



1 husband. AR 35. Her daily activities include visiting her daughter and grandson, sitting outside,  
2 watching TV, doing crosswords and other puzzles, and napping. AR 36-37.

3 Plaintiff's alleged disability is due to injuries to her back, neck, and right wrist, and  
4 depression and anxiety. AR 38-46. On July 30, 2012, Plaintiff filed an application for  
5 Supplemental Security Income benefits under Title XVI, alleging a disability beginning on  
6 October 15, 2004. AR 189. The application was denied initially on January 11, 2013 and on  
7 reconsideration on April 30, 2013. AR 111-114, 120-124. Plaintiff filed a request for a hearing on  
8 June 21, 2013. AR 126-128. The hearing was then conducted before Administrative Law Judge  
9 Sharon L. Madsen (the "ALJ") on August 12, 2014. AR 32-50. On October 3, 2014, the ALJ  
10 issued an unfavorable decision, determining that Plaintiff was not disabled. AR 8-29. Plaintiff  
11 filed an appeal of this decision with the Appeals Council. The Appeals Council denied the appeal  
12 on March 17, 2016, rendering the ALJ's order the final decision of the Commissioner. AR 1-6.

13 Plaintiff now challenges that decision, arguing that the ALJ incorrectly found Plaintiff not  
14 fully credible and improperly rejected Plaintiff's pain and symptom testimony.<sup>3</sup> (ECF No. 20).  
15 Defendant argues that the ALJ provided specific and legitimate reasons for discounting Plaintiff's  
16 testimony and properly considered Plaintiff's medical records as a whole. (ECF No. 28).

### 17 **III. THE DISABILITY DETERMINATION PROCESS**

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

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23 <sup>3</sup> Plaintiff also argues that SSR 16-3p, effective March 28, 2016, should be applied retroactively in place of  
24 SSR 96-7p. (ECF Nos. 20, p. 11 n.1 and 29, p. 3-4). Defendant argues that SSR 16-3p does not have retroactive  
25 effect. (ECF No. 28, p. 13). The Court notes that Defendant points to *Smith v. Colvin*, No. 3:14-cv-1752 (SRU), 2016  
26 WL 1170910, at \*7 n.3 (D. Conn. Mar. 23, 2016), as support for its position that SSR 16-3p does not apply  
27 retroactively. (ECF No. 28, p. 13). However, whether SSR 16-3p or 96-7p applies is not determinative to this claim's  
28 outcome and the Court therefore does not address the issue of retroactivity here. Moreover, the Ninth Circuit has  
stated that SSR 16-3p "makes clear what our precedent already required: that assessments of an individual's  
testimony by an ALJ are designed to 'evaluate the intensity and persistence of symptoms after [the ALJ] find[s] that  
the individual has a medically determinable impairment(s) that could reasonably be expected to produce those  
symptoms,' and not to delve into wide-ranging scrutiny of the claimant's character and apparent truthfulness."  
*Trevizo v. Berryhill*, 862 F.3d 987, 995 n.5 (9th Cir. 2017).

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

7 42 U.S.C. § 1382c(a)(3)(B).

8 To achieve uniformity in the decision-making process, the Commissioner has established  
9 a sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. §  
10 404.1520(a)-(f). The ALJ proceeds through the steps and stops upon reaching a dispositive  
11 finding that the claimant is or is not disabled. 20 C.F.R. § 404.1520(a)(4). The ALJ must  
12 consider objective medical evidence and opinion testimony. 20 C.F.R. § 404.1527, 404.1529.

13 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in  
14 substantial gainful activity during the period of alleged disability; (2) whether the claimant had  
15 medically-determinable "severe" impairments;<sup>4</sup> (3) whether these impairments meet or are  
16 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,  
17 Appendix 1; (4) whether the claimant retained the residual functional capacity ("RFC") to  
18 perform her past relevant work;<sup>5</sup> and (5) whether the claimant had the ability to perform other  
19 jobs existing in significant numbers at the regional and national level. 20 C.F.R. § 404.1520(a)-  
20 (f).

21 Using the Social Security Administration's five-step sequential evaluation process, the  
22 ALJ determined that Plaintiff did not meet the disability standard. AR 14-24. The ALJ found that  
23 Plaintiff had not engaged in substantial gainful activity since July 30, 2012, the date specified in  
24 her application. AR 16. The ALJ identified lumbar degenerative disc disease, status-post  
25 laminectomy; thoracic spine degenerative disc disease; cervical spine degenerative disc disease;  
26 right wrist subluxation of the right radial ulnar joint, status-post Darrach procedure; obesity; and  
27 major depressive disorder, as a medically determinable combination of impairments. AR 16.

28 <sup>4</sup> "Severe" simply means that the impairment significantly limits the claimant's physical or mental ability to do basic work activities. *See* 20 C.F.R. § 404.1520(c).

<sup>5</sup> Residual functional capacity captures what a claimant "can still do despite [his or her] limitations." 20 C.F.R. § 404.1545. "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th Cir. 2007).

1 However, the ALJ determined that the severity of Plaintiff's impairments did not meet or  
2 medically equal any of the listed impairments. AR 16.

3 Based on a review of the entire record, the ALJ determined that Plaintiff had the RFC to:

4 [L]ift and/or carry 20 pounds occasionally and 10 pounds frequently. She could  
5 sit, stand, and/or walk 6 to 8 hours in an 8-hour workday. This capacity most  
6 closely approximates light work as defined in 20 CFR 416.967(b) except she  
7 could occasionally climb, stoop, crouch, or crawl. She could frequently kneel or  
balance. She cannot climb ladders, ropes, or scaffolds. She could occasionally  
reach overhead, push, or pull with the right upper extremity. Mentally, she is  
limited to simple, routine tasks.

8 AR 18. Plaintiff was capable of performing her past relevant work as a Sorter despite her physical  
9 and mental limitations. AR 23. The ALJ found that because Plaintiff is capable of performing her  
10 past relevant work, she is not disabled within the meaning of the Social Security Act. AR 23.

#### 11 **IV. STANDARD OF REVIEW**

12 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine  
13 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.  
14 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d  
15 1071, 1074 (9th Cir. 2007).

16 "Substantial evidence means more than a scintilla but less than a preponderance."  
17 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is "relevant evidence which,  
18 considering the record as a whole, a reasonable person might accept as adequate to support a  
19 conclusion." *Id.* "Where the evidence is susceptible to more than one rational interpretation, one  
20 of which supports the ALJ's decision, the ALJ's conclusion must be upheld." *Id.*

#### 21 **V. DISCUSSION**

##### 22 **A. Evaluation of Plaintiff's Credibility**

##### 23 *i. Legal standards*

24 To evaluate the credibility of a claimant's testimony regarding subjective complaints of  
25 pain and other symptoms, an ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572  
26 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine whether the claimant has presented  
27 objective medical evidence of an underlying impairment that could reasonably be expected to  
28 produce the pain or other symptoms alleged. *Id.* The claimant is not required to show that the

1 impairment “could reasonably be expected to cause the *severity* of the symptom she has alleged;  
2 she need only show that it could reasonably have caused some degree of the symptom.” *Id.*  
3 (emphasis added). If the claimant meets the first test and there is no evidence of malingering, the  
4 ALJ can only reject the claimant's testimony regarding the severity of the symptoms for “specific,  
5 clear and convincing reasons” that are supported by substantial evidence. *Brown-Hunter v.*  
6 *Colvin*, 806 F.3d 487, 493 (9th Cir. 2015).

7 An ALJ can consider a variety of factors in assessing a claimant’s credibility, including:

8 (1) ordinary techniques of credibility evaluation, such as the claimant’s reputation  
9 for lying, prior inconsistent statements concerning the symptoms, and other  
10 testimony by the claimant that appears less than candid; (2) unexplained or  
11 inadequately explained failure to seek treatment or to follow a prescribed course  
12 of treatment; and (3) the claimant’s daily activities. If the ALJ’s finding is  
13 supported by substantial evidence, the court may not engage in second-guessing.

14 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations and internal quotation marks  
15 omitted).

16 Other factors can include a claimant’s work record and testimony from physicians and  
17 third parties concerning the nature, severity, and effect of the symptoms of which the claimant  
18 complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). An ALJ can only rely  
19 on an inconsistency between a claimant’s testimony and the objective medical evidence to reject  
20 that testimony where the ALJ specifies which “complaints are contradicted by what clinical  
21 observations.” *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999).  
22 An ALJ properly discounts credibility if she makes specific credibility findings that are properly  
23 supported by the record and sufficiently specific to ensure a reviewing court that she did not  
24 “arbitrarily discredit” the testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991).

### 25 *ii. Analysis*

26 Here, the ALJ found that Plaintiff’s medically determinable impairments could reasonably  
27 be expected to cause the alleged symptoms. However, the ALJ questioned Plaintiff’s credibility  
28 with respect to the intensity, persistence and limiting effects of her symptoms (AR 19), stating:

I also considered the third party report from the claimant’s daughter who reported she spends a good deal of time with the claimant watching television, playing games, and visiting. However, Ms. Cercado also stated the claimant is in constant

1 pain and is unable to sit, stand, or walk more than 10 minutes without a break. I  
2 find this inconsistent with the claimant's shared activities with her daughter and  
3 grandson as it would reasonably require a greater sitting capacity to perform the  
4 activities she describes. Indeed, Ms. Cercado stated the claimant watches  
5 television until her husband arrives. She stated the claimant spends time  
6 completing crossword puzzles. Both of these activities suggest the claimant is  
7 able to sit for longer periods than Ms. Cercado alleges. In addition, the third party  
8 reported the claimant prepares simple meals that take no longer than 10 to 15  
9 minutes to make. She is able to do laundry twice weekly, she walks and rides in  
10 cars when traveling, and is able to shop in stores 20 to 30 minutes at a time. She  
11 can pay bills, handle finances, read, and talk to family on the phone.

12 I give little weight to the third party reports due to the internal inconsistencies.  
13 Furthermore, this report suggests the claimant is capable of performing exertional  
14 and nonexertional activities for longer periods than alleged.

15 The claimant's presentation at the hearing was not entirely persuasive. The  
16 claimant testified she drives, but elsewhere stated she cannot. She does have a  
17 valid driver's license. She reported she does household chores, but also denied she  
18 is able to do so. She testified she does not socialize, but elsewhere, she reports  
19 spending time with family on a daily basis. She reported she is unable to deal with  
20 crowds, but admitted she goes shopping with her husband every week. She  
21 alleged constant neck pain, but she refused recommended treatment. She reported  
22 mental impairments with significant symptoms, but the treatment records  
23 document improvement with medication. Overall, I found the claimant's  
24 testimony was not fully credible or consistent with the remainder of the record.

25 AR 22 (internal citations omitted).

26 Plaintiff challenges the ALJ's credibility determination, arguing that the evidence as a  
27 whole indicates that Plaintiff continued to experience pain and that the ALJ took the perceived  
28 inconsistencies out of context. AR 13-14. Plaintiff further argues that the medical opinions relied  
upon by the ALJ were given prior to a July 2013 MRI discussing a possible second back surgery,  
and thus the examining physicians did not have access to the entire record as it currently stands.  
AR 13. Defendant argues that the ALJ properly found Plaintiff's statements to be inconsistent,  
and that the ALJ noted the July 2013 MRI results in her opinion. (ECF No. 28, p. 14-16).

29 The ALJ is required to provide "specific, clear and convincing reasons" for finding a  
30 plaintiff not credible. *Vasquez*, 572 F.3d at 591. A plaintiff's daily activities, inconsistencies in  
31 testimony, or unexplained or inadequately explained failure to seek treatment or to follow a  
32 prescribed course of treatment can constitute a reason to find that she lacks credibility.  
33 *Tommasetti*, 533 F.3d at 1039. The ALJ found Plaintiff's testimony not fully credible because

1 Plaintiff stated in her Function Report of October 15, 2012, that she cannot drive, but testified that  
2 she does drive during the hearing and has a valid driver's license. AR 22. The ALJ found that  
3 Plaintiff reported that she does household chores, but also denied that she does any chores. *Id.*  
4 Plaintiff also testified that she does not socialize, but does spend time with family on a daily  
5 basis. *Id.* In addition, the ALJ points to Plaintiff's report that she is unable to deal with crowds,  
6 but shops with her husband every week. *Id.*

7 Nevertheless, the record also shows that Plaintiff's Function Report was completed after  
8 Plaintiff recently had back surgery (AR 226) and, in her hearing, Plaintiff testified that while she  
9 does drive, she does so "very little[,] [m]aybe once or twice a month" (AR 35). While Plaintiff is  
10 capable of shopping with her husband, she also testified that "[w]hen I go to the store and my  
11 husband leaves me alone for a moment, I start getting the [sic] anxiety. I feel like I have to run  
12 out of there." AR 44. Regarding socializing, Plaintiff testified:

13 Q: You have any social activities like church or groups or friends, or family?

14 A: No, my life changed completely. I get scared when I am with a lot of people.

15 AR 36. While Plaintiff spends time daily with her family, she also indicates that she is unable to  
16 be around crowds or socialize without impairment. Thus, considering the records as a whole, the  
17 ALJ's findings regarding inconsistencies in Plaintiff's testimony are an inaccurate  
18 characterization of the evidence.

19 The ALJ also found Plaintiff's testimony to lack credibility because Plaintiff refused  
20 recommended treatment for her constant neck pain. AR 22. However, Plaintiff testified that she  
21 was taking Tramadol for the pain as well as using ice for relief, and told her primary doctor she  
22 did not want to have surgery for her neck pain because the pain in her hand and back became  
23 worse after surgery. AR 41. Thus, Plaintiff provided an uncontested explanation for not following  
24 recommend treatment for her neck pain.

25 The ALJ is correct, however, that some of Plaintiff's statements are not supported by the  
26 medical record. For example, Dr. Rustom Damania noted that Plaintiff refused to engage in range  
27 of motion testing of her back when he met with Plaintiff. AR 742. In addition, the ALJ found that  
28 Plaintiff "reported mental impairments with significant symptoms, but the treatment records

1 document improvement with medication.” AR 22. This is supported in the mental health  
2 treatment notes of October 13, 2012 and Plaintiff’s own testimony that the medication prescribed  
3 by the psychiatrist for her depression helps her symptoms. AR 43, 773.

4 The Court notes, however, that an ALJ may not find a plaintiff not credible *solely* because  
5 of a lack of corroborating evidence in the record. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.  
6 1991) (“an adjudicator may not reject a claimant’s subjective complaints based solely on the lack  
7 of objective medical evidence to fully corroborate the alleged severity of pain”). Thus, the ALJ  
8 failed to provide clear and convincing reasons that are supported by substantial evidence for  
9 finding Plaintiff’s alleged pain and symptoms testimony not credible.

10 **VI. CONCLUSION**

11 Based on the foregoing, the Court finds that the ALJ’s decision is not supported by  
12 substantial evidence in the record or free of clear legal error. Accordingly, this Court GRANTS  
13 Plaintiff’s appeal from the administrative decision of the Commissioner of Social Security and the  
14 case is REMANDED to the Social Security Administration for further proceeding consistent with  
15 this Order. The Clerk of the Court is DIRECTED to enter judgment in favor of Plaintiff Irma  
16 Pacheco Banuelos and against Defendant Nancy A. Berryhill, Commissioner of Social Security.

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18 IT IS SO ORDERED.

19 Dated: August 17, 2017

20 /s/ Eric P. Gray  
21 UNITED STATES MAGISTRATE JUDGE  
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