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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BERNADETTE R. TANGEN,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

Case No. 16-cv-01875 NC

**ORDER GRANTING IN PART AND  
DENYING IN PART CROSS-  
MOTIONS FOR SUMMARY  
JUDGMENT, AND REMANDING  
FOR FURTHER ADMINISTRATIVE  
PROCEEDINGS**

Re: Dkt. Nos. 13, 23 26

Plaintiff Bernadette Tangen seeks judicial review of the Commissioner of Social Security’s denial of her claim for disability benefits. Tangen argues her claim for benefits was wrongfully denied because the Administrative Law Judge gave too little weight to the opinions of treating medical sources, gave too much weight to the opinion of a medical expert, and found her lacking credibility. The Court finds the ALJ erred in giving too little weight to the opinion and findings of Tangen’s treating neurologist and in giving too much weight to the opinion of the medical expert, but finds the ALJ did not err in her findings regarding Tangen’s treating orthopedic surgeon or by finding Tangen not fully credible. Thus, the Court GRANTS in PART and DENIES in PART the cross-motions for summary judgment, and REMANDS for further proceedings consistent with this order.

**I. BACKGROUND**

Tangen applied for Social Security Disability Insurance benefits on August 7, 2012, alleging an onset date of August 17, 2011. AR 22. The claim was initially denied on Case No. 16-cv-01875 NC

1 February 5, 2013, and on reconsideration on July 10, 2013. *Id.* Tangen then requested a  
2 hearing, which was held on June 11, 2014, before ALJ Regina L. Sleater. *Id.* At that  
3 hearing, Tangen, medical expert Dr. Arthur Brovender, and vocational expert Ronald  
4 Morrell testified. *Id.* The ALJ found Tangen not disabled. AR 19. Tangen  
5 unsuccessfully appealed the ALJ’s decision to the SSA’s Appeals Council. AR 1.

6 In her analysis, the ALJ used a five-step evaluation process. AR 23. At step 1, the  
7 ALJ found Tangen had not engaged in substantial gainful activity since the alleged onset  
8 date. AR 24. At step 2, the ALJ found Tangen had the severe impairments of “cervical  
9 and lumbar degenerative disc disease, status post cervical discectomy and fusion at C5-6;  
10 and depressive disorder.” *Id.* As relevant here, the ALJ reviewed the medical records and  
11 opinions provided by Drs. Mark Howard and Dale Helman. AR 25.

12 Dr. Howard, Tangen’s treating orthopedic spinal surgeon, diagnosed her with  
13 cervical herniation from C5-C7, and referred her for spinal epidural injections. *Id.* The  
14 ALJ found Dr. Howard did not assess functional limitations “other than a three-month  
15 period of temporary disability between May and August 2012.” *Id.* According to the ALJ,  
16 Dr. Helman, Tangen’s treating neurologist, “advised conservative care with physical  
17 therapy” because of minimal findings. *Id.* In summarizing Tangen’s medical records, the  
18 ALJ found Tangen had complained to Dr. Helman of postoperative radiating neck and  
19 back pain. *Id.* Dr. Helman conducted multiple electromyography studies of her upper and  
20 lower extremities, but the most significant finding “was possible L5-S1 and C6-7  
21 radioculopathy.” AR 25-26. The ALJ criticized Dr. Helman’s Summary Impairment  
22 Questionnaire, AR 623-24, as lacking “any significant narrative discussion,” and “assessed  
23 extreme lifting and carrying limitations and manipulative limitations [for Tangen], which  
24 he did not explain.” AR 26. That Questionnaire limited Tangen to a restricted range of  
25 sedentary work. *Id.* Furthermore, a March 2014 letter by Dr. Helman concluded Tangen  
26 was disabled from any employment because of her spinal pain. *Id.* In a different form,  
27 also completed in March 2014, Dr. Helman limited Tangen to a restricted range of  
28 sedentary work. *Id.*

1           At step 3, the ALJ found Tangen did not have an impairment or a combination of  
2 impairments that met or equaled a listing. AR 27. The ALJ considered Listing 1.04,  
3 Disorders of the Spine, but found Tangen did not meet the listing because she did not  
4 “have the significant limitation of motion, neurological deficits, or inability to ambulate  
5 effectively.” *Id.* The ALJ found Tangen’s depression did not meet or equal Listing 12.04,  
6 Mental Disorders, because she did “not have multiple marked or extreme functional  
7 limitations due to her mental disorder.” *Id.*

8           At step 4, the ALJ found Tangen had the residual functional capacity to perform  
9 light work, “except she cannot lift or carry more than 20 pounds occasionally or 10 pounds  
10 frequently. She cannot sit, stand, or walk longer than 6 hours each in an 8-hour day.” AR  
11 28. In addition, the ALJ found Tangen “would be off pace about 10% of the time when  
12 working on detailed tasks,” and limited her “to occasional contact with the public and  
13 coworkers and occasional changes in the work place or work tasks.” *Id.*

14           When considering a claimant’s symptoms, ALJs must follow a two-step analysis.  
15 *Id.* First, the ALJ must determine if there is an “underlying medically determinable  
16 physical or mental impairment(s) . . . that could reasonably be expected to produce the  
17 claimant’s pain or other symptoms.” AR 28-29. If the first step is met, the ALJ next  
18 evaluates “the intensity, persistence, and limiting effects of the claimant’s symptoms to  
19 determine the extent to which they limit the claimant’s functioning.” AR 29. ALJs must  
20 decide on the claimant’s credibility based on the entire record. *Id.* Though the ALJ found  
21 Tangen’s “medically determinable impairments could reasonably be expected to cause”  
22 her symptoms, the ALJ also found Tangen’s “statements concerning the intensity,  
23 persistence and limiting effect of these symptoms are not entirely credible.” AR 31. The  
24 ALJ specifically found Tangen’s credibility undermined by “the lack of physical and  
25 mental health findings and the lack of significant ongoing treatment for pain or  
26 depression.” AR 30. In addition, the ALJ characterized Tangen’s ongoing treatment as  
27 conservative and intermittent. *Id.* Tangen’s extensive daily activities of taking care of a 7-  
28 year-old daughter, household chores, and engagement in various hobbies undermined her

1 credibility. *Id.* Lastly, the ALJ found Dr. Howard “did not assess any functional  
2 limitations other than a brief three-month temporary period of disability.” AR 29. The  
3 ALJ rejected the functional limitations assessed by Dr. Helman. AR 30. The ALJ did,  
4 however, accept the opinion of testifying medical expert Dr. Brovender. AR 29-30. Dr.  
5 Brovender found Tangen had “recovered well from surgery,” “postoperative examinations  
6 were essentially normal,” and that she could perform light work. AR 29. Lastly, the ALJ  
7 found Tangen able to perform her past relevant work. AR 31.

8 Tangen filed this case on April 11, 2016, and filed a motion for summary judgment  
9 on September 9, 2016.<sup>1</sup> Dkt. No. 13. Colvin opposes this motion and filed a cross-motion  
10 for summary judgment. Dkt. No. 26. Both parties consented to the jurisdiction of a  
11 magistrate judge. Dkt. Nos. 5, 6.

12 **II. LEGAL STANDARD**

13 A district court has the “power to enter, upon the pleadings and transcript of the  
14 record, a judgment affirming, modifying, or reversing the decision of the Commissioner of  
15 Social Security, with or without remanding the case for a rehearing.” 42 U.S.C. § 405(g).

16 The decision of the Commissioner should only be disturbed if it is not supported by  
17 substantial evidence or if it is based on legal error. *Burch v. Barnhart*, 400 F.3d 676, 679  
18 (9th Cir. 2005). Substantial evidence is evidence that a reasonable mind would accept as  
19 adequate to support the conclusion. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir.  
20 2005) (“[It] is more than a mere scintilla but less than a preponderance.”). Where evidence  
21 is susceptible to more than one rational interpretation, the ALJ’s decision should be  
22 upheld. *Andrews v. Shalala*, 53 F.3d 1035, 1039-40 (9th Cir.1995).

23 **III. DISCUSSION**

24 Tangen challenges the denial of benefits on two grounds. First, Tangen argues the

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26 <sup>1</sup> Tangen’s counsel failed to attach the Memorandum in Support of Summary Judgment to  
27 the Notice of Motion for Summary Judgment or Remand. Dkt. No. 13. The Court  
28 informed counsel of this failure on December 19, 2016, and counsel attached the  
Memorandum on December 20, 2016. Dkt. No. 23-1. The Court will refer to docket 23-1  
as Tangen’s motion. The Court will also cite to Colvin’s cross-motion for summary  
judgment at docket 26, filed in response to Tangen’s later-filed Memorandum.

1 ALJ erred in rejecting the medical opinions and findings of Drs. Helman and Howard, and  
2 in accepting the opinion of Dr. Brovender. Second, Tangen argues the ALJ erred in  
3 finding her testimony lacking credibility.

4 **A. The ALJ Improperly Discredited the Opinion and Findings of Dr. Helman,  
5 Properly Disregarded Purported Limitations Provided by Dr. Howard, and  
6 Improperly Gave Too Much Weight to the Testimony of Dr. Brovender.**

7 In social security disability cases, “[t]he ALJ must consider all medical opinion  
8 evidence.” *Tommasetti*, 533 F.3d at 1041. Generally, more weight is given to the opinion  
9 of a treating physician than to that of a non-examining physician. *Lester v. Chater*, 81  
10 F.3d 821, 830 (9th Cir. 1995), *as amended* (Apr. 9, 1996). Where a treating physician’s  
11 opinion is “well-supported by medically acceptable clinical and laboratory diagnostic  
12 techniques and is not inconsistent with the other substantial evidence” in the record, it  
13 must be given “controlling weight.” 20 C.F.R. § 404.1527(c)(2).

14 The Commissioner must provide “clear and convincing” reasons for rejecting the  
15 un-contradicted opinion of treating and examining physicians. *Lester*, 81 F.3d at 830.  
16 Where contradicted, the opinions of treating and examining physicians may only be  
17 rejected for “specific and legitimate reasons that are supported by substantial evidence in  
18 the record.” *Id.* at 830-31. A non-examining physician’s opinion “cannot by itself  
19 constitute substantial evidence that justifies the rejection of the opinion of an examining or  
20 treating physician.” *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir.  
21 1999). However, a non-examining physician’s opinion may constitute substantial evidence  
22 if the opinion is “consistent with independent clinical findings or other evidence in the  
23 record.” *Thomas*, 278 F.3d at 957. An ALJ may in part rely on non-examining  
24 physicians’ statements to the extent independent evidence in the record supports those  
25 statements. *Morgan*, 169 F.3d at 602.

26 **1. The ALJ Erred in Giving Too Little Weight to Dr. Helman’s Medical  
27 Opinion and Findings.**

28 Tangen challenges the ALJ’s finding that Dr. Helman’s assessments were not  
supported by his own treatment notes and the weight of the medical evidence. Dkt. No.

1 23-1 at 4; *see also* AR 29. The Court agrees with Tangen. The Court does note, however,  
2 that the medical records in this case were confusingly presented, often with duplicates.  
3 However, the relevant records were present and required analysis.

4       Though the Court agrees that the most significant finding on an EMG *specifically*  
5 was “possible L5-S1 and C6-7 radioculopathy,” the Court does not agree that this was Dr.  
6 Helman’s most significant finding as Tangen’s physician. AR 25-26. As Tangen pointed  
7 out, Dr. Helman’s examinations turned up repeated physical findings. Dkt. No. 23-1 at 4.  
8 For example, in February 2012, Dr. Helman’s physical examination showed “diminished  
9 touch in a stocking distribution to the knee on both sides.” AR 503; *see also* AR 519, 527)  
10 (March and May 2012 visits showed diminished touch in the L3, L4, and L5 distribution,  
11 and L4, L5, and S1 distribution, respectively, in addition to pain). Later doctor’s visits in  
12 2013 continued to find diminished touch, but also cervical and lumbar spine spasms, as  
13 well as back and neck pain. *See e.g.*, AR 626-27 (“My concern of course is that she may  
14 have entrapment neuropathy that might require surgery or worsening nerve impingement  
15 of the spine.”), 628-29, 630-31 (“She has much more severe spasms throughout her spine,  
16 although, she is doing her home therapy program. . . . It is my impression she is worse.  
17 She has evidence of possible mononeuropathies or polyneuropathies as well as nerve  
18 impingement syndrome”), 632-33. The Court notes the ALJ stated additional reasons for  
19 disbelieving the Dr. Helman’s opinions, such as that the doctor’s letters and forms did not  
20 include “any significant narrative discussion,” or explain his reasoning. AR 26. These are  
21 not grounds for disbelieving Dr. Helman when in those forms he refers to EMG findings,  
22 and his treatment notes were available in the medical record. *See e.g.*, AR 623, 877.

23       As a result, the ALJ’s finding that Dr. Helman “consistently reported a lack of  
24 physical findings despite taking repeated electrodiagnostic studies,” is not supported by  
25 substantial evidence, and frankly, glosses over the medical record, which included  
26 treatment notes in the form of cover letters that repeatedly reported her condition was  
27 deteriorating. This was not harmless error, even where the ALJ found medical expert, Dr.  
28 Brovender’s testimony contradicted Dr. Helman’s findings. *Lester*, 81 F.3d at 830-31.

1 Because Dr. Helman was a treating source, the ALJ needed to provide “specific and  
2 legitimate reasons” supported by substantial evidence in the medical record.<sup>2</sup> *Id.* The  
3 Court finds such reasons lacking in the opinion.

4 **2. The ALJ Properly Disregarded Purported Limitations Provided by**  
5 **Dr. Howard.**

6 Tangen argues the ALJ improperly rejected the physical function assessments of Dr.  
7 Howard. Dkt. No. 23-1 at 7. The dispute here regarding Dr. Howard’s opinion revolves  
8 around a 2012 temporary disability statement, AR 462, and his December 7, 2012,  
9 statement in a treatment note that “[b]ecause of persistent spinal pain complaints . . . [,  
10 Tangen] has a relative sitting intolerance and on that basis, she is currently not able to  
11 work in her regular capacity.” AR 963. In the ALJ’s decision, she stated that “Dr.  
12 Howard did not assess any functional limitations other than a single-three month period of  
13 temporary disability between May and August 2012.” AR 25. The Court finds the ALJ  
14 did not err in not including Dr. Howard’s vague finding as a functional limitation. Neither  
15 the Court nor the ALJ has the duty to attempt to decipher what a “relative sitting  
16 intolerance” is, or what it meant for Tangen to work “in her regular capacity” if it is not  
17 more fully explained as a limitation. AR 963.

18 **3. The ALJ Gave Too Much Weight to Dr. Brovender’s Testimony.**

19 Tangen argues the ALJ improperly gave Dr. Brovender’s testimony too much  
20 weight because he made “materially inaccurate restatements” of the medical record. Dkt.  
21 No. 23-1 at 8. As noted above, a non-examining physician’s opinion “cannot by itself  
22 constitute substantial evidence that justifies the rejection of the opinion of an examining or  
23 treating physician.” *Morgan*, 169 F.3d at 602. Yet a non-examining physician’s opinion  
24 may constitute substantial evidence if the opinion is “consistent with independent clinical  
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26 <sup>2</sup> The Court notes Tangen advanced an additional reason to reverse the ALJ’s decision, that  
27 Dr. Helman had not only advised “conservative care.” Dkt. No. 23-1 at 5 (citing AR 29).  
28 There is merit to this point, where Dr. Helman noted Tangen might need surgery in the  
future and that her condition was worsening. *See e.g.*, AR 626-27. However, because the  
Court already found that the ALJ did not consider all of Dr. Helman’s findings in this  
section, the Court does not rely on this point as a reason for reversal.

1 findings or other evidence in the record.” *Thomas*, 278 F.3d at 957.

2 Here, the ALJ’s stated reasons for rejecting Dr. Helman’s opinion did not trace back  
3 to Dr. Brovender. Rather, she rejected Dr. Helman’s opinions because she found them  
4 poorly supported. *See* AR 26, 30. Based on her reading of the medical record, the ALJ  
5 considered Dr. Brovender’s medical opinion to be the most consistent with the record.  
6 *Morgan*, 169 F.3d at 602. The Court has already indicated why such a reading was  
7 incorrect with respect to the analysis of Dr. Helman’s medical records. *See Thomas*, 278  
8 F.3d at 957. However, the Court also points out that the ALJ’s finding, based on Dr.  
9 Brovender’s testimony, that Tangen “recovered well from surgery,” and that  
10 “postoperative examinations were essentially normal,” ignores Dr. Howard’s later findings  
11 regarding her recovery. AR 29; *see* AR 963, 966, 968, 970-71 (discussing Tangen’s pain  
12 symptoms and the lack of consensus regarding whether her bones fused). Thus, the ALJ  
13 erred in relying on Dr. Brovender’s opinion because it was inconsistent with “other  
14 evidence in the record,” *Thomas*, 278 F.3d at 957, which made the ALJ’s conclusion  
15 regarding Tangen’s medical condition unsupported by substantial evidence.

16 **B. The ALJ Properly Found Tangen Lacking Credibility.**

17 Tangen argues the ALJ improperly found her not fully credible. Dkt. No. 23-1 at 9.  
18 Colvin argues the ALJ properly found her testimony lacking credibility. Dkt. No. 26 at 10.

19 An ALJ must use a two-step analysis to determine a claimant’s credibility as to  
20 subjective pain or symptoms. *Garrison*, 759 F.3d at 1014. An ALJ first decides if the  
21 claimant presented “objective medical evidence of an underlying impairment which could  
22 reasonably be expected to produce the pain or other symptoms alleged.” *Lingenfelter v.*  
23 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (internal quotations omitted). If the claimant  
24 meets the first test, and the ALJ finds no malingering, the claimant’s testimony regarding  
25 the severity of symptoms may only be rejected for “specific, clear and convincing  
26 reasons.” *Id.* Where a credibility determination is a “critical factor” in the ALJ’s decision,  
27 the ALJ must make an “explicit credibility finding” that is “supported by a specific, cogent  
28 reason for the disbelief.” *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). If a



1 reviewing court agrees that the ALJ’s finding is so supported, it must be given great  
2 weight. *Id.* “In weighing a claimant’s credibility, the ALJ may consider his reputation for  
3 truthfulness, inconsistencies either in his testimony or between his testimony and his  
4 conduct, his daily activities, his work record, and testimony from physicians and third  
5 parties concerning the nature, severity, and effects of the symptoms of which he  
6 complains.” *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

7 Here, the ALJ found Tangen not fully credible because (1) her treatment had been  
8 intermittent and conservative; (2) Tangen’s activities of daily living were “extensive”; and  
9 (3) her pain improved postoperatively. AR 30; *see also* Dkt. No. 23-1 at 9-12. Based on  
10 the Court’s analysis of the medical record, above, the first and third grounds are tenuous  
11 grounds for finding Tangen lacking credibility. However, the Court finds the ALJ did not  
12 err in not finding Tangen fully credible because of her extensive activities in taking care of  
13 her family and home, as well as her hobbies. AR 30. The Court finds that the ALJ’s  
14 conclusion that Tangen’s combined level of activity was not consistent with her allegations  
15 of disability is sufficiently specific, and supported by substantial evidence. *Light*, 119 F.3d  
16 at 792; *Rashad*, 903 F.2d at 1231.

17 **IV. CONCLUSION**

18 For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART  
19 the cross-motions for summary judgment, and REMANDS for further administrative  
20 proceedings consistent with this order.

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: February 23, 2017

  
NATHANAEL M. COUSINS  
United States Magistrate Judge