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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ALICIA R. HOY,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
  
Defendant.

No. 2:15-CV-00169-JTR  
  
ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF No. 14, 15. Attorney Lora Lee Stover represents Alicia R. Hoy (Plaintiff); Special Assistant United States Attorney Ellinor R. Coder represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. 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 filed an application for Supplemental Security Income (SSI) on February 24, 2012, alleging disability since June 1, 2010, due to mental problems, including bipolar disorder, attention deficit hyperactive disorder (ADHD), and posttraumatic stress disorder. Tr. 202-210, 263. The applications were denied

1 initially and upon reconsideration. Tr. 123-138. Administrative Law Judge (ALJ)  
2 Marie Palachuk held a hearing on November 6, 2013, at which Plaintiff,  
3 represented by counsel, vocational expert, Daniel McKinney, and medical expert,  
4 Joseph Cools, Ph.D., testified. Tr. 48-81. The ALJ issued an unfavorable decision  
5 on November 22, 2013. Tr. 24-36. The Appeals Council denied review on May  
6 12, 2015. Tr. 1-7. The ALJ's November 22, 2013, decision became the final  
7 decision of the Commissioner, which is appealable to the district court pursuant to  
8 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 8, 2015.  
9 ECF No. 1, 6.

### 10 **STATEMENT OF FACTS**

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

14 Plaintiff was 28 years old at the date of application. Tr. 202. She completed  
15 some college. Tr. 264. Plaintiff reported she stopped working on June 1, 2010,  
16 due to her conditions. Tr. 263. Her work history included customer service  
17 representative, office assistant, and sales person. Tr. 264.

### 18 **STANDARD OF REVIEW**

19 The ALJ is responsible for determining credibility, resolving conflicts in  
20 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
21 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
22 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
23 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
24 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
25 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
26 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
27 another way, substantial evidence is such relevant evidence as a reasonable mind  
28 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402

1 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
2 interpretation, the court may not substitute its judgment for that of the ALJ.  
3 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
4 evidence will be set aside if the proper legal standards were not applied in  
5 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
6 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
7 supports the administrative findings, or if conflicting evidence supports a finding  
8 of either disability or non-disability, the ALJ's determination is conclusive.  
9 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 10 SEQUENTIAL EVALUATION PROCESS

11 The Commissioner has established a five-step sequential evaluation process  
12 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
13 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
14 proof rests upon the claimant to establish a *prima facie* case of entitlement to  
15 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a  
16 claimant establishes that physical or mental impairments prevent her from  
17 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If a claimant  
18 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
19 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
20 other work, and (2) specific jobs exist in the national economy which the claimant  
21 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
22 (2004). If the claimant cannot make an adjustment to other work in the national  
23 economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

### 24 ADMINISTRATIVE DECISION

25 On November 22, 2013, the ALJ issued a decision finding Plaintiff was not  
26 disabled as defined in the Social Security Act.

27 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
28 activity since February 24, 2012, the application date. Tr. 26.

1 At step two, the ALJ determined Plaintiff had the following severe  
2 impairments: bipolar disorder; anxiety disorder; posttraumatic stress disorder; and  
3 borderline personality disorder. Tr. 26.

4 At step three, the ALJ found Plaintiff did not have an impairment or  
5 combination of impairments that met or medically equaled the severity of one of  
6 the listed impairments. Tr. 26-27.

7 At step four, the ALJ assessed Plaintiff's residual function capacity and  
8 determined she could perform a full range of work at all exertional levels with the  
9 following nonexertional limitations:

10 The claimant is able to understand, remember, and carry out simple,  
11 routine, and repetitive tasks and instructions involving up to three step  
12 commands. The claimant can have no judgment or decision making as  
13 part of her work routine. There should be no production rate or pace of  
14 work. The claimant can have no public interaction. She can have brief,  
superficial, and infrequent contact with coworkers and supervisors.

15 Tr. 27. The ALJ identified Plaintiff's past relevant work as general clerk, park  
16 aide, and teacher aide. Tr. 35. The ALJ concluded that Plaintiff was not able to  
17 perform her past relevant work. *Id.*

18 At step five, the ALJ determined that, considering Plaintiff's age, education,  
19 work experience and residual functional capacity, and based on the testimony of  
20 the vocational expert, there were other jobs that exist in significant numbers in the  
21 national economy Plaintiff could perform, including the jobs of industrial cleaner,  
22 inspector packer, and automatic packer operator. Tr. 35-36. The ALJ concluded  
23 Plaintiff was not under a disability within the meaning of the Social Security Act at  
24 any time from the date of application, February 24, 2012, through the date of the  
25 ALJ's decision, November 22, 2013. Tr. 36.

## 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) failing to include all of  
2 Plaintiff's limitations in the residual functional capacity determination; (2) failing  
3 to give the vocational expert an accurate hypothetical; and (3) making a decision  
4 not supported by the evidence of record.

## 5 DISCUSSION

### 6 A. Residual Functional Capacity

7 Plaintiff argues that the ALJ did not include limitations opined by Dr. Cools,  
8 in her residual functional capacity determination. ECF No. 14 at 8-11.

9 A claimant's residual functional capacity is "the most [a claimant] can still  
10 do despite [her] limitations." 20 C.F.R. § 416.945(a). In formulating a residual  
11 functional capacity, the ALJ weighs medical and other source opinions along with  
12 other evidence in the record. *See, e.g., Bray v. Comm'r, Soc. Sec. Admin.*, 554  
13 F.3d 1219, 1226 (9th Cir. 2009). If a residual functional capacity determination  
14 conflicts with an opinion from a medical source, the adjudicator must explain why  
15 the opinion was not adopted. S.S.R. 96-8p.

16 At the hearing, Dr. Cools testified as follows regarding Plaintiff's residual  
17 functional capacity:

18 But I think she does have substantial functional limitations and some  
19 work-related functions and I certainly would restrict her contact with  
20 other people as very brief, superficial and infrequent contact, including  
21 the general public, co-workers and supervisors. She's very  
22 hypersensitive to criticism and is likely to decompensate even with very  
23 mild kinds of criticism, such as regular supervision correcting her  
24 mistakes that she's making in a work-like situation. She also should  
25 not be subjected to strict production standards. That, I think, would  
26 generate even more anxiety and could be reliably predicted to cause the  
27 decompensation. Other than that, I think she could emotionally handle  
28 simple, routine instructions and carry out such instructions with  
adequate concentration, pace and persistence with the limitations that  
I've given under people contact as well as her production standards.

1 Q One final thing, doctor, it sounds from your review of the  
2 records, like she has pretty poor judgment. Would it be a good idea to  
3 limit her to positions where she doesn't have to actually exercise  
4 judgment?

4 A Absolutely.

5 ALJ: Okay. Great. Thank you, doctor. I don't have any other  
6 questions for you.  
7

8 Tr. 61-62. Plaintiff's counsel cross examined Dr. Cools. When asked about any  
9 limitations in Plaintiff's ability to maintain a schedule, Dr. Cools responded with  
10 "Well practical limitations. I mean she's had those limitations before because  
11 she's had a lot of difficulty with transportation issues, getting -- even getting her  
12 babies to the doctor or getting herself to the doctor or the same kind of schedule,  
13 but that's not due to her mental issues per se." Tr. 62-63.

14 Plaintiff argues that the ALJ failed to include Dr. Cools' limitation that  
15 Plaintiff was "very hypersensitive to criticism and is likely to decompensate even  
16 with very mild kinds of criticism, such as regular supervision correcting her  
17 mistakes that she's making in a work-like situation," and Plaintiff's absenteeism in  
18 her residual functional capacity determination. ECF No. 14 at 8-11.

19 As to Plaintiff's hypersensitivity to criticism, Defendant asserts that Dr.  
20 Cools' comment was simply an example of Plaintiff's limitation in interacting with  
21 co-workers and supervisors. ECF No. 15 at 4-5. Defendant appears to assert that  
22 physiological limitations in a residual functional capacity assessment must be  
23 expressed in terms of the basic work functions set forth in 20 § C.F.R. 416.921(b).  
24 ECF No. 15 at 5. But, 20 § C.F.R. 416.921(b) speaks to a limited number of basic  
25 work functions as examples. The ALJ can, and should, address all limitations with  
26 specificity, such as a claimant's ability to handle criticism.

27 The ALJ erred when she failed to include the limitation regarding  
28 Plaintiff's hypersensitivity to criticism in the residual functional capacity

1 determination without explaining why in her decision. However, this error is  
2 harmless. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error  
3 is harmless when “it is clear from the record that the . . . error was inconsequential  
4 to the ultimate nondisability determination”). The ALJ gave significant weight to  
5 the State agency psychological opinions in the current application. Tr. 32. These  
6 opinions included a residual functional capacity assessment that stated Plaintiff  
7 “can accept reasonable supervision,” and this is consistent with the ALJ’s residual  
8 functional capacity determination that Plaintiff can have “brief, superficial, and  
9 infrequent contact,” with supervisors. Tr. 101, 114. Plaintiff did not challenge the  
10 weight given to these opinions; therefore, the Court will not address the weight  
11 these opinions received. *See Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d  
12 1155, 1161 n.2 (9th Cir. 2008) (the court ordinarily will not consider matters on  
13 appeal that are not specifically and distinctly argued in an appellant’s opening  
14 brief). Therefore, the ALJ’s residual functional capacity determination is  
15 supported by substantial evidence.

16 Plaintiff also argued that the ALJ failed to include Dr. Cools’ limitation  
17 regarding absenteeism in her residual functional capacity determination. ECF No.  
18 14 at 8-11. Plaintiff based this argument on Dr. Cools’ testimony that Plaintiff had  
19 a moderate limitation in concentration, persistence, and pace when addressing the  
20 paragraph B criteria identified in section 12.00 of the listing of impairments. ECF  
21 No. 14 at 10; Tr. 60-61.

22 In her decision, the ALJ correctly stated that the paragraph B criteria is used  
23 as part of assessing whether or not a claimant meets a listing, and not as part of a  
24 residual functional capacity determination. Tr. 33; *See S.S.R. 96-8p*. Therefore,  
25 the ALJ’s determination regarding the treatment of Dr. Cools’ testimony of a  
26 moderate limitation in concentration, persistence, and pace is free of error.

27 **B. Hypothetical to Vocational Expert**

28 Plaintiff also argues that the ALJ’s hypothetical question to the vocational

1 expert was inadequate because it failed to account for the limitations of  
2 hypersensitivity to criticism and absenteeism as opined by Dr. Cools. ECF No. 14  
3 at 8-11. An ALJ is only required to present the vocational expert with those  
4 limitations the ALJ finds to be credible and supported by the evidence. *Osenbrock*  
5 *v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). As discussed above, the ALJ's  
6 residual functional capacity determination was supported by substantial evidence  
7 and free of harmful legal error. Therefore, the ALJ's hypothetical as presented to  
8 the vocational expert was without error.

9 **C. The Record as a Whole**

10 Plaintiff asserts that the evidence taken from the record as a whole does not  
11 support the ALJ's decision that Plaintiff was not disabled. ECF No. 14 at 6.  
12 However, the Plaintiff fails to support this assertion with specific argument. The  
13 Court ordinarily will not consider matters on appeal that are not specifically and  
14 distinctly argued in an appellant's opening brief. *See Carmickle*, 533 F.3d at 1161  
15 n.2. The Ninth Circuit has explained the necessity for providing specific  
16 argument:

17 The art of advocacy is not one of mystery. Our adversarial system relies  
18 on the advocates to inform the discussion and raise the issues to the  
19 court. Particularly on appeal, we have held firm against considering  
20 arguments that are not briefed. But the term "brief" in the appellate  
21 context does not mean opaque nor is it an exercise in issue spotting.  
22 However much we may importune lawyers to be brief and to get to the  
23 point, we have never suggested that they skip the substance of their  
24 argument in order to do so. It is no accident that the Federal Rules of  
25 Appellate Procedure require the opening brief to contain the  
26 "appellant's contentions and the reasons for them, with citations to the  
authorities and parts of the record on which the appellant relies." Fed.  
R. App. P. 28(a)(9)(A). We require contentions to be accompanied by  
reasons.

27 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).

28 Moreover, the Ninth Circuit has repeatedly admonished that the court will not



1 “manufacture arguments for an appellant” and therefore will not consider claims  
2 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*  
3 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to  
4 provide adequate briefing, the court declines to consider the remaining issue.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ’s findings, the Court finds the  
7 ALJ’s decision is supported by substantial evidence and free of harmful legal error.  
8 Accordingly, **IT IS ORDERED:**

9 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is  
10 **GRANTED.**

11 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

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

15 DATED May 12, 2016.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE