

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 ANITA HERNANDEZ,

No. C 11-2692 CW

5 Plaintiff,

ORDER DENYING
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT AND
GRANTING
DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT

6 v.

7 MICHAEL J. ASTRUE, Commissioner
8 of Social Security,

9 Defendant.
10 _____/

11 Plaintiff Anita Hernandez, now deceased and substituted by
12 Yvonne A. Poe, moves for summary judgment or, in the alternative,
13 for remand in this social security appeal on the grounds that the
14 administrative law judge (ALJ) failed to develop the record in
15 regard to her physical and mental impairments, failed to provide
16 adequate reasons for rejecting her testimony regarding the
17 severity of her symptoms, and failed to follow the regulations
18 governing evaluation of mental impairments. Defendant Michael J.
19 Astrue in his capacity as Commissioner of the Social Security
20 Administration (SSA) opposes Plaintiff's motion and cross-moves
21 for summary judgment. Plaintiff filed a reply. Having considered
22 the papers filed by the parties and the relevant legal authority,
23 the Court denies Plaintiff's motion for summary judgment or for
24 remand, and grants the Commissioner's cross-motion for summary
25 judgment.

26 BACKGROUND

27 In August 2008, Plaintiff filed applications for disability
28 benefits and supplemental security income pursuant to Titles II

1 and XVI of the Social Security Act, alleging that she became
2 disabled on May 10, 2001, because of carpal tunnel syndrome and
3 arthritis. AR 249. The applications were denied initially on
4 November 4, 2008, upon reconsideration on February 4, 2009, and,
5 after a hearing held on March 22, 2010, by an ALJ in a decision
6 dated May 4, 2010. The ALJ's denial of benefits became the final
7 decision of the Commissioner when the Appeals Council denied
8 review.

9 Plaintiff was born on February 22, 1962. At the time of the
10 ALJ decision, Plaintiff was forty-eight years old. She did not
11 complete high school but graduated from an administrative medical
12 assistant college program. AR 59, 69. Plaintiff had past
13 relevant work as a housekeeper, retail sales clerk and assembler.

14 In her application for disability benefits and supplemental
15 security income, Plaintiff reported that carpal tunnel syndrome
16 and arthritis interfered with her ability to work as of May 10,
17 2001. AR 249. Plaintiff also filed a claim for workers'
18 compensation arising from repetitive stress injury she sustained
19 in the course of her employment as an assembler. AR 320.

20 Plaintiff settled her workers' compensation claim by compromise
21 and release dated November 2, 2005. AR 314-19.

22 On May 10, 2001, Plaintiff was treated by Dr. Zaharoff who
23 noted that Plaintiff had been in a motor vehicle accident at the
24 age of two in which she hit the dashboard and broke her legs and
25 one arm and had had back problems ever since. AR 449-50, 523-24.
26 Dr. Zaharoff determined that Plaintiff required elbow supports and
27 that she could not reach above the shoulders and could perform
28 repetitive hand motions "frequently," which is less restrictive

1 than the categories of "occasionally" or "not at all," but is more
2 restrictive than "no restrictions." AR 522. Dr. Zaharoff also
3 noted that Plaintiff should not perform mandrel work or forceful
4 pinching or grasping. AR 522-24. Dr. Zaharoff saw Plaintiff
5 again on May 23, 2001, and continued to limit Plaintiff to no
6 reaching above the shoulders, frequent repetitive hand motions, no
7 mandrel work and no forceful grasping. AR 518. Dr. Zaharoff
8 diagnosed Plaintiff with carpal tunnel syndrome and cervical
9 dysfunction, also referred to as Double Crush Syndrome. AR 383,
10 442, 516.

11 On June 7, 2001, Dr. Vidaurri examined Plaintiff and
12 authorized moderate duty through June 29, 2001, but restricted use
13 of the left hand to perform occasional repetitive hand motions and
14 no repetitive firm grasping. AR 446. On June 8, 2001, Dr.
15 Vidaurri also diagnosed Plaintiff with CTS/cervical dysfunction
16 (Double Crush Syndrome) and noted that the carpal tunnel symptoms
17 were "very atypical." AR 514-15. Dr. Vidaurri conducted a Jamar
18 grip strength test showing Right: 45, 40, 35 and Left: 20, 15,
19 35.¹ AR 447, 514. On July 2, 2001, Dr. Zaharoff noted that a
20 nerve conduction study revealed bilateral CTS and prohibited
21 Plaintiff from performing mandrel work, but he authorized work for
22 eight hours per day and forty hours per week. AR 440. Dr.

23
24 ¹ These test results appear to refer to readings taken from
25 a Jamar® dynamometer which measures hand grip strength. See
26 Amaral, et al., Comparison of Three Hand Dynamometers in Relation
27 to the Accuracy and Precision of the Measurements (June 2012),
28 <http://www.ncbi.nlm.nih.gov/pubmed/22801514>. Plaintiff does not
point to any evidence in the record attributing particular
significance to her Jamar test results.

1 Zaharoff also noted that Plaintiff missed her scheduled physical
2 therapy on June 21, 2001, and was unable to cancel her
3 appointment. AR 439.

4 On August 24, 2001, Dr. Coomber examined Plaintiff to prepare
5 disability paperwork and noted a trace of popping as she moved her
6 left shoulder. AR 357-59. Although Dr. Coomber did not formally
7 measure Plaintiff's range of motion, he observed that it was not
8 grossly, severely limited. AR 358.

9 On October 18, 2001, Dr. Gunderson conducted an orthopaedic
10 evaluation of Plaintiff, noting that the Jamar grip strength test
11 showed Right: 50, 50, 60 and Left: 40, 35, 40. AR 437. Dr.
12 Gunderson reviewed Plaintiff's medical records and prepared a
13 report to address the issue of causation for the workers'
14 compensation claims examiner. AR 435-38. Dr. Gunderson
15 recommended that bilateral electrodiagnostic studies be carried
16 out to rule out carpal tunnel syndrome, after which he would
17 submit a supplemental report. AR 437.

18 On January 9, 2002, Dr. Kivett examined Plaintiff and noted
19 that a grip strength test showed Right: 15, 16, 22 and Left: 26,
20 31, 26. AR 380. He also noted two two-centimeter scars on
21 Plaintiff's right volar forearm and two scars on the dorsal hand,
22 a four-centimeter scar on the right dorsal mid-forearm, and a one-
23 centimeter burn on the right dorsal first web space, "reported as
24 asensate." AR 380. He diagnosed Plaintiff with dynamic symptoms
25 of bilateral carpal tunnel syndrome with positive physical
26 findings without improvement since being off work; bilateral
27
28

1 Wartenberg's² by history; and repetitive stress injury, bilateral
2 upper extremities. AR 381. Dr. Kivett concluded that Plaintiff
3 was subjected to repetitive stress injury for about three years
4 which caused the bilateral carpal tunnel syndrome. AR 381. Dr.
5 Kivett noted that, although Plaintiff's obesity may have been a
6 mitigating factor, the fact that her symptoms had not improved
7 since she stopped working and the evidence of a burn in asensate
8 tissue supported a conclusion of profound changes. AR 381.

9 On June 27, 2002, Dr. Satow conducted an upper extremity
10 electrodiagnostic study on Plaintiff which revealed evidence of
11 bilateral carpal tunnel syndrome; he categorized the right side as
12 severe and the left side as moderate to moderately severe. AR
13 392.

14 On August 8, 2002, Dr. Kivett opined that Plaintiff's pain,
15 numbness and tingling prevented her from returning to her regular
16 and customary work until September 15, 2002. AR 410. An
17 emergency department report indicates that on September 12, 2002,
18 Plaintiff was treated for a possibly infected abdominal surgical
19 wound following a cholecystectomy (gallbladder removal) about
20 three weeks earlier. AR 341.

21 On October 31, 2002, Dr. Newton conducted further
22 electrophysiologic studies of Plaintiff's upper extremities and
23 found the results compatible with bilateral carpal tunnel
24 syndrome. AR 593. Based on the results of these studies, Dr.
25 Gunderson prepared a supplemental report recommending that

26 ² Plaintiff represents that Wartenberg's syndrome is
27 entrapment of the sensory branch of the radial nerve described by
28 Wartenberg in 1932. Pl.'s Mot. at 5 n.2.

1 Plaintiff see a surgeon who specializes in carpal tunnel syndrome.
2 AR 591. In a November 25, 2002, report, Dr. Gunderson further
3 explained that Plaintiff "needs a right carpal tunnel release on
4 the right and should be permanent and stationary approximately
5 three months afterward. It may then be decided that the left side
6 also needs surgery and again a three month period afterward would
7 make her permanent and stationary." AR 588. Dr. Gunderson
8 indicated that until Plaintiff had the surgery, he would keep her
9 in night splints. AR 588. Dr. Gunderson further opined that,
10 since January 9, 2002, Plaintiff "could have been on modified duty
11 not being engaged in any repetitious hand work." AR 588.

12 On January 15, 2003, Plaintiff received authorization for
13 carpal tunnel release surgery. AR 384. Dr. Kivett's records
14 indicate that Plaintiff was scheduled for the surgery on February
15 14, 2003, but the operation was cancelled because Plaintiff did
16 not show up for her scheduled pre-operative visit. AR 394.
17 Although Plaintiff could not recall why she missed the visit and
18 did not have the surgery, she clarified at the hearing that it was
19 not due to her incarceration which occurred later in 2003. AR 39-
20 40.

21 Plaintiff's prison health records, submitted to the Appeals
22 Council after the ALJ's decision, indicate that on June 2, 2003,
23 she was excluded from the developmental disability program on the
24 ground that she received a passing score on a cognitive test. AR
25 630. The prison's mental health interdisciplinary progress notes
26 indicate that from October 6, 2003, to May 21, 2004, Plaintiff
27 reported symptoms of feeling depressed and difficulty sleeping.
28 AR 625-29. A progress note dated March 9, 2005, indicates that

1 Plaintiff failed to arrive for two psychoeducational group
2 sessions and was referred to her case manager. AR 624.

3 On May 11, 2005, Dr. Gordon saw Plaintiff for an orthopaedic
4 hand surgery evaluation and noted that Plaintiff had not had any
5 treatment since February 2003. AR 596. Dr. Gordon further noted
6 negative results for Tinel's sign and Phalen's sign, both of which
7 are tests for carpal tunnel syndrome. AR 597. Dynamometer
8 readings from Plaintiff's grip strength test showed Right: 40, 35,
9 25 and Left: 30, 25, 25. AR 603. Dr. Gordon opined that, based
10 on the overall clinical presentation, Plaintiff did not have
11 severe ongoing carpal tunnel syndrome necessitating surgery, but
12 noted, "Considering that she has had two positive
13 electrodiagnostic studies, if there is indeed a deterioration of
14 the clinical condition, an award for future medical treatment to
15 have a carpal tunnel release done in the future would be
16 reasonable." AR 601. Dr. Gordon suggested further treatment with
17 conservative supportive measures, anti-inflammatories, analgesics,
18 splinting, advice regarding hand use, a course of therapy up to
19 twelve visits a year over the next two years, and other supportive
20 conservative care. AR 601. Dr. Gordon restricted Plaintiff from
21 activities that require lifting more than ten pounds on a
22 repetitive basis or fifteen pounds intermittently. AR 601. He
23 allowed Plaintiff to do repetitive gripping or manipulative
24 activities for no more than half an hour at a time, up to three
25 hours interspersed throughout an eight-hour work shift. AR 601.

26 On October 26, 2006, Dr. Stanton examined Plaintiff and found
27 numbness down the arm and into wrist, and stiff joints, especially
28 at shoulder and elbow, and prescribed wrist braces and ibuprofen.

1 AR 354-55. On November 9, 2006, Dr. Berg examined Plaintiff and
2 indicated that Plaintiff had stiffness at the shoulders and
3 fingers, that wrist splints help with sleep, and that Plaintiff's
4 right wrist was numb, noting transient paresthesias³ in all
5 fingers. AR 352-53. On July 9, 2007, Dr. Riley limited Plaintiff
6 to typing forty words per minute, with a notation that she was
7 under Dr. Langley's care. AR 349.

8 Plaintiff filed an application for disability benefits on
9 August 12, 2008. AR 234-37. On September 2, 2008, Dr. Berg
10 treated Plaintiff at Sonoma County Indian Health for carpal tunnel
11 syndrome, pain in wrists, and right shoulder pain. AR 344.
12 Plaintiff requested pain medication stronger than Naprosyn and was
13 prescribed Celebrex. AR 344.

14 On October 28, 2008, Dr. Fieser examined Plaintiff for an
15 orthopedic evaluation. AR 361. Dr. Fieser reported negative
16 Tinel's and Phalen's signs bilaterally and found that flexion and
17 extension of the shoulders, elbows and wrists were all 5/5 and
18 symmetric, as was Plaintiff's grip strength. AR 363. Dr. Fieser
19 noted with respect to home tasks that she could stand at the sink
20 and wash dishes, load the washer and dryer, vacuum, perform light
21 dusting, lift a gallon of milk and lift and carry up to five
22 pounds. AR 361. Dr. Fieser noted Plaintiff's history of chronic
23 bilateral hand and wrist pain with a history of possible carpal
24 tunnel syndrome with no objective evidence on examination. AR
25 364. Dr. Fieser's functional assessment opined that Plaintiff

26 ³ Paresthesia is defined as a spontaneous abnormal, usually
27 nonpainful, sensation such as burning or pricking. See Stedman's
28 Medical Dictionary, 28th ed. (Lippincott Williams & Wilkins 2006).

1 could stand and walk, or sit, in an eight-hour workday without
2 limitations and with normal breaks, had no restrictions on the
3 amount of weight that Plaintiff could lift and carry, and had no
4 postural limitations or specific manipulative limitations. AR
5 364.

6 On October 16, 2008, Dr. Berg treated Plaintiff, who reported
7 that she had a persistent cough, and prescribed albuterol and
8 doxycycline. AR 458. On October 17, 2008, Dr. Coomber noted an
9 abnormal chest x-ray taken by Dr. Munroe showing a five-centimeter
10 lingular mass. AR 462. On October 21, 2008, Plaintiff saw Dr.
11 Berg who prescribed her additional medications. AR 464.

12 On November 12, 2008, Dr. Kruusmagi treated Plaintiff for
13 management of pneumonia, which Plaintiff had had for over two
14 months, and tested her for tuberculosis, for which she was
15 negative. AR 469, 476, 604.

16 On December 5, 2008, Plaintiff was seen by Dr. Steele who
17 noted that she had been sick due to respiratory infection six
18 times in the last year. AR 474. Dr. Steele noted that a CT scan
19 of the chest from earlier that month showed a persistent lung
20 abscess and started Plaintiff on a course of Augmentin
21 antibiotics. AR 475.

22 On December 30, 2008, in support of her application for
23 disability benefits, Plaintiff stated that her sleep was affected
24 but was not sure which of her many different medications was
25 affecting her sleep. AR 281. Plaintiff also indicated that she
26 was taking prozac for depression, amoxicillin for her lungs and
27 naprasen for pain, all of which caused upset stomach. AR 292.

28

1 In her application for disability benefits, Plaintiff stated
2 that, while she was in school, she had attention deficit disorder.
3 AR 285. When asked at the March 22, 2010, hearing about having
4 ADD, Plaintiff indicated that her friend first suggested that she
5 had ADD because she interrupts people. AR 68. Plaintiff's
6 counsel clarified that Plaintiff wasn't sure if she had an ADD
7 issue or learning disorder and asked the ALJ to order a
8 consultative examination (CE) by a psychologist to evaluate
9 Plaintiff's learning disorder. AR 70-71, 78. The ALJ declined to
10 order a CE, but stated that he would hold the record open for
11 twenty days to allow Plaintiff to submit recent treatment notes or
12 pharmacy notes. AR 78-79.

13 Plaintiff submitted evidence to the ALJ on March 19, 2010.
14 AR 328-31. The ALJ conducted a hearing on March 22, 2010, at
15 which Plaintiff was represented by a non-attorney representative.
16 Plaintiff testified at the hearing, as did her friend, Alex
17 Andrada. AR 13. A vocational expert also appeared at the
18 hearing. AR 10. The ALJ issued a decision dated May 4, 2010,
19 denying Plaintiff's application for disability benefits and
20 supplemental security income. AR 7.

21 Plaintiff appealed the ALJ's denial. AR 184. On October 20,
22 2010, Plaintiff submitted new psychological records from her
23 treating psychologist, Dr. Steinberg, and her prison medical
24 records dated June 2, 2003, to March 9, 2005, which the Appeals
25 Council made part of the record. AR 5, 615. Based on treatment
26 sessions with Plaintiff on July 20, 2010, August 3, 2010, August
27 17, 2010, and September 16, 2010, Dr. Steinberg opined that
28 Plaintiff had major depression, as substantiated by the symptoms

1 of dysphoric mood and loss of interest in almost all usual
2 activities, sleep disturbance, psychomotor agitation, loss of
3 energy and fatigue, feelings of worthlessness, impaired
4 concentration and indecisiveness, and recurring thoughts of death.
5 AR 617-21.

6 On March 31, 2011, the Appeals Council denied Plaintiff's
7 request for review of the ALJ's decision. AR 1-3. Plaintiff
8 filed this action for judicial review on June 3, 2011. The
9 parties' cross-motions for summary judgment are submitted on the
10 papers.

11 After Plaintiff's reply brief was filed, her attorney
12 notified the Court that Plaintiff passed away on March 3, 2012.
13 Pursuant to the motion for substitution by Yvonne A. Poe,
14 Plaintiff's daughter and the executor of Plaintiff's estate, the
15 Court entered an order substituting Ms. Poe for Plaintiff in this
16 action on June 4, 2012.

17 LEGAL STANDARD

18 A court may set aside the Commissioner's denial of disability
19 benefits only when his findings are based on legal error or are
20 not supported by substantial evidence in the record as a whole.
21 42 U.S.C. § 405(g); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th
22 Cir. 1999). The ALJ's decision is reviewed for harmless error.
23 Stout v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1054-56 (9th Cir.
24 2006) (applying harmless error standard of review in the social
25 security context). Substantial evidence is defined as "more than
26 a mere scintilla but less than a preponderance." Tackett, 180
27 F.3d at 1098. The court must consider the entire record, weighing
28

1 both the evidence that supports and that which contradicts the
2 Commissioner's conclusion. Id.

3 Even when a decision is supported by substantial evidence in
4 the record, it "should be set aside if the proper legal standards
5 were not applied in weighing the evidence and making the
6 decision." Benitez v. Califano, 573 F.2d 653, 655 (9th Cir. 1978)
7 (citing Flake v. Gardner, 399 F.2d 532, 540 (9th Cir. 1968)).
8 Under SSA regulations, the Commissioner must apply a five-step
9 sequential process to evaluate a disability benefits claim.⁴ The
10 claimant bears the burden of proof in steps one through four.
11 Bustamante v. Massanari, 262 F.3d 949, 953-954 (9th Cir. 2001).
12 The burden shifts to the Commissioner in step five. Id. at 954.

13 ALJ'S DECISION

14 At step one of the sequential process, the ALJ found that
15 Plaintiff had not worked since the alleged onset date of May 10,
16 2001. AR 12. At step two, the ALJ found that Plaintiff had
17 severe impairments of bilateral carpal tunnel syndrome and
18

19 ⁴ The five steps of the inquiry are

- 20 1. Is the claimant presently working in a substantially gainful
21 activity? If so, then the claimant is not disabled within
22 the meaning of the Social Security Act. If not, proceed to
23 step two. See 20 C.F.R. § 416.920(b).
24 2. Is the claimant's impairment severe? If so, proceed to step
25 three. If not, then the claimant is not disabled. See 20
26 C.F.R. § 416.920(c).
27 3. Does the impairment "meet or equal" one of a list of
28 specific impairments described in 20 C.F.R. Part 220,
Subpart P, Appendix 1? If so, then the claimant is
disabled. If not, proceed to step four. See 20 C.F.R.
§ 416.920(d).
4. Is the claimant able to do any work that he or she has done
in the past? If so, then the claimant is not disabled. If
not, proceed to step five. See 20 C.F.R. § 416.920(e).
5. Is the claimant able to do any other work? If so, then the
claimant is not disabled. If not, then the claimant is
disabled. See 20 C.F.R. § 416.920(f).

1 possible pneumonia. AR 12. At step three, the ALJ found that
2 Plaintiff's impairments or combination of impairments did not meet
3 or medically equal one of the listed impairments described in the
4 regulations. AR 12-13.

5 At step four, the ALJ determined Plaintiff's residual
6 functional capacity (RFC) based on the medical evidence and the
7 intensity, persistence and limiting effects of Plaintiff's
8 symptoms. AR at 13. The ALJ found that Plaintiff had the
9 physical RFC to perform light work with the following
10 restrictions: lifting/carrying ten pounds frequently and twenty
11 pounds occasionally, frequently using the upper extremities for
12 fine and gross manipulation, no reaching above shoulder level,
13 occasional stooping, bending, climbing, balancing, crouching,
14 kneeling and crawling, and avoiding work around dust, fumes,
15 odors, gases and pulmonary irritants. AR 14. In determining
16 Plaintiff's RFC, the ALJ accepted that Plaintiff had carpal tunnel
17 syndrome discomfort related to her past assembly work and had had
18 little treatment in the past few years. The ALJ noted that
19 Plaintiff testified at the hearing that her condition became worse
20 and that she needed medication, that she had trouble with elbows,
21 shoulders and neck, that she has not had surgery, that she has
22 arthritis in her knees and ankles, and that she had pneumonia
23 twice in one year. AR 13. Plaintiff also testified at the
24 hearing that she does housework, cooking and laundry. AR 13, 49-
25 50. The ALJ noted that Plaintiff had reported to the consultative
26 examiner, Dr. Fieser, that she performed independent activities of
27 daily living, such as showering, bathing, upper and lower
28 extremity dress, toileting, feeding and shopping, and household

1 activities such as standing at the sink and washing dishes,
2 loading the washer and dryer, vacuuming, and light dusting. AR
3 14, 361. The ALJ found that Plaintiff's statements about the
4 intensity, persistence and limiting effects of her symptoms were
5 not credible to the extent that they were inconsistent with the
6 RFC assessment. AR 14.

7 The ALJ also considered opinion evidence and found that
8 Plaintiff had a history of carpal tunnel syndrome as demonstrated
9 by nerve conduction testing. AR 14. The ALJ noted that on June
10 11, 2001, shortly after Plaintiff stopped working, Dr. Vidaurri
11 found Plaintiff's symptoms of carpal tunnel syndrome to be "very
12 atypical." AR 14, 443. Dr. Vidaurri recommended conservative
13 care with bracing, ice, physical therapy and possible
14 corticosteroid injections. AR 14, 443. The ALJ noted that
15 Plaintiff did not attend subsequent therapy in 2002 and that she
16 declined surgery that was planned in January 2003 and scheduled
17 for February 14, 2003. AR 14, 384. The ALJ further noted that
18 Plaintiff resumed treatment in May 2005 with Dr. Gordon who
19 stated, "Objectively, she has a decrease in grip strength. I
20 would consider her normal grip strength to be 50 pounds on the
21 right side and 40 on the left side." AR 14, 601. Dr. Gordon also
22 found that Plaintiff "has lost 35 percent of her capacity to do
23 lifting or push/pull activities and 40 percent of her capacity to
24 do repetitive gripping or repetitive manipulative activities using
25 right or left hands." AR 601.

26 The ALJ summarized Dr. Gordon's examination as finding some
27 decrease in grip, but negative results for Tinel's and Phalen's
28 and full range of motion of the fingers. AR 14, 597-98, 600-01.

1 The ALJ noted that Dr. Gordon advised against surgery, citing his
2 conclusion that "she does not have severe ongoing carpal tunnel
3 syndrome necessitating surgery." AR 14, 601. The ALJ also noted
4 Dr. Gordon's recommendation that Plaintiff be restricted to light
5 exertion, lifting no more than fifteen pounds intermittently and
6 avoiding repetitive gripping. AR 14, 601 ("Her restrictions are
7 activities that require lifting more than 10 pounds on a
8 repetitive basis or 15 pounds intermittently. She can do
9 repetitive gripping or manipulative activities up to a total of
10 approximately three hours interspersed throughout an eight-hour
11 work shift.").

12 The ALJ noted that Plaintiff was seen by Dr. Fieser, the
13 consultative examiner, on October 18, 2008, more than three years
14 after being seen by Dr. Gordon. AR 14. Dr. Fieser found no
15 significant tenderness to palpation over Plaintiff's right wrist,
16 and mild tenderness to palpation over the left carpal tunnel
17 region producing complaints of vague, nonspecific pain. AR 363.
18 Dr. Fieser found negative Tinel's signs and Phalen's signs in both
19 hands. AR 363. Dr. Fieser tested Plaintiff's motor strength and
20 determined that her shoulder flexion and extension, elbow flexion
21 and extension, wrist extension and extension, and grip strength
22 were all 5/5 and symmetric, but did not indicate how motor
23 strength was measured. AR 363. The ALJ summarized Dr. Fieser's
24 findings as showing that Plaintiff had grip strength of 5/5,
25 negative Phalen's and Tinel's, and an otherwise normal objective
26 examination. AR 14, 364.

27 The ALJ noted that Dr. Fieser assigned no residual functional
28 capacity limits, and that he had conducted Plaintiff's most recent

1 examination. AR 14, 364. The ALJ did not afford great weight to
2 the earlier assessments of Drs. Gordon and Vidaurri or find that
3 greater manipulative limitations were warranted by the objective
4 findings in the record. The ALJ determined that Plaintiff could
5 lift and carry ten pounds frequently and twenty pounds
6 occasionally, could frequently use the upper extremities for fine
7 and gross manipulation, could not reach above shoulder level, and
8 could occasionally stoop, bend, climb, balance, crouch, kneel and
9 crawl. AR 14. Due to Plaintiff's possible difficulty with
10 breathing after being admitted for pneumonia in October 2008, the
11 ALJ also determined that she should avoid work around dust, fumes,
12 odors, gases and pulmonary irritants. AR 14.

13 Having considered that Plaintiff had past relevant work as a
14 housekeeper, retail sales clerk and assembler, the ALJ determined
15 that those jobs required a higher level of exertion than allowed
16 by Plaintiff's RFC and concluded that Plaintiff was unable to
17 perform past relevant work. AR 15.

18 At the hearing, a vocational expert (VE) testified that an
19 individual with Plaintiff's age, education, work experience and
20 RFC could perform the requirements of representative occupations
21 such as product assembler and office helper, and that there are
22 6,000 and 2,500 such jobs, respectively, in the Bay Area. AR 15,
23 91, 97. At step five, the ALJ relied on the testimony of the VE,
24 based on the initial set of limitations presented to her, to
25 determine that Plaintiff was capable of making a successful
26 adjustment to other work that exists in significant numbers in the
27 national economy. AR 15-16. The ALJ rejected additional
28 limitations presented in hypothetical questions that adopted Dr.

1 Gordon's more restrictive May 11, 2005, opinion or that assumed
2 that Plaintiff required frequent breaks. AR 16. On this basis,
3 the ALJ found that Plaintiff was not disabled under the Act. AR
4 16.

5 DISCUSSION

6 I. The ALJ's Decision Is Supported by Substantial Evidence

7 Plaintiff contends that the ALJ failed to call a medical
8 expert or make findings of limitations on Plaintiff's ability to
9 manipulate her hands or on her grip strength to support his
10 residual functional capacity determination. Pl.'s Mot. at 11.
11 The ALJ relied on Dr. Fieser's consultative examination, which was
12 the most recent, in which he observed 5/5 grip strength,
13 suggesting that Plaintiff had no decreased grip strength although
14 Dr. Fieser did not indicate how the grip strength was measured.
15 Dr. Fieser also observed negative Phalen's and Tinel's, with an
16 otherwise normal objective examination, and assigned no residual
17 functional capacity limits. AR 14. The ALJ further states in his
18 findings that he did not afford "great weight to the earlier
19 assessments of Drs. Gordon and Vidaurri," which had been made in
20 2005 and 2001, respectively.

21 Plaintiff contends that the ALJ improperly rejected the
22 opinions of her treating physicians, Drs. Gordon, Satow and
23 Vidaurri, who documented Plaintiff's symptoms of carpal tunnel
24 syndrome. Generally, greater weight is given to a treating
25 physician's opinion because "he is employed to cure and has a
26 greater opportunity to know and observe the patient as an
27 individual." Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir.
28 1989); Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987).

1 Although the treating physician's opinion is not necessarily
2 conclusive as to either a physical condition or the ultimate issue
3 of disability, an ALJ must provide "specific and legitimate
4 reasons for rejecting the opinion of the treating physician."
5 Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983). The ALJ can
6 meet this burden by setting out a detailed and thorough summary of
7 the facts and conflicting clinical evidence, stating an
8 interpretation thereof, and making findings. Magallanes, 881 F.2d
9 at 751.

10 Here, the ALJ accepted the diagnosis of carpal tunnel
11 syndrome discomfort. AR 14. However, the ALJ determined that
12 Plaintiff's limited treatment, as evidenced in her medical
13 records, and the more recent objective findings of the
14 consultative examiner did not warrant the greater manipulative
15 limitations on repetitive gripping recommended by Dr. Gordon or
16 Dr. Vidaurri several years earlier. AR 14. In particular, Dr.
17 Gordon's assessment, dated May 11, 2005, restricted Plaintiff from
18 activities that required lifting more than ten pounds on a
19 repetitive basis or fifteen pounds intermittently and allowed
20 repetitive gripping or manipulative activities for no more than
21 half an hour at a time, up to three hours interspersed throughout
22 an eight-hour work shift. AR 601. As the ALJ noted, Dr. Fieser's
23 more recent examination of Plaintiff revealed a 5/5 grip strength,
24 although Dr. Fieser did not appear to use the same dynamometer
25 test that Dr. Gordon used three years earlier, and negative
26 Phalen's and Tinel's, which were consistent with Dr. Gordon's
27 negative Phalen's and Tinel's test results in May 2005. When
28 examining Plaintiff in October 2008, Dr. Fieser noted Plaintiff's

1 history of chronic bilateral hand and wrist pain with a history of
2 possible carpal tunnel syndrome, but found "no objective evidence
3 on examination today." AR 364. Based on this evidence, the ALJ
4 accepted the opinion of the consultative examiner that Plaintiff
5 did not require manipulative limitations on her residual
6 functional capacity.

7 The ALJ further found that Plaintiff's subjective statements
8 about the intensity, persistence and limiting effects of the
9 symptoms of her medically determinable impairments were not fully
10 credible. AR 12. "In deciding whether to accept a claimant's
11 subjective symptom testimony, an ALJ must perform two stages of
12 analysis: the Cotton analysis and an analysis of the credibility
13 of the claimant's testimony regarding the severity of her
14 symptoms." Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996)
15 (citing Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). The
16 Cotton test is a threshold test which requires a claimant who
17 alleges disability based on subjective symptoms to produce
18 objective medical evidence of an underlying impairment which could
19 reasonably be expected to produce the pain or other symptoms
20 alleged. Id. Once the claimant produces medical evidence of an
21 underlying impairment, the ALJ may only reject the claimant's
22 testimony if there is evidence that the claimant is malingering or
23 by offering specific, clear and convincing reasons for doing so.
24 Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); Soc. Sec.
25 Ruling 96-7p (July 2, 1996). To determine a claimant's
26 credibility regarding the severity of his or her symptoms, the ALJ
27 may consider "(1) ordinary techniques of credibility evaluation,
28 such as the claimant's reputation for lying, prior inconsistent

1 statements concerning the symptoms, and other testimony by the
2 claimant that appears less than candid; (2) unexplained or
3 inadequately explained failure to seek treatment or to follow a
4 prescribed course of treatment; and (3) the claimant's daily
5 activities." Smolen, 80 F.3d at 1284.

6 Plaintiff contends that the ALJ failed to provide clear and
7 convincing reasons to reject her testimony, Mot. at 14-15, but the
8 ALJ's decision articulated several reasons for discrediting her
9 subjective testimony. Here, the ALJ noted that Plaintiff had
10 little treatment for her carpal tunnel syndrome in the past few
11 years and had gaps in her recent treatment by her regular
12 physician. AR 14. The ALJ noted that Plaintiff never had carpal
13 tunnel surgery, and her medical record shows conservative
14 treatment, such as wrist splints worn at night and use of non-
15 steroidal anti-inflammatory drugs, naprosen and Celebrex. These
16 facts undermine her claims of disabling pain. See Tommasetti v.
17 Astrue, 533 F.3d 1035, 1039-40 (9th Cir. 2008) (favorable response
18 to conservative treatment including physical therapy and the use
19 of anti-inflammatory medication undermines reports of disabling
20 pain).

21 The ALJ may also consider daily living activities in the
22 credibility analysis. Burch, 400 F.3d at 680-81. The ALJ found
23 that Plaintiff could take care of her own personal daily living
24 needs, cook, clean, do laundry, shop, and take care of her
25 grandson. AR 13-14. Plaintiff also stated in her function report
26 dated December 30, 2008, that she was the sole caregiver for her
27 mentally disabled son, making sure he is clothed and fed. AR 281.
28 The ALJ also noted other activities, such as working part-time in

1 2007 and 2008 and obtaining a degree from Empire College in 2007,
2 though admittedly with help from her daughter. AR 14, 53-59, 72-
3 74, 254. The ALJ found that these activities were inconsistent
4 with Plaintiff's claims that she could not perform any work
5 activity. AR 14.

6 The ALJ further noted a physician's reference to "secondary
7 gains" and "disability seeking," in the record dated April 24,
8 2008, after Plaintiff was seen for carpal tunnel syndrome and
9 reported seeing spots before her eyes, suggesting a tendency to
10 exaggerate. AR 14, 346-47. Although the ALJ did not rely on
11 these records to support a finding of malingering, the ALJ
12 articulated clear and convincing reasons for discrediting
13 Plaintiff's testimony. Tonapetyan v. Halter, 242 F.3d 1144, 1148
14 (9th Cir. 2001) (tendency to exaggerate undermines credibility).

15 Based on the clear and convincing reasons set forth by the
16 ALJ, supported by substantial evidence in the record, for
17 partially rejecting Plaintiff's testimony, the ALJ properly
18 concluded that Plaintiff's testimony regarding her symptoms was
19 not credible to the extent it was inconsistent with the residual
20 functional capacity that the ALJ found.

21 II. Plaintiff Did Not Provide Sufficient Evidence of Medically
22 Determinable Mental Impairment

23 A. The ALJ Satisfied His Duty to Develop the Record

24 Plaintiff contends that the ALJ failed to develop a record
25 and sufficiently evaluate her mental impairments. In social
26 security cases, an ALJ has the duty to develop the record fully
27 and fairly and to ensure that the claimant's interests are
28 considered, even when the claimant is represented by counsel.

1 Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001). One of the
2 methods an ALJ has to develop the record is to order a CE at the
3 SSA's expense. Reed v. Massanari, 270 F.3d 838, 841 (9th Cir.
4 2001). However, the burden of proving disability lies with the
5 claimant and the ALJ's duty to develop the record is triggered
6 only when there is ambiguous evidence or when the record is
7 inadequate to allow for proper evaluation. Mayes, 276 F.3d at
8 459. The ALJ may discharge this duty in several ways including:
9 subpoenaing the claimant's physicians, submitting questions to the
10 claimant's physicians, continuing the hearing or keeping the
11 record open after the hearing to allow supplementation of the
12 record. Tonapetyan, 242 F.3d at 1150; Tidwell v. Apfel, 161 F.3d
13 599, 602 (9th Cir. 1998) (ALJ's indication to plaintiff and her
14 counsel that he would keep the record open so that they could
15 supplement her doctor's report satisfied ALJ's duty to develop the
16 record).

17 At the hearing before the ALJ, Plaintiff raised the
18 possibility of ADD, a learning disorder, or other underlying
19 mental impairment. AR 71. The ALJ noted that Plaintiff had
20 reported depression at one time, citing her medical records, and
21 Plaintiff testified to being prescribed medication for her
22 depression. AR 71-72, 343-359. When asked whether she had ever
23 seen a therapist about her depression, Plaintiff responded that
24 she had wanted to, but hadn't done so yet. AR 71. At the
25 hearing, the ALJ told Plaintiff's representative that he would
26 keep the record open for at least twenty days so that Plaintiff
27 could submit additional evidence. See AR 78-79, 99. Thus,
28 Plaintiff had the opportunity to submit additional evidence of her

1 mental impairment to the ALJ, but chose not to do so. The fact
2 that the ALJ kept the record open after the hearing for Plaintiff
3 to submit additional evidence is sufficient to satisfy any duty to
4 develop the record.

5 Plaintiff submitted additional evidence of her mental health
6 to the Appeals Council, including progress notes by a treating
7 psychologist from July 20, 2010 to September 16, 2010, which were
8 included in the administrative record. The Appeals Council
9 considered the additional evidence and determined that it did not
10 provide a basis for changing the ALJ's decision. AR 1-2. As
11 discussed in section II.C, below, the new evidence submitted to
12 the Appeals Council did not show that any functional limitations
13 were caused by Plaintiff's mental impairment.

14 B. Plaintiff Did Not Present a Colorable Claim of Mental
15 Impairment to the ALJ

16 Plaintiff contends that the ALJ failed to follow the
17 procedures for evaluating the severity of mental impairments
18 required by 20 C.F.R. § 404.1520a. When evaluating psychiatric
19 impairments, the ALJ must follow a "special psychiatric review
20 technique" and document the findings and conclusions in the
21 decision. Chaudhry v. Astrue, 688 F.3d 661, 670 (9th Cir. 2012).
22 As the Ninth Circuit has recently articulated,

23 In step two of the disability determination, an ALJ
24 must determine whether the claimant has a medically
25 severe impairment or combination of impairments. In
26 making this determination, an ALJ is bound by 20
27 C.F.R. § 404.1520a. That regulation requires those
28 reviewing an application for disability to follow a
special psychiatric review technique. 20 C.F.R.
§ 404.1520a. Specifically, the reviewer must
determine whether an applicant has a medically
determinable mental impairment, id. § 404.1520a(b),
rate the degree of functional limitation for four
functional areas, id. § 404.1520a(c), determine the

1 severity of the mental impairment (in part based on
2 the degree of functional limitation), id.
3 § 404.1520a(c)(1), and then, if the impairment is
4 severe, proceed to step three of the disability
analysis to determine if the impairment meets or
5 equals a specific listed mental disorder, id.
6 § 404.1520a(c)(2).

7 At the first two levels of review, this technique is
8 documented in a Psychiatric Review Technique Form
9 ("PRTF"). Id. § 404.1520a(e).

10 Keyser v. Comm'r Soc. Sec. Admin., 648 F.3d 721, 725 (9th Cir.
11 2011). The court noted that although the regulation had been
12 amended so that it no longer requires the PRTF to be attached to
13 the decision, "the Social Security Regulations require the ALJ to
14 complete a PRTF and append it to the decision, or to incorporate
15 its mode of analysis into the ALJ's findings and conclusions."
16 Id. at 725-26 (citing Gutierrez v. Apfel, 199 F.3d 1048, 1050 (9th
17 Cir. 2000), superseded by regulation as stated in Blackmon v.
18 Astrue, 719 F. Supp. 2d 80, 92 (D.D.C. 2010)). The court in
19 Keyser held, "An ALJ's failure to comply with 20 C.F.R.
20 § 404.1520a is not harmless if the claimant has a 'colorable claim
21 of mental impairment.'" Id. at 726 (quoting Gutierrez, 199 F.3d
22 at 1051).

23 A colorable claim is one that is not "wholly insubstantial,
24 immaterial, or frivolous." Udd v. Massanari, 245 F.3d 1096, 1099
25 (9th Cir. 2001) (quoting Boettcher v. Sec'y Health & Human Serv.,
26 759 F.2d 719, 722 (9th Cir. 1985)). The special technique under
27 § 404.1520a requires an evaluation of the claimant's "pertinent
28 symptoms, signs, and laboratory findings to determine whether you
have a medically determinable mental impairment(s)." 20 C.F.R.
§ 404.1520a(b). A medically determinable impairment "must result
from anatomical, physiological, or psychological abnormalities

1 which can be shown by medically acceptable clinical and laboratory
2 diagnostic techniques." 20 C.F.R. § 404.1508; 20 C.F.R.
3 § 416.908; 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D). On the record
4 before the ALJ, Plaintiff presented only one report of depression
5 or dysthymia and a prescription for prozac over a ten-year period,
6 with no records of psychotherapy or treatment by a psychologist.
7 AR 356. In his psychiatric review, state agency psychologist
8 Stephen Fair determined that Plaintiff's medical records were
9 insufficient to find a medically determinable impairment during
10 the assessment period of May 10, 2001 to September 30, 2007. AR
11 480. Though offered the opportunity to supplement her records
12 after the hearing, Plaintiff did not present the ALJ with clinical
13 or diagnostic reports to show a colorable claim of mental
14 impairment caused by depression. See Miles v. Astrue, 2012 WL
15 1605420 (C.D. Cal.) (ALJ was not required to follow special
16 procedure where claimant failed to make colorable claim of mental
17 impairment to the ALJ and presented scant evidence for the first
18 time to the Appeals Council); Bowman v. Astrue, 2011 WL 3323383
19 (C.D. Cal.) (affirming denial of benefits where the ALJ did not
20 receive any medical evidence of a medically determinable mental
21 impairment).

22 Similarly, Plaintiff's self-report of ADD or other possible
23 learning disability, without any supporting medical evidence, does
24 not present a colorable claim of mental impairment. "[U]nder no
25 circumstances may the existence of an impairment be established on
26 the basis of symptoms alone.'" Ukolov v. Barnhart, 420 F.3d 1002,
27 1005 (9th Cir. 2005) (citation omitted). See 20 C.F.R. § 404.1508
28 ("A physical or mental impairment must be established by medical

1 evidence consisting of signs, symptoms, and laboratory findings,
2 not only by your statement of symptoms."). The ALJ was not,
3 therefore, required to follow the special technique for evaluating
4 the severity of mental impairments.

5 C. The Additional Evidence Submitted to the Appeals Council
6 Does Not Reflect Any Functional Limitations Caused by Mental
7 Impairment

8 Plaintiff contends that the new evidence provided by her
9 treating psychologist, Dr. Steinberg, and submitted to the Appeals
10 Council, substantiates her claim of mental impairment so as to
11 trigger the special technique of evaluating mental impairments.
12 The Appeals Council is not required to make any particular
13 evidentiary finding in rejecting new evidence submitted after an
14 adverse administrative decision. Taylor v. Comm'r Soc. Sec.
15 Admin., 659 F.3d 1228, 1232 (9th Cir. 2011) (citing Gomez v.
16 Chater, 74 F.3d 967, 972 (9th Cir. 1996)). The Court, however,
17 considers the new evidence submitted to the Appeals Council in
18 light of the record as a whole to determine whether the ALJ's
19 decision was supported by substantial evidence and was free of
20 legal error. Id. (citing Ramirez v. Shalala, 8 F.3d 1449, 1452
21 (9th Cir. 1993)). See also Brewes v. Comm'r Soc. Sec. Admin., 682
22 F.3d 1157, 1162 (9th Cir. 2012) (the administrative record
23 includes evidence submitted to and considered by the Appeals
24 Council). Here, the additional evidence presented by Plaintiff
25 did not show that her depression precluded her from performing
26 suitable work or was so severe as to be disabling.

26 Dr. Steinberg treated Plaintiff from July 2010 to September
27 2010 and opined that she met the diagnostic criteria for major
28 depression pursuant to DSM-IV. AR 617. Dr. Steinberg also stated

1 that Plaintiff's history indicated that her recurrent depression
2 began at age twelve at the time of her father's death,⁵ and that
3 her depression was severely exacerbated a few years ago when the
4 man with whom she was in a long-term primary relationship was
5 deported to Mexico and not allowed to return to the United States
6 for ten years. AR 617. Dr. Steinberg opined that Plaintiff's
7 diagnostic interview substantiated the following symptoms that met
8 the criteria for major depression: "disphoric [sic] mood and loss
9 of interest in almost all usual activities, sleep disturbance,
10 psychomotor agitation, loss of energy and fatigue, feelings of
11 worthlessness, impaired concentration and indecisiveness, and
12 recurring thoughts of death." AR 617.

13 Dr. Steinberg's evaluation is vague as to the severity of
14 Plaintiff's depression during the relevant time period, noting
15 only that her depression was "severely exacerbated a few years
16 ago," with notes indicating that Plaintiff had been sad and
17 hopeless for the past four years since her partner was deported.
18 AR 617-18. Even assuming that Dr. Steinberg's opinion that
19 Plaintiff's depression covered the relevant time period of May 10,
20 2001 to September 30, 2007, his assessment did not opine, and
21 Plaintiff does not contend, that her depression satisfied the
22 required level of severity for mental disorders set forth in the
23 listing of impairments to presume conclusively that she was
24 disabled. See Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir.

25
26 ⁵ Elsewhere in his notes, Dr. Steinberg indicates that
27 Plaintiff was age fifteen when her father died, AR 621, which is
28 consistent with Plaintiff's testimony that she was in tenth grade
at the time of his death, AR 69-70.

1 1993) ("The required level of severity for diagnosis 12.04 is met
2 when the claimant's impairment meets at least one paragraph A
3 criterion and at least two paragraph B criteria."); 20 C.F.R.
4 § 404, Subpt. P, Appx. 1.⁶

5 _____
6 ⁶ In particular, Dr. Steinberg did not conclude that
7 Plaintiff had any two of the requisite symptoms listed in
8 paragraph B. The A and B criteria for affective disorders such as
9 depression are defined as follows:

10 A. Medically documented persistence, either continuous or
11 intermittent, of one of the following:

12 1. Depressive syndrome characterized by at least four of
13 the following:

14 a. Anhedonia or pervasive loss of interest in
15 almost all activities; or

16 b. Appetite disturbance with change in weight; or

17 c. Sleep disturbance; or

18 d. Psychomotor agitation or retardation; or

19 e. Decreased energy; or

20 f. Feelings of guilt or worthlessness; or

21 g. Difficulty concentrating or thinking; or

22 h. Thoughts of suicide; or

23 i. Hallucinations, delusions, or paranoid thinking;
24 or

25 2. Manic syndrome characterized by at least three of the
26 [listed symptoms]; or

27 3. Bipolar syndrome with a history of episodic periods
28 manifested by the full symptomatic picture of both manic
and depressive syndromes (and currently characterized by
either or both syndromes);

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or

1 Nor did Dr. Steinberg attribute any functional limitation to
2 Plaintiff's depression. Although Dr. Steinberg noted that
3 Plaintiff exhibited "loss of interest in almost all usual
4 activities," AR 617, he did not opine that she was unable or
5 limited in her ability to perform daily living activities, and her
6 testimony at the hearing indicated that she did actually perform
7 daily activities independently, AR 14, 361. Thus, even if the ALJ
8 erred in failing to evaluate Plaintiff's claim of mental
9 impairment under the special technique, any such error was
10 harmless because Plaintiff failed to show that her depression
11 resulted in functional loss in the four areas of function set out
12 in the special technique: (a) activities of daily living;
13 (b) social functioning; (c) concentration, persistence, or pace;
14 and (d) episodes of decompensation. Chaudry, 688 F.3d at 666-67;
15 20 C.F.R. § 416.920a(c)(3). Cf. Gatson v. Astrue, 2011 WL 3818494
16 (C.D. Cal.) (remanding for supplemental evaluation of mental

18 2. Marked difficulties in maintaining social
functioning; or

19 3. Marked difficulties in maintaining concentration,
20 persistence, or pace; or

21 4. Repeated episodes of decompensation, each of extended
22 duration;

23 If the paragraph B criteria are not satisfied, the paragraph
24 C criteria allows for a claimant to meet the listing for affective
25 disorders if there is "[m]edically documented history of a chronic
26 affective disorder of at least 2 years' duration that has caused
27 more than a minimal limitation of ability to do basic work
28 activities, with symptoms or signs currently attenuated by
medication or psychosocial support, and one of the [listed
factors]."

1 impairment evidence where the claimant presented extensive mental
2 health treatment records predating the ALJ's decision and
3 documenting "moderate limitations to understand and remember
4 detailed instructions" and "marked limitations in social
5 interactions").

6 The ALJ's determination that Plaintiff was not disabled under
7 the Act is supported by substantial evidence in the record. See
8 Allen v. Sec. Health & Human Serv., 726 F.2d 1470, 1473 (9th Cir.
9 1984) (psychiatric evidence "shows primarily that a disorder
10 exists [but] does not show that it was of disabling severity").
11 Even after having the opportunity to supplement her medical
12 records, Plaintiff did not demonstrate that she had a medically
13 determinable mental impairment that prevented her from engaging in
14 substantial gainful employment. Reddick v. Chater, 157 F.3d 715,
15 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).

16 III. Remand Is Not Warranted

17 Plaintiff seeks remand of her application for disability
18 benefits to the ALJ for consideration of new evidence or for award
19 of benefits without rehearing. Pl.'s Mot. at 1-2. Plaintiff
20 fails to demonstrate either basis for remand.

21 When seeking remand for consideration of new evidence
22 submitted after the Commissioner's final decision has been made, a
23 plaintiff "must show that there is: (1) new evidence that is
24 material, and (2) good cause for his failure to incorporate that
25 evidence into the administrative record." Sanchez v. Sec. Health
26 & Human Serv., 812 F.2d 509, 511 (9th Cir. 1987) (citing Allen,
27 726 F.2d at 1473 and 42 U.S.C. § 405(g)). "A claimant does not
28 meet the good cause requirement by merely obtaining a more

1 favorable report once his or her claim has been denied." Mayes v.
2 Massanari, 276 F.3d 453, 463 (9th Cir. 2001). New reports made
3 after issuance of the Commissioner's final decision "would be
4 material to a new application, but not probative of [the
5 plaintiff's] condition at the hearing." Sanchez, 812 F.2d at 512.

6 Plaintiff has submitted new medical records of treatment for
7 her pneumonia and/or a lung impairment dated between August 17,
8 2011 and October 19, 2011. Pl.'s Notice of New and Material
9 Evidence (Docket No. 14). These records are not material to
10 Plaintiff's condition as it existed at the time of the hearing and
11 do not satisfy the applicable standard for remand for
12 consideration of new evidence. Sanchez, 812 F.2d at 512.
13 Furthermore, Plaintiff has not demonstrated that the record
14 supports an award of benefits. Cf. Brewes, 682 F.3d at 1164 ("We
15 may direct an award of benefits where the record has been fully
16 developed and where further administrative proceedings would serve
17 no useful purpose.") (quoting Smolen, 80 F.3d at 1292).
18 Plaintiff's motion for remand is therefore denied.

19 CONCLUSION

20 Based on the foregoing, Defendant's cross-motion for summary
21 judgment is granted and Plaintiff's motion for summary judgment or

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1 for remand is denied. Judgment shall enter accordingly. The
2 parties shall bear their own costs.

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4 IT IS SO ORDERED.

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6 Dated: 9/26/2012



7 CLAUDIA WILKEN
8 United States District Judge

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