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

VIRGINIA GUTIERREZ,  
  
Plaintiff,  
  
v.  
  
COMMISSIONER OF SOCIAL  
SECURITY,  
  
Defendant.

Case No. 1:18-cv-01279 EPG  
  
**FINAL JUDGMENT AND ORDER  
REGARDING PLAINTIFF’S SOCIAL  
SECURITY COMPLAINT**

This matter is before the Court on Plaintiff’s complaint for judicial review of an unfavorable decision by the Commissioner of the Social Security Administration regarding her application for Disability Insurance Benefits and Supplemental Security Income. The parties have consented to entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. § 636(c) with any appeal to the Court of Appeals for the Ninth Circuit. (ECF Nos. 7, 8).

At a hearing on October 10, 2019, the Court heard from the parties and, having reviewed the record, administrative transcript, the briefs of the parties, and the applicable law, finds as follows:

1           **I.           Whether the ALJ Erred in Weighing the Opinion of the Consultative Examiner**

2           Plaintiff first challenges the ALJ’s decision on the basis that “the ALJ erred by relying on  
3 the unsupported, unexplained opinion of a non-examining expert, rather than the well-supported  
4 opinion of the consultative examiner, who opined Plaintiff does not have the ability to sustain an  
5 8-hour workday.” (ECF No. 14, at p. 1).

6           In weighing medical source opinions in Social Security cases, there are three categories of  
7 physicians: (i) treating physicians, who actually treat the claimant; (2) examining physicians,  
8 who examine but do not treat the claimant; and (3) non-examining physicians, who neither treat  
9 nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ must  
10 provide clear and convincing reasons that are supported by substantial evidence for rejecting the  
11 uncontradicted opinion of a treating or examining doctor. *Id.* at 830–31; *Bayliss v. Barnhart*, 427  
12 F.3d 1211, 1216 (9th Cir. 2005). An ALJ cannot reject a treating or examining physician's  
13 opinion in favor of another physician's opinion without first providing specific and legitimate  
14 reasons that are supported by substantial evidence. *Bayliss*, 427 F.3d at 1216; 20 C.F.R. §  
15 404.1527(c)(4) (an ALJ must consider whether an opinion is consistent with the record as a  
16 whole); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tommasetti v. Astrue*, 533 F.3d  
17 1035, 1041 (9th Cir. 2008) (finding it not improper for an ALJ to reject a treating physician's  
18 opinion that is inconsistent with the record).

19           Here, the ALJ discussed the examining consulting physician, Dr. Damania’s, opinion in  
20 two places. In the context of the step two analysis to determine whether Plaintiff has any  
21 medically determinable impairments that are severe, the ALJ stated as follows:

22           On August 31, 2016, the claimant identified herself to consultative internist  
23 Rustom Damania, M.D. by displaying her California driver’s license. The  
24 claimant contended that she could not stand for more than a half an hour due to  
25 low back pain, and her grip strength measurements were only 5 lbs. with her right  
26 hand and no weight at all with her left hand. However, the examination itself had  
27 found normal motor strength with good musculoskeletal range of motion, grossly  
28 intact sensation, and equal reflexes. Based then apparently on a combination of  
the examination findings and the claimant’s subjective complaints, Dr. Damania  
assessed the claimant with Cushing’s Syndrome, status-post pituitary adenoma  
post-surgery, osteoporosis, lumbar stenosis, old fractures of the vertebrae, possible

1 cirrhosis/liver problem from longstanding fatty liver, fatigue, and fibromyalgia.  
2 Ex. 12F. The undersigned notes that osteopenia is the claimant's diagnosed  
3 condition, and not the more severe, osteoporosis. Further, as explained above,  
4 there is insufficient medical evidence to support a clinical diagnosis of  
5 fibromyalgia. In addition, radiographs have shown only "mild" central canal  
6 stenosis at once disc space level and without nerve root compression or  
7 impingement, and Dr. [] Damania did not question the discrepancy between the  
8 claimant's nearly absent grip strength results and her normal and full signs of  
9 muscle strength on examination. Dr. Damania even adds a finding of "visual  
10 limitations" for the claimant, Exh. 12F, without considering that she had displayed  
11 a driver's license as ID.

12 (A.R. 35). Additionally, the ALJ stated as follows regarding Dr. Damania's opinion in the  
13 context of step four, regarding Plaintiff's residual functional capacity:<sup>1</sup>

14 Less reliance is accorded to the consultative physician's RFC . . . because some of  
15 these specific limitations such as a restriction to sitting for less than 4 hours total in  
16 an 8-hour workday have no medical foundation in the record. Therefore, like the  
17 reference to the claimant's visual limitations, this limitation appears to have been  
18 disproportionately based on the claimant's subjective complaints without objective  
19 medical or clinical findings in the record or consulting examination for objective  
20 support.

21 (A.R. 36).

22 As discussed at the hearing, while Dr. Damania examined Plaintiff, the findings from the  
23 examination were mostly normal. The critical limitations that "[t]he claimant can stand and walk  
24 less than four hours out of an eight hour work day" and "[t]he claimant can sit less than four  
25 hours out of an eight hour work day," do not appear based on the examination itself. Thus, the  
26 additional weight accorded an examining physician has less relevance here. With this in mind,  
27 and given that the ALJ's opinion was supported by the non-examining consultative examiner, the  
28 Court finds that the ALJ's reasons for the weight given to Dr. Damania's opinion were legally  
sufficient.

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<sup>1</sup> The ALJ referred to Exhibits 9F and 10F in this paragraph, which do not correspond to Dr. Damania's opinion. At oral argument, both parties confirmed that this was a typographical error, and that the ALJ was referring to Dr. Damania's opinion, which is Exhibit 12F of the record.

1           **II.       The ALJ’s Treatment of Plaintiff’s Subjective Symptom Testimony**

2           Plaintiff next claims the “ALJ failed to include work-related limitations in the RFC  
3 consistent with the nature and intensity of Ms. Gutierrez’s symptoms, and failed to offer any  
4 reason for discounting her symptoms of fatigue.” (ECF No. 14, at p. 1).

5           As to subjective testimony, the Ninth Circuit has summarized the ALJ’s task with respect  
6 to assessing a claimant’s credibility as follows:

7           To determine whether a claimant’s testimony regarding subjective pain or  
8 symptoms is credible, an ALJ must engage in a two-step analysis. First, the ALJ  
9 must determine whether the claimant has presented objective medical evidence of  
10 an underlying impairment which could reasonably be expected to produce the pain  
11 or other symptoms alleged. The claimant, however, need not show that her  
12 impairment could reasonably be expected to cause the severity of the symptom she  
13 has alleged; she need only show that it could reasonably have caused some degree  
14 of the symptom. Thus, the ALJ may not reject subjective symptom testimony ...  
15 simply because there is no showing that the impairment can reasonably produce  
16 the degree of symptom alleged.

17           Second, if the claimant meets this first test, and there is no evidence of  
18 malingering, the ALJ can reject the claimant’s testimony about the severity of her  
19 symptoms only by offering specific, clear and convincing reasons for doing so[.]

20           *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citations and quotation marks  
21 omitted). Given that there is objective medical evidence of an underlying impairment, the Court  
22 examines whether the ALJ rejected Plaintiff’s subjective symptom testimony by offering specific,  
23 clear, and convincing reasons.

24           The ALJ stated as follows regarding Plaintiff’s subjective symptoms:

25           The claimant contends quite significant limitations in standing and walking, yet  
26 she does not use a cane or walker. The claimant wears a back brace but stated that  
27 she was not wearing one when she came to the hearing. The claimant alternated  
28 between sitting and standing during her hearing, as if either position caused her  
significant pain after relatively short periods of time. However, the record does  
not document any significant neurological deficits, but instead repeatedly  
confirmed that the claimant maintained full (‘5/5’) motor strength with intact  
sensation and equal reflexes. Despite this lack of neurological signs, the claimant  
alleged during the hearing that she could not wear clothes with buttons or zippers  
because she was unable to close them. Again, while the claimant demonstrated  
only 5 lbs. of grip strength at the consulting examination in her right hand and no  
weight at all with her left hand, Ex. 12F, these measurements are contradicted by  
the claimant’s normal motor strength, good musculoskeletal range of motion, and  
grossly intact sensation findings on this same examination. It is noted that the  
results of grip strength test are subjective in nature since they depend upon the  
claimant’s exertion for the task.

          The claimant testified that she takes “a lot of pain medications” that makes her

1 vomit and then she cannot eat. Yet, the record does not document the claimant  
2 having made these complaints regularly to her treating gastroenterologist.

3 (A.R. 38).

4 However, regarding Plaintiff's complaint of fatigue in particular, the ALJ wrote:

5 [A]lthough subjectively reporting fatigue so severe that the claimant needs to sit  
6 up in bed for an hour or two each morning before being able to get out of bed, the  
7 record does not document a diagnosis of chronic fatigue syndrome that would  
8 satisfy the specific criteria of SSR 14-1p(II(A)(2). As with fibromyalgia, there are  
9 possibly other explanation for the claimant's reported fatigue including that she  
has often taken as many as 13 different medications daily. As these other causes  
have not been ruled out, and the record does not document a regularly diagnosed  
chronic fatigue syndrome impression, it cannot be considered a medically  
determinable impairment for purposes of this decision.

10 (A.R. 32). Plaintiff claims that this reasoning is insufficient because the ALJ did not provide  
11 clear and convincing reasons for discounting Plaintiff's subjective symptoms about fatigue in  
12 particular. Defendant, in contrast, claims that this reasoning was legally sufficient given the  
13 detailed reasons for discounting Plaintiff's subjective symptoms as a whole.

14 The Court finds that the ALJ's reasoning was legally sufficient. The ALJ need only  
15 provide clear and convincing reasons for rejecting the claimant's testimony about the severity of  
16 her symptoms—not clear and convincing reasons for rejecting the claimant's testimony about  
17 each of those individual symptoms. The ALJ's opinion was otherwise supported by substantial  
18 evidence including the opinion of a consulting physician. (Exh. 10F)

19 **III. Conclusion**

20 Thus, the Court finds that the decision of the Commissioner of Social Security is  
21 supported by substantial evidence, and the same is hereby affirmed.

22 The Clerk of the Court is directed to close this case.

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24 IT IS SO ORDERED.

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26 Dated: October 11, 2019

27 /s/ Eric P. Gray  
28 UNITED STATES MAGISTRATE JUDGE

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