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

SUSAN CAROL PERRY-DILLARD,

No. 2:14-CV-2025-CMK

Plaintiff,

vs.

MEMORANDUM OPINION AND ORDER

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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Plaintiff, who is proceeding with retained counsel, brings this action under 42 U.S.C. § 405(g) for judicial review of a final decision of the Commissioner of Social Security. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are plaintiff’s motion for summary judgment (Doc. 17) and defendant’s cross-motion for summary judgment (Doc. 20).

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## I. PROCEDURAL HISTORY

Plaintiff applied for social security benefits on July 11, 2011, and July 20, 2011.

In the applications, plaintiff claims that disability began on December 10, 2010. Plaintiff's claim was initially denied. Following denial of reconsideration, plaintiff requested an administrative hearing, which was held on December 18, 2013, before Administrative Law Judge ("ALJ") Sally C. Reason. In a February 5, 2014, decision, the ALJ concluded that plaintiff is not disabled based on the following relevant findings:

1. The claimant has the following severe impairment(s): fibromyalgia, history of cerebral vascular accident ("stroke"), degenerative disc disease of the spine, panic attacks, and history of methamphetamine abuse;
2. The claimant does not have an impairment or combination of impairments that meets or medically equals an impairment listed in the regulations;
3. The claimant has the following residual functional capacity: the claimant can perform light work, except she must avoid jobs requiring more than frequent communication as a result of residuals from her stroke;
4. Considering the claimant's age, education, work experience, residual functional capacity, the claimant is capable of performing her past relevant work as an office helper.

19 After the Appeals Council declined review on July 3, 2014, this appeal followed.

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## II. STANDARD OF REVIEW

The court reviews the Commissioner's final decision to determine whether it is: (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). "Substantial evidence" is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996). It is "... such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole, including both the evidence that supports and detracts from the Commissioner's conclusion, must be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones

1 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner’s  
2 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.  
3 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative  
4 findings, or if there is conflicting evidence supporting a particular finding, the finding of the  
5 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).  
6 Therefore, where the evidence is susceptible to more than one rational interpretation, one of  
7 which supports the Commissioner’s decision, the decision must be affirmed, see Thomas v.  
8 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal  
9 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th  
10 Cir. 1988).

### 11 12 III. DISCUSSION

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

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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  
13 Cotton v. Bowen, 799 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           Regarding reliance on a claimant’s daily activities to find testimony of disabling  
2 pain not credible, the Social Security Act does not require that disability claimants be utterly  
3 incapacitated. See Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989). The Ninth Circuit has  
4 repeatedly held that the “. . . mere fact that a plaintiff has carried out certain daily activities . . .  
5 does not . . . [necessarily] detract from her credibility as to her overall disability.” See Orn v.  
6 Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Heller, 260 F.3d 1044, 1050 (9th  
7 Cir. 2001)); see also Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir. 1986) (observing that a  
8 claim of pain-induced disability is not necessarily gainsaid by a capacity to engage in periodic  
9 restricted travel); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (concluding that the  
10 claimant was entitled to benefits based on constant leg and back pain despite the claimant’s  
11 ability to cook meals and wash dishes); Fair, 885 F.2d at 603 (observing that “many home  
12 activities are not easily transferable to what may be the more grueling environment of the  
13 workplace, where it might be impossible to periodically rest or take medication”). Daily  
14 activities must be such that they show that the claimant is “. . . able to spend a substantial part of  
15 his day engaged in pursuits involving the performance of physical functions that are transferable  
16 to a work setting.” Fair, 885 F.2d at 603. The ALJ must make specific findings in this regard  
17 before relying on daily activities to find a claimant’s pain testimony not credible. See Burch v.  
18 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

19           As to plaintiff’s testimony and credibility, the ALJ outlined the following:

20           The claimant alleges she is unable to work due to back and joint pain, and  
21           panic attacks. She is a 64-year-old, divorced female who lives in an  
22           apartment with a roommate she takes care of. . . .

23                           \* \* \*

24           The claimant completed a Function Report on August 9, 2011. She  
25           reported assisting her roommate with anything she needs help with during  
26           the day, including making meals and keeping up with daily needs of the  
                 apartment. The claimant said she goes outside daily, is able to go outside  
                 alone, operates a motor vehicle, shops in stores for basic household needs,  
                 pays bills, counts change, and is able to handle both checking and savings  
                 accounts. She reported socializing with her roommate including watching

1 television together, going out for meals weekly, and attending baseball  
2 games or playing bingo at the church once in a while. The claimant stated  
3 she is able to walk 10 to 15 min. after which she must rest 5 min. She  
4 noted she finishes what she starts. The claimant is able to follow written  
instructions but stated oral ones must be repeated. She said she does not  
handle stress well or changes in routine. Exhibit B5E at 5-6.

5 The ALJ also noted a third-party statement:

6 The claimant's client, Susan Berryhill, completed a Third Party Function  
7 Report on September 11, 2011. She reported the claimant performed  
8 normal everyday things throughout the day. The claimant had no  
9 problems with personal care. Exhibit B7E at 1-2. Ms. Berryhill stated the  
10 claimant prepares meals daily, does cleaning regularly, and laundry once a  
11 week. She said the claimant is able to go out alone. Ms. Berryhill  
reported the claimant goes outside daily, drives, and shops for groceries  
and household goods. Id. at 3-4. In contrast to what the claimant stated,  
her client stated that the claimant follows both written and oral instructions  
well. Id. at 5-7.

12 In finding that plaintiff's allegations are not entirely credible, the ALJ provided the following  
13 rationale:

14 The claimant's treatment records and activities of daily living belie her  
15 allegations of total disability. Although the claimant was diagnosed with  
16 fibromyalgia, she was directed by rheumatologist, Dr. Wilson, to engage in  
17 regular aerobic exercise, including pool therapy with stretching. Exhibit  
18 B16F at 6. Despite the claimant's complaints, she was not referred to  
19 physical therapy for her back or neck complaints. This would call into  
20 question the severity of her symptoms. The claimant reported to Dr.  
21 Cardones that she engaged in water aerobics twice a week and stated she  
22 was asymptomatic on February 21, 2013. The claimant also performed  
23 vigorous walking 30 to 60 min. daily, four to five times a week. Dr.  
24 Cardones reported that her exercise was shown to greatly reduce the pain  
25 associated with fibromyalgia. Exhibit B13F at 6 and 12. Although the  
26 claimant had been diagnosed with fibromyalgia, she reported the onset of  
symptoms 20 years ago, which means she was able to work for many years  
with it prior to reaching retirement age. Exhibit B16F at 1. The claimant  
had also reported experiencing depression since she was a teenager, but  
also was able to work in spite of it. Moreover, in addition to caring for  
herself, she is able to satisfactorily care for an elderly, disabled client  
entailing considerable physical activity. Despite the claimant's complaints  
of chronic and intractable pain throughout her body, she was not referred  
to a pain clinic or prescribed a strong regimen of narcotic-based pain  
medication ordinarily prescribed for severe and unremitting pain.

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1 The claimant has not had a consistent history of prior employment  
2 on a full-time basis, calling into question her motivation to work.  
3 Exhibit B6E. There are other inconsistencies in the record that cast  
4 doubt on the claimant's credibility. She had complained of panic  
5 attacks weekly, lasting several hours while also reporting panic  
6 attacks occurring daily and lasting for only 20 min. Exhibits B6F  
7 at 6 and B8F at 2. The claimant's depression/anxiety appears to be  
8 caused by situational stress due to her living situation as she  
9 expressed. However, this situational stress is transient and could  
10 be alleviated. In fact, the claimant reported that she was moving in  
11 with her sister, which could result in significant improvement of  
12 the claimant's mental complaints. The evidence further shows the  
13 claimant's mental impairments to have significantly improved with  
14 proper adjustment of her antidepressant/anti-anxiety medications.  
15 Dr. Tong reported the claimant had an improving response to  
16 medical treatment and that she had only minimal impairment of  
17 mental activities such as understanding and memory, sustained  
18 concentration or persistence, social interaction and adaptation.  
19 Exhibit B13F at 40. Consultative Board Certified psychiatrist, Dr.  
20 Nicholson, reported on October 12, 2011, that the claimant's  
21 condition was expected to improve within 12 months of treatment,  
22 which the evidence showed it had. Exhibit B8F at 5.

23 According to plaintiff, the ALJ's hearing decision merely "sets forth the oft  
24 rejected boilerplate language numerous courts have rejected as boilerplate." Plaintiff further  
25 argues: "It also appears that the ALJ simply rejects Ms. Perry-Dillard's testimony based on a  
26 belief that the testimony is not credible because it lacks support in the objective medical  
evidence."

Contrary to plaintiff's assertion, the ALJ did not reject her testimony as not  
credible "simply" because her complaints of totally disabling symptoms are unsupported by the  
objective medical evidence. In addition to noting that plaintiff's subjective complaints are belied  
by a medical history consisting of conservative treatment for pain as well as absence of any  
referral for physical therapy, the ALJ cited plaintiff's extensive activities of daily living and  
inconsistencies in plaintiff's complaints relating to panic attacks and ability to follow  
instructions.

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