

1 234, 319-322. Plaintiff's applications were denied initially and upon reconsideration. *Id.* at 243-
2 252, 254-261. On July 31, 2014, a hearing was held before administrative law judge ("ALJ")
3 Vincent Misenti. *Id.* at 43-89. Plaintiff was represented by counsel at the hearing, at which she
4 and a vocational expert ("VE") testified. *Id.*

5 On September 2, 2014, the ALJ issued an amended decision finding that plaintiff was not
6 disabled under sections 216(i), 223(d), 202(e) and 1614(a)(3)(A) of the Act.² *Id.* at 13-23. The
7 ALJ made the following specific findings:

- 8 1. The claimant meets the insured status requirements of the Social Security Act through
9 December 31, 2016.

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11 ² Disability Insurance Benefits are paid to disabled persons who have contributed to the
12 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income ("SSI") is paid
13 to disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Under both provisions,
14 disability is defined, in part, as an "inability to engage in any substantial gainful activity" due to
15 "a medically determinable physical or mental impairment." 42 U.S.C. §§ 423(d)(1)(a) &
16 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R.
17 §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The
18 following summarizes the sequential evaluation:

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

22 Step two: Does the claimant have a "severe" impairment?
23 If so, proceed to step three. If not, then a finding of not disabled is
24 appropriate.

25 Step three: Does the claimant's impairment or combination
26 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
27 404, Subpt. P, App.1? If so, the claimant is automatically
28 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. *Yuckert*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential
evaluation process proceeds to step five. *Id.*

- 1 2. It was previously found that the claimant is the unmarried widow of the deceased insured
2 worker and has attained the age of 50. The claimant met the non-disability requirements
3 for disabled widow's benefits set forth in section 202(e) of the Social Security Act.
4
5 3. The prescribed period ends on August 31, 2016.
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7 4. The claimant has not engaged in substantial gainful activity since January 31, 2007, the
8 alleged onset date (20 CFR 404.1571 *et seq.*, and 416.971 *et seq.*).
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10 5. The claimant has the following severe impairments: carpal tunnel syndrome (hereinafter
11 "CTS"); chronic obstructive pulmonary disease (hereinafter "COPD"); status post left eye
12 aneurysm; and anxiety disorder (20 CFR 404.1520(c) and 416.920(c)).

13 * * *

- 14 6. The claimant does not have an impairment or combination of impairments that meets or
15 medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart
16 P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and
17 416.926).

18 * * *

- 19 7. After careful consideration of the entire record, the undersigned finds that the claimant has
20 the residual functional capacity to lift and carry 50 pounds occasionally and 25 pounds
21 frequently, and stand, sit, and walk up to 6 hours in an 8-hour workday. She is able to
22 occasionally engage in overhead reaching with her left upper extremity. All other
23 reaching is limited to frequent. The claimant is capable of frequent handling and fingering
24 with her left hand. She is able to occasionally climb ramps and stairs, but is precluded
25 from climbing ladders, ropes, or scaffolds. The claimant should avoid working around
26 hazards such as machinery and heights. She is able to work around ordinary hazards in
27 the workplace, such as boxes on the floor, doors ajar or approaching people or vehicles.
28 The claimant is able [sic] to read very small print, but is able to read ordinary newsprint or
bulk print.³ She is precluded from engaging in commercial driving. The claimant is
able to frequently socially interact with coworkers, and occasionally interact with the
public.

* * *

8. The claimant is capable of performing past relevant work as a 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).

³ As observed by plaintiff, it appears that the ALJ intended to state that the plaintiff *could not* read very small print. As written, the decision's distinction between very small print and ordinary newsprint is superfluous. Moreover, when posing hypothetical questions to the VE at the administrative hearing, the ALJ included restrictions "from performing tasks requiring reading of very small print." AR 81. In any event, the apparent scrivener's error is not relevant to the issues raised by the parties.

1 * * *

2 9. The claimant has not been under a disability, as defined in the Social Security Act, from
3 January 31, 2007, through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

4 *Id.* at 16-23.

5 Plaintiff's request for Appeals Council review was denied on October 30, 2015, leaving
6 the ALJ's decision as the final decision of the Commissioner. *Id.* at 3-8.

7 II. LEGAL STANDARDS

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

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

19 "The ALJ is responsible for determining credibility, resolving conflicts in medical
20 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
21 2001) (citations omitted). "Where the evidence is susceptible to more than one rational
22 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."
23 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

24 III. ANALYSIS

25 Plaintiff argues that the ALJ erred in rejecting opinions from her examining physician,
26 non-examining physician, and nurse practitioner without sufficient justification. ECF No. 17 at
27 8-13.

1 Plaintiff was seen by internist Roger Wagner, M.D., an examining physician. AR 632-
2 636. Dr. Wagner diagnosed plaintiff with COPD, an aneurism burst of the left eye resolved with
3 surgery in 2012, carpal tunnel syndrome, and hypertension. *Id.* at 636. It was Dr. Wagner's
4 opinion that plaintiff could stand and walk up to six hours, sit without limitation, and lift 50
5 pounds occasionally and 25 pounds frequently. *Id.* He also opined that plaintiff had no postural
6 limitations and no manipulative limitations with her right hand, but could only perform frequent
7 manipulations with her left hand. *Id.* He also concluded that plaintiff should avoid working
8 around chemicals, dust, fumes, and gasses given her COPD. *Id.*

9 The record also contains opinions from Dr. J. Linder, a non-examining physician. Dr.
10 Linder opined that plaintiff could lift 50 pounds occasionally and 25 pounds frequently, stand
11 and/or walk about 6 hours in an 8-hour workday, sit about 6 hours in an 8-hour workday, use her
12 right hand without limitation, but was limited to occasional left hand manipulation. *Id.* at 186-
13 187, 199-200, 212-213.

14 Plaintiff's nurse practitioner, Debra Martin, also completed a physical RFC statement. *Id.*
15 at 855-858. Ms. Martin diagnosed plaintiff with hypertension, anxiety, COPD, osteoarthritis,
16 backache, chronic pain syndrome, hyperlipidemia, dysmetabolic syndrome, migraine headaches,
17 depression, and carpal tunnel syndrome. *Id.* at 855. Ms. Martin opined that plaintiff's pain and
18 stress would frequently interfere with the attention and concentration needed to complete simple
19 work tasks, and that she could not walk one city block without rest or severe pain, walk one city
20 block on rough or uneven ground, nor climb steps without the use of a handrail at a reasonable
21 pace. *Id.* at 856. She further opined that plaintiff would need to lie down for 2 hours during an 8-
22 hour workday due to fatigue, pain, and stress. *Id.* It was also Ms. Martin's opinion that plaintiff
23 could sit for about 4 hours in an 8-hour workday; stand and walk for about 3 hours in an 8-hour
24 workday; and lift 15 pounds occasionally, 10 pounds frequently, but never 20 pounds or more. *Id.*
25 at 856-857. She also opined that plaintiff would need to take a 15 minute break every hour,
26 would be "off task" more than 30 percent of the time during an 8-hour workday, and that
27 plaintiff's impairments would require her to be absent from work 5 days or more a month. *Id.* at
28 857-858.

1 Plaintiff first argues that the ALJ erred in rejecting Dr. Wagner’s opinion that plaintiff
2 should avoid working around chemicals, dust, fumes, and gases due to her COPD. ECF No. 12 at
3 4. In assessing plaintiff’s RFC, the ALJ gave “substantial weight to the opinion of Dr. Wagner,
4 placing the [plaintiff] at a medium exertional capacity, with manipulative and pulmonary
5 restrictions.” AR 21. Although the ALJ acknowledged that Dr. Wagner assessed pulmonary
6 restrictions, the ALJ did not incorporate such restrictions into plaintiff’s RFC. Moreover, the ALJ
7 provided no explanation for his rejection of this portion of Dr. Wagner’s opinion.

8 The Commissioner concedes that the ALJ did not explicitly reject the pulmonary
9 limitations assessed by Dr. Wagner. ECF No. 13 at 6. Nevertheless, the Commissioner argues
10 that “it is clear from [the ALJ’s] decision he reviewed the medical evidence of record including
11 this portion of Dr. Wagner’s opinion and accorded it appropriate weight.” *Id.* To support this
12 contention, the Commissioner relies on the ALJ’s observations that plaintiff’s “COPD complaints
13 appear brief, mild and reversible with medication. There is no evidence she has required
14 emergency room intervention or hospitalization for COPD attacks. Pulmonary function studies
15 were never performed. No treating or examining physician has precluded work based on COPD.
16 Furthermore, [she] has continued to smoke, against medical advice.” AR 22.

17 The ALJ’s observations, however, were raised in support of his rejection of plaintiff’s
18 subjective complaints, which included statements that her COPD was one of several impairments
19 that prevented her from worker. *See* AR 22, 56-57, 65-68. The ALJ did not, however, rely on
20 such observations to reject Dr. Wagner’s opinion.

21 Moreover, the ALJ’s observations regarding plaintiff’s COPD symptoms and treatment do
22 not undermine Dr. Wagner’s opinion. Dr. Wagner did not opine that plaintiff’s COPD would
23 preclude all work. Instead, he only opined that plaintiff “should avoid working around chemicals,
24 dust, fumes and gases given the COPD.” AR 636. This opinion is not at odds with the ALJ’s
25 observations that plaintiff’s shortness of breath and coughing may be controlled with medication,
26 or the fact that plaintiff has not required emergency services for her COPD. The mere fact that
27 medications have provided relief does not necessarily mean that plaintiff is free to work around
28 chemicals and other pulmonary irritants without exacerbation of her COPD symptoms.

1 Simply put, the ALJ's brief discussion of plaintiff's COPD, which was raised only in the
2 context of evaluating plaintiff's credibility, does not provide a sufficient basis for rejecting Dr.
3 Wagner's opinion. The ALJ failed to provide any reason, much less a specific and legitimate
4 reason, for rejecting Dr. Wagner's opinion that plaintiff had pulmonary limitations.

5 The Commissioner further argues that any error in not incorporating Dr. Wagner's full
6 opinion in the RFC was harmless. ECF No. 13 at 7; *see Curry v. Sullivan*, 925 F.2d 1127, 1129
7 (9th Cir. 1990) (harmless error analysis applicable in judicial review of social security cases);
8 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (holding that a court
9 may affirm an ALJ's decision "under the rubric of harmless error where the mistake was
10 nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion."). The
11 Commissioner contends that even with the pulmonary restrictions assessed by Dr. Wagner,
12 plaintiff would be able to perform her past work as a housekeeper because that job does not entail
13 exposure to chemicals, dust, fumes, or gases. *Id.*

14 The ALJ determined that plaintiff was not disabled based in part on a vocational expert's
15 testimony that a hypothetical individual with plaintiff's RFC could perform plaintiff's prior
16 relevant work as a housekeeper. According to the DOT, that job does not require exposure to air-
17 borne irritants or chemicals. Cleaner, Housekeeper, DOT 323.687-014, 1991 WL 672783
18 (exposure to atmospheric conditions, toxic chaotic chemicals, and other environmental conditions
19 are not present); *see also Meyerpeter v. Astrue*, 902 F. Supp. 2d 1219 (E.D. Mo. 2012) (finding
20 that the ALJ's failure to include limitation to avoiding concentrated exposure to airborne irritants
21 and chemicals in the hypothetical posed to the VE was harmless because the jobs identified by the
22 VE, including housekeeper, did not require exposure to such conditions). Thus, any failure by the
23 ALJ to include Dr. Wagner's opinion that plaintiff had pulmonary restrictions was harmless
24 because plaintiff could work as a housekeeper even with such environmental limitations.

25 Plaintiff next argues that the ALJ failed to give sufficient reasons for rejecting Dr.
26 Linder's opinion that plaintiff was limited to only occasional handling and fingering with her left

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1 hand.⁴ The ALJ accorded “significant weight” to Dr. Linder’s opinion because it was “consistent
2 with that of Dr. Wagner.” The only significant difference was that Dr. Linder limited plaintiff to
3 occasional handling and fingering, while Dr. Wagner limited plaintiff to frequent handling and
4 fingering. The ALJ was permitted to resolve the conflict between Dr. Linder and Dr. Wagner’s
5 assessments and give greater weight to the opinion of Dr. Wagner, an examining physician. *See*
6 *Edlund*, 253 F.3d at 1156 (an ALJ is responsible for resolving conflicts in medical testimony);
7 *Lester*, 81 F.3d at 830 (the opinion of an examining physician is entitled to greater weight than
8 the opinion of a non-examining physician); *cf. Sheffer v. Barnhart*, 45 F. App’x 644, 645 (9th Cir.
9 2002) (“Because the ALJ was entitled to resolve this evidentiary conflict between conflicting
10 opinions of equal weight, he did not need to provide specific and legitimate reasons for rejecting
11 [two treating physicians’ opinions].”). Accordingly, the ALJ permissibly rejected Dr. Linder’s
12 opinion that plaintiff was limited to occasional handling and fingering.

13 Lastly, plaintiff argues that the ALJ failed to provide sufficient reasons for rejecting the
14 opinion from her nurse practitioner, Ms. Martin. ECF No. 12 at 8-10. The applicable regulations
15 provide that a nurse, although a treating medical source, is viewed as an “other source” and not as
16 an “acceptable medical source.” SSR 06-3p; 20 C.F.R. §§ 404.1513(d), 416.913(d). In rejecting
17 testimony from an “other source,” the ALJ need only give germane reasons for doing so. *Molina*
18 *v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). The ALJ may consider the mere fact that an
19 opinion is not from an “acceptable medical source” in giving it reduced weight. *See* SSR 06-3p,
20 2006 WL 2329939, at *5; 20 C.F.R. §§ 404.1527(c), 416.927(c).

21 Here, the ALJ found the Ms. Martin’s opinion sharply contrasted with the opinion of Dr.
22 Wagner, suggesting that her opinion was influenced by sympathy for the plaintiff. AR 21.
23 Consequently, the ALJ determined that Dr. Wagner’s opinion was entitled to greater weight than
24 the opinion provided by Ms. Martin. *Id.* The ALJ permissibly rejected Ms. Martin’s opinion in
25 favor of an opinion that was not only from an acceptable medical source, but also substantially
26 consistent with the opinions from Dr. Linder, who is also an acceptable medical source. *See* 20
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28 ⁴ Curiously, plaintiff does not challenge Dr. Bullard’s identical opinion.

1 C.F.R. §§ 404.1527(c)(4) (“the more consistent an opinion is with the record as a whole, the more
2 weight we will give to that opinion”); 20 C.F.R. § 416.927(c)(4) (same); 20 C.F.R. § 404.1513(c)
3 (findings by state agency physicians constitute proper evidence from non-examining sources); 20
4 C.F.R. § 416.913(c); SSR 96–6p (“State agency medical . . . consultants are highly qualified
5 physicians . . . who are experts in the evaluation of the medical issues in disability claims.”).

6 Accordingly, plaintiff has failed to demonstrate the ALJ committed reversible error.

7 IV. CONCLUSION

8 Accordingly, it is hereby ORDERED that:

- 9 1. Plaintiff’s motion for summary judgment is denied;
- 10 2. The Commissioner’s cross-motion for summary judgment is granted; and
- 11 3. The Clerk is directed to enter judgment in the Commissioner’s favor.

12 DATED: March 21, 2017.

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14 EDMUND F. BRENNAN

15 UNITED STATES MAGISTRATE JUDGE
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