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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Karen S. Scott,

Plaintiff,

v.

Carolyn W. Colvin, Acting Commissioner
of Social Security,

Defendant.

Case No.: 16cv1773-W-BGS

**REPORT AND
RECOMMENDATION: DENYING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT [ECF No.
15] AND GRANTING
DEFENDANT’S CROSS-MOTION
FOR SUMMARY JUDGMENT [ECF
No. 18]**

I. INTRODUCTION

On July 8, 2016, Plaintiff Karen S. Scott (“Plaintiff”) filed a complaint pursuant to the Social Security Act, 42 U.S.C. § 405(g), challenging the Commissioner of the Social Security Administration’s (“Commissioner”) denial of disability insurance benefits and supplemental social security income. (ECF No. 1.) On October 28, 2016, the Commissioner filed an answer. (ECF No. 11.) On December 28, 2016, Plaintiff filed a motion for summary judgment, requesting reversal of the Administrative Law Judge’s (“ALJ”) final decision. (ECF No. 15.) Specifically, Plaintiff seeks reversal of the ALJ’s denial or, in the alternative, remand for further administrative proceedings on the basis that the ALJ failed to articulate legally sufficient reasons for rejecting Plaintiff’s limitations testimony. (Id.)

1 On January 23, 2017, the Commissioner filed a cross-motion for summary judgment
2 and a response in opposition to Plaintiff's motion. (ECF Nos. 18 and 19.) The
3 Commissioner argues that the ALJ's decision was supported by substantial evidence, is
4 free from legal error, and should be affirmed. *Id.* Plaintiff did not file a reply in support
5 of her motion for summary judgment or an opposition to the Commissioner's cross-motion
6 for summary judgment.

7 Pursuant to Civ. L.R. 7.1(d)(1), the Court finds the parties' cross-motions suitable
8 for decision on the papers and without oral argument. After careful consideration of the
9 administrative record and the applicable law and for the reasons discussed below, the Court
10 **RECOMMENDS** that Plaintiff's motion for summary judgment be **DENIED** and that
11 Commissioner's cross-motion for summary judgment be **GRANTED**.

12 **II. LEGAL STANDARDS FOR DETERMINATION OF DISABILITY**

13 In order to qualify for disability benefits, an applicant must show that: (1) he or she
14 suffers from a medically determinable physical or mental impairment that can be expected
15 to result in death, or that has lasted or can be expected to last for a continuous period of not
16 less than twelve months; and (2) the impairment renders the applicant incapable of
17 performing the work that he or she previously performed or any other substantially gainful
18 employment that exists in the national economy. See 42 U.S.C. §§ 423(d)(1)(A), (2)(A).
19 An applicant must meet both requirements to be "disabled." *Id.* The applicant has the
20 burden to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).

21 The Secretary of the Social Security Administration set forth a five-step sequential
22 evaluation process for determining whether a person has established his or her eligibility
23 for disability benefits. *Keyser v. Comm'r Soc. Sec. Admin.*, 648 F.3d 721, 724 (9th Cir.
24 2011); see 20 C.F.R. §§ 404.1520, 416.920. Each step is potentially dispositive. The
25 five steps in the process are as follows:

- 26 1. Is the claimant presently performing a "substantially gainful activity"? If so,
27 then the claimant is not disabled within the meaning of the Social Security
28

1 Act. If not, proceed to step two. See 20 C.F.R. §§ 404.1520(a)(4)(i),
2 404.1520(b), 416.920(b).

3 2. Is the claimant's impairment severe? If so, proceed to step three. If not, then
4 the claimant is not disabled. See 20 C.F.R. §§ 404.1520(a)(4)(ii),
5 404.1520(c), 416.920(c).

6 3. Does the impairment "meet or equal" one or more of the specific
7 impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so,
8 then the claimant is disabled. If not, proceed to step four. See 20 C.F.R.
9 §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(d).

10 4. Is the claimant able to do any work that he or she has done in the past? If so,
11 then the claimant is not disabled. If not, proceed to step five. See 20 C.F.R.
12 §§ 404.1520(a)(4)(iv), 404.1520(e), (e), 416.920(e).

13 5. Is the claimant able to do any other work? If so, then the claimant is not
14 disabled. If not, then the claimant is disabled. See 20 C.F.R.
15 §§ 404.1520(a)(4)(v), 404.1520(f), 416.920(f).

16 See also *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001).

17 In steps one through four, the claimant bears the burden of proof to establish that he
18 is disabled. *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); see *Parra v. Astrue*,
19 481 F.3d 742, 746 (9th Cir. 2007) (finding that the claimant bears the burden "to establish
20 [his] entitlement to disability insurance benefits" at all times). At step five, the
21 Commissioner bears the burden of proof to demonstrate that the claimant is not disabled.
22 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009) (stating that
23 the burden shifts to the Commissioner at step five to show that claimant can do other kinds
24 of work). The Commissioner must show that the claimant can perform other work that
25 exists in significant numbers in the national economy by "taking into consideration the
26 claimant's residual functional capacity, age, education, and work experience." *Tackett v.*
27 *Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999); see also 20 C.F.R. § 404.1566 (describing
28 "work which exists in the national economy"). If the Commissioner meets this burden,

1 then the claimant is not disabled. Bustamante, 262 F.3d at 954. However, if the
2 Commissioner fails to meet this burden, then the claimant is disabled. Id.

3 **III. BACKGROUND**

4 On June 13, 2012 Plaintiff filed an application under Title II for disability insurance
5 benefits and an application under Title XVI for supplemental security income, alleging
6 disability beginning June 4, 2012. (Administrative Record [“AR”] 163-75.) Plaintiff’s
7 claims were denied initially on September 28, 2012, (AR 45-63, 105-09), and upon
8 reconsideration on August 22, 2013 (AR 63-88, 113-18).

9 Subsequently on October 3, 2013, Plaintiff requested a de novo hearing before an
10 ALJ. (AR 121-22.) On June 20, 2014, the ALJ, Michael Radensky conducted a hearing
11 (“ALJ Hearing”). (AR 17-44.) Plaintiff appeared, represented by Bill Latour and Chris
12 Davis. (AR 19, 92.) Kristan Cicero, an impartial vocational expert (“VE”), also testified.
13 (AR 38-42.) In a decision dated September 25, 2014 (“ALJ Decision”), the ALJ found that
14 Plaintiff was not disabled as defined by the Social Security Act. (AR 89-104.) Following
15 the ALJ’s adverse decision, Plaintiff timely filed a Request for Review with the Social
16 Security’s Appeals Council. (AR 15-16.) Plaintiff submitted contentions and additional
17 medical records in support of the Request for Review, which the Appeals Council
18 considered in denying Plaintiff’s request of the ALJ Decision. (AR 4, 244, 523-620.)
19 When the Appeals Council declined to review the ALJ Decision on May 10, 2016, it
20 became the final decision of the Commissioner. (See AR 3-8.) Plaintiff then commenced
21 this action for judicial review pursuant to 42 U.S.C. § 405(g).

22 **A. Adult Function Report**

23 In her Adult Function Report dated August 20, 2013, Plaintiff stated that during the
24 day she “lays in bed or sits in a chair most of the time because she has to stay off of [her]
25 ankle.” She uses her cane to walk and wears an ankle brace. She states that the more she
26 is on her ankle, the more it hurts; then she has to take pain medication which makes her
27 sleep, so she has to stay home. (AR 216.) She reports that she can dress, shower, and go
28 to the bathroom unassisted. She gets help with the preparation of food due to her inability

1 to stand, and she frequently walks with a cane. (AR 217.) She makes frozen dinners and
2 prepares food monthly; she used to make full course meals but no longer can. She does
3 laundry and cleans her room once a month. (AR 218.) She still drives and goes shopping
4 for food once a month. (AR 219.) Additionally, she attends church regularly. (AR 220.)
5 She states that her condition affects her ability to lift, squat, stand, reach, walk, sit, climb
6 stairs, her memory, concentration, and to get along with others. She states she can walk
7 for sixteen to twenty steps and then rests for about three to five minutes. She pays attention
8 for five to ten minutes.¹ (AR 221.) She reports that she is currently living with family.
9 (AR 216.)

10 **B. HEARING BEFORE THE ALJ**

11 **1. Plaintiff's Testimony**

12 At the June 20, 2014 ALJ Hearing, Plaintiff testified that she last worked in June of
13 2012. At that time, she injured herself trying to pick up a patient while working as a
14 caregiver. As a result, she hurt her ankle and left shoulder. She has tried to apply for other
15 work since that time, but due to restrictions she conveyed to potential employers, she has
16 not been hired. (AR 20.) She testified that she told potential employers that she is unable
17 to lift over fifteen to twenty pounds, can only sit for a short period of time, has to get up
18 and walk around, that her shoulder will sometimes give her pain, and when it does, she
19 must get up and rotate it. She testified that those restrictions "interfere[] with . . . doing a
20 full four or eight hour job." (AR 21.)

21 Plaintiff further testified that there is a worker's compensation case pending
22 regarding her injury, and that she is currently using food stamps and is being supported by
23 family members. At the time of the hearing, she was 62 years old with a Bachelor of
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25
26 ¹ In medical records dated January 22, 2014, Plaintiff's complaints that she has difficulty "wearing heels"
27 and "dancing" are noted. Exercising increases her pain. (AR 414.) Further, a list of Plaintiff's daily
28 activities includes: activities of self-care, standing, sitting, reclining, climbing a flight of stairs, rising from
a chair, completing light housework, running errands, getting in and out of a car, and making meals. (AR
415.)

1 Science degree in business management. (AR 21-22.)

2 The ALJ asked a series of questions related to Plaintiff's most recent medical records
3 from her worker's compensation case and the fact that doctors are not placing many
4 restrictions on her ability to sit, stand, walk, or lift/carry. (AR 22-29.) In response to the
5 ALJ's assertion that Dr. Bret C. Powers cleared Plaintiff to return to work without
6 restrictions in September 2013, Plaintiff testified that Dr. Powers "did her shoulder,"
7 wanted to perform surgery on her shoulder, and that she cannot lift her shoulders above her
8 head. (AR 23.) When the ALJ noted that Dr. Powers does not place any limits on the
9 Plaintiff based on her shoulder, Plaintiff responded that "[U]nfortunately, I can't control
10 what they write." (AR 23.) Next, when asked about Dr. Baback Alavynehad's treatment
11 of her ankle and the fact that he had cleared Plaintiff to return to work at a sit down job
12 (see AR 35 [citing Ex. 4-F]), Plaintiff testified that "she did surgery on my ankle" and that
13 her "ankle did not heal the way it was supposed to." (AR 23.)

14 The ALJ then asked Plaintiff about how given the aforementioned opinions and two
15 other medical opinions that restricted Plaintiff to (1) "no speed walking" and limited her
16 lifting to twenty-five pounds and (2) limited her lifting to twenty-five pounds and restricted
17 her standing and walking to no more than six hours in an eight hour day, what stops her
18 from being able to perform her past customer service job. (AR 24.) Plaintiff testified that
19 she cannot get up and get records quickly and her foot has to be elevated. Further, that
20 they would not fix her desk if she had to move desks by moving her computer for her. (AR
21 22, 24.) The ALJ then noted that none of the opinions say that her foot has to be elevated.
22 (AR 24.) Later at the ALJ hearing, Plaintiff's counsel clarified that as documented in
23 Exhibit 5-F, she had been experiencing ankle swelling and was told to elevate her ankle
24 during the day. (AR 35 [citing Ex. 5F at 5-7].) Counsel admitted that this was not a "strict
25 diagnosis", but it is a "recommendation." (AR 35.)

26 Plaintiff testified that Dr. Alavynehad referred her to a pain specialist, Dr. Raafat N.
27 Mattar, who she was currently seeing at the time of the ALJ Hearing. (AR 25-26.) Further,
28 Plaintiff testified that Dr. Alavynehad told her the she could not go back to being a

1 customer service representative because of the pain she was suffering. She noted that “he
2 was pleased with the range of motion” and “was hoping that maybe after a year or two [the
3 pain] would go away, but it did not.” She testified the “pain is still there and the range of
4 motion has gotten worse.” (AR 25-26.) Further, she testified that because she only has
5 one kidney, she is unable to take anti-inflammatory medication so her ankle stays swollen
6 – the more she walks or does things in a standing position, the more it swells up. (AR 26.)
7 She testified that Dr. Mattar referred her to an orthopedic doctor for a second opinion who
8 wants to have an MRI performed, it has not taken place yet as “the insurance company is
9 slow to okay” it. She further testified that physical therapy “didn’t do anything” and
10 acupressure made the ankle worse. (AR 26.)

11 Plaintiff testified that “if I was in a position where I really could do the work as a
12 customer service rep and have my feet in a sitting position, because that is what is expected,
13 then I would do it.” (AR 27.) Further she stated that being 62 and coming in with
14 restrictions to work does not look good on an application. (AR 27.) She admitted that she
15 “wasn’t aware of some of the things [her doctors] said because it’s not what they said to”
16 her. (AR 28.) She also stated she cannot wear any other shoes besides flat shoes, and that
17 she in essence does not think that appropriate in a work environment. (AR 28-29.) She
18 wears an ankle brace all the time. (AR 29.)

19 Plaintiff was given a gel anti-inflammatory, Voltaren, and Norco for pain. She stated
20 that Norco “puts [her] to sleep, which would be difficult to take during the day and do a
21 job because you would feel sleepy after you take it.” (AR 29.) She has been prescribed
22 Voltaren gel and Gabapentin. (AR 29-30.) She testified that the Voltaren gel has not
23 started helping yet, but that she will “give it time.” She testified her next appointment with
24 pain specialist Dr. Mattar was scheduled for July, and she hopes the MRI will be approved
25 by insurance so that “he’ll know a better way to treat [her] pain.” (AR 31.)

26 Plaintiff testified that she lives by herself and her children check in on her. She
27 drives and does her own laundry. She does not cook, and instead buys frozen meals. She
28 does her own grocery shopping because she is able to “lean on the shopping basket to do

1 what I got to do.” She testified that she reads about three to four hours a day. She meditates
2 forty-five minutes a day. She goes to church every Sunday and has a young dog whose
3 poop she picks up in the backyard. She testified that her dog “was a pup” when she got
4 him, around a year and half to two years before the ALJ Hearing.² (AR 31-35.)

5 Plaintiff testified that as far as osteoarthritis, she only experiences major joint pain
6 throughout the body “only if [she has] been overdoing it.” (AR 36.) For example, after
7 going to two to three different stores, when she returns home “that’s when [she feels] like
8 the real pain.” (AR 36.) She testified that she then puts her groceries away, elevates her
9 ankle, ices it, takes her medication, and goes to sleep. Further, she testified that this is why
10 she does not “indulge in cooking” frequently, as she would be on her feet, and due to her
11 habit of washing her pots and pans as she goes, she is on her feet so much that it makes her
12 ankle hurt “like someone just comes up and just kicks [her] in the back of [her] ankle.”
13 (AR 36.)

14 Plaintiff was given an ankle wrap, which she always wears. If she does not wear it,
15 “sometimes [her] ankle will just give out.” (AR 37.) She testified she would not be able
16 to be on her feet for four hours during an eight hour day. She stated she could stand for at
17 most five to ten minutes, and then she would need to elevate her ankle. (AR 37-38.) She
18 does not use cortisone shots in her ankle; they only work in her shoulder. (AR 38.)

19 **2. Vocational Expert Testimony**

20 The ALJ also called Vocational Expert Kristan Cicero (“VE”) to testify. (AR 38.)
21 The VE testified as to Plaintiff’s past work and stated that Plaintiff has worked as: (1) a
22 home attendant (Dictionary of Occupational Titles Code 354.377-014), which is classified
23 as a medium, semi-skilled position; (2) a massage therapist (Dictionary of Occupational
24 Titles Code 334.374-010), which is classified as a medium, semi-skilled position, but the
25 job was heavy as performed by Plaintiff; and (3) a customer service representative
26 (Dictionary of Occupational Titles Code 241.367-014), which is classified as a sedentary,
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28 ² Thus, Plaintiff began caring for this young dog after her alleged disability onset date of June 4, 2012.

1 skilled position, but the job was medium as performed by Plaintiff. (AR 39.)

2 The ALJ asked the VE four hypotheticals to determine whether an individual would
3 be able to return to any of Plaintiff's past positions "who is closely approaching retirement
4 age, has a Bachelor's degree and the past work that [the VE] just identified." (AR 40.)
5 Under the first hypothetical, in which the individual is limited to light work, standing and
6 walking four hours in an eight hour day, occasional postural activities, "no ladders,
7 scaffolds, or ropes; occasional above shoulder reaching with the left upper extremity; avoid
8 concentrated exposure to extreme cold, vibration, and pulmonary irritants; no unprotected
9 heights or dangerous machinery," the VE testified that the individual could perform the
10 customer service representative position as generally, but not actually performed. (AR 40-
11 41.) Under the second hypothetical, if the individual's ability to stand and walk was limited
12 to two hours in an eight hours day, the VE testified that would not affect the individual's
13 ability to perform the customer service job as normally performed. (AR 41.) Under the
14 third hypothetical, if the individual was allowed to elevate her foot about six inches off the
15 floor on an as needed basis, the VE testified that would not affect the individual's ability
16 to perform the customer service job as normally performed. (AR 41.) Finally, in the fourth
17 hypothetical the VE opined that if an individual needed an additional ten minute break once
18 per hour in addition to regularly scheduled breaks to alleviate pain and swelling, she would
19 not be able to maintain employment. (AR 41.)

20 **IV. ALJ's FINDINGS**

21 On September 25, 2014, the ALJ issued his decision denying Plaintiff's application
22 for a period of disability and disability insurance benefits as well as her application for
23 supplemental social security income. (AR 89.) In arriving at his decision, the ALJ applied
24 the Commissioner's five-step sequential disability determination process set forth in 20
25 C.F.R. § 416.920(a). (See AR 93-94.) At step one, the ALJ found that Plaintiff had not
26 engaged in substantial gainful activity during the relevant period. Accordingly, the ALJ
27 found that Plaintiff satisfied step one. (AR 94.)

28 At step two, the ALJ found that Plaintiff suffered from the following severe

1 impairments: (1) history of right ankle injury; (2) migraine headaches; and (3) back pain.
2 Thus, with regard to Plaintiff's listed severe impairments, the ALJ found that Plaintiff
3 satisfied step two. (AR 94.) The ALJ considered Plaintiff's alleged symptoms of
4 depression and rejected it as a medically determinable impairment. (AR 95.)

5 At step three, the ALJ found that Plaintiff did not have an impairment or combination
6 of impairments that met or medically equaled one of the listed impairments under medical
7 listing 20 C.F.R. Part 404, Appendix 1 to Subpart P. Specifically, the ALJ noted that no
8 treating or examining physician identified findings equivalent in severity to the criteria of
9 any listed impairments. The ALJ, therefore, proceeded to step four. (AR 95.)

10 The fourth and fifth steps require the ALJ to determine how the claimant's
11 impairments affect the claimant's ability to perform work. To make this determination, the
12 ALJ formulates the claimant's Residual Functional Capacity ("RFC") assessment. The
13 RFC is used at step four of the sequential evaluation process to determine whether an
14 individual is able to do past relevant work. See 20 C.F.R. § 404.1545(a)(1) (defining an
15 RFC as "the most [a claimant] can still do despite [his or her] limitations"). An RFC is
16 used "at step five to determine whether an individual is able to do other work, considering
17 his or her age, education, and work experience." Social Security Ruling ("SSR") 96-8p.

18 Here, the ALJ found Plaintiff had the RFC to perform "light work" as defined in 20
19 CFR § 404.1567(b) and § 416.967(b)³ except "standing/walking is reduced to four hours
20 out of an eight-hour day. Occasionally, the claimant can perform postural activities but no
21 ladders, scaffolds, or ropes. The claimant can occasionally perform above shoulder
22 reaching with the left upper extremity, but she should avoid concentrated exposure to
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24 ³ Pursuant to both 20 C.F.R. § 404.1567(b) and § 416.967, light work "involves lifting no more than 20
25 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the
26 weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing,
27 or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be
28 considered capable of performing a full or wide range of light work, you must have the ability to do
sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit
for long periods of time."

1 extreme cold, vibration, pulmonary irritants, and there should be no unprotected heights or
2 dangerous machinery.” (AR 95.) The ALJ noted that “in making this finding, the
3 undersigned has considered all symptoms and the extent to which these symptoms can be
4 reasonably accepted as consistent with the objective medical evidence and other
5 evidence. . . .” (AR 95.)

6 The ALJ summarized Disability Reports provided by Plaintiff on which she claimed
7 that she was unable to work due to an injury to her left shoulder and ankle, as well as
8 depression and chronic migraines. (AR 96 [citing Exs. 2E and 5E].) Due to these
9 conditions, she alleged she had difficulty “lifting, squatting, standing, reaching, walking,
10 sitting, climbing stairs, completing tasks, concentrating, understanding, and getting along
11 with others.” (AR 96 [citing Ex. 5E].) In developing the RFC, the ALJ found Plaintiff’s
12 statements “not entirely credible” with respect to the intensity, persistence and limiting
13 effects of her allegedly disabling impairments for the following reasons. (AR 96.)

14 First, the ALJ stated that her daily activities of driving, shopping, cooking, cleaning,
15 reading, writing, caring for her small dog, and attending church on a weekly basis, were
16 inconsistent with the debilitating symptoms alleged and that “the physical and mental
17 abilities as well as social interactions required to perform these activities show some ability
18 to work.” (AR 96.) Specifically, the ALJ found that Plaintiff’s claimed drowsiness as a
19 side effect from the use of medication is (1) not documented in the medical records and
20 (2) inconsistent with her testimony that she continues to drive. Further, her ability to drive
21 contradicts her alleged impairment of an inability to concentrate. (AR 96.)

22 Second, the ALJ found that Plaintiff’s “limited work history before the alleged
23 disability onset date raises questions as to whether the claimant’s current unemployment is
24 actually the result of her medical problems.” (AR 96 [citing Ex. 6D].)

25 Third, the ALJ found that the Plaintiff’s credibility as to the severity of her symptoms
26 and limitations to be diminished because those allegations were not supported by objective
27 medical evidence in the record. (AR 96-99.) The ALJ recounted that the claimant
28 “reportedly sustained a work-related injury to her right ankle and left shoulder when she

1 lifted her daughter who had fallen” in June 2012. (AR 97.) He noted that the record
2 indicated she also suffered from chronic migraines and back pain. Citing Exhibits 1F, 2F,
3 7F, and 8F, the ALJ noted that Plaintiff “had a limited and painful range of motion of the
4 left shoulder and her grip strength with her left hand was reportedly zero pounds.” (AR
5 97.) An MRI of her left shoulder showed a possible superior posterior labral tear, but her
6 rotator cuff appeared intact (AR 97 [citing Ex. 7F].) Critically, the ALJ highlighted that a
7 treating physician noted Plaintiff made “questionable effort” during her grip strength
8 testing. (AR 97 [citing Ex. 7F].) As to her ankle, the ALJ stated the claimant reportedly
9 “had a right antalgic gait” and “wore an ankle brace and used a cane in her right hand.”
10 Citing Exhibits 2F, 7F, 8F, and 9F, he noted there was no swelling but tenderness to
11 palpitation over several ligaments coupled with a limited range of motion. An MRI
12 revealed a chronic anterior talofibular ligament tear, osteonecrosis of the talar dome, and
13 chronic tear of the peroneus longus. (AR 97.)

14 At a September 2012 orthopedic consultative examination by Dr. Vicente Bernabe,
15 Plaintiff complained of ankle, shoulder, and back pain, but ambulated without her cane,
16 instead just carrying it in her hand. The doctor opined that it was not a medical necessity,
17 full range of motion of the spine without pain. Examination of Plaintiff’s left shoulder
18 revealed positive impingement sign with pain and crepitus at the acromioclavicular joint;
19 examination of the right ankle showed tenderness to palpitation, but otherwise normal
20 range of motion. Dr. Bernabe opined that claimant could carry fifty pounds occasionally
21 and twenty-five frequently, walk/stand six out of eight hours a day, and could occasionally
22 perform overhead motion with the left upper extremity. (AR 97 [citing Ex. 1F].)

23 In April 2013, Plaintiff underwent surgery to repair her ankle injury. (AR 97-98
24 [citing Ex. 3F].) Following this surgery, in June 2013 Plaintiff’s treating physician Dr.
25 Alavynejad “reported that the claimant did not walk with a limp,” “had mild tenderness to
26 palpation”, “4/5 muscle strength” and “good range of motion.” (AR 98 [citing 4F].) By
27 August 20, 2013, Plaintiff had “5/5 muscle strength, full range of motion of the ankle joint,
28 and no tenderness to palpitation.” (AR 98 [citing 9F].)

1 Additionally, in developing Plaintiff’s RFC the ALJ considered numerous medical
2 opinions, several of which were treating or examining physicians who cleared Plaintiff to
3 return to work with varying restrictions in place over the course of her recovery. He noted
4 that in June 2013, Dr. Alavynejad opined that Plaintiff could return to work in a “sit down
5 job,” limited to standing or walking for four hours out of an eight hour day, and could lift,
6 push, and pull up to ten pounds. (AR 98 [citing Exs. 4F and 5F].) The ALJ specifically
7 noted that Dr. Alavynejad did not “indicate that elevating [her] ankle was necessary.” (AR
8 98 [citing Ex. 5F].) In August 2013, Dr. Alavynejad assessed that Plaintiff could return to
9 work with “limited standing and walking for six hours a day and lifting, pulling, and
10 pushing no more than twenty-five pounds.” In October 2013, he added the limitation that
11 Plaintiff could not speed walk. (AR 98 [citing Ex. 9F].) A physician’s assistant under the
12 supervision of Dr. Paul Kim opined that Plaintiff could return to a sit down job with
13 standing or walking restricted to five hours a day. (AR 98 [citing Ex. 7F].) The ALJ gave
14 “some weight” to these medical opinions because these professionals examined the
15 Plaintiff. However, he adopted specific restrictions “on a function-by-function basis that
16 are best supported by the objective evidence as a whole as well as generously
17 accommodating [Plaintiff’s] subjective complaints.” (AR 98.) Critically, the ALJ noted
18 that “the objective medical evidence does not show that [her] recovery time lasted 12
19 continuous months.” (AR 98.)

20 Further, the ALJ considered Dr. Bret C. Powers’ various opinions documented
21 throughout the course of her recovery, spanning from Plaintiff being restricted to lifting,
22 pushing, and pulling ten pounds, no overhead work, and no prolonged standing and
23 walking (citing Ex. 7F) to his ultimate conclusion that Plaintiff could return to work
24 “without restriction” (citing Ex. 8F) . (AR 98-99.) Again, the ALJ gave Dr. Powers’
25 opinions “some weight”, as the ten pound weight restriction was overly restrictive in light
26 of overall evidence. However, he gave “no weight” to Dr. Powers’ opinion that Plaintiff
27 could return to work without any restrictions. (AR 99.)

28 The ALJ gave little weight to the opinions of state agency medical consultant and

1 orthopedic consultative examiner at the initial level as evidence received after they
2 rendered their opinions showed Plaintiff was more limited than they originally determined
3 (citing Exs. 2A, 4A, 1F]), and he found the opinions regarding Plaintiff's "temporarily
4 totally disabled" in the context of her workers' compensation case were irrelevant and
5 inapplicable under Social Security Act standards. (AR 99.) He did consider all objective
6 clinical and diagnostic evidence used by physicians in reaching that conclusion however.

7 The ALJ gave "great weight" to the state agency medical consultant opinion at the
8 reconsideration level because the medical consultant was able to review additional
9 evidence that the consultant did not have at the initial level. After reviewing this evidence,
10 the medical consultant opined Plaintiff could perform work at the "light exertional level."
11 (AR 99.) The ALJ concluded that "the evidence as a whole supports the RFC assessed by
12 this decision" as the "objective findings, treatment records, consultative examination and
13 State Agency consultants' opinions, support a finding that the claimant is not disabled."
14 (AR 99.)

15 Finally, the ALJ considered the VE's testimony as described above and concluded
16 that Plaintiff is capable of performing her past work as a customer service representative,
17 classified as a sedentary exertional level occupation by the Dictionary of Occupational
18 Titles and as a medium exertional level occupation as described by Plaintiff. Of note, the
19 ALJ found that Plaintiff "would be able to perform the past relevant work of customer
20 service representative as generally performed in the regional and national economy, but
21 not as actually performed" by Plaintiff. (AR 99-100.) The ALJ found that this work "does
22 not require the performance of work-related activities precluded by [Plaintiff's RFC]."
23 (AR 99.)

24 He therefore concluded that Plaintiff is "not disabled" as defined by the Social
25 Security Act. (AR 100.)

26 **V. SCOPE OF REVIEW**

27 Section 405(g) of the Social Security Act allows unsuccessful applicants to seek
28 judicial review of a final agency decision. 42 U.S.C. § 405(g). The scope of judicial review

1 is limited. See *id.* This Court has jurisdiction to enter a judgment affirming, modifying,
2 or reversing the Commissioner’s decision. See *id.*; 20 C.F.R. § 404.900(a)(5). The matter
3 may also be remanded to the Social Security Administration for further proceedings. 42
4 U.S.C. § 405(g).

5 The Commissioner’s decision must be affirmed upon review if it is: (1) supported
6 by “substantial evidence” and (2) based on proper legal standards. *Uklov v. Barnhart*, 420
7 F.3d 1002, 1004 (9th Cir. 2005). If the Court, however, determines that the ALJ’s findings
8 are not supported by substantial evidence or are based on legal error, the Court may reject
9 the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d
10 1033, 1035 (9th Cir. 2001). Substantial evidence is more than a scintilla but less than a
11 preponderance. *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). It is “relevant
12 evidence that, considering the entire record, a reasonable person might accept as adequate
13 to support a conclusion.” *Lewis v. Apfel*, 236 F.3d 503, 509 (9th Cir. 2001); see also
14 *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (finding substantial
15 evidence in the record despite the ALJ’s failure to discuss every piece of evidence).
16 Moreover, “where evidence is susceptible to more than one rational interpretation,” the
17 ALJ’s conclusion must be upheld. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).
18 This includes deferring to the ALJ’s credibility determinations and resolutions of
19 evidentiary conflicts. See *Lewis*, 236 F.3d at 509. Nevertheless, the Court “must consider
20 the entire record as a whole and may not affirm simply by isolating a specific quantum of
21 supporting evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006).

22 VI. DISCUSSION

23 Plaintiff argues that the ALJ erred in failing to articulate “clear and convincing”
24 reasons for discounting her credibility as to her subjective limitations. (ECF No. 15-1 at
25 3.) Specifically, she argues that (1) the ALJ sets forth boilerplate language that is
26 insufficient as it “yields no clue to what weight the trier of fact gave the testimony” and
27 (2) the ALJ rejected Plaintiff’s testimony solely because it lacked support in the objective
28 medical evidence. (*Id.* at 7.) She asks the Court to reverse the final decision of the

1 Commissioner and order the payment of benefits, or in the alternative remand for further
2 administrative proceedings. (ECF No. 15 at 2.)

3 The Commissioner opposes Plaintiff’s motion and cross moves for summary
4 judgment, arguing the ALJ properly assessed Plaintiff’s credibility. (ECF Nos. 18-1.) For
5 reasons explained below,⁴ the Court concludes that the ALJ articulated “specific, clear and
6 convincing reasons” supported by substantial evidence in the record to discredit Plaintiff’s
7 statements concerning the intensity, persistence and limiting effects of her symptoms.

8 **A. Plaintiff’s Claimed Limitations and ALJ’s Findings**

9 Regarding her claimed limitations, Plaintiff summarizes them as follows. At the
10 hearing she testified about the nature and extent of her condition. She stopped work in
11 June 2012 when she hurt her left shoulder and ankle picking up a patient at work who fell.
12 (ECF No. 15-1 at 5 [citing AR 20].) She can stand for five to ten minutes, and then would
13 need to sit down and elevate her ankle. (Id. [citing AR 37-38].) Plaintiff only makes
14 microwave dinners and does not cook. (Id. [citing AR 32].) Plaintiff does her grocery
15 shopping for thirty minutes once a month but must lean on the cart while doing so. (Id.
16 [citing AR 32, 219].) She takes Norco and Gabapentin for pain. (Id. [citing AR 29-30].)

17 The ALJ summarized Plaintiff’s claimed limitations as follows. On the disability
18 reports the claimant alleged that she was unable to work due to an injury to her left shoulder
19 and right ankle as well as depression and chronic migraines. (AR 96 [citing Exs. 2E and
20 5E].) Due to these conditions, Plaintiff purported that she had difficulty lifting, squatting,
21 standing, reaching, walking, sitting, climbing stairs, completing tasks, concentrating,
22 understanding, and getting along with others. (AR 96 [citing Ex. 5E].) During the ALJ
23 Hearing, Plaintiff reported that she had tried to look for work, but due to her limitations,
24 employers were not able to employ her. Concerning her physical abilities, she reported
25 that she could lift up to twenty pounds, but she could only sit for a short time because her
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28 ⁴ All relevant medical evidence cited by the ALJ is discussed only as is necessary to give context to the reasoning set forth in the ALJ Decision.

1 ankle needed to be elevated. In addition to elevating her ankle, Plaintiff stated that she also
2 put ice on her ankle, took prescribed pain medication, and wore an ankle brace. (AR 96.)

3 The ALJ concluded that Plaintiff had an RFC to perform light work, except her
4 standing/walking is reduced to four hours out of an eight hour day. Occasionally, the
5 claimant can perform postural activities but no ladders, scaffolds, or ropes. She can
6 occasionally perform above shoulder reaching with the left upper extremity, but she should
7 avoid concentrated exposure to extreme cold, vibration, and pulmonary irritants, and there
8 should be no unprotected heights or dangerous machinery. (AR 95.)

9 **B. Relevant Law**

10 The ALJ has a “well-settled role as the judge of credibility.” *Matthews v. Shalala*,
11 10 F.3d 678, 680 (9th Cir. 1993) (quoting *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.
12 1982)). Accordingly, the ALJ’s assessment of a claimant’s credibility and pain severity
13 should be given “great weight.” *Dominguez v. Colvin*, 927 F. Supp. 2d 846, 865 (9th Cir.
14 2003) (citing *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986)). The ALJ is not
15 “required to believe every allegation of disabling pain, or else disability benefits would be
16 available for the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A).” *Molina v.*
17 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (quoting *Fair v. Bowen*, 885 F.2d 597, 603
18 (9th Cir. 1989)).

19 The Ninth Circuit has established a two-step analysis for the ALJ to evaluate the
20 credibility of a claimant’s testimony regarding subjective pain and impairments.⁵ *Vasquez*
21

22
23 ⁵ Although the second step has previously been termed a credibility determination, recently the Social
24 Security Administration (“SSA”) announced that it would no longer assess the “credibility” of an
25 applicant’s statements, but would instead focus on determining the “intensity and persistence of [the
26 applicant’s] symptoms.” See SSR 16-3p, 81 FR 14166-01, 2016 WL 1020935 (Mar. 16, 2016) (“We are
27 eliminating the use of the term ‘credibility’ from our sub-regulatory policy, as our regulations do not use
28 this term. In doing so, we clarify that subjective symptom evaluation is not an examination of an
individual’s character.”); see also SSR 16-3p, 2016 WL 1237954, *1 (Mar. 24, 2016) (correcting SSR 16-
3p effective date to read March 28, 2016). Social Security Rulings reflect the SSA’s official interpretation
of pertinent statutes, regulations, and policies. 20 C.F.R. § 402.35(b)(1). Although they “do not carry the
force of law,” Social Security Rulings “are binding on all components of the [SSA]” and are entitled to
deference if they are “consistent with the Social Security Act and regulations.” 20 C.F.R. § 402.35(b)(1);

1 v. Astrue, 572 F.3d 586, 591 (9th Cir. 2008) (citing *Lingenfelter v. Astrue*, 504 F.3d 1028,
2 1035-36 (9th Cir. 2007)). First, the ALJ must determine whether the claimant presented
3 objective medical evidence of an impairment or impairments that could reasonably be
4 expected to produce the pain or other alleged symptoms. *Id.* Second, if the claimant
5 satisfies the first step and there is no affirmative evidence of malingering, the ALJ may
6 reject the claimant’s testimony only if he provides “specific, clear and convincing reasons”
7 for doing so. *Id.*; see also *Parra*, 481 F.3d at 750 (citing *Lester v. Chater*, 81 F.3d 821,
8 834 (9th Cir. 1995)). These reasons must be “sufficiently specific to permit the court to
9 conclude that the ALJ did not arbitrarily discredit the claimant’s testimony.” *Turner v.*
10 *Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 n.3 (9th Cir. 2010) (quoting *Smolen*, 80 F.3d at
11 1284)). These reasons must be supported by substantial evidence in the record.
12 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008).

13 In weighing the credibility of the claimant’s testimony, the ALJ may use “ordinary
14 techniques of credibility determination.” *Id.* The ALJ may consider at least the following
15 when assessing a claimant’s credibility: (1) her reputation for truthfulness;
16 (2) inconsistencies in either her testimony or between her testimony and her conduct;
17 (3) her daily activities; (4) her work records; and (5) testimony from physicians and third
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20 *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009) (citations and quotation marks
21 omitted). As the Ninth Circuit recently acknowledged, SSR 16-3p “makes clear what our precedent
22 already required: that assessments of an individual’s testimony by an ALJ are designed to ‘evaluate the
23 intensity and persistence of symptoms after [the ALJ] find[s] that the individual has a medically
24 determinable impairment(s) that could reasonably be expected to produce those symptoms,’ and not to
25 delve into wide-ranging scrutiny of the claimant’s character and apparent truthfulness.” *Trevizo, v.*
26 *Berryhill*, No. 15-16277, 862 F.3d 987, 2017 WL 2925434, at *9 n.5 (9th Cir. July 10, 2017); see also
27 *Cole v. Colvin*, 831 F.3d 411, 412 (7th Cir. 2016) (Posner, J.) (“The change in wording is meant to clarify
28 that administrative law judges aren’t in the business of impeaching claimants’ character; obviously
administrative law judges will continue to assess the credibility of pain assertions by applicants, especially
as such assertions often cannot be either credited or rejected on the basis of medical evidence.”) SSR 16-
3p became effective after the issuance of the ALJ Decision in the instant case. Compare SSR 16-3p, 2016
WL 1237954, *1 (Mar. 24, 2016) (correcting SSR 16-3p effective date to read March 28, 2016), with (AR
89 [ALJ Decision dated September 25, 2014]). Nonetheless, the applicability of SSR 16-3p need not be
resolved here since the ALJ’s evaluation of Plaintiff’s subjective limitations in this case passes muster
whether SSR 16-3p or its predecessor, SSR 96-7p, governs.

1 parties concerning the nature, severity and effect of her condition. *Light v. Soc. Sec.*
2 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th
3 Cir. 2002); *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995) (quoting *Orteza v.*
4 *Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995)); 20 C.F.R. § 404.1529(c). If an ALJ’s
5 credibility finding is supported by substantial evidence in the record, then a reviewing court
6 must not “second-guess” it. *Thomas*, 278 F.3d at 959.

7 Furthermore, even if one or more reasons listed by the ALJ are invalid, so long as
8 the ALJ provides some valid reasons, his credibility determination will be upheld.
9 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (an ALJ’s
10 citation to erroneous reasons is harmless so long as the “remaining reasoning and ultimate
11 credibility determination were adequately supported by substantial evidence”).

12 **C. The ALJ Properly Set Forth “Specific, Clear and Convincing” Reasons**
13 **Supported by Substantial Evidence in the Record To Substantiate His**
14 **Credibility Determination Regarding Plaintiff’s Testimony**

15 Plaintiff satisfied the first step of the two-step credibility analysis as the ALJ
16 determined that she presented objective medical evidence of medically determinable
17 impairments that could reasonably be expected to cause some of her alleged symptoms.
18 (AR 96.) As regards step two, the ALJ found that Plaintiff’s statements “concerning the
19 intensity, persistence and limiting effects of these symptoms are not entirely credible for
20 the reasons explained in this decision.” (AR 96.) Therefore, the only remaining issue is
21 whether the ALJ provided “specific, clear and convincing reasons” for discounting
22 Plaintiff’s subjective pain and limitations testimony. See *Tommasetti*, 533 F.3d at 1039.

23 As to step two, Plaintiff argues that the ALJ failed to articulate sufficient reasons to
24 find her not credible. (ECF No. 15-1 at 4.) In particular Plaintiff focuses on the ALJ’s
25 finding that Plaintiff’s “statements concerning the intensity, persistence and limiting
26 effects of these symptoms are not entirely credible for the reasons explained in this
27 decision.” (*Id.* at 6.) Plaintiff argues this conclusory statement is wholly insufficient. *Id.*
28 at 6-7 (citing *Bjorson v. Astrue*, 671 F.3d 640, 645 (7th Cir. 2012)). However, Plaintiff

1 conveniently ignores the last phrase of that sentence, namely, “for the reasons explained in
2 this decision.” The ALJ in his decision expressly details his reasons for discrediting her
3 testimony. Here, the ALJ did not merely provide boilerplate language. As explained
4 below, the ALJ informed this Court in a meaningful, reviewable way of the specific
5 evidence that he used to make his credibility determination. (See AR 96-98.) As such, the
6 Court finds that the ALJ did not make a baseless, conclusory statement to discredit some
7 of Plaintiff’s testimony as Plaintiff argues. Thus, Plaintiff’s first argument for summary
8 judgment fails.

9 Next, Plaintiff argues that the ALJ simply rejected her testimony based on a belief
10 that the testimony was not credible because it lacks support in the objective medical
11 evidence which she argues is a “legally insufficient” reason. (ECF No. 15-1 at 7-8.)
12 Further, Plaintiff argues that her description of her daily activities does not provide any
13 indication that she can do what is required of substantial gainful work. (Id. at 9-11.)

14 Upon review of the ALJ Decision and the Administrative Record, the Court
15 **RECOMMENDS** a finding that the ALJ properly set forth “specific, clear and convincing
16 reasons” supported by substantial evidence in the record for discounting Plaintiff’s
17 subjective limitations testimony. The ALJ stated the following reasons for finding
18 Plaintiff’s testimony to not be credible: (1) her daily activities were inconsistent with her
19 subjective limitations and demonstrated an ability to work, and specifically that her
20 continued ability to drive contradicted her allegations of impaired concentration and
21 excessive drowsiness due to medication; (2) her limited work history before the alleged
22 disability onset date “raises questions as to whether [her] current unemployment is actually
23 the result of medical problems”; and (3) the objective clinical and diagnostic findings in
24 the record did not support the severity of her physical symptoms and limitations. (AR 96-
25 99.) The Court considers the validity of the ALJ’s stated reasons below.

26 **1. Plaintiff’s Daily Activities**

27 An “ALJ [is] permitted to consider daily living activities in his credibility analysis.”
28 Burch, 400 F.3d at 681; see also SSR 16-3p (“In addition to using all of the evidence to

1 evaluate the intensity, persistence, and limiting effects of an individual’s symptoms, we
2 will also use the factors set forth in 20 CFR §§ 404.1529(c)(3), 416.929(c)(3). These factors
3 include: [1] Daily activities”). An ALJ may discredit a claimant’s testimony when she
4 reports participation in everyday activities indicating capacities that are transferable to a
5 work setting. See *Molina*, 674 F.3d at 1112-13; 20 C.F.R. § 404.1529(c)(3)(i). Further,
6 the inconsistency between a claimant’s alleged symptoms and her daily activities, is
7 sufficient to support a finding that Plaintiff was not entirely credible. See *Lingenfelter*, 504
8 F.3d at 1040 (in determining credibility, an ALJ may consider “whether claimant engages
9 in daily activities inconsistent with alleged symptoms”); *Molina*, 674 F.3d at 1112-13
10 (affirming the ALJ’s adverse credibility determination where the plaintiff’s symptom
11 testimony was inconsistent with her daily activities throughout the disability period and the
12 medical evidence). Specifically, daily activities may be grounds for discrediting a
13 claimant’s testimony when a claimant “is able to spend a substantial part of his day engaged
14 in pursuits involving the performance of physical functions that are transferable to a work
15 setting.” *Fair*, 885 F.2d at 603. Even when such activities suggest some difficulty
16 functioning, the ALJ may discredit a claimant’s testimony to the extent that they contradict
17 claims of a totally debilitating impairment. See *Turner*, 613 F.3d at 1225; *Valentine*, 574
18 F.3d at 693.

19 In the ALJ Decision, the ALJ found that Plaintiff’s alleged impairments were
20 inconsistent with her activities of daily living and demonstrated “some ability to work.”
21 (AR 96.) Plaintiff contends that the ALJ improperly rejected Plaintiff’s complaints because
22 her alleged limitations were inconsistent with her daily activities. (ECF No. 15-1 at 9-10.)
23 She argues that her descriptions of her activity level “fall far short of what is needed to
24 demonstrate the capacity to perform work activity on a sustained basis” and that the ALJ
25 ignored the fact that she can only perform activities for a short period of time before
26 needing to rest. (*Id.* at 10) The Commissioner in her Cross Motion reiterates the ALJ’s
27 finding as to the daily activities Plaintiff testified she was able to do, noting that
28 inconsistencies between activities of daily living and assertions of fully disabling

1 limitations are a valid reason to discount Plaintiff's testimony. (ECF No. 18-1 at 5 [citing
2 *Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012)].)

3 Other than the contention that Plaintiff can only do daily activities for short periods
4 of time before needing rest, she does not point to anything else in the record that would
5 contradict the ALJ's finding that she can do the daily activities he listed in the ALJ
6 Decision. Further, she does not identify in the record which of the daily activities she can
7 do for only short periods of time before needing rest. Nor does she indicate for which of
8 her alleged disabilities she needs the rest. Thus, Plaintiff does not refute that she is in fact
9 able to engage in the activities the ALJ identified in his Decision. (See AR 96.)

10 In evaluating Plaintiff's activities of daily living, the ALJ noted that despite her
11 alleged limitations, she continues to drive, shop, cook, clean, read, write, care for her small
12 dog, and attend church on a regular basis. Critically, the ALJ made these findings based
13 on an Adult Function Report completed by Plaintiff and based on her own testimony at the
14 ALJ Hearing. (AR 96 [citing Ex. 5E].) Plaintiff is able to engage in all of these activities
15 despite the limitations noted in the Adult Function Report and at the ALJ Hearing. As
16 such, the Plaintiff's activity level suggests she had a greater overall functional capacity
17 than she alleged.

18 Plaintiff raises the issue as to whether the ALJ ignored, or did not consider,
19 Plaintiff's testimony that she could only do these daily activities for a short period of time
20 before needing to rest. The Court notes that Plaintiff does not connect for which of the
21 severe impairments, right ankle injury, left shoulder injury, migraine headaches, and/or
22 back pain, she needed to rest. Nor does Plaintiff address where in her testimony she has
23 so stated. Therefore, the Court will review her testimony at the hearing as regards her daily
24 activities.

25 Plaintiff claims she cannot do her past customer service job because one of the duties
26 is to go and get records, which she is unable to do so quickly because her foot has to be
27 elevated. (AR 24.) Because she has only one kidney, she cannot take anti-inflammatory
28 medication, so her ankle stays swollen. The more she walks, or does things in a standing

1 position, the more it will swell. (AR 26.) She takes Norco for pain, which puts her to
2 sleep. It would be difficult to take during the day and do a job because she would feel
3 sleepy after she took it. (AR 29.) She lives by herself, drives, does her laundry, and buys
4 microwave dinners, but otherwise does not cook. (AR 31-32.) She does her grocery
5 shopping because she can lean on the shopping basket. She spends three to four hours
6 reading, and meditates for about forty-five minutes each day. (AR 32-33.) She goes to
7 church every Sunday. (AR 33.) She has a dog, and cleans up his poop in her back yard.
8 (AR 34.) As regards to experiencing joint pain throughout her body, she testified that:

9 If I like have to go out to the grocery store and I'm going to a number of, two
10 or three different stores, when I get back home, that's when I feel like the real
11 pain. I'll go home and put my groceries away and go to bed. I elevate my
12 ankle, I put ice on it and I take my medication and I'm probably going to go
to sleep because I've overdone it, and I know I've overdone it.

13 (AR 36.) She adds that she does not indulge in a lot of cooking, because she is on
14 her feet to cook. She washes pots and pans as she goes. As soon as she makes a dish, she
15 takes it out of the pot and washes it. Being too long on her feet makes her ankle hurt. (AR
16 36.) Due to her ankle issue, she states she could stand for about maybe five, ten minutes
17 and then she would need a chair or something to elevate her ankle. (AR 37-38.)

18 Based on a review of this testimony, Plaintiff's main, and appears only, claim in
19 regards to needing to rest, is due to the pain she feels in her ankle from being on her feet
20 for too long. As she stated, if she overdoes it by shopping too long, or standing on her feet
21 to cook and clean pots for too long, her ankle hurts, and she needs to elevate it. She would
22 also ice it and take pain medication.

23 Contrary to Plaintiff's contention that the ALJ ignored her testimony regarding her
24 ankle pain and her need to elevate it, he specifically addressed her claimed limitation in the
25 ALJ Decision. According to the ALJ, following Plaintiff's right ankle surgery, in August
26 2013 Dr. Alavynejad opined that she had 5/5 muscle strength, full range of motion of the
27 ankle joint, and no tenderness to palpation. (AR 98 [citing Ex. 9F].) Nonetheless, the ALJ
28 considered Plaintiff's subjective complaints related to this condition and factored them into

1 her RFC by limiting her to light work with additional limitations, such as standing/walking
2 only four hours out of an eight hour day. Notably he stressed that although she reported
3 that she elevated her ankle to reduce her pain, Dr. Alavynejad did not indicate that elevating
4 the ankle was necessary.⁶ (AR 98 [citing Ex. 5F].) The Court notes that Dr. Alavynejad
5 in August 2013 opined that Plaintiff could return to work with limited standing and walking
6 for six hours a day. Further, a physician’s assistant under the supervision of Dr. Paul Kim,
7 opined that Plaintiff could return to a sit down job with standing or walking up to five hours
8 a day. (AR 98 [citing Ex. 7F at 7-11].)

9 Next, Plaintiff contends that nothing in her testimony provides any indication that
10 she is capable of performing anything other than a few basic daily activities and not what
11 is required of substantial gainful work activity. (ECF No. 15-1 at 10.) She argues that
12 descriptions of her activity level falls far short of what is needed to perform work activity
13 on a sustained basis. (Id.) Plaintiff does not elaborate as to why the daily activities to
14 which she testified she can perform are consistent with her alleged limitations. Nor does
15 she address the ALJ’s finding that some of the physical and mental abilities as well as
16 social interactions required to perform these daily activities show some ability to work, and
17 are not consistent with the debilitating symptoms she alleges. (See AR at 96.)

18 The apparent inconsistency between a Plaintiff’s alleged limitations and her daily
19 activities is sufficient to support a finding that a Plaintiff was not entirely credible. See
20 Lingenfelter, 504 F.3d at 1040 (in determining credibility, an ALJ may consider “whether
21 Plaintiff engages in daily activities inconsistent with alleged symptoms”). Daily activities
22 may be grounds for discrediting a claimant’s testimony when a claimant “is able to spend
23 a substantial part of his day engaged in pursuits involving the performance of physical
24 functions that are transferable to a work setting.” Fair, 885 F.2d at 603. Even when such
25 activities suggest some difficulty functioning, the ALJ may discredit a claimant’s

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27 ⁶ Further, as noted above, the VE testified during the ALJ Hearing that if Plaintiff were to elevate her foot
28 about six inches off the floor on an as needed basis, it would not affect her ability to perform the customer
service job as normally performed. (AR 41.)

1 testimony to the extent that they contradict claims of a totally debilitating impairment. See
2 Turner, 613 F.3d at 1225; Valentine, 574 F.3d at 693.

3 Plaintiff testified that she could stand for about maybe five, ten minutes and then she
4 would probably have to be given a chair to elevate her ankle as she could not stand that
5 long. (AR 37-38.) Further she claimed that due to the degree of ankle pain caused by
6 prolonged standing, she has to take medication that then puts her to sleep. (See AR 36 [“I
7 elevate my ankle, I put ice on it and I take my medication and I’m probably going to go to
8 sleep because I’ve overdone it, and I know I’ve overdone it.”].) She further testified that
9 she cannot do her customer service job because one of the duties is to go and get records,
10 which she is unable to do “that quickly because her foot has to be elevated.” (See AR 24.)
11 She could only sit for a short time because her ankle had to be elevated. (AR 96.)

12 The ALJ found that her continuing to drive, shop, cook, clean, read, write, care for
13 her small dog, and attend church on a regular basis are not consistent with the debilitating
14 symptoms she alleges. Some of the physical and mental abilities as well as social
15 interactions required to perform these activities show some ability to work. (AR 96.)
16 Further, the ALJ noted that Plaintiff’s claims of drowsiness and impaired concentration
17 due to the use of pain medication were directly contradicted by Plaintiff’s testimony that
18 she continued to drive.⁷ (AR 96.)

19 The Court agrees that these daily activities are at least in part inconsistent with
20 Plaintiff’s claimed debilitating symptoms. For instance, she states she can only stand for
21 five to ten minutes, and sit for a short while before having to raise her leg. Yet Plaintiff is
22 able to drive and attend church service every week, which entails sitting and standing for
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24 ⁷ Although not addressed in her Motion for Summary Judgment, Plaintiff submitted a list of objections
25 dated February 2, 2015 to the Appeals Council during their review of the ALJ Decision. In these
26 objections, she states that she “does not drive continuously” or “when taking strong medications.” (AR
27 244.) As noted by the Commissioner, this was not stated at the ALJ Hearing (see AR 31), medical notes
28 indicated no side effects or problems from medications (e.g., AR 379, 403) and she repeatedly denied side
effects from medications (e.g., AR 548, 550, 559). Based on the entirety of the record, the Court does not
find that this clarification undermines the ALJ’s determination that Plaintiff’s daily activities are
inconsistent with her alleged limitations. See Carmickle, 533 F.3d at 1162.

1 longer periods of time. She also drives and shops at stores, sometimes going to two or
2 three at a time. Such activity is inconsistent with her claimed limitation and indicates she
3 can stand and sit for longer periods of time than she alleges. See *Curry v. Sullivan*, 925
4 F.2d 1127, 1130 (9th Cir. 1991) (holding that an indication that a Plaintiff is able to take
5 care of personal needs, prepare meals, do easy housework, and shop for groceries can be
6 seen as inconsistent with a condition that precludes all work activity); *Burch*, 400 F.3d at
7 681 (stating that the ALJ may discredit Plaintiff’s testimony if he engages in daily activities
8 involving skills that could be transferred to the workplace). Additionally, Plaintiff testified
9 she spends several hours a day reading, contradicting her alleged inability to concentrate.
10 (See AR 32-33.) Even when such activities suggest some difficulty functioning, the ALJ
11 may discredit a claimant’s testimony to the extent that they contradict claims of a totally
12 debilitating impairment. See *Turner*, 613 F.3d at 1225; *Valentine*, 574 F.3d at 693. Thus,
13 Plaintiff’s self-described ability to perform the above detailed daily activities is not only
14 inconsistent with her alleged limitations, but also, as the ALJ found, tends to indicate that
15 she can perform the duties required of a customer service representative⁸ as generally
16 performed. (See AR at 96, 99-100.)

17 Therefore, **IT IS RECOMMENDED** that the Court find the ALJ provided a
18 “specific, clear and convincing” reason supported by substantial evidence for discounting
19 Plaintiff’s credibility as to her subjective limitations on this ground. See *Lingenfelter*, 504
20 F.3d at 1040 (inconsistency between a claimant’s alleged limitations and her daily activities
21 is sufficient to support a finding that Plaintiff was not entirely credible); *Molina*, 674 F.3d
22 at 1112 (daily activities that are inconsistent with alleged symptoms are a relevant
23 credibility consideration).

24 **2. Prior Work History**

25 An ALJ may properly consider a claimant’s poor or nonexistent work history in making
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27 ⁸ As reported by Plaintiff, at her past customer service position, she walked for an hour a day, stood for
28 an hour a day, and sat for seven hours a day. When asked to explain what she lifted and carried, she
responded “N/A worked in front of a computer.” (AR 212-14.)

1 a negative credibility determination. Thomas, 278 F.3d at 958-59 (“The ALJ may consider
2 at least the following factors when weighing the claimant's credibility: . . . [her] work
3 record”); 20 C.F.R. § 404.1529 (prior work history can be considered in assessing
4 credibility); 20 C.F.R. § 416.929 (same); see, e.g., Marsh v. Colvin, 792 F.3d 1170, 1174
5 n.2 (9th Cir. 2015) (noting that claimant’s “limited work history also detracts from the
6 credibility of her subjective allegations” and that the ALJ’s consideration of this factor was
7 proper); *Aarestad v. Comm’r of Soc. Sec. Admin.*, 450 Fed App’x 603, 604 (9th Cir. 2011)
8 (unpublished) (affirming ALJ’s determination of claimant’s testimony as partially not
9 credible where claimant “worked only sporadically before the alleged onset of disability
10 (which suggests that her decision not to work was not based on disability)”); *Burkstrand v.*
11 *Astrue*, 346 Fed. App’x 177, 179 (9th Cir. 2009) (unpublished) (“limited work history”
12 negatively impacted credibility).

13 Here, the ALJ found that Plaintiff’s “limited work history before the alleged ability
14 onset date raises questions as to whether the claimant’s current unemployment is actually
15 the result of her medical problems.”⁹ (AR 96 [citing Ex. 6D].) The ALJ relied on
16 Plaintiff’s Summary FICA Earnings For Years Requested (AR 187), which reflects
17 Plaintiff’s limited earnings and periods of unemployment prior to Plaintiff’s alleged
18 disability onset date of June 4, 2012. Thus, the ALJ was entitled to determine from
19 Plaintiff’s pre-disability period work history that she lacked motivation to work. See
20 *Thomas*, 278 F.3d at 959 (approving rejection of claimant’s credibility when the claimant
21 had an “extremely poor work history” reflecting “little propensity to work in her lifetime”
22 — i.e., where a claimant’s “work history was spotty, at best, with years of unemployment
23 between jobs, even before she claimed disability”). The ALJ here was entitled to discount
24 Plaintiff’s credibility based on her inconsistent work history prior to her alleged on-set
25 date, calling into question whether her current unemployment is actually the result of her
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27
28 ⁹ Notably, Plaintiff did not take issue with the ALJ’s use of her limited work history as a reason to discredit her testimony in her briefing.

1 medical conditions. (AR 96.)

2 Accordingly, it is **RECOMMENDED** that the Court find the ALJ properly set forth a
3 “specific, clear and convincing” reason supported by substantial evidence for discounting
4 Plaintiff’s credibility as to her subjective limitations on this ground.

5 **3. Medical Evidence**

6 When an ALJ finds that medically determinable impairments could reasonably be
7 expected to cause a claimant’s alleged symptoms, the ALJ may not reject a claimant’s
8 testimony solely based a lack of support of medical evidence. See *Reddick v. Chater*, 157
9 F.3d 715, 722 (9th Cir. 1998) (finding that an ALJ cannot reject a claimant’s testimony
10 simply because it is unsupported by objective medical evidence); *Burch*, 400 F.3d at 681.
11 However, when assessing a claimant’s credibility, the ALJ may consider inconsistent
12 medical evidence as a factor in his credibility analysis. See *Lingenfelter*, 504 F.3d at 1040
13 (in determining credibility, the ALJ may consider “whether the alleged symptoms are
14 consistent with the medical evidence”); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
15 2001) (“While subjective pain testimony cannot be rejected on the sole ground that it is not
16 fully corroborated by objective medical evidence, the medical evidence is still a relevant
17 factor in determining the severity of the claimant’s pain and its disabling effects.”); *Batson*
18 *v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (ALJ properly relied
19 on objective findings and physician’s opinions to discredit claimant’s testimony regarding
20 functional limitations).

21 Further, an ALJ may consider medical opinions about the nature, severity, and effect
22 of symptoms in evaluating the credibility of a plaintiff’s statements. See *Smolen*, 80 F.3d
23 at 1284. Such medical opinions are probative evidence when weighing the credibility of
24 subjective complaints. 20 C.F.R. § 416.929(c)(3) (describing factors relevant to
25 credibility); see also *Rollins*, 261 F.3d at 857 (noting that the ALJ appropriately considered
26 medical opinions contradicting claimant’s pain testimony in assessing credibility).

27 Plaintiff alleges that the ALJ rejected her testimony based on his belief that the
28 testimony was not credible because it lacks support in the objective medical evidence.

1 (ECF No. 15-1 at 7.) She argues that the ALJ’s rejection of her testimony for this reason
2 is always “legally insufficient.” Id. at 7-8 (citing Reddick, 157F.3d at 722). Given the
3 ALJ’s statement that “[t]he positive objective clinical and diagnostic finding since the
4 alleged onset date detailed below do not support more restrictive functional limitations than
5 those assessed herein”, however, the Commissioner stresses that contradictions between
6 alleged impairments and the medical record are a valid reason to discount Plaintiff’s
7 testimony. (AR 96; ECF No. 18-1 at 6 [citing 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4);
8 *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999); *Batson*, 359
9 F.3d at 1196].)

10 In short, Plaintiff misstates the law. As noted above, “While subjective pain
11 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective
12 medical evidence, the medical evidence is still a relevant factor in determining the severity
13 of the claimant’s pain and its disabling effects.” *Rollins*, 261 F.3d at 857 (emphasis added)
14 (citing 20 C.F.R. § 404.1529(c)(2)); *Lingenfelter*, 504 F.3d at 1040; *Burch*, 400 F.3d at
15 681; *Reddick*, 157 F.3d at 722; see also *Batson*, 359 F.3d at 1196 (ALJ properly relied on
16 objective findings and physician’s opinions to discredit claimant’s testimony regarding
17 functional limitations).

18 It is apparent to the Court that the ALJ’s reason for discrediting the severity of
19 Plaintiff’s claimed limitations is based not merely on a finding that the objective medical
20 evidence does not affirmatively support those limitations; rather, it is based on the fact that
21 the medical evidence contradicts and is inconsistent with Plaintiff’s claims as to the
22 severity of her limitations. Without reciting the entire analysis, the Court will summarize
23 those findings which contradict her testimony that she is unable to work as a customer
24 service representative. (See AR 96-99.) Of note, the Plaintiff has not identified medical
25 evidence anywhere in the Administrative Record that supports her claimed limitations, nor
26 in her motion does she take issue with any of the findings made by the ALJ regarding his
27 summary of the medical evidence.

28 First, the ALJ went through a chronology of Plaintiff’s medical history and

1 treatment. It begins with her work related injury on June 4, 2012 in which she injured her
2 right ankle and left shoulder. An MRI of the left shoulder showed a possible superior labral
3 tear, but her rotator cuff appeared intact. (AR 97 [citing Ex. 7F at 22, 30-31].) Dr. Powers,
4 a treating physician, repeatedly opined that Plaintiff was limited to lifting, pushing, and
5 pulling up to ten pounds, no overhead work, and no prolonged standing or walking. (AR
6 98 [citing Ex. 7F at 18, 42, 58-59, 62, 63, 69].) In August 2012, Dr. Powers updated his
7 assessment, limiting Plaintiff to lifting, pushing, and pulling up to twenty pounds, no
8 overhead work, and no prolonged standing and/or walking. In September 2013, Dr. Powers
9 opined that Plaintiff could return to work without any restrictions. (AR 98 [citing Exs. 7F
10 at 69, 8F at 16].) Thus, this medical evidence contradicted Plaintiff's claims that she could
11 not work due to her shoulder injury.¹⁰

12 In regards to her ankle injury, an MRI revealed chronic anterior talofibular ligament
13 tear, osteonecrosis of the talar dome, and chronic tear of the peroneus longus. (AR 97.) In
14 September 2012, Plaintiff attended an orthopedic consultative examination performed by
15 Vicente Bernabe, D.O. regarding her right ankle pain, left shoulder pain, and low back
16 pain. Based on that examination, Dr. Bernabe opined that the Plaintiff could lift and carry
17 fifty pounds occasionally, and twenty-five pounds frequently. She could walk and stand
18 six hours out of an eight hour day, and could occasionally perform overhead motion with
19 the left upper extremity. (AR 97.) Although this assessment has Plaintiff being able to
20 perform a range of work at the medium exertional level, the ALJ gave little weight to it.
21 His rationale was based on the fact that other evidence received after that assessment
22 showed that Plaintiff was more limited. (AR 99.) This type of detailed analysis conducted
23

24 ¹⁰ Prior to August 2012, Dr. Powers had repeatedly opined that Plaintiff was restricted to lifting, pushing,
25 and pulling up to ten pounds. (AR 98 [citing Ex 7F].) Ultimately, the ALJ did not adopt this ten pound
26 weight restriction, finding it to be overly restrictive in light of the overall evidence. He specifically noted
27 that Dr. Powers documented that Plaintiff "made questionable effort during grip strength testing." (AR
28 98 [citing Ex. 7F at 38].) At the same time, the ALJ also did not adopt Dr. Powers' September 2013
opinion that Plaintiff could return to work without any restrictions, instead opting for an RFC which took
into account her testimony and expressed subjective limitations. (AR 98-99 [citing Exs. 7F at 69, 8F at
16].)

1 by the ALJ is a far cry from Plaintiff's contention that "the ALJ simply reject[ed her]
2 testimony based on a belief that the testimony is not credible because it lacks support in
3 the objective medical evidence." (ECF No. 15-1 at 7.)

4 The ALJ noted that in April 2013 the Plaintiff underwent partial resection of the
5 peroneal tendon tear, peroneal tendon tenosynovectomy, and exostectomy of lateral
6 calcaneal wall. (AR 97-98 [citing Ex. 3F].) Following this surgery, in June 2013, Plaintiff
7 was examined by Dr. Alavynejad, a treating physician. At that exam Dr. Alavynejad
8 reported that Plaintiff did not walk with a limp, and had only mild tenderness to palpation,
9 4/5 strength with eversion, and good range of motion. On August 20, 2013 Dr. Alavynejad
10 examined Plaintiff, and found she had 5/5 muscle strength, full range of motion of the ankle
11 joint, and no tenderness to palpitation. (AR 98 [citing Exs. 4F and 9F].) The ALJ
12 nonetheless considered Plaintiff's subjective complaints related to this condition, and
13 factored them into Plaintiff's RFC by limiting her to light work with additional limitations,
14 such as standing/walking only four hours out of an eight hour day. Of note, by August
15 2013, Dr. Alavynejad assessed that Plaintiff could return to work with limited standing and
16 walking for six hours a day, and pulling and pushing no more than twenty-five pounds.
17 (AR 98 [citing Exs. 9F at 4-5, 10, 20, 26-28].) Additionally, the ALJ specifically noted
18 that "the objective medical evidence does not show that [Plaintiff's] recovery time [after
19 her surgery] lasted 12 continuous months." (AR 98); see 42 U.S.C. § 423(d)(1)(A) (for
20 disability to be found, the condition cannot be temporary and must be expected to last over
21 at least a twelve month period).

22 The ALJ gave great weight to the opinion provided by the state agency medical
23 consultant at the reconsideration level because he had the opportunity to review additional
24 evidence. (AR 99 [citing Exs. 6A and 8A].) The medical consultant after review of said
25 evidence (see AR 64-88) opined that the Plaintiff could perform work at the light exertional
26 level. The ALJ found this opinion consistent with the overall objective findings and
27 accommodated Plaintiff's subjective complaints. (AR 99.)

28 In sum, contrary to Plaintiff's contention, the ALJ did not solely and completely

1 discredit her testimony because it was not substantiated affirmatively by objective medical
2 evidence. He properly considered the objective medical records as well as medical opinion
3 evidence as a factor in assessing the severity of Plaintiff's pain and its disabling effects.
4 As discussed above, medical records and opinions cited by the ALJ do contradict the
5 severity of her claimed limitations.

6 Accordingly, as discussed above, the ALJ considered the entire case record and
7 reasonably discounted Plaintiff's allegations of disabling pain based on other factors in
8 addition to the contrary objective medical evidence. Therefore, **IT IS RECOMMENDED**
9 that the Court find the ALJ provided a "specific, clear and convincing" reason supported
10 by substantial evidence for discounting Plaintiff's credibility as to her subjective
11 limitations on the ground discussed in this section.

12 **VII. CONCLUSION**

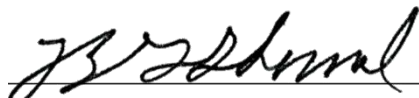
13 Based on the above reasoning, **IT IS RECOMMENDED** that the Court find the ALJ
14 properly set forth "specific, clear and convincing" reasons supported by substantial
15 evidence for discounting Plaintiff's credibility as to her testimony regarding her subjective
16 limitations. Accordingly, the undersigned Magistrate Judge **RECOMMENDS** that
17 Plaintiff's motion for summary judgment (ECF No. 15) be **DENIED** and that
18 Commissioner's cross-motion for summary judgment (ECF No. 18) be **GRANTED**.

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

21 **IT IS ORDERED** that no later than **August 22, 2017**, any party to this action may
22 file written objections with the Court and serve a copy to all parties. The document should
23 be captioned "Objections to Report and Recommendation."

24 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
25 the Court and served on all parties no later than **September 5, 2017**.

26 Dated: August 8, 2017

27 
28 Hon. Bernard G. Skomal
United States Magistrate Judge

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