

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

TABITHA ANN HARTILL,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,

Defendant.

No. 1:15-CV-00132-RHW

**ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
REMAND**

Before the Court are the parties’ cross-motions for summary judgment, ECF Nos. 12 and 14. Ms. Hartill brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner’s final decision, which denied her application for Disability Insurance Benefits and Supplemental Security Income under Titles II & XVI of the Social Security Act, 42 U.S.C §§ 401-434 & 1381-1383F. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set forth below, the Court

1 **GRANTS** Plaintiff’s Motion for Summary Judgment and **REMANDS** for
2 additional proceedings consistent with this order.

3 **I. Jurisdiction**

4 Ms. Hartill filed for Disability Insurance Benefits and Supplemental Security
5 Income on June 23, 2011. AR 84. Her alleged onset date is November 25, 2009.
6 AR 86. Ms. Hartill’s application was initially denied on July 29, 2011, AR 126-29,
7 and on reconsideration on October 31, 2011, AR 132-33.

8 A hearing with Administrative Law Judge (“ALJ”) R.J. Payne occurred on
9 March 13, 2013. AR 41-53. The psychological expert, Dr. Kent Layton, PhD,
10 found there was not enough information to determine psychological impairments
11 and requested a psychological evaluation. AR 21. Following the evaluation, a
12 supplemental hearing was held August 20, 2013. AR 54-83.

13 On September 16, 2013, the ALJ issued a decision finding Ms. Hartill
14 ineligible for disability benefits. AR 21-36. The Appeals Council denied Ms.
15 Hartill’s request for review on March 21, 2015, AR 1-6, making the ALJ’s ruling
16 the “final decision” of the Commissioner.

17 Ms. Hartill timely filed the present action challenging the denial of benefits,
18 on May 15, 2015. ECF No. 3. Accordingly, Ms. Hartill’s claims are properly
19 before this Court pursuant to 42 U.S.C. § 405(g).

20 //

1 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
2 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

3 Step two asks whether the claimant has a severe impairment, or combination
4 of impairments, that significantly limits the claimant’s physical or mental ability to
5 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe
6 impairment is one that has lasted or is expected to last for at least twelve months,
7 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
8 416.908-09. If the claimant does not have a severe impairment, or combination of
9 impairments, the disability claim is denied, and no further evaluative steps are
10 required. Otherwise, the evaluation proceeds to the third step.

11 Step three involves a determination of whether any of the claimant’s severe
12 impairments “meets or equals” one of the listed impairments acknowledged by the
13 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
14 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
15 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
16 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
17 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
18 the fourth step.

19 Step four examines whether the claimant’s residual functional capacity
20 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)

1 & 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant
2 is not entitled to disability benefits and the inquiry ends. *Id.*

3 Step five shifts the burden to the Commissioner to prove that the claimant is
4 able to perform other work in the national economy, taking into account the
5 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
6 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
7 burden, the Commissioner must establish that (1) the claimant is capable of
8 performing other work; and (2) such work exists in "significant numbers in the
9 national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
10 676 F.3d 1203, 1206 (9th Cir. 2012).

11 III. Standard of Review

12 A district court's review of a final decision of the Commissioner is governed
13 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
14 Commissioner's decision will be disturbed "only if it is not supported by
15 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1144,
16 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than
17 a mere scintilla but less than a preponderance; it is such relevant evidence as a
18 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*
19 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
20 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining

1 whether the Commissioner’s findings are supported by substantial evidence, “a
2 reviewing court must consider the entire record as a whole and may not affirm
3 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
4 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
5 F.2d 498, 501 (9th Cir. 1989)).

6 In reviewing a denial of benefits, a district court may not substitute its
7 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
8 1992). If the evidence in the record “is susceptible to more than one rational
9 interpretation, [the court] must uphold the ALJ's findings if they are supported by
10 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
11 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
12 2002) (if the “evidence is susceptible to more than one rational interpretation, one
13 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
14 a district court “may not reverse an ALJ's decision on account of an error that is
15 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
16 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
17 The burden of showing that an error is harmful generally falls upon the party
18 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

19 //

20 //

1 **IV. Statement of Facts**

2 The facts of the case are set forth in detail in the transcript of proceedings,
3 and only briefly summarized here. Ms. Hartill was 41 years old at the alleged onset
4 date. AR 35. She has a high school education and is the single mother of two
5 children. AR 64, 85.

6 Among the conditions mentioned in Ms. Hartill’s medical record are elbow
7 pain, hip pain, sinusitis, abdominal pain, back pain, depression, asthma, chronic
8 obstructive pulmonary disease (“COPD”), and ovarian cysts. AR 305-08, 311-12.
9 Ms. Hartill has previous work experience as a motel housekeeper and janitor. AR
10 35. She asserts that she quit her most recent job because of pain and difficulty
11 breathing. ECF No. 12 at 3.

12 **V. The ALJ’s Findings**

13 The ALJ determined that Ms. Hartill was not under a disability within the
14 meaning of the Act from November 25, 2009, her alleged date of onset. AR 22.

15 **At step one**, the ALJ found that Ms. Hartill had not engaged in substantial
16 gainful activity since November 25, 2009, her alleged onset date (citing 20 C.F.R.
17 §§ 404.1571 *et seq.* & 416.971 *et seq.*). AR 23.

18 **At step two**, the ALJ found Ms. Hartill had the following severe
19 impairments: chronic obstructive pulmonary disease and low back pain (citing 20
20 C.F.R. §§ 404.1520(c) & 416.920(c)). AR 23-25.

1 properly consider and weigh the medical opinion evidence; (3) improperly failing
2 to obtain the testimony of a vocational expert to make the step five determination;
3 and (4) failing to give controlling weight to treating physician Dr. Lahtinen's
4 medical opinion.

5 **VII. Discussion**

6 **A. The ALJ did not err in determining Ms. Hartill's credibility.**

7 An ALJ engages in a two-step analysis to determine whether a claimant's
8 testimony regarding subjective symptoms is credible. *Tommasetti v. Astrue*, 533
9 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective
10 medical evidence of an underlying impairment or impairments that could
11 reasonably be expected to produce some degree of the symptoms alleged. *Id.*
12 Second, if the claimant meets this threshold, and there is no affirmative evidence
13 suggesting malingering, "the ALJ can reject the claimant's testimony about the
14 severity of [his] symptoms only by offering specific, clear, and convincing reasons
15 for doing so." *Id.*

16 In weighing a claimant's credibility, the ALJ may consider many factors,
17 including, "(1) ordinary techniques of credibility evaluation, such as the claimant's
18 reputation for lying, prior inconsistent statements concerning the symptoms, and
19 other testimony by the claimant that appears less than candid; (2) unexplained or
20 inadequately explained failure to seek treatment or to follow a prescribed course of

1 treatment; and (3) the claimant's daily activities.” *Smolen*, 80 F.3d at 1284. When
2 evidence reasonably supports either confirming or reversing the ALJ's decision, the
3 Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180
4 F.3d 1094, 1098 (9th Cir.1999). “General findings are insufficient: rather the ALJ
5 must identify what testimony is not credible and what evidence undermines the
6 claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (as
7 amended).

8 The ALJ found that Ms. Hartill’s alleged impairments are not consistent
9 with the objective evidence in the record. It is not error for an ALJ to reject
10 subjective symptom complaints when the evidence in the record does not support
11 the level of limitations alleged. *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.
12 1995).

13 In this case, the ALJ pointed to normal neurological and psychological
14 examinations, AR 420, and a pattern of stability while on medication, AR 464,
15 489. The ALJ also noted that even Ms. Hartill stated to Dr. Arnold, PhD, that there
16 were no psychological reasons preventing her from working. AR 501.

17 The ALJ also noted that the evidence does not demonstrate “clinical
18 abnormalities” that could reasonably be expected to have produced persistent
19 symptoms consistent with Ms. Hartill’s allegations. AR 32-33. ALJ Payne cited to
20 relatively benign pelvic ultrasounds, AR 375, as well as spinal x-rays that failed to

1 demonstrate acute fractures, significant misalignment, or notable changes from
2 prior images. AR 371, 373. Likewise, the ALJ noted a pattern of improvement in
3 pulmonary functioning tests. AR 364, 368.

4 In briefing, Ms. Hartill points to several pieces of evidence that she asserts
5 provide ample objective evidence of her complaints. ECF No. 15 at 4-5. However,
6 the ALJ is the ultimate arbiter of the evidence, and the Court will not reverse the
7 ALJ's evaluation because one party disagrees with the threshold of required
8 evidence. *See, e.g., Molina*, 674 F.3d at 1111; *Thomas*, 278 F.3d at 954.

9 Further, the ALJ noted that some of the objective testing in the record with
10 regard to her psychological impairments is unreliable, which played a role in the
11 credibility determination. AR 33, 432. A lack of credible effort and a tendency to
12 exaggerate are factors an ALJ may consider when rejecting subjective symptom
13 testimony. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). Here, Dr.
14 Arnold performed objective testing that resulted in unreliable results, including the
15 Minnesota Multiphasic Personality Inventory – Second Edition Restructured Form
16 and the Million Clinic Multi-Axial Inventory, Third Edition. AR 432. Dr. Arnold
17 found Ms. Hartill's "efforts across the objective testing appeared to be mixed" *Id.*
18 She showed "some tendency toward embellishment" on the Million Clinic Multi-
19 Axial Inventory and the Minnesota Multiphasic Personality Inventory results were
20 invalid "due to over endorsement of infrequent pathological items." *Id.* These

1 inconsistencies and pattern of unreliability provided a basis of substantial evidence
2 for the ALJ's credibility determination.

3 Likewise, ALJ Payne also pointed to inconsistencies between Ms. Hartill's
4 testimony and the objective evidence. AR 33. Ms. Hartill gave differing reports
5 regarding her migraine frequency, AR 33, and while Ms. Hartill may characterize
6 this as varying symptoms, the ALJ interpreted this discrepancy differently. The
7 Court will not reverse due to a difference of interpretation of the record when the
8 ALJ's interpretation is rational. *Thomas*, 278 F.3d at 954.

9 ALJ Payne also reasoned that the conservative treatment prescribed by Ms.
10 Hartill's physicians suggested her symptoms were not as severe as she alleged. AR
11 32. Conservative treatment can be evidence that discredits the subjective
12 complaints of a claimant. *See Johnson*, 60 F.3d at 1434. The record contains
13 multiple instances in which the plan for her care included conservative measures,
14 such as continued medication and activities of daily living, and encouragement to
15 quit smoking and follow a proper diet and exercise. AR 312, 420, 447, 489.

16 Finally, ALJ Payne pointed to Ms. Hartill's failure to follow recommended
17 treatment as a factor to determine her credibility. AR 32. A claimant's statements
18 may be less credible when treatment is inconsistent with the level of complaints or
19 a claimant is not following treatment prescribed without good reason. *Molina*, 674
20 F.3d at 1114. When refusing prescribed treatment, the reasons presented for not

1 following the treatment must be related to the mental impairment and not a matter
2 of personal preference. *Id.* In particular, the ALJ references instances in which Ms.
3 Hartill did not take her prescribed medication, nor wanted to try physical therapy.
4 AR 33. On February 6, 2013, Ms. Hartill told her doctor she was not taking one of
5 her inhaler medications, contrary to recommendations, and the record also
6 indicated that she was no longer taking medications for her depression, but she
7 suffered only from “little depression.” AR 494. At this same visit, she also stated
8 she did not want to try physical therapy. *Id.*

9 Most significantly, the record is full of instances where Ms. Hartill was
10 advised to quit smoking cigarettes, but there is no evidence that she followed these
11 recommendations. *See, e.g.* AR 312, 489, 495. The ALJ specifically noted Ms.
12 Hartill’s continued smoking, which “severely aggravates any breathing condition
13 she has.” AR 33. The overall record demonstrates that Ms. Hartill did not follow
14 the prescribed treatment as such that it was not improper for the ALJ to consider
15 this in assessing her credibility.

16 In sum, the ALJ provided numerous legally sufficient reasons to support the
17 negative credibility finding that is supported by substantial evidence in the record.

18 The Court does not find error.

19 //

20 //

1 **B. The ALJ erred in the weight given to some, but not all, of the medical**
2 **opinions in the record.**

3 The Ninth Circuit has distinguished between three classes of medical
4 providers in defining the weight to be given to their opinions: (1) treating
5 providers, those who actually treat the claimant; (2) examining providers, those
6 who examine but do not treat the claimant; and (3) non-examining providers, those
7 who neither treat nor examine the claimant. *Lester*, 81 F.3d at 830.

8 A treating provider’s opinion is given the most weight, followed by an
9 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
10 absence of a contrary opinion, a treating or examining provider’s opinion may not
11 be rejected unless “clear and convincing” reasons are provided. *Id.* at 830. If a
12 treating or examining provider’s opinion is contradicted, it may only be discounted
13 for “specific and legitimate reasons that are supported by substantial evidence in
14 the record.” *Id.* at 830-31.

15 The ALJ may meet the specific and legitimate standard by “setting out a
16 detailed and thorough summary of the facts and conflicting clinical evidence,
17 stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881
18 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When rejecting a treating
19 provider’s opinion on a psychological impairment, the ALJ must offer more than
20

1 his or her own conclusions and explain why he or she, as opposed to the provider,
2 is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

3 **1. Dr. Lahtinen**

4 The ALJ gave “little weight” to the opinions of Dr. Lahtinen that were
5 presented in four exhibits and created for the Washington State Department of
6 Social and Health Services (“DSHS”). AR 34. The ALJ in part rejected these
7 because they were substantially based on subjective reporting by Ms. Hartill. *Id.*
8 As the ALJ’s credibility determination was valid, this was not in error. *See supra*
9 pp. 9-13.

10 The ALJ found inconsistency in Dr. Lahtinen’s opinions. In particular, Dr.
11 Lahtinen recommended only conservative treatment, AR 34, *see also supra* p. 12,
12 despite asserting that Ms. Hartill is disabled. AR 34. Conservative treatment, the
13 ALJ reasoned, is not consistent with how a doctor would treat a truly disabled
14 claimant. *Id.* Additionally, when Ms. Hartill’s subjective complaints are removed,
15 Dr. Lahtinen’s notes do not demonstrate the significant findings that would be
16 consistent with disability, such those he states in these reports to DSHS. *See, e.g.*
17 AR 489, 494. In fact, on multiple occasions, Dr. Lahtinen advises that Ms. Hartill
18 continue with her daily activities or to consider physical therapy “if she continues
19 to have back and hip problems.” *Id.* The record does not support the conclusions in
20 the DSHS forms, and the ALJ did not err in rejecting these opinions. *See Bayliss v.*

1 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (holding an ALJ may reject a
2 doctor’s opinion when not supported by clinical evidence and based on subjective
3 complaints). While Dr. Lahtinen was a treating doctor, who normally is given
4 deference, the ALJ provided the requisite specific and legitimate reasons to
5 discount these opinions. *See Lester*, 81 F.3d at 830.

6 **2. Dr. Arnold**

7 “Little weight” was also given to Dr. Arnold’s opinion that Ms. Hartill has
8 moderate to severe mental limitations. AR 34. The ALJ dismissed this opinion
9 because it was based on objective testing that by the doctor’s own admission was
10 either invalid or provided “with some tendency toward embellishment.” AR 34,
11 432. The ALJ was skeptical of the findings because of these irregularities.

12 Dr. Arnold saw Ms. Hartill only once, at the visit in which these irregular
13 testing results were reached. AR 34, 432. Length of treatment relationship and
14 frequency of evaluation are factors for an ALJ to consider when determining the
15 weight to give a physician’s opinion. 20 C.F.R. §§ 404.1527(c)(2)(i),
16 416.927(c)(2)(i). If a treating physician has seen the claimant a number of times
17 “to have obtained a longitudinal picture” of the claimant’s impairment, the ALJ
18 will give the source's opinion more weight than a non-treating provider. *Id.* In this
19 case, however, the only visit produced insufficient test results. AR 432. The ALJ
20 reasoned this was insufficient to form a reliable medical opinion. AR 34.

1 It is the ALJ's duty to determine the credibility of the medical evidence. *See*
2 *Thomas*, 278 F.3d 947 (9th Cir. 2002). ALJ Payne provided specific and legitimate
3 reasons to discredit Dr. Arnold's opinion. The Court finds no error.

4 **3. Dr. Severinghaus**

5 ALJ Payne also gave "little weight" to the opinion of Dr. Severinghaus, who
6 also only saw Ms. Hartill once and reviewed only the report of Dr. Arnold. AR 34,
7 500-01. The ALJ also dismissed Dr. Severinghaus's opinion because he appeared
8 to rely quite heavily on subjective information provided by Ms. Hartill. AR 34. As
9 discussed previously, because Ms. Hartill's credibility determination was valid,
10 this would not be in error. *See supra*, pp. 9-13.

11 While the ALJ may discount the portions of the report based on subjective
12 information, Dr. Severinghaus also performed objective testing and evaluated Ms.
13 Hartill, resulting in objective observations. AR 501-07. The ALJ is required to
14 consider all of the report, both subjective and objective, and provide legally
15 sufficient reasons for rejecting it in its entirety.

16 As discussed previously, an ALJ may consider the length of treatment when
17 determining a claimant's credibility. *See supra* p. 16. However, unlike Dr.
18 Arnold's objective testing results, there is no evidence that Dr. Severinghaus's test
19 results were unreliable or that Ms. Hartill embellished her answers. AR 501-07.
20 Rather, the objective evidence in the report supports Dr. Severinghaus's opinion,

1 and the ALJ offers no explanation regarding the objective portions of the opinion.
2 Dr. Severinghaus reported that “[s]he appears to try her best for the most part,
3 although I wonder about possible flagging energy and interest towards the end.”
4 AR 504-05. Dr. Severinghaus opined that Ms. Hartill’s slow responses may have
5 been the result of fatigue or limited skills, but does not mention exaggeration. *Id.*
6 Unlike Dr. Arnold’s testing, Dr. Severinghaus does not question the validity of
7 results or the presence of embellishment, and the ALJ failed to explain why this
8 objective testing should not have been given consideration.

9 This is not harmless error, as these mental impairments were not accounted
10 for in the residual functional capacity calculation. However, it is not clear from the
11 record that even if Dr. Severinghaus’s opinion is credited as true, Ms. Hartill
12 would be disabled. *See Lester*, 81 F.3d at 834. Thus, remand is appropriate.

13 Additionally, because the residual functional capacity did not account for
14 additional non-exertional limitations, the Court need not reach a conclusion as to
15 whether the Medical-Vocational Guidelines alone would have been sufficient to
16 sustain the Commissioner’s burden at step five.

17 **C. Remedy**

18 The Court has the discretion to remand the case for additional evidence and
19 findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award
20 benefits if the record is fully developed and further administrative proceedings

1 would serve no useful purpose. *Id.* Remand is appropriate when additional
2 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d
3 759, 763 (9th Cir. 1989). In this case, the Court finds that further proceedings are
4 necessary for a proper determination to be made.

5 On remand, the ALJ shall credit the opinion of Dr. Severinghaus. Once
6 accepting these findings, the ALJ shall recalculate the residual functional capacity,
7 considering all impairments, and then evaluate, based on this updated residual
8 functional capacity, Ms. Hartill's ability to perform past relevant work, as well as
9 work available in the national economy.

10 **VIII. Conclusion**

11 Having reviewed the record and the ALJ's findings, the Court finds the
12 ALJ's decision is not supported by substantial evidence and contains legal error.

13 Accordingly, **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**,
15 **in part.**

16 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

17 3. The District Court Executive is directed to enter judgment in favor of
18 Plaintiff and against Defendant.

19 ///

20 ///

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

4. This matter is **REMANDED** to the Commissioner for further proceedings consistent with this Order.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, forward copies to counsel and **close the file.**

DATED this 19th day of July, 2016.

s/Robert H. Whaley
ROBERT H. WHALEY
Senior United States District Judge