

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

Jan 18, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ARLENE R. M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 17-CV-370-FVS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 11, 12. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Lora Lee Stover. Defendant is represented by Special Assistant United States Attorney Daphne Banay. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 11, is denied and Defendant's Motion, ECF No. 12, is granted.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Plaintiff Arlene R. M.¹ (Plaintiff), filed for widow’s insurance benefits
3 (disability) and supplemental security income on March 6, 2013, alleging an onset
4 date of June 30, 2012.² Tr. 4, 224-29, 232-33, 246-47. Benefits were denied
5 initially, 132-39, and upon reconsideration, Tr. 147-51. Plaintiff appeared at a
6 hearing before an administrative law judge (ALJ) on July 21, 2015. Tr. 25-67. On
7 July 31, 2015, the ALJ issued an unfavorable decision. Tr. 115-26.

8 The Appeals Council granted review on August 18, 2017 because the ALJ had
9 incorrectly adjudicated an application for disability insurance benefits (DIB) and
10 omitted the claim for widow’s insurance benefits.³ Tr. 208-11. On September 29,
11 2017, the Appeals Council corrected those findings, adopted the ALJ’s other
12 findings and conclusions, and issued an unfavorable decision denying the
13 applications for SSI disability and for widow’s insurance benefits. Tr. 1-7. The
14 decision of the Appeals Council is the Commissioner’s final decision subject to

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16 ¹In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first
17 name and last initial, and, subsequently, Plaintiff’s first name only, throughout this
18 decision.

19 ²At the hearing, Plaintiff amended the alleged onset date to July 15, 2008. Tr. 29.

20 ³Plaintiff’s application for disability insurance benefits was denied due to lack of
21 insured status. Tr. 4, 208.

1 review. 20 C.F.R. § 404.98, 416.148; *Sousa v. Callahan*, 143 F.3d 1240, 1242 n.3
2 (9th Cir. 1998).

3 **BACKGROUND**

4 The facts of the case are set forth in the administrative hearing and transcripts,
5 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
6 therefore only summarized here.

7 Plaintiff was born in 1958 and was 57 years old at the time of the hearing. Tr.
8 43. She has a bachelor's degree in business management and an MBA in healthcare
9 administration. Tr. 41. She has work experience as a secretary. Tr. 41. She had a
10 right knee injury in July 2012 and ultimately underwent surgery for a ruptured
11 tendon. Tr. 47-50, 62. At the time of the hearing, she had recently stopped using a
12 cane and could walk half a mile at a time. Tr. 48. Plaintiff testified she also has had
13 lower back pain since high school. Tr. 52, 54. She testified that she could possibly
14 perform a 40-hour work week if she could sit down, but not if she had to stand all
15 the time. Tr. 61.

16 **STANDARD OF REVIEW**

17 A district court's review of a final decision of the Commissioner of Social
18 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
19 limited; the Commissioner's decision will be disturbed "only if it is not supported by
20 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
21 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable

1 mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and
2 citation omitted). Stated differently, substantial evidence equates to “more than a
3 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).
4 In determining whether the standard has been satisfied, a reviewing court must
5 consider the entire record as a whole rather than searching for supporting evidence in
6 isolation. *Id.*

7 In reviewing a denial of benefits, a district court may not substitute its
8 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
9 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
10 rational interpretation, [the court] must uphold the ALJ’s findings if they are
11 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
12 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
13 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
14 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
15 (quotation and citation omitted). The party appealing the ALJ’s decision generally
16 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
17 396, 409-10 (2009).

18 **FIVE-STEP EVALUATION PROCESS**

19 A claimant must satisfy two conditions to be considered “disabled” within the
20 meaning of the Social Security Act. First, the claimant must be “unable to engage in
21 any substantial gainful activity by reason of any medically determinable physical or

1 mental impairment which can be expected to result in death or which has lasted or
2 can be expected to last for a continuous period of not less than twelve months.” 42
3 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must
4 be “of such severity that he is not only unable to do his previous work[,] but cannot,
5 considering his age, education, and work experience, engage in any other kind of
6 substantial gainful work which exists in the national economy.” 42 U.S.C. §§
7 423(d)(2)(A), 1382c(a)(3)(B).

8 The Commissioner has established a five-step sequential analysis to determine
9 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
10 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
11 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is
12 engaged in “substantial gainful activity,” the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

14 If the claimant is not engaged in substantial gainful activity, the analysis
15 proceeds to step two. At this step, the Commissioner considers the severity of the
16 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
17 claimant suffers from “any impairment or combination of impairments which
18 significantly limits [his or her] physical or mental ability to do basic work
19 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
20 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
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1 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
2 §§ 404.1520(c), 416.920(c).

3 At step three, the Commissioner compares the claimant's impairment to
4 severe impairments recognized by the Commissioner to be so severe as to preclude a
5 person from engaging in substantial gainful activity. 20 C.F.R. §§
6 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe
7 than one of the enumerated impairments, the Commissioner must find the claimant
8 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

9 If the severity of the claimant's impairment does not meet or exceed the
10 severity of the enumerated impairments, the Commissioner must pause to assess the
11 claimant's "residual functional capacity." Residual functional capacity (RFC),
12 defined generally as the claimant's ability to perform physical and mental work
13 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
14 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
15 analysis.

16 At step four, the Commissioner considers whether, in view of the claimant's
17 RFC, the claimant is capable of performing work that he or she has performed in the
18 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
19 claimant is capable of performing past relevant work, the Commissioner must find
20 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
21 claimant is incapable of performing such work, the analysis proceeds to step five.

1 At step five, the Commissioner should conclude whether, in view of the
2 claimant's RFC, the claimant is capable of performing other work in the national
3 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this
4 determination, the Commissioner must also consider vocational factors such as the
5 claimant's age, education and past work experience. 20 C.F.R. §§
6 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other
7 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
8 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
9 work, analysis concludes with a finding that the claimant is disabled and is therefore
10 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

11 The claimant bears the burden of proof at steps one through four above.
12 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
13 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
14 capable of performing other work; and (2) such work "exists in significant numbers
15 in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
16 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

17 APPEALS COUNCIL FINDINGS

18 At step one, the Appeals Council (AC) found Plaintiff did not engage in
19 substantial gainful activity since July 15, 2008, the amended alleged onset date. Tr.
20 5. At step two, the AC found that Plaintiff has the following severe impairments:
21 right knee degenerative joint disease, tendon rupture status post-surgery, and

1 obesity. Tr. 5. At step three, the AC found that Plaintiff does not have an
2 impairment or combination of impairments that meets or medically equals the
3 severity of a listed impairment. Tr. 5.

4 The AC then found that Plaintiff has the residual functional capacity to
5 perform a full range of light work with the following additional limitations:

6 she can stand or walk only 2 hours in an 8 hour day, for 10 to 15 minutes
7 at a time; she will have no use of her right (dominant) upper extremity
8 when walking because of her use of a cane; she can never climb ramps,
9 stairs, ladders, ropes, or scaffolds, and can perform all other postural
activities only occasionally; and she cannot have concentrated exposure
to extreme cold, extreme heat, vibration, or hazards, such as
unprotected heights and moving mechanical parts.

10 Tr. 6.

11 At step four, the AC found that Plaintiff is capable of performing past relevant
12 work as a secretary. Tr. 6. Therefore, at step five, the AC concluded that Plaintiff
13 has not been under a disability, as defined in the Social Security Act, at any time
14 through July 31, 2015, the date of the ALJ's decision. Tr. 6.

15 ISSUES

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 widow's insurance benefits under Title II and supplemental security income under
18 Title XVI of the Social Security Act. ECF No. 12. Plaintiff raises the following
19 issues for review:

- 20 1. Whether the ALJ properly evaluated Plaintiff's symptom complaints;
- 21 2. Whether the ALJ properly considered the medical expert's testimony;

1 3. Whether the ALJ properly assessed Plaintiff’s residual functional
2 capacity;

3 4. Whether the ALJ posed a complete hypothetical to the vocational
4 expert; and

5 5. Whether the ALJ properly found Plaintiff is capable of performing past
6 relevant work.⁴

7 ECF No. 11 at 7.

8 DISCUSSION

9 A. Symptom Claims

10 Plaintiff contends the ALJ improperly rejected her symptom claims. ECF
11 No. 11 at 9-11. An ALJ engages in a two-step analysis to determine whether a
12 claimant’s testimony regarding subjective pain or symptoms is credible. “First, the
13 ALJ must determine whether there is objective medical evidence of an underlying
14 impairment which could reasonably be expected to produce the pain or other

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16 ⁴Plaintiff frames the issues in terms of the ALJ’s decision rather than the decision
17 of the Appeals Council, ECF No. 11 at 7, even though the Appeals Council’s
18 decision is the final decision of the Commissioner subject to review by the Court.
19 For clarity and ease of discussion, and because the Appeals Council adopted the
20 ALJ’s findings which are challenged by Plaintiff, the Court also discusses the
21 issues in terms of the ALJ’s findings.

1 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
2 “The claimant is not required to show that her impairment could reasonably be
3 expected to cause the severity of the symptom she has alleged; she need only show
4 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*
5 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
10 citations and quotations omitted). “General findings are insufficient; rather, the
11 ALJ must identify what testimony is not credible and what evidence undermines
12 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
13 Cir. 1995); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he
14 ALJ must make a credibility determination with findings sufficiently specific to
15 permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s
16 testimony.”). “The clear and convincing [evidence] standard is the most
17 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
18 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
19 924 (9th Cir. 2002)).

20 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*
21 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the

1 claimant's testimony or between his testimony and his conduct; (3) the claimant's
2 daily living activities; (4) the claimant's work record; and (5) testimony from
3 physicians or third parties concerning the nature, severity, and effect of the
4 claimant's condition. *Thomas*, 278 F.3d at 958-59.

5 This Court finds that the ALJ provided specific, clear, and convincing reasons
6 for finding Plaintiff's statements concerning the intensity, persistence, and limiting
7 effects of her symptoms were not entirely credible. Tr. 119-20

8 First, the ALJ found Plaintiff's work history weakens the credibility of her
9 allegations. Tr. 120. The claimant's work record is an appropriate consideration
10 in weighing the claimant's symptom claims. *Thomas*, 278 F.3d 947, 958-59 (9th
11 Cir. 2002); 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2011). Second, the ALJ
12 found Plaintiff's daily activities erode the strength of her statements regarding the
13 extent of her impairments. Tr. 120. It is reasonable for an ALJ to consider a
14 claimant's activities which undermine claims of totally disabling pain in assessing
15 a claimant's symptom complaints. *See Rollins v. Massanari*, 261 F.3d 853, 857
16 (9th Cir. 2001). Third, the ALJ found the objective evidence only partially
17 supports Plaintiff's statements regarding the limiting effect of her impairments. Tr.
18 120-21. While subjective pain testimony may not be rejected solely because it is
19 not corroborated by objective medical findings, the medical evidence is a relevant
20 factor in determining the severity of a claimant's pain and its disabling effects.
21 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2) (2011).

1 These reasons are supported by the ALJ's analysis and citations to the record. Tr.
2 119-21.

3 Plaintiff contends the ALJ did not provide clear and convincing reasons for
4 finding her statements less than fully credible. ECF No. 11 at 10. Plaintiff asserts
5 that her "credibility is bolstered" by other evidence but fails to address the reasons
6 cited by the ALJ or demonstrate any error. ECF No. 11 at 10. Without citing the
7 record, Plaintiff references objective evidence of abnormality of her knees, the
8 opinion of Dr. Mullen, Dr. Thompson's testimony, and findings from the Division
9 of Vocational Rehabilitation. ECF No. 11 at 10-11. The evidence referenced by
10 Plaintiff was considered by the ALJ. The ALJ found Plaintiff's right knee
11 degenerative joint disease and post-surgery tendon rupture are severe impairments.
12 Tr. 118. The ALJ also addressed Dr. Thompson's testimony, discussed *infra*. Tr.
13 123.

14 The ALJ gave little weight to some of Dr. Mullen's conclusions, which is
15 not challenged by Plaintiff.⁵ Tr. 122-23. Similarly, the ALJ gave partial weight to
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17 ⁵The ALJ discussed five opinions given by Dr. Mullen regarding Plaintiff's
18 functional ability dated March 13, 2014; December 30, 2014; January 23, 2015;
19 January 25, 2015; and February 13, 2015. Tr. 122, 531, 574, 579, 581, 600. The
20 ALJ gave partial weight to the March 2014 and January 2015 opinions but rejected
21 the remaining opinions. Tr. 122-23. Plaintiff does not challenge the weight given

1 the opinion of Margie Hemming, a community rehabilitation specialist for the
2 Division of Vocational Rehabilitation (DVR). Tr. 124, 676-81. The ALJ provided
3 several reasons for the weight assigned to the opinion which are not challenged by
4 Plaintiff. Tr. 124. The ALJ therefore reasonably considered and rejected the
5 evidence cited by Plaintiff. For these reasons, and because Plaintiff did not
6 identify any error in the reasons cited by the ALJ in evaluating Plaintiff's symptom
7 claims, the Court concludes the ALJ provided clear and convincing reasons
8 supported by substantial evidence.

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15 to Dr. Mullen's opinions or the ALJ's reasoning. Further, Plaintiff does not
16 specifically identify which opinion supports her argument, vaguely referencing
17 "the opinions of Dr. Mullen and his actions of assisting her with obtaining a
18 disabled parking permit." ECF No. 11 at 10-11. The Court ordinarily will not
19 consider matters on appeal that are not specifically and distinctly argued in the
20 opening brief. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
21 n.2 (9th Cir. 2008). Thus, the Court declines to further address this issue except to
find that the ALJ's consideration of Dr. Mullen's opinions was legally sufficient.

1 **B. Medical Opinion Evidence**

2 Plaintiff contends the ALJ failed to properly consider the opinion of the
3 medical expert, Robert Thompson, M.D.⁶ ECF No. 11 at 11-12. Dr. Thompson
4 testified that during the period from June 1, 2012 to July 1, 2013, Plaintiff's
5 impairments met the requirements of listing 1.02(A) for major dysfunction of a joint.
6 Tr. 33. He also testified that he could not complete a residual functional capacity
7 finding after July 1, 2013 because the record did not include specific limitations. Tr.
8 33. The ALJ gave partial weight to Dr. Thompson's opinion.

9 There are three types of physicians: "(1) those who treat the claimant (treating
10 physicians); (2) those who examine but do not treat the claimant (examining
11 physicians); and (3) those who neither examine nor treat the claimant but who
12 review the claimant's file (nonexamining or reviewing physicians)." *Holohan*, 246
13 F.3d at 1201-02 (brackets omitted). "Generally, a treating physician's opinion

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16 ⁶ Plaintiff's list of issues indicates that Plaintiff challenges the ALJ's consideration
17 of Dr. Thompson's testimony, but Plaintiff fails to cite any authority on this issue
18 or to specifically argue that Dr. Thompson's opinion was improperly considered.
19 While this "argument" could reasonably be rejected for lack of specificity, *see*
20 *Carmickle*, 533 F.3d at 1161, in this instance the Court gives Plaintiff the benefit of
21 the doubt and considers the sufficiency of the ALJ's analysis of Dr. Thompson's
testimony.

1 carries more weight than an examining physician's, and an examining physician's
2 opinion carries more weight than a reviewing physician's." *Id.* "In addition, the
3 regulations give more weight to opinions that are explained than to those that are
4 not, and to the opinions of specialists concerning matters relating to their specialty
5 over that of nonspecialists." *Id.* (citations omitted).

6 If a treating or examining physician's opinion is uncontradicted, an ALJ may
7 reject it only by offering "clear and convincing reasons that are supported by
8 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
9 "However, the ALJ need not accept the opinion of any physician, including a
10 treating physician, if that opinion is brief, conclusory and inadequately supported by
11 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th
12 Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
13 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may
14 only reject it by providing specific and legitimate reasons that are supported by
15 substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31).

16 The ALJ adopted portions of Dr. Thompson's opinion, but only to the extent
17 it conformed to other evidence in the record. Tr. 123. Because Dr. Thompson's
18 opinion was contradicted by the opinion of Dr. Hander, Tr. 97-98, the ALJ was
19 required to provide specific and legitimate reasons for rejecting portions of Dr.
20 Thompson's opinion. *Bayliss*, 427 F.3d at 1216.

1 The ALJ observed that Dr. Thompson relied on a combination of left and
2 right knee impairments in finding Plaintiff met the requirements of listing 1.02 for
3 major dysfunction of a joint as of June 1, 2012. Tr. 33, 123. Major dysfunction of
4 a joint is “[c]haracterized by gross anatomical deformity (e.g., subluxation,
5 contracture, bony or fibrous ankylosis, instability) and chronic joint pain and
6 stiffness with signs of limitation of motion or other abnormal motion of the
7 affected joint(s).” 20 C.F.R. § Pt. 404, Subpt. P, App. 1, 1.02 (July 20, 2015). The
8 listing requires medically acceptable imaging of joint space narrowing, bony
9 destruction, or ankylosis of the hip, knee, or ankle which causes the “inability to
10 ambulate effectively.” *Id.*

11 An inability to ambulate effectively “means an extreme limitation of the
12 ability to walk . . . defined generally as having insufficient lower extremity
13 functioning . . . to permit independent ambulation without the use of a hand-held
14 assistive device(s) that limits the functioning of both upper extremities.” 20 C.F.R.
15 § Pt. 404, Subpt. P, App. 1, 1.00B2b (July 20, 2015). An example of ineffective
16 ambulation is “the inability to walk without the use of a walker, two crutches or
17 two canes.” *Id.*

18 The ALJ noted that Plaintiff testified she has no problem with her left knee.
19 Tr. 53-54, 123. The ALJ also noted that imaging of Plaintiff’s left knee was
20 normal, and she had no significant treatment of her left knee. Tr. 123, 383-84.
21 Most significantly, the ALJ observed that Plaintiff testified she was able to walk

1 with a cane in her right hand for a couple of months before her injury on July 20,
2 2012, indicating that Plaintiff's limitations were not listing-level at that time. Tr.
3 62-63, 123. This was a reasonable conclusion because the inability to ambulate
4 effectively involves the use of a hand-held assistive device that limits functioning
5 of both upper extremities, and Plaintiff's testimony that she used a cane in her right
6 hand indicates that she did not use both upper extremities to ambulate. The ALJ is
7 therefore correct that the record does not support the finding that Plaintiff met
8 listing 1.02 on June 1, 2012. Thus, the ALJ reasonably rejected that portion of Dr.
9 Thompson's opinion.

10 Plaintiff implies that the ALJ improperly failed to credit Dr. Thompson's
11 testimony that she met a listing without either identifying the listing or any error in
12 the ALJ's consideration of the evidence. Based on the foregoing, the ALJ's reason
13 for rejecting a portion of Dr. Thompson's opinion is specific, legitimate, and based
14 on substantial evidence. Plaintiff also asserts the ALJ had a duty to develop the
15 record regarding Plaintiff's residual functional capacity after July 2013 but fails to
16 cite any authority or explain how a duty to develop the record was implicated in
17 this case. The Court declines to further elaborate on this issue which was not
18 argued with specificity. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155,
19 1161 n.2 (9th Cir. 2007).

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1 **C. RFC, Hypothetical, and Step Four**

2 Plaintiff argues the ALJ erred at step four because the vocational expert's
3 opinion that plaintiff can return to past relevant work was based on an incomplete
4 hypothetical. ECF No. 11 at 12-13. The ALJ's hypothetical must be based on
5 medical assumptions supported by substantial evidence in the record which reflect
6 all of a claimant's limitations. *Osenbrook v. Apfel*, 240 F.3D 1157, 1165 (9th Cir.
7 2001). The hypothetical should be "accurate, detailed, and supported by the
8 medical record." *Tackett*, 180 F.3d at 1101. The ALJ is not bound to accept as
9 true the restrictions presented in a hypothetical question propounded by a
10 claimant's counsel. *Osenbrook*, 240 F.3d at 1164; *Magallanes v. Bowen*, 881 F.2d
11 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir.
12 1986). The ALJ is free to accept or reject these restrictions as long as they are
13 supported by substantial evidence, even when there is conflicting medical
14 evidence. *Magallanes*, 881 F.2d at 756-57.

15 Plaintiff's argument assumes that the ALJ erred in considering Dr.
16 Thompson's testimony, Dr. Mullen's opinions, and the findings of the Division of
17 Vocational Rehabilitation. ECF No. 11 at 13. The ALJ's reason for rejecting a
18 portion of Dr. Thompson's opinion was legally sufficient and supported by
19 substantial evidence, and the ALJ's consideration of Dr. Mullen's opinion and the
20 DVR findings was reasonable, as discussed *supra*. Plaintiff again failed to argue
21 this point with specificity and failed to demonstrate that the ALJ made any error of

1 fact or law in evaluating the record. The ALJ therefore properly excluded those
2 findings from the RFC and hypothetical to the vocational expert. The hypothetical
3 contained the limitations the ALJ found credible and supported by substantial
4 evidence in the record. The ALJ's reliance on testimony the VE gave in response to
5 the hypothetical was therefore proper. *See id.; Bayliss*, 427 F. 3d at 1217-18.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's findings, this Court concludes the
8 ALJ's decision is supported by substantial evidence and free of harmful legal error.
9 Accordingly,

10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

11 2. Defendant's Motion for Summary Judgment, **ECF No. 12**, is

12 **GRANTED**.

13 **IT IS SO ORDERED**. The District Court Clerk is directed to enter this
14 Order and provide copies to counsel. Judgment shall be entered for Defendant and
15 the file shall be **CLOSED**.

16 **DATED** January 18, 2019.

17
18 *s/ Rosanna Malouf Peterson*
19 ROSANNA MALOUF PETERSON
20 United States District Judge
21