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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MERRIWEATHER ROSE FRANKLIN,

Plaintiff,

No. C 12-3503 PJH

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

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

Plaintiff Merriweather Rose Franklin ("Franklin") seeks judicial review of the Commissioner of Social Security's ("Commissioner") decision denying her claim for disability benefits pursuant to 42 U.S.C. § 405(g). This action is before the court on the parties' cross-motions for summary judgment. Having read the parties' papers and the administrative record, and having considered the relevant legal authority, the court DENIES Franklin's motion for summary judgment, GRANTS the Commissioner's cross-motion for summary judgment, and AFFIRMS the Commissioner's final decision to deny benefits.

BACKGROUND

Franklin protectively filed an application for supplemental security income ("SSI") benefits on January 29, 2010.¹ Administrative Record ("AR") 15. Franklin alleged she suffered from a combination of physical and mental disabilities that rendered her unable to undertake work activities on a regular and continuous basis. Franklin claimed she had been disabled since June 3, 2009. AR 15. The Commissioner denied Franklin's

¹ Franklin filed an earlier application for benefits which was denied in a decision dated June 3, 2009, in which the ALJ found the claimant "not disabled and capable of engaging in less than a full range of light work." AR 15. On October 27, 2010, the Appeals Council denied the claimant's request for review of the June 2009 decision. *Id.*

1 application initially on May 11, 2010, and again, upon reconsideration, on September 1,
2 2010. AR 15, 84, 93.

3 Franklin filed a request for a hearing on September 14, 2010. AR 15. On April 8,
4 2011, a hearing was conducted before an administrative law judge (“ALJ”). Id. Franklin
5 appeared and testified at the hearing. Id. She was represented by her attorney, David J.
6 Linden. Id. In a subsequent decision dated April 28, 2011, the ALJ found that Franklin was
7 “not disabled” within the meaning of the Social Security Act (“the Act”). Id.

8 On May 13, 2011, Franklin requested review by the Appeals Council of the
9 unfavorable ALJ decision. AR 11. The Appeals Council denied the request for review,
10 making the ALJ’s decision the final decision of the Commissioner. On December 7, 2012,
11 Franklin brought this action seeking judicial review of the ALJ’s decision pursuant to 42
12 U.S.C. § 405(g).

13 On December 7, 2012, Franklin filed a motion for summary judgment. The
14 Commissioner filed its opposition and cross motion for summary judgment on February 4,
15 2013. On February 15, 2013, Franklin filed a reply and opposition to the Commissioner’s
16 cross-motion. The matter is submitted on the papers.

17 **STATUTORY AND REGULATORY FRAMEWORK**

18 The Social Security Act provides for the payment of disability insurance benefits to
19 people who have contributed to the social security system and who suffer from a physical
20 or mental disability. See 42 U.S.C. § 423(a)(1). A claimant is disabled “if he is unable to
21 engage in any substantial gainful activity by reason of any medically determinable physical
22 or mental impairment which can be expected to result in death or which has lasted or can
23 be expected to last for a continuous period of not less than twelve months.” 42 U.S.C.
24 § 423(d)(1)(A); Sullivan v. Zebley, 439 U.S. 521, 524 (1990). To evaluate whether a
25 claimant is disabled within the meaning of the Act, the ALJ is required to use a five-step
26 analysis. 20 C.F.R. § 416.920. The ALJ may terminate the analysis at any stage where a
27 decision can be made that the claimant is or is not disabled. Pitzer v. Sullivan, 908 F.2d
28 502, 504 (9th Cir. 1990).

1 At step one, the ALJ determines whether the claimant is engaged in any “substantial
2 gainful activity,” which would automatically preclude the claimant from receiving benefits.
3 20 C.F.R. § 404.1520(a)(4)(i). If not, at step two, the ALJ must determine whether the
4 claimant has a “severe” impairment or combination of impairments which significantly limits
5 his ability to do basic work activities. 20 C.F.R. § 404.1521; 20 C.F.R. § 416.921. The
6 claimant’s own statement of symptoms alone will not suffice. See 20 C.F.R. § 404.1508,
7 416.908.

8 Next, at step three, the ALJ must determine whether the impairment or combination
9 of impairments meets or equals an impairment listed in Appendix 1 and meets the duration
10 requirements. 20 C.F.R. § 404.1520(d), 416.920(d). If the claimant’s impairment or
11 combination of impairments meets or equals an impairment in the Listing, the claimant is
12 presumed to be disabled and benefits are awarded. Id. If the claimant’s condition does not
13 meet or equal a listing, the ALJ moves to step four to determine whether the claimant has
14 sufficient residual functional capacity (“RFC”) to perform his past relevant work. 20 C.F.R.
15 § 404.1520(f), 416.920(f).

16 If the claimant can still perform past relevant work, the ALJ will make a finding of not
17 disabled. 20 C.F.R. § 404.1520(f), 416.920(f). If the claimant cannot perform past relevant
18 work, the ALJ moves to the fifth step to determine whether the claimant can perform other
19 work that exists in significant number in the national economy, taking into consideration the
20 claimant’s RFC, age, education and past work experience. 20 C.F.R. § 404.920(a)(4)(v). If
21 the claimant can make an adjustment to other work, the ALJ will find the claimant not
22 disabled. Id.

23 In steps one through four, the claimant has the burden to demonstrate a severe
24 impairment and an inability to engage in his or her previous occupation. Parra v. Astrue,
25 481 F.3d 742, 746 (9th Cir. 2007). Then, if the analysis proceeds to step five, the burden
26 shifts to the Commissioner to demonstrate that the claimant can perform other work. Id.;
27 20 C.F.R. § 404.920(a)(4)(v).

28

ALJ's FINDINGS

The ALJ concluded that Franklin was not disabled within the meaning of the Act. Beginning at step one, the ALJ found that Franklin had not engaged in any substantial gainful activity since January 29, 2010, the application date. AR 17.

At step two, the ALJ determined that Franklin had the following severe physical impairments: shoulder pain possibly secondary to mild thoracic scoliosis, and sensorineural hearing loss. Id. The ALJ also found the following mental impairments: anxiety-related disorder, affective disorder, and borderline personality disorder. Id. The ALJ also found that Franklin suffered from renal stones and fibromyalgia; however, these conditions were not severe. AR 18.

At step three, the ALJ determined that Franklin did not have an impairment or combination of impairments that met or medically equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 18. In evaluating the severity of Franklin's impairments, the ALJ considered whether Franklin satisfied the paragraph B criteria.² The ALJ found that Franklin suffered from mild restriction on daily living activities and on concentration, persistence or pace, and moderate difficulties in social functioning. AR 19. However, the ALJ found no "marked" limitations and no evidence of decompensation. Id. Accordingly, the ALJ found that Franklin did not suffer from a listed impairment. The ALJ further considered whether Franklin satisfied the paragraph C criteria.³ The ALJ found that there was no evidence showing a complete inability to function independently outside the area of her home. AR 19.

² In order to qualify for disability benefits under the Listing, both subsection A requirements ("paragraph A criteria") and the subsection B requirements ("paragraph B criteria") under 20 C.F.R. Part 404, Subpart P, Appendix 1 must be met. Paragraph B criteria indicates the severity of the illness. To satisfy the paragraph B criteria, the mental impairments must result in at least two of the following: marked restriction of activities of daily life; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence, or pace; or repeated episodes of decompensation, each of extended duration. A marked limitation means more than moderate but less than extreme. AR 18.

³ To satisfy the paragraph C criteria, evidence is required to show a complete inability to function independently outside the area of one's home.

1 At step four, the ALJ assessed Franklin’s RFC to consider whether it was sufficient
2 for her to perform her past work. In the past, Franklin had worked as a cashier, a case aid
3 and overnight counselor, a dog washer, a salesperson and a barista. AR 23. The ALJ
4 found

[Franklin] has the residual functional capacity to perform light work as defined in 20 C.F.R. 416.967(b), except she requires a sit-stand option and can only occasionally stoop and crouch . . . is limited to frequent overhead reaching with her non-dominant, left-upper extremity . . . should not engage in work requiring fine hearing or public interaction . . . [and] should [engage in] work requiring only infrequent contact with co-workers and supervisors. . . . Finally, the claimant retains the abilities to engage in at least simple, repetitive tasks equating to unskilled work.

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10 AR 20. When determining Franklin’s RFC, the ALJ considered Franklin’s symptoms in light
11 of the objective medical evidence, opinion evidence and other evidence. AR 20. In doing
12 so, the ALJ applied a two-step process: 1) the ALJ determined whether there was an
13 underlying medically determinable physical or mental impairment that could reasonably be
14 expected to produce Franklin’s pain or other symptoms; and 2) the ALJ evaluated the
15 intensity, persistence and limiting effects of Franklin’s symptoms to determine the extent to
16 which they limited her functioning. AR 20-21. Whenever certain pain or symptom
17 statements were not substantiated by objective medical evidence, the ALJ made findings
18 as to the credibility of such statements. AR 21.

19 The ALJ found some of Franklin’s symptom statements to be unreliable because
20 Franklin lacked credibility. The ALJ concluded that Franklin’s “medically determinable
21 impairments could reasonably be expected to cause the alleged symptoms; however,
22 [Franklin’s] statements concerning the intensity, persistence and limiting effect of these
23 symptoms are not credible to the extent they are inconsistent with the above residual
24 functional capacity assessment.” AR 23. In support, the ALJ noted from Franklin’s
25 testimony that her pain from her lumbar spine was improving. AR 21.

26 The ALJ found that the medical evidence did not support a finding of disability. For
27 her alleged physical disabilities, the ALJ gave great weight to the internal medicine
28 evaluation by the examining physician, Dr. Rose Lewis, because her “assessment [was]

1 consistent with her findings on the examination, the evidence as a whole, and the previous
2 decision” AR 21, 326. She assessed that Franklin could “engage in less than a full
3 range of light activity.” AR 21. Weight was also given to the two concurring assessments
4 by state agency physicians. See AR 338-345 (physical RFC assessment and case
5 analysis by Dr. Amon).

6 As for the alleged mental disabilities, the ALJ gave little weight to the psychiatric
7 evaluation by the examining physician, Dr. Zipperle, because her assessment was based
8 “primarily, if not solely, . . . on [Franklin’s] subjectively reported symptoms and limitations.”
9 AR 22, 332-337. Moreover, her assessment was not consistent with the record. AR 22.

10 Weight was given to the assessments of the state agency psychological consultants,
11 Drs. Valdez and Sheehy. The ALJ noted

12 [Dr. Valdez] determined in April 2010 that schizophrenia,
13 depressive disorder, post-traumatic stress disorder (PTSD), a
14 pain disorder, borderline personality disorder, and alcohol
15 dependence in remission caused mild restrictions in [Franklin’s]
activities of daily living, moderate difficulties in maintaining
social functioning, mild difficulties in maintaining concentration,
persistence, or pace, and no episodes of decompensation.

16 AR 22 (citing AR 343-345, 354-367, 368-371). The ALJ further noted Dr. Valdez’s
17 observation that Dr. Zipperle’s assessment was based on a one-time evaluation of
18 Franklin’s self-reported symptoms. AR 22. Additionally, Dr. Valdez found that “[Franklin]
19 reported a longer and longer list of symptoms and problems, but that it was not clear that
20 she was receiving any psychotherapy.” AR 22. In support of Dr. Valdez’s assessment, the
21 ALJ noted that in August 2010, another State agency psychological consultant affirmed Dr.
22 Valdez’s initial RFC determination. AR 22 (citing AR 424-427).

23 The treating physician, Dr. Tamar Seiver’s assessment was given some weight to
24 the extent it was supported by the record. AR 22. Although “Dr. Seiver’s statement could
25 be construed to identify greater limitations than that of [Franklin’s RFC],” the ALJ found that
26 greater limitations were not supported by treatment records or other evidence, except
27 Franklin’s subjective reports. AR 23. In addition, the ALJ noted that Franklin and her
28

1 mother's testimony showed improvement in Franklin's condition since the last decision in
2 June 2009 when Franklin was found to be not disabled. AR 23.

3 After determining Franklin's RFC, the ALJ assessed whether Franklin could perform
4 any past relevant work. In doing so, the ALJ concluded that Franklin was unable to perform
5 past relevant work, because her past work required "exertional activity inconsistent with the
6 residual functional capacity above, or require[d] the ability to perform more than unskilled
7 work, or require[d] interaction with the public." AR 23.

8 Upon determining at step four that Franklin could not perform his past work, the ALJ
9 then proceeded to step five. The ALJ determined that, considering Franklin's age,
10 education, work experience, and RFC, there were jobs that existed in significant numbers
11 in the national economy that Franklin could perform. In support, the ALJ noted that
12 Franklin was 33 years old on the alleged onset date, was able to communicate in English,
13 and had at least a high school education. AR 24. The ALJ inquired of the Vocational
14 Expert ("VE"), Mr. Davis, as to whether jobs existed in the national economy for an
15 individual with Franklin's age, education, work experience and RFC. *Id.*

16 The VE responded positively, testifying that Franklin "could perform the
17 requirements of about fifty per cent of all light, unskilled jobs, and eighty per cent of all
18 unskilled jobs." Relying on the VE's testimony, the ALJ concluded that Franklin could
19 perform other work that existed in significant number in the national economy. AR 24.
20 Accordingly, the ALJ found Franklin "not disabled." *Id.*

21 STANDARD OF REVIEW

22 Judicial review of the Commissioner's final decision to deny disability benefits is
23 permitted under 42 U.S.C. § 405(g). The ALJ's decision must be affirmed if the ALJ's
24 findings are "supported by substantial evidence and if the [ALJ] applied the correct legal
25 standards." *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (citing *Tackett v.*
26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999)). Substantial evidence "means such relevant
27 evidence as a reasonable mind might accept as adequate to support a conclusion."
28 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) (quoting

1 Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 576 (9th Cir. 1988)). The
2 evidence must be “more than a mere scintilla,” but may be “less than a preponderance.”
3 Id. (quoting Desrosiers, 846 F.2d at 576).

4 The court is required to review the administrative record as a whole, weighing both
5 the evidence that supports and detracts from the ALJ's conclusion. McAllister v. Sullivan,
6 888 F.2d 599, 602 (9th Cir. 1989). If the evidence is susceptible to more than one rational
7 interpretation, the court must uphold the ALJ's decision if they are “supported by inferences
8 reasonably drawn from the record.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir.
9 2008); Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

10 The court may not reverse an ALJ's decision on account of an error that is harmless.
11 Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). “[T]he burden of showing that an
12 error is harmful normally falls upon the party attacking the agency's determination.” Id.
13 (quoting Shinseki v. Sanders, 556 U.S. 396, 409 (2009)).

14 ISSUES

15 Franklin seeks reversal of the ALJ's decision on the following grounds:

- 16 (1) The ALJ improperly rejected opinions of Dr. Zipperle and Dr. Seiver;
- 17 (2) the ALJ erred in failing to address Franklin's stress intolerance;
- 18 (3) the ALJ improperly evaluated Franklin's credibility;
- 19 (4) the ALJ erred in rejecting the lay witness testimony;
- 20 (5) the ALJ failed to include all of Franklin's limitations in the RFC findings;
- 21 (6) the appropriate remedy is remand for payment of benefits.

22 Franklin only appeals from the denial of benefits for mental disability and does not
23 contest the ALJ's physical RFC findings. PI's Reply at 9.

24 DISCUSSION

25 A. Opinions of Dr. Zipperle and Dr. Seiver

26 1. Legal Standard

27 There are three types of medical opinions (treating, examining, and non-examining)
28 and each type is accorded different weight. See Valentine, 574 F.3d at 692; Lester v.

1 Chater, 81 F.3d 821, 830-831 (9th Cir. 1996). Generally, the opinion of a treating physician
2 is given the most weight, and the opinion of an examining physician is given more weight
3 than a non-examining physician. See Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219,
4 1228 (9th Cir. 2009) (“A treating physician’s opinion is entitled to ‘substantial weight.’”)
5 (quoting Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.1988)); Lester, 81 F.3d at 830.

6 If a treating or examining opinion is contradicted by another physician’s opinion, an
7 ALJ may reject the opinion of the treating or examining physician only if the ALJ provides
8 “specific and legitimate reasons” supported by substantial evidence in the record. Lester,
9 81 F.3d at 830 (citing Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995)).

10 If a treating physician’s opinion is not contradicted by another doctor’s opinion, it can
11 only be rejected for “clear and convincing” reasons. Lester, 81 F.3d at 830; Baxter v.
12 Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991).

13 2. Dr. Zipperle’s Opinion

14 Franklin challenges the ALJ’s failure to give sufficient weight to the opinion of her
15 examining physician, Dr. Zipperle, who assessed that Franklin lacked the abilities and
16 attitudes necessary to do most jobs. AR 22 (citing AR 336). The ALJ did not entirely reject
17 Zipperle’s assessment; rather, the ALJ gave the opinion limited weight in concluding that
18 Franklin was limited to infrequent contact with co-workers and supervisors and no public
19 interaction. AR 20, 22. The ALJ’s opinion discussed Dr. Zipperle’s assessment as follows:

20 Little weight is given to Dr. Zipperle’s assessment because it is
21 primarily, if not solely, based on the claimant’s subjectively
22 reported symptoms and limitations. The record does not
23 support the claimant’s reported symptoms and limitations.

24 The consultant [Dr. Valdez] observed that schizophrenia, PTSD,
25 a pain disorder, and a personality disorder were based on Dr.
26 Zipperle’s one-time evaluation, which was based on the
27 claimant’s self-reported symptoms. [AR 359-61.] She also
28 noted that the claimant reported a longer and longer list of
symptoms and problems, but that it was not clear that she was
receiving any psychotherapy. [AR 366.] In August 2010,
another State agency psychological consultant [Dr. Sheehy]
affirmed the initial determination. [AR 424-427.]

AR 22.

1 Franklin contends that the ALJ failed to state clear and convincing reasons to reject
2 Zipperle's opinion. Pl's Mot. at 11. Franklin cites Ryan v. Comm'r of Soc. Sec. Admin.,
3 where the court held that the ALJ improperly rejected an examining doctor's opinion for
4 being "based too heavily on [the plaintiff's] 'subjective complaints'" and unsupported by the
5 treating doctor's records. 528 F.3d 1194, 1199 (9th Cir. 2008). The court in Ryan held that
6 "an ALJ does not provide clear and convincing reasons for rejecting an examining
7 physician's opinion by questioning the credibility of the patient's complaints where the
8 doctor does not discredit those complaints and supports his ultimate opinion with his own
9 observations." Id. at 1199-1200.

10 Here, unlike the examining doctor's uncontradicted opinion in Ryan, Dr. Zipperle's
11 assessment of Franklin's mental condition was contradicted by Drs. Valdez and Sheehy's
12 opinions. AR 22. The ALJ was therefore required to state specific and legitimate reasons
13 to reject Zipperle's opinion, not clear and convincing reasons. Lester, 81 F.3d at 830.

14 The ALJ stated two reasons to give limited weight to Zipperle's diagnosis:
15 (1) Zipperle's assessment was based primarily on Franklin's account of her subjectively
16 reported symptoms and limitations, and (2) the record did not support Franklin's reported
17 symptoms and limitations. AR 22.

18 **a. Subjective Reports**

19 First, the ALJ may disregard medical opinions when they are based on discredited
20 subjective complaints. See Fair v. Bowen, 885 F.2d 597, 605 (9th Cir. 1989). The ALJ did
21 not find Franklin's subjective complaints to be fully credible, as discussed further below.
22 See AR 23 ("the claimant's statements concerning the intensity, persistence and limiting
23 effects of these symptoms are not credible to the extent they are inconsistent with the
24 above residual functional capacity assessment"). Thus, the ALJ reasonably rejected Dr.
25 Zipperle's assessment where the findings noted in her evaluation were primarily based on
26 Franklin's subjective complaints. For example, Zipperle noted that "[Franklin's] prognosis is
27 poor, due to her auditory hallucinations; visual hallucinations; her feeling that people are
28 talking about her and are after her, and that people would really hurt her; suicidal ideations;

1 and her binging and purging eating disorder.” AR 22. These conditions were based on
2 Franklin’s self reported symptoms.

3 Dr. Zipperle made observations about Franklin’s general appearance, attitude and
4 behavior during her mental status examinations. AR 335. During the examination, Zipperle
5 also performed a series of intellectual functioning tests. AR 335. In assessing Franklin’s
6 ability to work, however, Dr. Zipperle relied primarily on Franklin’s subjectively reported
7 symptoms and limitations:

8 The claimant could probably manage her own money.

9 The claimant could perform simple and repetitive tasks.

10 She would have difficulty with detailed and complex tasks.

11 She cannot accept instructions from supervisors or interact well
12 with coworkers and the public.

13 She would not need special or additional instruction; however,
14 maintaining a regular work attendance would not be possible for
15 her as her psychiatric condition would interrupt her work day.

16 She could not deal adequately with stress encountered in the
17 workplace.

18 AR 336. Dr. Zipperle did not cite her own observations in assessing Franklin’s limitations.
19 In Ryan, by contrast, the treating doctor relied on his own clinical observations during his
20 mental status examination to support his conclusion that Ryan was incapable of
21 maintaining a regular work schedule: “Behavior and mannerisms are somewhat odd. She
22 has rapid speech. . . . She is easily agitated and appears to be very angry[;] anxious,
23 distraught, nervous, shaky, and edgy.” Ryan, 528 F.3d at 1199. Here, there is substantial
24 evidence in the record to support the ALJ’s finding that Dr. Zipperle’s assessment did not
25 rely on evidence or observations other than Franklin’s self-reported symptoms to conclude
26 that Franklin would not be able to perform most jobs. AR 22.

27 **b. Disabling Symptoms Not Supported by Record**

28 Second, the ALJ determined that Dr. Zipperle’s opinion, i.e., that Franklin lacked the
abilities and attitudes necessary to do most jobs, was not supported by the record. AR 22.
The ALJ is not required to accept a treating doctor’s opinion that is not supported by clinical

1 evidence and is based on the claimant’s subjective complaints. Bayliss v. Barnhart, 427
2 F.3d 1211, 1217 (9th Cir. 2005) (citing Thomas v. Barnhart, 278 F.3d 947, 957 (9th
3 Cir.2002) (“The ALJ need not accept the opinion of any physician, including a treating
4 physician, if that opinion is brief, conclusory, and inadequately supported by clinical
5 findings.”)). See also Turner v. Comm’r of Soc. Sec. Admin., 613 F.3d 1217, 1223 (9th Cir.
6 2010) (finding specific and legitimate reasons for rejecting the treating physician’s opinion
7 to the extent that it suggested that the claimant was disabled where the record did not
8 support the claim and the opinion was “based almost entirely on the claimant’s self
9 reporting[,]’ . . . without any independent analysis or diagnosis . . . [or] ‘objective findings to
10 substantiate’ a claim” of disability).

11 Franklin does not point to medical records, other than opinion evidence, to show that
12 the ALJ’s decision was not supported by substantial evidence. Franklin contends,
13 however, that “the ALJ also improperly relied on the opinions of the state agency non-
14 examining physicians over those of Dr. Zipperle.” Pl’s Mot. at 11. Franklin argues that
15 “[t]he opinion of a non-examining physician cannot by itself constitute substantial evidence
16 that justifies the rejection of the opinion of either an examining physician or a treating
17 physician.” Id. (citing Lester, 81 F.3d at 830-831). In Lester, the court held that “[t]he
18 opinion of a non-examining physician cannot by itself constitute substantial evidence that
19 justifies the rejection of the opinion of either an examining physician or a treating
20 physician.” 81 F.3d at 830-31. The court in Lester, recognized, however, that the ALJ may
21 rely on a non-examining doctor’s opinion with something more, such as laboratory test
22 results or the claimant’s testimony, to reject a treating doctor’s opinion. Id. at 831 (citing
23 Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989); Andrews, 53 F.3d at 1043;
24 Roberts v. Shalala, 66 F.3d 179 (9th Cir. 1995)).

25 In weighing the opinion evidence, the ALJ did not merely cite the non-examining
26 doctors’ opinions, but also noted Dr. Valdez’s observation that Dr. Zipperle’s diagnoses of
27 schizophrenia, PTSD, a pain disorder, and a personality disorder were based on Dr.
28 Zipperle’s one-time evaluation, which itself was based on Franklin’s self-reported

1 symptoms. AR 22 (citing AR 359-61). Dr. Valdez’s report took into consideration Dr.
2 Zipperle’s assessment. AR 366 (“Vendor [Dr. Zipperle] generates an extensive list of DX
3 based largely on clmt’s self-report. MSS, likewise, is significantly limiting but apparently
4 based largely on clmt’s self-report.”). Dr. Valdez also noted the absence of medical records
5 to support Franklin’s subjective complaints: “[u]nfortunately, the only Y MER [psychological
6 medical evidence of record] for [Franklin] since 2007 are the [psychological consultative
7 examinations]. [Franklin] reports she sees [a psychiatrist] but no [medical evidence] is
8 returned from this source who indicates they have no records for this [claimant].” AR 366.
9 Dr. Valdez’s assessment included detailed consultant’s notes to explain her check-box
10 summary of findings, and was not merely a standardized check-box form review. See AR
11 366. Cf. Ryan, 528 F.3d at 1201-02 (check-box assessment form completed by non-
12 examining physicians contained no supporting explanation for bare conclusions and did not
13 outweigh other evidence in the record).

14 The ALJ summarized Dr. Valdez’s findings as noting that Franklin “reported a longer
15 and longer list of symptoms and problems, but that it was not clear that she was receiving
16 any psychotherapy.” AR 22 (citing AR 366). Dr. Valdez’s finding was thus consistent with
17 the ALJ’s own finding that the record did not support Franklin’s self-reported symptoms and
18 limitations. The ALJ found the record did not support Franklin’s reported symptoms and
19 limitations, on which Dr. Zipperle’s assessment was based, providing a specific and
20 legitimate reason to discount Dr. Zipperle’s opinion that Franklin was unable to perform
21 most jobs.

22 **3. Dr. Seiver**

23 Franklin also challenges the ALJ’s rejection of the opinion of her treating psychiatrist,
24 Dr. Seiver, in assessing her mental RFC. The ALJ’s opinion discussed Dr. Seiver’s
25 assessment as follows:

26 A treating source, psychiatrist Tamar Seiver, MD, wrote in August 2010
27 that the claimant’s diagnoses were major depression, eating disorder,
28 anxiety disorder, and borderline personality disorder. [AR 435.] Dr.
Seiver wrote that she had a very limited ability to adapt to change and
stress in the workplace, and to interact with colleagues and

1 supervisors. [AR 434.] He assessed a fair prognosis for improvement.
2 [AR 435.] Dr. Seiver's assessment and opinions are given some
3 weight, particularly where supported by the record. The residual
4 functional capacity above is not entirely inconsistent with his
5 assessment.

6 AR 22. Franklin contends that the ALJ failed to specify how much weight was actually
7 assigned to Seiver's opinion regarding Franklin's psychological assessment, and that the
8 ALJ opinion "provides no insight into what evidence the ALJ considered either supported or
9 failed to support Dr. Seiver's opinions." Pl's Mot. at 13. In opposition, the Commissioner
10 argues that "[t]he ALJ properly accorded weight to Dr. Seiver's opinion to the extent it was
11 consistent with and supported by the record."⁴ Def's Opp./X-Mot. at 5.

12 In assessing Franklin's current level of functioning, Dr. Seiver opined on Franklin's
13 limitations as follows:

- 14 A. Present Daily Activities: "independent but low level of
15 functioning"
- 16 B. Social Functioning: "minimal social contacts"
- 17 C. Concentration and Task Completion: "decreased ability due
18 to depression + anxiety"
- 19 D. Adaptation to Work or Work-like Situations: "very limited
20 ability to adapt to change + stress in the work place,
21 interaction w/ colleagues + supervisors"

22 AR 433-34. Dr. Seiver's evaluation did not state an opinion that Franklin would be unable
23 to work due to her mental disorders. The ALJ found that Dr. Seiver's assessment was not
24 entirely inconsistent with the mental RFC determined by the ALJ, i.e., that Franklin should
25 not engage in work requiring public interaction, should seek work requiring only infrequent
26 contact with co-workers and supervisors, and retained the abilities to engage in at least
27 simple, repetitive tasks equating to unskilled work. AR 20, 22. However, the ALJ rejected
28 Dr. Seiver's opinion to the extent that his opinion "could be construed to identify greater
limitations" on Franklin's RFC. AR 23.

26 ⁴ The Commissioner erroneously cites Title 20, Section 416.927(d)(4) of the Code
27 of Federal Regulations. The relevant authority is 20 C.F.R. Section 416.927(c)(4) ("Generally,
28 the more consistent an opinion is with the record as a whole, the more weight we will give to
that opinion.").

1 Neither party identifies the applicable standard that the ALJ was required to apply in
2 rejecting the opinion of Dr. Seiver, a treating doctor. See Pl’s Mot. at 13 (“the ALJ’s
3 rejection of Dr. Seiver’s opinions fails to meet **either** the ‘clear and convincing’ standard [to
4 reject an uncontradicted opinion] **or** the ‘specific and legitimate reasons that are supported
5 by substantial evidence in the record’ standard” to reject an opinion contradicted by another
6 doctor’s opinion) (emphasis added). The record demonstrates that Dr. Seiver’s opinion
7 differed from Dr. Valdez and Dr. Sheehy’s assessment of Franklin’s ability to interact with
8 colleagues and supervisors: Dr. Valdez and Dr. Sheehy determined that Franklin was
9 moderately limited, and thus required a setting with limited social contact, whereas Dr.
10 Seiver opined that Franklin required “minimal social contact” and had “very limited ability” to
11 interact with colleagues and supervisors. AR 366, 434. The ALJ concluded that Franklin
12 was limited to infrequent contact with co-workers and supervisors and no public interaction.
13 AR 20. Dr. Valdez and Dr. Sheehy’s opinions contradicted Dr. Seiver’s opinion about the
14 severity of Franklin’s limitations, but both the Valdez and Sheehy opinions were issued
15 before Dr. Seiver issued his opinion, dated August 11, 2010, and did not address Dr.
16 Seiver’s contrary opinion. Furthermore, the ALJ did not cite medical opinions that
17 contradicted Dr. Seiver’s assessment of Franklin’s mental condition to the extent that Dr.
18 Seiver’s opinion could be construed to support greater functional limitations. Because Dr.
19 Seiver’s opinion was uncontradicted on this record, the ALJ was required to state clear and
20 convincing reasons that are supported by substantial evidence to reject Dr. Seiver’s opinion
21 as a treating doctor. Lester, 81 F.3d at 830-31.

22 The ALJ gave clear and convincing reasons to reject Dr. Seiver’s assessment that
23 Franklin had limitations beyond the RFC that the ALJ determined to be supported by the
24 objective evidence. The ALJ stated that “the claimant has not generally received the type
25 of medical treatment one would expect for a totally disabled individual.” AR 23. The ALJ
26 further stated that “[t]he record really does not contain any opinions from treating
27 physicians indicating that the claimant is disabled or even has limitations greater than those
28 determined in this decision.” Id. The ALJ also stated that to the extent that Dr. Seiver’s

1 opinion could be construed to identify greater limitations, these limitations “are not
2 supported by treatment records or any other evidence, except for the claimant’s subjective
3 reports.” AR 23.

4 In reporting evidence of anxiety, depression or other affective disorder, Dr. Seiver
5 noted “depressed[,] anxious[,] panic sx, disrupted sleep. picking at herself - at her fingers.
6 feels like someone choking her. [gaining] weight. had thought to cut herself w/ razors -
7 brought razors in + disposed of them.” AR 433. Dr. Seiver’s opinion does not indicate that
8 he observed these conditions himself; rather, Dr. Seiver made the following observations
9 about Franklin: “overall she is compliant w/ apts + does not need assistance in keeping
10 them. generally - appropriate dress manner + hygiene. sometimes can be slightly
11 dissheveled [sic]. good eye contact. forthcoming.” AR 431. The ALJ determined that Dr.
12 Seiver’s opinion relied on Franklin’s subjective reports which the ALJ found to be
13 discredited. AR 23. Dr. Seiver’s opinion as to Franklin’s decreased or “very limited”
14 abilities did not refer to Dr. Seiver’s own independent observations, in contrast to the
15 psychiatric evaluation credited in Ryan, where the treating psychiatrist recorded not only
16 the symptoms relayed by the claimant, but also recorded his own clinical observations in
17 support of his opinion that the claimant would not be able to complete a regular work week.
18 See Ryan, 528 F.3d at 1199-1200 (“an ALJ does not provide clear and convincing reasons
19 for rejecting an examining physician’s opinions by questioning the credibility of the patient’s
20 complaints where the doctor does not discredit those complaints and supports his ultimate
21 opinion with his own observations.”).

22 Furthermore, Dr. Seiver did not directly state or opine that Franklin could not work
23 due to her mental condition, unlike Ryan, where the examining physician “opined that Ryan
24 would be unable to complete a regular work week due to her mental impairments.” 528
25 F.3d at 1199. On this record, the ALJ provided clear and convincing reasons, supported by
26 substantial evidence, to reject Dr. Seiver’s opinion to the extent that it “could be construed
27 to identify greater limitations,” where Dr. Seiver himself did not opine that Franklin was
28 unable to work on a regular and continuous basis.

1 **B. Franklin’s Ability to Tolerate Stress**

2 Franklin argues that the ALJ erred by failing to address her stress intolerance. PI’s
3 Mot. at 14. Franklin contends that Drs. Zipperle and Seiver’s opinions, as well as Franklin
4 and her mother’s testimony, demonstrated her limited ability to handle stress. *Id.* Franklin
5 emphasizes that because stress is “highly individualized. . . , the mentally impaired may
6 have difficulty meeting the requirements of even so-called ‘low stress’ jobs.” *Id.* at 15
7 (citing Social Security Ruling 85-15). Thus, Franklin contends that the ALJ committed legal
8 error by failing to address Franklin’s ability to tolerate stress and improperly finding Franklin
9 to be able to perform other work. *Id.* at 15.

10 Franklin cites Social Security Ruling (“SSR”) 85-15, which states that a person’s
11 ability to cope with stress in the workplace is a “highly individualized” condition that requires
12 “thoroughness in evaluation on an individualized basis.” *See Perkins v. Astrue*, 2012 WL
13 4755402 at *2 (C.D. Cal. Oct. 5, 2012) (quoting SSR 85-15). Franklin also cites *Lancellotta*
14 *v. Sec. of HHS*, 806 F.2d 284, 285 (1st Cir. 1986), where the court cited SSR 85-15 to hold
15 that the ALJ failed to make sufficient findings on stress, in support of her argument that the
16 ALJ failed to account for Franklin’s inability to handle stress in the RFC finding.

17 SSR 85-15 requires that “[a]ny impairment-related limitations created by an
18 individual’s response to demands of work [] must be reflected in the RFC assessment.”
19 SSR 85-15, 1983-1991 Soc. Sec. Rep. Serv. 343 (S.S.A. 1985). The Ninth Circuit has
20 recognized, however, that SSR 85-15 was issued to clarify “policies applicable in cases
21 involving the evaluation of solely nonexertional impairments.” *Roberts v. Shalala*, 66 F.3d
22 179, 183 (9th Cir. 1995). Thus, SSR 85-15 has no application to a claimant who claims
23 both exertional and nonexertional impairments, as SSR 85-15 provides guidance only for
24 cases in which the claimant asserts “solely nonexertional impairments.” *Id.* (citing SSR 85-
25 15).

26 The Commissioner fails to address Franklin’s contention that the ALJ did not follow
27 SSR 85-15. The court determines, however, that because Franklin asserted both
28 exertional and nonexertional impairments, SSR 85–15 does not apply. *See Sandgathe v.*

1 Chater, 108 F.3d 978, 980–81 (9th Cir. 1997) (holding SSR 85–15 was inapplicable
2 because the claimant had exertional and nonexertional impairments).

3 Here, the record demonstrates that the ALJ gave clear and convincing reasons to
4 reject Dr. Seiver’s opinion that Franklin had “a very limited ability to adapt to change and
5 stress in the work place.” AR 22 (citing AR 434). As discussed above, the ALJ rejected Dr.
6 Seiver’s opinion to the extent that it was unsupported by treatment records or other
7 evidence. AR 22-23. See Bayliss v. Barnhard, 427 F.3d 1211, 1217 (9th Cir. 2005). In
8 Bayliss, the court held that the ALJ did not err in failing to address the plaintiff’s reaction to
9 stress because the ALJ properly considered “those limitations for which there was record
10 support that did not depend on Bayliss’s subjective complaints.” 427 F.3d at 1217. The
11 court in Bayliss further held, “[p]reparing a function-by-function analysis for medical
12 conditions or impairments that the ALJ found neither credible nor supported by the record is
13 unnecessary.” Id. Similarly, here, the ALJ did not fail to consider Franklin’s tolerance for
14 stress where he determined that “[t]he record really does not contain any opinions from
15 treating physicians indicating that the claimant is disabled or even has limitations greater
16 than those determined in this decision.” AR 23.

17 With respect to other evidence cited by Franklin to show her inability to tolerate
18 stress, the record demonstrates that the ALJ found that such evidence was entitled to little
19 weight. The ALJ discounted Dr. Zipperle’s opinion that Franklin “could not deal adequately
20 with stress encountered in the workplace,” because it was primarily based on Franklin’s
21 subjective complaints and was not supported by the record. AR 336. In her function report
22 dated February 24, 2010, Franklin stated, “[I can’t handle stress] at all, I freak out, [have]
23 panic attacks, anxiety and anger which gets explosive.” AR 211. Further, in her later
24 function report dated July 23, 2010, she stated that “[she] can’t handle stress at all,” and
25 that “[she] do[es] not cope well when there’s change.” AR 287. The ALJ found, however,
26 that Franklin was not credible, as discussed further below.

27 Franklin also argues that her mother, Heather Ann Hanan, testified about Franklin’s
28 limited ability to tolerate stress. Pl’s Mot. at 14-15. See AR 221 (in response to 3rd party

1 function report dated February 24, 2010, asking how well Franklin handles stress, Hanan
2 responded, “not well. She has very few self soothing skills that help with the physical pain
3 and almost none to help [with] interpersonal problems.”); AR 276 (in response to the same
4 question in July 23, 2010 report, Hanan responded, “not well, rages at others, hurts
5 herself.”). The ALJ’s opinion indicates that he considered Franklin’s mother’s testimony,
6 and accorded some weight to her statements, but discredited her testimony where it was
7 consistent with Franklin’s discredited subjective complaints, as further discussed in Section
8 D, below. AR 21, 23.

9 On this record, there was substantial evidence to support the ALJ’s finding that
10 Franklin was not disabled and the ALJ did not err in giving little weight to the evidence
11 suggesting that Franklin was unable to tolerate stress.

12 **C. Franklin’s Credibility**

13 Franklin challenges the ALJ’s determination that her testimony regarding the severity
14 of her symptoms lacked credibility.

15 If an ALJ finds that a claimant’s testimony regarding the severity of his pain and
16 impairments is unreliable, the ALJ must give “specific, clear and convincing reasons” for
17 rejecting the claimant’s testimony. Lengenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.
18 2007) (citing Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996)). See also Robbins v.
19 Social Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006) (“[U]nless an ALJ makes a finding of
20 malingering based on affirmative evidence thereof, he or she may only find an applicant not
21 credible by making specific findings as to credibility and stating clear and convincing
22 reasons for each.”).

23 When weighing the claimant’s credibility, the ALJ may consider factors such as the
24 following: “claimant’s reputation for truthfulness, inconsistencies either in claimant’s
25 testimony or between her testimony and her conduct, claimant’s daily activities, her work
26 record, and testimony from physicians and third parties concerning the nature, severity,
27 and effect of the symptoms of which claimant complains.” Thomas v. Barnhart, 278 F.3d
28 947, 958-59 (9th Cir. 2002) (quoting Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th

1 Cir. 1997)) (internal marks omitted). “If the ALJ’s credibility finding is supported by
2 substantial evidence in the record, [the court] may not engage in second-guessing.” *Id.* at
3 959 (citing *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)).

4 Franklin argues that the ALJ failed to identify specific evidence which shows that
5 specific testimony is not credible. PI’s Mot. at 18. In making credibility determinations, the
6 ALJ must specifically identify the testimony he finds not to be credible and must explain
7 what evidence undermines the testimony. *Holohan*, 246 F.3d at 1208.

8 **1. Concern That Working Would “Ruin Her Case”**

9 Here, the ALJ gave specific, clear and convincing reasons for finding that Franklin’s
10 inconsistent statements about her disabling impairments were not fully credible. First, the
11 ALJ cited medical reports showing that Franklin did not work for fear of being denied SSI
12 benefits. In September 2010, “[s]he informed her therapist [] that she had been denied
13 disability benefits for the fifth time; she explained that she knew she was disabled and that
14 if she worked now, it would ruin her case.” AR 22 (citing AR 526). Franklin contends that
15 she is not a lawyer and that her statement “if I worked now it would ruin my case” has no
16 legal significance, emphasizing that “many disabled SSI applicants can work and still be
17 disabled.” PI’s Reply at 6. However, this evidence that Franklin believed that working
18 would ruin her chances of obtaining SSI benefits was cited by the ALJ and supported the
19 ALJ’s credibility determination.

20 **2. Doctor’s Doubt About Franklin’s Reason for Hospital Admission**

21 Second, the ALJ cited Franklin’s hospital records dated February 2011: “The doctor
22 commented that the claimant told her that she had a pending SSI application; it was not
23 clear to the doctor whether the admission to the hospital had anything to do with the SSI
24 application.” AR 22-23 (citing AR 447). Franklin contends that the doctor’s speculation is
25 not substantial evidence, but the ALJ may properly consider Franklin’s reputation for
26 truthfulness. *Thomas*, 278 F.3d at 958. Here, Dr. Ramanathan’s observation that “Client
27 states that she has a pending SSI application [and] I am not clear whether this admission
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1 had anything to do with that application” reflects the doctor’s own doubts about Franklin’s
2 credibility. AR 447.

3 **3. Substance Abuse**

4 Third, the ALJ reviewed Franklin’s substance abuse history, citing medical records in
5 February 2011 showing that she took medical marijuana for fibromyalgia and anxiety. AR
6 23 (citing AR 449). Franklin “also had a history of doing speed, cocaine, and heroin.” *Id.*
7 Noting Franklin’s work history showing that she performed well at one of her longest held
8 jobs while she was free from the use of substances, the ALJ found that “[t]he record
9 strongly indicates that continued marijuana use deprives the claimant of the motivation to
10 comply with her psychiatrist’s treatment plan.” *Id.* The ALJ determined that “[a]ll of this
11 combined strongly suggests that the claimant’s psychological impairments would impose
12 negligible limitations if she were to stop the use of marijuana and consistently comply with
13 treatment and medications.” *Id.* Franklin argues that it would be unreasonable to stop the
14 use of medical marijuana, which currently assists with her fibromyalgia and anxiety
15 disorder, to improve another disorder. Pl’s Mot. at 20. Franklin has not, however,
16 presented medical opinion evidence or other evidence in the record that marijuana is the
17 only treatment available for her fibromyalgia and anxiety. On this record, substantial
18 evidence supports the ALJ’s finding that Franklin’s substance abuse history and continued
19 marijuana use discredited her subjective complaints of disabling mental impairments.

20 Franklin also challenges this finding on the ground that the ALJ failed to comply with
21 Social Security Ruling 82-59, which delineates the circumstances in which the
22 Commissioner can deny benefits on the basis that the claimant has failed to follow
23 prescribed treatment, including a requirement that “[t]he evidence of record discloses that
24 there has been refusal to follow prescribed treatment.” *Ibarra v. Comm’r of Soc. Sec.*
25 *Admin.*, 92 F. Supp. 2d 1084, 1087 (D. Or. 2000) (citing SSR 82–59).

26 Franklin also contends that the ALJ failed to consider “whether or not Ms. Franklin
27 had good cause for failing to comply with any treatments,” citing *Byrnes v. Shalala*, 60 F.3d
28 639, 641 (9th Cir. 1995). Pl’s Mot. at 20-21. In *Byrnes*, the Commissioner argued on

1 appeal that the claimant’s diabetes would have been controllable if he followed his doctors’
2 advice and quit smoking, but the court found that the ALJ did not make such
3 noncompliance findings in assessing the claimant’s credibility. 60 F.3d at 641. The court in
4 Byrnes did not therefore consider whether the ALJ made findings pursuant to 20 C.F.R.
5 § 404.1530, regulating denial of benefits for noncompliance with a prescribed treatment
6 program, which requires the ALJ to “examine the medical conditions and personal factors
7 that bear on whether [a claimant] can reasonably remedy” his impairment and must make
8 specific findings.” Id.

9 The Commissioner fails to address Franklin’s arguments that the ALJ failed to
10 comply with SSR 82-59 or make specific findings on “the medical conditions and personal
11 factors that bear on whether a claimant can reasonably remedy his impairment.” PI’s Mot.
12 at 20-21 (citing Byrnes, 60 F.3d at 641). The court determines, however, that SSR 82-59
13 and the regulations governing noncompliance with a treatment program are not applicable
14 here because Franklin was not denied benefits on the ground that she failed to follow a
15 prescribed treatment program. Here, as in Byrnes, the ALJ did not make a finding that
16 Franklin was not complying with a prescribed treatment program, or that a prescribed
17 treatment would restore Franklin’s ability to work. See Byrnes, 60 F.3d at 641 (“we decline
18 to review the record to ascertain whether substantial evidence might support these findings
19 not made”) (citation and internal quotation marks omitted). Rather, the ALJ denied benefits
20 on the ground that, even with her impairments, Franklin was able to perform other work
21 subject to the limitations reflected in her RFC. AR 24. The ALJ further determined that the
22 evidence in the record “strongly suggests” that her psychological impairments would have
23 negligible limitations if she stopped taking marijuana and consistently complied with
24 medical treatment. AR 23. This finding sets forth a specific, clear and convincing reason
25 for the ALJ’s credibility assessment.

26 **4. Improvements**

27 A fourth reason given by the ALJ in discounting Franklin’s credibility was the
28 substantial evidence of Franklin’s improvements. In particular, the ALJ noted that Hanan

1 found that “when [Franklin] takes her medication, she picks fewer fights.” AR 19, AR 215.
2 The ALJ also noted Hanan’s testimony that “[Franklin’s] condition had gotten better since
3 June 2009,” discrediting Franklin’s testimony that “she could not work because she is
4 unable to function.” AR 21. With respect to Franklin’s physical impairments, the ALJ noted
5 that Franklin’s physical therapy reports showed that she reported on March 19, 2010 that
6 she “‘felt better’ and had taken her bike out for a ride,” then on April 7, 2010, reported
7 “feeling better overall.” AR 21 (citing 422-23). Franklin contends that the evidence about
8 her physical impairments is not relevant to the ALJ’s findings as to her mental impairments.
9 Pl’s Reply at 9. The ALJ did, however, refer to these records in assessing Franklin’s
10 overall credibility. AR 21.

11 These observations in the record, as well as the ALJ’s citation to Hanan’s testimony
12 that “medications and therapy helped with the claimant’s anger,” support the ALJ’s finding
13 that Franklin’s impairments are not disabling and that “the claimant’s statements
14 concerning the intensity, persistence and limiting effects of these symptoms are not
15 credible to the extent that they are inconsistent with the above residual functional capacity
16 assessment.” AR 21, 23.

17 **5. Medical Treatment Not Consistent With Being Totally Disabled**

18 Fifth, the ALJ found that “the claimant has not generally received the type of medical
19 treatment one would expect for a totally disabled individual.” AR 23. Franklin argues that
20 “the ALJ is not qualified to substitute his opinion of appropriate treatment for that of the
21 treating physician.” Pl’s Mot. at 18-19. The ALJ found, however, that “[t]he record really
22 does not contain any opinions from treating physicians indicating that the claimant is
23 disabled or even has limitations greater than those determined in this decision.” AR 23.
24 See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ’s credibility determination
25 was supported by substantial evidence where medical records were not “the sort of
26 description and recommendations one would expect to accompany a finding that [the
27 claimant] was totally disabled under the Act.”).

28

1 On this record, the ALJ gave specific reasons for discounting Franklin’s subjective
2 complaints which were supported by substantial evidence in the record.

3 **D. Lay witness testimony**

4 Franklin contends that the ALJ erred by failing to address the complete testimony of
5 her mother, Heather Ann Hanan. Pl’s Mot. at 16. Franklin states that the ALJ noted
6 several comments made by Franklin’s mother, but “[did] not address the lay witness’ more
7 specific testimony regarding the limitations Ms. Franklin continues to have.” *Id.*

8 The ALJ must take into consideration the lay witness testimony regarding a
9 claimant’s symptoms or impairments, which “cannot be disregarded without comment.”
10 *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) (quoting *Nguyen v. Chater*, 100 F.3d
11 1462, 1467 (9th Cir. 1996)). An ALJ ““must give reasons that are germane to each
12 witness,”” but is not required “to discuss every witness’s testimony on a individualized,
13 witness-by-witness basis.” *Id.* (quoting *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.1993)).
14 Accordingly, if an ALJ cites germane reasons for rejecting the testimony of one witness, the
15 ALJ need only point to those reasons when rejecting similar testimony by a different
16 witness. *Id.* (citing *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir.
17 2009)).

18 In *Molina*, the court held that “if an ALJ has provided well-supported grounds for
19 rejecting testimony regarding specified limitations, we cannot ignore the ALJ’s reasoning
20 and reverse the agency merely because the ALJ did not expressly discredit each witness
21 who described the same limitations. Further, where the ALJ rejects a witness’ testimony
22 without providing germane reasons, but has already provided germane reasons for
23 rejecting similar testimony, we cannot reverse the agency merely because the ALJ did not
24 ‘clearly link his determination to those reasons.’” 674 F.3d at 1121. Where the ALJ gave
25 reasons for rejecting the claimant’s testimony regarding her symptoms that were equally
26 relevant to the similar testimony of lay witnesses, and that would support a finding that the
27 lay testimony was similarly not credible, the court held that the ALJ’s failure to comment
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1 upon the lay testimony, either individually or in the aggregate, was harmless error. Id. at
2 1115, 1122.

3 Here, the ALJ opinion discussed Hanan’s testimony on several occasions but did not
4 discuss his reasons for discrediting Hanan’s testimony. According to the ALJ, “Mrs. Hanan
5 stated that the claimant’s condition had gotten better since June 2009.” AR 21. Overall,
6 the ALJ found that Hanan’s testimony, in combination with Franklin’s own testimony,
7 demonstrated improvement in Franklin’s condition. AR 23 (“The claimant’s testimony, as
8 well as that of her mother’s, tends to show improvement . . .”). As Franklin herself
9 concedes, her mother’s testimony is “generally consistent with Plaintiff’s own reports and
10 testimony” that she cannot perform work activity on a regular and continuous basis. PI’s
11 Mot. at 3-4, 17. Franklin argues that if Hanan’s testimony were fully credited, a reasonable
12 ALJ would have found that Franklin is “unable to sustain work or handle stresses of
13 competitive employment.” PI’s Reply at 10.

14 The ALJ provided specific, clear and convincing reasons for discounting Franklin’s
15 testimony, as discussed above. The ALJ’s failure to give specific reasons for rejecting
16 Hanan’s testimony, which did not describe any limitations beyond those that Franklin
17 herself described, did not alter the ultimate nondisability determination. Under Molina, the
18 ALJ is not required to state specific reasons for rejecting the testimony of a lay witness, if
19 the same reasons were used to reject the testimony of another witness. Molina, 674 F.3d
20 at 1122. Thus, the ALJ’s error in failing to explain his reasons for rejecting Hanan’s
21 testimony was harmless.

22 **E. RFC Finding**

23 Franklin contends that the ALJ’s RFC finding failed to incorporate all of Franklin’s
24 limitations, and that the VE’s opinion had no evidentiary value because the ALJ’s vocational
25 hypothetical failed to include the functional limitations assessed by Drs. Zipperle and
26 Seiver, and as established by Franklin’s own testimony and the lay witness testimony. PI’s
27 Mot. at 23.

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1 At step five, the ALJ consulted the VE to determine Franklin’s occupational base. In
2 eliciting the VE’s testimony regarding Franklin’s ability to perform other work, the ALJ
3 posed a hypothetical to the VE, i.e., whether a person with Franklin’s age, education, work
4 experience and RFC could perform work that existed in significant numbers in the national
5 economy. AR 24.

6 If an ALJ calls upon a VE to testify at a hearing, the ALJ “poses hypothetical
7 questions to the [VE] that ‘set out all of the claimant’s impairments’ for the [VE’s]
8 consideration.” Tackett v. Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999) (citing Gamer v.
9 Secretary of Health and Human Servs., 815 F.2d 1275, 1279 (9th Cir. 1987)). The ALJ’s
10 hypothetical questions must depict the claimant’s impairments and limitations, and must be
11 supported by the record. Id. See Shinseki v. Sanders, 556 U.S. 396, 409 (2009) (“the
12 burden of showing that an error is harmful normally falls upon the party attacking the
13 agency’s determination”); McLeod v. Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (“the burden
14 is on the party attacking the agency’s determination to show that prejudice resulted from
15 the error”).

16 Franklin’s challenge to the ALJ’s RFC findings and the VE’s testimony lacks merit.
17 Franklin’s arguments are based on her other challenges to the ALJ’s findings, but, as the
18 court has determined, substantial evidence supports the ALJ determinations to give limited
19 weight to the opinions of Drs. Zipperle and Seiver and to discount the testimonies of
20 Franklin and her mother. The ALJ did not, therefore, err in posing the hypothetical to VE,
21 because it incorporated all the limitations that the ALJ found to be supported by the record.
22 Tackett, 180 F.3d at 1101. Because the ALJ’s RFC findings were supported by substantial
23 evidence in the record, Franklin has failed to satisfy her burden of showing that the ALJ
24 committed error.

25 **F. Franklin’s Request for Remand for Payment of Benefits**

26 Because the court affirms the Commissioner’s finding that Franklin is not disabled,
27 the court does not reach the question whether the case should be remanded for further
28 proceedings or for an award of benefits.

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CONCLUSION

For the foregoing reasons, Franklin’s motion for summary judgment is DENIED and the Commissioner’s cross-motion for summary judgment is GRANTED. The Commissioner’s decision to deny benefits is AFFIRMED. This order fully adjudicates the motions listed as docket numbers twenty-two and twenty-six, and terminates all pending motions. The clerk shall close the file.

IT IS SO ORDERED.

Dated: August 13, 2013



PHYLLIS J. HAMILTON
United States District Judge