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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LESLIE CAREY,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner
of Social Security,

Defendant.

Case No.: 16cv2891-CAB (BLM)

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

[ECF Nos. 12, 13]

Plaintiff Leslie Carey brought this action for judicial review of the Social Security Commissioner's ("Commissioner") denial of her claim for disability insurance benefits. ECF No. 1. Before the Court are Plaintiff's Motion for Summary Judgment [ECF No. 12 ("Pl.'s Mot.")], Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment [ECF Nos. 13-1 and 14-1¹ ("Def.'s Mot.")], and Plaintiff's Reply in Support of her Motion for Summary Judgment and an Opposition to Defendant's Cross-Motion for

¹ Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment appear on the Docket as two documents, numbers 13 and 14. The contents of the documents are the same so, for clarity, the Court will refer to Defendant's cross-motion and opposition as one document, namely "Def.'s Mot." and will cite to ECF No. 13-1.

1 Summary Judgment [ECF Nos. 15 and 16² (“Pl.’s Reply”)].

2 This Report and Recommendation is submitted to United States District Judge Cathy Ann
3 Bencivengo pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(c) of the United States
4 District Court for the Southern District of California. For the reasons set forth below, this Court
5 **RECOMMENDS** that Plaintiff’s Motion for Summary Judgment be **DENIED** and Defendant’s
6 Cross-Motion for Summary Judgment be **GRANTED**.

7 **PROCEDURAL BACKGROUND**

8 On October 19, 2015, Plaintiff filed a Title II application for a period of disability and
9 disability insurance benefits, alleging disability beginning on July 8, 2015. See Administrative
10 Record (“AR”) at 147-58. The claim was denied initially on December 9, 2015, and upon
11 reconsideration on February 24, 2016, resulting in Plaintiff’s request for an administrative
12 hearing. Id. at 72-75, 78-82, 88-89.

13 On August 24, 2016, a hearing was held before Administrative Law Judge (“ALJ”) William
14 Mueller. Id. at 30-49. Plaintiff and an impartial vocational expert (“VE”), Erin Welsh, testified
15 at the hearing. See id. In a written decision dated September 2, 2016, ALJ Mueller determined
16 that Plaintiff has not been under a disability, as defined in the Social Security Act, from October
17 19, 2015³, through the date of the ALJ’s decision. Id. at 13-23. Plaintiff requested review by
18 the Appeals Council. Id. at 7-9. In an order dated September 28, 2016, the Appeals Council
19 denied review of the ALJ’s ruling, and the ALJ’s decision therefore became the final decision of
20 the Commissioner. Id. at 1-6.

21 On November 25, 2016, Plaintiff filed the instant action seeking judicial review by the
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23 ² Plaintiff’s Reply in Support of her Motion for Summary Judgment and Opposition to Defendant’s
24 Cross-Motion for Summary Judgment appear on the Docket as two documents, numbers 15 and
25 16. The contents of the documents are the same so, for clarity, the Court will refer to Plaintiff’s
26 Reply in Support of her Motion for Summary Judgment and an Opposition to Defendant’s Cross-
27 Motion for Summary Judgment as one document, namely, “Pl.’s Reply” and will cite to ECF No.
28 15.

³ The ALJ errantly listed September 24, 2015 as the date Plaintiff’s application was filed. See
AR at 22, 147-58.

1 federal district court. See ECF No. 1. On April 4, 2017, Plaintiff filed a motion for summary
2 judgment alleging the following errors: (1) the ALJ improperly found Plaintiff's mental health
3 condition to be non-severe and (2) the ALJ erred in assessing Plaintiff's credibility. See Pl.'s Mot.
4 at 11-14. Plaintiff asks the Court to reverse the final decision of the Commissioner and remand
5 the case for payment of benefits, or, alternatively, remand the case to the Social Security
6 Administration for further proceedings. Id. at 14-15. On April 28, 2017, Defendant filed a timely
7 cross-motion for summary judgment asserting that the ALJ properly found Plaintiff's mental
8 health condition to be non-severe and properly assessed Plaintiff's credibility. See Def.'s Mot.
9 at 3-8. On May 19, 2017, Plaintiff timely filed a reply in support of her motion for summary
10 judgment and opposition to Defendant's cross-motion for summary judgment. Pl.'s Reply.
11 Defendant did not file a reply. See Docket.

12 **DISABILITY HEARING**

13 On August 24, 2016, Plaintiff, who was represented by counsel, appeared at the hearing
14 before the ALJ. See AR at 30-49. Plaintiff was fifty-six years old at the time of the ALJ's hearing.
15 Id. at 34. During the hearing, the ALJ noted that Plaintiff was alleging disability in light of
16 anxiety and Degenerative Disc Disease, which causes Plaintiff back and leg pain. See id. at 15,
17 41.

18 The ALJ questioned Plaintiff regarding her work experience and alleged disability. Id. at
19 34-37. Plaintiff testified that she has a GED and had worked as a manager of a doughnut shop,
20 as a waitress and server, as a home health care provider, and as a Certified Nursing Assistant
21 ("CNA"). Id. at 34-37. Plaintiff stated that her anxiety, back pain, and leg pain prevent her
22 from working. Id. at 41.

23 Plaintiff stated that she has had anxiety since she was fifteen years old and generally has
24 anxiety at night three to four times a week, but also experiences anxiety during the day. Id. at
25 40-41. Plaintiff testified that she has severe anxiety when she tries to sleep at night causing
26 her to "literally choke on [her] own saliva" Id. at 41. Plaintiff also stated that driving
27 gives her anxiety and that, as a result, she drives "maybe five times a year." Id. at 37. Plaintiff
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1 stated that her anxiety negatively impacted her career because driving clients around was part
2 of her job requirements as a CNA. Id. As a result, Plaintiff explained that her husband or friends
3 drive her around. Id. Plaintiff testified that she was prescribed Clonazepam to treat her anxiety.
4 Id. at 40. At one point, Plaintiff testified that she was prescribed .05 milligrams of Clonazepam
5 twice a day as needed, but her doctor upped her dose to one milligram of Clonazepam twice a
6 day. Id. Plaintiff explained that in March of 2016, she told her doctor to lower the dose because
7 she knew Clonazepam is addictive and the dosage was too high. Id.

8 Plaintiff testified that on a scale of one to ten, her back pain is typically at about a seven
9 and a half and that she takes ibuprofen to relieve the pain, which lowers her pain level to a five.
10 Id. at 41-42. Plaintiff explained that she can sit for ten to fifteen minutes and that she is
11 constantly moving from one side to the other to prevent her pain from radiating down her sides
12 while sitting. Id. at 42. Plaintiff stated that she can stand for ten minutes before experiencing
13 pain. Id. at 43. Plaintiff also explained that her pain exacerbates her anxiety. Id.

14 Plaintiff explained that she lives with her husband, does light housekeeping and cooking,
15 can dress herself, feed herself, do the dishes and make herself a cup of coffee. Id. at 37, 39.
16 Plaintiff stated that she cannot do the laundry because she cannot carry the laundry in a laundry
17 basket up or down stairs and cannot transfer "heavy" wet items out of the laundry machine to
18 the dryer. Id. at 38. She testified that bending over and lifting heavy items is painful. Id. at
19 37-38. Plaintiff also stated that she cannot go to the grocery store by herself because her
20 anxiety prevents her from driving and she cannot carry grocery bags. Id. at 39.

21 Ms. Welsh, a VE, also testified at Plaintiff's administrative hearing. Id. at 44-49. She
22 classified Plaintiff's past relevant work as a "food server," Dictionary of Occupational Titles
23 ("DOT") 311.477-030, light with an SVP of 3, semi-skilled, and "CNA," DOT 355.674-014,
24 medium with an SVP of 4, semi-skilled. Id. at 45. Ms. Welsh opined that a hypothetical person
25 of Plaintiff's age, education, and work experience who was capable of medium work and limited
26 to frequent postural activities and only occasional climbing of ladders, ropes, and scaffolds could
27 perform Plaintiff's past work. Id. at 45-46. She also opined that there would be a significant
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1 number of jobs that a hypothetical person of Plaintiff's age, education, and work experience who
2 was capable of medium work, but could only engage in frequent postural activities, only
3 occasionally climb ladders, ropes, and scaffolds, but was further limited to non-public, simple,
4 routine tasks with occasional contact with coworkers and supervisors could perform. Id. at 46.
5 Ms. Welsh opined that such a person would be able to perform the following jobs: "laundry
6 worker," DOT 361.685-018, medium with an SVP of 2, with 44,000 jobs nationally; "automobile
7 detailer," DOT 915.687-034, medium with an SVP of 2, with 54,000 jobs nationally; and "hand
8 packager," DOT 920.587-018, medium with an SVP of 2, with 42,000 jobs nationally. Id.

9 Plaintiff's attorney asked whether the laundry worker job would require any amount of
10 significant bending. Id. at 47. Ms. Welsh answered that it would require "occasional stooping,
11 which is bending at the waist" for about two and a half hours throughout the day. Id. Plaintiff's
12 attorney then asked Ms. Welsh what the stooping requirements are for the other two jobs. Id.
13 Ms. Welsh testified that the hand packaging job requires no stooping and the auto detailer job
14 required frequent stooping of about two and a half hours to six hours of stooping. Id. Plaintiff's
15 attorney then asked whether any of the three jobs would be impacted by a person who must sit
16 for fifteen minutes and then stand for fifteen minutes. Id. at 48. Ms. Welsh testified that such
17 a person would not be able to perform medium work as described by the ALJ's hypotheticals.
18 Id.

19 **ALJ's DECISION**

20 On September 2, 2016, the ALJ issued a written decision in which he determined that
21 Plaintiff was not disabled as defined in the Social Security Act. Id. at 13-23. Initially, the ALJ
22 determined that Plaintiff had not engaged in substantial gainful activity since the date of
23 Plaintiff's application for disability insurance benefits. Id. at 15. He then considered all of
24 Plaintiff's medical impairments and determined that Plaintiff's Degenerative Disc Disease was
25 "severe" and Plaintiff's anxiety was "nonsevere" as defined in the Regulations. Id. at 15-16. At
26 step three, the ALJ found that Plaintiff did not have an impairment or combination of
27 impairments that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404,
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1 Subpart P, Appendix 1. Id. at 18. The ALJ concluded that Plaintiff's residual functional capacity
2 ("RFC") permitted her to:

3 perform medium work as defined in 20 CFR 416.967(c) except [Plaintiff] is able to
4 lift and carry up to 50 pounds occasionally and up to 25 pounds frequently. She
5 is able to sit, stand or walk up to six hours in an 8-hour workday. [Plaintiff] is able
6 to perform tasks where there is a frequent requirement for bending, stooping,
7 crouching, crawling, kneeling, climbing and balancing. However, that said,
8 [Plaintiff] is able to perform tasks where there is a requirement for climbing ropes,
9 ladders or scaffolds on an occasional basis.

9 Id. The ALJ then found that Plaintiff has no past relevant work. Id. at 21. The ALJ concluded
10 that there are jobs that exist in significant numbers in the national economy that Plaintiff can
11 perform and that Plaintiff has not been under a disability as defined in the Social Security Act
12 since the date her application for disability was filed. Id. at 21-22.

13 **STANDARD OF REVIEW**

14 Section 405(g) of the Social Security Act permits unsuccessful applicants to seek judicial
15 review of the Commissioner's final decision. 42 U.S.C. § 405(g). The scope of judicial review is
16 limited in that a denial of benefits will not be disturbed if it is supported by substantial evidence
17 and contains no legal error. Id.; see also Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190,
18 1193 (9th Cir. 2004).

19 Substantial evidence is "more than a mere scintilla, but may be less than a
20 preponderance." Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001) (citation omitted). It is
21 "relevant evidence that, considering the entire record, a reasonable person might accept as
22 adequate to support a conclusion." Id. (citation omitted); see also Howard ex rel. Wolff v.
23 Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). "In determining whether the [ALJ's] findings
24 are supported by substantial evidence, [the court] must review the administrative record as a
25 whole, weighing both the evidence that supports and the evidence that detracts from the [ALJ's]
26 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998) (citations omitted). Where
27 the evidence can reasonably be construed to support more than one rational interpretation, the
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1 court must uphold the ALJ's decision. See Batson, 359 F.3d at 1193. This includes deferring to
2 the ALJ's credibility determinations and resolutions of evidentiary conflicts. See Lewis, 236 F.3d
3 at 509.

4 Even if the reviewing court finds that substantial evidence supports the ALJ's conclusions,
5 the court must set aside the decision if the ALJ failed to apply the proper legal standards in
6 weighing the evidence and reaching his or her decision. See Batson, 359 F.3d at 1193. Section
7 405(g) permits a court to enter judgment affirming, modifying, or reversing the Commissioner's
8 decision. 42 U.S.C. § 405(g). The reviewing court may also remand the matter to the Social
9 Security Administration for further proceedings. Id.

10 **DISCUSSION**

11 Plaintiff alleges that the ALJ erred in finding that her mental health impairment was non-
12 severe at Step Two of the five-step sequential evaluation process and in evaluating Plaintiff's
13 testimony. Pl.'s Mot. at 11-14; Pl.'s Reply at 1-3. Defendant contends that the ALJ's decision is
14 supported by substantial evidence, and thus should be affirmed. Def.'s Mot. at 3-8.

15 **I. Lack of Evidence Establishing Severe Impairment**

16 Plaintiff argues that the ALJ's finding that Plaintiff's mental health condition is non-severe
17 is erroneous and not supported by substantial evidence. Pl.'s Mot. at 11-12. Pursuant to Social
18 Security regulations, the ALJ is required to follow a five-step sequential evaluation process for
19 determining whether a claimant is disabled. See C.F.R. § 416.920(a). At the first step, the ALJ
20 determined that Plaintiff had not engaged in substantial gainful activity since the date of
21 Plaintiff's application for Social Security disability insurance benefits. AR at 15. This finding is
22 not contested.

23 At the second step, the ALJ must determine whether the claimant has "a severe medically
24 determinable physical or mental impairment that meets the duration requirement in § 404.1509,
25 or a combination of impairments that is severe and meets the duration requirement." 20 C.F.R.
26 § 404.1520(a)(4)(ii). The inquiry at Step Two is a de minimis screening "to dispose of groundless
27 claims." Webb v. Barnhart, 433 F.3d 683, 686-87 (9th Cir. 2005) (citation omitted). A claimant
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1 is required to make a “threshold showing” that (1) she has a medically determinable impairment
2 or combination of impairments and (2) the impairment or combination of impairments is severe.
3 See 20 C.F.R. § 404.1520(c), 416.920(c). The burden of proof is on the claimant to establish a
4 medically determinable severe impairment. Id.; see also Uy v. Colvin, 2015 WL 351438, at *8
5 (E.D. Cal. Jan. 26, 2015).

6 Here, the ALJ found that Plaintiff’s anxiety satisfies the first element, but did not satisfy
7 the second. AR at 16. The ALJ stated that Plaintiff’s “medically determinable mental impairment
8 of anxiety does not cause more than minimal limitation in [Plaintiff’s] ability to perform basic
9 mental work activities and is therefore nonsevere.” Id. Plaintiff contests this finding. See Pl.’s
10 Mot. at 11; Pl.’s Reply at 1-3.

11 A mental impairment is severe if it causes episodes of decompensation and imposes more
12 than mild limitations on the claimant’s activities of daily living, social functioning, and
13 concentration, persistence, or pace. 20 C.F.R. § 404.1520a(c), (d)(1); see 20 C.F.R. § 404,
14 subpt. P, app. 1, § 12.00(C) (stating that “[a]ctivities of daily living include . . . cleaning,
15 shopping, cooking, taking public transportation, paying bills, maintaining a residence, [and]
16 caring appropriately for . . . grooming and hygiene”; “[s]ocial functioning” refers to the “capacity
17 to interact independently, appropriately, effectively, and on a sustained basis with other
18 individuals,” such as “family members, friends, neighbors, grocery clerks, landlords, or bus
19 drivers”; “[c]oncentration, persistence, or pace refers to the ability to sustain focused attention
20 and concentration sufficiently long to permit the timely and appropriate completion of tasks
21 commonly found in work adaptive functioning” that “would ordinarily require increased
22 treatment or a less stressful situation (or a combination of the two)”). “The mere existence of
23 an impairment is insufficient proof of a disability.” Matthews v. Shalala, 10 F.3d 678, 680 (9th
24 Cir. 1993). In other words, a medical diagnosis alone does not make an impairment qualify as
25 “severe.” Id. Further, a medical problem which can be controlled by medication is not severe.
26 See Warre v. Comm’r of Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th Cir. 2006) (stating that
27 “[i]mpairments that can be controlled effectively with medication are not disabling for the
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1 purpose of determining eligibility for SSI benefits.”).

2 In this case, the ALJ carefully reviewed all of the medical records and considered the four
3 broad functional areas set forth in the disability regulations for evaluating mental disorders and
4 concluded:

5 [Plaintiff’s] medically determinable mental impairment causes no more than “mild”
6 limitation in any of the first three functional areas and “no” episodes of
7 decompensation which have been of extended duration in the fourth area, [and,
8 therefore,] is nonsevere.

9 AR at 17.

10 **1. The Objective Medical Record**

11 Plaintiff asserts that the medical record clearly shows she has a severe mental impairment
12 because she “was consistently diagnosed with depression, anxiety, and/or panic disorder.” Id.
13 at 11; Pl.’s Reply at 2-3. Plaintiff’s argument overlooks too much of the record. A chronological
14 review of the objective medical record shows that Plaintiff’s mental health symptoms fluctuated,
15 but that her symptoms improved and were largely, but not completely, controlled with
16 medication.

17 On January 14, 2015, Plaintiff saw Rogelio Samorano, MD, for a psychiatric examination.
18 AR at 298-301. Dr. Samorano found that Plaintiff had mild depression, but was responding well
19 to medication. Id. at 298. Plaintiff reported she was sleeping better and wasn’t depressed, but
20 still dealt with anxiety – particularly when commuting to work. Id. Dr. Samorano found Plaintiff
21 had good hygiene, good eye contact, normal gait and station, linear thought processes, intact
22 associations, intact memory, intact attention span and concentration, intact language, normal
23 fund of knowledge, fair insight and judgment, and her speech was clear and of normal rate,
24 volume and rhythm. Id. at 299-300. Dr. Samorano concluded that Plaintiff’s conditions had
25 improved. Id. at 300.

26 On April 8, 2015, Plaintiff reported to Dr. Samorano that she “feels better when she is
27 working,” takes her medication only “as needed,” and responds well to her medication. Id. at
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1 294. Dr. Samorano found that Plaintiff had fair insight and judgment, that her symptoms were
2 well controlled, and that Plaintiff was functioning well. Id. at 295-96.

3 Plaintiff's symptoms began to increase in severity by June 19, 2015, when she had
4 another follow-up appointment with Dr. Samorano. Id. at 290-92. Plaintiff reported a lot of
5 extra stress and anxiety relating to a breast biopsy. Id. at 290. Plaintiff reported having anxiety
6 attacks about every other day and that her prescription, Klonopin, was not helping. Id. In
7 response, Dr. Samorano increased the Klonopin dosage. Id.

8 On July 1, 2015, Plaintiff had another follow-up psychiatric appointment with Dr.
9 Samorano. Id. at 286-89. Dr. Samorano noted that Plaintiff's depressive and anxiety symptoms
10 had increased due to her recent breast lump and uterus tumor biopsies and that Plaintiff had
11 poor to fair insight and judgment. Id. at 288. Plaintiff reported that she "is so jumpy that she
12 cannot even drive," but responds well to her medication. Id. at 286. Dr. Samorano prescribed
13 Plaintiff Sertraline HCI to treat her increased symptoms. Id. at 288.

14 By Plaintiff's August 17, 2015 follow-up with Dr. Samorano, Plaintiff's symptoms still
15 hadn't improved. AR at 282. Dr. Samorano found that Plaintiff was anxious and had poor to
16 fair insight and judgment. Id. at 284. Dr. Samorano instructed Plaintiff to take .5 milligrams of
17 Klonopin twice a day as needed and 5 milligrams of Zolpidem Tartrate at bedtime to treat her
18 insomnia. Id. Dr. Samorano also told Plaintiff to stop taking Sertraline based on Plaintiff's
19 reported side effects. Id.

20 By October 14, 2015, Plaintiff's condition began improving. See id. at 278-80. Plaintiff
21 saw Dr. Samorano with complaints of panic attacks, depression, and insomnia. Id. at 278.
22 Plaintiff told Dr. Samorano she is "better," and that her mood is improved, her sleep is well
23 controlled, and she only uses Zolpidem as needed. Id. Plaintiff told Dr. Samorano she had just
24 come back from visiting her daughter in the Sacramento, CA area and enjoyed spending time
25 there and might consider moving to a more affordable location outside of Southern California.
26 Id. Plaintiff reported her response to medication was "fair to good." Id. Dr. Samorano found
27 Plaintiff had good hygiene, good eye contact, a normal gait and station, linear and coherent
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1 thought processes, intact associations, intact memory, intact attention span and concentration,
2 intact language, normal fund of knowledge, constricted affect, fair insight and judgment, and
3 her speech was clear and of normal rate, volume and rhythm. Id. at 279-80. Overall, Dr.
4 Samorano found Plaintiff's anxiety "well controlled" and noted that Plaintiff reported "feelind
5 [sic] and functioning better." Id. at 280.

6 By January 6, 2016, when Plaintiff saw Kekoa C. Ede, MD, her symptoms had worsened.
7 Id. at 336-37, 360-62. Plaintiff reported that her anxiety had increased in severity and she was
8 "literally wak[ing] up choking on saliva" and suffering from racing thoughts. Id. Dr. Ede
9 increased Plaintiff's Klonopan dosage. Id. at 338, 362.

10 On February 16, 2016, Plaintiff again saw Dr. Ede for a medication management follow-
11 up. Id. at 357-59. Plaintiff reported having a lot of anxiety and that Clonazepam was taking an
12 hour to work and was over-sedating her. Id. at 357. Plaintiff complained that she couldn't eat
13 because her anxiety made her feel like her throat was closing up. See id. at 358. Dr. Ede
14 modified her medications and recommended a follow-up appointment in three weeks. Id. at
15 359.

16 On March 4, 2016, Plaintiff followed-up with Dr. Ede. Id. at 354-56. Plaintiff reported
17 "bad" anxiety with daily anxiety attacks. Id. at 354. Dr. Ede refused to prescribe
18 benzodiazepines due to Plaintiff's history of Xanax and alcohol dependence and prescribed
19 Depakote. Id. at 355-56. Plaintiff refused Depakote and became frustrated at Dr. Ede's
20 accusations of dependence. Id. Plaintiff informed Dr. Ede she would be seeking psychiatric
21 services elsewhere. Id. at 356.

22 On March 8, 2016, Plaintiff saw James H. Schultz, MD, to refill Klonopin. AR at 393-96.
23 Dr. Schultz found Plaintiff had mild depression. Id. at 393. Plaintiff requested an Alprazolam
24 refill and requested to see a different psychiatrist than Dr. Ede. Id. Dr. Schultz prescribed
25 Klonopin until Plaintiff could see a new psychiatrist and instructed Plaintiff to stop taking
26 Alprazolam. Id. at 395.

27 Plaintiff's symptoms began improving once she began seeing a different psychiatrist. On
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1 March 23, 2016, Plaintiff saw Gabriel Rodarte, MD, for a psychiatric medication management
2 follow-up. Id. at 351-53. Dr. Rodarte found that Plaintiff was responding fairly to medication
3 and had good insight and judgment. Id. at 351, 353. Dr. Rodarte found no abnormalities and
4 found that Plaintiff did not meet the criteria for either alcohol dependence or benzodiazepine
5 dependence. Id. at 353. Dr. Rodarte explained that Plaintiff might have had an episode of
6 benzodiazepine abuse decades ago, but that a low-dose of benzodiazepine would not put her at
7 high risk. Id.

8 On April 5, 2016, Plaintiff saw Dr. Schultz for a follow-up psychiatric appointment
9 regarding her anxiety. Id. at 390-92. Plaintiff reported that her anxiety was improving after her
10 last psychiatric visit. Id. at 391.

11 At the initial level of Plaintiff's Disability Determination Explanation form, Psychiatrist K.
12 J. Loomis, DO, opined after reviewing the medical evidence of record that Plaintiff's mental
13 health impairments were non-severe because her treatment was conservative and her mental
14 status examinations ("MSE") indicated adequate function. Id. at 54. Upon reconsideration,
15 state agency consultant Uwe Jacobs, Ph.D., found that Plaintiff is independent in her activities
16 of daily living and that her MSEs indicated that her mental health impairments are non-severe.
17 Id. at 65. After reviewing the medical evidence of record, Ph.D. Jacobs opined that Plaintiff's
18 mental health impairments are non-severe and noted that the record does show a history of
19 anxiety, but found that while the impairment is clinically significant, there are "no more than
20 mild work-related impairment[s]." Id. at 66. Ph.D. Jacobs did not explain what the mild work-
21 related impairments were. See id. at 66-69.

22 After thoroughly reviewing the record, this Court cannot agree with Plaintiff's contention
23 that "[i]t is clear from the record" that Plaintiff's mental health condition imposes more than
24 minimal limitations on her ability to work. See Pl.'s Mot. at 12. Rather, as set forth above, the
25 Court finds there is substantial evidence in the objective medical record supporting the ALJ's
26 decision that Plaintiff's mental health impairment is non-severe. See Uy, 2015 WL 351438, at
27 *8 (finding that the plaintiff failed to meet his burden of proving an impairment is disabling).

1 The ALJ's findings are supported by the State Agency mental health consultants'
2 assessments of Plaintiff's mental health impairment. Id. at 19, 50-59, 65-70. As discussed
3 previously, Psychiatrist Loomis opined in a Disability Determination Explanation report at the
4 initial level that Plaintiff's mental health impairments are non-severe due to Plaintiff's
5 conservative treatment and adequate MSEs. Id. at 50-59. Additionally, Ph.D. Jacobs reviewed
6 the objective medical evidence and opined in a Disability Determination Explanation report at
7 the reconsideration level that Plaintiff's affective disorders are non-severe and that Plaintiff has
8 only mild restrictions of activities of daily living, maintaining social functioning, maintaining
9 concentration, persistence, or pace, and no repeated episodes of decompensation of an
10 extended duration. Id. at 66. Ph.D. Jacobs specifically stated that Plaintiff's "[r]ecord shows a
11 h[istory] of anxiety . . . [which is] clinically significant[,] but no more than mild work-related
12 impairment as assessed initially." Id. Notably, Plaintiff does not challenge the State Agency
13 findings. See Pl.'s Mot.; Pl.'s Reply.

14 Further, no doctor opined in their progress notes that Plaintiff had limitations in the three
15 areas of functioning nor stated that Plaintiff had experienced any episodes of decompensation
16 or inpatient hospitalization or treatment for her mental impairment. See AR at 251-403.
17 Accordingly, the state agency consultants' opinions do not conflict with the treating physicians'
18 progress notes. See id. at 50-59, 61-70, 251-403. Plaintiff's testimony, which was properly
19 discredited by the ALJ as discussed in the next section, is the only indication that Plaintiff has
20 limitations in the areas of functioning. See id. at 32-49, 195-203.

21 Thus, Plaintiff's argument that she doesn't grocery shop alone and stays home a lot is
22 insufficient to counter the ALJ's decision, which is supported by the State Agency mental health
23 consultant's unopposed findings. See Hutchinson v. Colvin, 2014 WL 5847108, at *5 (D. Maine,
24 Nov. 12, 2014) (taking the plaintiff's daily living activities into considering in determining whether
25 the plaintiff's mental health impairment was severe).

26 **3. Conclusion**

27 Accordingly, the ALJ's determination that Plaintiff's mental health impairments are non-
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1 severe is supported by substantial evidence, including the objective medical evidence and
2 Plaintiff's activities of daily living. See AR at 16; see also Hutchinson, 2014 WL 5847108, at *5
3 (D. Maine, Nov. 12, 2014) (finding the ALJ's determination that the plaintiff's mental health
4 impairments were non-severe based on activities of daily living and opinions of treating and
5 examining physicians appropriate). The ALJ extensively discussed Plaintiff's objective medical
6 record and mental impairment at steps two and four of the sequential process. AR at 16-21. In
7 support of his finding, the ALJ cited to the State Agency mental health consultants' opinions,
8 Plaintiff's medical record, and Plaintiff's own admission that her anxiety and insomnia appear
9 well controlled. Id. at 21. Further, Plaintiff does not identify any treating or examining physician
10 who opined that Plaintiff's mental conditions limited her ability to perform basic work activities
11 or constitute a severe impairment or combination of impairments. See Pl.'s Mot.; Pl.'s Reply.
12 The fact that no physician found Plaintiff's mental impairment to be severe supports the ALJ's
13 determination that no such impairment exists. See Ukolov v. Barnhart, 420 F.3d 1002, 1005-06
14 (9th Cir. 2005) (finding that the ALJ did not err in finding lack of impairment at Step Two where,
15 *inter alia*, physicians made no finding of impairment, but only restated claimant's own
16 descriptions of his problems). Finally, the Court's own review of the record found substantial
17 evidence supporting the ALJ's decision.

18 **II. Plaintiff's Credibility**

19 Plaintiff argues that the ALJ erred in discrediting her testimony. See Pl.'s Mot. at 12-14.
20 Specifically, Plaintiff asserts that the ALJ failed to set forth the requisite specific findings to reject
21 her testimony. See id. at 14. Defendant asserts that the ALJ properly found Plaintiff's testimony
22 not fully credible. Def.'s Mot. at 6-8.

23 The Ninth Circuit has established a two-part test for evaluating a claimant's subjective
24 symptoms. See Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007). "First, the ALJ
25 must determine whether the claimant has presented objective medical evidence of an underlying
26 impairment which could reasonably be expected to produce the pain or other symptoms
27 alleged." Id. (citation and internal quotation marks omitted). The claimant, however, need not
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1 prove that the impairment reasonably could be expected to produce the alleged degree of pain
2 or other symptoms; the claimant need only prove that the impairment reasonably could be
3 expected to produce some degree of pain or other symptom. Id. If the claimant satisfies the
4 first element and there is no evidence of malingering, then the ALJ “can [only] reject the
5 claimant’s testimony about the severity of her symptoms . . . by offering specific, clear and
6 convincing reasons for doing so.” Id. (citation and internal quotation mark omitted). “General
7 findings are insufficient; rather, the ALJ must identify what testimony is not credible and what
8 evidence undermines the claimant’s complaints.” Reddick, 157 F.3d at 722 (quoting Lester v.
9 Chater, 81 F.3d 821, 834 (9th Cir. 1995)). The ALJ’s findings must be “sufficiently specific to
10 permit the court to conclude that the ALJ did not arbitrarily discredit [Plaintiff’s] testimony.”
11 Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002).

12 When weighing the claimant’s testimony, “an ALJ may consider . . . reputation for
13 truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities,
14 and unexplained, or inadequately explained, failure to seek treatment or follow a prescribed
15 course of treatment.” Orn v. Astrue, 495 F.3d 625, 636 (9th Cir. 2007) (internal quotation marks
16 and citation omitted). An ALJ also may consider the claimant’s work record and testimony from
17 doctors and third parties regarding the “nature, severity, and effect of the symptoms” of which
18 the claimant complains. Thomas, 278 F.3d at 958-59; see also 20 C.F.R. § 404.1529(c). If the
19 ALJ’s finding is supported by substantial evidence, the court may not second-guess his or her
20 decision. See Thomas, 278 F.3d at 959; Carmikle v. Comm’r of Soc. Sec. Admin., 533 F.3d
21 1155, 1163 (9th Cir. 2008) (where the ALJ’s credibility assessment is supported by substantial
22 evidence, it will not be disturbed even where some of the reasons for discrediting a claimant’s
23 testimony were improper).

24 Neither party contests the ALJ’s determination that Plaintiff has the following
25 impairments: Degenerative Disc Disease and anxiety. AR at 15-16; see also Pl.’s Mot.; Pl.’s
26 Reply; Def.’s Mot. Because the ALJ concluded that Plaintiff’s “medically determinable
27 impairments could reasonably be expected to cause the alleged symptoms,” a finding which is
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1 not contested by the parties, the first prong of the ALJ's inquiry regarding Plaintiff's subjective
2 symptoms is satisfied. See AR at 19; see also Lingenfelter, 504 F.3d at 1036; Pl.'s Mot.; Def.'s
3 Mot. Further, neither party alleges that the ALJ found that Plaintiff was malingering. See Pl.'s
4 Mot.; Def.'s Mot. As a result, the Court must determine whether the ALJ provided clear and
5 convincing reasons for discounting Plaintiff's subjective claims regarding her symptoms. See
6 Lingenfelter, 504 F.3d at 1036.

7 Here, the ALJ concluded that Plaintiff's "medically determinable impairments could
8 reasonably be expected to produce the alleged symptoms," but that Plaintiff's "statements
9 concerning the intensity, persistence and limiting effects of these symptoms are not entirely
10 consistent with the medical evidence and other evidence in the record" AR at 19. The
11 ALJ found Plaintiff not fully credible, reasoning as follows:

12 As noted throughout the decision, [Plaintiff's] subjective allegations are often
13 inconsistent with the objective medical evidence of record. Moreover, the
14 undersigned and the DDS noted that [Plaintiff] reported having cancer, before
15 tests were concluded. Because of these examples, as well as the record as a
16 whole, the undersigned ALJ finds that [Plaintiff's] allegations and reports are
somewhat inconsistent.

17 In terms of [Plaintiff's] allegations of anxiety and back pain, the undersigned ALJ
18 has taken [Plaintiff's] allegations into consideration. The ALJ finds that [Plaintiff's]
19 ability to function is greatly exaggerated. Her medical evidence of record is mild
20 and significantly more conservative.

21 Id. The ALJ also discredited Plaintiff's Function Report and her husband's Third Party Function
22 Report, noting inconsistencies between the two reports and with the medical evidence of record.
23 Id. at 20-21. Plaintiff challenges the following reasons provided by the ALJ: (1) Plaintiff's
24 subjective allegations are inconsistent with the objective medical evidence of record, and (2)
25 the Function Reports are inconsistent with each other.⁴ Pl.'s Mot. at 12. The Court will consider

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27 ⁴ Plaintiff also argues that the ALJ did not consider Plaintiff's hearing testimony. Pl.'s Mot. at
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1 Plaintiff's challenges below.

2 **1. Objective Medical Evidence**

3 The objective medical record provides substantial evidence to support the ALJ's decision
4 to discredit Plaintiff's testimony.

5 With regard to Plaintiff's physical impairments and Degenerative Disc Disease, the ALJ
6 determined that Plaintiff's ability to function is greatly exaggerated. Id. at 19. Plaintiff alleged
7 that her back pain is so severe that she cannot lift a wet towel out of the washing machine,
8 cannot sit or stand for more than 5-10 minutes, and that bending causes pain. Id. at 39, 42,
9 200. The ALJ rejected Plaintiff's testimony in favor of the DDS State Agency physician's
10 assessments that Plaintiff could occasionally lift and/or carry up to 50 pounds and frequently lift
11 and/or carry up to 25 pounds, can sit and stand for about six hours in an eight hour work-day,
12 can stoop, kneel, crouch and crawl frequently. Id. at 19, 67-68.

13 In reviewing the ALJ's decision regarding Plaintiff's physical impairments, the Court notes
14 that the ALJ considered the totality of the medical evidence of record and correctly interpreted
15 it as generally reflecting mild or normal objective findings and treatment for mild or moderate
16 pain. Id. at 15-16, 19. While Plaintiff did sustain a serious injury on July 8, 2015, when she
17 was intoxicated and fell off a second story balcony that was under construction, the medical
18 evidence shows that her pain was greatly reduced with treatment. See id. at 251. As a result
19 of her fall, Plaintiff sustained multiple left side rib fractures that were minimally or mildly
20 displaced, a concussion, mild probably acute compression fractures of the spine without
21 retropulsion and with a height loss of 10%. Id. at 251-52, 259. She was admitted to the
22 Emergency Room ("ER") on July 8, 2015, and discharged after "[e]xcellent recovery and
23 progress" on July 11, 2015. Id. at 251-52. At her first follow-up appointment on July 21, 2015,
24 Plaintiff complained of rib pain, but not back pain. See id. at 317-19. Dr. Schultz refilled her
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26 12. This argument is without merit as the ALJ's decision specifically discussed Plaintiff's
27 subjective allegations presented during the hearing and found them inconsistent with the
28 medical record and Plaintiff's activities of daily living. See AR at 19-21.

1 prescription of Percocet for the pain and instructed Plaintiff to return in two to three weeks if
2 her symptoms worsen or she has other problems. Id. at 319.

3 Plaintiff saw Dr. Samorano for a psychiatric follow-up on August 17, 2015. Id. at 282-
4 84. Dr. Samorano noted that Plaintiff stopped taking Percocet and was controlling her pain with
5 Tylenol and/or ibuprofen. Id. at 282. At Plaintiff's September 22, 2015 follow-up appointment
6 with Dr. Schultz, she complained of "on and off bilateral hip pain" and a "shooting pain that
7 radiates to [the] middle back of [her] thigh." Id. at 314. She also complained of left rib pain,
8 which she stated was improving. Id. Plaintiff had stopped taking ibuprofen because she was
9 concerned about her kidneys and did not want to take narcotic pain killers because they "made
10 her feel bad." Id. Dr. Schultz concluded that Plaintiff's ribs were "tender," but were resolving,
11 and advised Plaintiff to resume taking ibuprofen to control her pain. Id. at 316.

12 Plaintiff did not again seek treatment for her back, leg, or rib pain until four months later,
13 on December 21, 2015, when Dr. Schultz asked to meet with Plaintiff regarding her request that
14 he fill out a disability form for her. Id. at 339-41. The progress notes indicate that Plaintiff had
15 continuing lower back pain that is worse when lifting heavy objects. Id. at 339. For the first
16 time, Plaintiff reported that she had been suffering from bilateral hip and low back pain without
17 neurological lower extremity symptoms for three years, but explained that her rib pain was
18 "mostly resolved." See id. at 339, 251-403. The Court cannot verify Plaintiff's allegation of pain
19 for three years because the medical record only goes back until January 14, 2015. See AR at
20 251-403. The Court also notes that Plaintiff did not complain of back or leg pain prior to the
21 July 8, 2015 fall. See id. at 286-326. Further, Plaintiff's alleged onset of disability date is the
22 date of the fall, July 8, 2015. Id. at 147.

23 On December 21, 2015, Plaintiff was found to have bilateral lower paralumbar tenderness
24 with some spasm, but had negative straight leg raising tests with tight hamstrings and her lower
25 extremities were found to be within normal limits. Id. at 339-41. Dr. Schultz found that Plaintiff's
26 rib fractures had delayed healing and assessed that Plaintiff had Degenerative Disc Disease. Id.
27 at 341. To treat her Degenerative Disc Disease, Dr. Schultz referred Plaintiff to a physical
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1 therapist. Id. Plaintiff saw Dr. Schultz again on June 14, 2016, and complained of lower back
2 pain. Id. at 386-89. Dr. Schultz noted that Plaintiff did not schedule an appointment with a
3 physical therapist and again gave Plaintiff the information to do so. Id. at 386. On January 11,
4 2016, Plaintiff underwent a bone scan of her lumbar spine and right femoral neck. Id. at 342.
5 Plaintiff was found to have normal bone mineralization. Id. The record does not contain any
6 evidence indicating that Dr. Schultz opined that Plaintiff was disabled or limited in her ability to
7 work or perform physical tasks due to her physical impairments, nor does it appear that Dr.
8 Schultz completed a disability form on behalf of Plaintiff. See id. at 339-41.

9 As such, there is substantial evidence in the record to support the ALJ's conclusion that
10 Plaintiff's claimed functional physical limitations are "greatly exaggerated" because: (1) she
11 received very conservative medical treatment, consisting of mild pain relievers and a physical
12 therapy recommendation, (2) she obtained relief from the pain using only Tylenol or Ibuprofen
13 within one month after her traumatic fall, and (3) her medical care was inconsistent as she didn't
14 return to Dr. Schultz in a timeframe indicating increased pain or physical limitation, and she
15 failed to pursue physical therapy. See Social Security Ruling ("SSR") 88-13 (permitting the ALJ
16 to discount a claimant's credibility based on the type, dosage, effectiveness, and adverse side-
17 effects of any pain medication and treatment, other than medication, for relief of pain); Fair v.
18 Bowen, 885 F.2d 597, 603 (9th Cir. 1989) (stating that the ALJ may consider the "unexplained,
19 or inadequately explained failure to seek treatment or follow a prescribed course of treatment").
20 In addition, Plaintiff's testimony regarding her physical pain and limitations is contradicted by
21 her doctors as Dr. Schultz did not opine that Plaintiff had any limitations on her daily activities
22 and the DDS State Agency physicians found only mild restrictions.

23 In rejecting Plaintiff's allegations regarding her mental impairments, the ALJ again
24 referenced the medical evidence as a whole and the DDS State Agency mental health
25 consultant's opinion. Id. at 19-20. Plaintiff testified at the hearing that "[p]retty much every
26 day" she is "just afraid of everything" when she is alone or in public due to her anxiety and just
27 wants to "go home[,] . . . get comfortable and lay in . . . bed." Id. at 43-44. The ALJ concurred
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1 with the State Agency mental health consultant's assessment that Plaintiff's affective disorder
2 and anxiety were non-severe and resulted in only mild restrictions of Plaintiff's ability to function.
3 Id. at 19-20. As discussed in detail in Section I above, the objective medical evidence does not
4 support the severity of symptoms and limitations claimed by Plaintiff and attributed to her mental
5 health issues. Rather, the objective medical records indicate that Plaintiff's mental health issues
6 are responsive to medication, only mildly affect her daily activities, and have never caused a
7 period of decompensation of any duration. Similarly, Plaintiff's mental health providers did not
8 prescribe medication or treatment indicating severe mental health issues or related life or work
9 limitations.

10 In summation, the ALJ identified specific reasons for discounting Plaintiff's credibility
11 regarding both her physical and mental symptoms by contrasting them with the medical
12 evidence as a whole and with opinions of the DDS State Agency physician and mental health
13 consultant. AR at 19-20. Thus, substantial evidence supports the ALJ's determination that the
14 objective medical evidence of record contradicts Plaintiff's subjective allegations. Carmickle, 533
15 F.3d at 1161 ("Contradiction with the medical record is a sufficient basis for rejecting the
16 claimant's subjective testimony.") (citing Johnson v. Shalala, 60 F.3d 1428 (9th Cir. 1995)).
17 However, the lack of objective medical evidence contradicting Plaintiff's subjective allegations
18 alone cannot suffice as the basis for discounting Plaintiff's testimony. See Burch v. Barnhart,
19 400 F.3d 676, 681 (9th Cir. 2005).

20 **2. Activities of Daily Living**

21 Plaintiff also argues that the ALJ improperly discredited her testimony because her Adult
22 Function Report and the Third Party Function Report, submitted by her husband, Alan Kosbab,
23 contain two minor inconsistencies regarding her activities of daily living. Pl.'s Mot. at 13. In
24 determining a plaintiff's credibility, an ALJ may consider whether a plaintiff's daily activities are
25 consistent with the asserted symptoms. See Thomas, 278 F.3d at 958-59 (citation omitted);
26 see also SSR 96-7p, 1996 SSR WL 374186, at *3 (stating that the "adjudicator must consider in
27 addition to the objective medical evidence when assessing the credibility of an individual's
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1 statements: . . . [t]he individual’s daily activities”). While the fact that a plaintiff can participate
2 in various daily activities does not necessarily detract from the plaintiff’s credibility as to her
3 specific limitations or overall disability, “a negative inference is permissible where the activities
4 contradict the other testimony of the claimant, or where the activities are of a nature and extent
5 to reflect transferrable work skills.” Elizondo v. Astrue, 2010 WL 3432261, at *5 (E.D. Cal. Aug.
6 31, 2010). “Daily activities support an adverse credibility finding if a claimant is able to spend
7 a substantial part of her day engaged in pursuits involving the performance of physical functions
8 or skills that are transferable to a work setting.” Id. (citing Orn, 495 F.3d at 639; Morgan v.
9 Comm’r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999); and Thomas, 278 F.3d at 959).
10 “A claimant’s performance of chores such as preparing meals, cleaning house, doing laundry,
11 shopping, occasional childcare, and interacting with others has been considered sufficient to
12 support an adverse finding when performed for a substantial portion of the day.” Elizondo, 2010
13 WL 3432261, at *5 (citing Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008);
14 Burch, 400 F.3d at 680-81; Thomas, 278 F.3d at 959; Morgan, 169 F.3d at 600; and Curry v.
15 Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1990)).

16 Here, the ALJ found that Plaintiff’s allegations were inconsistent with her activities of daily
17 living. AR at 21. Specifically, the ALJ noted that there were inconsistencies between the
18 objective medical record and Plaintiff’s reported level of abilities and activities and that Plaintiff
19 omitted some functional abilities and activities in her Function Report. Id. In support, the ALJ
20 stated that “[f]rom a psychological aspect, [Plaintiff] has no to mild restrictions and limitations
21 pertaining to her activities of daily living.” Id. at 20. This is supported by the record, which
22 shows that Plaintiff reported being able to take care of herself, do light household chores, cook,
23 and shop if it doesn’t require her to be on her feet for more than 15 minutes. Id. at 20, 196-
24 97. The ALJ explained that Plaintiff’s ability to prepare complete meals and watch television
25 programs suggests that she can sustain concentration, persistence, and pace. Id. at 20. The
26 ALJ also noted that socially, Plaintiff enjoys visiting with her family daily by phone or computer.
27 Id. at 20, 190, 199. Finally, the ALJ found no evidence that Plaintiff experienced any episodes
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1 of decompensation of any duration. Id. at 20. As a result, the ALJ, concurring with the State
2 Agency mental health consultant, found mild restrictions of activities of daily living, mild
3 difficulties in maintaining social functioning, mild difficulties in maintaining concentration,
4 persistence or pace, and no episodes of decompensation of any duration. Id. at 20, 66. Thus,
5 the ALJ gave little weight to Plaintiff's Function Report and Mr. Kosbab's Third Party Function
6 Report, which largely corroborated Plaintiff's report. Id. at 21.

7 An ALJ must identify "*which* daily activities conflicted with *which* part of [the c]laimant's
8 testimony," pointing to specific facts in the record to support an adverse credibility finding.
9 Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014) (emphasis in original). Here, the ALJ
10 noted that Plaintiff is "largely able to take care of herself regarding personal hygiene, and
11 grooming," is able to "perform light housekeeping chores such as feeding her pets, cleaning,
12 doing the dishes, helping make the bed, and cooking light or complete meals," and is able to
13 "use a cell phone and a computer." AR at 17. The ALJ also determined that Plaintiff indicated
14 a "modicum of ability to concentrate and attend on story or plot lines, or non-fiction shows"
15 because she watches television daily and is able to perform multiple step tasks, like preparing
16 complete meals or using a microwave. Id. Specifically, the ALJ noted that:

17 [Plaintiff] reported that she is able to prepare sandwiches, frozen foods and even
18 complete meals, if she can do so by not being on her feet more than 15 minutes.
19 By light housekeeping, she stated that she is able to clean, do the dishes, dust and
20 help make the bed. She reported that she no longer drives, as she cannot turn
21 her head or back to look behind her. She does go shopping with her husband for
22 food, clothes and household items noting that this only takes 10-15 minutes. She
23 is able to count change, but reported that she has no money regarding paying bills
24 or using accounts. She did not answer whether she is intellectually capable of
25 handling money matters. [Plaintiff] reported that her hobbies include watching
26 television and talking to her animals. Socially, she visits with her family daily by
27 telephone. Regarding her medications, she stated that she takes Klonopin and
28 Ambien, which make her tired, and Tramadol and Hydrocodone give her nausea,
and dizziness. [Plaintiff] added that her pain is not the same every day.

Id. at 20. The ALJ noted that Plaintiff's wide-ranging daily activities are largely corroborated by

1 Mr. Kosbab's Third Party Function Report. Id. at 21, 186-93. The ALJ found two inconsistencies
2 to be of particular interest: (1) Mr. Kosbab reported that Plaintiff uses the computer on a daily
3 basis to socialize, and (2) Mr. Kosbab reported that Plaintiff can handle money. Id. at 21, 189-
4 90.

5 Plaintiff argues that the ALJ's adverse credibility determination is inappropriately based
6 on these two differences, which might not even be inconsistent with one another. Pl.'s Mot. at
7 13. The Court agrees with Plaintiff that the first alleged inconsistency might not actually be an
8 inconsistency. Plaintiff explained in her Function Report that she could handle money if she had
9 any, which does not differ from Mr. Kosbab's statement that Plaintiff has the ability to handle
10 money. Id. at 13; see also AR at 189, 198-99. With regard to the second inconsistency, the
11 Court acknowledges that both Plaintiff and her husband stated that Plaintiff socialized daily so
12 the statements are not inconsistent in that respect. AR at 187-89, 199. However, as noted by
13 the ALJ, the important inconsistency is that Plaintiff failed to acknowledge daily use of a
14 computer, which is a skill that is transferrable to the work environment. Id. at 21; see Bray v.
15 Commissioner of Social Security Admin., 554 F.3d 1219, 1224 n.5 (9th Cir. 2008) (stating that
16 it is the ALJ who must find that use of a computer is a transferrable skill).

17 Moreover, the ALJ did not base his adverse credibility determination only on the alleged
18 inconsistencies between Plaintiff's and Mr. Kosbab's function reports. See id. at 21. Rather, the
19 ALJ found that Plaintiff's activities of daily living, or functional abilities, were greatly exaggerated.
20 Id. at 19-20. Plaintiff's Function Report and Mr. Kosbab's Third Party Function Report both
21 report that Plaintiff's activities of daily living are wide-ranging. These admitted, wide-ranging
22 activities of daily living are inconsistent with the presence of an incapacitating or debilitating
23 medical condition. Based on the foregoing, substantial evidence supports the ALJ's finding that
24 Plaintiff's daily activities contradict her complaints of disabling impairments and that this was a
25 clear and convincing reason for discounting Plaintiff's credibility. See Rezendes v. Colvin, 2015
26 WL 3407928, at *11-12 (C.D. Cal. May 26, 2015) (finding that there was substantial evidence
27 to discredit the claimant's testimony because the "wide-ranging" daily activities listed in the
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1 claimant's function report and his spouse's third party function report contradicted the claimant's
2 allegations of disabling impairments).

3 **3. Plaintiff's Truthfulness**

4 Although Plaintiff challenges the ALJ's adverse credibility determination based on the
5 objective medical record and her activities of daily living, which were listed in the function
6 reports, Plaintiff does not challenge the ALJ's third and final reason for discounting Plaintiff's
7 credibility – her reputation for truthfulness. See Pl.'s Mot.; Pl.'s Reply.

8 Specifically, the ALJ stated: "[t]he undersigned and the DDS noted that [Plaintiff] reported
9 having cancer, before tests were done and concluded." AR at 19. Substantial evidence in the
10 record supports this finding. On July 8, 2015, the date of Plaintiff's fall, she told a nurse that
11 she found out that day she had breast cancer. Id. at 253. A week before her fall, Plaintiff had
12 a right breast biopsy done, which demonstrated benign results. Id. at 326, 401. There was no
13 evidence of atypia or malignancy and Plaintiff was advised to have a follow-up breast MRI six
14 months later. Id. at 326. The DDS State Agency consultant highlighted this discrepancy in
15 opining that Plaintiff is "partially credible." Id. at 67.

16 The ALJ also found Plaintiff's reports concerning her alcohol usage variable and
17 inconsistent. Id. at 16-17. Substantial medical evidence supports this finding. On March 4,
18 2016, Plaintiff reported she occasionally drinks and has about three to four glass of wine per
19 week. Id. at 355. Dr. Ede found this inconsistent with her June 19, 2015 statement that Plaintiff
20 only drinks one drink every couple of weeks. Id. Dr. Ede also noted that on June 19, 2015,
21 Plaintiff reported having two drinks the Wednesday prior to her appointment and three glasses
22 of wine two nights prior to the appointment, but otherwise was not drinking at all. Id. Dr. Ede
23 reported that Plaintiff violated her controlled medication by continuing to drink alcohol. Id. at
24 356.

25 On June 28, 2016, Dr. Schultz screened Plaintiff for alcohol use. Id. at 379. Plaintiff
26 reported that she had four or more drinks in a day only once a year, that she drinks two to four
27 times a month, that when she drinks she typically only has one or two drinks, that she has never
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1 had more than 5 drinks on one occasion, and that she has never been injured because she was
2 drinking. Id. This contradicts reports about Plaintiff's alcohol usage on July 8, 2015. Plaintiff
3 was assessed with alcohol intoxication when she was admitted to the ER to treat her injuries
4 sustained from falling off a second story balcony. Id. at 251. Her lab results indicated acute
5 alcohol intoxication. Id. at 251, 254. On that date, Plaintiff also reported using alcohol regularly.
6 Id. at 253.

7 The ALJ properly factored Plaintiff's inconsistent statements regarding her breast biopsy
8 and alcohol usage into his credibility analysis. Id. at 19; see Orn, 495 F.3d at 636 (9th Cir.
9 2007) (stating that it is proper for the ALJ to consider evidence regarding the plaintiff's
10 reputation for truthfulness). Accordingly, substantial evidence supports the ALJ's determination
11 that Plaintiff's reputation for truthfulness adversely impacted her credibility.

12 **4. Conclusion**

13 Given the totality of the record, the Court finds that substantial evidence supports the
14 ALJ's conclusion that the objective medical evidence does not support Plaintiff's allegations
15 regarding the intensity, persistence, and limiting effects of her symptoms. The ALJ pointed to
16 specific evidence in the record, including progress notes with Plaintiff's primary care providers
17 and the State Agency consultants' opinions, in identifying the objective medical evidence that
18 undermined the Plaintiff's credibility regarding her alleged symptoms. See AR at 15-20. In
19 addition, the ALJ considered the fact that Plaintiff's wide-ranging daily activities were
20 inconsistent with a debilitating and disabling medical impairment. Id. Further, the ALJ
21 considered the negative impact of Plaintiff's reputation for truthfulness in regards to her breast
22 biopsy and alcohol usage – which Plaintiff does not dispute. Id. at 19; see Pl.'s Mot. Each of
23 these reasons was supported by substantial evidence and together constitute a sufficient basis
24 for discounting Plaintiff's impairment testimony.

25 **CONCLUSION**

26 For the reasons set forth above, the Court **RECOMMENDS** that Plaintiff's Motion for
27 Summary Judgment be **DENIED** and Defendant's Cross-Motion for Summary Judgment be

1 **GRANTED.**

2 **IT IS HEREBY ORDERED** that any written objections to this Report and
3 Recommendation must be filed with the Court and served on all parties no later than **August**
4 **25, 2017**. The document should be captioned "Objections to Report and Recommendation."

5 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court
6 and served on all parties no later than **September 8, 2017**. The parties are advised that
7 failure to file objections within the specified time may waive the right to raise those objections
8 on appeal of the Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez
9 v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

10 **IT IS SO ORDERED.**

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12 Dated: 8/11/2017


13 Hon. Barbara L. Major
14 United States Magistrate Judge
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