

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jun 27, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LORIE D.

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-CV-00296-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney Lora Lee Stover represents Lorie D. (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. 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.

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 **JURISDICTION**

2 Plaintiff filed an application for Supplemental Security Income (SSI) on  
3 August 28, 2013, Tr. 145, alleging disability since September 2, 2009, Tr. 258, due  
4 to a brain tumor, injuries affecting memory, and mental stability, Tr. 292. The  
5 application was denied initially and upon reconsideration. Tr. 170-73, 177-79.  
6 Administrative Law Judge (ALJ) R.J. Payne held a hearing on February 2, 2016  
7 and heard testimony from Plaintiff, medical expert, Lynn Jahnke, M.D.,  
8 psychological expert, Nancy Winfrey, Ph.D., and vocational expert, K. Diane  
9 Kramer. Tr. 69-119. At the hearing, Plaintiff amended her onset date to August  
10 28, 2013. Tr. 71. The ALJ issued an unfavorable decision on March 9, 2016. Tr.  
11 22-38. The Appeals Council denied review on June 27, 2017. Tr. 1-7. The ALJ's  
12 March 9, 2016 decision became the final decision of the Commissioner, which is  
13 appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff  
14 filed this action for judicial review on August 24, 2017. ECF Nos. 1, 4.

15 **STATEMENT OF FACTS**

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

19 Plaintiff was 51 years old at the alleged date of onset. Tr. 258. Her highest  
20 level of education was the eighth grade completed in 1976. Tr. 293. Her reported  
21 work history includes the jobs of cashier, customer service representative, and  
22 laborer. Tr. 293. Plaintiff reported that she stopped working on December 1, 2003  
23 because she was let go, but that her conditions became severe enough to keep her  
24 from working as of September 2, 2009. Tr. 292.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in  
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
28 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
6 another way, substantial evidence is such relevant evidence as a reasonable mind  
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
9 interpretation, the court may not substitute its judgment for that of the ALJ.  
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
11 findings, or if conflicting evidence supports a finding of either disability or non-  
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
13 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
14 evidence will be set aside if the proper legal standards were not applied in  
15 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process  
19 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
20 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of  
21 proof rests upon the claimant to establish a prima facie case of entitlement to  
22 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the  
23 claimant establishes that physical or mental impairments prevent her from  
24 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant  
25 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
26 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
27 other work, and (2) specific jobs which the claimant can perform exist in the  
28 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94

1 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the  
2 national economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

### 3 **ADMINISTRATIVE DECISION**

4 On March 9, 2016, the ALJ issued a decision finding Plaintiff was not  
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
7 activity since August 28, 2013, the amended date of onset. Tr. 24.

8 At step two, the ALJ determined Plaintiff had the following severe  
9 impairments: degenerative disc disease – cervical and lumbar spine; cognitive  
10 disorder; depressive disorder; anxiety disorder; pain disorder associated with  
11 psychological factors and a general medical condition; personality disorder; and  
12 alcohol and amphetamine dependence in remission. Tr. 24.

13 At step three, the ALJ found Plaintiff did not have an impairment or  
14 combination of impairments that met or medically equaled the severity of one of  
15 the listed impairments. Tr. 26.

16 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
17 determined she could perform a range of light work with the following limitations:

18 The claimant could lift no more than 20 pounds occasionally and lift or  
19 carry 10 pounds occasionally; would have no limitation standing  
20 walking, and sitting except she would need to change positions from  
21 sitting to standing every hour for one minute; never climb ladders,  
22 ropes, or scaffolds; should avoid concentrated exposure to heavy,  
23 industrial vibration, and temperature extremes of heat and cold; could  
24 understand, remember, and carry out simple routine work instructions;  
25 could have superficial to occasional contact with the general public; no  
work settings with large crowds; no independent decision-making; and  
no fast-paced or strict production quota type work.

26 Tr. 28. The ALJ identified Plaintiff’s past relevant work as cashier, deli clerk, and  
27 small stock facer and concluded that Plaintiff was not able to perform this past  
28 relevant work. Tr. 36-37.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,  
2 work experience and residual functional capacity, and based on the testimony of  
3 the vocational expert, there were other jobs that exist in significant numbers in the  
4 national economy Plaintiff could perform, including the jobs of office helper, mail  
5 clerk, photocopying machine operator, and small parts assembler. Tr. 37-38. The  
6 ALJ concluded Plaintiff was not under a disability within the meaning of the Social  
7 Security Act at any time from August 28, 2013, through the date of the ALJ's  
8 decision. Tr. 38.

### 9 ISSUES

10 The question presented is whether substantial evidence supports the ALJ's  
11 decision denying benefits and, if so, whether that decision is based on proper legal  
12 standards. Plaintiff contends the ALJ erred by (1) failing to properly address  
13 Plaintiff's symptom statements, (2) failing to make a proper residual functional  
14 capacity determination, (3) failing to present an accurate hypothetical to the  
15 vocational expert, and (4) failing to make a proper step five determination.

### 16 DISCUSSION

#### 17 1. Plaintiff's Symptom Statements

18 Plaintiff contests the ALJ's determination that Plaintiff's symptom  
19 statements were less than fully credible. ECF No. 13 at 11-13.

20 It is generally the province of the ALJ to make determinations regarding the  
21 credibility of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the  
22 ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*,  
23 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
24 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
25 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*  
26 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:  
27 rather the ALJ must identify what testimony is not credible and what evidence  
28 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

1 The ALJ found Plaintiff less than fully credible concerning the intensity,  
2 persistence, and limiting effects of her symptoms. Tr. 29. The ALJ reasoned that  
3 Plaintiff's statements were unreliable because her symptom reporting was contrary  
4 to the objective medical evidence and her treatments appeared to improve the  
5 severity of her symptoms. Tr. 33.

6 Plaintiff's challenge to the ALJ's determination consists of the assertion that  
7 "the ALJ failed to provide clear and convincing reasons for discrediting Plaintiff's  
8 subjective complaint testimony," and an assertion that she is credible. ECF No. 13  
9 at 11-13. Nowhere does Plaintiff specifically point to any of the ALJ's reasons and  
10 challenge them as an error of law or as not supported by substantial evidence. *Id.*  
11 Plaintiff's argument amounts to an alternate interpretation of the evidence, which  
12 is insufficient to succeed in a review by this Court. *Rollins v. Massanari*, 261 F.3d  
13 853, 857 (9th Cir. 2001) (*citing Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)  
14 ("the ALJ's interpretation of her testimony may not be the only reasonable one.  
15 But it is still a reasonable interpretation and is supported by substantial evidence;  
16 thus, it is not our role to second-guess it.")).

17 Additionally, it is not the role of this Court to "manufacture arguments for  
18 an appellant" and, therefore, the Court will not consider claims that were not  
19 actually argued in Plaintiff's opening brief. *Greenwood v. Fed. Aviation Admin.*,  
20 28 F.3d 971, 977 (9th Cir. 1994). The Ninth Circuit has explained the necessity for  
21 providing specific arguments:

22 The art of advocacy is not one of mystery. Our adversarial system relies  
23 on the advocates to inform the discussion and raise the issues to the  
24 court. Particularly on appeal, we have held firm against considering  
25 arguments that are not briefed. But the term "brief" in the appellate  
26 context does not mean opaque nor is it an exercise in issue spotting.  
27 However much we may importune lawyers to be brief and to get to the  
28 point, we have never suggested that they skip the substance of their  
argument in order to do so. It is no accident that the Federal Rules of  
Appellate Procedure require the opening brief to contain the

1 “appellant’s contentions and the reasons for them, with citations to the  
2 authorities and parts of the record on which the appellant relies.” Fed.  
3 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by  
4 reasons.

4 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).<sup>1</sup>

5 Because Plaintiff failed to provide adequate briefing challenging the reasons  
6 provided by the ALJ for rejecting Plaintiff’s testimony, the court declines to  
7 consider the issue further.

## 8 **2. Residual Functional Capacity**

9 Plaintiff argues that the ALJ “ignored the Plaintiff’s limitations regarding  
10 her pain and the effects of her impairments in terms of her ability to maintain  
11 attendance and work effectively during an eight hour day.” ECF No. 13 at 13-14.  
12 She further asserts that the ALJ “inappropriately considered the evidence from the  
13 Plaintiff’s forty day work assessment at Goodwill Industries – especially in light of  
14 her need for a sit/stand opinion,” and that the ALJ failed to consider “the objective  
15 medical evidence of her orthopedic impairments and the effects of her pain  
16 disorder which he acknowledged in Finding of Fact Number Two.” *Id.* at 14.

17 The ALJ’s residual functional capacity determination includes a sit/stand  
18 requirement: “she would need to change positions from sitting to standing every  
19 hour for one minute.” Tr. 28. In making the residual functional capacity  
20 determination, the ALJ considered the report from Plaintiff’s supervisor at  
21 Goodwill Industries and the observations this supervisor made concerning her  
22 ability to sit and stand throughout her shift. Tr. 32. The ALJ gave partial weight  
23 to this opinion because this supervisor observed Plaintiff during her shift. *Id.*  
24 Plaintiff makes no additional argument in her briefing as to how the ALJ  
25 inappropriately addressed this evidence. ECF No. 13 at 13-14. Considering it was  
26

---

27 <sup>1</sup>Under the current version of the Federal Rules of Appellate Procedure, the  
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 addressed by the ALJ, the ALJ assigned it partial weight, and the ALJ included a  
2 sit/stand requirement in the residual functional capacity determination, this Court  
3 declines to find error in the ALJ's treatment of this evidence.

4 Plaintiff's challenge of the ALJ's treatment of the orthopedic impairments  
5 and the effects of her pain disorder lacks specifics. The ALJ included orthopedic  
6 impairments and pain disorder as severe impairments at step two. Tr. 24 (finding  
7 Plaintiff's degenerative disc disease – cervical and lumbar spine and pain disorder  
8 associated with psychological factors and a general medical condition as severe  
9 impairments). The ALJ then included physical limitations in the residual  
10 functional capacity determination. Tr. 28 (limiting Plaintiff to light work with a  
11 requirement to change positions from sitting to standing every hour and precluding  
12 climbing ladders, ropes, or scaffolds). Plaintiff failed to allege any additional  
13 restrictions necessary to accommodate Plaintiff's orthopedic impairments and pain  
14 disorder. ECF No. 13 at 13-14. Without a more specific argument by Plaintiff, the  
15 Court cannot consider the issue further and finds that the ALJ did not error. *See*  
16 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)  
17 (“We do not address this finding because [Plaintiff] failed to argue this issue with  
18 any specificity in his briefing.”).

### 19 **3. Hypothetical to Vocational Expert**

20 Plaintiff alleges that the hypothetical question posed by the ALJ was  
21 incomplete. ECF No. 13 at 15. She states that Dr. Winfrey rated Plaintiff as  
22 having a moderate degree of limitation in terms of concentration, persistence and  
23 pace and opined that Plaintiff would need a work environment that would include  
24 simple, routine and repetitive tasks and agrees that these limitations were  
25 incorporated into the residual functional capacity determination. *Id.* However, she  
26 asserts that Dr. Winfrey also found that Plaintiff had a limited ability to learn new  
27 tasks which was not included in the hypothetical posed to the vocational expert.  
28 *Id.* She additionally asserts that Perry Grey, Psy.D., John F. Arnold, Ph.D., and the



1 report from the Department of Vocational Rehabilitation (DVR) included  
2 limitations in her ability to learn new tasks and it was an error for the ALJ to leave  
3 this limitation out of the hypothetical presented to the vocational expert. ECF No.  
4 13 at 16.

5 At the hearing, Dr. Winfrey provided testimony regarding Plaintiff's residual  
6 functional capacity and opined that Plaintiff could understand, remember and carry  
7 out simple routine work instructions, Tr. 83, was limited to superficial to  
8 occasional contact with the public with a preclusion from crowds, Tr. 84, was  
9 precluded from independent decision making, Tr. 85, and was precluded from fast  
10 pace or strict production-type work, Tr. 87. Dr. Winfrey did not testify that  
11 Plaintiff had a limitation in her ability to learn new tasks. Tr. 78-89. The ALJ  
12 gave Dr. Winfrey's opinion great weight. Tr. 36. Plaintiff did not challenge the  
13 weight the ALJ provided to Dr. Winfrey's opinion. ECF No. 13 at 15. Seeing as  
14 Plaintiff's argument is not supported by the record and she failed to challenge the  
15 weight assigned to the opinion, this Court cannot disturb the ALJ's treatment of the  
16 opinion.

17 Dr. Grey examined and tested Plaintiff in August of 2014 and provided an  
18 opinion regarding her functioning on September 19, 2014. Tr. 500-11. In his  
19 opinion, he included the following statement: "Firstly, she would require frequent  
20 repetition of material, written cues, and supervised practice and application of  
21 learned concepts. Ms. Delafield will struggle with learning new concepts,  
22 therefore these learning supports are recommended." Tr. 511. The ALJ gave Dr.  
23 Grey's opinion less weight because "he did not offer an opinion on how the  
24 claimant's symptoms would interfere with her ability to work," and because "his  
25 opinion on the severity of the claimant's symptoms is considerably more drastic  
26 than the majority of the acceptable and non-acceptable medical source opinions in  
27 the record." Tr. 34. Plaintiff did not challenge the weight the ALJ assigned to Dr.  
28 Grey's opinion. ECF No. 13. Therefore, the Court will not consider the issue

1 further. *See Carmickle*, 533 F.3d at 1161 n.2.

2 On January 28, 2016, Dr. Arnold completed an evaluation for the  
3 Washington Department of Social and Health Services. Tr. 625-28. He diagnosed  
4 Plaintiff with a rule out neurocognitive disorder, a persistent depressive disorder  
5 with late onset, generalized anxiety disorder, and unspecified personality disorder.  
6 Tr. 626. He rated Plaintiff’s limitation in thirteen basic work activities which  
7 included a marked limitation in three basic work activities, including in the ability  
8 to learn new tasks, and a severe limitation in two additional basic work activities.  
9 Tr. 627. The ALJ gave no weight to Dr. Arnold’s opined severe limitations and  
10 stated that “[t]he claimant did not report any of her recent activities to Dr. Arnold,  
11 and her misinformation regarding her sobriety suggests that his conclusions are  
12 based at least in part on faulty information.” Tr. 36. The ALJ did not specifically  
13 address the weight he assigned to the marked limitations opined by Dr. Arnold. *Id.*  
14 Plaintiff argues that the marked limitation in the ability to learn new tasks was  
15 supported by substantial evidence and should have been included in the  
16 hypothetical presented to the vocational expert. While the ALJ did not specifically  
17 reject the limitation in the ability to learn new tasks, the Ninth Circuit has  
18 recognized that the ALJ is not required to use “magic words” to achieve his  
19 analysis, as long as the Court can draw specific and legitimate inferences from his  
20 findings. *Magallanes*, 881 F.2d at 755. Here, Plaintiff failed to assert any  
21 challenge to the weight the ALJ impliedly or expressly gave to Dr. Arnold’s  
22 opinion or any reason the ALJ provided for such weight. ECF No. 13. Again, this  
23 Court will not manufacture arguments for Plaintiff. *See Greenwood*, 28 F.3d at  
24 977.

25 Plaintiff also asserts that the limitation in learning new tasks was addressed  
26 by the DVR report dated June 9, 2015. ECF No. 13 at 16. However, the supports  
27 and accommodations recommended in the report did not specifically address the  
28 ability to learn new tasks. Tr. 364-65. Instead, it addressed the need for extra

1 breaks, a quiet place to calm herself, encouragement/positive feedback, extra  
2 supervision, assistance with decision making/problem solving, assistance with  
3 anxiety and stress, assistance with instructions and complex processes, assistance  
4 with repetitive skills and work assignments, assistance with work tolerance and  
5 adjusting to work environment, assistance with focus concerns and repetitive  
6 instructions, assistance with social cues/personal boundaries, and the need for  
7 protective equipment. *Id.* The ALJ assigned partial weight to these  
8 recommendations, Tr. 32, and Plaintiff did not challenge the assigned weight, ECF  
9 No. 13. While a reasonable interpretation of these recommendations could include  
10 a limitation in the ability to perform new tasks, this is simply an interpretation. It  
11 is the ALJ's role to resolve any ambiguities, *Andrews*, 53 F.3d at 1039, and it is not  
12 the Court's role to second guess a reasonable interpretation of the evidence.  
13 *Rollins*, 261 F.3d at 857. The Court finds that the ALJ's residual functional  
14 capacity determination is also a reasonable interpretation of the recommendations,  
15 and since Plaintiff failed to challenge the weight assigned to the recommendations,  
16 this Court will not disturb the residual functional determination. Therefore, the  
17 Court declines to find error in the hypothetical given to the vocational expert that  
18 matched the ALJ's residual functional capacity determination. Tr. 115-16.

#### 19 **4. Step Five**

20 Plaintiff's step five argument is premised on the Court finding the ALJ erred  
21 in the residual functional capacity determination and in the hypothetical provided  
22 to the vocational expert. ECF No. 13 at 14-16. Because the Court did not find the  
23 ALJ erred in relation to either of these arguments, the step five determination is  
24 also without error.

### 25 **CONCLUSION**

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

28 Accordingly, **IT IS ORDERED:**

1           1.     Defendant’s Motion for Summary Judgment, **ECF No. 14**, is  
2 **GRANTED.**

3           2.     Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is **DENIED.**

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

7           **IT IS SO ORDERED.**

8           DATED June 27, 2018.

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

---

12           JOHN T. RODGERS  
13           UNITED STATES MAGISTRATE JUDGE  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28