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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHERINE ROCHA,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
  
Defendant.

No. 2:15-CV-00003-JTR  
  
ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF Nos. 12, 20. Attorney Cory J. Brandt represents Katherine Rocha (Plaintiff); Special Assistant United States Attorney Alexis L. Toma represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 19. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**JURISDICTION**

Plaintiff applied for Disability Insurance Benefits (DIB) on February 5, 2012, alleging disability since March 19, 2011. Tr. 12. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) James

1 Sherry held a hearing on October 22, 2013, at which Plaintiff, represented by  
2 counsel, testified as did vocational expert (VE) Trevor Duncan. Tr. 34-69. The  
3 ALJ issued an unfavorable decision on December 2, 2013. Tr. 9-27. The Appeals  
4 Council denied review. Tr. 1-5. The ALJ's December 2013 decision became the  
5 final decision of the Commissioner, which is appealable to the district court  
6 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on  
7 January 5, 2015. ECF Nos. 1, 3.

### 8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the  
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
11 here.

12 Plaintiff was 51 years old at the time of the hearing. Tr. 42. Plaintiff did not  
13 graduate from high school, but obtained a general equivalency diploma (GED). Tr.  
14 43. Plaintiff previously worked in preschools and a daycare; Plaintiff also worked  
15 for a time as a school bus driver, a potato packager, and as an overnight stocker at  
16 Walmart. Tr. 43, 47-50, 63. Plaintiff last worked as an in-home caretaker part-  
17 time for six months, but had to stop working because she did not take a required  
18 test. Tr. 45-46.

19 Plaintiff testified that she was unable to work because of knee pain, anxiety,  
20 and depression. Tr. 51. Plaintiff testified that she gets anxious when she goes out  
21 in public and when she is around other people. Tr. 51. Plaintiff testified that her  
22 depression makes her feel like she's "stuck in a dark hole," makes it difficult for  
23 her to sleep or concentrate, and leaves her without energy, motivation, or appetite.  
24 Tr. 53-55. Plaintiff testified that she has feelings of worthlessness and she has lost  
25 interest in things she used to enjoy, including crocheting, cross-stitching, and  
26 reading. Tr. 55. Plaintiff rarely leaves the house by herself. Tr. 56. Plaintiff  
27 testified that, for about twenty days each month, her anxiety and depression are so  
28 bad that she cannot leave her house. Tr. 59. Plaintiff testified that depression

1 drove her to make one suicide attempt. Tr. 60.

2 Regarding her knee pain, Plaintiff testified that she had right knee  
3 replacement surgery, and, after physical therapy, her knee “felt 100 percent better  
4 than it did [prior to surgery].” Tr. 57. But Plaintiff’s knee still hurts, swells, and  
5 feels hot, and she has to elevate her leg a couple times a day. Tr. 57.

6 Plaintiff testified that she can only stand for about fifteen minutes at a time.  
7 Tr. 58. After standing, Plaintiff testified that she needs to sit for ten or fifteen  
8 minutes. Tr. 58. Plaintiff testified that she would only be able to stand for half an  
9 hour in an eight-hour workday. Tr. 58. Plaintiff stated that it was easier for her to  
10 walk than to stand in one place and she can walk for about half an hour or forty  
11 five minutes. Tr. 59-60.

## 12 STANDARD OF REVIEW

13 The ALJ is responsible for determining credibility, resolving conflicts in  
14 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
15 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,  
16 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
17 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
18 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
19 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
20 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
21 another way, substantial evidence is such relevant evidence as a reasonable mind  
22 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
23 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
24 interpretation, the court may not substitute its judgment for that of the ALJ.  
25 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
26 evidence will still be set aside if the proper legal standards were not applied in  
27 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
28 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence

1 supports the administrative findings, or if conflicting evidence supports a finding  
2 of either disability or non-disability, the ALJ's determination is conclusive.  
3 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

#### 4 **SEQUENTIAL EVALUATION PROCESS**

5 The Commissioner has established a five-step sequential evaluation process  
6 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*  
7 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
8 proof rests upon claimants to establish a prima facie case of entitlement to  
9 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once  
10 claimants establish that physical or mental impairments prevent them from  
11 engaging in their previous occupations. 20 C.F.R. § 404.1520(a)(4). If claimants  
12 cannot do their past relevant work, the ALJ proceeds to step five, and the burden  
13 shifts to the Commissioner to show that (1) the claimants can make an adjustment  
14 to other work, and (2) specific jobs exist in the national economy which claimants  
15 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
16 (2004). If claimants cannot make an adjustment to other work in the national  
17 economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(i-v).

#### 18 **ADMINISTRATIVE DECISION**

19 On December 2, 2013, the ALJ issued a decision finding Plaintiff was not  
20 disabled as defined in the Social Security Act. Preliminarily, the ALJ found  
21 Plaintiff met the insured status requirements of the Social Security Act through  
22 December 31, 2015.

23 At step one, the ALJ found Plaintiff had engaged in substantial gainful  
24 activity from January 2012 to June 2012, but there was a continuous 12-month  
25 period during which Plaintiff did not engage in substantial gainful activity. Tr. 14.

26 At step two, the ALJ determined Plaintiff had the following severe  
27 impairments: severe osteoarthritis, right knee, status post total knee replacement in  
28 March 2011; left knee osteoarthritis, mostly asymptomatic; obesity; major

1 depressive disorder; and, panic disorder with agoraphobia. Tr. 14.

2 At step three, the ALJ found Plaintiff did not have an impairment or  
3 combination of impairments that met or medically equaled the severity of one of  
4 the listed impairments. Tr. 15.

5 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)  
6 and determined she could perform a range of light work except:

7 [L]ift no more than 20 pounds at a time; frequently lift and carry 10  
8 pounds; sit, stand and walk 6 hours out of an 8-hour workday;  
9 unlimited push/pull within lifting restrictions; never climb ladders,  
10 ropes, and scaffolds and crouch; occasionally climb ramps or stairs,  
11 kneel, and crawl; frequently balance, and stoop; avoid concentrated  
12 exposure to extreme cold and excessive vibration; avoid moderate  
13 exposure to unprotected heights and use of moving machinery;  
14 capable of simple, routine and repetitive tasks, some well learned  
15 detailed tasks; can maintain attention and concentration for 2 hour  
16 segments for simple and well learned tasks without more than  
normally expected brief interruptions; is capable of superficial contact  
with the general public; can interact with coworkers on specific work  
related tasks.

17 Tr. 17. The ALJ concluded that Plaintiff was not able to perform her past relevant  
18 work. Tr. 22.

19 At step five, the ALJ determined that, considering Plaintiff's age, education,  
20 work experience and RFC, and based on the testimony of the vocational expert,  
21 there were other jobs that exist in significant numbers in the national economy  
22 Plaintiff could perform, including the jobs of production assembler, cashier II, and  
23 fast food worker. Tr. 24. The ALJ thus concluded Plaintiff was not under a  
24 disability within the meaning of the Social Security Act at any time from March  
25 19, 2011, through the date of the ALJ's decision. Tr. 24.

## 26 ISSUES

27 The question presented is whether substantial evidence supports the ALJ's  
28 decision denying benefits, and, if so, whether that decision is based on proper legal

1 standards. Plaintiff contends the ALJ erred by (1) improperly rejecting the  
2 opinions of Plaintiff’s treating and examining medical providers; (2) improperly  
3 rejecting Plaintiff’s testimony about the severity of her symptoms; and, (3) failing  
4 make adequate findings at step five.

## 5 **DISCUSSION**

### 6 **A. Credibility**

7 Plaintiff contests the ALJ’s adverse credibility determination. ECF No. 12  
8 at 12-17.

9 It is generally the province of the ALJ to make credibility determinations,  
10 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific  
11 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
12 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
13 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d  
14 1273, 1281 (9th Cir. 1996). “General findings are insufficient: rather the ALJ  
15 must identify what testimony is not credible and what evidence undermines the  
16 claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

17 The ALJ found Plaintiff not fully credible concerning the intensity,  
18 persistence, and limiting effects of her symptoms. Tr. 21. The ALJ reasoned that  
19 Plaintiff was less than credible because her symptom reporting was inconsistent  
20 with (1) objective medical evidence and the fact that her impairments could be  
21 controlled with medication, (2) her history of conservative treatment, (3) her  
22 normal presentation at medical appointments, (4) her lack of regular mental health  
23 treatment, and (5) her activities of daily living.

#### 24 **1. Objective evidence and improvement with medication**

25 The ALJ noted that medical evidence did not demonstrate Plaintiff’s  
26 impairments caused total disability and that medications generally controlled her  
27 mental impairments. Tr. 21 (citing Tr. 368, 369, 370-71, 376).

28 Objective medical evidence is a “relevant factor in determining the severity

1 of the claimant’s pain and its disabling effects,” but it cannot serve as the sole  
2 ground for rejecting a claimant’s credibility. *Rollins v. Massanari*, 261 F.3d 853,  
3 857 (9th Cir. 2001). Furthermore, the fact that a condition can be remedied by  
4 medication is a legitimate reason for discrediting an opinion. *Warre v. Comm’r of*  
5 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

6 The ALJ’s reasoning that Plaintiff’s alleged disability is unsupported by  
7 objective medical evidence and that her impairments have improved with  
8 medication are clear and convincing reasons to discredit Plaintiff. As noted by the  
9 ALJ, x-rays of Plaintiff’s right knee showed that her knee was stable after surgery.  
10 Tr. 376. The ALJ also noted Dr. Wheaton’s opinion that Plaintiff was capable of  
11 working with some restrictions that would last for less than a year. Tr. 21 (citing  
12 Tr. 326). And although Plaintiff historically had problems with her medication, in  
13 Plaintiff’s most recent treatment notes, she reported that Effexor and Lorazepam  
14 effectively controlled her depression and anxiety. Tr. 368, 370. These are clear  
15 and convincing reasons to discredit Plaintiff.

## 16 **2. Conservative treatment**

17 The ALJ noted that Plaintiff’s treatment was mostly routine and/or  
18 conservative in nature. Tr. 21.

19 Conservative treatment can be “sufficient to discount a claimant’s testimony  
20 regarding [the] severity of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 751  
21 (9th Cir. 2007).

22 The Court finds the ALJ partially erred in concluding that Plaintiff’s  
23 treatment was mostly routine and/or conservative. As discussed *infra*, Plaintiff  
24 received limited treatment for her depression and anxiety, and this treatment was  
25 limited to medication management and two counseling sessions. Much of the  
26 record regarding Plaintiff’s physical impairments, however, involves treatment  
27 Plaintiff received after her total right knee replacement, a surgery which cannot be  
28 classified as conservative or routine treatment. Thus, the ALJ did not err in

1 discrediting Plaintiff based on conservative treatment for her mental impairments,  
2 but this reasoning is inapplicable to her physical impairments.

### 3 **3. Normal presentations**

4 The ALJ found Plaintiff's reporting of depression and suicidal thoughts  
5 inconsistent with treatment notes indicating that Plaintiff presented normally to her  
6 health care providers. Tr. 21 (citing Tr. 298).

7 In determining a claimant's credibility, the ALJ may consider "ordinary  
8 techniques of credibility evaluation, such as the claimant's reputation for lying,  
9 prior inconsistent statements . . . and other testimony by the claimant that appears  
10 less than candid." *Smolen*, 80 F.3d at 1284.

11 The ALJ did not err in using Plaintiff's normal presentations at her medical  
12 appointments to discredit Plaintiff. As noted by the ALJ, some of Plaintiff's  
13 treatment notes, especially Plaintiff's most recent treatment notes, indicate that  
14 Plaintiff presented to her medical appointments without signs of depression. *See*  
15 Tr. 298, 366, 368, 369, 370. These observations are inconsistent with Plaintiff's  
16 allegations of disabling depressive symptoms and suggest that Plaintiff's  
17 depression is substantially controlled. Plaintiff is accurate in arguing that, for a  
18 period of time, between approximately May 2011 and November 2011, treatment  
19 notes reflect that Plaintiff did present with a depressed mood and blunted affect.  
20 ECF No. 12 at 15 (citing Tr. 288, 291, 293, 298, 300, 330, 332, 356). These  
21 observations corroborate Plaintiff's allegations. But given the inconsistent  
22 evidence, the Court must defer to the ALJ's interpretation, which is substantially  
23 supported. *Tackett*, 180 F.3d at 1097.

### 24 **4. Lack of regular mental health treatment**

25 The ALJ noted that Plaintiff only sought mental health treatment on "a very  
26 infrequent basis" and reasoned, "If [Plaintiff's] health problems were not severe  
27 enough to motivate her to follow through with treatment, it is difficult to accept  
28 that they are disabling." Tr. 21.



1 Unexplained or inadequately explained reasons for failing to seek medical  
2 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. § 404.1530;  
3 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

4 The ALJ did not err in reasoning that Plaintiff's lack of regular mental health  
5 treatment suggested that Plaintiff's impairments were not as severe as she alleged.  
6 Treatment notes indicate Plaintiff has a history of depression. *See, e.g.*, Tr. 303  
7 (treatment note dated March 11, 2011, noting Plaintiff's depression "stable"). In  
8 the time period relevant to this case, the record reflects that Plaintiff sought  
9 treatment for depression from her primary care provider on six occasions: May 19,  
10 2011, July 18, 2011, October 6, 2011, October 21, 2011, October 26, 2011, and  
11 November 9, 2011. Tr. 288, 290, 292, 295 297, 299. Plaintiff attended counseling  
12 sessions on October 27, 2011, and November 4, 2011, Tr. 327-332, but apparently  
13 discontinued counseling because she was not sure "what [she was] supposed to get  
14 out of [it]," Tr. 331. After November 2011, Plaintiff apparently did not seek  
15 mental health treatment for over a year. Plaintiff again alleged depressive  
16 symptoms at approximately five appointments between April 16, 2013, and July  
17 22, 2013. Tr. 365-71. These appointments were primarily related to treatment  
18 involving a lipoma on Plaintiff's back, but Plaintiff's treating source also made  
19 adjustments to Plaintiff's medication for her depression and anxiety. Given the  
20 significant gap in treatment between November 2011 and April 2013, and the fact  
21 that Plaintiff declined to pursue counseling, the ALJ did not err in discrediting  
22 Plaintiff based on her lack of mental health treatment.

23 Plaintiff argues that her failure to seek treatment can be excused given the  
24 fact that her suicidal thoughts increased when she started taking anti-depressants,  
25 causing her "to develop an aversion to treatment through prescription drugs and  
26 counseling." ECF No. 12 at 16. While this may have been Plaintiff's subjective  
27 rationale for not seeking treatment, it is not supported by the administrative record.  
28 Rather, the record indicates, although Plaintiff's treatment providers stopped

1 prescribing her Wellbutrin, Plaintiff continued to take other medications until her  
2 treating sources eventually found the right combination and dosage of medications  
3 to effectively control Plaintiff's depression and anxiety. *See* Tr. 368-71.  
4 Plaintiff's rationale further does not seem to excuse her failure to seek counseling.  
5 Counseling does not appear to have played a role in Plaintiff's overdose and  
6 Plaintiff apparently found counseling unnecessary. *See* Tr. 331 (at Plaintiff's  
7 second, and final, counseling session she stated that she was not sure "what [she  
8 was] supposed to get out of [counseling]").

### 9 **5. Activities of daily living**

10 The ALJ found Plaintiff's activities inconsistent with her reports of disabling  
11 limitations and symptoms. Tr. 21. The ALJ noted Plaintiff was able to go on daily  
12 twenty minute walks and care for her grandchildren and her son's girlfriend's son.  
13 Tr. 21 (citing Tr. 320, 331). The ALJ also noted that Plaintiff worked for six  
14 months as a home health aide, and such employment ended because Plaintiff did  
15 not take a test within the required timeframe. Tr. 22.

16 A claimant's daily activities may support an adverse credibility finding if (1)  
17 the claimant's activities contradict his or her other testimony, or (2) "the claimant  
18 is able to spend a substantial part of his day engaged in pursuits involving  
19 performance of physical functions that are transferable to a work setting." *Orn v.*  
20 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603). "The ALJ  
21 must make 'specific findings relating to [the daily] activities' and their  
22 transferability to conclude that a claimant's daily activities warrant an adverse  
23 credibility determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th  
24 Cir. 2005)). A claimant need not be "utterly incapacitated" to be eligible for  
25 benefits. *Fair*, 885 F.2d at 603.

26 The ALJ partially erred in finding Plaintiff's activities inconsistent with her  
27 symptom reporting. The ALJ erred in finding Plaintiff's daily walks were  
28 inconsistent with her symptom reporting. At the hearing, Plaintiff testified that she

1 can walk for about half an hour or forty five minutes. Tr. 59-60. Plaintiff  
2 consistently reported her ability to walk and the ALJ made no finding that being  
3 able to walk for twenty to forty five minutes was a task transferable to a work  
4 setting. Furthermore, the ALJ made no specific findings about how Plaintiff's care  
5 of her grandchildren was inconsistent with her testimony or involved tasks  
6 transferrable to a work setting. Simply because the children were difficult and the  
7 babysitting schedule was somewhat unpredictable does not necessarily mean that  
8 Plaintiff engaged in activity inconsistent with her testimony or which involved  
9 tasks transferable to a work setting. *See Fair*, 885 F.2d at 603 (claimant need not  
10 be "utterly incapacitated" to be eligible for benefits).

11 The ALJ's finding that Plaintiff was able to work during her alleged  
12 disability is a specific, clear, and convincing reason for discrediting Plaintiff.  
13 Plaintiff testified that she worked as an in-home caretaker part-time for six months,  
14 but had to stop working because she did not take a required test. Tr. 45-46. Even  
15 though this was not full time work, the ALJ was still allowed to consider it in  
16 evaluating Plaintiff's credibility and did not err in finding that such work was  
17 inconsistent with Plaintiff's reporting of disabling symptoms. *See Bray v.*  
18 *Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (claimant's ability  
19 to work can be considered in assessing credibility). The ALJ's finding is bolstered  
20 by the fact that Plaintiff stopped this work for reasons other than her alleged  
21 disability. *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (ALJ  
22 properly relied on the fact that claimant left his job because he was laid off, rather  
23 than because he was injured, in finding the claimant not entirely credible). The  
24 fact that Plaintiff worked part time for six months during her alleged disability is a  
25 specific, clear, and convincing reason to discredit Plaintiff.

## 26 **6. Conclusion**

27 Some of the reasons provided by the ALJ were not specific, clear, and  
28 convincing reasons to discredit Plaintiff. Specifically, the ALJ erred in finding

1 Plaintiff underwent only conservative treatment and by failing to provide specific  
2 reasons for how Plaintiff's ability to go on walks and care for her grandchildren  
3 was inconsistent with her symptom reporting or involved tasks transferrable to a  
4 work setting. These errors are harmless, however, given the number of other  
5 specific, clear, and convincing reasons provided by the ALJ to discredit Plaintiff.  
6 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is  
7 harmless when "it is clear from the record that the . . . error was inconsequential to  
8 the ultimate nondisability determination"); *Carmickle v. Comm'r, Soc. Sec.*  
9 *Admin.*, 533 F.3d 1160, 1163 (9th Cir. 2008) (upholding adverse credibility finding  
10 where ALJ provided four reasons to discredit claimant, two of which were invalid).

11 **B. Evaluation of Medical Evidence**

12 Plaintiff argues the ALJ failed to give adequate weight to the limitations  
13 assessed by John Wheaton, M.D., one of Plaintiff's treating physicians, and  
14 Thomas Genthe, Ph.D., an examining psychologist. ECF No. 12 at 10-12.

15 "In making a determination of disability, the ALJ must develop the record  
16 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barnhart*, 341 F.3d  
17 1006, 1012 (9th Cir. 2003).

18 In weighing medical source opinions, the ALJ should distinguish between  
19 three different types of physicians: (1) treating physicians, who actually treat the  
20 claimant; (2) examining physicians, who examine but do not treat the claimant;  
21 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
22 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
23 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at  
24 631. The ALJ should give more weight to the opinion of an examining physician  
25 than to the opinion of a nonexamining physician. *Id.*

26 When a physician's opinion is not contradicted by another physician, the  
27 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*  
28 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is

1 contradicted by another physician, the ALJ is only required to provide “specific  
2 and legitimate reasons” for rejecting the opinion of the first physician. *Murray v.*  
3 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

4 **1. John Wheaton, M.D.**

5 Dr. Wheaton is an orthopedic specialist who performed Plaintiff’s right total  
6 knee arthroplasty and treated Plaintiff on a number of occasions post-surgery. *See*  
7 Tr. 320-26, 333. In May 2011, Dr. Wheaton opined that Plaintiff could return to  
8 work with the following limitations: “No ladders or kneeling,” “No squatting more  
9 than 1 hour per shift,” and “No pushing, pulling, or lifting greater than 30 pounds.”  
10 Tr. 326. Dr. Wheaton stated that these limitations would “all be enforced until  
11 September 1, 2011.” Tr. 326. In April 2012, Dr. Wheaton opined that Plaintiff  
12 was “unable to kneel.” Tr. 333.

13 Plaintiff argues that the ALJ ignored the limitations assessed by Dr.  
14 Wheaton, including her need to avoid ladders and kneeling. ECF No. 12 at 11.  
15 Defendant notes that the ALJ discussed Dr. Wheaton’s assessments, but Defendant  
16 concedes that the ALJ failed to weigh them. ECF No. 20 at 13 (citing Tr. 19).  
17 Defendant argues that any error made by the ALJ was harmless, however, as Dr.  
18 Wheaton opined that the limitations would only last for about four months, the  
19 ALJ accounted for most of the limitations assessed by Dr. Wheaton, and because  
20 the jobs identified by the ALJ at step five do not involve kneeling. *Id.* at 14.

21 The Court finds any error made by the ALJ to be harmless for the reasons  
22 argued by Defendant. While the opinions of a treating physician are generally  
23 entitled to deference, even if the ALJ had given controlling weight to the  
24 limitations assessed by Dr. Wheaton, the ALJ’s ultimate nondisability  
25 determination would not be affected. Therefore, the error was harmless.

26 First, Dr. Wheaton estimated the limitations he assessed in May 2011 would  
27 need to be enforced only until September 2011. Plaintiff’s surgery was in April  
28 2011 and it is reasonable to presume that these limitations began immediately after

1 her surgery. If, as estimated by Dr. Wheaton, these limitations lasted into  
2 September 2011, the record supports that Plaintiff’s limitations assessed by Dr.  
3 Wheaton at Tr. 326 lasted for five to six months. This is not long enough to  
4 establish disability. *See* 42 U.S.C. § 1382c(a)(3)(A) (disability must be premised  
5 on medically determinable physical or mental impairments that have “lasted or can  
6 be expected to last for a continuous period of not less than twelve months”).

7 Second, the ALJ’s RFC determination generally accounted for Plaintiff’s  
8 lifting, pushing, pulling limitations, and Dr. Wheaton’s opinion that Plaintiff  
9 should never climb ladders. *Compare* Tr. 17 *with* Tr. 326.

10 Finally, even if the ALJ had credited Dr. Wheaton’s April 2012 opinion that  
11 Plaintiff “is unable to kneel,” Tr. 333, this limitation would not preclude Plaintiff  
12 from performing the jobs identified by the VE, Tr. 64-65, because none of these  
13 jobs involve kneeling. *See* Dictionary of Occupational Titles 706.687-010, 1991  
14 WL 679074 (production assembler), 211.462-010, 1991 WL 671840 (cashier II),  
15 311.472-010, 1991 WL 672682 (fast food worker).

16 In conclusion, the error made by the ALJ in failing to give weight to Dr.  
17 Wheaton’s opinions is harmless.

## 18 **2. Thomas Genthe, Ph.D.**

19 Dr. Genthe completed a psychological evaluation of Plaintiff in August  
20 2012. Tr. 353-57. Dr. Genthe diagnosed Plaintiff with major depressive disorder  
21 and panic disorder with agoraphobia. Tr. 356. Dr. Genthe concluded

22 [Plaintiff’s] ability to understand and remember short, simple  
23 instructions was assessed as good. Her ability to understand and  
24 remember detailed instructions was assessed as fair. Her ability to  
25 carry out short, simple instructions was assessed as good. Her ability  
26 to carry out detailed instructions was assessed as fair. Her ability to  
27 sustain an ordinary routine without supervision was assessed as good  
28 to fair. Her ability to work with or near others without being  
distracted by them was assessed as fair. Her ability to respond  
appropriately to changes in the work setting was assessed as fair.

1 From a social perspective, [Plaintiff's] ability to interact appropriately  
2 with the public was assessed as fair. Her ability to get along with  
3 coworkers and/or peers was assessed as fair, and her ability to respond  
4 appropriately to criticism from supervisors as fair.

5 [Plaintiff's] prognosis is viewed as fair. At this time, she is unlikely  
6 to function adequately in a work setting until her psychological  
7 symptoms have been managed more effectively. Given her response  
8 to treatment, and willing participation, a period of 3-6 months may  
9 likely be sufficient to address her treatment needs at least moderately  
well, and help her regain the necessary emotional functioning to  
resume fulltime work related activities.

10 Tr. 357.

11 The ALJ gave some weight to Dr. Genthe's opinions. Tr. 22. The ALJ  
12 rejected Dr. Genthe's conclusion that Plaintiff is unlikely able to function  
13 adequately until she receives treatment. Tr. 22. The ALJ found this conclusion  
14 inconsistent with Dr. Genthe's normal mental status examination and the fact that  
15 Plaintiff reported that her physical condition was the primary reason why she was  
16 unable to work. Tr. 22. The ALJ further found that other records indicated that  
17 Plaintiff's depression and anxiety were improved and controlled. Tr. 22.

18 Plaintiff argues that the ALJ ignored Dr. Genthe's conclusion that Plaintiff  
19 was unable to work without treatment and erred in reasoning that Dr. Genthe relied  
20 on Plaintiff's self-reported symptoms. ECF No. 12 at 11-12. Defendant concedes  
21 that the ALJ erred in reasoning that Plaintiff reported primarily physical  
22 impairments and not mental impairments, ECF No. 20 at 15 (citing Tr. 353), but  
23 argues that the error was harmless in light of the ALJ's other reasons, *id.*

24 The Court finds that the ALJ did not err in evaluating Dr. Genthe's opinions  
25 and provided specific and legitimate reasons for rejecting Dr. Genthe's conclusion  
26 that Plaintiff was unable to work without further treatment. Plaintiff appears to be  
27 mistaken when she argues that the ALJ rejected Dr. Genthe's opinion on account  
28 of Plaintiff's unreliable reporting; the ALJ did not cite this as a reason to reject Dr.

1 Genthe’s opinion. The ALJ did not err in noting inconsistencies between the  
2 results of Dr. Genthe’s “fairly normal” mental status exam and his ultimate  
3 conclusion. Tr. 22, 355-57; *see Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.  
4 2005) (finding that an ALJ may cite internal inconsistencies in evaluating a  
5 physician’s report). The ALJ also did not err in reasoning that, contrary to Dr.  
6 Genthe’s opinion, Plaintiff reported that her depression and anxiety were improved  
7 and controlled. Tr. 22; *see also* Tr. 366-71. The fact that a condition can be  
8 remedied by medication is a legitimate reason for discrediting an opinion. *Warre*,  
9 439 F.3d at 1006. The ALJ provided specific and legitimate reasons for rejecting  
10 Dr. Genthe’s opinion that Plaintiff would be likely be unable to work without  
11 treatment.

### 12 **C. RFC and Hypothetical Question**

13 Plaintiff argues that the ALJ did not account for all of Plaintiff’s limitations  
14 in the ALJ’s RFC determination and inquiries to the VE. ECF No. 12 at 17-18.  
15 Plaintiff argues that ALJ should have included limitations regarding kneeling,  
16 standing, and psychological symptoms. *Id.* Plaintiff also argues that ALJ should  
17 have found her limited to sedentary work. *Id.* at 18.

18 A claimant’s RFC is “the most [a claimant] can still do despite [her]  
19 limitations.” 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P,  
20 Appendix 2, § 200.00(c) (defining RFC as the “maximum degree to which the  
21 individual retains the capacity for sustained performance of the physical-mental  
22 requirements of jobs.”). In formulating a RFC, the ALJ weighs medical and other  
23 source opinions and also considers the claimant’s credibility and ability to perform  
24 daily activities. *See, e.g., Bray*, 554 F.3d at 1226.

25 In this case, the ALJ found Plaintiff had the RFC to perform a range of light  
26 work except:

27 [L]ift no more than 20 pounds at a time; frequently lift and carry 10  
28



1 pounds; sit, stand and walk 6 hours out of an 8-hour workday;  
2 unlimited push/pull within lifting restrictions; never climb ladders,  
3 ropes, and scaffolds and crouch; occasionally climb ramps or stairs,  
4 kneel, and crawl; frequently balance, and stoop; avoid concentrated  
5 exposure to extreme cold and excessive vibration; avoid moderate  
6 exposure to unprotected heights and use of moving machinery;  
7 capable of simple, routine and repetitive tasks, some well learned  
8 detailed tasks; can maintain attention and concentration for 2 hour  
9 segments for simple and well learned tasks without more than  
10 normally expected brief interruptions; is capable of superficial contact  
11 with the general public; can interact with coworkers on specific work  
12 related tasks.

13 Tr. 17. When the ALJ asked the VE if someone with Plaintiff's background and  
14 these limitations was capable of working, the VE testified that such a person could  
15 work as a production assembler, cashier II, or a fast food worker. Tr. 64-65.

16 The Court concludes that the ALJ's RFC determination is supported by  
17 substantial evidence and not based on legal error. The nonexertional social and  
18 cognitive limitations contained in Plaintiff's RFC are essentially the same as those  
19 assessed by Dr. Genthe. *Cf.* Tr. 357. And as discussed *supra*, any error the ALJ  
20 made in not giving weight to Dr. Wheaton's opinions concerning Plaintiff's ability  
21 to kneel, and other (temporary) limitations, Tr. 327, 333, is harmless. Finally,  
22 although Plaintiff testified that she can only stand for about fifteen minutes at a  
23 time or for half an hour in an eight-hour workday, Tr. 58, such a severe limitation  
24 is not supported by the record and the ALJ did not err in finding Plaintiff's  
25 symptom reporting less than credible. Likewise, Plaintiff fails to point to any  
26 evidence—other than her own testimony—supporting her argument that she is  
27 limited to sedentary work. As the ALJ's hypothetical question to the VE mirrored  
28 the ALJ's RFC determination, the Court further finds that the ALJ's inquiries to  
the VE were also proper. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th  
Cir. 2001) (ALJ is only required to present the VE with those limitations the ALJ  
finds to be credible and supported by the evidence).

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the  
3 ALJ's decision is supported by substantial evidence and free of legal error.

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is  
6 **GRANTED.**

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED.**

8 The District Court Executive is directed to file this Order and provide a copy  
9 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
10 **and the file shall be CLOSED.**

11 DATED September 28, 2015.

A handwritten signature in black ink, appearing to read "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE