July 31, 2007, medical consultant W.G. Jackson opined that Plaintiff could  
22 occasionally lift fifty pounds and frequently lift twenty-five pounds; could stand, walk, and sit for  
23 six hours in an eight-hour work day; had unlimited ability to push or pull; could frequently climb,  
24 balance, and stoop; could occasionally kneel, crouch, and crawl. Plaintiff demonstrated no other  
25 limitations.

26 **II. Legal Standards**

27 To qualify for benefits, a claimant must establish that he or she is unable to engage in  
28 substantial gainful activity because of a medically determinable physical or mental impairment

1 which has lasted or can be expected to last for a continuous period of not less than twelve months.  
2 42 U.S.C. § 1382c (a)(3)(A). A claimant must demonstrate a physical or mental impairment of  
3 such severity that he or she is not only unable to do his or her previous work, but cannot,  
4 considering age, education, and work experience, engage in any other substantial gainful work  
5 existing in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9<sup>th</sup> Cir. 1989).

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

- 10 Step one: Is the claimant engaging in substantial gainful activity? If so, the  
11 claimant is found not disabled. If not, proceed to step two.
- 12 Step two: Does the claimant have a “severe” impairment? If so, proceed to  
13 step three. If not, then a finding of not disabled is appropriate.
- 14 Step three: Does the claimant’s impairment or combination of impairments  
15 meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,  
16 App. 1? If so, the claimant is automatically determined disabled. If  
17 not, proceed to step four.
- 18 Step four: Is the claimant capable of performing his past work? If so, the  
19 claimant is not disabled. If not, proceed to step five.
- 20 Step five: Does the claimant have the residual functional capacity to perform  
21 any other work? If so, the claimant is not disabled. If not, the  
22 claimant is disabled.

23 *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9<sup>th</sup> Cir. 1995).

24 The ALJ found that Plaintiff had not engaged in substantial gainful activity since the  
25 alleged onset date of January 1, 2006. Her only severe impairment was varicose veins with left  
26 knee pain. Her impairment did not meet or equal the requirements of a listed impairment.

27 Plaintiff retained the residual functional capacity to perform medium work as defined in  
28 20 C.F.R. § 404.1567(c) except that she could sit, stand, or walk up to six hours in an eight hour  
work day; lift or carry up to 50 pounds occasionally and 25 pounds frequently; occasionally kneel,  
crouch or crawl; but could not work around hazards such as dangerous heights or moving  
machinery. Despite her impairment, Plaintiff was able to perform her past relevant work as a  
legal secretary or manager of a retail store.

1 **III. Scope of Review**

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

16 **IV. Severity of Mental Impairment**

17 Plaintiff claims that the ALJ erred in failing to categorize her depression as a serious  
18 impairment and that the ALJ improperly rejected the opinions of Dr. Stanton and Dr. Cushman.  
19 The Commissioner disagrees. Following a careful review of the complete record, including the  
20 hearing decision prepared by the Administrative Law Judge, the Court concludes that substantial  
21 evidence supported the ALJ’s determination the Plaintiff’s depression was not a severe  
22 impairment.

23 “An impairment or combination of impairments is not severe if it does not significantly  
24 limit your physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1521 (a). Basic  
25 work activities include:

- 26 1. Physical activities such as walking, sitting, lifting, pushing, pulling reaching,  
27 carrying, or handling;
- 28 2. Capacities for seeing, hearing, and speaking;

- 1 3. Understanding, carrying out, and remembering simple instructions;
- 2 4. Use of judgment;
- 3 5. Responding appropriately to supervision, co-workers, and usual work situations;
- 4 and
- 5 6. Dealing with changes in a routine work setting.

6 20 C.F.R. § 404.1521 (b).

7 Judge Heely carefully considered Plaintiff's depression before determining it to be a  
8 nonsevere impairment. Evaluating Plaintiff's adult function report (AR 126-134), he noted that  
9 although Plaintiff characterized her depression as impeding her motivation and ability to handle  
10 stress, she reported that she had no difficulty paying attention or following written or spoken  
11 instructions. She got along "fine" with authority figures and had never been fired for an inability  
12 to get along with others.

13 The ALJ rejected Dr. Cushman's opinion that Plaintiff could not manage interpersonal  
14 relationships or deal with the stress of a competitive work environment, criticizing Cushman's  
15 over-reliance on Plaintiff's subjective complaints. The ALJ also rejected Dr. Stanton's opinion,  
16 finding that Stanton simply attributed Plaintiff's impaired abilities to deal with stress and to  
17 follow complex instructions to her depression and inability to tolerate stressful situations. Noting  
18 that Stanton was a family practitioner rather than a mental health specialist, the ALJ emphasized  
19 that Plaintiff's depression was not reported to have worsened, her medication remained the same,  
20 and Stanton had not referred Plaintiff for mental health services.

21 Physicians render two types of opinions in disability cases: (1) medical, clinical opinions  
22 regarding the nature of the claimant's impairments and (2) opinions on the claimant's ability to  
23 perform work. *See Reddick v. Chater*, 157 F.3d 715, 725 (9<sup>th</sup> Cir. 1998). An ALJ is "not bound  
24 by an expert medical opinion on the ultimate question of disability." *Tomasetti v. Astrue*, 533  
25 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008); S. S. R. 96-5p.

26 Three types of physicians may offer opinions in social security cases: "(1) those who  
27 treat[ed] the claimant (treating physicians); (2) those who examine[d] but d[id] not treat the  
28 claimant (examining physicians); and (3) those who neither examine[d] nor treat[ed] the claimant



1 (nonexamining physicians).” *Lester*, 81 F.3d at 830. A treating physician’s opinion is generally  
2 entitled to more weight than the opinion of a doctor who examined but did not treat the claimant,  
3 and an examining physician’s opinion is generally entitled to more weight than that of a non-  
4 examining physician. *Id.* The Social Security Administration favors the opinion of a treating  
5 physician over that of nontreating physicians. 20 C.F.R. § 404.1527; *Orn v. Astrue*, 495 F.3d 625,  
6 631 (9<sup>th</sup> Cir. 2007). A treating physician is employed to cure and has a greater opportunity to  
7 know and observe the patient. *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9<sup>th</sup> Cir. 1987).  
8 Nonetheless, a treating physician’s opinion is not conclusive as to either a physical condition or  
9 the ultimate issue of disability. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989).

10         Once a court has considered the source of a medical opinion, it considers whether the  
11 Commissioner properly rejected a medical opinion by assessing whether (1) contradictory  
12 opinions are in the record; and (2) clinical findings support the opinions. The ALJ may reject the  
13 uncontradicted opinion of a treating or examining medical physician only for clear and convincing  
14 reasons supported by substantial evidence in the record. *Lester*, 81 F.3d at 831. Even though the  
15 treating physician’s opinion is generally given greater weight, when it is contradicted by an  
16 examining physician’s opinion that is supported by different clinical findings the ALJ may resolve  
17 the conflict. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995). The ALJ must set forth a  
18 detailed and thorough factual summary, address conflicting clinical evidence, interpret the  
19 evidence and make a finding. *Magallanes*, 881 F.2d at 751-55. The ALJ need not give weight to  
20 a conclusory opinion supported by minimal clinical findings. *Meanel v. Apfel*, 172 F.3d 1111,  
21 1113 (9<sup>th</sup> Cir. 1999); *Magallanes*, 881 F.2d at 751. The ALJ must tie the objective factors or the  
22 record as a whole to the opinions and findings that he or she rejects. *Embrey v. Bowen*, 849 F.2d  
23 418, 422 (9<sup>th</sup> Cir. 1988).

24         Judge Heely noted that Plaintiff’s only mental health treatment was an antidepressant  
25 (Paxil) first prescribed over ten years ago. Plaintiff testified that the Paxil kept her depression at a  
26 “tolerable level,” and told Dr. Chang that she was stable on Paxil (AR 289). Despite her  
27 depression, Plaintiff had managed a video store, a position that required public contact. She  
28 stopped working there when the store closed, not because she was too depressed to work. The

1 ALJ also noted that Plaintiff fully managed her activities of daily living, caring for her cats,  
2 reading, paying her bills, working in the yard, doing household chores, talking on the phone,  
3 shopping, driving, cooking, doing laundry, attending church and Bible study, volunteering in the  
4 church office, and going out to dinner.

5 The ALJ's role is to resolve any conflict between the opinions of treating and examining  
6 physicians. *Andrews*, 53 F.3d at 1041. The ALJ accomplishes this by setting forth a detailed and  
7 thorough factual summary, addressing conflicting clinical evidence, interpreting the evidence, and  
8 making a finding. *Magallanes*, 881 F.2d at 751-55. The ALJ must tie the objective factors or the  
9 record as a whole to the opinions and findings that he or she rejects. *Embrey*, 849 F.2d at 422.  
10 Because the evidence as a whole strongly contradicted Stanton's unsupported opinion and  
11 Cushman's impression following a single examination, Judge Heely properly rejected both  
12 opinions. His opinion was carefully analyzed and supported by substantial evidence.

13 **VI. Conclusion and Order**

14 For the reasons discussed above, this Court hereby AFFIRMS the agency's determination  
15 to deny Plaintiff disability benefits. The Clerk of Court is directed to enter judgment for  
16 Defendant Michael J. Astrue, Commissioner of Social Security.

17  
18 IT IS SO ORDERED.

19 **Dated: December 29, 2011**

**/s/ Sandra M. Snyder**  
**UNITED STATES MAGISTRATE JUDGE**

20  
21  
22  
23  
24  
25  
26  
27  
28