

1 I. PROCEDURAL BACKGROUND

2 Plaintiff applied for disability insurance benefits (“DIB”) and for supplemental security
3 income (“SSI”) on September 26, 2012. Administrative Record (“AR”) 120-21.² The disability
4 onset date for both applications was alleged to be August 27, 2010. Id. Plaintiff was insured for
5 DIB through December 31, 2012. AR 257. The applications were disapproved initially and on
6 reconsideration. AR 120-21, 168-80. On July 22, 2014, ALJ Dante Alegre presided over the
7 hearing on plaintiff’s challenge to the disapprovals. AR 46-67 (transcript). Plaintiff was present
8 and testified at the hearing. AR 48. Plaintiff was represented by Ms. Svetlana Kumansky at the
9 hearing. AR 48. Susan Creighton-Clavel, Vocational Expert, also testified. AR 48. An
10 interpreter was present to assist plaintiff as necessary. Id.

11 On October 23, 2014, the ALJ issued an unfavorable decision, finding plaintiff “not
12 disabled” under Sections 216(i) and 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d), and
13 Section 1614(a)(3)(A) of Title XVI of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR 9-21 (decision),
14 22-25 (exhibit list). On October 23, 2014, the Appeals Council denied plaintiff’s request for
15 review, leaving the ALJ’s decision as the final decision of the Commissioner of Social Security.
16 AR 1-5.

17 Plaintiff filed this action on April 12, 2016. ECF No. 1; see 42 U.S.C. §§ 405(g),
18 1383c(3). The parties consented to the jurisdiction of the magistrate judge. ECF Nos. 1,7. The
19 parties’ cross-motions for summary judgment, based upon the Administrative Record filed by the
20 Commissioner, have been fully briefed. ECF Nos. 14 (plaintiff’s summary judgment motion), 24
21 (Commissioner’s summary judgment motion), 26 (plaintiff’s reply).

22 Plaintiff previously applied for DIB and SSI in July 2008; an ALJ denied plaintiff’s prior
23 application on August 26, 2010. AR 80-81.

24 II. FACTUAL BACKGROUND

25 Plaintiff was born on July 4, 1968, and accordingly was 42 years old on the alleged
26 disability onset date, making Ms. Plummer a “younger person” under the regulations. AR 256;

27 _____
28 ² The AR is electronically filed at ECF Nos. 11-3 to 11-19 (AR 1 to AR 782).

1 see 20 C.F.R §§ 404.1563(c), 416.963(c). Plaintiff obtained her GED in Russia, and attended
2 adult school in the United States to learn English. AR 52. Plaintiff can communicate in English
3 but was assisted by a translator when she appeared before the ALJ. AR 48.

4 III. LEGAL STANDARDS

5 “[A] federal court’s review of Social Security determinations is quite limited.” Brown-
6 Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015). The Commissioner’s decision that a
7 claimant is not disabled will be upheld “if it is supported by substantial evidence and if the
8 Commissioner applied the correct legal standards.” Howard ex rel. Wolff v. Barnhart, 341 F.3d
9 1006, 1011 (9th Cir. 2003). “The findings of the Secretary as to any fact, if supported by
10 substantial evidence, shall be conclusive . . .” Andrews v. Shalala, 53 F.3d 1035, 1039 (9th
11 Cir. 1995) (quoting 42 U.S.C. § 405(g)).

12 Substantial evidence is “more than a mere scintilla,” but “may be less than a
13 preponderance.” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). “It means such relevant
14 evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v.
15 Perales, 402 U.S. 389, 401 (1971) (internal quotation marks omitted). “While inferences from the
16 record can constitute substantial evidence, only those ‘reasonably drawn from the record’ will
17 suffice.” Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

18 Although this court cannot substitute its discretion for that of the Commissioner, the court
19 nonetheless must review the record as a whole, “weighing both the evidence that supports and the
20 evidence that detracts from the [Commissioner’s] conclusion.” Desrosiers v. Secretary of HHS,
21 846 F.2d 573, 576 (9th Cir. 1988); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (“The
22 court must consider both evidence that supports and evidence that detracts from the ALJ’s
23 conclusion; it may not affirm simply by isolating a specific quantum of supporting evidence.”).

24 “The ALJ is responsible for determining credibility, resolving conflicts in medical
25 testimony, and resolving ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th
26 Cir. 2001). “Where the evidence is susceptible to more than one rational interpretation, one of
27 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas v. Barnhart,
28 278 F.3d 947, 954 (9th Cir. 2002). However, the court may review only the reasons stated by the

1 ALJ in his decision “and may not affirm the ALJ on a ground upon which he did not rely.” Orn
2 v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
3 2003) (“It was error for the district court to affirm the ALJ’s credibility decision based on
4 evidence that the ALJ did not discuss”).

5 The court will not reverse the Commissioner’s decision if it is based on harmless error,
6 which exists only when it is “clear from the record that an ALJ’s error was ‘inconsequential to the
7 ultimate nondisability determination.’” Robbins v. SSA, 466 F.3d 880, 885 (9th Cir. 2006)
8 (quoting Stout v. Commissioner, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v.
9 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

10 “The principles of res judicata apply to administrative decisions, although the doctrine is
11 applied less rigidly to administrative proceedings than to judicial proceedings.” Chavez v.
12 Bowen, 844 F.2d 691, 693 (9th Cir. 1988). The ALJ’s or Appeals Council’s finding of non-
13 disability, once it becomes the final decision of the Commissioner, is given “res judicata effect”
14 as to the period of disability covered by the decision, so long as no “manifest injustice” would
15 result. Lyle v. Secretary of Health & Human Services, 700 F.2d 566, 568 & 568 n.2 (9th Cir.
16 1983). However, for any subsequent, un-adjudicated period of alleged disability, an ALJ’s
17 finding that a claimant is not disabled only “create[s] a presumption that [the claimant] continued
18 to be able to work” after the adjudicated period. Lester v. Chater, 81 F.3d 821, 827-28 (9th Cir.
19 1996) (emphasis added). “The claimant, in order to overcome the presumption of continuing
20 nondisability arising from the first administrative law judge’s findings of nondisability, must
21 prove ‘changed circumstances’ indicating a greater disability.” Chavez, 844 F.2d at 693 (quoting
22 Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985)); Light v. Soc. Sec. Admin., 119 F.3d 789,
23 791-92 (9th Cir. 1997) (“[t]he claimant may overcome the presumption by proving the existence
24 of ‘changed circumstances’ that would establish disability’ ”) (some internal quotation marks
25 omitted) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)).

26 IV. RELEVANT LAW

27 Disability Insurance Benefits and Supplemental Security Income are available for every
28 eligible individual who is “disabled.” 42 U.S.C. §§ 423(a)(1)(E) (DIB), 1381a (SSI). Plaintiff is

1 “disabled” if she is unable to engage in substantial gainful activity due to a medically
2 determinable physical or mental impairment. Bowen v. Yuckert, 482 U.S. 137, 140 (1987)
3 (citing identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)).

4 The Commissioner uses a five-step sequential evaluation process to determine whether an
5 applicant is disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4);
6 Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation
7 process to determine disability” under Title II and Title XVI). The following summarizes the
8 sequential evaluation:

9 Step one: Is the claimant engaging in substantial gainful activity? If
10 so, the claimant is not disabled. If not, proceed to step two.
11 20 C.F.R. §§ 404.1520(a)(4)(i), (b) and 416.920(a)(4)(i), (b).

12 Step two: Does the claimant have a “severe” impairment? If so,
13 proceed to step three. If not, the claimant is not disabled.
14 Id., §§ 404.1520(a)(4)(ii), (c) and 416.920(a)(4)(ii), (c).

15 Step three: Does the claimant's impairment or combination of
16 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
17 404, Subpt. P, App. 1? If so, the claimant is disabled. If not,
18 proceed to step four.
19 Id., §§ 404.1520(a)(4)(iii), (d) and 416.920(a)(4)(iii), (d).

20 Step four: Does the claimant’s residual functional capacity make
21 him capable of performing his past work? If so, the claimant is not
22 disabled. If not, proceed to step five.
23 Id., §§ 404.1520(a)(4)(iv), (e), (f) and 416.920(a)(4)(iv), (e), (f).

24 Step five: Does the claimant have the residual functional capacity
25 perform any other work? If so, the claimant is not disabled. If not,
26 the claimant is disabled.
27 Id., §§ 404.1520(a)(4)(v), (g) and 416.920(a)(4)(v), (g).

28 The claimant bears the burden of proof in the first four steps of the sequential evaluation
process. 20 C.F.R. §§ 404.1512(a) (“In general, you have to prove to us that you are blind or
disabled”), 416.912(a) (same); Bowen, 482 U.S. at 146 n.5. However, “[a]t the fifth step of the
sequential analysis, the burden shifts to the Commissioner to demonstrate that the claimant is not
disabled and can engage in work that exists in significant numbers in the national economy.” Hill

1 v. Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Bowen, 482 U.S. at 146 n.5.

2 V. THE ALJ's DECISION

3 The ALJ made the following findings:

4 1. The claimant meets the insured status requirements of the Social
5 Security Act through December 31, 2012.

6 2. [Step 1] The claimant has not engaged in substantial gainful
7 activity since August 27, 2010, the alleged onset date (20 CFR
8 404.1571 et seq., and 416.971 et seq.).

9 3. [Step 2] The claimant has the following severe impairments:
10 degenerative disc disease of the lumbar spine; obesity (20 CFR
11 404.1420(c) and 416.920(c).

12 4. [Step 3] The claimant does not have an impairment or
13 combination of impairments that meets or medically equals the
14 severity of one of the listed impairments in 20 CFR Part 404,
15 Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526,
16 416.920(d), 416.925 and 416.926).

17 5. [Preparation for Step 4] After careful consideration of the entire
18 record . . . claimant has the residual functional capacity to perform
19 light work as defined in 20 CFR 404.1567(b) and 416.967(b) except
20 the claimant can lift and carry 20 pounds occasionally, ten pounds
21 frequently, and sit, stand and walk for six hours each in an eight
22 hour day. The claimant can occasionally walk on uneven terrain
23 and work at heights, but she can never climb ladders, ropes, or
24 scaffolds.

25 6. [Step 4] The claimant is unable to perform any past relevant
26 work (20 CFR 404.1565 and 416.965).

27 7. [Step 5] The claimant was born on July 4, 1968 and was 42 years
28 old, which is defined as a younger individual age 18-49, on the
alleged disability onset date (20 CFR 404.1463 and 416.963).

8. [Step 5, continued] The claimant has at least a high school
education and is able to communicate in English (20 CFR 404.1564
and 416.964).

9. [Step 5, continued] Transferability of job skills is not material to
the determination of disability because using the Medical-
Vocational Rules as a framework supports a finding that the
claimant is "not disabled," whether or not the claimant has
transferable job skills (See SSR 82-41 and 20 CFR Part 404,
Subpart P, Appendix 2).

10. [Step 5, continued] Considering the claimant's age, education,
work experience, and residual functional capacity, there are jobs
that exist in significant numbers in the national economy that the
claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969,
and 416.969(a).

1 11. The claimant has not been under a disability, as defined in the
2 Social Security Act, from August 27, 2010, through the date of this
3 decision (20 CFR 404.1520(g) and 416.920(g)).

4 AR 11-21.

5 As noted, the ALJ concluded that plaintiff was “not disabled” under Sections 216(i) and
6 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d), and Section 1614(a)(3)(A) of Title XVI
7 of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR 21.

8 VI. ANALYSIS

9 Plaintiff alleges that the ALJ erred by (1) discounting worsening in plaintiff’s condition
10 since her previous denial of benefits; (2) improperly relying on the opinion of non-examining
11 physicians; and (3) disregarding plaintiff’s testimony and her father’s lay person testimony. ECF
12 14 at 8-16. Upon thorough review of the record, none of these criticisms of the ALJ’s opinion
13 withstand scrutiny.

14 A. Plaintiff did not rebut the presumption of continuing non-disability.

15 Plaintiff’s assertion that she tendered a “changed circumstance” by the time of the 2014
16 decision, that was not part of the 2010 finding of nondisability, is not borne out by the record.
17 The ALJ’s opinion accounts for and rejects any new medical evidence presented by plaintiff.
18 First, plaintiff argues that her “diagnostic lumbar condition was already serious at the time of the
19 first ALJ decision” and that the ALJ in that case improperly relied on a consultative examiner and
20 did not review MRI information. ECF 14 at 9, 16. Though plaintiff criticizes the 2010 decision,
21 it is not at issue here; the period of disability plaintiff now claims begins after the closing of the
22 2010 case. AR 80-81, 120-121. The 2010 decision is not before this court, and the undersigned
23 will not accept plaintiff’s invitation to re-litigate that case at this time. See 20 C.F.R. §404.988
24 (“Conditions for reopening”). Even if the substance of the original ALJ determination were
25 subject to re-litigation in the context of the instant case, it would not affect the result of this order.
26 The ALJ’s finding of nondisability is based on a full review of the record, and does not simply
27 rely on the principles of res judicata. See AR 13-19.

28 Second, plaintiff asserts that new medical evidence demonstrates a worsening of her
condition since the 2010 finding of nondisability. ECF 14 at 10. Plaintiff argues that applying a

1 presumption of continuing nondisability would result in manifest injustice because the medical
2 record shows that her condition has become “so serious that surgery is scarcely an option any
3 longer[.]” Id. at 14. Upon review of the medical record and the ALJ’s decision, the court finds
4 the decision properly accounts for changes in the medical record, and the ALJ’s analysis supports
5 his findings even without the presumption of continuing nondisability.

6 As a preliminary matter, it is unclear how plaintiff concludes that her condition is now too
7 severe for surgery; all the evidence in the medical records indicates that surgery was
8 recommended multiple times and refused on each occasion. AR 19, 483, 547, 618, 781. Plaintiff
9 does not cite any record that indicates her condition has now become too severe for surgery.
10 Plaintiff does not explain how the continued refusal to have a surgery that was previously offered
11 demonstrates a worsening of her condition.

12 Plaintiff is correct that the ALJ did note that her objective medical records show some
13 worsening herniation. AR 19. However, the ALJ also noted that the consultative examination
14 report showed plaintiff lived a fairly active lifestyle, and was able to do light household chores
15 such as washing dishes, laundry, and paying bills. AR 19. The ALJ is permitted to consider
16 plaintiff’s activities of daily living in making a disability determination. 20 C.F.R. §404.1529;
17 see also Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2009).

18 The ALJ also noted that plaintiff had an accident while riding her bicycle on August 11,
19 2012, and that she walked home from the accident. AR 19, 522. While she reported a pain level
20 of 10 out of 10 following the accident, she was able to walk unassisted from the toilet to her bed
21 before she was discharged from Kaiser Foundation Hospital. AR 19, 523-24. The ALJ
22 acknowledges the consultative report showed that plaintiff walked with a cane, but notes that the
23 cane was not mentioned in plaintiff’s treatment records from Kaiser Permanente, and the physical
24 exam in several medical records showed that she had a normal gait. AR 19, 448, 500, 628. The
25 ALJ further found that, while plaintiff had some positive straight leg raising tests, most of the
26 tests were negative. AR 19, 449, 517, 527, 617. Plaintiff also denied pain/weakness in her lower
27 extremities or back on occasion. AR 583, 526-27, 627. Plaintiff’s physical examinations did not
28 reveal any severe limiting effects from her chronic back pain. AR 19, 429, 438, 449, 526-27,

1 617, 724-26. It is the ALJ's responsibility to interpret the medical records and resolve conflicts.
2 Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007). In this case, the ALJ addressed
3 inconsistencies and came to a logical interpretation of the evidence.

4 Upon review of plaintiff's arguments, the ALJ's decision, and the record, the court finds
5 the ALJ properly applied the presumption of continuing disability. The ALJ did not simply rely
6 on the presumption; he independently considered and evaluated the new medical evidence and
7 reached a conclusion of nondisability. AR 13-19. The court finds that the ALJ did not err in his
8 determination that plaintiff has not rebutted the presumption of continuing nondisability.

9 B. The ALJ properly relied on non-examining doctors.

10 Plaintiff contends that the ALJ afforded more weight to the opinions of state agency
11 doctors than plaintiff's treating physician, Dr. Fieser. This argument does not warrant reversal
12 because the ALJ adequately explained why the treating physician was being discounted, and why
13 the specialized knowledge of the state doctors aided in his decision. AR 18-20. The ALJ is
14 entitled to give greater than usual weight to non-treating doctors' opinions where they are
15 consistent with the record as a whole. 20 C.F.R. § 404.1527(d)(4), Thomas, 278 F.3d at 957. The
16 ALJ may reject the unsupported opinions of plaintiff's treating physician, whether or not that
17 opinion is contradicted. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ may
18 not give controlling weight to a treating physician's medical opinion unless it is well supported
19 and not inconsistent with the other substantial evidence in the record. 20 C.F.R. §
20 404.1527(d)(2).

21 Here, the ALJ considered the opinion of Dr. Fieser, but gave the opinion little weight
22 because it is "brief, conclusory, and inadequately supported by clinical findings." AR 18. The
23 ALJ noted that Dr. Fieser assessed very restrictive functional limitations without providing any
24 explanation for the assessment. Id. The ALJ found that Dr. Fieser's report essentially
25 summarized plaintiff's subjective complaints, diagnoses, and treatment, but did not provide
26 "medically objective or diagnostic support" for his opinion. AR 18. These are all valid reasons
27 for giving little weight to a treating physician's opinion. Chaudhry v. Astrue, 688 F.3d 661, 671
28 (9th Cir. 2012), citing Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir.2005) ("If a treating or

1 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it
2 by providing specific and legitimate reasons that are supported by substantial evidence....”) and
3 Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9th Cir.2009) (“The ALJ need not
4 accept the opinion of any physician, including a treating physician, if that opinion is brief,
5 conclusory, and inadequately supported by clinical findings.”). The ALJ did not err in giving
6 little weight to plaintiff’s treating physician because he explained his reasoning for doing so with
7 the requisite specificity, and his reasoning is supported by the case law. Further, the ALJ
8 supported his reliance on the non-examining physicians. AR 18-19. He noted in his discussion
9 that the state agency consultant opinions were “well supported by the objective medical evidence
10 and are consistent with the record as a whole including the claimant’s activities of daily living.”
11 AR 19. The ALJ did not err in determining the relative weight given to the state agency
12 physicians and plaintiff’s treating physicians.

13 C. The ALJ properly discounted the statements of plaintiff and her father.

14 The ALJ acted within the scope of his authority in making credibility determinations
15 regarding plaintiff and her father’s subjective statements; his findings are supported in the record
16 and do not warrant reversal. While an ALJ may not discredit subjective testimony of excess pain
17 without making specific findings justifying that decision, he is also not “required to believe every
18 allegation of disabling pain[.]” Fair v. Bowen, 885 F.2d 597, 602-03 (9th Cir. 1989). There are
19 types of evidence an ALJ can rely on in discrediting a plaintiff’s testimony regarding pain,
20 including testimony about the claimant’s daily activities or a claimant’s unexplained failure to
21 seek treatment or follow a course of treatment. Id. Further, while an ALJ is generally bound to
22 consider lay witness testimony, “[w]here lay witness testimony does not describe any limitations
23 not already described by the claimant, and the ALJ’s well-supported reasons for rejecting the
24 claimant’s testimony apply equally well to the lay witness testimony,” failure to discuss lay
25 testimony is not prejudicial per se. Molina v. Astrue, 674 F.3d 1104, 1117 (9th Cir. 2012).

26 In this case, the ALJ found that both plaintiff’s daily activities and her failure to pursue
27 recommended treatment discredited her subjective testimony. AR 19. Plaintiff does not dispute
28 that she continues to refuse surgery. ECF 14 at 6 n. 6. Plaintiff has also refused other treatments

1 to improve her condition, such as injections, physical therapy, and counselors to assist with her
2 depression. AR 19, 616, 449, 485-86. The ALJ appropriately noted that this demonstrates a
3 possible unwillingness on the part of plaintiff to do what is necessary to improve her condition,
4 and undermines the credibility of plaintiff's subjective complaints. AR 19. The ALJ also found
5 plaintiff's daily activities, which include maintaining her personal care, preparing meals, light
6 cleaning, laundry, shopping for groceries and clothes, managing her finances, and visiting with
7 others once a week, undermined her testimony regarding debilitating pain. AR 16. Although the
8 ALJ did not discuss plaintiff's father's statement at length, he noted that it mirrored plaintiff's
9 statement and was not supported by the medical evidence. AR 16; compare AR 293-301 to 284-
10 92. Thus, it was properly rejected for the same reasons as plaintiff's statement. The ALJ's did
11 not err in his treatment of plaintiff's subjective statements and her father's lay person testimony.

12 VII. CONCLUSION

13 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's motion for summary judgment (ECF No. 14), is DENIED;
- 15 2. The Commissioner's cross-motion for summary judgment (ECF No. 24), is

16 GRANTED; and

- 17 3. The Clerk of the Court shall enter judgment for defendant, and close this case.

18 DATED: July 11, 2017

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20 ALLISON CLAIRE
21 UNITED STATES MAGISTRATE JUDGE
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