

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERRA MACIAS-HATCH,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 1:14-CV-3079-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 13, 17. Plaintiff is represented by D. James Tree. Defendant is represented by Diana Andsager. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

//

//

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g),
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158 (9th Cir. 2012). “Substantial evidence” means relevant evidence that “a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
11 (quotation and citation omitted). Stated differently, substantial evidence equates to
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
13 citation omitted). In determining whether this standard has been satisfied, a
14 reviewing court must consider the entire record as a whole rather than searching
15 for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record “is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ’s findings if they are supported by inferences reasonably drawn from the
20 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.
19 §§ 404.1520(a)(4)(i)–(v), 416.920(a)(4)(i)–(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R.
3 §§ 404.1520(b), 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R.
15 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe as or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations, 20 C.F.R.

3 §§ 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of
4 the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv),
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R.

10 §§ 404.1520(f), 416.920(f). If the claimant is incapable of performing such work,
11 the analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R.

18 §§ 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to
19 other work, the analysis concludes with a finding that the claimant is disabled and
20 is therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R.
6 §§ 404.1560(c), 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir.
7 2012).

8 ALJ FINDINGS

9 Plaintiff filed applications for disability insurance benefits and supplemental
10 security income on August 8, 2007. Tr. 108, 109, 273–75, 276–80. Plaintiff’s
11 claims were denied initially and upon reconsideration. Tr. 135–38, 144–47, 154–
12 55, 157–58. Following hearings in June and November 2010, an ALJ denied
13 Plaintiff’s claims on November 15, 2010. Tr. 36–45, 46–79, 115–123. The
14 Appeals Council reviewed this decision and remanded the matter on March 16,
15 2012, for additional proceedings. Tr. 128–31.

16 A new hearing was held before a different ALJ on August 28, 2012. Tr. 80–
17 107. The ALJ issued a decision denying Plaintiff’s claims on September 27, 2012.
18 Tr. 11–30. At step one, the ALJ found that Plaintiff had not engaged in
19 substantial gainful activity since May 28, 2004. Tr. 14. At step two, the ALJ
20 found that Plaintiff had the following severe impairments: personality disorder;

1 posttraumatic stress disorder; panic disorder; affective disorder; seizure disorder;
2 diverticulosis; and obesity. *Id.* At step three, the ALJ found that Plaintiff did not
3 have an impairment or combination of impairments that met or medically equaled
4 a listed impairment. Tr. 15. The ALJ then concluded that Plaintiff had the RFC

5 to perform light work as defined in 20 CFR 404.1567(b) and
6 416.967(b) except: the claimant can never climb ladders, ropes, or
7 scaffolds; the claimant can frequently balance; the claimant should
8 avoid hazardous working conditions such as proximity to unprotected
9 heights, moving machinery, sharp objects, open water, and hot
surfaces; the claimant is limited to tasks that can be learned in one
year or less; the claimant is able to engage in occasional public
interaction; and the claimant is able to adapt to a predictable work
routine with no more than occasional changes.

10 Tr. 17. The ALJ found, at step four, that Plaintiff was unable to perform past
11 relevant work. Tr. 28. At step five, the ALJ found that, considering Plaintiff's
12 age, education, work experience, and RFC, jobs exist in significant numbers in the
13 national economy which Plaintiff can perform in representative occupations such
14 as small product assembly, housekeeper, and hand packager. Tr. 29. On that
15 basis, the ALJ concluded that Plaintiff was not disabled as defined in the Social
16 Security Act. Tr. 30.

17 The Appeals Council denied Plaintiff's request for review on April 16, 2014,
18 making the ALJ's decision the Commissioner's final decision for purposes of
19 judicial review. Tr. 1-5; 42 U.S.C. §§ 405(g), 1383(c)(3); 20 C.F.R. §§ 416.1481,
20 422.210.

1 ISSUES

2 Plaintiff raises the following issues for review:

3 (1) Whether the ALJ properly evaluated the credibility of Plaintiff’s
4 subjective complaints. ECF No. 13 at 14–18.

5 (2) Whether the ALJ properly assessed Plaintiff’s RFC. Specifically,
6 whether the ALJ properly weighed certain medical opinions and whether
7 the ALJ properly acknowledged the effect of the possible psychogenic
8 nature of Plaintiff’s seizures. *Id.* at 9–12.

9 (3) Whether the ALJ properly evaluated Plaintiff’s ability to participate in
10 jobs in the national economy at step five. *Id.* at 18–20.

11 DISCUSSION

12 A. Plaintiff’s Credibility

13 Plaintiff contends that the ALJ erred by rejecting the full extent of Plaintiff’s
14 subjective complaints about the severity of the symptoms caused by her
15 impairments. ECF No. 13 at 17–18. Plaintiff argues that “the ALJ offers a number
16 of rationales for finding the claimant not credible, but these reasons do not meet
17 the Ninth Circuit’s clear and convincing standard.” *Id.* at 17. Defendant contends
18 the ALJ provided legally sufficient reasons to reject Plaintiff’s testimony. ECF
19 No. 17 at 12–15.

1 In social security proceedings, a claimant must prove the existence of a
2 physical or mental impairment with “medical evidence consisting of signs,
3 symptoms, and laboratory findings.” 20 C.F.R. §§ 416.908, 416.927. A claimant’s
4 statements about his or her symptoms alone will not suffice. 20 C.F.R. §§
5 416.908, 416.927. Once an impairment has been proven to exist, an ALJ “may not
6 reject a claimant’s subjective complaints based solely on a lack of objective
7 medical evidence to fully corroborate the alleged severity of [the symptom].” *See*
8 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). As long as the
9 impairment “could reasonably be expected to produce [the symptom],” the
10 claimant may offer a subjective evaluation as to the severity of the impairment. *Id.*
11 at 344 (citation omitted). This rule recognizes that the severity of a claimant’s
12 symptoms “cannot be objectively verified or measured.” *Id.* at 347 (citation
13 omitted).

14 However, an ALJ may conclude that the claimant’s subjective assessment is
15 unreliable, so long as the ALJ makes “a credibility determination with findings
16 sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not
17 arbitrarily discredit claimant's testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958
18 (9th Cir. 2002); *see also Bunnell*, 947 F.2d at 345 (“[A]lthough an adjudicator may
19 find the claimant's allegations of severity to be not credible, the adjudicator must
20 specifically make findings which support this conclusion.”). In making such a

1 determination, the ALJ may consider, *inter alia*: (1) the claimant’s reputation for
2 truthfulness; (2) inconsistencies in the claimant’s testimony or between her
3 testimony and her conduct; (3) the claimant’s daily living activities; (4) the
4 claimant’s work record; and (5) testimony from physicians or third parties
5 concerning the nature, severity, and effect of the claimant’s condition. *Thomas*,
6 278 F.3d at 958. If there is no evidence of malingering, the ALJ’s reasons for not
7 crediting the claimant's testimony must be “specific, clear and convincing.”
8 *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012). The ALJ “must
9 specifically identify the testimony she or he finds not to be credible and must
10 explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246
11 F.3d 1195, 1208 (9th Cir. 2001).

12 Here, the ALJ found that Plaintiff’s medically determinable impairments
13 could reasonably be expected to cause Plaintiff’s alleged symptoms. Tr. 19.
14 However, the ALJ did not credit Plaintiff’s testimony about the severity of her
15 symptoms. *Id.* The ALJ did not conclude there was evidence of malingering, and
16 therefore the Court must determine whether the ALJ provided specific, clear and
17 convincing reasons not to credit Plaintiff’s testimony of the limiting effects of her
18 impairments. *Chaudhry*, 688 F.3d at 672. The Court concludes that the ALJ did
19 provide specific, clear and convincing reasons which are supported by substantial
20 evidence.

1 The ALJ provided a number of reasons for concluding that Plaintiff's
2 testimony was not credible. First, the ALJ noted that Plaintiff has made
3 inconsistent statements regarding both her substance abuse and her seizures which
4 diminish her credibility. Tr. 20–23. The ALJ cited many occasions in which
5 Plaintiff made inconsistent reports to health care providers about her history of
6 substance abuse. Tr. 20–21. For example, in September 2010 Plaintiff report to
7 Emma Joan H. Billings, Ph.D., that she had not consumed alcohol in
8 approximately a year, but “[i]n the past she was consuming a half-gallon of vodka
9 every two days.” Tr. 632. This is inconsistent with Plaintiff's statement to Jay M.
10 Toews, Ed.D., in August 2008 that Plaintiff quit drinking when she began having
11 seizures sometime around the year 2001.¹ Tr. 492. The ALJ also noted Plaintiff's
12 inconsistent statements regarding the last time she used drugs, stating variably that
13 this was in 2007 (Tr. 100), 2008 (Tr. 72, 73), or 2010 (Tr. 632). Tr. 21.²

14
15 ¹ It is not entirely clear from the record when Plaintiff began experiencing seizures.
16 Plaintiff told Dr. Toews she was first diagnosed in 2001. Tr. 492. Dr. R. Richard
17 Sloop notes Plaintiff told him she was first treated for seizures in 1998. Tr. 555.

18 ² Plaintiff contends that Dr. Billings “misdocumented” the 2010 substance use. Tr.
19 100. Even were that true, Plaintiff still testified inconsistently at her first hearing
20 that she last used methamphetamines in 2008 and at her second hearing that she

1 The ALJ further cited many inconsistencies in Plaintiff's statements
2 regarding her seizures. Tr. 21–23. For example in July 2010, Plaintiff reported to
3 a neurologist that she was experiencing ongoing seizures at the rate of twice a
4 month. Tr. 640. However, in August 2011, Plaintiff told a different physician that
5 she had not experienced a seizure since September 2009. Tr. 742.

6 An ALJ may properly consider inconsistent statements in evaluating the
7 credibility of a claimant's statements about the severity of her impairments. *See*
8 *Thomas*, 278 F.3d at 958–59; *see also* SSR 96-7p, 1996 WL 374186 at *5 (July 2,
9 1996) (“One strong indication of the credibility of an individual's statements is
10 their consistency The adjudicator must compare statements made by the
11 individual in connection with his or her claim for disability benefits with
12 statements he or she made under other circumstances, when such information is in
13 the case record.”). Here, the ALJ noted the many inconsistencies in Plaintiff's
14 statements made both to medical providers and during her hearings, and properly
15 considered those inconsistencies in evaluating Plaintiff's credibility.

16
17 last used methamphetamines in 2007. *Compare* Tr. 72, *with* Tr. 100. Plaintiff was
18 even uncertain in the first hearing whether she last used in 2008 or 2009. Tr. 72.
19 Whether Plaintiff is being untruthful or not, her testimony is nevertheless
20 unreliable because of her inability to testify consistently.

1 Second, the ALJ cited numerous portions of the record that indicated
2 Plaintiff had “not been compliant with taking prescribed medications, adhering to
3 prescribed treatment, or attending appointments.” Tr. 20. For example, on
4 multiple occasions Plaintiff did not follow through with scheduled evaluations or
5 lab testing. *See* Tr. 413, 426–27, 458, 528. The ALJ also noted instances where
6 Plaintiff reported she was not taking her prescribed seizure medication. Tr. 22,
7 412, 458, 475, 493, 527. Plaintiff stated on one occasion that she stopped taking
8 two of her medications because of adverse side effects. Tr. 21, 375, 527. But as
9 the ALJ noted, Plaintiff reported elsewhere that she quit these medications because
10 they were ineffective or because she could not afford them. Tr. 21, 22, 397, 458.
11 The ALJ also noted that Plaintiff was noncompliant with proscribed antibiotics—to
12 which there is no indication she suffered adverse effects. Tr. 20, 527. Such
13 inadequately explained failures to follow prescribed courses of treatment “can cast
14 doubt on the sincerity of the claimant’s [symptom] testimony.” *Fair v. Brown*, 885
15 F.2d 597, 603 (9th Cir. 1989).³

16 ³ Plaintiff contends, citing *Regennitter v. Comm’r of Social Sec.*, 166 F.3d 1294,
17 1299–1300 (9th Cir. 1999), that her “mental health impairments inhibit her ability
18 to seek treatment.” ECF No. 13 at 14. In *Regennitter*, the Ninth Circuit criticized
19 the practice of “chastis[ing] one with a mental impairment for the exercise of poor
20 judgment in seeking rehabilitation.” *Id.* (citation omitted). However, Plaintiff’s

1 Third, the ALJ cited Plaintiff's criminal history, including unlawful issuance
2 of bank drafts, as another factor supporting an adverse credibility finding. Tr. 21.
3 An ALJ may consider the claimant's reputation for truthfulness as a relevant aspect
4 of evaluating credibility. *Thomas*, 278 F.3d at 958. Passing bad checks is a crime
5 involving fraud, properly considered in assessing credibility. *See, e.g., State v.*
6 *Ben-Neth*, 34 Wash.App. 600, 606 (1983) ("for unlawful issuance of checks, the
7 trier of fact must find the defendant wrote the check with intent to defraud,
8 knowing he had insufficient funds in his account"). The ALJ did not place undue
9 emphasis on Plaintiff's criminal history in assessing Plaintiff's credibility. The
10 ALJ's credibility assessment was founded predominantly upon Plaintiff's
11 inconsistent statements and noncompliance with prescribed treatment.

12 Finally, the ALJ observed that Plaintiff's "testimony that she stays at home
13 is contradicted by evidence elsewhere in the record that she engages in a range of
14 activities." Tr. 20. There are two grounds for using daily activities in evaluating a

15
16 actions in this case go beyond mere failure to seek treatment. Plaintiff in fact
17 sought treatment on many occasions, but she then failed to follow the advice and
18 directives of her medical providers. The Court has not found, nor has Plaintiff
19 pointed to, any evidence in the record demonstrating that Plaintiff's failure to
20 follow her prescribed treatment was influenced by her mental impairments.

1 claimant's credibility. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). First,
2 the daily activities may simply contradict a claimant's other testimony. *Id.*;
3 *Molina*, 674 F.3d at 1113 ("whether the claimant engages in daily activities
4 inconsistent with the alleged symptoms") (citation omitted). Second, daily
5 activities may be grounds for an adverse credibility finding if a claimant is able to
6 spend a substantial part of her day engaged in pursuits involving the performance
7 of physical functions that are transferable to a work setting. *Orn*, 495 F.3d at 639.
8 Here, the ALJ cited Plaintiff's activities of attending church four to five days a
9 week, walking to see a friend several times a week, and her self-reports that she is
10 getting out and doing more, as contradicting Plaintiff's claimed extreme aversion
11 to leaving the house. Tr. 20, 626, 679, 693, 709. As with Plaintiff's criminal
12 history, the ALJ's reference to daily activities lends support to a credibility
13 determination predominantly founded on Plaintiff's inconsistent statements and
14 noncompliance.

15 In sum, the ALJ properly relied upon inconsistencies in Plaintiff's
16 statements and her noncompliance with prescribed treatment to evaluate Plaintiff's
17 credibility. While the brief reference to Plaintiff's daily activities and criminal
18 record do not themselves meet the standard alone, the ALJ's full decision provides
19 specific, clear, and convincing reasons sufficient for this Court to conclude that the
20 adverse credibility determination is supported by substantial evidence.

1 B. RFC Evaluation

2 Plaintiff contends generally that the “ALJ’s residual function capacity
3 assessment fails to accurately describe the nature and symptoms of [Plaintiff’s]
4 mental health conditions.” ECF No. 13 at 7. Specifically, Plaintiff contends that
5 the ALJ failed to “consider the effect of psychogenic seizures” on Plaintiff’s RFC.
6 *Id.* at 14. Plaintiff also contends the ALJ erred in rejecting the opinions of Emma
7 John H. Billings, Pd.D., and Donna Veraldi, Ph.D. *Id.* at 9–13. The Court
8 considers each argument in turn.

9 Plaintiff argues that the ALJ failed to consider the effect of psychogenic
10 seizures on Plaintiff’s RFC. ECF No. 13 at 14. Specifically, Plaintiff contends
11 that the severity of her seizures is greater if they have a psychological component.
12 ECF Nos. 13 at 13; 19 at 4. The Court is not persuaded by Plaintiff’s argument.

13 First, the ALJ noted that medication for Plaintiff’s seizures has been
14 effective and that she was not having seizures now that she was on Topomax. Tr.
15 26. The ALJ also noted that if the seizures were in fact psychogenic, they were
16 also treatable with psychiatric care. *Id.* “Impairments that can be controlled
17 effectively with medication are not disabling for the purpose of determining
18 eligibility for SSI benefits.” *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001,
19 1006 (9th Cir. 2006). Second, the ALJ included safety precautions in Plaintiff’s
20 RFC to avoid injury in the case that Plaintiff does experience a seizure while on the

1 job. Tr. 17 (“[T]he claimant should avoid hazardous working conditions such as
2 proximity to unprotected heights, moving machinery, sharp objects, open water,
3 and hot surfaces . . .”). Whether Plaintiff’s seizures are psychogenic or epileptic,
4 the ALJ properly considered their existence and severity, and afforded appropriate
5 limitations in Plaintiff’s RFC.

6 Plaintiff also argues that the ALJ failed to properly consider the opinion of
7 Emma John H. Billings, Pd.D., who examined Plaintiff in September 2010. ECF
8 Nos. 13 at 9–12; 19 at 3–4. The ALJ assigned this opinion some weight,
9 concluding that the “severity of [Dr. Billings’] finding restricting any public
10 contact is inconsistent with the overall evidence of record.” Tr. 26. For instance,
11 Donna Veraldi, Ph.D., disagreed with the conclusions reached by Dr. Billings. *See*
12 Tr. 25, 67–68. “If a treating or examining doctor’s opinion is contradicted by
13 another doctor’s opinion, an ALJ may only reject it by providing specific and
14 legitimate reasons that are supported by substantial evidence.” *Bayliss v.*
15 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (citing *Lester v. Chater*, 81 F.3d
16 821, 830-31 (9th Cir. 1995)). As a contradicted opinion, the Court must determine
17 whether the ALJ provided specific and legitimate reasons supported by substantial
18 evidence in assigning Dr. Billings’ opinion limited weight.

19 It is the ALJ’s duty to resolve conflicting medical opinions. *Thomas*, 278
20 F.3d at 956. Plaintiff disagrees with the ALJ’s conclusions in this case and argues

1 that the ALJ “provided no specific references to inconsistencies that actually
2 [were] applied by Dr. Billings in arriving at her ultimate conclusions. Without
3 such a statement, these inconsistencies are nothing more than minor points
4 intended to justify a decision the ALJ has already made.” ECF No. 13 at 10–11.
5 However, the ALJ set out a detailed and thorough examination of the record and
6 conflicting opinions, made specific findings, and addressed inconsistencies
7 between Dr. Billings’ conclusions and the treatment notes of other medical
8 providers. Tr. 24–28. The ALJ’s resolution of the conflicting opinions is
9 reasonable and must be upheld. *See Batson v. Comm’r of Soc. Sec. Admin.*, 359
10 F.3d 1190, 1193 (9th Cir. 2004) (“[T]he Commissioner’s findings are upheld if
11 supported by inferences reasonably drawn from the record . . . and if evidence
12 exists to support more than one rational interpretation, we must defer to the
13 Commissioner’s decision.” (citation omitted)). The ALJ provided specific and
14 legitimate reasons to assign limited weight to the functional assessment of Dr.
15 Billings.

16 Finally, Plaintiff argues briefly that the ALJ failed to provide proper reasons
17 to reject the opinion of Donna Veraldi, Ph.D, the testifying medical expert at
18 Plaintiff’s November 2010 hearing. ECF No. 13 at 9. The ALJ did not reject Dr.
19 Veraldi’s testimony, but instead gave it “significant weight” and incorporated Dr.
20 Veraldi’s conclusions into Plaintiff’s RFC. Tr. 25, 58–59, 60 (“If it was work I

1 think she would be limited to simple, routine, repetitive because of the working
2 memory problems and the attention and concentration problems, yes. And there
3 are some limitations in her social interaction. But yes, based on what I have, I
4 would not see anything that would take her out of [maintaining full time work on a
5 regular and continuing basis in a competitive work environment].”). Plaintiff has
6 not shown error in the ALJ’s reasons to reject Dr. Veraldi’s opinion because the
7 ALJ did not in fact reject the opinion.

8 However, as Defendant concedes, there is one aspect of Dr. Veraldi’s
9 opinion that is not expressly incorporated into Plaintiff’s RFC. ECF No. 17 at 17.
10 During Plaintiff’s hearing, Dr. Veraldi concluded that Plaintiff had marked
11 difficulties in maintaining concentration, persistence, and pace, and in
12 understanding and remembering complex instructions. Tr. 25, 58, 59. Based upon
13 these limitations, Dr. Veraldi opined that Plaintiff’s work ability was “limited to
14 simple, routine, repetitive” tasks. Tr. 25, 60. While the ALJ gave this opinion
15 significant weight, the RFC articulated by the ALJ stated Plaintiff could perform
16 “tasks that can be learned in one year or less.” Tr. 17, 25. This, Defendant
17 concedes, was error given Dr. Veraldi’s specific opinion offered at the hearing.

18 *See* ECF No. 17 at 17.⁴

19 ⁴ In her briefing, Defendant essentially argues the inverse of this error, contending
20 that the ALJ erred in assigning significant weight to Dr. Veraldi’s opinion given

1 Assuming that the ALJ erred by not expressly limiting Plaintiff's RFC to
2 "simple, repetitive tasks" instead of "tasks that can be learned in one year or less,"
3 the Court must evaluate whether this error was harmful. *See Molina*, 674 F.3d at
4 1111 ("[W]e may not reverse an ALJ's decision on account of an error that is
5 harmless."). To show this error was harmful, Plaintiff must demonstrate that it was
6 consequential in the ALJ's ultimate nondisability determination. *See id.* at 115
7 ("[A]n ALJ's error is harmless where it is inconsequential to the ultimate
8 nondisability determination." (internal quotation marks omitted)). In this case, the
9 Court must determine whether a properly articulated RFC would have nevertheless
10 resulted in a finding that Plaintiff was not disabled. To make this determination,
11 the Court proceeds to evaluate the ALJ's step-five analysis and whether the
12 erroneous statement in Plaintiff's RFC was consequential to the vocational expert's
13 conclusions and thus the ALJ's ultimate nondisability finding.

14
15 the subsequent statement in the RFC. However, it is clear that the ALJ gave
16 significant weight to Dr. Veraldi's opinion and then proceeded to apply that
17 opinion in developing Plaintiff's RFC. The ALJ gave no reason to discount this
18 particular aspect of Dr. Veraldi's overall opinion, and the Court therefore reviews
19 the ALJ's decision on the basis that the ALJ erred in not expressly limiting
20 Plaintiff to simple, routine tasks as opined by Dr. Veraldi and credited by the ALJ.

1 C. Vocational Expert Hypothetical

2 At step five, the burden shifts to the Commissioner to show that a claimant
3 can do other substantial gainful activity considering her age, education, and work
4 experience. *See Beltran*, 700 F.3d at 389. “There are two ways for the
5 Commissioner to meet [her] Step Five burden: (1) the testimony of a [vocational
6 expert]; or (2) by reference to the Medical-Vocational Guidelines Where the
7 claimant has significant non-exertional impairments, however, the ALJ cannot rely
8 on the Guidelines.” *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001)
9 (citations omitted). In obtaining vocational expert testimony, the ALJ must pose to
10 the expert “a hypothetical that is based on medical assumptions supported by
11 substantial evidence in the record that reflects each of the claimant's limitations.”
12 *Id.* at 1163. Thus, the ALJ need not include limitations in the hypothetical that the
13 ALJ has concluded are not supported by substantial evidence in the record.

14 Plaintiff contends that the hypothetical the ALJ posed to the vocational
15 expert was erroneous because it did not contain Dr. Billings’ conclusions of
16 Plaintiff’s inability to work in a public setting, her marked limitations in attention
17 and concentration, or her anxiety around men. ECF No. 13 at 19. As discussed
18 previously, the ALJ properly evaluated and gave limited weight Dr. Billing’s
19 opinion of the severity of these limitations. As such, the ALJ was not required to
20 include those specific limitations in the hypothetical posed to the vocational expert.

1 Plaintiff has identified no error in the ALJ’s exclusion of Dr. Billing’s specific
2 opinions from the hypothetical posed.

3 Plaintiff also contends that the ALJ failed to properly factor in her seizures.
4 ECF No. 13 at 20. The ALJ did incorporate certain seizure-related limitations into
5 the hypothetical. Tr. 104 (“The individual should avoid hazardous working
6 conditions such as proximity to unprotected heights, moving machinery, sharp
7 objects, open water, and hot surfaces.”). The ALJ rejected further limitations
8 because they were not supported by substantial evidence in the record. Tr. 28.
9 Plaintiff has shown no error in the ALJ’s exclusion of greater seizure-related
10 limitations.

11 As discussed above, however, the ALJ presented a partially erroneous
12 hypothetical to the vocational expert when the ALJ framed Plaintiff’s RFC as
13 including the ability to perform “tasks that can be learned in one year or less.” Tr.
14 104. The Court must determine whether this inclusion was consequential to the
15 vocational expert’s ultimate conclusion that Plaintiff could perform relevant work.

16 Defendant states that a limitation to “[j]obs that can be learned in one year or
17 less yields a Specific Vocational Preparation, or ‘SVP’ level of 5,” and that such
18 jobs “are classified as ‘skilled’ jobs.” ECF No. 17 at 17. Defendant then admits
19 that “skilled work is inconsistent with a limitation to simple, repetitive tasks.” *Id.*;
20 *see also* SSR 00-4p, 2000 WL 1898704 (Dec. 4, 2000) (“Using the skill level

1 definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an
2 SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work
3 corresponds to an SVP of 5-9 in the DOT.”).

4 Nevertheless, the relevant jobs identified by the vocational expert were not
5 skilled positions. The vocational expert identified three jobs which Plaintiff could
6 perform: small product assembly, housekeeper, and hand packager. Tr. 104. The
7 Dictionary of Occupational Titles (“DOT”) states that each of these jobs requires a
8 SVP of 2, meaning that the employee must be able to learn the job “beyond short
9 demonstration up to and including 1 month” of training. DICTIONARY OF
10 OCCUPATIONAL TITLES [DOT a/k/a DICOT] §§ 332.687-014, 559.687-074,
11 739.687-030 (4th ed. 1991), *available at* 1991 WL 672783, 1991 WL 683797,
12 1991 WL 680180; *see also* 20 C.F.R. § 404.1568 (“Unskilled work is work which
13 needs little or no judgment to do simple duties that can be learned on the job in a
14 short period of time. . . . [A] person can usually learn to do the job in 30 days, and
15 little specific vocational preparation and judgment are needed.”).

16 Each identified job requires only a general learning ability in the “[l]owest
17 1/3 excluding [b]ottom 10%.” DICOT §§ 332.687-014, 559.687-074, 739.687-
18 030. Each job requires only that the employee “apply commonsense understanding
19 to carry out” either “simple one- or two-step instructions” (house cleaner) or
20 “detailed but uninvolved written or oral instructions” (small product assembler and

1 hand packager). *Id.* §§ 332.687-014, 559.687-074, 739.687-030. Finally, each job
2 involves “[p]erforming REPETITIVE or short-cycle work.” *Id.* §§ 332.687-014,
3 559.687-074, 739.687-030 (emphasis in original).

4 “The DOT creates a rebuttable presumption as to the job classification.”
5 *Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008); *see also Pinto v.*
6 *Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (“[T]he best source for how a job is
7 generally performed is usually the Dictionary of Occupational Titles.”); SSR 00-4p
8 at *2 (“In making disability determinations, we rely primarily on the DOT . . . for
9 information about the requirements of work in the national economy. We use
10 these publications at steps 4 and 5 of the sequential evaluation process.”). The
11 vocational expert’s testimony identified jobs in the DOT that were limited to
12 simple, repetitive tasks. Based upon the defined requirements of the identified jobs
13 and the ALJ’s specific findings of Plaintiff’s limitations, the ALJ’s misstatement of
14 Plaintiff’s ability to perform “tasks that can be learned in one year or less” had no
15 consequence on the ALJ’s ultimate determination that there exist jobs which
16 Plaintiff could perform.

17 In short, crediting the entirety of Dr. Veraldi’s testimony regarding
18 Plaintiff’s limitations, including an express limitation to “simple, repetitive tasks,”
19 the jobs identified by the vocational expert are ones which Plaintiff is nevertheless
20 capable of performing. Plaintiff has not demonstrated that the failure to

1 specifically incorporate a reference to “simple, repetitive tasks” was consequential
2 to the ALJ’s ultimate determination of non-disability. As such, the ALJ’s error
3 was harmless and the decision must be affirmed.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Plaintiff’s Motion for Summary Judgment (ECF No. 13) is **DENIED**.

6 2. Defendant’s Motion for Summary Judgment (ECF No. 17) is

7 **GRANTED.**

8 The District Court Executive is hereby directed to file this Order, enter
9 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

10 **DATED** June 8, 2015.



13
14
15
16
17
18
19
20

A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge