

1 evidence and is based on legal error. The Commissioner filed a cross-motion for summary
2 judgment. In the motion, the Commissioner argues the ALJ's decision is supported by substantial
3 evidence and is not based on legal error.

4 **PROCEDURAL HISTORY**

5 Plaintiff filed an application for supplemental security income payments on April 29, 2003.
6 (A.R. at 758.) The claim was denied initially and then again on reconsideration. Plaintiff filed a
7 request for a hearing and her claim was denied by decision on July 28, 2005. Plaintiff
8 subsequently filed an additional application for supplemental security income payments on
9 December 28, 2005. (Id.) Plaintiff is alleging disability since January 17, 2001, on both
10 applications. Plaintiff filed a request for review of the decision that was denied by the Appeals
11 Council on March 17, 2006. Plaintiff subsequently filed an appeal with the United States District
12 Court Southern District of California. On September 5, 2007, Plaintiff's appeal was granted and
13 the decision was remanded for further consideration. (Id.)

14 On remand and after two more hearings the ALJ issued a decision on March 26, 2008.
15 The ALJ found Plaintiff was disabled from December 1, 2003 through March 1, 2005. (A.R. at
16 762.) October 21, 2008, the appeals counsel declined to assume jurisdiction. On November 30,
17 2009, Plaintiff filed a Motion for Summary Judgment. (Doc. No. 20.) On January 4, 2010,
18 Defendant filed a Cross Motion for Summary Judgment and Response in Opposition to Plaintiff's
19 Motion for Summary Judgment. (Doc. No. 21.)

20 **FACTUAL BACKGROUND**

21 Plaintiff was born July 30, 1960; at the alleged onset of her disability Plaintiff was forty-
22 two years old. (A.R. at 754.) Plaintiff has a twelfth grade education and is able to read and
23 communicate in English. (A.R. at 755.) Plaintiff has no transferable job skills due to a lack of
24 past relevant work experience. (Id.)

25 At the August 2007 hearing Plaintiff testified she cannot work due to (a) joint disease of
26 the knee, (b) back pain, (c) asthma and (d) carpal tunnel syndrome. (A.R. at 835.) Plaintiff states
27 she receives Workers Compensation (Id.)

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1 **LEGAL STANDARD**

2 The supplemental security income program established by Title XVI of the Act provides
3 benefits to disabled persons without substantial resources and little income. 42 U.S.C. § 1383. To
4 qualify, a claimant must establish an inability to engage in “substantial gainful activity” because of
5 a “medically determinable physical or mental impairment” that “has lasted or can be expected to
6 last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(A). The
7 disabling impairment must be so severe that, considering age, education, and work experience, the
8 claimant cannot engage in any kind of substantial gainful work that exists in the national economy.
9 42 U.S.C. § 1382(a)(3)(B).

10 The Commissioner makes this assessment by a five-step analysis. First, the claimant must
11 currently not be working. 20 C.F.R. § 416.920(b). Second, the claimant must have a “severe”
12 impairment. 20 C.F.R. § 416.920(c). Third, the medical evidence of the claimant’s impairment is
13 compared to a list of impairments presumed severe enough to preclude work. 20 C.F.R. §
14 416.920(d). If the claimant’s impairment meets or equals one of the listed impairments, benefits
15 are awarded. 20 C.F.R. § 416.920(d). Fourth, if the claimant can do his past work, benefits are
16 denied. 20 C.F.R. § 416.920(e). Fifth, if the claimant cannot do his past work and, considering the
17 claimant’s age, education, work experience, and residual functional capacity, cannot do other work
18 that exists in the national economy, benefits are awarded. 20 C.F.R. § 416.920(f). The last two
19 steps of the analysis are required by statute. 42 U.S.C. § 1382(a)(3)(B).

20 In addition, when evaluating the severity of a claimant’s alleged mental impairments, the
21 Commissioner uses a “special technique” at each level of the review process. 20 C.F.R. §
22 416.1520a. In order to be considered disabled under the Act, the claimant must have: (1) a
23 medically determinable mental impairment(s), 20 C.F.R. § 416.1520a(b)(1)², and (2) exhibit
24 specified functional limitations as a result of that impairment(s) which prohibit the claimant from
25 engaging in any gainful activity. 20 C.F.R. § 416.1520a(b)(2). If the claimant has a medically

26
27 ² There are nine diagnostic categories that the Act considers to be medically determinable mental impairment(s):
28 Organic mental disorders (12.02); schizophrenic, paranoid, and other psychotic disorders (12.03); affective disorders
(12.04); mental retardation (12.05); anxiety related disorders (12.06); somatoform disorders (12.07); personality disorders
(12.08); substance addiction disorders (12.09); and autistic disorder and other pervasive developmental disorders (12.10).
20 C.F.R.Pt. 404, Subpt. P, App. 1 § 12.00.A.

1 determinable mental impairment but does not exhibit the requisite functional limitations, the
2 claimant may nevertheless still be considered disabled if the claimant exhibits clusters of
3 symptoms or a syndrome indicating an inability to engage in gainful activity. 20 C.F.R. §
4 404.1520a(d); 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.00.A. (impairment(s) must either pose
5 functional limitations or cause symptoms or a syndrome to support a finding of disabled).

6 Sections 405(g) through 1383(c)(3) of the Act, allow unsuccessful applicants to seek
7 judicial review of a final agency decision of the Commissioner. 42 U.S.C. §§ 1383(c)(3), 405(g).
8 The scope of judicial review is limited, however, and the Commissioner's denial of benefits "will
9 be disturbed only if it is not supported by substantial evidence or is based on legal error." *Brawner*
10 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433(9th Cir. 1988) (quoting *Green v.*
11 *Heckler*, 803 F.2d 528, 529 (9th Cir. 1986)).

12 Substantial evidence means "more than a mere scintilla" but less than a preponderance.
13 *Sandqathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). "[I]t is such relevant evidence as a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Andrews v.*
15 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). The court must consider the record as a whole,
16 weighing both the evidence that supports and detracts from the Commissioner's conclusions.
17 *Desrosiers v. Secretary of Health & Human Services*, 846 F.2d 573, 576, (9th Cir. 1988). If the
18 evidence supports more than one rational interpretation, the court must uphold the ALJ's decision.
19 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). When the evidence is inconclusive, "questions
20 of credibility and resolution of conflicts in the testimony are functions solely of the Secretary."
21 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

22 The ALJ has a special duty in social security cases to fully and fairly develop the record in
23 order to make an informed decision on a claimant's entitlement to disability benefits. *DeLorme v.*
24 *Sullivan*, 924 F.2d 841, 849 (9th Cir. 1991). Because disability hearings are not adversarial in
25 nature, the ALJ must "inform himself about the facts relevant to his decision," even if the claimant
26 is represented by counsel. *Id.* (quoting *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983)).

27 Even if the reviewing court finds substantial evidence supports the ALJ's conclusions, the
28 court must set aside the decision if the ALJ failed to apply the proper legal standard(s) in weighing

1 the evidence and reaching a decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978).
2 Section 405(g) permits a court to enter a judgment affirming, modifying or reversing the
3 Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may also remand the matter to
4 the Social Security Administrator for further proceedings. *Id.*

5 **DISCUSSION**

6 **Medical Evidence Presented**

7 In order to understand Plaintiff’s alleged medical problems a review of her relevant
8 medical history is presented here.

9 **Dr. Thomas Harris, M.D. (orthopedic surgeon)-Treating physician (2001-2005)**

10 -March 7, 2001: Plaintiff began seeing Dr. Harris for a swollen left knee . (A.R. at 752.)

11 At that time, Plaintiff complained of a swollen left knee. (A.R. at 752 .) She reported having
12 undergone three prior surgeries on her left knee before she had another knee injury in January
13 2001. She reported she had no work restrictions related to her knee as a result of those surgeries.

14 Dr. Harris diagnosed a sprain/strain of the left knee, referred Plaintiff for an MRI, prescribed
15 Tylenol with Codeine #3 and placed Plaintiff on temporary total disability status. (A.R. at 752 .)

16 -April 18, 2001: Dr. Harris performed arthroscopic surgery on Plaintiff’s left knee. (A.R. at
17 373.)

18 -September 2001: Plaintiff reported her right knee was starting to bother her because she
19 was having to compensate for her left knee. (A.R. at 755.)

20 -November 27, 2001: Dr. Harris prepared a “Treating Physician Permanent and Stationary
21 Report.” He stated Plaintiff would require future medical care, including anti-inflammatory pain
22 medications, physical therapy, Synvisc injections and, additional arthroscopic chondroplasties and
23 eventually a total knee arthroplasty due to significant chondral damage in Plaintiff’s left knee.
24 (A.R. at 755).

25 -April 2002: Dr. Harris reported Plaintiff continued to have ongoing symptoms. He
26 recommended a series of Synvisc injections for Plaintiff’s left knee. (A.R. at 375.)

27 -June 2002: Plaintiff reported having increased back and hip pain, with pain radiating into
28 both legs with numbness and tingling. (A.R. at 373.)

1 -October 2002: Plaintiff reported having another fall in October 2002 due to her left leg
2 “giving out” on her. (A.R. at 375 .) Dr. Harris prescribed physical therapy and crutches.

3 -November 2002: Plaintiff sustains another fall due to her knee. Dr. Harris advises her to
4 remain on crutches to keep from falling. (A.R. at 375.)

5 -January 2003: Dr. Harris prescribed Lortab for Plaintiff’s ongoing pain. (A.R. at 375 .)

6 -February 2003: Plaintiff reported having significant pain in her low back radiating into her
7 left leg, as well as trouble getting around and sitting. (A.R. at 756.) Plaintiff’s primary case
8 physician refers her to a neurologist who diagnoses carpal tunnel in the right hand. (A.R. at 375 .)
9 Plaintiff ‘s gait is found by Dr. Harris to still be antalgic and very irregular. She is also found to
10 have back spasms and flattening of the lumbar spine. (A.R. at 756.)

11 -April 2003: A lumber MRI is performed showing degenerative disc disease at L5-S1 and a
12 small central focal protrusion without spinal stenosis or neural foraminal narrowing. (A.R. at 756.)

13 -June 2003: Plaintiff complains of chronic lumbrosacral spine pain with burning into the
14 left lower extremity, as well as burning in her right wrist. (A.R. at 190.) Plaintiff used Valium to
15 control her muscle spasms.

16 -July 2003: Dr. Harris refers Plaintiff to Dr. David Kupfer M.D. (hand surgeon) for her
17 upper extremity discomfort and to Dr. Denise Rubino, M.D. for possible epidural steroid injections
18 to relieve Plaintiff’s lower back discomfort. (A.R. at 759.)

19 -October 2003: Plaintiff reported her left knee had given out and she had fallen down
20 again, landing on her right wrist and injuring her right leg. (A.R. at 543 .)

21 -November 2003: Dr. Harris gives Plaintiff a series of three Synvisc injections in her left
22 knee.

23 -December 2003: Dr. Kupfer performs carpal tunnel surgery. (A.R. at 535.)

24 -January 2004: Dr. Harris observes Plaintiff was possibly developing Reflex Sympathy
25 Dystrophy (“RSD”)³ of the right upper extremity. (A.R. at 532 .) Dr. Harris reports Plaintiff had
26 been unable to work since 2001 due to the injuries she sustained in January 2001.

27
28 ³ RSD is a chronic neurological syndrome resulting from an injury to a nerve or soft tissue that does not follow the normal healing path, and in which the sympathetic nervous system seems to assume an abnormal function after an injury. See *Oldham v. Astrue*, 509 F.3d 1254, 1255 fn.1 (10th Cir. 2007).

1 -April 2004: Dr. Harris recommends Plaintiff see a pain management specialist. Dr Harris
2 recommends an MRI and possible arthroscopy on Plaintiff's right knee. (A.R. at 394.) However,
3 her workman's compensation carrier denies the request on the basis her right knee problems are
4 unrelated to her work related injury. (A.R. at 513-515 .)

5 -June 2004: Dr. Harris notes Plaintiff continues to have symptoms of RSD in her right
6 upper extremity, burning left knee pain, and back pain. (A.R. at 511.) Dr. Harris also notes
7 concern Plaintiff is having reactive depression secondary to her medical condition. He suggests
8 Plaintiff be seen by a psychiatrist. (A.R. at 511.)

9 -July 2004: Dr. Harris notes none of his recommendations for further treatments have been
10 approved by Plaintiff's compensation carrier. He asserts her treatment is being compromised by
11 her inability to receive treatment for both her left and right knees.

12 -August 2004: Dr. Harris continues Plaintiff on her pain management regimen. (A.R. at
13 503.) Dr. Harris states Plaintiff is not capable of performing sustained sedentary work on a regular
14 and continuing basis. (A.R. at 506.)

15 -May 2005: Dr. Harris notes Plaintiff still had ongoing multiple orthopedic complaints
16 involving her knees and upper extremities.

17 -August 2004 and May 2005 : Dr. Harris finds Plaintiff cannot lift any weight at all due to
18 her bilateral carpal tunnel syndrome and ulnar neuropathy. He states Plaintiff can stand and/or
19 walk for less than 2 hours in an 8 hour workday, and could sit for 6 hours out of an 8 hour
20 workday, but would need to alternate sitting and walking/standing every 15-20 minutes due to
21 bilateral knee meniscus tears and chondromalacia, as well as chronic lumbar sprain with
22 degeneration. He also states Plaintiff's ability to push and pull is limited, and that she can never
23 climb, balance, kneel, crouch, crawl, or stoop. Finally he states Plaintiff's manipulative functions
24 are impaired, such that she should never engage in reaching, handling, or fingering, and can
25 engage in feeling only on an occasional basis. (A.R. at 394-401.)

26 **David M. Kupfer, M.D. (hand surgeon) – Treating physician (2003–2004)**

27 -December 2003: Dr. Kupfer performs carpal tunnel release surgery on Plaintiff's right
28 wrist. (A.R. at 499.)

1 -January 2004: Plaintiff complains of increased frequent numbness and tingling in both
2 hands. (A.R. at 499.)

3 -March 2004: Dr. Kupfer confirms RSD diagnosis and refers Plaintiff to Dr. Zimmer for
4 ganglion blocks.

5 -May 2004: Dr. Kupfer notes Plaintiff's right hand and finger symptoms are significantly
6 better following treatment with Dr. Zimmer. (A.R. at 513-515.)

7 -June 2004: Dr. Kupfer recommends Plaintiff receive a cervical MRI due to post-
8 sympathetic block radiculitis. (A.R. at 492.)

9 -September 2004: Plaintiff reports substantial improvement in her right hand and the post-
10 surgical RSD has improved. (A.R. at 501.) Dr. Kupfer indicates Plaintiff is temporarily totally
11 disabled pending surgery on her left arm.

12 -June 2005: Dr. Kupfer opines Plaintiff is not capable of performing sustained sedentary
13 work on a regular and continuing basis. (A.R. at .)

14 2005 - Present: According to Plaintiff's attorney, Plaintiff "has not seen Dr. Harris since
15 2005, but he continues to prescribe her medications because of her pain." (A.R. at 835 citing the
16 Supplemental Security Income Benefits Hearing August 27, 2007.)

17 **Denise Rubino, M.D.—Treating physician (2003)**

18 -October 2003: Plaintiff received lumbar epidural steroid injections by Dr. Rubino. Dr.
19 Rubino opined Plaintiff can sit, stand, and walk for only one hour each per day, and can not lift or
20 carry any weight over five pounds. (A.R.at 362.) She qualifies her opinion, however, by stating
21 Plaintiff can be reassessed after treatment has been concluded. (A.R.at 365.)

22 **Eric Zimmer, M.D. – (pain management specialist) Treating physician (2004)**

23 -May 2004: Dr. Zimmer reports Plaintiff is suffering from a severe aggressive RSD in the
24 right upper extremity, and should receive another series of ganglion blocks. (A.R.at 423-427.)

25 **Richard Greenfield, M.D.-- Examining Orthopedic Surgeon (2002–2003)**

26 -February/March 2002: Dr. Greenfield opines Plaintiff has achieved maximum medical
27 benefit from active medical care with respect to her left knee.

28 -February 2003: Dr. Greenfield reevaluates Plaintiff's knee, hip, pelvis, and back

1 complaints. He finds no further disability or restrictions in the left knee. However, Plaintiff
2 requires ongoing conservative care, and the care provided by Dr. Harris was appropriate. (A.R. at
3 284.) He also finds Plaintiff's injury to her left knee had causes her right knee, back and hip
4 problems.

5 -November 2003: A third evaluation of Plaintiff was done for her hand complaints. Dr.
6 Greenfield finds it is possible her hand symptoms had been caused by using her crutches. He
7 advises Plaintiff has a temporary partial disability due to her hands, and she can not do any
8 repetitive tasks such as typing, keying, fingering, grasping, lifting, carrying, pushing, or pulling.
9 He recommends nerve conduction studies in order to further evaluate Plaintiff's condition. (A.R.
10 at 392.)

11 **Byron King, M.D. -Examining Orthopedic Surgeon (2003)**

12 -May 2003: On review of Dr. Harris' April 2001 report, Dr. King finds advanced
13 degenerative changes in Plaintiff's left knee. He also finds Plaintiff requires appropriate treatment
14 for her hands, wrists, lower back, and right knee. He does not believe Plaintiff's factors of
15 disability can be accurately rated without Plaintiff first reaching maximum medical improvement.
16 (A.R. at 370.)

17 **Steven Gerson, D.O.– Examining Internist (2002)**

18 -July 2003: Dr. Gerson performs an internal medicine evaluation of Plaintiff. He notes
19 Plaintiff's chief complaints at that time are left knee pain and asthma. Dr. Gerson opines Plaintiff
20 can lift up to 10 pounds frequently and 20 pounds occasionally, and can sit, stand, and walk for 6
21 hours in an 8 hour workday. (A.R. at 313.)

22 **Thomas Sabourin, M.D. – Examining Orthopedic Surgeon (2004)**

23 -November 2004: After performing an orthopedic consultation, Dr. Saboruin finds : 1)
24 degenerative arthritis of the left knee, status post multiple knee surgeries; 2) bilateral carpal tunnel
25 syndrome, status post right carpal release; 3) reflex sympathetic dystrophy of the right upper
26 extremity, now improved; 4) cervical spine degenerative arthritis; and 5) lumbar spine
27 degenerative disc disease. (A.R. at 436.)

28 Dr. Sabourin finds: “[H]er complaints are somewhat disproportionate to the determinable

1 condition....her complaints are much more vociferous than the actual physical examination.” (A.R.
2 at 440.)

3 **Vocational Evidence Presented**

4 Vocational expert (“VE”), Gloria Lasoff , testified at the August 2007 hearing. Based upon
5 the vocational profile, residual functional capacity assessment and hypotheticals provided by the
6 ALJ at that time, VE Lasoff, testified no former work is available to Plaintiff. However, based
7 upon her RFC and the hypotheticals presented she could perform eighty-five percent of the
8 unskilled sedentary jobs available in the national economy. (AR at 859.) Specifically, VE Lasoff
9 testified Plaintiff could perform jobs classified as assembler, production inspector, and cuff folder.
10 (A.R. at 860.)

11 VE Mark Remas testified at the February 2008 hearing. Based upon the vocational profile
12 and hypotheticals provided by the ALJ at that time, VE Remas testified no former work was
13 available to Plaintiff. (A.R. at 885.) Similar to VE Lasoff’s testimony, VE Remas testified
14 Plaintiff could perform fifty percent of the unskilled sedentary work available in the national
15 economy. Specifically, VE Remas testified Plaintiff could perform jobs classified as lens inserter,
16 final assembler, and cuff folder. (A.R. at 886.)

17 Both vocational experts testified; if Dr. Harris’ opinion regarding Plaintiff’s work
18 restrictions were accepted, Plaintiff would be precluded from performing any work. (A.R. at 864,
19 886.)

20 **ALJ’s Medical Evidence Evaluation**

21 After a lengthy discussion of the medical evidence presented and a presentation of
22 Plaintiff’s testimony, the ALJ determined Plaintiff was not entitled to disability insurance benefits
23 under the Act (A.R. at 749.) based upon the following findings:

24 1. From January 17, 2001 through the date of his decision, Plaintiff did not engage in
25 substantial gainful activity. (A.R. at 752.)

26 2. Plaintiff’s cervical and lumbar degenerative disc disease, degenerative joint disease of
27 the knees status post multiple surgeries, asthma, bilateral carpal tunnel syndrome status post
28 surgical release, somatoform pain disorder, alcohol abuse, and polysubstance abuse are considered

1 “severe” based on the requirements in the Regulations [citation omitted]. (Id.)

2 3. These medically determinable impairments do not meet or medically equal one of the
3 listed impairments in [the Social Security Regulations.] (Id.)

4 4. The ALJ finds that, from January 1, 2001 through October 1, 2001, the Plaintiff had the
5 residual functional capacity to perform less than sedentary work. The undersigned gives the
6 Plaintiff the benefit of the doubt that she was only capable of performing limited range of less than
7 sedentary work. (A.R. at 754.) The Plaintiff was unable to perform any of her past relevant work
8 during this time. (Id.)

9 5. Medical improvement occurred as of October 2, 2001. (A.R. at 755.) The undersigned
10 finds Plaintiff’s functional capacity for basic work activities has increased. (A.R. at 761.)

11 6. Beginning on October 2, 2001 through November 31, 2003, Plaintiff has not had an
12 impairment or combination of impairments that meets or medically equals on of the impairments.
13 (A.R. at 756.)

14 7. The ALJ finds the Plaintiff’s allegations regarding her limitations during the period from
15 October 2, 2001 through November 31, 2003, are not totally credible for the reasons set forth in
16 the body of the decision.

17 8. From October 2, 2001 through November 31, 2003, Plaintiff had the residual functional
18 capacity to perform sedentary work except she was able to lift and carry ten pounds occasionally
19 and less than ten pounds frequently; stand for 3-4 hours and sit for six hours in an eight hour day;
20 occasionally climb stairs and ramps, balance, and stoop, but never climb ropes, ladders or
21 scaffolds and no frequent kneeling, crawling, or squatting; frequently but not continuously or
22 repetively finger and feel; unrestricted in reaching; occasionally keyboard and type; and had to
23 avoid concentrated exposure to pollutants. She was limited to simple, low stress activities in
24 supportive environment.

25 9. The ALJ finds that, beginning on December 1, 2003, through March 1, 2005, Plaintiff
26 had the residual functional capacity to perform less than sedentary work. The ALJ finds that
27 beginning December 1, 2003 through March 1, 2005, Plaintiff’s allegations regarding her
28 symptoms and limitations are generally credible. (A.R. at 762.)

1 10. Beginning on December 1, 2003, through March 1, 2005, Plaintiff was unable to
2 perform past relevant work. (A.R. at 765.)

3 11. From December 1, 2003, through March 1, 2005, there were no jobs that existed in
4 significant numbers in the national economy Plaintiff could have performed.

5 12. Plaintiff was under a disability from December 1, 2003 through March 1, 2005.

6 13. Medical improvement occurred as of March 1, 2005, the date Plaintiff's disability
7 ended.

8 14. Beginning on March 1, 2005, Plaintiff has not had an impairment or combination of
9 impairments that meets or medically equals one of the impairments listed in [the Social Security
10 Regulations].

11 15. The ALJ finds that beginning on March 1, 2005, Plaintiff has had the residual
12 functional capacity to perform sedentary work ... she is able to lift and carry ten pounds
13 occasionally and less than ten pounds frequently; stand for 3-4 hours at 1.5 hours at a time and sit
14 for six hours in an eight hour day; occasionally climb stairs and ramps, balance, and stoop, but
15 never climb ropes, ladders or scaffolds; cannot frequently kneel, crawl, or squat; can frequently but
16 not continuously or highly repetitive finger and feel; is unrestricted in reaching; occasionally
17 keyboard and type; and must avoid concentrated exposure to cold, pollutants, industrial vibration,
18 and hazards. She is limited to simple, low stress activities in a supportive environment. (A.R. at
19 768.)

20 16. Beginning March 1, 2005, considering Plaintiff's age, education, work experience, and
21 residual functional capacity, the claimant has been able to perform a significant number of jobs in
22 the national economy. (A.R. at 773.) Plaintiff's disability ended on March 1, 2005. [citation
23 omitted.]

24 **Plaintiff's Claim on Appeal**

25 Plaintiff asserts four claims: 1) The ALJ failed to address substantial evidence establishing
26 Plaintiff's obesity ; 2) The ALJ's decision failed to adequately reject the opinions of Plaintiff's
27 treating physicians; 3) The ALJ failed to establish medical improvement; 4) The ALJ failed to
28 resolve conflicts in the testimony of the vocation expert; 5) The ALJ failed to establish Plaintiff

1 was able to perform work from October 2, 2001 to November 30, 2003.

2 **1) Plaintiff's Obesity**

3 Plaintiff contends the ALJ failed to consider the impact of her obesity with her other
4 multiple impairments on her ability to work. (Pl. MSJ at 4.) Specifically Plaintiff contends “[t]he
5 ALJ ignored substantial evidence that Plaintiff’s obesity was a severe impairment that imposed
6 functional limitations.” (P’s MSJ at 4.)

7 Defendant contends Plaintiff failed to present obesity related limitations in her argument
8 claiming disability. (Def’s MSJ at 5.) Specifically, Defendant asserts Plaintiff did not present any
9 evidence or argument at the hearing to support her claim that her obesity in conjunction with her
10 other serious medical impairments renders her disabled and entitled to benefits.

11 The Ninth Circuit has held “[t]he ALJ in a social security case has an independent ‘duty to
12 fully and fairly develop the record and to assure that the claimant’s interests are considered.’”
13 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). Obesity is a complicated, chronic and
14 often misunderstood disease which the Commissioner must scrutinize carefully pursuant to SSR
15 02-01p.” *Phillips v. Barnhart*, 421 F.Supp. 2d 272, 282 (D.Mass 2006). Social Security Ruling
16 02-1P, 2000 WL 628049 (S.S.A.) states in pertinent part:

17 **Because there is no listing for obesity, we will find...that a listing is met**
18 **if there is an impairment that, in combination with obesity, meets the**
19 **requirements of a listing. For example, obesity may increase the severity of**
20 **coexisting or related impairments to the extent that the combination of**
21 **impairments meets the requirements of a listing. This is especially true of**
22 **musculoskeletal, respiratory, and cardiovascular impairments. ...**

23 **Obesity in combination with another impairment may or may not**
24 **increase the severity or functional limitations of the other impairment. We will**
25 **evaluate each case based on the information in the case record.**

26 SSR 02-1p.

27 Well on point here is *Celaya v. Halter*, 332 F.3d 1177 (9th Cir. 2003). The Court held “the ALJ
28 was responsible for determining the effect of Celaya’s obesity upon her other impairments, and its

1 effect on her ability to work and general health, given the presence of those impairments.” *Id.* at
2 1182. After *Celya*, the Ninth Circuit again addressed the issue of whether the ALJ adequately
3 considered plaintiff’s obesity in *Burch v. Barnhart*, 400 F 3d 676, 681 (9th Cir. 2004). While the
4 record revealed the claimant was obese, the Ninth Circuit in Burch held an “ALJ is not required to
5 discuss the combined effects of a claimant’s impairments or compare them to any listing in an
6 equivalency determination, unless the claimant presents evidence in an effort to establish
7 equivalence.” *Id.* at 683.

8 In this case, several factors weigh against finding the ALJ erred. First, with the exception
9 of Dr. Weilepp’s testimony the medical record is silent about her weight and whether and to what
10 degree Plaintiff’s weight affects her condition. Second, obesity is not raised in Plaintiff’s report of
11 symptoms. Third, it does not appear from the evidence in the record that Plaintiff is at the
12 “extreme” end of obesity. Indeed, Dr. Weilepp testified that after March 2005, Plaintiff was only
13 “moderately” overweight. Finally, and most importantly, at the August 2007 hearing Plaintiff’s
14 counsel spent significant time questioning the medical expert about Plaintiff’s ability for gross
15 manipulations. (A.R. at 851-856.) In contrast, Plaintiff’s counsel appears never to have addressed
16 Plaintiff’s alleged work restrictions based upon her weight. Even at the February 2008 hearing
17 Plaintiff’s counsel failed to raise the issue of Plaintiff’s weight as a factor in her disability. (A.R. at
18 881.) Thus, Plaintiff simply fails to direct the Court’s attention to any evidence in the record to
19 support a finding that Plaintiff was disabled on account of her alleged obesity in combination with
20 any other impairment.

21 Furthermore, the Court finds the ALJ’s failure to specifically include obesity in
22 combination with Plaintiff’s other impairments is harmless error. The Ninth Circuit has held,
23 “[w]e recognize harmless error applies in the Social Security context. *Stout v. Commissioner Soc.*
24 *Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006). A finding of harmless error has been upheld
25 “where the mistake was nonprejudicial to the claimant or irrelevant to the ALJ’s ultimate disability
26 conclusion.” *Id.* That the ALJ incorporated Dr. Weilepp’s opinions (including his opinion
27 regarding her weight) into his own formulation of Plaintiff’s RFC shows Plaintiff was not
28 prejudiced by the ALJ’s lack of specificity regarding her weight. Similarly, the ALJ’s ultimate

1 determination that Plaintiff had the residual functional capacity to perform only sedentary work
2 demonstrates any specific reference to obesity was irrelevant to the ALJ's disability conclusion.
3 For example, sedentary jobs are defined, in part, when "walking and standing are required only
4 occasionally and all other sedentary criteria are met." DICOT 713.687-026. This aspect of
5 Plaintiff's RFC fits well within Plaintiff's physical limitations as evidenced by the information
6 presented in the record, including the testimony of Dr. Weilepp.

7 For these reasons, it is recommended Plaintiff's motion for summary judgment on her
8 claim that the ALJ committed error for failure to specifically address her obesity be **DENIED**.

9 **2) Non-treating vs. Treating physicians**

10 Plaintiff contends the "ALJ failed to properly reject the treating physicians's opinion of
11 Plaintiff's limitations with specific and legitimate reasons based upon substantial evidence in the
12 record." (P's MSJ at 8.) Specifically, Plaintiff argues "[t]he ALJ failed in his duty to provide
13 specific and legitimate reasons to reject the opinions of Drs. Harris and Rubino." (Id.) Plaintiff
14 cites the Ninth Circuit case of *Lester v. Chater*, 81 F. 3d 821, 830-31 (9th Cir 1995) for the
15 proposition the opinion of an examining physician can only be rejected for specific and legitimate
16 reasons supported by substantial evidence in the record, even if contradicted by a non-examining
17 doctor. *Id.*

18 Defendant argues it was not error for the ALJ to discount Drs. Harris and Rubino's
19 opinions because they were inconsistent with the record as a whole. Defendants also contend the
20 ALJ provided numerous reasons supported by substantial evidence in the record. (Def. at 6.) As
21 noted by Defendant "[t]he ALJ noted that the opinions that Plaintiff was always incapable of even
22 sedentary work was inconsistent with other evidence in the record." (Id.) Moreover, Defendant
23 points out "[t]he ALJ referred to other medical sources who did not find Plaintiff to be totally
24 disabled including Steven E. Gerson, D.O., S.C. Swan, M.D., George C. Spellman, M.D., and
25 Thomas Sabourin, M.D." (Id. at 7.)

26 The Ninth Circuit distinguishes among the opinions of three types of physicians: (1) those
27 who treat the claimant ("treating physicians"); (2) those who examine but do not treat the claimant
28 ("examining physicians"); and (3) those who neither examine nor treat the claimant

1 (“nonexamining physicians”). *Lester v. Chater*, 81 F3d 821, 830 (9th Cir. 1996). As a general
2 rule, more weight is given to the opinion of a treating source than to that of a nontreating
3 physician. *Id.* (citing *Winans v. Bowen*, 853 F2d 643, 647 (9th Cir. 1987)). Likewise, the opinion
4 of an examining physician is typically entitled to greater weight than that of a nonexamining
5 physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990).

6 The Ninth Circuit examined the weight to be given a treating source opinion in *Orn v.*
7 *Astrue*, 495 F.3d 625 (9th Cir. 2007) The Ninth Circuit held “[i]f a treating physician’s opinion is
8 not given ‘controlling weight’ because it is not ‘well-supported’ or because it is inconsistent with
9 other substantial evidence in the record, the Administration considers specific factors in
10 determining the weight it will be given. Those factors include the ‘length of the treatment
11 relationship and the frequency of examination’ by the treating physician; and the ‘nature and
12 extent of the treatment relationship’ between the patient and the treating physician. Generally, the
13 opinions of examining physicians are afforded more weight than those of non-examining
14 physicians, and the opinions of examining non-treating physicians are afforded less weight than
15 those of treating physicians.” *Id.* at 631.

16 Where a non-treating, non-examining physician’s opinion contradicts the treating
17 physician’s opinion, the ALJ may only reject the treating physician’s opinion “if the ALJ gives
18 specific, legitimate reasons for doing so that are based upon substantial evidence in the record.”
19 *Jamerson v. Chater*, 112 F.3d. 1064, 1066 (9th Cir. 1997) (quoting *Andrew v. Shalala*, 53 F3d
20 1035, 1041 (9th Cir. 1995)). “The ALJ may meet this burden by setting out a detailed and thorough
21 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
22 making findings.” *Morgan v. Apfel*, 169 F.3d 595, 600-601 (9th Cir. 1999) (citing *Magallanes,*
23 *supra*, 881 F.2d at 751)). Additionally, “[r]eports of consultative physicians called in by the
24 Secretary may serve as substantial evidence.” *Andrews, supra*, 53 F.3d at 1041. Where medical
25 reports are inconclusive, “questions of credibility and resolution of conflicts in the testimony are
26 functions solely of the Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982)
27 (quoting *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971)).

28 An noted herein, the ALJ in this case initially set forth his reasons why he did not fully

1 credit Dr.Harris’ and Dr. Rubino’s opinions as treating physicians. In his analysis the ALJ cited to
2 substantial evidence in the record to support his reasons not to give controlling weight to the
3 opinions of Drs. Harris and Rubino regarding Plaintiff’s ability to sustain employment. In *Orn*,
4 *supra*, the ALJ’s reasons for rejecting the treating physician’s opinion were actually contradicted
5 by the record in that case. *Orn v. Astrue*, 495 F.3d at 634. In contrast, the ALJ here specifically
6 cited to inconsistencies between the opinions of Drs. Harris and Rubino and other evidence
7 presented in the record, including “substantial evidence of record , documenting less severe
8 limitations.” (A.R. at 760.) “The doctor failed to cite any medical testing results or objective
9 observations to support his conclusions as to the claimant’s residual functional capacity.” (Id.; see
10 also A.R. at 771.)

11 The ALJ next set forth the evidence presented in the record he used to determine Plaintiff
12 has not been under a disability. As presented herein, the ALJ relied on the opinions of virtually all
13 the physicians (treating and non-treating, examining and non-examining) to support his conclusion
14 Plaintiff is not disabled. Specifically, the record indicates none of the non-treating or non-
15 examining physician’s opinions contradicted the treating physician’s opinions with the exception
16 of Drs. Harris and Rubino’s statements that Plaintiff is unable to function in the competitive job
17 market. (A.R. at 760-761, 768-773.) Overall, the great majority of physicians in this case who
18 either treated, examined or reviewed Plaintiff’s medical condition made findings consistent with
19 the ALJ’s residual functional determination. Accordingly, the Court finds the ALJ’s finding is
20 supported by substantial evidence and free of legal error and recommends Plaintiff’s motion on
21 this ground be **DENIED**.

22 **3) The ALJ failed to establish medical improvement**

23 Plaintiff also contends “[t]he ALJ’s discussion failed to provide evidence that Plaintiff was
24 no longer disabled as of October 2, 2001 due to improvements in Plaintiff’s residual functional
25 capacity.” (P’s MSJ at 13.) Plaintiff relies on various reports of treating physician Dr. Harris. For
26 example, Plaintiff cites Dr. Harris’ report of October 29, 2001 referring to “numerous ongoing
27 medical impairments and limitations.” (Id.)

28 Defendant contends ‘[t]he ALJ ... provided substantial evidence of medical improvement

1 and his conclusion should be upheld regardless of Plaintiff's disagreement ." (Def. MSJ at 8.) For
2 example, Defendant points out the ALJ's citation to the reports of Dr. Harris (A.R. at 226, 775.),
3 Dr. Greenfield (A.R. at 293-295) and Dr. Gerson (A.R. at 316-317.) According to the ALJ these
4 physicians all noted improvements in Plaintiff's physical condition. The ALJ pointed to evidence
5 in the record Plaintiff exhibited only slight knee pain (A.R. at 227.) Plaintiff's knee was stable
6 (A.R. at 227). Plaintiff's MRI showed normal menisci without tears (A.R. at 299.) Plaintiff has
7 full range of motion in her knee and a stable gait (A.R. at 316) and almost normal strength in her
8 knee with no atrophy. (A.R. at 756, 184.)

9 There is substantial evidence in the record supporting the ALJ's finding of medical
10 improvement after October 2001. Despite Plaintiff's protestations and her own citations to the
11 record in support of her claim; "[w]here the evidence is susceptible to more than one rational
12 interpretation, we must uphold the ALJ's conclusions." *Tommasetti v. Astrue*, 533 F.3d 1035,
13 1038 (9th Cir. 2008). "Thus, even if the weight of the evidence is against the ALJ's conclusion, so
14 long as there is substantial evidence to support the conclusion, we must affirm." *Pearson v. Astrue*,
15 2010 WL 76446 (9th Cir. 2010).⁴ It is recommended Plaintiff's motion for summary judgment on
16 this claim be **DENIED**.

17 **4) Error regarding the Vocational Expert**

18 Plaintiff argues the ALJ failed to resolve conflicts in the testimony of the Vocational
19 Expert ("VE"). Specifically, she contends the physical demands of the jobs identified by the VE,
20 and adopted by the ALJ, as other work Plaintiff can perform (e.g. lens inserter, final assembler and
21 cuff folder) exceed Plaintiff's limitations. (P.'s MSJ at 18.) In response, Defendant contends
22 "there is no conflict between the vocational expert's testimony and the DOT." (Def. MSJ at 8.)

23 From October 2, 2001 through November 31, 2003 the ALJ found Plaintiff's residual
24 functional capacity ("RFC") was as follows:

25 **[A]ble to lift and carry ten pounds occasionally and less than ten**
26 **pounds frequently; stand for 3-4 hours and sit for six hours in an eight hour**

28 ⁴ The Court may cite unpublished Ninth Circuit opinions issued on or after 01/01/07. U.S. Ct. App. 9th Cir. Rule
36-3(b).

1 day; occasionally climb stairs and ramps, balance, and stoop, but never climb
2 ropes, ladders or scaffolds and no frequent kneeling, crawling, or squatting;
3 frequently but not continuously or repetitively finger and feel; unrestricted in
4 reaching; occasionally keyboard and type; and had to avoid concentrated
5 exposure to pollutants. ... limited to simple, low stress activities in supportive
6 environment. (A.R.at 757.)

7 Further, March 1, 2005 the ALJ found Plaintiff's RFC was as follows:

8 [A]ble to lift and carry ten pounds occasionally and less than ten
9 pounds frequently; stand for 3-4 hours at 1.5 hour intervals at a time and sit
10 for six hours in an eight hour day; occasionally climb stairs and ramps,
11 balance, and stoop, but never climb ropes, ladders or scaffolds, cannot
12 frequently kneel, crawl, or squat; can frequently but not continuously or
13 highly repetitively finger and feel; is unrestricted in reaching; occasionally
14 keyboard and type; and must avoid concentrated exposure to cold, pollutants,
15 industrial vibration, and hazards. She is limited to simple, low stress activities
16 in a supportive environment. (A.R. at 768.)

17 A review of the exertional requirements for the three occupations cited by the VE all fall
18 within Plaintiff's exertional limitations. For example, none require climbing, balancing, stooping,
19 kneeling, crouching, or crawling. *See* DICOT 713.687-026, 713.687-018, 685.687-014. Further,
20 only frequent reaching, handling and fingering is present in each occupation. *Id.* Lastly, all are
21 categorized as sedentary work. *Id.* Here, Plaintiff has failed to adequately demonstrate the
22 existence of ambiguities in the record between Plaintiff's RFC and the occupations cited by the VE
23 as suitable for Plaintiff. Therefore, it is recommended Plaintiff's claim for summary judgment on
24 this ground be **DENIED**.

25 **5) ALJ erred in finding Plaintiff able to work from October 2, 2001 through**
26 **November 30, 2003**

27 Plaintiff contends the ALJ "failed to identify any job positions for the time period from
28 October 2, 2001, to November 31 (sp) 2003." (P's MSJ at 20.) Specifically, Plaintiff asserts the

1 ALJ's decision did not identify any positions Plaintiff could perform with her functional
2 limitations from during the time period from October 2001 through November 2003. The record
3 transcript shows the ALJ expressly asked the VE⁵ about the period from October 2001 through
4 November 2003 what jobs would be available given Plaintiff's RFC :

5 **VE: That would rule out past relevant work, Your Honor, because this would be**
6 **essentially at a sedentary work level. Past work was light or medium. So that would rule it**
7 **all out. Within this hypothetical, there would be other work available.**

8 **ALJ: Of the 200 sedentary, unskilled, how many would available?**

9 **VE: 50 percent, Your Honor.**

10 **ALJ: And the illustrations of those would be what?**

11 **VE: Lens inserter, 713 –**

12 **ALJ: Next job title?**

13 **VE: Final assembler.**

14 **ALJ: All right. The third one?**

15 **VE: A cuff folder. (A.R.at 883-886.)**

16 The testimony of vocational expert Mark Remas is clear. He specifically identifies the
17 three occupations cited herein as available to Plaintiff from October 2, 2001 to November 31,
18 2003. Additionally, within the section of his decision addressing Plaintiff's RFC between October
19 2001 and November 2003, the ALJ noted the vocational expert testified "given all of these factors
20 the individual would be able to perform the requirements of representative occupations such as the
21 following ...lens inserter, final assembler, cuff folder." (A.R. at 762..)

22 Thus, substantial evidence supports the ALJ's conclusion jobs within Plaintiff's
23 capabilities exist in the national market. For these reasons, Plaintiff's allegation of error on this
24 ground is unsupported by the record in this case. According, it is recommended Plaintiff's motion
25 for summary judgment be **DENIED** on this ground.

26 ///

28 ⁵ The transcript indicates "ME" to designate the testimony of vocational expert Mr. Remas. A thorough review of the transcripts indicates that the "ME" designation for Mr. Remas is a typographical error.

1 **CONCLUSION**

2 Accordingly, it is recommended that Plaintiff's Motion for Summary Judgment be
3 **DENIED** and that Defendant's Cross-Motion for Summary Judgment be **GRANTED**.

4 This Report and Recommendation of the undersigned Magistrate Judge is submitted to the
5 United States District Judge assigned to the this case, pursuant to the provisions of 28 U.S.C. §
6 636(b)(1).

7 **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with
8 the Court and served on all parties no later than **February 22, 2010**. The document should be
9 captioned "Objections to Report and Recommendation."

10 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court
11 and served on all parties no later than **March 1, 2010**. The parties are advised that failure to file
12 objections within the specified time may waive the right to raise those objections on appeal of the
13 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 **IT IS SO ORDERED.**

15 DATED: February 8, 2010

16 

17 Hon. William McCurine, Jr.
18 U.S. Magistrate Judge
19 United States District Court