

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

|                                |   |                                   |
|--------------------------------|---|-----------------------------------|
| DONNA L. RUBIN,                | ) | Case No.: 5:13-CV-00297-EJD       |
|                                | ) |                                   |
| Plaintiff,                     | ) | <b>ORDER GRANTING DEFENDANT’S</b> |
|                                | ) | <b>MOTION FOR SUMMARY</b>         |
| v.                             | ) | <b>JUDGMENT; DENYING P’S</b>      |
|                                | ) | <b>MOTION FOR SJ</b>              |
| CAROLYN W. COLVIN,             | ) |                                   |
| Acting Commissioner            | ) |                                   |
| Social Security Administration | ) |                                   |
|                                | ) | <b>[Re: Docket No. 21]</b>        |
| Defendant.                     | ) |                                   |

Plaintiff Donna Rubin (“Plaintiff”) brought this action pursuant to 42 U.S.C. § 405(g) to obtain review of the decision of the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for Social Security Disability benefits. Plaintiff’s Motion for Summary Judgment seeks an order reversing the Commissioner’s final decision denying benefits, and remand the matter for immediate payment, or in the alternative, a remand for further administrative proceedings.

Presently before the Court are Plaintiff’s and Defendant’s cross-motions for summary judgment. Having considered the parties’ submissions and the administrative record, the Court GRANTS Defendant’s Motion for Summary Judgment, and DENIES Plaintiff’s Motion for Summary Judgment.

1           **I.     Background**

2                 **a.   Procedural History**

3           On January 5, 2007, Plaintiff filed for Social Security Disability Insurance Benefits  
4 under Title II of the Social Security Act. Administrative Transcript (“Tr.”) at 173-180. Plaintiff’s  
5 claim was initially denied by the Social Security Administration on April 30, 2007 because the  
6 condition was deemed not disabling on any date through December 31, 2003. Tr. at 112-116.  
7 Plaintiff’s request for reconsideration was granted and the Social Security Administration again  
8 denied her claim on August 20, 2007. Tr. at 119-123.

9           Plaintiff subsequently requested a hearing before an Administrative Law Judge  
10 (“ALJ”), which occurred before ALJ Brenton Rogozen on December 16, 2008. Following the  
11 hearing, the ALJ rendered an unfavorable decision on February 13, 2009. Tr. at 102-107. Upon  
12 Plaintiff’s March 2009 request, the Appeals Council reversed and remanded the case back to the  
13 ALJ noting that Plaintiff’s past relevant work did not appear to fit within the parameter of  
14 Plaintiff’s residual functional capacity. Tr. at 164-165, 110-111. The ALJ was instructed to obtain  
15 additional evidence from a vocational expert regarding Plaintiff’s ability to perform her past  
16 relevant work and what skills, if any, did she acquire that are transferable with very little  
17 adjustment to other occupations. Tr. at 110-111. In a written decision dated July 25, 2011, Judge  
18 Rogozen ultimately found that Plaintiff has the residual functional capacity to perform at the full  
19 sedentary level and rendered an unfavorable decision. Tr. at 10-17.

20           Plaintiff then sought review of the ALJ’s determination. Tr. at 1-6. On September 4,  
21 2012, the Appeals Council denied the request for review, and the ALJ’s decision became the final  
22 decision of the Administration. Id.

23           Plaintiff filed the instant action requesting judicial review of the Administration’s  
24 decision on Jan 22, 2013. See Compl., Docket Item No. 1. Plaintiff moved for summary judgment  
25 on July 23, 2013. See Docket Item No.18. Defendant filed its cross-motion for summary judgment  
26 on July 26, 2013. See Docket Item No.21.

1                   **b. Plaintiff’s Personal, Vocational and Medical History**

2                   Plaintiff was born on March 28, 1947. Tr. at 269. She received her GED in 1964 and  
3 began working for National Semiconductor as a Technical Support Specialist in 1985. Tr. at 198-  
4 206. She was promoted to Senior Program Manager in 1991. Tr. at 197-198. In Plaintiff’s first  
5 hearing, she testified that her typical day as a Senior Program Manager consisted of lots of  
6 meetings, five to six hours a day sitting at a computer, and the rest of her time walking back and  
7 forth between buildings. Tr. at 56.

8                   Plaintiff was 50 years old at the time she experienced a bilateral knee injury from a  
9 bicycle accident in 1997 and 51 years old at the onset of the alleged disability. Tr. at 196-205. In  
10 addition to chronic pain in both knees, Plaintiff claims to suffer from Spondylolisthesis,  
11 degenerative bone disease, Stenosis of the spine and Tenosynovitis which has rendered her  
12 incapable of sitting, standing or walking for long periods of time. Tr. at 196. She underwent  
13 surgery on her right knee in April 1998 and returned to work part-time shortly thereafter. Tr. at 57;  
14 75. Plaintiff testified in her 2008 hearing that her doctor told her total knee replacement surgery  
15 would be necessary in the future but that she should wait as long as possible because new knees do  
16 not typically last very long. Tr. at 58.

17                   Plaintiff returned to National Semiconductor part-time shortly after the surgery, but  
18 found it difficult to walk between locations, sit for long lengths of time, keep her legs elevated  
19 while iced, and sometimes would fall due to her knee giving out completely. Tr. at 76. Her right  
20 leg was constantly swelling after one hour or more of sitting. Tr. at 77. Plaintiff testified at her  
21 2011 hearing that her orthopaedic surgeon, Dr. Littlejohn, told her to ice and elevate her right knee  
22 in order to reduce the swelling. Tr. at 77. She also attempted to adjust her schedule and  
23 implement more teleconferencing to minimize the swelling and pain. Id.

24                   Plaintiff stopped working permanently in May 1998 after being laid off from her  
25 company. Tr. at 77. Plaintiff did not look for new work because she felt she could not get her legs  
26 “under control” due to the swelling, the pain and her inability to sit longer than one hour. Tr. at 76-  
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1 77. Plaintiff further testified that both Dr. Littlejohn and Dr. Holmes stated she would “definitely”  
2 need knee replacements, which she ultimately had in 2007. Tr. at 79-80.

3 **II. Legal Standard**

4 **a. Standard for Reviewing the ALJ’s Decision**

5 The Court has authority to review an ALJ’s decision denying disability benefits. 42  
6 U.S.C. § 405(g). The Social Security Act states that, upon review of the Secretary’s decision by the  
7 district court, “[t]he findings of the Secretary as to any fact, if supported by substantial evidence,  
8 shall be conclusive...” *Id.* Accordingly, the Court’s jurisdiction is limited to determining whether  
9 the denial of benefits is supported by substantial evidence in the administrative record. Reversal of  
10 an ALJ’s decision is only appropriate where it is not supported by substantial evidence or the  
11 decision is based on legal error. *Id.*; accord Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir.  
12 2001).

13 “Substantial evidence” is more than a scintilla, but less than a preponderance. Thomas  
14 v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). The inquiry here is whether the record, read as a  
15 whole, yields such evidence as would allow a reasonable mind to accept the conclusions reached  
16 by the ALJ. Richardson v. Perales, 402 U.S. 381, 401 (1971); Sample v. Schweiker, 694 F.2d 639,  
17 642 (9th Cir. 1982). Where evidence is susceptible of more than one rational interpretation, it is the  
18 ALJ’s conclusion which must be upheld, Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971); and  
19 in reaching his findings, the ALJ is entitled to draw inferences logically flowing from the evidence.  
20 Beane v. Richardson, 457 F.2d 758 (9th Cir. 1972).

21 **b. Standard for Determining Disability**

22 Disability is the “inability to engage in any substantive gainful activity by reason of any  
23 medically determinable physical or mental impairment which can be expected to result in death or  
24 which has lasted or can be expected to last for a continuous period of not less than twelve months.”  
25 42 U.S.C. § 423(d)(1)(A). The impairment must be so severe that a claimant is unable to do her  
26 previous work, and cannot “engage in any other kind of substantial gainful work which exists in  
27 the national economy,” given the claimant’s age, education, and work experience. 42 U.S.C. §

1 423(d)(2)(A). “The claimant carries the initial burden of proving a disability.” Ukolov v.  
2 Barnhart, 420 F.3d 1002, 1004 (9th Cir. 2005). The burden of proof is on the claimant as to steps  
3 one to four. As to step five, the burden shifts to the Commissioner. Tackett v. Apfel, 180 F.3d  
4 1094, 1098 (9th Cir. 1999). If a claimant is found to be “disabled” or “not disabled” at any step in  
5 the sequence, there is no need to consider subsequent steps. Id. If the claimant proves a prima  
6 facie case of disability, the burden shifts to the Commissioner to establish that the claimant can  
7 perform a “significant number of other jobs in the national economy.” Thomas, 278 F.3d at 955.  
8 “The Commissioner can meet this burden through the testimony of a vocational expert or by  
9 reference to the Medical Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2.” Id.

10 The ALJ evaluates Social Security disability claims using a five-step process. 20  
11 C.F.R. §§ 404.1520, 416.920.

- 12 1) The ALJ must first determine whether the claimant is presently engaged in  
13 substantially gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If so, the  
14 claimant is not disabled; otherwise the evaluation proceeds to step two.
- 15 2) The ALJ must determine whether the claimant has a severe impairment or  
16 combination of impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the  
17 claimant is not disabled; otherwise the evaluation proceeds to step three.
- 18 3) The ALJ must determine whether the claimant’s impairment or combination of  
19 impairments meets or medically equals the requirements of the Listing of  
20 Impairments. 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is disabled;  
21 otherwise, the analysis proceeds to step four.
- 22 4) The ALJ must determine the claimant’s residual functional capacity despite  
23 limitations from the claimant’s impairments. 20 C.F.R. §§404.1520(e), 416.920(e).  
24 If the claimant can still perform work that the individual has done in the past, the  
25 claimant is not disabled. If she cannot perform the work, the evaluation proceeds to  
26 step five. 20 C.F.R. §§ 404.1520(f), 416.920(f).

1                   5) In this step, the Commissioner has the burden of demonstrating that the claimant is  
2                   not disabled. Considering a claimant’s age, education, and vocational background,  
3                   the Commissioner must show that the claimant can perform some substantial gainful  
4                   work in the national economy. 20 C.F.R. §§ 404.1520(g), 416.920(g).

5                   **III. Discussion**

6                   The ALJ made the following findings and conclusions on the five steps: (1) for step  
7 one, the ALJ determined that the Plaintiff had not engaged in substantial gainful activity since  
8 Plaintiff’s alleged onset date of January 1, 1999, through her date last insured, December 31, 2003;  
9 (2) for step two, the ALJ determined Plaintiff has “severe” medical impairments; (3) for step three,  
10 the ALJ determined that Plaintiff did not have an impairment that met or medically equaled a list  
11 impairment; (4) for step four, the ALJ determined Plaintiff’s medical impairments did not preclude  
12 her from performing her past relevant work as it generally is performed. The ALJ did not proceed  
13 to step five following the determination Plaintiff’s medical impairments did not preclude her from  
14 performing her past relevant work.

15                   Plaintiff requests that the Court reverse the ALJ’s final decision and remand the case to  
16 the Social Security Administration for an award of benefits. See Pl.’s MSJ. Alternatively, Plaintiff  
17 requests that this case be remanded for further administrative proceedings to re-adjudicate the  
18 issues. Id. Plaintiff supports these requests with the following contentions: (1) the ALJ’s  
19 reasoning affording “little weight” to the consultative examination report of Clark E. Gable, M.D.,  
20 as opposed to non-examining State Agency internal evaluators was flawed; (2) the ALJ’s finding  
21 that Plaintiff’s testimony regarding her inability to sit 6 hours a day was exaggerated is erroneous;  
22 (3) the ALJ’s rationale for rejecting the credibility of Plaintiff’s testimony that she was only taking  
23 “Aleve” is not factually sustainable; and (4) the Commissioner wrongly denied Plaintiff’s claim at  
24 step four and therefore failed to meet its burden at step five.

25                   **a. Evidence Supporting the ALJ’s Rejection of the Opinion of Dr. Gable**

26                   Plaintiff argues that the ALJ’s reasoning for affording “little weight” to the consultative  
27 examination report of Dr. Clark E. Gable and “significant weight” to the medical opinions of state

1 agency consultants Sadda Reddy, M.D. and Roger Fast, M.D. was flawed. Pl.’s MSJ at 16.  
2 Plaintiff contends that the ALJ did not provide specific and legitimate reasons and erred by not  
3 giving the examining physician’s opinion proper deference. Pl.’s MSJ at 16-18.

4 In the context of Social Security determinations, the weight prescribed to medical  
5 opinions depends in part on whether they are offered by treating, examining, or non-examining  
6 professionals. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). The Commissioner must provide  
7 “clear and convincing” reasons for rejecting the uncontradicted opinion of an examining physician.  
8 Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990). The opinion of an examining doctor, even if  
9 contradicted by another doctor, can only be rejected for specific and legitimate reasons that are  
10 supported by substantial evidence in the record. Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir.  
11 1995). An ALJ can reject a treating physician’s opinion in favor of other conflicting medical  
12 opinions so long as the ALJ makes “findings setting forth specific, legitimate reasons for doing so  
13 that are based on substantial evidence in the record.” Thomas, 278 F.3d at 956-957. A non-  
14 treating or non-examining physician’s opinion may serve as substantial evidence when those  
15 opinions are consistent with independent clinical findings or other evidence in the record. Id.

16 The ALJ properly assigned “little weight” to Dr. Gable’s medical opinion and  
17 “significant weight” to the consultative examination reports of Dr. Reddy and Dr. Fast because the  
18 ALJ provided specific and legitimate reasons supported by substantial evidence. First, the ALJ  
19 explained that Dr. Gable’s opinion regarding Plaintiff’s ability or inability to sit for 6 or more  
20 hours was not retrospective to any time prior to December 31, 2003, the date Plaintiff was last  
21 insured. Tr. at 374-377. Dr. Gable only notes that he thinks “the claimant can probably sit  
22 cumulatively 2-4 hours a day” and that claimant’s “standing and/or walking would be very  
23 limited.” Tr. at 377. His assessment is in the present tense and is deficient of any medical opinion  
24 as to Plaintiff’s ability to sit for more than 6 hours between January 1999 and December 2003.  
25 Second, the ALJ found it significant that Dr. Gable only examined Plaintiff one time and more than  
26 three years after the date Plaintiff was last insured. Tr. at 15. Finally, the ALJ discounted Dr.  
27 Gable’s opinion because he was an internist and not an orthopedist with a specialty in

1 musculoskeletal problems. Id. The Court finds the ALJ provided clear and convincing reasons to  
2 discount Dr. Gable’s opinion.

3 The ALJ instead gave “significant weight” to the two state consultants who  
4 independently reviewed the Plaintiff’s record and found insufficient evidence between January  
5 1999, and December 2003, to assess the claimant’s residual functional capacity. Id. Objective  
6 medical evidence in the record is consistent with the two state consultants’ opinions and therefore  
7 serves as substantial evidence. Id.; See also Thomas at 956-957. A 1999 examination of  
8 Plaintiff’s left knee showed normal range of motion, a negative Lachman and anterior drawer sign,  
9 a negative pivot shift, and no effusion. Tr. at 276. The progress report of Dr. Holmes noted  
10 Plaintiff was “healing nicely” from her knee surgery, that Plaintiff could attend physical therapy,  
11 and that she could manage periodic flare ups of knee pain with medication. Tr. at 388. As such,  
12 the Court finds that the weight prescribed to the medical opinions was proper.

13 **b. Evidence Supporting the ALJ’s Evaluation of Plaintiff’s Statements**

14 An ALJ is required to make specific credibility findings which “make clear to the  
15 individual and to any subsequent reviewers the weight the adjudicator gave the individual’s  
16 statements and the reasons for that weight.” Social Security Ruling 96-7, 1996 SSR LEXIS 4. In  
17 making the credibility analysis, “the adjudicator must consider the entire case record, including the  
18 objective medical evidence, the individual’s own statements about symptoms, statements and other  
19 information provided by treating or examining physicians or psychologists and other persons about  
20 the symptoms and how they affect the individual, and any other relevant evidence in the case  
21 record.” Id.

22 The Court’s review of the ALJ’s decision regarding credibility determinations is  
23 limited. See Matney, 981 F.2d at 1019 (“The trier of fact and not the reviewing court must resolve  
24 conflicts in the evidence, and if the evidence can support either outcome, the court may not  
25 substitute its judgment for that of the ALJ.”). The ALJ’s assessment of a claimant’s credibility  
26 must be “properly supported by the record” and “sufficiently specific” to assure the reviewing  
27 court that the ALJ “rejected the claimant’s testimony on permissible grounds and did not arbitrarily  
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1 discredit a claimant’s testimony regarding pain.” Bunnell v. Sullivan, 947 F.2d 341, 345-346 (9th  
2 Cir. 1995) (quoting Elam v. Railroad Retirement Bd., 921 F.2d 1210, 1213-1214 (11th Cir. 1991)  
3 (quotations omitted). Absent affirmative evidence of malingering, an ALJ may not discount a  
4 claimant’s testimony without clear and convincing reasons. See Reddick v. Chater, 157 F.3d 715,  
5 722 (9th Cir. 1998). However, a court must give deference to the ALJ’s assessment of a plaintiff’s  
6 credibility if it is supported by the record and applicable legal standards. See Rollins v. Massanari,  
7 261 F.3d 853, 857 (9th Cir. 2001) (citing Reddick, 157 F.3d at 720).

8 The ALJ’s conclusion at step four that Plaintiff had residual functional capacity  
9 (“RFC”) to perform at the sedentary level prior to December 31, 2003 was supported by substantial  
10 evidence. To make that finding, the ALJ engaged in a two-step process. First, the ALJ determined  
11 that Plaintiff’s medically determinable impairments could reasonably be expected to cause some of  
12 the alleged symptoms. Tr. at 15. Second, the ALJ found Plaintiff’s subjective description of her  
13 symptoms concerning the intensity, persistence and limiting effects of these symptoms to be less  
14 than entirely credible to the extent that they were inconsistent with the claimant’s residual  
15 functional capacity assessment. Id.

16 The ALJ’s first conclusion is supported by substantial evidence in the record. Plaintiff  
17 testified in both her 2008 and 2011 hearings that she experienced constant swelling and pain in  
18 both her knees. Tr. at 58; 79. She found it difficult to work at her computer because she had to  
19 constantly keep her legs elevated and iced. Tr. at 76; 83. Plaintiff further alleged that she found it  
20 difficult to walk between locations at work, sit for longer than one hour, and would “fall on her  
21 face” sometimes when her knees would give out. Tr. at 76-77. Evidence in the record of  
22 Plaintiff’s numerous surgeries, including total knee replacement in 2007, supports the conclusion  
23 that her knee condition could reasonably be expected to cause the aforementioned symptoms.

24 The ALJ’s second conclusion that the intensity, persistence, and limiting effects of the  
25 Plaintiff’s symptoms are “not entirely credible” was properly supported by the record and  
26 sufficiently specific to allow the Court to conclude the ALJ rejected the Plaintiff’s testimony on  
27 permissible grounds. See Elam at 1215. The ALJ in making his determination analyzed the entire

1 medical record pursuant to Social Security Ruling 88-13 (“SSR 88-13”). SSR 88-13 prescribes  
2 factors that an ALJ must consider when making a credibility finding, including claimant’s daily  
3 activities, functional restrictions, and type of pain medication. The ALJ found “little evidence”  
4 that the claimant could not work at the sedentary level prior to December 31, 2003. Tr. at 15. No  
5 examining or treating physician throughout the entire record opined that Plaintiff could not sit for  
6 six hours of an eight-hour workday. Plaintiff stated in her “Exertional Daily Activities  
7 Questionnaire” that she still could walk about a block, climb 16 stairs, carry light groceries, do  
8 some household chores, drive a car, and do light yard work. Tr. at 234-236. An ALJ may consider  
9 whether the claimant “engages in daily activities inconsistent with the alleged symptoms.” Molina  
10 v. Astrue, 674 F.3d 1104, 1113 (9th Cir. 2012). Furthermore, the ALJ noted that Plaintiff was only  
11 taking over-the-counter pain medication and other evidence in the record indicated Plaintiff was  
12 “healing nicely.” Tr. at 16; 388. From this, and other evidence in the record, the ALJ concluded  
13 that Plaintiff’s daily activities and type of pain medication were inconsistent with an inability to sit  
14 at least six hours in an eight hour day. The Court defers to the ALJ’s assessment of Plaintiff’s  
15 credibility because it is properly supported by the record and sufficiently specific to assure it was  
16 not capriciously discredited.

17 **c. Plaintiff Failed to Meet Her Burden Establishing a Prima Facie Case of**  
18 **Disability**

19 The Court rejects Plaintiff’s argument that the Commission did not meet its burden at  
20 step five to show alternate occupations Plaintiff could perform in the national economy. The  
21 burden of showing that the claimant can do other sorts of jobs available in the national economy  
22 only shifts to the Commission after the applicant makes a prima facie case that he or she is unable  
23 to work at their usual occupation. Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984). The  
24 Court finds substantial evidence in the record supports the ALJ’s step-four finding that Plaintiff  
25 could do her past relevant work. Therefore, the Commission did not need to proceed to step five.  
26 See 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1560(b)(1)-(3).

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**IV. Conclusion**

For the foregoing reasons, the Court DENIES Plaintiff's Motion for Summary Judgment, and GRANTS Defendant's Motion for Summary Judgment.

**IT IS SO ORDERED**

Dated: November 25, 2013

  
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EDWARD J. DAVILA  
United States District Judge