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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VICTORIA MORALES,

 Plaintiff,

 v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

 Defendant.

No. 2:17-cv-02246 CKD

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). The parties have consented to Magistrate Judge jurisdiction to conduct all proceedings in the case, including the entry of final judgment. For the reasons discussed below, the court will deny plaintiff’s motion for summary judgment and grant the Commissioner’s cross-motion for summary judgment.

BACKGROUND

Plaintiff, born April 17, 1974, applied on January 8, 2015 for SSI and disability insurance benefits (DIB), alleging disability beginning December 29, 2014. Administrative Transcript (“AT”) 25, 217-233. Plaintiff alleged she was unable to work due to lupus, fibromyalgia, neuroma, joint pain, stiffness and swelling, chest pain, fatigue, muscle knots, cramping,

1 weakness, balance problems, brain fog, shortness of breath, pain and swelling in the right foot,
2 and difficulty sleeping. AT 132. In a decision dated January 26, 2017, the ALJ determined that
3 plaintiff was not disabled.¹ AT 25-39. The ALJ made the following findings (citations to 20
4 C.F.R. omitted):

- 5 1. The claimant meets the insured status requirements of the Social
6 Security Act through December 31, 2018.
- 7 2. The claimant has not engaged in substantial gainful activity since
8 December 29, 2014, the alleged onset date.
- 9 3. The claimant has the following severe impairments: obesity,
10 fibromyalgia with headaches, sleep apnea, and recurrent allergic
11 rhinitis.

12 _____
13 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
14 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
15 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
16 part, as an “inability to engage in any substantial gainful activity” due to “a medically
17 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
18 A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
19 See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
20 137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

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

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

27 Step three: Does the claimant’s impairment or combination
28 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, 107 S. Ct. at 2294 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.

4 5. After careful consideration of the entire record, the undersigned
5 finds that the claimant has the residual functional capacity to perform
6 light work, except that she is able to lift and carry 10 pounds
7 frequently and 20 pounds occasionally; she is able to sit for about six
8 hours of an eight-hour workday; she is able to stand and/or walk for
9 about six hours in an eight-hour workday; she is precluded from
10 climbing ladders, ropes, and scaffolds; she is precluded from
11 working around unprotected heights and hazardous machinery; she
12 should avoid concentrated exposure to fumes, odors, dusts, gases,
13 poor ventilation, extreme cold/heat, and extreme humidity; she is
14 able to perform frequent fine and gross manipulation; she is limited
15 to occasional stooping, kneeling, crouching, and crawling.

16 6. The claimant is capable of performing past relevant work as a
17 management trainee and fast food worker. This work does not
18 require the performance of work-related activities precluded by the
19 claimant's residual functional capacity.

20 7. The claimant has not been under a disability, as defined in the
21 Social Security Act, from December 29, 2014 through the date of this
22 decision.

23 AT 27-38.

24 The ALJ also made alternative step five findings that, considering the claimant's age,
25 work experience, and residual functional capacity ("RFC"), there were other jobs that exist in
26 significant numbers in the national economy that the claimant also could perform. AT 37. Based
27 on the testimony of the vocational expert, the ALJ determined that plaintiff could perform the
28 requirements of representative occupations such as cashier, storage facility rental clerk, and
cafeteria attendant. AT 37-38.

29 ISSUES PRESENTED

30 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not
31 disabled: (1) the ALJ improperly weighed the medical evidence; (2) the ALJ improperly
32 discounted plaintiff's subjective testimony; (3) the ALJ improperly discounted third party
33 statements; and (4) the ALJ's questions to the vocational expert did not include all plaintiff's
34 limitations.

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1 LEGAL STANDARDS

2 The court reviews the Commissioner’s decision to determine whether (1) it is based on
3 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
4 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
5 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340
6 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable
7 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th
8 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). “The ALJ is
9 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
10 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
11 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one
12 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

13 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th
14 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ’s
15 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not
16 affirm the ALJ’s decision simply by isolating a specific quantum of supporting evidence. Id.; see
17 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the
18 administrative findings, or if there is conflicting evidence supporting a finding of either disability
19 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,
20 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
21 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

22 ANALYSIS

23 A. Medical Evidence

24 Plaintiff contends that the ALJ’s determination that she could perform light work was
25 “based on the erroneous rejection of Dr. Ferrari’s opinion.” (ECF No. 11-1.) Plaintiff further
26 contends that the ALJ rejected “all medical opinions of record” without explanation, such that the
27 RFC is not supported by substantial evidence. (Id.)

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1 The weight given to medical opinions depends in part on whether they are proffered by
2 treating, examining, or non-examining professionals. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
3 1995). Ordinarily, more weight is given to the opinion of a treating professional, who has a
4 greater opportunity to know and observe the patient as an individual. Id.; Smolen v. Chater, 80
5 F.3d 1273, 1285 (9th Cir. 1996).

6 To evaluate whether an ALJ properly rejected a medical opinion, in addition to
7 considering its source, the court considers whether (1) contradictory opinions are in the record,
8 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a
9 treating or examining medical professional only for “clear and convincing” reasons. Lester, 81
10 F.3d at 831. In contrast, a contradicted opinion of a treating or examining professional may be
11 rejected for “specific and legitimate” reasons, that are supported by substantial evidence. Id. at
12 830. While a treating professional’s opinion generally is accorded superior weight, if it is
13 contradicted by a supported examining professional’s opinion (e.g., supported by different
14 independent clinical findings), the ALJ may resolve the conflict. Andrews v. Shalala, 53 F.3d
15 1035, 1041 (9th Cir. 1995) (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). In
16 any event, the ALJ need not give weight to conclusory opinions supported by minimal clinical
17 findings. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (treating physician’s conclusory,
18 minimally supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a
19 non-examining professional, without other evidence, is insufficient to reject the opinion of a
20 treating or examining professional. Lester, 81 F.3d at 831.

21 Dr. Albert Ferrari, plaintiff’s treating rheumatologist, examined her on the alleged
22 disability onset date of December 29, 2014, when she presented with complaints of “total body
23 pain,” stiffness in the morning, and joint pain. AT 31, 324. “Objective findings included
24 tenderness in the left hand, both knees, and lumbar and cervical spine. No abnormal findings
25 were noted with the eyes, neck, chest, heart, or abdomen. Pain medication was prescribed and the
26 claimant was discharged in stable condition,” the ALJ wrote. AT 31; see AT 332-324. Similarly,
27 when plaintiff sought medical care for a urinary tract infection roughly two weeks later, on
28 January 15, 2015, providers documented normal examination findings for her neck, respiratory,

1 cardiovascular, abdominal, back, and neurological systems, including normal ranges of motion
2 and non-tender extremities and abdomen. AT 31, 459-460.

3 On May 5, 2015, Dr. Ferrari filed out a Fibromyalgia Residual Functional Capacity
4 Questionnaire for plaintiff. AT 501-507. Reviewing this opinion, the ALJ wrote:

5 Dr. Ferrari reported that the claimant suffered from pain in the
6 lumbar spine, cervical spine, thoracic spine, chest, shoulders, arms,
7 and hips. He further found that the claimant was incapable of even
8 low stress jobs. Functionally, Dr. Ferrari found that the claimant
9 could sit, stand, and walk each for less than two hours in an eight-
10 hour workday. He further indicated that the claimant could
11 occasionally lift 10 pounds, rarely twist, stoop, and climb stairs, and
12 never crouch or climb ladders. With regard to reaching, grasping,
13 and fine manipulation, Dr. Ferrari reported that the claimant could
14 only do these tasks for 25 percent of an eight-hour workday.

15 AT 35; see AT 501-507.

16 The ALJ continued:

17 This opinion is given little weight because it is inconsistent with the
18 medical evidence, which shows that the claimant displayed normal
19 ears, nose, and throat, a supple and non-tender neck with full range
20 of motion, clear lungs, normal breath sounds, a regular heart rate and
21 rhythm, normal heart sounds, a soft and non-tender abdomen, a
22 normal back, no costovertebral angle tenderness, normal skin, non-
23 tender extremities with normal range of motion, intact sensation,
24 good coordination, intact cranial nerves, no back spasm, no lumbar
25 tenderness, normal back range of motion, and a normal gait.

26 AT 35. The ALJ cited November 19, 2014 medical notes documenting normal examination
27 results except for trapezius muscle tenderness (AT 31, 35, 340-344, 413-417); April and May
28 2015 medical notes documenting largely normal examination results except for, e.g., point and
lumbar tenderness (AT 32, 35, 424-440); and normal findings at a January 15, 2015 hospital visit
(AT 453-460). The ALJ also cited July 29, 2015 medical notes (AT 33, 35, 508-509) and other
2015 and 2016 records documenting plaintiff's largely unremarkable medical examinations. AT
33, 35; see, e.g., AT 511 (December 2016 record noting "[n]o joint deformity, erythema, or
tenderness. Full [range of motion] all joints. Normal gait."), 564 (January 2016 record noting
normal systems and range of motion, but costovertebral angle tenderness on right side).²

² Plaintiff cites Russell v. Colvin, 2017 WL 191011, *4 (E.D. Cal. Jan. 18, 2017), where "the ALJ failed to offer any explanation as to why [the examining physician's] opinion was overly

1 The ALJ also considered the opinions of State agency medical consultants Dr. Trias and
2 Dr. Nasrabadi, both of whom reviewed plaintiff's medical history in 2015. AT 94-95, 116-117.
3 In contrast to Dr. Ferrari, who opined that plaintiff could not perform even low-stress work and
4 had marked functional limitations, both non-examining physicians "found that the claimant was
5 capable of medium work with no additional postural, manipulative, visual, communicative, or
6 environmental limitations," the ALJ noted. AT 36.

7 While the ALJ rejected Dr. Ferrari's opinion for being too restrictive, she rejected the
8 State agency physicians' opinions for failing to take into account plaintiff's documented health
9 problems. The ALJ found Dr. Trias's and Dr. Nasrabadi's opinions "inconsistent with the
10 medical evidence, which shows that the claimant suffered from trapezius muscle tenderness,
11 impaired ability to lift, limited mobility, decreased back range of motion, lumbar tenderness,
12 episodes of congestion, sinus pain, a runny nose, headaches, and fever, and tenderness in the left
13 hand, both knees, and lumbar cervical spine." AT 36, citing AT 323-324 (January 2015
14 examination notes of tenderness of the spine and musculature), AT 340-344 (November 2014
15 treatment notes for back and neck pain), 384-399 (April 2015 functional capacity evaluation by
16 physical therapist Kim Paustenbach), and AT 418-441 (hospital treatment notes).

17 The ALJ concluded the RFC analysis as follows:

18 In sum, the medical evidence shows that the claimant suffers from
19 physical impairments that produced trapezius muscle tenderness,
20 impaired ability to lift, limited mobility, decreased back range of
21 motion, lumbar tenderness, episodes of congestion, sinus pain, a
22 runny nose, headaches, and fever, and tenderness in the left hand,
23 both knees, and lumbar and cervical spine. [Record citations.]
24 However, the objective medical evidence, the claimant's reported
25 daily activities and testimony, and medical opinions discussed above,
26 indicate that the claimant's intensity, persistence and limiting effects
27 of these symptoms are not as restrictive on the claimant's
28 capabilities, as alleged. Therefore, while these symptoms do limit
functionality, the record, considered as a whole, supports a finding
that the claimant has the residual functional capacity to perform light
work [with certain limitations].

26 AT 36.

27 _____
28 restrictive in light of the evidence in the record[.]” The instant case is distinguishable as the ALJ
provided such an explanation.

1 Based on the foregoing, the ALJ gave specific and legitimate reasons for discounting both
2 Dr. Ferrari’s highly restrictive opinion and the State physicians’ minimally restrictive opinion as
3 to plaintiff’s ability to perform work-related functions. The ALJ reviewed and cited medical
4 evidence showing that, while plaintiff’s examination results were often normal and unremarkable,
5 her treatment and examination record reflected some positive findings. The ALJ was not required
6 to adopt any one medical opinion, but appropriately resolved conflicts in the opinion evidence
7 with reference to the objective record. See Chao v. Astrue, 2012 WL 868839, *11 (E.D. Cal.
8 Mar. 13, 2012) (ALJ “was entitled to draw from all the medical evidence in the record, including
9 portions of the diametrically opposed functional limitations posited by Drs. Lu and Selcon, in
10 order to resolve conflicts in the medical evidence.”); 20 C.F.R. §§ 404.1527(e)(2) (“Although we
11 consider opinions from medical sources on issues such as ... your residual functional capacity ...,
12 the final responsibility for deciding these issues is reserved to the Commissioner”).

13 The undersigned finds no error in the ALJ’s evaluation of the medical opinions.

14 B. Credibility

15 Plaintiff next asserts that the ALJ erred in discounting her subjective complaints in
16 determining RFC. The ALJ concluded that plaintiff “has described daily activities and exhibited
17 behavior that is inconsistent with the claimant’s allegations of disabling symptoms and
18 limitations. Additionally, the objective medical records do not completely corroborate her
19 statements and allegations regarding her impairments and resultant limitations.” AT 30; see 36
20 (excerpt above).

21 The ALJ determines whether a disability applicant is credible, and the court defers to the
22 ALJ’s discretion if the ALJ used the proper process and provided proper reasons. See, e.g.,
23 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an
24 explicit credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.
25 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be
26 supported by “a specific, cogent reason for the disbelief”).

27 In evaluating whether subjective complaints are credible, the ALJ should first consider
28 objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947 F.2d 341,

1 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment, the ALJ
2 then may consider the nature of the symptoms alleged, including aggravating factors, medication,
3 treatment and functional restrictions. See id. at 345-47. The ALJ also may consider: (1) the
4 applicant’s reputation for truthfulness, prior inconsistent statements or other inconsistent
5 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a
6 prescribed course of treatment, and (3) the applicant’s daily activities. Smolen v. Chater, 80 F.3d
7 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR 55406-
8 01; SSR 88-13. Work records, physician and third party testimony about nature, severity and
9 effect of symptoms, and inconsistencies between testimony and conduct also may be relevant.
10 Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek
11 treatment for an allegedly debilitating medical problem may be a valid consideration by the ALJ
12 in determining whether the alleged associated pain is not a significant nonexertional impairment.
13 See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part,
14 on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453, 1458 (9th Cir.
15 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900 F.2d 172, 177 n.6
16 (9th Cir. 1990). “Without affirmative evidence showing that the claimant is malingering, the
17 Commissioner’s reasons for rejecting the claimant’s testimony must be clear and convincing.”
18 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

19 Here, the ALJ recounted plaintiff’s statements and hearing testimony that her impairments
20 caused fatigue, joint pain, shortness of breath, musculoskeletal pain, impaired sleep, stiffness,
21 decreased mobility, back and foot pain, and problems using her hands, among other problems.
22 AT 30. At the hearing, for example, plaintiff testified that she had pain in her back, joints, and
23 “every single part of my body” and that “the pain never goes away.” AT 64. “However, the
24 claimant further testified that she helped care for her son, shopped for groceries, and prepared
25 meals. Despite the claimant’s symptoms, the claimant reported that she did her own grocery
26 shopping, and drove a car.” AT 30; see AT 56-57, 76, 259-261. “Additionally, medical records
27 indicate that the claimant was walking daily.” Id., citing AT 684 (July 2016 medical note that
28 plaintiff was walking three-quarters of a mile daily). Plaintiff points out that she qualified these

1 statements about her daily activities, noting that she did them on “good days,” took breaks as
2 needed, and received help from her adult daughter. See AT 56-57.

3 The ALJ also summarized the medical record, which, as discussed above, indicated
4 numerous unremarkable findings as well as some positive findings. See Stubbs-Danielson v.
5 Astrue, 539 F.3d 1169, 1176 (9th Cir. 2008) (ALJ did not err in discrediting claimant’s testimony
6 when the alleged severity of her symptoms was “disproportionate and not supported by the
7 objective medical findings nor any other corroborating evidence” and the record reflected
8 claimant performed “normal activities of daily living”).

9 Plaintiff asserts that the ALJ failed to properly evaluate her fibromyalgia-related
10 symptoms under Social Security Ruling 12-2p and Revels v. Berryhill, 874 F.3d 648 (9th Cir.
11 2017). SSR 12-2p provides guidance on evaluating a disability claim involving fibromyalgia.
12 Under SSR 12-2-p, an ALJ evaluates a claimant’s statements about her symptoms and functional
13 limitations by following the two-step process set forth in 20 CFR § 404.1529. First the ALJ must
14 consider whether the claimant’s statements about her symptoms are consistent with the “medical
15 signs and [laboratory] findings” of record. SSR 16-3p. If the objective medical evidence does
16 not on its own compel a finding of disability, the ALJ must consider the evidence and the factors
17 set forth in 20 C.F.R § 404.1529, including the claimant’s daily activities. Id.

18 Here, the ALJ found plaintiff’s fibromyalgia to be a severe, medically determinable
19 impairment that limited her ability to perform basic work activities. AT 27. The ALJ then
20 considered whether plaintiff’s alleged symptoms and limitations were consistent with the medical
21 evidence and other evidence in the longitudinal record from 2014 to 2016, pursuant to section
22 404.1529. See Revels, 874 F.3d at 657 (reasoning that the longitudinal treatment record is
23 relevant to assessing functional limitations arising from fibromyalgia). Following a detailed
24 breakdown of the medical evidence, including sometime findings of muscle tenderness and point
25 tenderness (AT 31-34), the ALJ concluded that plaintiff’s fibromyalgia and other impairments
26 could reasonably be expected to cause “trapezius muscle tenderness, impaired ability to lift,
27 limited mobility, decreased range of motion, lumbar tenderness, . . . and tenderness in the left
28 hand, both knees, and lumbar cervical spine.” AT 34. However, the ALJ determined that the

1 claimed severity of these impairments was “not entirely consistent” with the longitudinal record.
2 AT 30. “[W]hile these symptoms do limit functionality, the record, considered as a whole,
3 supports a finding that the claimant has the [RFC] to perform light work[.]” AT 36.

4 The court finds no error in the ALJ’s consideration of the evidence as it related to
5 fibromyalgia. As the ALJ used the proper process and provided proper reasons, the court defers
6 to the ALJ’s credibility determination.

7 C. Third Party Statements

8 Plaintiff asserts that the ALJ failed to properly assess an April 2015 functional capacity
9 evaluation by physical therapist Kim Paustenbach. The ALJ summarized this report, noting that
10 during the testing, plaintiff

11 demonstrated the ability to sit for 20 minutes, stand for five to eight
12 minutes, walk continuously for five minutes, and intermittently
13 stand, sit, and walk for 90 minutes. Additionally, the claimant
14 displayed the ability to lift 10 pounds from waist to shoulder and zero
pounds from floor to waist and floor to shoulder on an occasional
basis. The claimant was also unable to crouch or squat to lift from
the floor.

15 AT 23, citing AT 384-399. The ALJ also cited Ms. Paustenbach’s report in the RFC analysis as
16 evidence that plaintiff had impaired ability to lift, limited mobility, and other physical limitations.
17 AT 36, citing AT 384-399.

18 Chiropractors and physical therapists are not acceptable medical sources who can give
19 medical opinions. See 20 C.F.R. § 404.1513(a). The ALJ may evaluate opinions of other medical
20 sources using the same factors applied to evaluate medical opinions of acceptable medical
21 sources. SSR 06-03p. But the ALJ may give less weight to opinions of other medical sources than
22 to those of acceptable medical sources. *Id.* The ALJ must give specific, germane reasons for
23 rejecting opinions from other sources that are not acceptable medical sources. Dodrill v. Shalala,
24 12 F.3d 915, 919 (9th Cir. 1993).

25 Here, the ALJ rejected Ms. Paustenbach’s report insofar as the RFC was less restrictive
26 than Ms. Paustenbach’s findings. The ALJ did not give specific reasons for rejecting this
27 functional capacity evaluation. However, in his May 2015 physical RFC assessment, Dr. Ferrari
28 incorporated Ms. Paustenbach’s findings of one month earlier. In fact, Ms. Paustenbach assisted

1 in completing the May 2015 report, filling in the sections pertaining to plaintiff's functional
2 limitations. AT 503-506. As discussed above, the ALJ gave specific and legitimate reasons for
3 discounting Dr. Ferrari's (and Ms. Paustenbach's) May 2015 opinion. Any error in not assigning
4 weight to Ms. Paustenbach's earlier report was harmless, because the functional limitations she
5 identified were also included in the May 2015 report. See Molina v. Astrue, 674 F.3d 1104, 1111
6 (9th Cir. 2012) ("we may not reverse an ALJ's decision on account of an error that is harmless");
7 Rogal v. Colvin, 590 F. App'x 667, 670-671 (9th Cir. 2014) (where ALJ considered but "did not
8 expressly state what weight she assigned to" physician's opinion, any error was harmless because
9 ALJ discussed and gave significant weight to another doctor's opinion, which relied on first
10 doctor's opinion).

11 Plaintiff next argues that the ALJ failed to sufficiently explain why she rejected the lay
12 witness statement of plaintiff's daughter, Gabriela Aguilar, who stated that plaintiff experienced
13 frequent pain, had to take breaks during her daily activities, and had trouble sleeping. See AT
14 308-309. Considering this statement, the ALJ wrote:

15 The undersigned has considered this statement in terms of helping to
16 understand the severity of the claimant's various symptoms over time
17 as explained in SSR 06-03p (also see 20 CFR 404.1512 and
18 416.912). However, the lay opinions therein do not amount to
evidence that would change the determinations made in this decision
according to SSA regulations. Therefore this statement is given little
weight with respect to assessing the claimant's functional limitations.

19 AT 35.

20 "[L]ay witness testimony as to a claimant's symptoms or how an impairment affects
21 ability to work is competent evidence, and therefore cannot be disregarded without comment."
22 Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996); see also Dodrill, 12 F.3d at 918-19
23 (friends and family members in a position to observe a plaintiff's symptoms and daily activities
24 are competent to testify to condition). "If the ALJ wishes to discount the testimony of the lay
25 witnesses, he must give reasons that are germane to each witness." Dodrill, 12 F.3d at 919; see
26 also Stout v. Commissioner SSA, 454 F.3d 1050, 1056 (9th Cir. 2006) (where ALJ fails to
27 properly discuss competent lay testimony favorable to plaintiff, court cannot consider error to be
28 harmless unless it can confidently conclude no reasonable ALJ, when fully crediting testimony,

1 could have reached different disability determination). Moreover, “the reasons ‘germane to each
2 witness’ must be specific.” Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009) (quoting Stout,
3 454 F.3d at 1054).

4 Here, the ALJ determined that the limitations set forth by Ms. Aguilar did not change the
5 RFC based on the overall record. While the ALJ expressly considered this third-party statement,
6 she did not provide specific reasons for discounting Ms. Aguilar’s testimony about the severity of
7 plaintiff’s symptoms and functional limitations. This was error.

8 The next question is whether the ALJ’s error was harmless. See Stout, 454 F.3d at 1056.
9 Ms. Aguilar’s testimony about plaintiff’s daily functioning was very similar to plaintiff’s
10 testimony, e.g., that plaintiff experienced pain and fatigue during her daily activities and had to
11 take breaks, that plaintiff’s daughter helped her with housework, and that plaintiff could walk for
12 fifteen or twenty minutes without a break. AT 56-57, 68, 259-260; compare AT 308 (Ms.
13 Aguilar’s testimony that plaintiff could walk for thirty minutes). The ALJ found plaintiff’s
14 subjective testimony less than fully credible, as discussed above, and found both plaintiff’s and
15 Ms. Aguilar’s testimony consistent with an RFC for light work when considered with other record
16 evidence. Given that Ms. Aguilar’s testimony added little to plaintiff’s subjective statements, the
17 court concludes the ALJ’s error was harmless because, even crediting Ms. Aguilar’s statements,
18 no reasonable ALJ would have reached a different disability determination.

19 D. Vocational Expert

20 Finally, plaintiff asserts that the ALJ failed to pose a complete hypothetical question to the
21 vocational expert that included all of the limitations supported by the record. The ALJ’s question
22 to the VE relied on the RFC assessment. AT 83. Because plaintiff has not established that the
23 RFC was erroneous, as discussed with respect to the above claims, plaintiff does not show error
24 on this basis.

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CONCLUSION

For the reasons stated herein, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 11) is denied;
 2. The Commissioner's cross-motion for summary judgment (ECF No. 16) is granted;
- and
3. Judgment is entered for the Commissioner.

Dated: February 7, 2019



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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