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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NANCY HABIBI,

Plaintiff,

vs.

COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

CASE NO. 08cv461 JLS (POR)

**ORDER (1) OVERRULING
PLAINTIFF’S OBJECTIONS; (2)
ADOPTING MAGISTRATE
JUDGE PORTER’S REPORT AND
RECOMMENDATION; (3)
DENYING PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT; and
(4) GRANTING DEFENDANT’S
CROSS-MOTION FOR
SUMMARY JUDGMENT.**

(Doc. Nos. 13, 16 & 20.)

Presently before the Court is Nancy Habibi’s (“plaintiff”) complaint pursuant to section 205(g) of the Social Security Act requesting judicial review of the final decision of the Commissioner of the Social Security Administration (“defendant”) regarding the denial of plaintiff’s claim for disability insurance and supplemental security income benefits. (Doc. 1.) In plaintiff’s motion for summary judgment filed on December 17, 2008, plaintiff contends that the Administrative Law Judge (“ALJ”) erred in (1) determining she could return to her past relevant work and (2) rejecting plaintiff’s treating physicians’ opinions of her limitation. (Doc. No. 13.) Defendant filed a cross-motion for summary judgment on February 10, 2009. (Doc. No. 16.)

The matter was referred to United States Magistrate Judge Louisa S. Porter, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(d). On August 7, 2009, Magistrate Judge Porter issued a

1 Report and Recommendation (“R&R”), concluding that this Court should deny plaintiff’s motion for
2 summary judgment and grant defendant’s cross-motion for summary judgment. (Doc. No. 20.)
3 Plaintiff timely filed objections to the R&R on September 1, 2009. (Doc. No. 21.)

4 Having considered the R&R and plaintiff’s objections, this Court (1) overrules plaintiff’s
5 objections; (2) adopts Magistrate Judge Porter’s Recommendation and Report; (3) denies plaintiff’s
6 motion for summary judgment; and (4) grants defendant’s cross-motion for summary judgment.

7 **BACKGROUND**

8 Magistrate Judge Porter’s R&R contains a detailed factual and procedural background,
9 citing the Administrative Record in the case. Plaintiff makes no specific objection to these
10 summaries. Thus, this Order incorporates by reference the facts and procedural history as set forth
11 in the R&R.

12 **LEGAL STANDARDS**

13 **A. Review of the Report and Recommendation**

14 Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1) set forth the
15 duties of the district court in connection with a magistrate judge’s report and recommendation.
16 “The district court must make a *de novo* determination of those portions of the report . . . to which
17 objection is made,” and “may accept, reject, or modify, in whole or in part, the finding or
18 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1)(c); *see also United States v.*
19 *Remsing*, 874 F.2d 614, 617 (9th Cir. 1989); *United States v. Raddatz*, 447 U.S. 667, 676 (1980).

20 **B. Review of Denial of Disability Claim**

21 In order to qualify for disability benefits under the Social Security Act, applicants must
22 show that they are “disabled” as defined by the statute. 42 U.S.C. §§ 423(d)(1)(A), (2)(A) (West
23 Supp. 2008). To prove a disability, the applicant must show two things: (1) the applicant suffers
24 from a medically determinable impairment that can be expected to last for a continuous period of
25 twelve months or more, or would result in death; and (2) the impairment renders applicant
26 incapable of performing the work they previously performed or any other substantially gainful
27 employment that exists in the national economy. *Id.* To guide a determination of whether a
28 claimant meets this showing, the Social Security regulations outline a five-step process in 20

1 C.F.R. § 404.1520. The applicant bears the burden of proof for the first four steps and must prove
2 that: (1) plaintiff is not presently working in a substantially gainful activity; (2) plaintiff's
3 impairment is severe; (3) the impairment meets or is equal to one of the specific impairments in
4 the regulations; and (4) plaintiff is not able to do any relevant work that he or she has done in the
5 past. *See Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). If the plaintiff establishes
6 those four steps, the burden shifts to the Commissioner to prove the fifth step, which is that the
7 claimant is able to do other work and therefore not "disabled." *Id.*

8 An applicant whose claims have been denied may seek judicial review of the
9 Commissioner's final agency decision pursuant to sections 205(g) and 1631(c)(3) of the Social
10 Security Act. In reviewing the decision, the district court reverses the Commissioner only if "it is
11 based upon legal error or is not supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d
12 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).
13 "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
14 support [the ALJ's] conclusion[,]" considering the record as a whole. *Webb v. Barnhart*, 433 F.3d
15 683, 686 (9th Cir. 2005) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). There must be
16 "more than a mere scintilla but less than a preponderance[]" of evidence. *Tidwell*, 161 F.2d at 601.

17 "The court must consider both evidence that supports and the evidence that detracts from
18 the ALJ's conclusion" *Frost v. Barnhart*, 314 F.3d 359, 366-67 (9th Cir. 2002) (quoting
19 *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)). If the evidence reasonably supports the
20 administration's determination, then the court may not substitute its own judgment. *Flaten v.*
21 *Sec'y Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). The Court must uphold the
22 denial of benefits if the evidence is susceptible to more than one rational interpretation, one of
23 which supports the ALJ's decisions. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

24 Finally, the Court will not reverse an ALJ's decisions if its finds harmless error, which exists when
25 it is clear from the record that "the ALJ's error was 'inconsequential to the ultimate nondisability
26 determination.'" *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir. 2006) (quoting *Stout v.*
27 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006))

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1 **DISCUSSION**

2 **A. Past Relevant Work**

3 In her motion for summary judgment, plaintiff alleges that the ALJ erred in Step 4 by
4 determining that she could return to her past relevant work. (Doc. No. 13 at 9-17.) Specifically,
5 plaintiff argues that the ALJ’s decision failed to ascertain the specific demands of plaintiff’s past
6 work as a sales and file clerk, and, therefore, the ALJ inaccurately evaluated her ability to continue
7 to work given her physical limitations. (*Id.*)

8 To determine whether plaintiff has the capacity to perform past relevant work, the ALJ
9 must assess both the actual functional demands and duties of the past relevant job and the
10 functional demands and duties of the job as typically required by employers throughout the nation.
11 *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). To determine the work as generally
12 performed in the national economy, the ALJ refers to the Dictionary of Occupational Titles
13 (“DOT”). *Id.* at 845. To determine the work actually performed by plaintiff in the course of her
14 past relevant work, the ALJ may consider plaintiff’s testimony and expert vocational reports. *Id.*
15 The ALJ then compares these sources with plaintiff’s residual functional capacity (“RFC”) to
16 determine whether plaintiff could perform her past relevant work as actually and generally
17 performed. A plaintiff’s RFC is the *most* a claimant can do despite her limitations.¹ 20 C.F.R. §
18 404.1545.

19 In this case, Magistrate Judge Porter found that “based on Plaintiff’s RFC, Plaintiff’s
20 testimony, the vocational report, and the Dictionary of Occupational Titles . . . the ALJ properly
21 determined Plaintiff could perform her past relevant work of sales clerk and file clerk as actually
22 and generally performed.” (R&R at 15.) Magistrate Judge Porter, however, conceded that the
23 ALJ erred by failing to address whether plaintiff’s previous work as a sales clerk constituted
24 substantial gainful activity and “never concluded Plaintiff had sufficient time to learn the
25 techniques, acquire the information, and develop the facility needed for average performance on
26 the job.” (R&R at 16 (citing Social Security Ruling 82-62.) But, Magistrate Judge Porter went on

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28 ¹ In this case, the ALJ found that plaintiff had the RFC to “lift/carry 20 pounds occasionally,
lift/carry 10 pounds frequently, stand/walk for 6 hours of an 8 hour day, and set for 6 hour of an 8 hour
day with no above-the-shoulder activity with the dominant right arm.” (R&R at 12 (citing AR 189).)

1 to find that “any error the ALJ made in finding Plaintiff could do her past relevant work was . . .
2 ‘inconsequential to the ultimate nondisability determination[,]’” and therefore harmless. (R&R at
3 16 (citing *Robbins*, 466 F.3d at 885).)

4 Plaintiff filed an objection to Magistrate Judge Porter’s finding, contending that the R&R
5 failed to address plaintiff’s argument that “the ALJ failed to address the demands of plaintiff’s past
6 work, failed to obtain a valid DOT number for the position of file clerk, failed to question the
7 vocational expert regarding conflicts between her testimony and the DOT.” (Pl. Obj. to R&R at
8 iv-v.) Essentially, plaintiff asserts that the DOT number for file clerk did not adequately reflect
9 the actual need for plaintiff to use her injured shoulder when “reaching and handling items in the
10 position of file clerk,” as established by her testimony and the vocational expert report. Plaintiff
11 therefore objects because the ALR did not address this apparent conflict between her actual duties
12 and those established by the DOT score for file clerk. The Court finds this objection unpersuasive.

13 Plaintiff cites *Massachi v. Astrue* for the proposition that the ALR had an affirmative duty
14 to ask the vocational expert about this alleged conflict between the expert’s report and the DOT
15 score for file clerk. 486 F.3d 1149, 1153 (9th Cir. 2007). Reviewing *Massachi*, however, it is
16 clear that the ALJ only has an affirmative duty to inquire into any possible conflicts, and “whether
17 the vocational expert’s explanation for the conflict is reasonable,” after it determines that a conflict
18 does in fact exist. *Id.* Here, because the ALJ did not address the conflict, it may be presumed that
19 the ALJ did not find any such conflict, contrary to plaintiff’s assertion. Accordingly, any such
20 affirmative duty of the ALJ to address the conflict as mandated by *Massachi* never arose in this
21 case.

22 Furthermore, even assuming the ALJ erred in not finding or addressing a conflict, the
23 Court finds that any such error was harmless. Given the variety of evidence considered by the
24 ALJ in making its determination that plaintiff could perform past relevant work, any neglect of the
25 conflict issue is “inconsequential to the ultimate nondisability determination.” Thus, the Court
26 overrules plaintiff’s objection as it relates to the determination that she is able to return to her past
27 relevant work, and therefore not “disabled” as defined by the Social Security Regulations.

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1 **B. Treating Physicians’ Opinions**

2 Plaintiff asserts that the ALJ improperly gave her treating physicians’ opinions of her
3 limitations reduced weight, doing so without specific and legitimate reasons and based upon
4 insubstantial evidence. (Doc. 13 at 18-19, 22-23.)

5 An ALJ may reject opinions of treating physicians under certain circumstances. *See*
6 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). Generally, a treating
7 physician’s opinion is controlling over a nontreating physician’s opinion. *See* 20 C.F.R. §
8 404.1527. But, if the treating physician’s opinion is contradicted by another physician, as is the
9 case here, the ALJ may reject the treating physician’s opinion if it provides “specific and
10 legitimate reasons’ supported by substantial evidence in the record . . .” *Lester v. Chater*, 81 F.3d
11 821, 830 (9th Cir. 1995). “The findings of a nontreating, nonexamining physician can amount to
12 substantial evidence, so long as other evidence in the record supports those findings.” *Saelee v.*
13 *Chater*, 94 F.3d 520, 522 (9th Cir. 1996); *see also Morgan v. Comm’r of Soc. Sec. Admin.*, 169
14 F.3d 595, 600 (9th Cir. 1999) (stating that a nonexamining physician’s opinion must be “supported
15 by other evidence in the record and [be] consistent with it.”) Furthermore, “an ALJ may discredit
16 treating physicians’ opinions that are conclusory, brief, and unsupported by the record as a whole .
17 . . or by objective medical findings . . .” *Batson*, 359 F.3d at 1195 (citations omitted).

18 Magistrate Judge Porter found that “the ALJ provided specific and legitimate reasons based
19 on substantial evidence for rejecting the opinion of Plaintiff’s treating physicians in determining
20 Plaintiff’s RFC.” (R&R at 18.) The ALJ gave greater weight to the opinions of other physicians,
21 but did so because they were ““more consistent with the totality of the evidence, better supported
22 by the medically acceptable diagnostic techniques,’ and consistent with his assessment of
23 Plaintiff’s subjective complaints.” (R&R at 18 (quoting AR 24).) Further, the ALJ “properly cited
24 15 legitimate and specific reasons why he gave little weight to the opinions of [the treating
25 physicians].” (R&R at 19; AR 22-24.) Thus, Magistrate Judge Porter concluded that the ALR did
26 not legally err in giving the treating physicians’ less weight, and that this decision was supported
27 by substantial evidence. (R&R at 21.)

28 Plaintiff objects to this portion of the R&R on the basis that it “failed to address Plaintiff’s

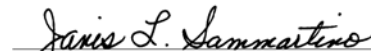
1 arguments that the physicians' conclusions cited by the ALJ did not constitute substantial
2 evidence." (Pl. Obj. to R&R at v.) Specifically, plaintiff contends that Magistrate Judge Porter
3 merely recited the ALJ's reasons for rejecting the opinions. Plaintiff asserts that this is not
4 sufficient because "case law requires the Court to analyze the ALJ's decision regarding the
5 opinions of treating physicians extensively." (*Id.* (citing *Orn v. Astrue*, 495 F.3d 625 (9th Cir.
6 2007).) The Court disagrees, finding that the R&R adequately and sufficiently evaluated the
7 ALJ's decision and properly found that it was supported by "specific and legitimate reasons" and
8 "substantial evidence." By reiterating the ALJ's reasons behind crediting or discrediting the
9 physicians' testimony, Magistrate Judge Porter illustrates the substantial evidence establishing the
10 inconsistencies between the physicians' opinions and the various medical evaluations that guided
11 the ALR's judgment. The Court, therefore, overrules plaintiff's objection regarding this portion of
12 the R&R.

13 CONCLUSION

14 Accordingly, for the reasons stated above, the Court hereby **ADOPTS** Magistrate Judge
15 Porter's Report and Recommendation. The Court therefore **DENIES** plaintiff's motion for
16 summary judgment and **GRANTS** defendant's cross-motion for summary judgment.

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18 **IT IS SO ORDERED.**

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20 DATED: September 22, 2009

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22 Honorable Janis L. Sammartino
23 United States District Judge
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