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3 **Not For Publication**
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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7 EUREKA DIVISION
8

9 BARBARA JO MOLLER,
10

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,

15 Defendant.
16

No. CV 11-4372 NJV

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**
(Doc. No. 14)

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**
(Doc. No. 15)

17
18 **I. BACKGROUND**

19 Barbara Jo Moller ("Moller" or "Plaintiff") seeks judicial review of an Administrative
20 Law Judge ("ALJ") decision dated July 27, 2010, denying her application for Child's Insurance
21 Benefits. (Doc. No. 1.) Pursuant to the Social Security Act (the "Act"), this Court has subject
22 matter jurisdiction over only a final decision by the Commissioner of Social Security. 42
23 U.S.C.A. § 405 (g); *see Bass v. Social Security Admin.*, 872 F.2d 832, 833 (9th Cir. 1989). The
24 Commissioner of Social Security, Michael J. Astrue ("the Commissioner"), is the Defendant in
25 this action. The ALJ decision's became the Commissioner's final decision after the Appeals
26 Council denied Moller's request for review on June 23, 2011. (Administrative Transcript ("Tr.")
27 at 1; Doc. No. 15 at 2.) This Court's review of the Commissioner's decision is therefore
28 appropriate.

1 subjective complaints of symptoms, and (4) the vocational expert's testimony and its relevance
2 to Moller's claims. (Doc. No. 15.)

3 III. LEGAL STANDARD

4 A district court has limited scope of review of an administrative law judge's decision
5 denying Social Security disability benefits and can only set aside a denial of benefits if it is not
6 supported by substantial evidence or if it is based on legal error. *Flaten v. Sec'y of Health &*
7 *Human Services*, 44 F.3d 1453 (9th Cir. 1995). The Commissioner's findings "as to any fact, if
8 supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial
9 evidence is "more than a mere scintilla but less than a preponderance; it is such relevant
10 evidence as a reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*
11 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997). "In determining whether the Commissioner's
12 findings are supported by substantial evidence," a district court must review the administrative
13 record as a whole, considering "both the evidence that supports and the evidence that detracts
14 from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).
15 The Commissioner's conclusion is upheld where the evidence is susceptible to more than one
16 rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). If the evidence
17 can support either outcome, the Court may not substitute its judgment for that of the ALJ.
18 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). A decision of the ALJ will not be
19 reversed for errors that are harmless. *See Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991).

20 IV. DISCUSSION

21 Child's Insurance Benefits are available to the children of persons who are deceased or
22 who are drawing Social Security disability or retirement benefits, provided that the child became
23 disabled before age 22. 42 U.S.C.A. § 402(d).

24
25 Disability claims are evaluated according to a five-step process. In step
26 one, the Secretary determines whether a claimant is currently engaged in
27 substantial gainful activity. If so, the claimant is not disabled. In step two,
28 the Secretary determines whether the claimant has a medically severe
impairment or combination of impairments. If the answer is yes, the
Secretary determines whether the impairment meets or equals a listed
impairment that the Secretary has acknowledged to be so severe as to
preclude substantial gainful activity. If this requirement is met, the

1 claimant is conclusively presumed disabled; if not, the Secretary
2 determines whether the claimant can still perform past relevant work. If
3 the claimant can perform such work, she is not disabled. If the claimant
4 meets the burden of establishing an inability to perform prior work, the
5 Secretary must show, at step five, that the claimant can perform other
6 substantial work that exists in the national economy.

7 *Reddick*, 157 F.3d at 721. A claimant bears the burden of proving her disability at steps one
8 through four, but the burden shifts to the Commissioner at step five to prove that the claimant is
9 not disabled. *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). The
10 ALJ must consider all evidence in the claimant’s case record to determine disability. *Carpenter*
11 *v. Astrue*, 537 F.3d 1264, 1266 (10th Cir. 2008). The ALJ has a duty to completely and fairly
12 develop the record and to assure that the claimant’s interests are considered. *Brown v. Heckler*,
13 713 F.2d 441, 443 (9th Cir. 1983). Here, substantial evidence supports the ALJ’s finding that
14 Moller was not disabled under the Act before she became 22 years old.

15 **A. The Court’s review is limited to the Administrative Record.**

16 Plaintiff submitted medical records to the ALJ documenting her medical condition(s) in
17 2006, 2009 and 2010 (Tr. 205-250, 271-275), and observed that her case was hampered because
18 all her medical records from the period of the 1967 accident were destroyed in the regular course
19 of business. In support of her motion for summary judgment, Plaintiff attempted to supplement
20 the Administrative Record by submitting a letter from a physical therapist to the Court and
21 additional medical records. (Doc. No. 14 at 20-24, 29.) These documents were not before the
22 ALJ, nor were they presented to the Appeals Council, therefore they are not part of the
23 Administrative Record. *See Brewes v. Comm’r of Soc. Sec. Admin.*, No. 11-35216, slip op. at
24 6851 (9th Cir. June 14, 2012). The Court cannot consider them as evidence in this case.

25 In any event, these new records document Plaintiff’s condition in 2006-2010, and there is
26 no evidence in the record that would allow a reasonable fact-finder to deduce based on the new
27 records that Moller was disabled before she became 22 years old in 1971.

28 **B. The ALJ’s conclusion that Plaintiff performed Substantially Gainful Activity is supported by substantial evidence.**

At step one, the claimant bears the burden of showing she is not engaged in Substantially

1 Gainful Activity (“SGA”). 20 C.F.R. § 404.1520(b). “Substantial” is defined as “activity that
2 involves doing significant physical or mental activities” and “gainful” is defined as “work that is
3 usually done for pay or profit regardless of profit realization.” 20 C.F.R. §§ 404.1572(a),
4 416.972(a); 20 C.F.R. §§ 404.1572(b), 416.972(b). If the claimant has worked and the work is
5 found to be SGA, the claimant will be found not disabled regardless of the severity of her
6 physical or mental impairments. *Id.*

7 The ALJ found that Moller engaged in SGA in the second half of 1970 and all of 1971
8 (before turning 22), when she worked as a licensed vocational nurse. (Tr. 13.) This finding is
9 supported by substantial evidence in the record, including Moller’s own testimony (Tr. 49-55),
10 and it is not contested by either party. Despite noting Moller’s SGA as a licensed vocational
11 nurse during the period of alleged disability (both before and after turning 22 years old), the ALJ
12 continued with the five-step sequential evaluation process because Plaintiff did not engage in
13 SGA before the second half of 1970. (Tr. 13.) Assuming *arguendo* that Moller’s short SGA
14 period was not a sufficient basis for the denial of benefits, as the ALJ appears to have done, the
15 Court continues its review of the decision.

16 **C. The ALJ’s conclusion that Plaintiff suffered from a medically severe impairment is**
17 **supported by substantial evidence.**

18 At step two, the claimant must show she has a medically severe impairment or
19 combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). A severe impairment is one
20 defined as significantly limiting physical or mental ability to do basic work activity. *Id.* The
21 ALJ found Moller had a severe impairment, a left frontal lobe brain injury, prior to attaining the
22 age of 22. (Tr. 13.) Again, this finding is supported by substantial evidence in the record (Tr.
23 196-198), and it is not contested by either party.

24 **D. The ALJ’s findings at step three are supported by substantial evidence.**

25 At step three, the ALJ considers whether the claimant has an impairment which (1) meets
26 or equals an impairment listed in Appendix I and (2) meets the 12 month duration requirement.
27 *See* 20 C.F.R. § 404.1520(d). If the claimant is found to have such an impairment, a disability is
28 presumed and benefits are awarded. *Id.* If no such impairment is found, the ALJ must assess the

1 claimant’s residual functional capacity (“RFC”) before proceeding to step four. *Id.* An
2 individual’s RFC is her ability to do physical and mental work activities on a sustained basis
3 despite limitations from impairments. *See* 20 C.F.R. §§ 404.1545(a), 416.945(a). In determining
4 a claimant’s RFC, an ALJ must assess all the evidence – including the claimant’s and others’
5 descriptions of limitations and medical reports – to determine what capacity the claimant has for
6 work despite his or her impairment. *See id.*

7 Here, the ALJ found that Moller did not have an impairment or combination of
8 impairments that met or medically equaled one of the listed impairments prior to attaining 22
9 years of age. (Tr. 14.) This finding is not contested by either party.

10 Next, the ALJ assessed Moller’s RFC and found that prior to attaining age 22, Moller had
11 the RFC “to perform light work as defined in 20 C.F.R. 404.1567(b) except that she was able to
12 stand and/or walk for 2 hours in an 8 hour workday; frequently but not constantly use the right
13 dominant upper extremity; no climbing or balancing; should avoid hazards such as unprotected
14 heights and dangerous machinery; occasional interaction with coworkers and the general public;
15 and no close tandem work with coworkers.” (Tr. 14.)

16 Plaintiff argues that the ALJ’s RFC finding is erroneous because: (1) the ALJ did not
17 consider all the evidence of Moller’s inability to function in a competitive work environment,
18 including her work and medical history, (2) the ALJ’s holding was contrary to the law because it
19 ignored testimony from the treating physician, Dr. Couperus, (3) the ALJ unfairly relied on the
20 testimony of Vocational Expert Berkley despite the fact that Moller and Berkley never met
21 before the June 15, 2010 hearing, and (4) the ALJ improperly considered Moller’s credibility.
22 (Doc. No. 14.) None of these arguments has merit.¹

23 **1. The ALJ considered all the evidence in the record.**

24 In making this determination, the ALJ properly considered all the evidence, including
25 Moller’s subjective reports of symptoms, testimony from Dr. Couperus and Vocational Expert

26
27 ¹ In fact, the evidence in the record, including Plaintiff’s own testimony regarding the
28 tasks she performed as an LPN before she turned 22 years old, suggests that any error in the
ALJ’s RFC finding was in Plaintiff’s favor.

1 Berkley, and Moller's work and medical history from the relevant time period. (Tr. 14-15.) In
2 her motion for summary judgment, Moller argues that the ALJ erred because he did not consider
3 evidence of her degenerative disc disease. (Doc. No. 14 at 10.) She argues that x-ray and
4 magnetic resonance imaging (MRI) records of her spine from 1991 and 2009 demonstrate that
5 her disease is progressive (Doc. 14 at 3, 10), and she later suggests that the progression started
6 when she injured herself on a trampoline as a child (Doc. No. 14 at 12.) However, there is no
7 evidence that the disc disease was caused by a childhood accident, or more important, that
8 Plaintiff was disabled as a result of disc disease before she turned 22. (Cf. Doc. No. 14 at 24.)
9 Absent any evidence in the record establishing such a connection, it was proper for the ALJ to
10 exclude the x-ray and MRI records from the RFC analysis. The ALJ properly based his analysis
11 on evidence in the record pertaining to Moller's condition before she was 22 years old.

12 **2. The ALJ did not ignore the testimony of Plaintiff's treating physician.**

13 Under the Treating Physician Rule, the Commissioner will generally give greater weight
14 to the opinions of sources of information who have treated the claimant than those who have not.
15 *Langley v. Barnhart*, 373 F.3d 1116, 1119 (10th Cir. 2004). However, if the treating physician
16 gives a qualified medical opinion without supporting medical records, that evidence is less
17 probative. *See, e.g., Halasz v. Apfel*, 2001 WL 253225 (N.D. Cal., Feb. 20, 2001) (denying
18 motions for summary judgment when medical testimony relied on by ALJ was qualified and
19 unsupported by medical records).

20 The ALJ reviewed the prior trial testimony of Dr. Couperus, the physician who treated
21 Moller in 1967 after her accident. (Tr. 195-201.) Dr. Couperus' treatment notes and Plaintiff's
22 medical records pertaining to the 1967 accident are unavailable. (Tr. 15.) The six pages of Dr.
23 Couperus' testimony that Plaintiff submitted to the ALJ constitute the sum total of the medical
24 evidence relating to Plaintiff's condition during the relevant time period. The ALJ addressed Dr.
25 Couperus' testimony throughout the June 15, 2010 hearing and asked Plaintiff questions
26 pertaining to Dr. Couperus' testimony and his treatment of Plaintiff. (Tr. 36-39, 42, 62-64, 71,
27 80.)

28 In his decision, the ALJ noted that Dr. Couperus testified that Moller was in a coma for

1 two weeks, had residual memory loss, and was distractible, nervous and argumentative after her
2 June 2, 1967 accident. (Tr. 15.) He noted that Dr. Couperus testified that Moller’s reported
3 anxiety in 1991 “could” be attributed in part to a less than full recovery from the 1967 accident.
4 (*Id.*) The ALJ observed that “there are no treating notes to support severe functional limitations
5 during the pre-age 22 period.” (Tr. 15.) Dr. Couperus did not opine on Moller’s disability
6 before she turned 22; nor did Dr. Couperus reach any conclusion as to whether Moller recovered
7 fully after her accident before attaining 22 years of age.² The ALJ thus did consider Dr.
8 Couperus’ testimony when assessing Plaintiff’s RFC. Moreover, the RFC determination does
9 not contradict any of Dr. Couperus’ testimony.

10 **3. The ALJ properly relied on the testimony of the vocational expert to**
11 **determine what types of work a claimant with Moller’s RFC (as limited)**
12 **could perform, and the availability of such work.**

13 Plaintiff incorrectly asserts that Vocational Expert Berkley was required to interview her
14 in person before rendering an opinion about Plaintiff’s RFC. The Vocational Expert did not
15 evaluate Plaintiff’s RFC, nor did the ALJ rely on the Vocational Expert to evaluate Plaintiff’s
16 RFC. As explained further below, Vocational Expert Berkley answered hypothetical questions
17 posed to her by the ALJ, and the ALJ used Berkley’s answers to evaluate whether Plaintiff could
18 perform past relevant work and whether she could sustain substantial employment. *See infra*, at
19 10-11. There was no error.

20 **4. The ALJ had sufficient evidence to find Moller’s subjective reports of**
21 **symptoms incredible insofar as they contradicted the RFC evidence.**

22 If a claimant has produced objective evidence of an underlying impairment which could
23 reasonably be expected to produce the symptoms alleged, and there is no evidence of
24 malingering, an ALJ can reject the claimant’s testimony about the severity of her symptoms only
25 by offering specific, clear and convincing reasons for doing so. *Vasquez v. Astrue*, 572 F.3d 586,
26 591 (9th Cir. 2009) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996)). The ALJ
27 may not reject subjective symptom testimony simply because there is no showing that the

28 ² Dr. Couperus testified that the symptoms that Moller displayed could “sometimes” be
expected to “clear up completely” but might also leave a “residual disability.” (Tr. 199.)

1 impairment can reasonably produce the degree of symptom alleged. *Smolen*, 80 F.3d at 1282.
2 However, when the ALJ has objective evidence of a claimant performing activities that are
3 inconsistent with the pain or symptoms alleged, the ALJ may find the claimant’s testimony
4 incredible. *See id.* at 1281 (claimant’s work record and daily activities were relevant to
5 credibility analysis); *see also George v. Astrue*, 301 Fed. Appx. 581 (8th Cir. 2008) (substantial
6 evidence discounted claimant’s testimony that her pain and other impairments were disabling,
7 when testimony was inconsistent with claimant’s daily activities); *Wendelin v. Astrue*, 366 Fed.
8 Appx. 899 (10th Cir. 2010).

9 The ALJ found that Moller’s “medically determinable impairments could be reasonably
10 expected to cause the alleged symptoms.” (Tr. 14.) However, he found that “the claimant’s
11 statements concerning the intensity, persistence and limiting effects of these symptoms [were]
12 not credible to the extent they are inconsistent” with his assessment of Moller’s “residual
13 functional capacity” (*Id.*) Moller challenges this finding. (Doc. 14 at 13.)

14 In finding that Moller’s statements of symptoms were incredible insofar as they
15 contradicted the RFC evidence, the ALJ relied on Moller’s ability to attend a six-month data
16 entry program with IBM beginning in the fall of 1967, and then to attend five days of classes a
17 week and complete an eighteen-month Licensed Practical Nurse (LPN) training program at City
18 College, thereafter passing a State Board examination and working as an LPN in 1970 and 1971.
19 (Tr. 14, 51.) By basing his judgment on these daily activities, the ALJ proffered specific, clear
20 and convincing reasons for doubting Moller’s subjective reports of symptoms insofar as they
21 contradicted the RFC evidence.

22 Moreover, Moller’s testimony, that while working as an LPN during the relevant period
23 she did not have trouble remembering things, was capable of interacting with coworkers and
24 supervisors, and did not receive special accommodations, substantially corroborates the ALJ’s
25 findings. (Tr. 48-54.) The ALJ was “persuaded based on her testimony” that Moller could only
26 do light work as described in the RFC, not the medium work she had actually performed as an
27 LPN with little limitation during the relevant period. (Tr. 15.) To a considerable extent, the ALJ
28 in fact relied on Moller’s testimony rather than refuted its credibility. However, to the extent

1 that the ALJ's RFC determination contradicts Moller's testimony, it is supported by specific,
2 clear and convincing reasons.

3 **E. The ALJ's finding that someone with Plaintiff's RFC could not perform Plaintiff's**
4 **past relevant work is supported by substantial evidence.**

5 At step four, the ALJ determines whether a claimant can perform his or her past relevant
6 work. *See* 20 C.F.R. §§ 404.1520(f), 416.920(f). Often this inquiry is limited to the last 15
7 years, as recommended by the SSA guidelines, but that limited scope is not mandatory. *See*
8 *Smith v. Sec'y of Health & Human Services*, 893 F.2d 106, 109 (6th Cir. 1989). The ALJ
9 reviews a claimant's RFC and the physical and mental demands of the work he or she has
10 previously performed. *See id.*; *see also Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). If
11 the ALJ determines the claimant has the RFC required to perform this past work, the claimant is
12 found not disabled. If the claimant cannot perform this past work, the ALJ then proceeds to step
13 five. Here, the ALJ relied principally on the Vocational Expert's testimony to find that someone
14 with the RFC that the ALJ had determined for Moller could not perform Moller's past relevant
15 work as an LPN. (Tr. 15.)

16 **F. The ALJ's finding that Plaintiff could engage in gainful activity that exists in**
17 **significant numbers in the national economy is supported by substantial evidence.**

18 At step five, the Social Security Administration must demonstrate that the claimant is not
19 disabled and that, based on the RFC from the pre-22 years old period, she can engage in some
20 type of substantial gainful activity that currently exists in "significant numbers" in the national
21 economy. *Smolen*, 80 F.3d at 1291; *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068,
22 1071 (9th Cir. 2010) (where claimant establishes that she suffers from a severe impairment that
23 prevents her from doing past work, burden shifts to the Commissioner to show that she can
24 perform some other work). Courts have found work is available in "significant numbers" when
25 there are tens of thousands of jobs nationally that the claimant can perform. *See, e.g., Lewis v.*
26 *Astrue*, 2012 WL 1067397 (N.D. Cal., Mar. 28, 2012) (16,000 and 90,000 jobs nationally, for two
27 respective occupations, satisfied the significant numbers requirement).

28 If the claimant's limitations are only exertional, the ALJ must apply the Medical

1 demonstrate that the ALJ's findings were based on legal error or were unsupported by substantial
2 evidence. First, the ALJ properly considered all the evidence of Moller's inability to function in a
3 competitive work environment, including her work and medical history. Second, the ALJ's
4 findings were wholly consistent with and did not ignore testimony from Moller's treating
5 physician. Third, the ALJ properly relied on the testimony of the Vocational Expert. Lastly, the
6 ALJ's determination that Moller's testimony was incredible to the extent that it contradicted her
7 RFC was supported by substantial evidence, including evidence of Moller's daily activities during
8 the relevant period.

9 Accordingly, **IT IS HEREBY ORDERED** that:

- 10 (1) Plaintiff's motion for summary judgment is **DENIED**;
- 11 (2) Defendant's cross-motion for summary judgment is **GRANTED**;
- 12 (3) The Clerk of the Court is directed to close this case.

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14 DATED: June 26, 2012



NANDOR J. VADAS
United States Magistrate Judge

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