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

KARRIE ANN FRAZIER,

No. 2:13-CV-0756-GEB-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATION

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pending before the court are plaintiff’s motion for summary judgment (Doc. 16) and defendant’s cross-motion for summary judgment (Doc. 19).

**I. PROCEDURAL HISTORY**

Plaintiff applied for social security benefits on November 4, 2009, with a protective filing date of October 29, 2009, alleging an onset of disability on April 1, 2008, due to disabilities including migraine headaches, anxiety, depression, and bi-polar disorder (Certified administrative record (“CAR”) 65-68, 123-29, 140-47). Plaintiff’s claim was denied initially and upon reconsideration. Plaintiff requested an administrative hearing, which was held on August 2,

1 2011, before Administrative Law Judge (“ALJ”) Mark C. Ramsey. In a November 18, 2011,  
2 decision, the ALJ concluded that plaintiff is not disabled<sup>1</sup> based on the following findings:

- 3 1. The claimant meets the insured status requirements of the Social  
4 Security Act through December 31, 2009.
- 5 2. The claimant has not engaged in substantial gainful activity since  
6 April 1, 2008, the alleged onset date (20 CFR 404.1571 *et seq.*, and  
7 416.971 *et seq.*).
- 8 3. The claimant has the following severe impairments: borderline  
9 intellectual functioning, anxiety, depression and bipolar. (20 CFR  
10 404.1520(c) and 416.920(c)).
- 11 4. The claimant does not have an impairment or combination of  
12 impairments that meets or medically equals the severity of one of  
13 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1

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14 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to  
15 the Social Security program, 42 U.S.C. § 401 *et seq.* Supplemental Security Income (“SSI”) is  
16 paid 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 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925  
2 and 416.926).

- 3 5. After careful consideration of the entire record, the undersigned  
4 finds that the claimant has the residual functional capacity to  
5 perform a full range of work at all exertional levels but with the  
6 following nonexertional limitations: simple, unskilled work  
7 without frequent contact with the public or coworkers.
- 8 6. The claimant is capable of performing past relevant work as a  
9 housekeeper. This work does not require the performance of work  
-related activities precluded by the claimant's residual functional  
capacity (20 CFR 404.1565 and 416.965).
- 7 7. The claimant has not been under a disability, as defined in the  
Social Security Act, from April 1, 2008, through the date of this  
decision (20 CFR 404.1520(f) and 416.920(f)).

10 After the Appeals Council declined review on January 9, 2013, this appeal followed.

## 11 **II. STANDARD OF REVIEW**

12 The court reviews the Commissioner's final decision to determine whether it is:  
13 (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a  
14 whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is  
15 more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521  
16 (9th Cir. 1996). It is "such evidence as a reasonable mind might accept as adequate to support a  
17 conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole, including  
18 both the evidence that supports and detracts from the Commissioner's conclusion, must be  
19 considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones v.  
20 Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner's  
21 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.  
22 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative  
23 findings, or if there is conflicting evidence supporting a particular finding, the finding of the  
24 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).  
25 Therefore, where the evidence is susceptible to more than one rational interpretation, one of  
26 which supports the Commissioner's decision, the decision must be affirmed, see Thomas v.

1 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal  
2 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th  
3 Cir. 1988).

### 4 **III. DISCUSSION**

5 Plaintiff argues the ALJ erred in several ways: (1) the ALJ failed to properly  
6 evaluate the severity of her migraine headaches; (2) the ALJ's finding regarding the listing of  
7 impairments lacks substantial evidence; (3) the ALJ improperly rejected her treating and  
8 examining physicians' opinions; (4) the ALJ improperly discredited plaintiff's testimony as well  
9 as her lay witness; (5) the ALJ's RFC assessment lacked substantial evidence; (6) the ALJ's  
10 determination of plaintiff's past relevant work was erroneous; and (7) the ALJ failed to obtain a  
11 vocational expert .

#### 12 **A. Severity of Conditions**

13 In order to be entitled to benefits, the plaintiff must have an impairment severe  
14 enough to significantly limit the physical or mental ability to do basic work activities. See 20  
15 C.F.R. §§ 404.1520(c), 416.920(c).<sup>2</sup> In determining whether a claimant's alleged impairment is  
16 sufficiently severe to limit the ability to work, the Commissioner must consider the combined  
17 effect of all impairments on the ability to function, without regard to whether each impairment  
18 alone would be sufficiently severe. See Smolen v. Chater, 80 F.3d 1273, 1289-90 (9th Cir.  
19 1996); see also 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523 and 416.923. An impairment,  
20 or combination of impairments, can only be found to be non-severe if the evidence establishes  
21 only a slight abnormality that has no more than a minimal effect on an individual's ability to  
22 work. See Social Security Ruling ("SSR") 85-28; see also Yuckert v. Bowen, 841 F.2d 303, 306  
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24 <sup>2</sup> Basic work activities include: (1) walking, standing, sitting, lifting, pushing,  
25 pulling, reaching, carrying, or handling; (2) seeing, hearing, and speaking; (3) understanding,  
26 carrying out, and remembering simple instructions; (4) use of judgment; (5) responding  
appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes  
in a routine work setting. See 20 C.F.R. §§ 404.1521, 416.921.

1 (9th Cir. 1988) (adopting SSR 85-28). “Step two, then, is ‘a de minimis screening device [used]  
2 to dispose of groundless claims,’ and an ALJ may find that a claimant lacks a medically severe  
3 impairment or combination of impairments only when his conclusion is ‘clearly established by  
4 medical evidence.’” Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting Smolen v.  
5 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); S.S.R. 85–28). The plaintiff has the burden of  
6 establishing the severity of the impairment by providing medical evidence consisting of signs,  
7 symptoms, and laboratory findings. See 20 C.F.R. §§ 404.1508, 416.908. The plaintiff’s own  
8 statement of symptoms alone is insufficient. See id.

9           Here, the ALJ found plaintiff’s migraine headaches were not a severe impairment.  
10 He specifically found:

11           Although review of the entire record shows intermittent treatment  
12 from headaches, most treatment has been for depression and  
13 anxiety. Treatment records show that headaches are controlled  
with medication. Therefore, the undersigned finds that the  
claimant’s migraine headaches are not a severe impairment.

14 (CAR 17).

15           Plaintiff argues this determination is erroneous and not supported by substantial  
16 evidence.

17           The medical records in this case are minimal, the most detailed of which do show  
18 treatment for depression and anxiety. However, contrary to the ALJ’s statement, the record  
19 contains numerous medical visits where plaintiff sought treatment for her migraine headaches.  
20 The record also indicates that plaintiff was routinely prescribed medication for her migraines, but  
21 it would appear that she continued to suffer from headaches despite the medication. Several of  
22 her office visits with Dr. Budhram were for treatment of headaches. In addition, when she was  
23 being seen for her anxiety and/or depression, there was often a notation in the medical report as  
24 to plaintiff’s on-going headaches. (See e.g., CAR 210, 223, 288-97). Even if the medication she  
25 was prescribed was helpful in controlling the headaches, the undersigned cannot find that there is  
26 substantial evidence to support the ALJ’s determination that the medical evidence *clearly*

1 established that plaintiff's headaches were not a severe impairment, either alone or in  
2 combination with her other impairments. Indeed, the record includes evidence of problems  
3 sufficient to pass the de minimis threshold of step two.

4 As noted above, the ALJ's conclusion that the claimant lacks a medically severe  
5 impairment or combination of impairments is valid only when the ALJ's conclusion is "clearly  
6 established by medical evidence." Webb, 433 F.3d at 687. Here, the undersigned cannot say that  
7 there was substantial evidence to find that the objective medical evidence clearly established that  
8 plaintiff's migraine headaches were not a medically severe impairment. See id. at 688 ("There is  
9 not, in this instance, the total absence of objective evidence of severe medical impairment....").  
10 As such, an order remanding this action for further proceedings is recommended.

#### 11 **B. Credibility**

12 Plaintiff also argues the ALJ's credibility determination was erroneous, both as to  
13 plaintiff's testimony as well as that of her lay witness, Mr. Heninger. Defendant contends the  
14 ALJ's credibility determination as to Mr. Heninger was sufficient, or at least harmless error, but  
15 fails to defend the credibility determination as to plaintiff herself.

16 The Commissioner determines whether a disability applicant is credible, and the  
17 court defers to the Commissioner's discretion if the Commissioner used the proper process and  
18 provided proper reasons. See Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996). An explicit  
19 credibility finding must be supported by specific, cogent reasons. See Rashad v. Sullivan, 903  
20 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. See Lester v. Chater, 81 F.3d  
21 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify what testimony is not credible  
22 and what evidence undermines the testimony. See id. Moreover, unless there is affirmative  
23 evidence in the record of malingering, the Commissioner's reasons for rejecting testimony as not  
24 credible must be "clear and convincing." See id.; see also Carmickle v. Commissioner, 533 F.3d  
25 1155, 1160 (9th Cir. 2008) (citing Lingenfelter v Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007),  
26 and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)).

1 If there is objective medical evidence of an underlying impairment, the  
2 Commissioner may not discredit a claimant's testimony as to the severity of symptoms merely  
3 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d  
4 341, 347-48 (9th Cir. 1991) (en banc). As the Ninth Circuit explained in Smolen v. Chater:

5 The claimant need not produce objective medical evidence of the  
6 [symptom] itself, or the severity thereof. Nor must the claimant produce  
7 objective medical evidence of the causal relationship between the  
8 medically determinable impairment and the symptom. By requiring that  
9 the medical impairment "could reasonably be expected to produce" pain or  
10 another symptom, the Cotton test requires only that the causal relationship  
11 be a reasonable inference, not a medically proven phenomenon.

12 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in Cotton v. Bowen, 799  
13 F.2d 1403 (9th Cir. 1986)).

14 The Commissioner may, however, consider the nature of the symptoms alleged,  
15 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell,  
16 947 F.2d at 345-47. In weighing credibility, the Commissioner may also consider: (1) the  
17 claimant's reputation for truthfulness, prior inconsistent statements, or other inconsistent  
18 testimony; (2) unexplained or inadequately explained failure to seek treatment or to follow a  
19 prescribed course of treatment; (3) the claimant's daily activities; (4) work records; and (5)  
20 physician and third-party testimony about the nature, severity, and effect of symptoms. See  
21 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the  
22 claimant cooperated during physical examinations or provided conflicting statements concerning  
23 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the  
24 claimant testifies as to symptoms greater than would normally be produced by a given  
25 impairment, the ALJ may disbelieve that testimony provided specific findings are made. See  
26 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)).

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1 Here, the ALJ simply determined that:

2 After careful consideration of the evidence, the undersigned finds  
3 that the claimant's medically determinable impairments could  
4 reasonably be expected to cause the alleged symptoms; however,  
5 the claimant's statements concerning the intensity, persistence and  
6 limiting effects of these symptoms are not credible to the extent  
7 they are inconsistent with the above residual functional capacity  
8 assessment.

9 (CAR 21).

10 The ALJ did not provide any reasons for discrediting plaintiff's testimony, nor did  
11 he specify which portions of the testimony were discredited. While there is some discussion as to  
12 plaintiff's complaints and symptoms, and perhaps some implied discrediting including a  
13 suggestion of malingering in one report, the ALJ fails to articulate specific reasons for  
14 discrediting plaintiff. This analysis, or lack thereof, is insufficient to meet the standard.  
15 Therefore, as an additional, alternative finding, the undersigned finds the ALJ's credibility  
16 determination to be erroneous, and an alternative grounds for remand.

#### 17 **IV. CONCLUSION**

18 Based on the foregoing, the undersigned finds that the ALJ committed reversible  
19 error, and will recommend this matter be remanded under sentence four of 42 U.S.C. § 405(g) for  
20 further development of the record and/or further findings addressing the deficiencies noted  
21 above.

22 As the determination as to plaintiff's severe impairment at step two impacts the  
23 rest of the sequential analysis, an error at step two necessarily will require additional proceedings.  
24 Alternatively, the credibility analysis is unsupported. As remand is recommended, the other  
25 errors claimed by plaintiff need not be analyzed at this time.

26 Accordingly, the undersigned recommends that:

- 27 1. Plaintiff's motion for summary judgment (Doc. 16) be granted;
- 28 2. Defendant's cross-motion for summary judgment (Doc. 19) be denied;
- 29 3. This matter be remanded for further proceedings consistent with this order;



1 and

2 4. The Clerk of the Court be directed to enter judgment and close this file.

3 These findings and recommendations are submitted to the United States District  
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court. Responses to objections shall be filed within 14 days after service of  
7 objections. Failure to file objections within the specified time may waive the right to appeal.  
8 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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11 DATED: September 4, 2014

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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE

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