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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ROSALVA M. MADRID,
Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No. 14-cv-05380-BLF

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

[Re: ECF 11, 14]

Plaintiff Rosalva M. Madrid appeals a final decision of Defendant Carolyn W. Colvin, Acting Commissioner of Social Security, denying her application for a period of disability and disability insurance benefits under Title II of the Social Security Act. Before the Court are the parties' cross-motions for summary judgment, which have been fully briefed. Upon consideration of the briefing¹ and for the reasons set forth below, the Court DENIES Plaintiff's motion and GRANTS Defendant's motion.

I. BACKGROUND

Plaintiff, a United States citizen, was born on February 4, 1961. Admin. R. ("AR") 107. She completed the twelfth grade, obtained a cosmetology license, and most recently worked as a photocopy machine operator. AR 18, 58, 143. She also has past relevant work as a clerical assistant/data entry and as a mail clerk. AR 18. She is married and lives with her husband and her adult daughter. AR 15.

On September 19, 2011, Plaintiff filed an application for a period of disability and disability insurance benefits, alleging disability beginning January 17, 2011. AR 107. Plaintiff claims disability resulting from diabetes and resulting fatigue, vision problems, and pain and

¹ This matter was submitted without oral argument pursuant to Civil Local Rule 16-5.

1 numbness in her feet. AR 15-16. Plaintiff also is obese. AR 16. Plaintiff’s medical records
2 indicate that Plaintiff first was diagnosed with diabetes during her second pregnancy, at age thirty-
3 two. AR 291. Postpartum she was off treatment until the age of thirty-seven, when she presented
4 with blurred vision and thirst. *Id.* Her weight steadily increased and eventually she was started on
5 insulin. *Id.* Plaintiff was forty-nine on her alleged onset date and later that year her primary
6 diagnosis was “Type 2 diabetes complicated by retinopathy and neuropathy, with long history of
7 being uncontrolled.”² AR 193.

8 Plaintiff was denied benefits initially and upon reconsideration. AR 76-77. She requested
9 and received a hearing before an administrative law judge (“ALJ”), which was held on May 30,
10 2013. AR 49-75. At the hearing, the ALJ heard testimony from Plaintiff and from a vocational
11 expert (“VE”). On August 22, 2013, the ALJ issued a written decision finding Plaintiff not
12 disabled and thus not entitled to benefits. AR 10-20. The ALJ’s decision was affirmed by the
13 Appeals Council on April 8, 2014, making the ALJ’s decision the final decision of the
14 Commissioner of Social Security. AR 1-3. Plaintiff now seeks judicial review of the denial of
15 benefits.

16 **II. LEGAL STANDARD**

17 **A. Standard of Review**

18 District courts “have power to enter, upon the pleadings and transcript of the record, a
19 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
20 with or without remanding the cause for a rehearing.” 42 USC § 405(g). However, “a federal
21 court’s review of Social Security determinations is quite limited.” *Brown-Hunter v. Colvin*, 806
22 F.3d 487, 492 (9th Cir. 2015). Federal courts ““leave it to the ALJ to determine credibility,
23 resolve conflicts in the testimony, and resolve ambiguities in the record.”” *Id.* (quoting *Treichler*
24

25 ² Diabetic retinopathy is a condition in which high glucose levels result in damage to retinal blood
26 vessels. *Parmer v. Washington Dep’t of Corr.*, No. C11-5390 RBL/KLS, 2013 WL 550477, at *3
27 (W.D. Wash. Jan. 15, 2013). The blood vessels can bleed spontaneously and eventually destroy
28 the retina. *Id.* Neuropathy is “a painful nerve disorder that causes numbness, burning, and
stinging sensations.” *Kirkish v. Mesa Imports, Inc.*, No. CV-08-1965-PHX-NVW, 2010 WL
364183, at *2 (9th Cir. Feb. 1, 2010).

1 v. *Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014)).

2 A court “will disturb the Commissioner’s decision to deny benefits only if it is not
3 supported by substantial evidence or is based on legal error.” *Brown-Hunter*, 806 F.3d at 492
4 (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence as
5 a reasonable mind might accept as adequate to support a conclusion, and must be more than a
6 mere scintilla, but may be less than a preponderance.” *Rounds v. Comm’r of Soc. Sec. Admin.*,
7 807 F.3d 996, 1002 (9th Cir. 2015) (internal quotation marks and citations omitted). A court
8 “must consider the evidence as a whole, weighing both the evidence that supports and the
9 evidence that detracts from the Commissioner’s conclusion.” *Id.* (internal quotation marks and
10 citation omitted). If the evidence is susceptible to more than one rational interpretation, the ALJ’s
11 findings must be upheld if supported by reasonable inferences drawn from the record. *Id.*

12 Finally, even when the ALJ commits legal error, the ALJ’s decision will be upheld so long
13 as the error is harmless. *Brown-Hunter*, 806 F.3d at 492. However, “[a] reviewing court may not
14 make independent findings based on the evidence before the ALJ to conclude that the ALJ’s error
15 was harmless.” *Id.* The court is “constrained to review the reasons the ALJ asserts.” *Id.*

16 **B. Standard for Determining Disability**

17 Disability benefits are available under Title II of the Social Security Act when an eligible
18 claimant is unable “to engage in any substantial gainful activity by reason of any medically
19 determinable physical or mental impairment which can be expected to result in death or which has
20 lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §
21 423(d)(1)(A).

22 “To determine whether a claimant is disabled, an ALJ is required to employ a five-step
23 sequential analysis, determining: (1) whether the claimant is doing substantial gainful activity;
24 (2) whether the claimant has a severe medically determinable physical or mental impairment or
25 combination of impairments that has lasted for more than 12 months; (3) whether the impairment
26 meets or equals one of the listings in the regulations; (4) whether, given the claimant’s residual
27 functional capacity, the claimant can still do his or her past relevant work; and (5) whether the
28 claimant can make an adjustment to other work.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th

1 Cir. 2014) (internal quotation marks and citations omitted). The residual functional capacity, or
2 RFC, referenced at step four is what a claimant can still do despite his or her limitations. *Id.* at
3 1160 n.5. “The burden of proof is on the claimant at steps one through four, but shifts to the
4 Commissioner at step five.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir.
5 2009).

6 **III. DISCUSSION**

7 The ALJ determined that Plaintiff had acquired sufficient quarters of coverage to remain
8 insured through December 31, 2016. AR 10. At step one, the ALJ determined that Plaintiff had
9 not engaged in substantial gainful activity since her alleged onset date of January 17, 2011. AR
10 12. At step two, the ALJ found that Plaintiff has a severe combination of impairments consisting
11 of “diabetes mellitus with mild neuropathy and retinopathy; and obesity.” *Id.* At step three, the
12 ALJ concluded that Plaintiff’s impairments do not meet or medically equal the severity of one of
13 the listed impairments in the regulations. AR 14-15.

14 Prior to making a step four determination, the ALJ found that Plaintiff has the RFC to
15 perform a full range of sedentary work. AR 15. In making that finding, the ALJ discounted in
16 part the RFC assessment of Plaintiff’s treating physician, Dr. Yoon Jung Cho. AR 17-18. In
17 particular, the ALJ discounted Dr. Cho’s opinions that Plaintiff can sit for only two hours in an
18 eight-hour day, can use her fingers only 5-10% of the time, and has impaired concentration. AR
19 18. The ALJ also found that Plaintiff’s subjective complaints regarding pain and other symptoms
20 are “not entirely credible.” AR 16.

21 At step four, the ALJ concluded that based upon the sedentary RFC, Plaintiff could
22 perform her past relevant work as a clerical assistant/data entry. AR 18-19. The ALJ made an
23 alternative step five determination that even if Plaintiff could not perform past relevant work she
24 could perform other sedentary jobs existing in the national economy. AR 19. The ALJ reached
25 these determinations based in part upon a series of hypotheticals posed to the VE which assumed
26 an individual of Plaintiff’s age, education, and work experience with various RFCs. AR 19-20.

27 Plaintiff challenges the ALJ’s step four and alternative step five determinations, asserting
28 that the ALJ failed to give sufficient reasons, supported by the record, for discounting Dr. Cho’s

1 opinion and her own subjective complaints.

2 **A. The ALJ Articulated Specific and Legitimate Reasons, Supported by**
3 **Substantial Evidence, for Discounting the Opinion of Plaintiff’s Treating**
4 **Physician, Dr. Cho**

5 Plaintiff first argues that the ALJ failed to give sufficient reasons, supported by the record,
6 for discounting the RFC provided by Plaintiff’s treating physician, Dr. Cho.

7 “Generally, the opinion of a treating physician must be given more weight than the opinion
8 of an examining physician, and the opinion of an examining physician must be afforded more
9 weight than the opinion of a reviewing physician.” *Ghanim*, 763 F.3d at 1160. “If a treating
10 physician’s opinion is well-supported by medically acceptable clinical and laboratory diagnostic
11 techniques and is not inconsistent with the other substantial evidence in the case record, it will be
12 given controlling weight.” *Id.* (internal quotation marks, citation, and brackets omitted). If the
13 treating physician’s opinion is contradicted by the opinion of another physician, the ALJ may
14 reject the treating physician’s opinion but only based upon “specific and legitimate reasons that
15 are supported by substantial evidence.” *Id.* (internal quotation marks and citation omitted). In
16 determining how much weight to give a treating physician’s opinion, the ALJ must consider the
17 following factors: the length of the treatment relationship and the frequency of examination by the
18 treating physician, the nature and extent of the treatment relationship between the patient and the
19 treating physician, the supportability of the physician’s opinion with medical evidence, and the
20 consistency of the physician’s opinion with the record as a whole.” *Id.* (internal quotation marks,
21 citation, and brackets omitted). “However, the ALJ need not accept the opinion of any physician,
22 including a treating physician, if that opinion is brief, conclusory, and inadequately supported by
23 clinical findings.” *Bray*, 554 F.3d at 1228 (internal quotation marks, citation and alteration
24 omitted).

25 In this case, the opinion of Plaintiff’s treating physician, Dr. Cho, is contradicted by the
26 opinions of three non-examining, reviewing physicians retained by the Commissioner. Thus on
27 review this Court’s task is to determine whether the ALJ provided “specific and legitimate reasons
28 that are supported by substantial evidence” for rejecting Dr. Cho’s opinion.

1 The opinions of Dr. Cho and the state agency reviewing physicians,³ and the weight given
2 to each by the ALJ, are summarized below:

3 **1. Dr. Cho (Treating Physician)**

4 Dr. Cho is Plaintiff’s primary treating physician. The administrative record contains
5 medical records from Dr. Cho dating from 2008 through 2012. AR 196, 274-277, 512-544. On
6 March 29, 2012, Dr. Cho completed a “Form: Diabetes Mellitus Residual Functional Capacity
7 Questionnaire,” which, if credited, would result in a RFC precluding even sedentary work. AR
8 274-277. Dr. Cho checked boxes indicating that Plaintiff: experiences pain or other symptoms
9 severe enough to cause constant interference with attention and concentration; is incapable of even
10 low stress jobs; can sit for only one hour at a time; can stand for only 5 minutes at a time; can sit
11 or stand/walk less than two hours in an eight-hour workday; and will need unscheduled breaks
12 every one to two hours. AR 276. She also indicated that Plaintiff can use her fingers only 5-10%
13 of the time; cannot use her hands or arms at all; and must avoid all exposure to cold, heat,
14 chemicals, dust, cleaners, and the like. AR 276-77. Dr. Cho found Plaintiff to have postural
15 limitations such that she can never: lift, carry, twist, stoop, crouch/squat, climb ladders, or climb
16 stairs. AR 276. Under “Clinical findings,” Dr. Cho wrote that Plaintiff has “Diminished
17 proprioception of both feet,”⁴ and “Decreased eye sights [sic] due to retinopathy.” AR 274. Dr.
18 Cho indicated by box-check that Plaintiff is not a malingerer. *Id.*

19 The ALJ concluded that these limitations are not consistent with the record evidence.
20 Specifically, the ALJ found that the evidence “demonstrates that the claimant has a greater
21 capacity for sitting, standing, walking, lifting, and carrying than Dr. Cho finds.” AR 18. The ALJ
22 also stated that “while the claimant has complained of numbness and tingling in her fingers, no
23

24 ³ The record contains medical evidence from other providers, including Mitra Emami, M.D., a
25 neurologist, and Sun H. Kim, M.D., an assistant professor at Stanford’s Endocrinology Clinic.
26 *See, e.g.*, AR 222-23, 291-325. While the ALJ referred to those medical records in other portions
of her written decision, the ALJ did not discuss those records when evaluating Dr. Cho’s opinion.

27 ⁴ “Proprioception is defined as a sense or perception, usually at a subconscious level, of the
28 movements and position of the body and especially its limbs, independent of vision.” *Hill v.*
Astrue, No. 03:11-CV-01014-HU, 2013 WL 1294650, at *6 n.5 (D. Ore. Feb. 4, 2013) (internal
quotation marks, citation, and alteration omitted).

1 doctor has described any objective findings to substantiate those complaints, suggesting that she
2 does not have any limitation on her ability to use her fingers.” *Id.* The ALJ noted that Plaintiff
3 “has not alleged any difficulties reaching or handling, and it is not clear why Dr. Cho identifies
4 limitations in these areas.” *Id.* The ALJ likewise noted that Plaintiff has not complained of
5 problems interacting with the environmental conditions listed by Dr. Cho and that Plaintiff does
6 not have a breathing condition that would cause such problems. *Id.* Finally, the ALJ observed
7 that “none of the claimant’s treatment providers has ever noted that she seems to have trouble
8 maintaining attention or concentration during appointments or following instructions, or that she
9 appears to have particular difficulty tolerating stress.” *Id.*

10 Because the ALJ concluded that Dr. Cho’s opinion is not well supported by the medical
11 evidence, the ALJ gave Dr. Cho’s opinion “very little weight.” *Id.*

12 **2. Dr. Jensine Wright (Reviewing Physician)**

13 Dr. Jensine Wright, an agency reviewing physician, opined that Plaintiff: can sit for six
14 hours in an eight-hour workday, stand/walk for six hours in an eight-hour workday, has no
15 limitation on use of her fingers, and has no limitation regarding exposure to cold, heat, fumes,
16 dust, and the like. AR 411. Dr. Wright also found that Plaintiff can occasionally lift twenty
17 pounds and frequently lift ten pounds, and that Plaintiff has very few postural limitations with the
18 exception of climbing ladders/ropes, or scaffolds, which she is never to do. AR 410.

19 The ALJ concluded that Dr. Wright’s opinion “is not entirely consistent” with the record
20 evidence. AR 17. In particular, the ALJ concluded that in light of Plaintiff’s obesity and
21 neuropathy with decreased sensation in the feet, Plaintiff likely cannot stand or walk for six hours
22 in an eight-hour day as found by Dr. Wright. *Id.* The ALJ found it more reasonable that Plaintiff
23 can stand or walk for two hours in an eight-hour day. *Id.* The ALJ also found that Plaintiff likely
24 is more limited posturally and in her ability to lift and carry than found by Dr. Wright. *Id.*

25 However, the ALJ found Dr. Wright’s conclusion that Plaintiff can sit for six hours each
26 work day to be supported by the evidence, noting that Plaintiff “has not described any significant
27 difficulty sitting, and there is no objective evidence to suggest that she cannot perform the sitting
28 outlined by Dr. Wright.” AR 17. The ALJ also found Dr. Wright’s failure to assign manipulative

1 restrictions to be supported by the evidence, stating that “no doctor has noted abnormalities in her
2 hands, and electrodiagnostic testing of her upper extremities performed in June 2012 was entirely
3 normal.” *Id.*

4 Accordingly, the ALJ gave Dr. Wright’s opinion “some weight.” AR 17.

5 **3. Dr. F. Greene (Reviewing Physician)**

6 Dr. F. Greene, an agency reviewing physician, found that Plaintiff can sit for six hours in
7 an eight-hour workday, stand/walk for six hours in an eight-hour workday, has no limitation on
8 use of her fingers, and has no exposure limitations. AR 270-71. Dr. Greene found no postural
9 limitations whatsoever. AR 271.

10 The ALJ concluded that Dr. Greene overestimated Plaintiff’s exertional capacity for the
11 same reasons that the ALJ rejected Dr. Wright’s opinion regarding Plaintiff’s ability to walk,
12 stand, and lift. AR 18. The ALJ gave “little weight” to Dr. Greene’s opinion. *Id.*

13 **4. Dr. R. Fast (Reviewing Physician)**

14 Dr. R. Fast, an agency reviewing physician, noted that Plaintiff has difficulty with fatigue
15 but found that she can do light work with no limitations. AR 190. The ALJ concluded that Dr.
16 Fast overestimated Plaintiff’s exertional capacity for the same reasons that the ALJ rejected Dr.
17 Wright’s opinion regarding Plaintiff’s ability to walk, stand, and lift. AR 18. The ALJ gave “little
18 weight” to Dr. Greene’s opinion. *Id.*

19 **5. Analysis**

20 As is apparent from the above summaries, the ALJ was presented with physicians’
21 opinions that are in conflict regarding limitations that are key to determining whether Plaintiff
22 retains the RFC to do sedentary work. In some instances the ALJ found Dr. Cho’s opinions to be
23 better supported by the record, for example, with respect to some postural limitations and
24 limitations on standing, walking, and lifting. The ALJ supported her reliance on Dr. Cho’s
25 opinion on these points with specific reference to Plaintiff’s obesity, neuropathy, and decreased
26 sensation in the feet.

27 In other instances the ALJ found Dr. Wright’s opinions to be better supported by the
28 record, for example, with respect to Plaintiff’s limitations on sitting and use of her fingers. The

1 ALJ supported her reliance on Dr. Wright’s opinion on these points pointing out that Plaintiff has
2 not complained of problems sitting and that the record evidence does not suggest a severe
3 limitation on sitting (as opposed to record evidence that clearly suggests severe limitations on
4 standing and walking). Similarly, with respect to the use of fingers, the ALJ pointed to normal
5 electrodiagnostic testing of Plaintiff’s upper extremities and the absence of record evidence that
6 Plaintiff has severe limitations on her ability to use her fingers.

7 Finally, with respect to Plaintiff’s abilities to concentrate and deal with stress, the ALJ
8 simply found Dr. Cho’s opinion to be unsupported by the record evidence even though there was
9 no conflicting opinion from Dr. Wright on that point. The ALJ determined that none of Plaintiff’s
10 treatment providers had ever documented problems with concentration or stress and found that
11 absent such documentation there was no basis for Dr. Cho’s opinion.

12 Plaintiff asserts that the ALJ erred because “substantial evidence” supports the RFC
13 provided by Dr. Cho. *See* Pl.’s MSJ at 6, ECF 11. As an initial matter, the relevant legal question
14 is not whether substantial evidence supports the RFC determined by *Dr. Cho*, but whether
15 substantial evidence supports the RFC determined by *the ALJ*. Plaintiff argues that Dr. Cho’s
16 opinion is supported by various records documenting Plaintiff’s pain, fatigue, and difficulty
17 walking. Those are not the aspects of Dr. Cho’s opinion that the ALJ rejected.

18 The key aspects of Dr. Cho’s opinion that the ALJ rejected in order to determine that
19 Plaintiff retains the RFC to perform sedentary work are the limitations on sitting, fingering, and
20 concentration. Sedentary work by definition is a job “which involves sitting.” 20 C.F.R. §
21 404.1567(a), 416.967(a). Moreover, the VE testified that a person with Plaintiff’s vocational
22 profile (age, education, and prior work experience) would be able to perform Plaintiff’s past
23 relevant work of data entry, a sedentary position, only if she could perform “continuous
24 fingering.” AR 69, 71. If that hypothetical person were limited to no more than “frequent
25 handling or fingering,” she could not perform Plaintiff’s past relevant work of data entry, but she
26 could perform other sedentary jobs such as appointment clerk, information clerk, or receptionist.
27 AR 71. However, if that hypothetical person had impaired concentration such that she could do
28 only simple, repetitive tasks, she would not be qualified for any jobs in the national economy. AR

1 73.

2 The section of Plaintiff’s brief challenging the ALJ’s rejection of Dr. Cho’s opinion does
3 not refer to any evidence whatsoever regarding Plaintiff’s capacity to sit or finger. With respect to
4 the issue of concentration, Plaintiff cites to the Exertion Questionnaire that she completed at the
5 request of the Commissioner, specifically to her statement that her medications leave her “very
6 forgetful at times disoriented.” AR 154. Plaintiff also cites to her testimony that she is able to
7 concentrate for only a short time before losing focus. AR 62. While Plaintiff’s subjective
8 complaints could, if credited, support a determination of impaired concentration, the ALJ made an
9 adverse credibility finding as to Plaintiff’s subjective complaints regarding concentration. That
10 adverse credibility finding is supported by the record, as discussed below. Thus Plaintiff’s citation
11 to her subjective complaints of impaired concentration does not undermine the ALJ’s rejection of
12 Dr. Cho’s opinion.

13 Having considered the administrative record as a whole, the Court concludes that the ALJ
14 took a measured approach in determining Plaintiff’s RFC and that she articulated legitimate and
15 specific reasons, supported by substantial evidence, for rejecting Dr. Cho’s opinion as to certain
16 limitations.

17 **B. The ALJ Articulated Specific, Clear and Convincing Reasons for the Adverse**
18 **Credibility Determination Regarding Plaintiff**

19 Plaintiff next argues that the ALJ erred in failing to fully credit Plaintiff’s subjective
20 complaints of pain and other symptoms.

21 “In assessing the credibility of a claimant’s testimony regarding subjective pain or the
22 intensity of symptoms, the ALJ engages in a two-step analysis.” *Ghanim*, 763 F.3d at 1163
23 (internal quotation marks and citation omitted). “First, the ALJ must determine whether the
24 claimant has presented objective medical evidence of an underlying impairment which could
25 reasonably be expected to produce the pain or other symptoms alleged.” *Id.* (internal quotation
26 marks and citation omitted). “If the claimant meets the first test and there is no evidence of
27 malingering, the ALJ can only reject the claimant’s testimony about the severity of the symptoms
28

1 if she gives specific, clear and convincing reasons for the rejection.”⁵ *Id.* (internal quotation marks
2 and citation omitted).

3 **1. Plaintiff’s Complaints of Pain and Other Symptoms**

4 At the hearing, Plaintiff testified that she suffers from pain in her feet that makes them feel
5 “swollen and burning” or sometimes like she is “walking on needles.” AR 62-63. Plaintiff also
6 occasionally feels something like an electrical shock in her legs or in her hands. AR 63. Mostly
7 the pain comes on when Plaintiff is on her feet, but sometimes it happens when she is not walking.
8 *Id.* Plaintiff testified that she can concentrate for only a little while and then she will lose focus.
9 AR 62. She gets very sleepy and rests throughout much of the day. AR 62, 65. Sometimes
10 Plaintiff has difficulty focusing her eyes, and they hurt if she goes outside without sunglasses. AR
11 63-64.

12 Plaintiff testified that she drives, but only to the grocery store “when, like something
13 small,” and to take her granddaughter to school a couple blocks away each morning.⁶ AR 60.
14 Plaintiff testified that when she gets back from dropping her granddaughter off, she eats breakfast,
15 makes her bed, “and that’s about it.” AR 61. She does use the computer to access Facebook and
16 read the newspaper. *Id.* She naps. AR 65.

17 Plaintiff also submitted an Exertion Questionnaire at the request of the Social Security
18 Administration. ECF 153-57. In the questionnaire, she stated that she can be on her feet for only
19 a short time before she is in “deep pain.” AR 154. Plaintiff goes on a short walk – about a half of
20 a mile – daily, using a cane, but must stop if she gets short of breath or dizzy. AR 154, 156. She
21 indicated that her medications make her forgetful and sleepy. AR 154. She also indicated that she
22 does laundry twice a week and shops for groceries with her husband once a week. AR 155. She
23 does some housework/chores but must stop when she becomes short of breath and dizzy. AR 156.

24
25
26 ⁵ The Commissioner disputes application of the “clear and convincing reasons” standard to
27 credibility determinations. The Ninth Circuit has rejected the Commissioner’s position on this
point. *See Brown-Hunter*, 806 F.3d at 493.

28 ⁶ Plaintiff’s granddaughter does not live with her; she is dropped off at Plaintiff’s home every
morning so that Plaintiff can drive her to school. AR 61.

1 **2. ALJ’s Credibility Determination**

2 At the first step of the credibility analysis, the ALJ concluded that Plaintiff presented
3 evidence of medically determinable impairments that reasonably could be expected to cause the
4 alleged symptoms. AR 16. However, at the second step of the analysis the ALJ found that
5 Plaintiff’s “statements concerning the intensity, persistence, and limiting effects of these
6 symptoms are not entirely credible.” *Id.* The ALJ made no finding of malingering. *Id.* Under the
7 standards articulated above, the ALJ’s adverse credibility determination may be upheld only if she
8 has given “specific, clear and convincing reasons,” for the determination.

9 With respect to Plaintiff’s statements about symptoms in her hands, the ALJ observed that
10 although physical examinations revealed decreased sensation in Plaintiff’s feet and diminished
11 reflexes in the lower extremities, “no treating or examining clinician has ever noticed decreased
12 sensation or dexterity in her hands.” AR 16. The ALJ also stated that, “[I]ikewise, no provider
13 has suggested that she appears particularly fatigued. *Id.* The ALJ followed these statements with
14 a lengthy string citation to particular medical records. *Id.*

15 The ALJ also observed that although Plaintiff testified that she has trouble performing
16 routine daily tasks, she “also indicated that she can do chores around the house, grocery shop,
17 drive, and prepare meals, and she has told various treatment providers that she folds laundry,
18 exercises, walks with her granddaughter, takes care of her daughter.” AR 16-17. The ALJ
19 supported this statement with a string citation to record evidence. AR 17. The cited evidence
20 supports the ALJ’s statements regarding Plaintiff’s ability to do some daily chores, except that the
21 Court did not find reference to meal preparation in the cited evidence.

22 The ALJ found that Plaintiff does not fully follow her doctor’s recommendations regarding
23 diet, blood glucose monitoring, and weight loss. AR 17. The hearing transcript contains a
24 colloquy between the ALJ and Plaintiff in which the ALJ questioned Plaintiff about her failure to
25 monitor and regulate her glucose, which she must do in order to properly adjust her medication
26 level. AR 66-67. The ALJ concluded that Plaintiff’s “ability to engage in a range of daily
27 activities, and her decision not to fully follow her doctors’ recommendations, all suggest that
28 [Plaintiff’s] symptoms are not as severe or as limiting as she claims. AR 17.

1 The ALJ noted that Plaintiff has complained that her medications cause her to feel sleepy
2 and affect her ability to focus, but found that Plaintiff “has not discussed these side effects with
3 her treatment providers, and those clinicians have not made any objective findings consistent with
4 drowsiness or diminished concentration.” AR 17. The ALJ concluded that “[t]ogether, this
5 implies that these side effects are not as problematic as the claimant has indicated.” *Id.*

6 3. Analysis

7 Before addressing each of the reasons proffered by the ALJ for her adverse credibility
8 determination, the Court observes that the ALJ has satisfied the Ninth Circuit’s directive that
9 “[g]eneral findings are insufficient; rather, the ALJ must identify what testimony is not credible
10 and what evidence undermines the claimant’s complaints.” *Brown-Hunter*, 806 F.3d at 493.
11 Here, the ALJ identified with particularity which of Plaintiff’s complaints she found not credible,
12 and cited specific record evidence in support of her adverse credibility determination.
13 Accordingly, the Court must evaluate the cited evidence to determine whether it supports the
14 adverse credibility determination under the applicable clear and convincing standard.

15 The Court first addresses the ALJ’s conclusion that Plaintiff’s ability to do some basic
16 household chores undermines her subjective complaints. “Engaging in daily activities that are
17 incompatible with the severity of symptoms alleged can support an adverse credibility
18 determination.” *Ghanim*, 763 F.3d at 1165. “Daily activities may also be grounds for an adverse
19 credibility finding if a claimant is able to spend a substantial part of his day engaged in pursuits
20 involving the performance of physical functions that are transferable to a work setting.” *Id.*
21 (internal quotation marks and citation omitted). However, the Ninth Circuit has “repeatedly
22 warned that ALJs must be especially cautious in concluding that daily activities are inconsistent
23 with testimony about pain, because impairments that would unquestionably preclude work and all
24 the pressures of a workplace environment will often be consistent with doing more than merely
25 resting in bed all day.” *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). Here, Plaintiff’s
26 description of her daily activities was entirely consistent with her subjective complaints of pain
27 and other symptoms. Plaintiff takes short walks for exercise but at times must stop because of
28 pain, fatigue, or dizziness. She shops at the grocery store, but only for small things or with her

1 husband. She drives her granddaughter to school each day, which takes only five minutes. At the
2 hearing, Plaintiff testified that she drives her granddaughter “so I can have something to make me
3 get up, otherwise I’d be just sleeping in all the time.” AR 61. These very limited activities are not
4 inconsistent with Plaintiff’s subjective complaints and thus do not support the ALJ’s adverse
5 credibility determination.

6 The Court next addresses the ALJ’s reliance upon the absence of clinical findings
7 regarding Plaintiff’s claimed fatigue and drowsiness. Based upon the Court’s review of the
8 record, the ALJ’s characterization of the evidence is accurate. However, the record does reflect
9 that Plaintiff reported fatigue and drowsiness during several medical appointments, and that
10 Plaintiff attributed her drowsiness to her medications at one appointment. AR 231, 238, 244, 254,
11 259, 336. Those reports were not made to Plaintiff’s primary treating physician, but to Dr. Sun H.
12 Kim, M.D., an assistant professor at Stanford’s Endocrinology Clinic. *Id.* The Court concludes
13 that the absence of clinical findings to support Plaintiff’s claims of fatigue and drowsiness does
14 not constitute a clear and convincing reason for an adverse credibility determination given
15 documentation that Plaintiff did tell her doctors of those symptoms.

16 However, the ALJ’s adverse credibility determination is supported by Plaintiff’s failure to
17 fully follow her doctor’s recommendations regarding glucose monitoring. Plaintiff alleged that
18 her fatigue and drowsiness resulted from fluctuations in her glucose and side effects of
19 medication. As discussed above, Plaintiff testified that she failed to monitor and regulate her
20 glucose, which she must do in order to properly adjust her medication level. AR 66-67. A
21 claimant’s failure to follow prescribed treatment can support an adverse credibility determination.
22 *See Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012). The ALJ found that Plaintiff’s failure
23 to follow her doctor’s directions suggested that Plaintiff’s symptoms are not so severe or limiting
24 as she claims. The Court concludes that this reason for discounting Plaintiff’s symptoms is
25 supported by the record and meets the clear and convincing standard.

26 The absence of any medical records documenting a decrease in sensation or dexterity in
27 Plaintiff’s hands supports the ALJ’s adverse credibility determination regarding those claimed
28 symptoms. It is not clear to the Court that Plaintiff actually alleged a decrease in sensation or

1 dexterity regarding her hands. She did not mention those symptoms in her testimony or her
2 Exertion Questionnaire, and the Court could not find any medical records in which she
3 complained of diminished dexterity. However, the RFC prepared by Plaintiff’s treating physician,
4 Dr. Cho, indicates severe limitations on Plaintiff’s use of hands and fingers. As discussed above,
5 Plaintiff’s ability to finger was critical to the ALJ’s determination that Plaintiff retains the RFC to
6 perform sedentary work.⁷ The Court presumes that the ALJ addressed the issue of dexterity for
7 that reason.

8 Given the extensive medical documentation regarding decreased sensation in Plaintiff’s
9 feet and her related difficulties walking and standing, the absence of any such documentation
10 regarding decreased sensation or dexterity in Plaintiff’s hands is glaring. The absence of such
11 documentation – or indeed any record that Plaintiff complained of diminished dexterity – supports
12 the ALJ’s finding. *See Peterson v. Comm’r of Soc. Sec. Admin.*, No. 3:15-cv-01023-HZ, 2016 WL
13 1029481, at *5 (D. Ore. March 15, 2016) (“The total absence of any objective medical evidence
14 about Petersen’s cough is a legitimate basis to discount the credibility of his claims about the
15 limiting effects of those symptoms.”). The only clinical findings addressing Plaintiff’s hands
16 indicated that “[t]he sensory nerve studies of upper extremities were normal.” AR 312.

17 Plaintiff points to two instances in which medical records note that Plaintiff complained of
18 hand pain during office visits. AR 313, 342. However, the ALJ did not reject Plaintiff’s
19 complaints that she suffers hand pain.⁸ The ALJ’s focus was on Plaintiff’s claim that she cannot
20 work in part because her diabetes “limits her ability to use her hands.” AR 16. The Court
21 concludes that the ALJ has provided specific, clear and convincing reasons, supported by the
22

23 ⁷ Also critical were the ALJ’s determinations that Plaintiff can sit for six hours in an eight-hour
24 workday and that Plaintiff can maintain sufficient concentration to perform more than simple,
25 repetitive tasks. Plaintiff’s subjective complaints did not include an inability to sit. Plaintiff’s
complaints regarding inability to concentrate are addressed below.

26 ⁸ The Ninth Circuit has held that “the adjudicator may not discredit a claimant’s testimony of pain
27 and deny disability benefits solely because the degree of pain alleged by the claimant is not
28 supported by objective medical evidence.” *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
1991). As discussed herein, the ALJ did not reject Plaintiff’s allegations that she suffers hand
pain, but rather evaluated record evidence regarding Plaintiff’s alleged diminished dexterity.

1 record, for failing to credit Plaintiff’s subjective complaints regarding limited ability to use her
2 hands.

3 The Court likewise concludes that the ALJ’s citation to the absence of any medical records
4 indicating that Plaintiff raised concentration issues with her doctors, or any clinical findings
5 regarding diminished concentration, supports the ALJ’s conclusion that Plaintiff’s claimed
6 diminished concentration is not as problematic as Plaintiff indicates. A claimant’s “unexplained
7 or inadequately explained failure to seek treatment” is a factor that an ALJ may consider in
8 weighing a claimant’s credibility. *See Chaudhry*, 688 F.3d at 672. The Ninth Circuit has held
9 specifically that if a claimant complains of disabling pain but fails to seek treatment, the ALJ may
10 use such failure as a basis for finding the complaint unjustified or exaggerated. *Id.* The Court
11 concludes that Plaintiff’s failure to raise her claimed diminished concentration with her doctors
12 constitutes a specific, clear and convincing reason for failing to credit Plaintiff’s subjective
13 complaints regarding that symptom.

14 **C. Conclusion**


15 It is clear from the record that Plaintiff suffers from a serious disease and that she endures
16 significant pain and other symptoms on a daily basis. However, this Court’s task in performing
17 the very limited review permitted by law is to determine whether the ALJ applied the correct legal
18 standards and whether her written decision is supported by evidence in the record. If the evidence
19 could support either a favorable or an unfavorable outcome for Plaintiff, the ALJ’s decision must
20 be upheld. *Rounds*, 807 F.3d at 1002. In this case, the ALJ applied the correct legal standards and
21 her findings are supported by the record evidence.

22 **IV. ORDER**

23 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 24 (1) Plaintiff’s motion for summary judgment is DENIED; and
25 (2) Defendant’s motion for summary judgment is GRANTED.

26
27 Dated: March 23, 2016


BETH LABSON FREEMAN
United States District Judge