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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHERYL CARREIRA,

Plaintiff,

No. CIV S-09-1672 EFB

vs.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

ORDER

Due to an oversight, the court previously docketed a portion of this order on March 25, 2011. That partial order is hereby vacated and superseded by this order.

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security denying her application for disability benefits under Title II and XVIII of the Social Security Act. For the reasons discussed below, the court grants defendant’s motion for summary judgment and denies plaintiff’s motion for summary judgment.

I. BACKGROUND

Plaintiff filed an application for disability insurance benefits on July 21, 2006, alleging disability since April 25, 2003. Administrative Record (“AR”) 9. Her application was denied initially and upon reconsideration. *Id.* A hearing was held on February 26, 2008, before Administrative Law Judge (“ALJ”) Daniel J. Heely. *Id.* at 20-42. Plaintiff was represented by

1 attorney Robert Kolber. *Id.* at 22. Plaintiff and vocational expert George Meyers testified. *Id.*
2 In a decision dated May 29, 2008, the ALJ determined plaintiff was not disabled.¹ *Id.* at 6-19.

3 The ALJ made the following specific findings:

- 4 1. The claimant meets the insured status requirements of the
5 Social Security Act through December 31, 2010.
- 6 2. The claimant has not engaged in substantial gainful activity
7 since April 28, 2003, the alleged onset date (20 CFR 404.1520(b)
8 and 404.1571 *et seq.*)
9 ...
- 10 3. The claimant has the following severe impairments: left foot
11 fracture, status post multiple surgeries, degenerative joint
12 disease/back strain and depression (20 CFR 404.1520(c)).
13 ...

14 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
15 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income (“SSI”) is paid
16 to disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Under both provisions,
17 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to
18 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &
19 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R.
20 §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The
21 following summarizes the sequential evaluation:

22 Step one: Is the claimant engaging in substantial gainful
23 activity? If so, the claimant is found not disabled. If not, proceed
24 to step two.

25 Step two: Does the claimant have a “severe” impairment?
26 If so, proceed to step three. If not, then a finding of not disabled is
appropriate.

Step three: Does the claimant’s impairment or combination
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
404, Subpt. P, App.1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past
work? If so, the claimant is not disabled. If not, proceed to step
five.

Step five: Does the claimant have the residual functional
capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation
process. *Bowen*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. *Id.*

1 4. The claimant does not have an impairment or combination of
2 impairments that meets or medically equals one of the listed
3 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR
404.1520(d), 404.1525 and 404.1526).

3 ...

4 5. After careful consideration of the entire record, the undersigned
5 finds that the claimant has a residual functional capacity to
6 perform sedentary work as defined in 20 CFR 404.1567(a) except
7 she should push and/or pull only occasionally with the left lower
8 extremity. The claimant can occasionally climb ramps, stairs,
9 ladders, ropes or scaffolds, stoop, kneel, crouch or crawl. She can
10 balance frequently. She is limited to reaching occasionally with
11 the bilateral extremities. The client retains the ability to
12 understand, remember and carry out simple job instructions but is
13 limited in her ability to respond appropriately to the general public
14 and should have only occasional public contact.

9 ...

10 6. The claimant is unable to perform any past relevant work. (20
11 CFR 404.1565).

11 ...

12 7. The claimant was born on April 29, 1966 and was thirty-six
13 years old, which is defined as a younger individual age 18-44, on
14 the alleged disability date (20 CFR 404.1563).

15 8. The claimant has at least a high school education and is able to
16 communicate in English (20 CFR 404.1564).

17 9. The claimant has acquired job skills from past relevant work
18 (20 CFR 404.1568).

17 ...

18 10. Considering the claimant's age, education, work experience,
19 and residual functional capacity, the claimant has acquired work
20 skills from past relevant work that are transferable to other
21 occupations with jobs existing in significant numbers in the
22 national economy (20 CFR 404.1560(c), 404.1566 and
23 404.1568(d)).

21 ...

22 11. The claimant has not been under a disability, as defined in the
23 Social Security Act, from April 28, 2003 through the date of this
24 decision (20 CFR 404.1520(g)).

24 *Id.* at 12-19.

25 ///

26 ///

1 Plaintiff requested that the Appeals Council review the ALJ's decision. However, on
2 April 15, 2009, the Appeals Council denied review, leaving the ALJ's decision as the final
3 decision of the Commissioner of Social Security. *Id.* at 1-5.

4 This appeal followed. Plaintiff contends that the ALJ erred in failing to find that
5 plaintiff's reactive airway disease was a severe impairment; rejecting the opinion of plaintiff's
6 treating physician without a legitimate basis for doing so; failing to credit plaintiff's testimony
7 and third party statements as to the nature and extent of her functional limitations; and failing to
8 properly assess plaintiff's RFC and failing to credit the testimony of the vocational expert in
9 response to the hypothetical which accurately reflected her limitations. Dckt. No. 23.

10 II. LEGAL STANDARDS

11 The Commissioner's decision that a claimant is not disabled will be upheld if the findings
12 of fact are supported by substantial evidence in the record and the proper legal standards were
13 applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);
14 *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,
15 180 F.3d 1094, 1097 (9th Cir. 1999).

16 The findings of the Commissioner as to any fact, if supported by substantial evidence, are
17 conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is
18 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521
19 (9th Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to
20 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol.*
21 *Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

22 "The ALJ is responsible for determining credibility, resolving conflicts in medical
23 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
24 2001) (citations omitted). "Where the evidence is susceptible to more than one rational
25 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."
26 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

1 III. ANALYSIS

2 A. Severe Impairment

3 Plaintiff contends that the ALJ erred in failing to find that plaintiff's reactive airway
4 disease was a severe impairment. An impairment or combination of impairments may be found
5 "not severe only if the evidence establishes a slight abnormality that has no more than a minimal
6 effect on an individual's ability to work." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).
7 If an ALJ cannot clearly determine the effect of an impairment or combination of impairments
8 on the individual's ability to do basic work activities, the sequential evaluation should not end
9 with the not severe evaluation step. S.S.R. No. 85-28. Step two is "a de minimis screening
10 device to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).
11 An ALJ may find that a claimant lacks a medically severe impairment or combination of
12 impairments only when his conclusion is "clearly established by medical evidence." S.S.R.
13 85-28.

14 In this case, the ALJ made the following findings regarding plaintiff's reactive airways
15 disease:

16 Although the claimant suffers from reactive airways disease, a pulmonary and
17 sleep consultation on April 25, 2007 noted that her asthma was currently in
18 remission and controlled with medications. Pulmonary function testing showed
19 essentially normal spirometric values (B25F/9-12). The claimant continues to
20 smoke one pack per day of cigarettes, leading the undersigned to conclude that
her respiratory condition is not as limiting as alleged. In light of the foregoing,
the undersigned finds that the claimant's reactive airway disease does not rise to
the level of a severe impairment.

21 AR at 14.

22 Plaintiff argues that the ALJ failed to accurately depict the evidence regarding plaintiff's
23 reactive airway disease, as one medical report noted that COPD, emphysema, and hypoxemia
24 had to be ruled out, and another report documented abnormalities characteristic of emphysema.
25 Dckt. No. 23 at 22-23. Plaintiff further argues that she continued to smoke because she suffered
26 from tobacco dependence, and not because her reactive airway disease was not a severe

1 impairment. *Id.* at 23. Defendant contends that substantial evidence supports the ALJ’s
2 findings. Dckt. No. 29 at 8. Specifically, defendant notes that the plaintiff did not testify that
3 her pulmonary condition prevented her from working. *Id.*

4 The medical record that the ALJ refers to states: “A pulmonary function study on the day
5 of the evaluation revealed a forced vital capacity of 3.11 liters or 88% of predicted. The FEV1
6 was 23.6 liters or 89% of predicted, and the FEV1/FVC ratio was 85%. Flow rates were slightly
7 reduced in the large airways. PFT shows essentially normal spirometric values.” AR 507. The
8 impression given was “Asthma, currently in remission, controlled with medications. Rule out
9 COPD, emphysema, and hypoxemia.” *Id.* The record that plaintiff refers to states that she has
10 hyper-inflated lungs and a very low diffusion capacity. *Id.* at 511. The report states that such
11 symptoms are “characteristic of emphysema” and that “in view of the severity of the diffusion
12 defect, studies with exercise would be helpful to evaluate the presence of hypoxemia.” *Id.* A
13 report of plaintiff’s pulmonary and sleep consultation states that plaintiff has a history of asthma
14 and has “multiple respiratory problems.” *Id.* at 504.

15 During the hearing, the ALJ asked plaintiff what health problems “stop[ped her] from
16 working full-time.” AR 24. She replied “I have a problem with my foot. I have fibromyalgia. I
17 have neck, back, shoulder problems, chronic pain, fatigue and mental.” *Id.* Upon further
18 questioning from the ALJ, she clarified that her mental problem was depression. *Id.*

19 Although the ALJ’s comment on plaintiff’s continuing to smoke misses the point,² there
20 nonetheless is substantial evidence in the record to support the ALJ’s conclusion that plaintiff’s
21 reactive airways disease did not constitute a severe impairment—that is, that the disease is a slight
22 abnormality that has no more than a minimal effect on plaintiff’s ability to work. First, as noted
23 above, plaintiff did not identify her reactive airways disease as a problem that stopped her from

24
25 ² The fact the plaintiff continues to smoke may evidence the extent of her tobacco
26 dependency (even addiction), but it in no way substitutes for the medical evidence as to the
severity of her condition and does not establish that plaintiff’s condition is less serious than
alleged.

1 working. Second, her asthma was in remission and was controlled by medication. Although
2 other medical records may provide contradictory evidence, the ALJ's findings of fact, if
3 supported by substantial evidence, are conclusive. *See Miller v. Heckler*, 770 F.2d at 847. The
4 ALJ's finding that plaintiff's reactive airways disease is not a severe impairment is supported by
5 substantial evidence and therefore must be upheld.

6 B. Treating Physician's Opinion

7 Next, plaintiff argues that the ALJ erred in rejecting the opinion of her treating physician,
8 Dr. Bacay, without a legitimate basis for doing so. The weight given to medical opinions
9 depends in part on whether they are proffered by treating, examining, or non-examining
10 professionals. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Ordinarily, more weight is
11 given to the opinion of a treating professional, who has a greater opportunity to know and
12 observe the patient as an individual. *Id.* To evaluate whether an ALJ properly rejected a
13 medical opinion, in addition to considering its source, the court considers whether (1)
14 contradictory opinions are in the record; and (2) clinical findings support the opinions. An ALJ
15 may reject an uncontradicted opinion of a treating or examining medical professional only for
16 "clear and convincing" reasons. *Lester*, 81 F.3d at 831. In contrast, a contradicted opinion of a
17 treating or examining professional may be rejected for "specific and legitimate" reasons, that are
18 supported by substantial evidence. *Id.* at 830. The opinion of a non-examining professional,
19 without other evidence, is insufficient to reject the opinion of a treating or examining
20 professional. *Lester*, 81 F.3d at 831. In addition, an ALJ must set out in the record his reasoning
21 and the evidentiary support for his interpretation of the medical evidence. *See Tackett v. Apfel*,
22 180 F.3d 1094, 1102 (9th Cir. 1999).

23 Dr. Bacay was plaintiff's treating physician from May 9, 2006 through February 1, 2008.
24 AR 487. She filled out a form entitled "Complete Medical Report of Physical and Mental Work-
25 Related Impairments," in which she opined that plaintiff could never lift or carry even up to 10
26 pounds; could sit, stand or walk for a total of zero hours in an eight-hour workday, and for zero

1 hours at a time; was restricted in her exposure to heights, moving machinery, vibrations, noise,
2 dust, fumes, odors, smoke, chemicals, wetness, dryness, and temperature extremes; had a poor
3 ability to follow work rules, relate to co-workers, deal with the public, use judgement, interact
4 with supervisors, deal with work stress, function independently, and maintain attention and
5 concentration, understand, remember and carry out complex, detailed but not complex, and
6 simple job instructions; had a fair ability to maintain personal appearance, behave in an
7 emotionally stable manner, behave predictably in social situations; and a poor ability to
8 demonstrate reliability. *Id.* at 488-90. Dr. Bacay further opined, “due to ongoing pain, she’s not
9 mentally capable of performing any job, even sedentary.” *Id.* at 490.

10 Regarding plaintiff’s treating physicians’ opinions, the ALJ wrote:

11 The undersigned gives less weight to the assessments of the claimant’s treating
12 physicians to the effect that she is unable to perform even sedentary work (B20F,
13 B22F, B23F/2). The course of treatment pursued by these doctors has not been
14 consistent with what one would expect if the claimant were truly disabled, as the
15 doctor has reported. For example, although the claimant’s podiatrist stated that
16 she is disabled and unable to maintain employment, he treats her only for the
17 residual effects from her left foot surgery and sees her on a maintenance basis
18 every three months. This treatment does not support his opinion regarding her
19 ability to work, particularly as he does not treat her for any other impairments
20 (B23F/2). Further, they all apparently relied quite heavily on the subjective
21 report of symptoms and limitations provided by the claimant, and seemed to
22 uncritically accept as true most, if not all, of what the claimant reported. Yet, as
23 explained elsewhere in this decision, there exist good reasons for questioning the
24 reliability of the claimant’s subjective complaints.

19 *Id.* at 17.

20 Thus, the ALJ gave two reasons for rejecting Bacay’s opinion: 1) the course of treatment
21 pursued by Bacay was not consistent with what one would expect if plaintiff were truly disabled;
22 and 2) Bacay relied heavily and uncritically on plaintiff’s subjective report of her symptoms and
23 limitations.

24 The ALJ did not explain what he meant by his second reason for discrediting Dr. Bacay’s
25 opinion, that Dr. Bacay relied heavily and uncritically on plaintiff’s subjective complaints, but
26 the record does not appear to support this broad assertion. Dr. Bacay ordered laboratory tests,

1 MRIs, and pulmonary testing to confirm her diagnoses. Examination and testing reflected in Dr.
2 Bacay's treatment notes document plaintiff's decreased range of motion in the neck and
3 decreased grip strength on the right; tenderness on the right shoulder going up to her right side of
4 her neck, to the right occiput; an inability to flex her neck secondary to pain; and significant
5 back pain. AR 375. MRI results confirmed some of plaintiff's complaints, showing that she had
6 an osteophytic area and lumbar disc disease with some lumbar stenosis. *Id.* at 417. A
7 pulmonary function study showed that plaintiff had a severely reduced diffusing capacity and
8 overinflation. *Id.* at 511. Lab reports showed that plaintiff had elevated cholesterol and
9 triglyceride levels and abnormal findings suggesting hypothyroidism or hyperthyroidism. *Id.* at
10 410-411. As discussed below, Dr. Bacay expressed a rather extreme interpretation of plaintiff's
11 functional limitations, but the record shows that she did not rely solely upon plaintiff's
12 subjective complaints in forming her opinions, and that some of plaintiff's subjective complaints
13 were supported by objective medical evidence.

14 As for the first reason the ALJ stated for not accepting Dr. Bacay's conclusion as to
15 disability, plaintiff argues that Dr. Bacay's treatment of plaintiff was "exactly what one would
16 expect."

17 Dr. Bacay's diagnoses included degenerative disc disease, fibromyalgia, migraine
18 headaches, depression, insomnia, reactive airway disease, COPD, emphysema,
19 hyperlipidemia, and tobacco dependence...Dr. Bacay's treatment of these
20 conditions included prescriptions for Ultram, Skelaxin, Norco, and Soma for pain;
21 prescriptions for Topamax and Maxalt for her headaches; a prescription of
22 Lovastatin for her high cholesterol, Valium for anxiety, Albuterol, Advair disc,
23 Spira, nebulizer, and oxygen for her reactive airway disease, COPD, and
24 difficulty breathing, a prescription for Rozerem for her insomnia; and a
25 prescription of Cymbalta for depression....In addition, Dr. Bacay also sought
26 insurance authorization for massage therapy (TR 375), ordered laboratory tests
(TR 410-411), ordered MRIs which confirmed "an osteophytic area in the C5-C6
as well as lumbar disc disease with some lumbar stenosis" (TR 329-330, 417);
ordered a pulmonary function test which documented "a severely reduced
diffusing capacity and overinflation" which were characteristic of emphysema
(TR 511); advised her to stop smoking due to her "severe reactive airway disease"
and wanted her to try Chantix, a new drug that worked for tobacco cessation (TR
415); and referred her to Dr. Arrogante, a pain specialist (TR 417).

Dckt. No. 23 at 26. Plaintiff argues that Dr. Bacay's treatment of plaintiff does not appear to be

1 obviously inconsistent with what one would expect. But the ALJ's concern is more specific than
2 that. The focus here is on why he did not fully accept Dr. Bacay's conclusions about plaintiff's
3 ability to work. Although the ALJ could have been more precise in articulating his reasons, a
4 comparison of his stated concern with Dr. Bacay's descriptions reveal adequate evidence to
5 support the ALJ's finding.

6 The ALJ stated that "[t]he course of treatment pursued by these doctors has not been
7 consistent with what one would expect if the claimant were truly disabled, as the doctor has
8 reported." But the examples cited by the ALJ show that the specific concern was not that the
9 course of treatment was unexpected, but rather whether Dr. Bacay's reports include findings and
10 objective evidence which do not support a conclusion that plaintiff is unable to perform at least
11 sedentary work. Dr. Bacay opined that plaintiff could sit, stand, and walk for *zero* hours at a
12 time, and for a total of *zero* hours a day, where the next incremental category was one hour a
13 day, and could never lift or carry up to ten pounds, where that was the lightest category on the
14 form. It was not inappropriate for the ALJ to look to Dr. Bacay's treatment records for the
15 presence of objective findings that could support that rather extreme opinion. As defendant
16 argues, Dr. Bacay's stated limitations suggest a total invalid with an inability to sit, stand, walk,
17 or lift anything at all. Yet her records include ranges of motion and neurologic reports which
18 show otherwise. Indeed, the findings by her partner, Dr. Bernard Barclay, state that plaintiff was
19 neurologically intact and had no motor deficits. AR 375-76. While there may be little doubt that
20 plaintiff's condition warrants the treatment provided, there is adequate evidence in the record to
21 support that ALJ's finding that the plaintiff has a residual functional capacity for sedentary work
22 notwithstanding the contrary statement by Dr. Bacay.

23 C. Plaintiff's Testimony and Third Party Statements

24 Plaintiff argues that the ALJ erred in rejecting her testimony and her sister's third party
25 statement. The ALJ determines whether a disability applicant is credible, and the court defers to
26 the ALJ's discretion if the ALJ used the proper process and provided proper reasons. *See, e.g.,*

1 *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make
2 an explicit credibility finding. *Albalos v. Sullivan*, 907 F.2d 871, 873-74 (9th Cir. 1990); *Rashad*
3 *v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.1990) (requiring explicit credibility finding to be
4 supported by “a specific, cogent reason for the disbelief”).

5 In evaluating whether subjective complaints are credible, the ALJ should first determine
6 whether the claimant has presented objective medical evidence of an underlying impairment
7 “which could reasonably be expected to produce the pain or other symptoms alleged.” *Bunnell v.*
8 *Sullivan*, 947 F.2d 341, 344 (9th Cir.1991) (en banc). If there is objective medical evidence of an
9 impairment, the ALJ then may consider the nature of the symptoms alleged, including
10 aggravating factors, medication, treatment and functional restrictions. *Id.* at 345-47. The ALJ
11 also may consider: (1) the applicant's reputation for truthfulness, prior inconsistent statements or
12 other inconsistent testimony, (2) unexplained or inadequately explained failure to seek treatment
13 or to follow a prescribed course of treatment, and (3) the applicant's daily activities. *Orn v.*
14 *Astrue*, 495 F.3d 625, 636 (9th Cir.2007); *Smolen v. Chater*, 80 F.3d at 1284. “Without
15 affirmative evidence showing that the claimant is malingering, the Commissioner's reasons for
16 rejecting the claimant’s testimony must be clear and convincing.” *Morgan v. Comm'r of Soc.*
17 *Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *see also Lingenfelter v. Astrue*, 504 F.3d 1028,
18 1036 (9th Cir. 2007). To support a lack of credibility finding, the ALJ must “point to specific
19 facts in the record which demonstrate that [the claimant is in less pain or the claimant’s
20 symptoms are less severe] than she claims.” *Vasquez v. Astrue*, 547 F.3d 1101, 1105 (9th Cir.
21 2008).

22 Here, the ALJ found that plaintiff was not fully credible. He provided the following
23 reasons for disbelieving her testimony: 1) her treatment had been “routine and conservative in
24 nature” and she was not a candidate for surgery; 2) although plaintiff took medication, which
25 weighed in favor of her credibility, the medication had been “relatively effective” in controlling
26 her symptoms; 3) objective clinical findings were consistently normal or minimally abnormal;

1 and 4) she had not sought mental health treatment for her depression, although her primary care
2 doctor prescribed her antidepressants. The ALJ noted that although her daily activities were
3 limited, he did not consider this to be strong evidence in favor of her credibility, because her
4 daily activities could not be objectively verified, and in light of the “relatively weak” medical
5 evidence, even if plaintiff’s daily activities were limited, the limitations must be due to “other
6 reasons” rather than her medical condition. AR 16.

7 Plaintiff argues that her treatment was not routine and conservative, as she took narcotic
8 pain medications, used a TENS unit, and had trigger point injections and massage therapy; that
9 she testified that she was in great pain despite the medications; that objective test results
10 corroborated some of her subjective complaints; that she received appropriate mental health care
11 from her primary care physician; and that daily activities could never be verified “short of spying
12 on [her] twenty four hours a day.” But, as explained above, medical evidence in the record does
13 not support plaintiff’s testimony, for example, that she could not sit or stand for more than 15
14 minutes. Although as the ALJ noted, plaintiff’s medications and limited daily activities weighed
15 in favor of finding her credible, those factors were outweighed by the other factors he listed. As
16 the ALJ provided legally adequate reasons for finding that plaintiff was not fully credible, this
17 court may not reweigh the evidence, but must affirm the ALJ’s credibility finding.

18 Plaintiff’s sister submitted a third party statement in which she described plaintiff’s
19 limitations and daily activities. The ALJ assigned little weight to her statement. “Lay witness
20 testimony as to a claimant's symptoms or how an impairment affects ability to work is competent
21 evidence, and therefore cannot be disregarded without comment.” *Nguyen v. Chater*, 100 F.3d
22 1462, 1467 (9th Cir.1996); *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir.1993)
23 (friends and family members in a position to observe a plaintiff’s symptoms and daily activities
24 are competent to testify to condition); 20 C.F.R. § 404.1513(d)(4) (providing that evidence
25 provided by lay witnesses may be used to show “the severity of [a claimant's] impairment(s) and
26 how it affects [the claimant’s] ability to work”). “If the ALJ wishes to discount the testimony of

1 the lay witnesses, he must give reasons that are germane to each witness.” *Dodrill*, 12 F.3d at
2 919; *see also Bruce v. Astrue*, 557 F.3d 1113 (9th Cir. Mar.5, 2009) (finding that the ALJ erred
3 in rejecting, without sufficient comment, the lay witness testimony of the plaintiff’s wife); *Stout*
4 *v. Comm’r of Soc. Sec.*, 454 F.3d 1050, 1054 (9th Cir.2006) (finding that the ALJ erred by failing
5 to consider the lay testimony of two witnesses about how the plaintiff’s impairments affected his
6 ability to work).

7 Here, the ALJ did not disregard plaintiff’s sister’s statement, but gave two reasons for
8 assigning it little weight: 1) plaintiff’s sister had a “vested interest” in the outcome of the case,
9 and 2) “she had to rely, at least in part, on the claimant’s subjective complaints.” AR 16. It is
10 unclear what the ALJ meant by the first reason. There is no evidence in the record to suggest
11 that plaintiff’s sister would receive money if plaintiff’s case were resolved favorably. Insofar as
12 the ALJ meant that the witness was biased as a result of being the plaintiff’s sister, this was not a
13 proper reason to discount her testimony. *See Smolen*, 80 F.3d at 1289 (“The fact that a lay
14 witness is a family member cannot be a ground for rejecting his or her testimony. To the
15 contrary, testimony from lay witnesses who see the claimant everyday is of particular
16 value...such lay witnesses will often be family members”). The ALJ’s second reason is
17 adequate, but it only applies to some of plaintiff’s sister’s statements—that is, the statements
18 which derive from plaintiff’s complaints rather than plaintiff’s sister’s observations. Although it
19 is difficult to determine which statements were based on plaintiff’s subjective complaints,
20 reviewing plaintiff’s sister’s statement reveals the following evidence that could not have been
21 based on plaintiff’s complaints:

- 22 • Plaintiff often takes two or three days to return her sister’s phone call.
- 23 • Plaintiff used to be a “clean freak” and “always had a spotless house” but now she
24 doesn’t care.
- 25 • Plaintiff visits her sister three to four times a month and her parents almost every
26 weekend.

- 1 • If you ask plaintiff to get something she often forgets what you asked her for.
- 2 • Plaintiff's sister does not think that plaintiff handles stress well now, but she used to
3 handle it better.
- 4 • Plaintiff seems very depressed. She used to talk a lot more. At times she cuts a
5 conversation short.
- 6 • Plaintiff used to be happy and full of ambition. Now she is "angry and bitter and her
7 mouth is not so nice. She cries at the drop of a hat and is easily offended. So I am
8 cautious what I say to her that she doesn't take it wrong."

9 AR 130-38. Where an ALJ has failed to properly discuss lay testimony, a reviewing court
10 cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ,
11 when fully crediting the testimony, could have reached a different disability determination. *See*
12 *Stout*, 454 F.3d at 1054. If only the above testimony were fully credited, the court finds that no
13 reasonable ALJ would have reached a different disability determination. Therefore, the ALJ's
14 error was harmless.

15 D. VE Testimony

16 Finally, plaintiff argues that the ALJ failed to credit the VE's testimony in response to the
17 hypothetical which accurately reflected her limitations. Hypothetical questions posed to a
18 vocational expert must set out all the substantial, supported limitations and restrictions of the
19 particular claimant. *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). If a hypothetical
20 does not reflect all the claimant's limitations, the expert's testimony as to jobs in the national
21 economy the claimant can perform has no evidentiary value. *DeLorme v. Sullivan*, 924 F.2d
22 841, 850 (9th Cir. 1991). While the ALJ may pose to the expert a range of hypothetical
23 questions, based on alternate interpretations of the evidence, the hypothetical that ultimately
24 serves as the basis for the ALJ's determination must be supported by substantial evidence in the
25 record as a whole. *Embrey v. Bowen*, 849 F.2d 418, 422-23 (9th Cir. 1988). Here, plaintiff
26 argues that the ALJ should have credited her treating physician's opinion, her own testimony,

1 and her sister's statement, and therefore should have assessed a different RFC and should have
2 posed a different hypothetical to the VE. The court has already rejected these arguments. The
3 hypothetical posed to the VE was based on the ALJ's assessed RFC findings. Thus, defendant is
4 entitled to summary judgment on this claim.

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. The court's March 25, 2011 order is vacated;
- 7 2. Plaintiff's motion for summary judgment or remand is denied;
- 8 3. The Commissioner's cross-motion for summary judgment is granted; and
- 9 4. The case remains closed.

10 DATED: March 29, 2011.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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