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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JEANNE C. COLE,

 Plaintiff,

 v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

 Defendant.

1:15-cv-928-GSA

**ORDER REGARDING PLAINTIFF’S
SOCIAL SECURITY COMPLAINT**

(Doc. 13)

I. INTRODUCTION

Plaintiff Jeanne C. Cole (“Plaintiff”) seeks judicial review of the final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for Disability Insurance Benefits (“DIB”) benefits pursuant to Title II of the Social Security Act. (Docs. 1 and 13). The Commissioner filed an opposition (Doc. 18). Plaintiff filed a reply. (Doc. 22). The matter is currently before the Court on the parties’ briefs which were submitted without oral argument to the Honorable Gary S. Austin, United States Magistrate Judge.² After reviewing

¹ Pursuant to Fed. R. Civ. Pro. 25(d), Nancy A. Berryhill shall be substituted in for Carolyn W. Colvin, as Nancy A. Berryhill is now the acting Commissioner of Social Security.

² The parties have consented to magistrate judge jurisdiction. (Docs. 8 and 10).

1 the administrative record and the pleadings, the Court finds the ALJ’s decision is supported by
2 substantial evidence and denies Plaintiff’s appeal.

3 **II. BACKGROUND AND PRIOR PROCEEDINGS³**

4 Plaintiff filed an application for DIB on April 8, 2011, alleging a disability beginning December
5 20, 2006. AR 34; 148-152. Her application was denied initially and on reconsideration on
6 November 14, 2011. AR 34. Plaintiff requested a hearing before an administrative law judge
7 (“ALJ”). AR 22. ALJ Trevor Skarda conducted a hearing on December 10, 2012 (AR 56-87),
8 and published an unfavorable decision on January 31, 2013. AR 34-48. Plaintiff filed an appeal
9 and the Appeals Council denied the request for review on July 24, 2104, rendering the order the
10 final decision of the Commissioner. AR 1; 18-20.

11 **III. ISSUES FOR JUDICIAL REVIEW**

12 Plaintiff challenges the ALJ’s non-disability determination. She alleges the ALJ: (1)
13 improperly weighed the medical opinions in her case. Specifically, she contends that the ALJ did
14 not properly consider the opinion of Rhonda Johnson, a certified physician’s assistant who treated
15 her, and Dr. Patel, her treating pulmonologist’s opinions, as well as several other doctors’
16 opinions related to her gastrointestinal condition; (2) failed to discuss whether fibromyalgia met
17 or equaled a listing impairment; (3) erroneously rejected Plaintiff’s pain and fatigue testimony;
18 and (4) improperly relied on the vocational expert’s testimony at step five resulting in erroneously
19 concluding that Plaintiff could work as an addresser, a lens inserter, and a touch up screener.⁴
20 Plaintiff argues that the case be remanded for a calculation of benefits, or in the alternative, that
21 the case be remanded for further proceedings. (Doc. 13, pgs. 6-28; Doc. 22, pgs. 3-8). The
22

23 ³ References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

24 ⁴ In the opening brief Plaintiff also makes a brief argument that the ALJ improperly used evidence (Dr. Bolschwing’s
25 evaluation) from a prior application and that remand is required. (Doc. 13, pg. 6:25-27; pg.8:1-6). Plaintiff’s
26 argument consists of three sentences with incomplete case citations. The Court is unable to understand the argument
27 given Plaintiff’s lack of specificity and analysis and considers that argument waived. See *Indep. Towers of*
28 *Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (“Our circuit has repeatedly admonished that we
cannot manufacture arguments for an appellant and therefore we will not consider any claims that were not actually
argued in appellant’s opening brief. Rather, we review only issues which are argued specifically and distinctly in a
party’s opening brief.”); *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 872 (9th Cir. 2001) *aff’d sub nom. Nevada*
Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003) (“We therefore cannot grant relief [on this] argument, because he
has failed to develop the record and his argument sufficiently to render it capable of assessment by this court.”).

1 Commissioner opposes each of these arguments and contends that the ALJ's evaluation of the
2 medical evidence, his credibility determinations, and his analysis at step five were proper and are
3 supported by substantial evidence. (Doc. 17, pgs. 6-16).

4 **IV. THE MEDICAL RECORD**

5 *A. Summary of the Medical Treatment Notes*

6 Plaintiff complained of excessive daytime sleepiness. During a consultative examination
7 on August 1, 2007, pulmonologist Kirit Patel, M.D. diagnosed her with obstructive sleep apnea,
8 fibromyalgia, gastroesophageal reflux, depression, and mild exogenous obesity. AR 434-435. A
9 sleep study revealed that Plaintiff had three hundred eighty three minutes of total sleep time with
10 normal sleep efficiency. AR 436. Plaintiff was advised that she could undergo nasal CPAP
11 therapy and should consider weight loss, avoidance of pre-sleep alcohol intake, and avoidance of
12 supine sleeping position. AR 436.

13 Plaintiff began seeing Physician's Assistant ("PA") Rhonda Johnson at the Central Valley
14 Pain Management and Wellness Clinic in September 2007 for a re-evaluation of cervical and low
15 back pain, anxiety, and myofascial pain syndrome. She reported a pain rating of seven out of ten
16 and a depression rating of six to seven out of ten. AR 387. Plaintiff was prescribed Duragesic (a
17 fentanyl transdermal system to treat pain), Norco (for pain) and Omeprazole (for acid reflux). AR
18 387.

19 She continued to see PA Johnson in 2008 and 2009 for monitoring and adjustment of her
20 medications. During this time she complained of pain, fatigue, and headaches. AR 389-412. In
21 July 2008, Plaintiff was doing well with medications despite ongoing pain throughout her body,
22 muscle weakness, and swelling. AR 387; 393. The dosage of her Duragesic patch was reduced in
23 early August 2008 (AR 391) because of concerns that she was over medicated (AR 389-390), and
24 Plaintiff was prescribed Avinza for pain. AR 397. Plaintiff's reported pain control was good on
25 the new medications. AR 391. Later in August 2008, she presented with headaches and reported
26 soreness after working in her garden, but continued doing well on the decreased dosage of
27 Duragesic. AR 393. In October 2008, Plaintiff reported taking Xanax for anxiety and Lexapro in
28 addition to Duragesic. AR 395-396. Plaintiff requested that the Duragesic patch be discontinued

1 and another medication be substituted in its place. AR 395. Plaintiff was prescribed Valium. AR
2 396. The Duragesic dosage was reduced further and the Xanax was discontinued. AR 396. In
3 November 2008, it was reported that Plaintiff was taking Ambien (for sleep), Lexapro (for
4 depression), Zanaflex (for acid reflux), Trazodone (for pain), Lexapro (for depression), and Norco
5 (for pain). Plaintiff's prescriptions for Avinza and Valium were also renewed. AR 397. She
6 complained of fatigue in November and December. AR 397; 399.

7 In February 2009, Plaintiff complained of headaches, neck pain, and lower back pain. She
8 indicated that she was doing great on her medication schedule and reported a two out of ten on
9 the pain scale. AR 401. She continued to be in school and was doing well despite having "pain all
10 over." AR 403. In April 2009, she complained of fatigue but denied insomnia. AR 403. She was
11 cleared for low impact physical education, and assessed her pain at five out of ten. AR 404.
12 Plaintiff continued to complain of headaches and pain in her neck and shoulders throughout 2009
13 reporting a three in June (AR 405), a one in September (AR 407) and a four in November (AR
14 409). She complained of insomnia, fatigue, and anxiety in September 2009. AR 407. In
15 December 2009, Plaintiff reported having her "worst headache ever" but was sure it would be
16 under control and rated her pain at an eight out of ten. AR 411.

17 In 2010, there was no significant change in Plaintiff's condition or prescriptions. AR 413-
18 425. She complained of headaches, neck and shoulder pain. AR 413; 415; 417; 419; 421. She
19 also reported she was under stress in September and October which was exacerbating her pain
20 and making her anxious. She was prescribed Xanax but did not take it unless it was absolutely
21 necessary. AR 423; 425. As of October of that year, she was "stable with her current
22 medications" and was still anxious because she was in school completing a degree in
23 archaeology. AR 425. Her reports of pain on a ten point scale in 2010 were as follows: June -
24 four (AR 413); March - three (AR 415); July - one (AR 419); September- three to four (AR 421-
25 424); October - three (AR 425). She reported fatigue only once in September. AR 421; 423.

26 In January 2011, Plaintiff presented with pain in her back, shoulder along with fatigue.
27 AR 461. She reported increased stress and requested to see a counselor. AR 461. She continued to
28 report pain, depression, anxiety and fatigue in March, May, and June 2011 reporting five, eight

1 and seven (AR 467) on a pain scale for those months respectively.

2 On June 3, 2011, Plaintiff was seen at Golden Valley Health Center for lower abdominal
3 pain that she had been experiencing for two months. AR 264. Physician's Assistant Rios referred
4 her to a gastroenterologist for suspected obstruction of a bile duct. AR 265.

5 On June 6, 2011, an abdominal sonogram performed by Dr. Kleiger indicated a
6 "constellation of findings considered highly suspicious for obstruction of the common bile duct"
7 with dilation of the "main pancreatic duct, gallbladder, and common bile duct." AR 258.

8 On June 15, 2011, Dr. Carlos Canale, M.D. a gastroenterologist, performed a consultative
9 exam and opined he did not believe Plaintiff's pain related to a common bile duct obstruction. He
10 recommended a colonoscopy and a MRI to evaluate the common bile duct more closely. AR 310-
11 311. A MRI of Plaintiff's abdomen was performed and mild intra and extrahepatic biliary ductal
12 dilatation, distal dilatation pancreatic duct, as well as rapid tapering at the level of the ampulia
13 was diagnosed. AR 283.

14 In June 28, 2011, Plaintiff returned to Central Valley Pain Management complaining of
15 headaches, neck, back, and chest pain. AR 467. She also reported lower abdominal pain and
16 requested additional pain medication that was stronger than Norco. AR 467. PA Johnson added
17 Oxycodone to Plaintiff's medications. AR 468.

18 On July 27, 2011, Plaintiff returned to see PA Johnson and presented with neck, back,
19 lower abdominal pain, chest pressure, and a headache. AR 469-470. It was noted that Plaintiff's
20 insomnia, fatigue, depression, and anxiety had worsened. AR 469. Plaintiff reported an eight on a
21 pain scale of ten and indicated that the Norco worked better to relieve her pain. PA Johnson
22 discontinued the Oxycodone and increased her Avinza, as well as reduced her Trazodone. AR
23 470.

24 On August 15, 2011, Plaintiff returned to PA Johnson complaining of migraines,
25 twitching, fatigue, achiness, blurry vision, and bruising on the inside of her hands. AR 471. She
26 also reported back, hip, shoulder, arm, feet, and back pain as a six on a pain scale of ten. PA
27 Johnson discontinued the Oxycodone, and Norco was added back into Plaintiff's prescription
28 regimen, not to be taken more than six times a day. AR 470.

1 On August 15, 2011, Dr. Isaac Faraji performed an endoscopic retrograde
2 cholangiopancreatography, sphincterotomy, and biliary stent placement. AR 313-315. On August
3 15, 2011, Plaintiff was treated at the emergency room by Dr. Truong Van Thinh and
4 hospitalized due to vomiting blood and abdominal pain. AR 292-308. Upon examination,
5 Plaintiff reported a nine out of ten on the pain scale. AR 292. Dr. Truong noted that, Plaintiff “has
6 been doing well, in her normal usual state of health,” and that apart from gastrointestinal issues,
7 the ten systems were reviewed and found to be negative.” AR 293.

8 An abdominal CAT scan was performed on August 16, 2011, which revealed
9 inhomogeneity in the head of the pancreas with fluid around the head of the pancreas with
10 probable cholelithiasis (inflammation of the gall bladder). Mild colitis was also noted. AR 305.
11 On August 17, 2011, Dr. Canale performed an esophagogastroduodenoscopy with biopsies due to
12 abdominal pain and hematemesis (vomiting blood). Gastritis was noted. AR 270-271. Following
13 those procedures, Plaintiff suffered pancreatitis. AR 296. She remained in the hospital and was
14 discharged on August 21, 2011, after she was stabilized. AR 286-287.

15 Following surgery, on August 25, 2011, Plaintiff’s presented to PA Johnson with neck and
16 bilateral shoulder pain on her left side, rating the pain four out of ten. AR 473. Her medication
17 helped decrease the pain and her physical examination was generally normal despite some
18 tenderness and pain when flexing her neck. AR 473-474. From a psychological standpoint,
19 Plaintiff presented with with normal cognition, memory, thought, mood, and affect. AR 474.

20 Plaintiff continued to be monitored by PA Johnson once every two months from October
21 2011 through September 2012. AR 475-496. She complained of headaches, insomnia and
22 fatigue; continued to have pain in her back, neck, and shoulder; and exhibited tenderness in
23 various areas. *Id.* However, it was noted during these visits that Plaintiff was ambulatory, could
24 perform self-care and was able to drive. AR 477; 479; 482; 485; 487; 489; 491; 493. At various
25 times during this period, Plaintiff was taking Trazodone (for depression), Xanax (for anxiety),
26 Norco (for pain), Abilify (for depression), Avinza (for pain) and Lexapro (for depression). AR
27 476; 480; 483; 485-486; 490; 494. Her pain fluctuated from a four to eight on a ten point scale
28 with six being the average on several visits. AR 475 (October 2011 – seven); AR 477 (Nov. 2011-

1 four); AR 479 (Jan. 2012 – six); AR 482 (Mar. 2012 – six); AR 483 (April 2012- six); AR 487
2 (May 2012 – seven); AR 489 (July 2012 – five); AR 491(August 2012 - eight). In October 2011,
3 it was noted that she had been overdoing it with household chores and requested a Toradol
4 injection. AR 475. In November 2011, she was taking Trazodone at night for sleep, was rarely
5 taking the Xanax for anxiety, and that she was going to a gym. AR 477.

6 In June 2012, Plaintiff was seen by Dr. Jaskaran S. Dhingsa, M.D. for right-sided
7 abdominal pain lasting for five days and feeling itchy all over her body. AR 449. It was noted
8 that Plaintiff exercises occasionally. AR 450. Dr. Dhingsa did not find any anomalies on physical
9 examination except for abdominal tenderness and constipation. AR 449-453. Plaintiff was
10 prescribed Miralax and Colace for constipation. AR451; 453. A comparison abdominal
11 ultrasound in June 2012 indicated persistent biliary ductal dilatation, including prominence of the
12 pancreatic and common bile duct, no cholelithiasis, and was suspicious for hepatocellular disease.
13 AR 448.

14 In June 2012, Dr. Faraji performed a consultative examination at the request of Dr.
15 Dhingsa and found Plaintiff to be well developed . . . [and] in no apparent distress, with normal
16 ranges of motion, appropriate affect and grossly normal memory. AR 455-456. Plaintiff was
17 negative for fatigue but complained of panic attacks and either sleeping too much or not enough.
18 AR 455. Dr. Faraji diagnosed Plaintiff with gastroesophageal reflux disease. AR 457.

19 Dr. Faraji saw Plaintiff again on June 27, 2012 for abdominal pain and elevated liver
20 function test (“LFT”). An endoscopic retrograde cholangiopancreatography and a change of her
21 stent was ordered. AR 459-460. An August 10, 2012, a hepatobiliary iminodiacetic acid scan
22 (“HIDA scan”) used to diagnose conditions of the gallbladder, liver and bile ducts was negative.
23 AR 454.

24 In September 2012, she returned to PA Johnson complaining of migraine headaches and
25 depression because he father was dying. She did not want additional medication but requested
26 and received a Toradol injection. A 493-494. On November 1, 2012, Plaintiff underwent surgery
27 with Dr. Greenbarg who performed a cholecystectomy (surgical removal of gallbladder) in an
28 effort to address Ms. Cole’s pain. AR 499-507. An examination of the removed gallbladder

1 revealed no gallstones but chronic cholecystitis (inflammation of the gallbladder). AR 505.

2 ***B. Summary of Medical Opinions***

3 *1. Medical Impairments*

4 a. Dr. Robert Wagner, M.D.

5 In July 2011, Robert Wagner, M.D., a consultative internist examined Plaintiff for
6 complaints of asthma and fibromyalgia with chronic fatigue. AR 368-372. Dr. Wagner reviewed
7 Plaintiff's medications and noted she was taking Oxycodone, Avinza, Lexapro, Xanax,
8 Trazodone, and Primatene pills and inhaler (for asthma). AR 369. Plaintiff complained of
9 "hurt[ing] everywhere," "memory fog," some problem sleeping, and chronic fatigue. AR 368.
10 She reported completing some household tasks, driving, shopping, having "her own activities [of]
11 daily living," and doing "some stretching exercises and light walking." AR 370. On examination,
12 Dr. Wagner found Plaintiff to be largely normal including no limitations in her range of motion,
13 and having 5/5 motor strength despite appearing somewhat tired and displaying some tenderness.
14 AR 369-371. Dr. Wagner diagnosed Plaintiff with mild asthma and fibromyalgia noting that
15 although there were minimal objective findings, Plaintiff had many of the typical trigger points
16 for fibromyalgia. AR 371. Based on that examination, Dr. Wagner opined that Plaintiff had no
17 limitations. AR 371-372.

18 b. Dr. Cochran, M.D.

19 On November 2, 2011, Barabara Cochran, M.D., a non-examining state agency physician
20 completed a physical residual functional capacity assessment of Plaintiff. AR 331; 349-356. After
21 reviewing the medical evidence she opined that Plaintiff could occasionally lift and carry twenty
22 pounds, frequently lift and carry ten pounds, and sit and stand for six hours in an eight hour day.
23 AR 350-353. Dr. Cochran found Plaintiff's statements to be only partially credible based on the
24 fact that: (1) Plaintiff alleged she sat most of the day; (2) during a medical examination she stated
25 that she was attending school, cared for her father, was independent in her activities of daily
26 living, and shopped; (3) although she alleged difficulty with lifting, bending, and standing, the
27 objective medical evidence failed to confirm any such limitations; and (4) she was cleared for
28 physical education. AR 354.

1 c. Rhonda Johnson, Certified Physician's Assistant

2 On April 17, 2012, PA Johnson completed a medical source statement. AR 442-447. Ms.
3 Johnson treated Plaintiff since September 25, 2007. AR 387. She diagnosed Plaintiff with chronic
4 neck pain, chronic lower back pain, depression, insomnia, fibromyalgia, and headaches. AR 443.
5 She noted Plaintiff had eighteen tender points and had pain ranging from six to eight on a ten
6 point scale, and fatigue ranging from five to ten on a ten point scale. AR 443. Ms. Johnson
7 determined that Plaintiff could sit, stand, and walk for a period of two hours in an eight hour work
8 day, and it would be necessary or medically recommended for her to sit continuously. AR 444.
9 She further opined that Plaintiff would not be able to stoop, push, pull, bend or kneel. AR 445.
10 She also found that Plaintiff had psychological limitations, had limited vision, and would need to
11 avoid temperature extremes, humidity, dust, and heights. AR 445. She noted that Plaintiff was
12 prescribed Norco (with no side effects), Xanax (which causes drowsiness), Ability (with no side
13 effects), Trazodone (which causes nighttime sleepiness), Lexapro (with no side effects), and
14 Avinza (no side effects). AR 445. She opined that Plaintiff's pain and fibromyalgia affects her
15 sleep, cognition, and mobility. She has more bad days than good, and suffers from fatigue and
16 depression. AR 446. Ms. Johnson opined that Plaintiff would be absent from work more than
17 three times a month. AR 447.

18 2. *Psychological Impairments*

19 a. Dr. Debrorah Von Bolschwing, Ph.D.

20 In 2007, Deborah Von Bolschwing, Ph.D., completed a psychological consultative
21 examination. AR 437. Plaintiff reported fibromyalgia and chronic fatigue syndrome, as well as
22 depression and anxiety since March 1998. AR 437-438. It was noted that although Plaintiff had
23 been taking Cymbalta for depression since 2005 and was taking Buspar for anxiety, she had never
24 attended therapy and had no psychiatric hospitalizations. AR 438. Dr. Bolschwing diagnosed
25 Plaintiff with adjustment disorder with mixed anxiety and depressed mood. AR 439. She noted
26 Plaintiff had mild difficulty maintaining attention and concentration for the duration of the
27 evaluation, but she was able to interact appropriately during the interview. The doctor opined that
28 Plaintiff's ability to interact with the public, supervisors, and coworkers appeared to be adequate.

1 No other limitations were assessed. AR 439-440.

2 b. Dr. Jacklyn Chandler, Ph.D.

3 On July 19, 2011, Dr. Jacklyn Chandler, PhD., performed a psychological consultative
4 examination. AR 45; 363-365. Plaintiff reported having depression, anxiety and chronic pain
5 since 1996. She began having panic attacks in 2007 and has been taking medications prescribed
6 by her primary care physician which helped reduce her symptoms. AR 364. She has never
7 attended therapy with a mental health professional or had psychiatric hospitalizations. AR 363-
8 364. Plaintiff appeared fatigued but was well oriented, walked with a slow gate, and was
9 unkempt. AR 364. Despite restricted mood and moderately dysphoric affect, she was able to
10 understand, remember, and carry out simple and complex instructions. She scored 28/30 on the
11 Mini Mental State Examination. AR 364-365. Dr. Chandler observed that Plaintiff had
12 significant economic problems and assessed her Global Assessment of Functioning (GAF) score
13 at 60 (indicating moderate symptoms or moderate difficulty in social, occupational or school
14 functioning). AR 371-372. She diagnosed Plaintiff with a pain disorder with both psychological
15 factors and chronic pain, and adjustment disorder with mixed anxiety and depressed mood with
16 chronic panic attacks. AR 364-365. As to work limitations, however, the doctor noted that
17 Plaintiff was able to understand, remember, carry out simple and complex instructions and she
18 appeared capable of adapting to changes in routine work settings. AR 365. Based on observations
19 of Plaintiff's behavior during the interview and her psychiatric history, the doctor opined that
20 Plaintiff's ability to interact with the public, supervisors, and coworkers would be moderately
21 impaired. AR 365.

22 c. Dr. Tomas Unger, M.D.

23 In November 2011, state agency psychiatrist Tomas Unger, M.D., reviewed
24 the medical evidence and opined that Plaintiff was mildly limited in activities of daily living and
25 maintaining concentration, persistence or pace, and moderately limited in maintaining social
26 functioning. AR 327-328. He also completed a mental residual functional capacity assessment
27 finding that Plaintiff would have only minor limitations in understanding, memory, and sustained
28 concentration and persistence. AR 329. However, the doctor noted that due to Plaintiff's

1 depressive and anxiety symptoms, she would intermittently have difficulty interacting
2 appropriately with the general public, supervisors, and coworkers but she could perform tasks on
3 a sustained basis in a work environment where she had minimal contact with the general public.
4 AR 329.

5 **V. THE DISABILITY DETERMINATION PROCESS**

6 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or she
7 is unable to engage in substantial gainful activity due to a medically determinable physical or
8 mental impairment that has lasted or can be expected to last for a continuous period of not less
9 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a
10 disability only if:

11 . . . his physical or mental impairment or impairments are of such severity that he is not only
12 unable to do his previous work, but cannot, considering his age, education, and work
13 experience, engage in any other kind of substantial gainful work which exists in the national
14 economy, regardless of whether such work exists in the immediate area in which he lives, or
whether a specific job vacancy exists for him, or whether he would be hired if he applied for
work.

15 42 U.S.C. § 1382c(a)(3)(B).

16 To achieve uniformity in the decision-making process, the Commissioner has established
17 a sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. §
18 404.1520(a). The ALJ proceeds through the steps and stops upon reaching a dispositive finding
19 that the claimant is or is not disabled. 20 C.F.R. § 404.1520(a)(4). The ALJ must consider
20 objective medical evidence and opinion testimony. 20 C.F.R. § 404.1513.

21 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in
22 substantial gainful activity during the period of alleged disability; (2) whether the claimant had
23 medically-determinable "severe" impairments; (3) whether these impairments meet or are
24 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,
25 Appendix 1; (4) whether the claimant retained the residual functional capacity ("RFC") to
26 perform his past relevant work; and (5) whether the claimant had the ability to perform other jobs
27 existing in significant numbers at the regional and national level. 20 C.F.R. § 404.1520(a)(4).

28 ///

1 **VI. SUMMARY OF THE ALJ’S FINDINGS**

2 Using the Social Security Administration’s five-step sequential evaluation process, the
3 ALJ determined that Plaintiff did not meet the disability standard. AR 34-48. At step one, he
4 found that Plaintiff last met the insured status requirements on March 31, 2012, and that she had
5 not engaged in substantial gainful activity during the period from her alleged onset date of
6 December 20, 2006 through her date last insured. AR 36. At step two, the ALJ identified chronic
7 fatigue syndrome, fibromyalgia, affective disorder with depression, adjustment disorder with
8 anxiety and panic attacks, pain disorder, obstructive sleep apnea, and asthma as severe
9 impairments. AR36. At step three, the ALJ determined that the severity of Plaintiff’s
10 impairments did not meet or exceed any of the listed impairments. AR 36-38.

11 Based on a review of the entire record, the ALJ determined that Plaintiff had the RFC to
12 perform sedentary work as defined in 20 CFR § 404.1567 (a) except that Plaintiff could:
13 frequently climb ramps and stairs; occasionally climb ropes, ladders and scaffolds; frequently
14 balance, stoop, kneel, crouch, and crawl; must avoid concentrated exposure to operational control
15 of dangerous moving machinery and unprotected heights; perform simple, routine, repetitive
16 tasks, and low stress work, which is defined as no more than occasional decision making and only
17 occasional changes in the work setting with no interaction with the public. AR 38-46. Given these
18 limitations, the ALJ determined that Plaintiff could not perform her past work as an
19 administrative assistant or child monitor. AR 46. However, the ALJ determined that Plaintiff
20 could perform other jobs that existed in significant numbers in the national economy including an
21 addresser, a lens inserter, and a touch up screener. AR 46-47.

22 **VII. STANDARD OF REVIEW**

23 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
24 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.
25 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
26 1071, 1074 (9th Cir. 2007).

27 “Substantial evidence means more than a scintilla but less than a preponderance.”
28 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which,

1 considering the record as a whole, a reasonable person might accept as adequate to support a
2 conclusion.” *Id.* “Where the evidence is susceptible to more than one rational interpretation, one
3 of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

4 **VIII. DISCUSSION**

5 **A. The ALJ Properly Evaluated the Medical Evidence.**

6 Plaintiff contends that that ALJ’s evaluation of the medical evidence was not proper.
7 Specifically, she alleges that the ALJ rejected PA Johnson’s findings by failing to address the
8 factors in SSR 06-3p and erroneously relied upon the state agency physicians’ opinions. In doing
9 so, the ALJ ignored several other treating physicians’ opinions without giving specific and
10 legitimate reasons for doing so. She also alleges that the ALJ did not adequately assess Plaintiff’s
11 fibromyalgia as a listed impairment at step three. (Docs. 20, pgs. 6-28). The Court is not
12 persuaded by Plaintiff’s arguments.

13 When assessing the medical evidence, the ALJ discussed the opinions of three medical
14 professionals: 1) PA Johnson who treated Plaintiff since 2007 at Central Valley Pain Management
15 and offered an opinion in April 2012 (AR 442-447); 2) Dr. Wagner, a state agency doctor who
16 performed a consultative examination in July 2011 (AR 368-440); and 3) Dr. Cochran, a non-
17 examining state agency physician who rendered an opinion in November 2011. AR 350-353. The
18 ALJ gave the greatest weight to Dr. Wagner’s findings, moderate weight to Dr. Cochran’s
19 findings, and little weight to PA Johnson’s opinion. AR 43-46. A review of administrative
20 records reveals the ALJ’s assessment of the medical evidence is supported by substantial
21 evidence.

22 An ALJ is responsible for resolving conflicts in the medical record, including conflicts
23 among physicians' opinions. *Carmickle v. CSS*, 533 F.3d at 1164. To reject the uncontroverted
24 opinion of a treating or examining physician, the ALJ must present clear and convincing reasons.
25 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). If a treating or examining doctor's
26 opinion is contradicted by another doctor's opinion, it may be rejected for specific and legitimate
27 reasons. *Garrison v. CSS*, 759 F.3d 995, 1012 (9th Cir. 2014); *Ghanim v. CSS*, 763 F.3d 1155,
28 1161(9th Cir. 2014).

1 However, only physicians and certain other qualified specialists are considered
2 “[a]cceptable medical sources.” *Molina v. CSS*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also* 20
3 C.F.R. § 404.1513(a). Physician assistants are not acceptable medical sources but are considered
4 “other sources” unless the record establishes that the PA worked under a physician’s close
5 supervision. *Molina v. CSS*, 674 F.3d at 1111; *See also, Taylor v. Social Security Administration*,
6 659 F. 3d 1228, 1234 (9th Cir. 2011) (finding a nurse practitioner can constitute an acceptable
7 medical source opinion when that individual works closely under the supervision of a doctor); 20
8 C.F.R. § 404.1513(d) (defining other medical source).⁵ An ALJ must evaluate the opinions from
9 other sources, and may discount such testimony if the ALJ provides germane reasons for doing
10 so. *Britton v. Colvin*, 787 F. 3d at 1011 (9th Cir. 2015); *Ghanim v. Colvin*, 763 F.3d at 1161(9th
11 Cir. 2014); *Molina v. Astrue*, 674 F. 3d at 1111.

12 Plaintiff argues that the ALJ was required to provide specific and legitimate reasons for
13 discounting PA Johnson’s opinion but she has cited nothing in the record, nor has the Court found
14 any evidence that a physician was closely supervising PA Johnson. Plaintiff makes an
15 unsupported contention that Dr. Rhodes is a doctor at the pain clinic where Plaintiff was treated
16 with a specialty in fibromyalgia. (Doc. 13, pg. 3, n. 2). However, there is no evidence that Dr.
17 Rhodes ever treated Plaintiff or supervised her care. Therefore, the ALJ was only required to give
18 germane reasons for discounting PA Johnson’s opinion. Here, the ALJ not only gave germane
19 reasons, but his findings also satisfy the higher standard of specific and legitimate reasons for
20 rejecting PA Johnson’s opinion.

21 When evaluating the medical evidence, the ALJ noted that although PA Johnson had a
22 longitudinal history with the Plaintiff, he gave her opinion little weight because her findings were
23 inconsistent with the medical record. AR 43. As part of this analysis, the ALJ assessed Plaintiff’s
24 credibility and found that she was not credible.⁶ AR 39-46. He summarized many of Plaintiff’s
25 appointments with PA Johnson over a five year period (AR 41-43), and described all of the
26 medical opinions assessing her fibromyalgia in detail. AR 43-46. He gave the greatest weight to

27 ⁵ This regulation was superseded by 20 C.F.R. § 404.1513(3) for claims filed after March 27, 2017.

28 ⁶ As described in more detail in this order, the ALJ’s credibility analysis is supported by substantial evidence.

1 Dr. Wagner's opinion who assessed Plaintiff with no physical limitations (AR 371-372), and gave
2 moderate weight to Dr. Cochran's findings, who limited Plaintiff to light work. AR 349-356. He
3 found that medications had been relatively effective in controlling Plaintiff's symptoms (AR 43)
4 and that Dr. Wagner and Dr. Cochran's opinions were consistent with the record as a whole in
5 accordance with SSR 06-3p. AR 43-46.

6 As Defendant notes, the opinions of non-treating or non-examining physicians may serve as
7 substantial evidence when the opinions are consistent with independent clinical findings or other
8 evidence in the record. *Thomas v. Barnhart*, 278 F. 3d 947, 957 (9th Cir. 2002). Here, Dr.
9 Wagner performed his own consultative examination which revealed no functional limitations,
10 although he noted Plaintiff had many of the traditional trigger points consistent with
11 fibromyalgia. AR 44-45; 368-372. Moreover, Dr. Cochran completed a review of the entire
12 record which included examining Dr. Wagner's opinion and years of PA Johnson's notes. AR
13 331. After completing a full physical functional capacity assessment, she recommended that
14 Plaintiff be limited to light work with several other limitations. AR 44-45; 349-356. The ALJ's
15 assessment of the medical evidence is supported by substantial evidence because he accorded the
16 greatest weight to the only two accepted medical source opinions in the record. He then gave
17 Plaintiff the benefit of the doubt by formulating a RFC that limited her to sedentary work which
18 was more restrictive than either doctor recommended. AR 38. Therefore, the ALJ's assessment
19 of the medical evidence was proper.

20 Plaintiff has argued the ALJ erred because he failed to consider Dr. Patel's opinion, one of
21 Plaintiff's treating physicians. (Docs. 13, pg. 19-21; Doc. 22, pg. 4). However, this is not the
22 case. First, Dr. Patel was not a treating physician. He was an examining pulmonologist who
23 performed a sleep study during a consultative examination in 2007. AR 436. He recommended
24 that Plaintiff undergo CPAP therapy, lose weight, decrease her alcohol intake and avoid sleeping
25 in the supine position. AR 436. Second, while the ALJ did not weigh the opinion per se, the ALJ
26 summarized the doctor's findings and determined that Plaintiff's obstructive sleep apnea was a
27 severe impairment. AR 36-37; 40. He therefore clearly considered the report.

28 Plaintiff contends that the ALJ was required to weigh this opinion, as well as the opinions of

1 Drs. Dhingsa, Atwal, Thinh, Faraji, Canale, and Greenberg who treated Plaintiff's gastrointestinal
2 condition. AR 270-272; 292-308; 305; 313-315; 449-453; 455-457; 499-507. The Court agrees
3 that the ALJ did not discuss or consider Plaintiff's gastrointestinal conditions, or any of the
4 related treatment notes in his order. This omission was error. However, the Court finds that this
5 error was harmless as none of these doctors, including Dr. Patel, identified any functional
6 limitations that would have affected Plaintiff's ability to work. *Molina v. Astrue*, 674 F.3d at
7 1115. (An error is harmless if it is "inconsequential to the ultimate nondisability determination").
8 Medical opinions are statements from acceptable medical sources that are judgments about the
9 severity of the impairment including symptoms, diagnosis, and prognosis, as well what a person
10 can to do despite impairment, and physical or mental restrictions. 20 CFR § 404.1527(a)(1). The
11 mere diagnosis of an impairment is not sufficient to sustain a finding of disability. *Key v.*
12 *Heckler*, 754 F. 2d 1545, 1549 (9th Cir. 1985); *See also, Matthews v. Shalala*, 10 F. 3d 678, 680
13 (9th Cir. 1993).

14 Here, Plaintiff experienced pancreatitis after experiencing complications due to the surgical
15 placement of a stent. AR 313;315; 296. After her gallbladder was removed, a biopsy revealed
16 chronic cholecystitis. AR 505. None of the doctors treating Plaintiff for these conditions provided
17 a medical opinion that identified any functional limitation that would affect her ability to work,
18 nor has Plaintiff identified any aspect of those records that would have changed the ALJ's
19 disability determination. In fact, Plaintiff's entire discussion of the doctors treating her
20 gastrointestinal condition consists of three paragraphs of boilerplate language with only general
21 references to the record. Therefore, the ALJ's failure to discuss Plaintiff's gastrointestinal
22 conditions, and the related medical records was at most harmless error.

23 **B. The ALJ's Fibromyalgia Analysis at Step Three Does Not Require Remand.**

24 Plaintiff further argues that the case must be remanded because the ALJ did not properly
25 consider Plaintiff's fibromyalgia at step three as a listed impairment under SSR 12-2p. (Doc. 13,
26 pg. 28). However, the Ninth Circuit has held that an alleged case of fibromyalgia cannot meet the
27 listing requirements because fibromyalgia is not a listed impairment. *Britton v. Colvin*, 878 F. 3d
28 1011, 1012 (9th Cir. 2015); SSR 12-2p 2012 WL 3017612 (July 25, 2012) ("FM cannot meet a

1 listing in appendix 1 because FM is not a listed impairment”). Therefore, when assessing
2 fibromyalgia at step three, the analysis focuses on whether fibromyalgia medically equals a
3 listing, or whether it medically equals a listing in combination with at least one other medically
4 determinable impairment. *Id.*

5 To demonstrate that a condition matches a listed impairment, the claimant must show that
6 the impairment meets all of the medical criteria in a listing. *Sullivan v. Zebley*, 493 U.S. 521, 530
7 (1990). “An impairment that manifests only some of those criteria, no matter how severely, does
8 not qualify.” *Id.* To “equal a listed impairment, a claimant must establish symptoms, signs and
9 laboratory findings ‘at least equal in severity and duration’ to the characteristics of a relevant
10 listed impairment.” *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); 20 C.F.R. §
11 404.1526(a). Under the law of this circuit, an ALJ is not required to discuss the combined effects
12 of a claimant's impairments or compare them to any listing in an equivalency determination,
13 unless the claimant presents evidence in an effort to establish equivalence. *Burch v. Barnhart*,
14 400 F.3d 676, 683 (9th Cir. 2005); *See Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) (An
15 ALJ's failure to consider equivalence was not reversible error because the claimant did not offer
16 any theory, plausible or otherwise, as to how his impairments combined to equal a listing
17 impairment).

18 In this instance, Plaintiff has not identified which medical evidence establishes equivalence,
19 nor has she offered any theory about how her combined impairments equal a listing. She merely
20 states the case must be remanded so that the ALJ can complete an analysis under SSR 12-2p.
21 This is insufficient. Moreover, although the ALJ did not specifically elaborate on his rationale
22 under the severity impairments heading, he provided a comprehensive recitation of the medical
23 evidence related to Plaintiff's fibromyalgia in the order which provided an adequate statement for
24 his non-disability determination. *Gonzalez v. Sullivan*, 914 F. 2d 1197, 1201 (9th Cir. 1990)
25 (“The Commissioner’s “four page ‘evaluation of the evidence’ is an adequate statement of the
26 ‘foundations on which the ultimate factual conclusions are based’”). Therefore, the ALJ
27 appropriately made a finding of “not disabled” at step three and then proceeded to step four.

28 ///

1 **C. The ALJ Properly Discredited Plaintiff’s Subjective Complaints**

2 Plaintiff argues that the ALJ’s credibility determination was improper because he did not
3 identify which part of the Plaintiff’s testimony he found not credible and why. Additionally, she
4 contends that the ALJ failed to adequately address Plaintiff’s testimony regarding her fatigue,
5 including assessing any side effects of her medications. (Doc. 13, pgs.15-19; Doc. 22, pgs. 5-7).
6 A review of the entire record reveals Plaintiff’s arguments are misplaced.

7 A two-step analysis applies at the administrative level when considering a claimant’s
8 credibility. *Treichler v. Comm. of Soc. Sec.*, 775 F. 3d 1090, 1098 (9th Cir. 2014). First, the
9 claimant must produce objective medical evidence of his or her impairment that could reasonably
10 be expected to produce some degree of the symptom or pain alleged. *Id.* If the claimant satisfies
11 the first step and there is no evidence of malingering, the ALJ may reject the claimant’s testimony
12 regarding the severity of his or her symptoms only if he or she makes specific findings and
13 provides clear and convincing reasons for doing so. *Id.*; *Brown-Hunter v. Colvin*, 806 F.3d 487,
14 493 (9th Cir. 2015); SSR 96-7p (ALJ’s decision “must be sufficiently specific to make clear to
15 the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s
16 statements and reasons for that weight.”). Factors an ALJ may consider include: 1) the
17 applicant’s reputation for truthfulness, prior inconsistent statements or other inconsistent
18 testimony; (2) inconsistencies either in the claimant's testimony or between the claimant's
19 testimony and her conduct; (3) the claimant's daily activities; (4) the claimant's work record; and
20 (5) testimony from physicians and third parties concerning the nature, severity, and effect of the
21 symptoms of which the claimant complains. *See Thomas v. Barnhart*, 278 F. 3d at 958-959; *Light*
22 *v. Social Security Administration*, 119 F. 3d 789, 792 (9th Cir. 1997), *see also* 20 C.F.R. §
23 404.1529(c).

24 In this case, the ALJ found that Plaintiff’s impairment could reasonably be expected to
25 produce her alleged symptoms. AR 39. However, the ALJ concluded that the Plaintiff’s
26 statements concerning “the intensity, persistence and limiting effects of these symptoms are not
27 entirely credible for the reasons explained in this decision” AR 40. This finding satisfied step one
28 of the credibility analysis. *Smolen v. Chater*, 80 F.3d 1281-82 (9th Cir. 1996).

1 As noted above, because the ALJ did not find that Plaintiff was malingering, he was
2 required to provide clear and convincing reasons for rejecting Plaintiff's testimony. *Brown –*
3 *Hunter*, 806 F. 3d at 493; *Smolen*, 80 F.3d at 1283-84; *Lester v. Chater*, 81 F.3d 821, 834 (9th
4 Cir. 1995). When there is evidence of an underlying medical impairment, the ALJ may not
5 discredit the claimant's testimony regarding the severity of his or her symptoms solely because
6 they are unsupported by medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir.
7 1991); SSR 96-7. Moreover, general findings are insufficient; rather, the ALJ must identify what
8 testimony is not credible and what evidence undermines the claimant's complaints. *Brown-*
9 *Hunter*, 806 F. 3d at 493.

10 In discrediting Plaintiff's credibility, the ALJ relied on: (1) Plaintiff's activities of daily
11 living, including taking care of her father and pets, which he found to be inconsistent with her
12 disabling complaints of pain (AR 39; 183; 185); (2) the fact that Plaintiff did not seek treatment
13 from a specialist for depression or her panic attacks; (AR 40; 363-364); (3) Plaintiff worked from
14 1996-2007 demonstrating that she was able to work with a disabling impairment (AR 40; 159-
15 160; 363); (4) Plaintiff worked for a period of four months in 2010 babysitting two children
16 which suggests she could currently work (AR 39; 62-63; 74-76); (5) Plaintiff took a trip to
17 Kansas to help her friend move during the alleged disability period (AR 39; 76); (6) no diagnosis
18 of fibromyalgia was made by an acceptable medical source such as a rheumatologist or a
19 specialist (AR 40); and (7) Plaintiff's pain was relatively controlled on her medication. (AR 43).
20 These are all clear and convincing reasons that are supported by substantial evidence to reject
21 Plaintiff's testimony. *See Thomas v. Barnhart*, 278 at 958-959; *see also* 20 C.F.R. § 404.1529(c)
22 (ALJ can consider inconsistencies either in the claimant's testimony or between the claimant's
23 testimony and her conduct; the claimant's daily activities; and the claimant's work record when
24 assessing credibility); *Chaudhry v. Astrue*, 885 F.3d 661, 672 (9th Cir. 2012) (The ALJ may
25 consider an "unexplained or inadequately explained failure to seek treatment or to follow a
26 prescribed course of treatment" in discrediting a claimant's credibility); *Orn v. Astrue*, 495 F.3d
27 625, 638 (9th Cir. 2007) (citation omitted) ("[I]f a claimant complains about disabling pain but
28 fails to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may use such

1 failure as a basis for finding the complaint unjustified or exaggerated....”); *Warre v. Com’r of*
2 *Soc. Sec.*, 439 F. 3d 1001, 1005 (9th Cir. 2006) (impairment amenable to control is not disabling).

3 Although Plaintiff contends that the ALJ should have addressed her fatigue as a side-
4 effect of her medications, her contention is without merit. There are two different approaches in
5 the Ninth Circuit regarding an ALJ’s duty to consider medication side effects. The first approach
6 requires that an ALJ consider all factors that might have a significant impact on an individual’s
7 ability to work, including the side effects of medications. *Erickson v. Shalala*, 9 F.3d 813, 817 18
8 (9th Cir.1993) (citing *Varney v. Secretary of HHS*, 846 F.2d 581, 585 (9th Cir.1987) (superseded
9 by statute on other grounds). Under *Varney*, an ALJ may not reject a claimant’s testimony as to
10 subjective limitations of side effects without making specific findings similar to those required for
11 excess pain testimony. *Varney*, 846 F.2d at 585.

12 The second line of cases has distinguished *Varney* and has held that in order for an ALJ’s
13 failure to discuss medication side effects to be in error, the side effects must be a contributing
14 factor in a claimant’s inability to work. *See, Osenbrock v. Apfel*, 240 F.3d 1157, 1164 (9th Cir.
15 2001) (no error in a question to a vocational expert that did not include information about side
16 effects because “[t]here were passing mentions of the side effects of Mr. Osenbrock’s medication
17 in some of the medical records, but there was no evidence of side effects severe enough to
18 interfere with Osenbrock’s ability to work.”); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir.
19 2005) (failure to expressly address medication side effects is not error where there was no record
20 support for side effects); *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir.1985) (claimant had the
21 burden of producing evidence that his use of prescription narcotics impaired his ability to work).

22 Here, Plaintiff testified that she suffered from pain and fatigue. AR 62; 65-66. However,
23 while she complained of fatigue as early as 2009, at that time she was “[d]oing great on current
24 medications,” doing well in school, and was cleared for low impact physical education. AR
25 41-42; 389-412. While Plaintiff complained of fatigue on-and-off after 2009, there was no
26 indication that it was persistent, that it was a side effect of her medication, or that
27 she had any significant side-effects from her medications. AR 413; 415; 417; 419; 421; 425; 427;
28 429; 455; 459; 461; 463; 467; 469.

1 Moreover, when the ALJ specifically asked her about the side effects of her medication she
2 indicated that she started taking the Trazodone, Avinza and Lexapro at night because they made
3 her tired. AR 71. There was no indication that these medications limited Plaintiff's ability to
4 work. In fact, PA Johnson noted that none of Plaintiff's medication caused side effects except
5 that Xanax caused drowsiness and Trazodone caused nighttime sleepiness.⁷ AR 445. A review of
6 the record reveals that Plaintiff was prescribed Xanax intermittently and only took it when it was
7 absolutely necessary. AR 396; 423; 425; 477. Moreover, the only other time Plaintiff complained
8 of side effects was when she began taking a new medication, but that medication was promptly
9 discontinued. AR 471. Given the record, the ALJ did not err in failing to specifically address the
10 medication side effects in his decision. Additionally, he properly discounted Plaintiff's
11 allegations of disabling fatigue and other symptoms for the reasons indicated above. AR 39-45.

12 Given the above, the ALJ provided clear and convincing reasons outlined above that are
13 supported by substantial evidence to conclude Plaintiff's subjective symptom testimony was not
14 credible. Here, the ALJ clearly identified what testimony he found not credible and what
15 evidence undermined Plaintiff's complaints. *Brown-Hunter*, 806 F. 3d at 493; *Lester*, 81 F.3d at
16 834. It is not the role of the Court to re-determine Plaintiff's credibility de novo. If the ALJ's
17 finding is supported by substantial evidence, the Court "may not engage in second-guessing."
18 *Thomas*, 278 F.3d at 959. Although evidence supporting an ALJ's conclusions might also permit
19 an interpretation more favorable to the claimant, if the ALJ's interpretation of evidence was
20 rational, as it was here, the Court must uphold the ALJ's decision where the evidence is
21 susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 680-81
22 (9th Cir. 2005). Accordingly, the ALJ's credibility determination was proper.

23 **D. The ALJ Did Not Err at Step Five.**

24 Finally, Plaintiff argues that the ALJ erred at step five because he improperly relied on the
25 VE's testimony that Plaintiff could perform work as an addresser, a lens inserter, or a touch up
26 screener. She contends that the ALJ's analysis was improper because none of the job descriptions

27 _____
28 ⁷ The ALJ discussed PA Johnson's opinion regarding the side effects of Plaintiff's medications when summarizing
the medical record in his decision. AR 43.

1 in the DOT address whether they require more than occasional decision making or occasional
2 changes in the work setting as defined by Plaintiff's RFC. Plaintiff contends that given this
3 ambiguity, the ALJ was required to obtain testimony from the VE to clarify this issue and failure
4 to do so was not harmless error. The Court disagrees.

5 If Plaintiff establishes that she is unable to perform her past work at step four, the burden
6 shifts to the Commissioner at step five "to identify specific jobs existing in substantial numbers in
7 the national economy that [a] claimant can perform despite [her] identified limitations." *Johnson*
8 *v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *see also* 20 C.F.R. §§ 404.1560(g), 416.920(g).
9 At this stage, the ALJ first assesses a claimant's "residual functional capacity," which is defined
10 as the most that a claimant can do despite "physical and mental limitations" caused by his
11 impairments and related symptoms. 20 C.F.R. §§ 404.1545, 416.945(a)(1). The ALJ then
12 considers potential occupations that the claimant may be able to perform. *See* 20 C.F.R. §§
13 404.1566, 416.966.

14 Similar to step four, in making this step five determination, the ALJ may rely on the
15 Dictionary of Occupational Titles ("DOT") and testimony from a VE to assess a claimant's
16 ability to perform certain jobs in light of his residual functional capacity. 20 C.F.R. §§
17 404.1566(e); 404.1569; 404.1566(d); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 689
18 (9th Cir. 2009). As part of this process, occupational information provided by a VE should
19 generally be consistent with the DOT. SSR 00-04, 2000 WL 1898704, at *2, (Dec. 4, 2000).
20 Furthermore, the ALJ must resolve any apparent conflict between the VE's testimony and the
21 DOT before relying on the VE's testimony in support of a disability determination. *Zavalin v.*
22 *Colvin*, 778 F. 3d 842, 845 (9th Cir. 2015); *Massachi v. Astrue*, 486 F. 3d 1149, 1153-1154 (9th
23 Cir. 2007). When there is an apparent unresolved conflict between the VE and the DOT, the
24 adjudicator must elicit a reasonable explanation for the conflict before relying on the VE to
25 support a determination or decision about whether the claimant is disabled. *Zavalin v. Colvin*, 778
26 F. 3d at 846; *Massachi*, 486 F. 3d at 1153. Neither the DOT nor the VE testimony automatically
27 "trumps" when there is a conflict. *Massachi*, 486 F. 3d at 1153. The adjudicator must resolve the
28 conflict by determining if the explanation given by the VE is reasonable and provides a basis for

1 relying on the VE testimony rather than on the DOT information. *Massachi*, 486 F. 3d at 1153.

2 However, not all potential conflicts between a vocational expert’s job suitability
3 recommendation and the DOT will be apparent or obvious. *Gutierrez v. Colvin*, 844 F. 3d 804,
4 808 (9th Cir. 2016). In order for a difference between a VE’s testimony and the DOT’s listings to
5 be fairly characterized as a conflict, it must be obvious or apparent. *Id.* This means that the
6 testimony must be at odds with the DOT's listing of job requirements that are essential, integral,
7 or expected. *Id.* Thus, the obligation to inquire doesn't extend to unlikely situations or
8 circumstances, and the requirement that an ALJ ask follow-up questions to determine if an actual
9 conflict exists is fact-dependent. *Id.*

10 Here, prior to taking the VE’s testimony, the ALJ advised the VE to tell him if the
11 testimony was inconsistent with the DOT. AR 83. He then provided the VE with a hypothetical
12 that included all of Plaintiff’s limitations including the restrictions that Plaintiff could only
13 perform occasional decision making and occasional changes in the work setting. AR 84-85. The
14 VE did not acknowledge any conflict with DOT and testified that Plaintiff could work as an
15 addresser, a touch up screener, and a lens inserter which were all unskilled positions. AR 85.
16 Unskilled work is that “which needs little or no judgment to do simple duties that can be learned
17 on the job in a short period of time.” 20 C.F.R. § 404.1568(a).

18 A review of the proposed jobs reveals the ALJ’s finding at step five is supported by
19 substantial evidence. A lens inserter (DOT 713.687-026) requires level one reasoning which
20 mandates a commonsense understanding to carry out simple one-or two-step instructions, and
21 dealing with standardized situations with occasional or no variable in or from these situations
22 encountered on the job. DOT (4th Ed. 1991), App. C, DOT § III, 1991 WL 688702. The duties of
23 a lens inserter as follows:

24 Fits lenses into plastic sunglass frames and places frames on
25 conveyor belt that passes under heat lamps which soften frames
26 preparatory to setting of lenses. DOT 713.687-026, 1991 WL
27 679273.

27 An addresser (DOT 209.587-010) and touch up screener (DOT 726.684-110) require
28 level two reasoning which involves applying a commonsense understanding to carry out details

1 by uninvolved written or oral instruction, and dealing with problems involving a few concrete
2 variables in or from standardized situations.

3 Arguably, there may have been a conflict between the VE's testimony and the DOT for
4 the addresser and touch up screener jobs given the need for level two reasoning.⁸ However, since
5 a lens inserter only requires level one reasoning and the job description requires fitting lenses into
6 frames, there is no conflict, or certainly not one that was so apparent that it would require further
7 explanation from the VE. Therefore, the ALJ's conclusion that Plaintiff can work as a lens
8 inserter is proper and his step five analysis is supported by substantial evidence.

9 **X. CONCLUSION**

10 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial
11 evidence and is based on proper legal standards. Accordingly, this Court DENIES Plaintiff's
12 appeal against the Commissioner of Social Security. The Clerk of this Court shall enter judgment
13 in favor of Nancy A. Berryhill, Commissioner of Social Security, and against Plaintiff Jeanne C.
14 Cole. The Clerk of the Court is directed to close this action.

15 IT IS SO ORDERED.

16 Dated: March 31, 2017

17 /s/ Gary S. Austin
18 UNITED STATES MAGISTRATE JUDGE

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⁸ The Court need not address this issue since another job is available.