

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

Mar 19, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No: 2:17-CV-00425-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 18. Attorney Dana C. Madsen represents Jennifer C. (Plaintiff); Special Assistant United States Attorney Dephne Banay represents the Commissioner of Social Security (Defendant). The parties consented to proceed before a magistrate judge. ECF No. 13. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendant's motion for summary judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on February 6, 2011, Tr. 72, 167, alleging disability since December 23, 2010, Tr. 153, due to "Cerebral Vascular Accident Stroke." Tr. 171. The application was denied

1 initially and upon reconsideration. Tr. 92-98. Administrative Law Judge (ALJ)
2 Marie Palachuck held a hearing on October 2, 2012 and heard testimony from
3 Plaintiff, medical expert James M. Haynes, M.D., psychological expert Donna M.
4 Veraldi, Ph.D., and vocational expert Daniel McKinney. Tr. 35-71. The ALJ issued
5 an unfavorable decision on November 14, 2012. Tr. 15-27. The Appeals Council
6 denied review on January 9, 2014. Tr. 1-6. Plaintiff sought judicial review of the
7 ALJ's November 14, 2012 decision before this Court on March 5, 2014. Tr. 597.
8 On June 11, 2015, District Judge Robert H. Whaley issued an order remanding this
9 case for additional proceedings. Tr. 600-610. On October 21, 2015, the Appeals
10 Council issued an order vacating the November 14, 2012 ALJ decision and
11 remanding this case back to the ALJ for additional proceedings. Tr. 612-14.

12 On April 28, 2016, the ALJ held a remand hearing and took testimony from
13 Plaintiff and vocational expert Daniel R. McKinney. Tr. 542-61. The ALJ issued an
14 unfavorable decision on May 27, 2016. Tr. 519-35. The Appeals Council denied
15 review on October 19, 2017. Tr. 510-14. The ALJ's May 27, 2016 decision became
16 the final decision of the Commissioner, which is appealable to the district court
17 pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial
18 review on December 18, 2017. ECF Nos. 1, 4.

19 **STATEMENT OF FACTS**

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

22 Plaintiff was 34 years old at the date of application. Tr. 153. She completed
23 the tenth grade and has not completed her GED. Tr. 172, 346. She stated that she
24 stopped working on September 28, 2007 because her daughter was having
25 difficulties with Bi-Polar issues. Tr. 171. She alleged that her impairments became
26 severe enough to keep her from working on December 23, 2010, Tr. 171, which
27 correlates to the date of her stroke, Tr. 239-40. Her reported work history includes
28 the job of caretaker. Tr. 172.

1 her past relevant work, the ALJ proceeds to step five, and the burden shifts to the
2 Commissioner to show that (1) the claimant can make an adjustment to other work,
3 and (2) the claimant can perform specific jobs which exist in the national economy.
4 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If
5 the claimant cannot make an adjustment to other work in the national economy, a
6 finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

7 ADMINISTRATIVE DECISION

8 On May 27, 2016, the ALJ issued a decision finding Plaintiff was not disabled
9 as defined in the Social Security Act from February 6, 2011 through the date of the
10 decision.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity since February 6, 2011, the date of application. Tr. 521.

13 At step two, the ALJ determined that Plaintiff had the following severe
14 impairments: status-post cerebrovascular accident; obesity; major depressive
15 disorder; generalized anxiety disorder; and post-traumatic stress disorder (PTSD).
16 Tr. 521.

17 At step three, the ALJ found that Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled the severity of one of the
19 listed impairments. Tr. 523.

20 At step four, the ALJ assessed Plaintiff’s residual function capacity and
21 determined she could perform sedentary work with the following limitations:

22 she could stand and/or walk for six hours in an eight-hour day; she could
23 sit for six hours in an eight-hour workday; she could never climb ladders,
24 ropes, or scaffolds; she should avoid all exposure to unprotected heights;
25 she could understand, remember, and carry out simple, routine, and
26 repetitive tasks and instructions; she could maintain attention and
27 concentration on simple routine tasks for two-hour intervals between
28 regularly schedule breaks; she could not exercise judgment or make
decisions on the job; she could not perform fast-paced, production rate
work (i.e., assembly line work); she could not interact with the public;

1 and she could only interact with co-workers and supervisors in small
2 groups of three to four individuals.

3 Tr. 526-27. The ALJ found Plaintiff had no past relevant work. Tr. 533.

4 At step five, the ALJ determined that, considering Plaintiff's age, education,
5 work experience and residual functional capacity, and based on the testimony of the
6 vocational expert, there were other jobs that exist in significant numbers in the
7 national economy Plaintiff could perform, including the jobs of mail clerk, table
8 worker, and garment sorter. Tr. 534. The ALJ concluded Plaintiff was not under a
9 disability within the meaning of the Social Security Act from February 6, 2011,
10 through the date of the ALJ's decision. Tr. 534-35.

11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's
13 decision denying benefits and, if so, whether that decision is based on proper legal
14 standards. Plaintiff contends the ALJ erred by (1) failing to properly address
15 Plaintiff's symptom statements and (2) failing to properly weigh the medical
16 opinions. Additionally, Plaintiff asserts that these errors were harmful and requests
17 the Court remand for an immediate award of benefits. ECF No. 14.

18 DISCUSSION¹

19 1. Plaintiff's Symptom Statements

20 Plaintiff contests the ALJ's determination that Plaintiff's symptom statements

21
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies to
25 Social Security ALJs, the parties have forfeited the issue by failing to raise it in their
26 briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
27 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 concerning the intensity, persistence and limiting effects of her symptoms were not
2 entirely consistent with the medical evidence and other evidence in the record. ECF
3 No. 14 at 12-13.

4 It is generally the province of the ALJ to make determinations regarding the
5 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
6 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
7 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
8 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and
9 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
10 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather
11 the ALJ must identify what testimony is not credible and what evidence undermines
12 the claimant's complaints." *Lester*, 81 F.3d at 834.

13 The ALJ found that Plaintiff's "malingering behavior during Dr. Arnold's and
14 Dr. Everhart's examinations detracted from the legitimacy of her reported
15 symptoms." Tr. 522. However, neither party addressed this finding of malingering
16 in rejecting Plaintiff's symptom statements in their briefing. ECF Nos. 14 at 12-13,
17 18 at 4-7. Therefore, the Court highlights the finding but proceeds with addressing
18 whether the other reasons provided by the ALJ meet the specific, clear, and
19 convincing standard. See *Carmickle*, 533 F.3d at 1161 n.2 (The Court may refuse to
20 address issues that are not argued specifically in the briefing).

21 The ALJ found Plaintiff's statements concerning the intensity, persistence,
22 and limiting effects of her symptoms to be "not entirely consistent with the medical
23 evidence and other evidence in the record." Tr. 527-28. Specifically, the ALJ found
24 that (1) Plaintiff made inconsistent statements regarding her functional abilities, (2)
25 objective medical evidence does not support Plaintiff's allegations (3) Plaintiff
26 repeatedly misstated her history of substance abuse, (4) Plaintiff's lack of treatment
27 was inconsistent with the alleged severity of symptoms, and (5) Plaintiff's reason for
28 leaving her prior job and her poor work history suggests little motivation to work.

1 Tr. 528-30.

2 **A. Inconsistent Statements**

3 The first reason the ALJ provided for rejecting Plaintiff's symptom
4 statements, that she made inconsistent statements regarding her functional abilities,
5 is specific, clear and convincing. An ALJ may consider inconsistent statements by a
6 claimant in assessing the reliability of her alleged symptoms and limitations. *Popa*
7 *v. Berryhill*, 872 F.3d 901, 906-07 (9th Cir. 2017) citing *Tonapetyan v. Halter*, 242
8 F.3d 1144, 1148 (9th Cir. 2001).

9 Neither party addressed this reason in their briefing. By failing to challenge a
10 reason in her opening brief, Plaintiff arguably waived the issue. See *Carmickle*, 533
11 F.3d at 1161 n.2 (The Court may refuse to address issues that are not argued
12 specifically in the briefing). However, since both parties failed to identify this
13 reason, the Court will address it in full.

14 The ALJ found that “[a]lthough the claimant testified at the hearing that she
15 dragged her right foot when she walked and could only walk one block, she denied
16 any problems walking to Mr. Oliver.” Tr. 528. This is supported by substantial
17 evidence. In her hearing testimony, Plaintiff reported that her impairments affected
18 “my balance because last year I fell going up the stairs and I can’t pick my feet up
19 right going up and down the stairs or whatever because my foot catches and I think
20 that I’ve made it, but I don’t’ and I fall.” Tr. 59. She further reported that she
21 fractured her elbow tripping. Tr. 60. At the April 28, 2016 hearing, she testified
22 that she has fallen because “the right leg don’t pick up all the way, and I think it
23 does, and I go to step, and it makes me fall.” Tr. 548. Yet in her April 18, 2013
24 evaluation by Richard Oliver, PAC during her state disability claim, Plaintiff “denies
25 problems with walking or with her upper extremities.” Tr. 761.

26 Additionally, the ALJ found that in a report to Mr. Oliver, Plaintiff “denied
27 any problems with her upper extremities, contrary to her testimony that she did not
28 have complete control of her right arm.” Tr. 528-29. This too is supported by

1 substantial evidence. At her October 2, 2012 hearing, Plaintiff reported that her
2 stroke affected her right side: “Like I’ll be holding something and then it’ll drop, and
3 I don’t even notice that it dropped out of my hand until I hear it hit the floor.” Tr.
4 57. At the April 28, 2016 hearing, Plaintiff reported that “sometimes I’ll be holding
5 a cup and I won’t even notice that I lost it, until I hit - - hear it hit the ground.” Tr.
6 547. This is in direct conflict with her statements to Mr. Oliver during her
7 evaluation for state disability: Plaintiff “denies problems with walking or with her
8 upper extremities.” Tr. 761.

9 In sum, this reason is supported by substantial evidence and meets the
10 specific, clear and convincing standard.

11 **B. Medical Evidence**

12 The ALJ found that the objective findings of Mr. Oliver did not support
13 Plaintiff’s allegations of physical restriction or alleged mental limitations. Tr. 529-
14 30. An ALJ may cite inconsistencies between a claimant’s testimony and the
15 objective medical evidence in discounting such testimony. *Bray v. Comm’r of Soc.*
16 *Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). However, it cannot be the only
17 reason the ALJ relies upon for rejecting such testimony. See *Lester*, 81 F.3d at 834
18 (the ALJ may not discredit the claimant’s testimony as to subjective symptoms
19 merely because they are unsupported by objective evidence); *Rollins v. Massanari*,
20 261 F.3d 853, 857 (9th Cir. 2001) (Although it cannot serve as the sole ground for
21 rejecting a claimant’s credibility, objective medical evidence is a “relevant factor in
22 determining the severity of the claimant’s pain and its disabling effects.”).

23 The ALJ specifically pointed to an evaluation by Richard Oliver, PAC and
24 found that it did not support Plaintiff’s allegations. Tr. 529. On April 18, 2013, Mr.
25 Oliver completed a physical evaluation in which he found that Plaintiff had no
26 sensory loss, no motor weakness, intact balance and gait, intact coordination, and
27 preserved deep tendon reflexes. Tr. 763. The ALJ found that these normal results
28 failed to support Plaintiff’s statements at both hearings about a loss of grip strength

1 and foot drop on the right side. Tr. 57, 59-60, 547-48. This reason is supported by
2 substantial evidence and meets the specific, clear and convincing standard.

3 The ALJ also found that a nurse practitioner's refusal to issue Plaintiff a
4 disabled parking pass further supported her conclusion that the objective evidence
5 did not support Plaintiff's allegations. Tr. 529. On November 13, 2015, Plaintiff
6 presented to Diane Beernink, ARNP requesting a disabled parking pass. Tr. 770.
7 The physical exam revealed normal strength and tone in the lower extremities. Id.
8 Additionally, she found that Plaintiff "[a]mbulates fluidly without assistive device."
9 Id. Regardless of whether or not Plaintiff qualified for the parking pass, Nurse
10 Beernink's observation that she ambulated fluidly is inconsistent with Plaintiff's
11 statements regarding her ambulation at the hearing. Therefore, this reason meets the
12 specific, clear and convincing standard.

13 **C. History of Substance Abuse**

14 The ALJ found that Plaintiff repeatedly misstated her history of substance
15 abuse. Tr. 529. An ALJ may properly consider evidence of a claimant's substance
16 use in assessing Plaintiff's veracity. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th
17 Cir. 2002) (ALJ's finding that claimant was not a reliable historian regarding drug
18 and alcohol usage supports negative credibility determination); *Verduzco v. Apfel*,
19 188 F.3d 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony
20 concerning alcohol or drug use can contribute to an adverse credibility finding);
21 *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001) (ALJ properly considered
22 drug-seeking behavior).

23 First, the ALJ noted that Plaintiff denied any history of substance abuse to Mr.
24 Oliver, but three months earlier she had reported to Dr. Arnold that she had used
25 drugs until age 27. Tr. 529 referring to Tr. 499, 761. The ALJ also supported her
26 determination with evidence of a positive drug screen for methamphetamine at the
27 time of her stroke when she was 34 years old. Tr. 529. However, there is no
28 positive tox screen in the records pertaining to her stroke. Instead, in her interview

1 with Dr. Arnold, Plaintiff reported that her emergency room labs were positive for
2 methamphetamine at the time of her stroke. Tr. 499. In December of 2012, when
3 Plaintiff was 36 years old, she was admitted to the hospital for an overdose and a
4 urine tox screen was positive for methamphetamine and benzodazepines. Tr. 742.
5 Therefore, the ALJ's determination is supported by substantial evidence because at
6 the time of Plaintiff's report to Dr. Arnold, her statements that there was no recent
7 substance use were suspect.

8 Additionally, the ALJ pointed out that Mr. Oliver had requested that Plaintiff
9 provide a urine sample as part of her disability evaluation, and she left his office
10 without leaving a sample. Tr. 529. Plaintiff argues her failure to provide a sample
11 was due to her mental health impairments affecting her short-term memory. ECF
12 No. 19 at 4-5. However, this is simply an alternative interpretation of the evidence.
13 When there is evidence that supports both the ALJ's determination and Plaintiff's
14 assertions, such as here, the Court must give deference to the ALJ's interpretation of
15 the evidence. See Tackett, 180 F.3d at 1097 (If the evidence is susceptible to more
16 than one rational interpretation, the court may not substitute its judgment for that of
17 the ALJ.).

18 Plaintiff argues that S.S.R. 16-3p precludes the ALJ from making a veracity
19 determination and thus her inconsistent reporting of substance abuse cannot be
20 considered when assessing her symptom reports. ECF No. 14 at 12-13. The ALJ
21 acknowledged the potential conflict with S.S.R. 16-3p, stating the following:

22 The USDC directed the undersigned to conduct a new credibility
23 determination, but SSA policy recently changed under SSR 16-3p. This
24 ruling requires a determination of the consistency between the claimant's
25 alleged symptoms and the objective evidence rather than a determination
26 of the claimant's credibility. Nonetheless, several instances in the record
27 reflect the claimant's misinformation to care providers, misinformation
28 that could taint the providers' conclusions. The claimant's denial of any
drug use history is one of [those] instances.

1 Tr. 529. The Ninth Circuit has found that S.S.R. 16-3p, makes clear what the circuit
2 precedent already required:

3 that assessments of an individual’s testimony by an ALJ are designed to
4 “evaluate the intensity and persistence of symptoms after [the ALJ]
5 find[s] that the individual has a medically determinable impairment(s)
6 that could reasonably be expected to produce those symptoms,” and not
7 to delve into wide-ranging scrutiny of the claimant’s character and
apparent truthfulness.

8 *Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (as amended) (quoting
9 S.S.R. 16-3p). At the same time, other recent Ninth Circuit cases have held that the
10 ALJ may consider a claimant’s inconsistent statements in assessing her credibility.
11 *Popa*, 872 F.3d at 906-07. Plaintiff’s inconsistencies regarding the history of her
12 substance abuse provide some support for the ALJ’s finding that Plaintiff’s
13 testimony was not entirely reliable to the extent that it undermines her reported
14 symptoms and their severity during the relevant period. In any event, the ALJ
15 provided other, more specific and convincing reasons for her finding. See
16 *Carmickle*, 533 F.3d at 1163 (upholding an adverse credibility finding where the
17 ALJ provided four reasons to discredit the claimant, two of which were invalid).

18 **D. Lack of Treatment**

19 The ALJ’s fourth reason for rejecting Plaintiff’s symptom statements, that her
20 lack of treatment was inconsistent with the severity of symptoms she alleged, is
21 specific, clear and convincing. Unexplained or inadequately explained reasons for
22 failing to seek medical treatment cast doubt on a claimant’s subjective complaints.
23 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Macri v. Chater*, 93 F.3d 540, 544
24 (9th Cir. 1996) (finding the ALJ’s decision to reject the claimant’s subjective pain
25 testimony was supported by the fact that claimant was not taking pain medication).

26 The ALJ found that Plaintiff’s “non-compliance and lack of treatment
27 suggests that her symptoms were not significantly problematic.” Tr. 529. The ALJ
28 cited Plaintiff’s failure to follow through with treatment prescribed by Diane

1 Beernink, ARNP. Tr. 529.² On October 16, 2014, Diane Beernink, ARNP
2 prescribed Plaintiff medication for high blood pressure and advised her to return to
3 her office in two weeks for a blood pressure check and lab work. Tr. 767. She did
4 not return to see Ms. Beernink until November 13, 2015. Tr. 770. At this point, she
5 had medical insurance and was being treated for mental health impairments. Id. She
6 was instructed to return to the office on November 18, 2015 and December 11, 2015.
7 Tr. 771, 890-91. She did not return to the office until February 25, 2016. Tr. 887.
8 Her failure to follow through with treatment while having medical insurance is
9 supported by substantial evidence and a specific, clear and convincing reason to
10 reject her symptom statements.

11 **E. Little Motivation to Work**

12 The ALJ's fifth reason for rejecting Plaintiff's symptoms statements, that her
13 reason for leaving her prior job and poor work history suggests little motive to work,
14 is specific, clear and convincing. The Ninth Circuit has found that the reasons for
15 leaving employment and a poor work history can support a rejection of Plaintiff's
16 symptom statements. See *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001)
17 (ALJ properly relied on the fact that claimant left his job because he was laid off,
18 rather than because he was injured, in finding the claimant's statement unreliable);
19 *Thomas*, 278 F.3d at 959 (An ALJ's finding that the claimant had limited work
20 history and "ha[d] shown little propensity to work in her lifetime" was a specific,
21 clear, and convincing reason for discounting the claimant's testimony.).

22 Here, the ALJ found that Plaintiff's statements to Dr. Arnold "suggests that
23

24 ²The ALJ stated that Plaintiff was instructed to follow up in one month for a
25 referral for neurology. Tr. 529. However, the record indicates Plaintiff was
26 instructed to follow up in two weeks for additional blood pressure reading and lab
27 work. Tr. 767. While the ALJ was inaccurate on the time and reason for the follow
28 up, the fact remains that Plaintiff failed to follow the treatment prescribed.

1 she only stopped working because of family issues rather than a personal inability to
2 work, and her longstanding history of unemployment shows little motivation to
3 return to work.” Tr. 531.

4 At application and in her discussion with Dr. Arnold, Plaintiff reported that
5 she stopped working because her daughter was experiencing symptoms of bi-polar
6 disorder and Child Protective Services was involved. Tr. 171, 501. A review of
7 Plaintiff’s earning history shows that she worked in 1998, earning a total of
8 \$1,571.63, in 2003 earning a total of \$273.40, in 2005 earning a total of \$32.00, and
9 in 2007 earning a total of \$15.86. Tr. 163-64. Therefore, the ALJ’s determination is
10 supported by substantial evidence.

11 Plaintiff failed to challenge this reason in her opening briefing. ECF No. 14.
12 In her response briefing, Plaintiff asserted that the reason Plaintiff stopped working
13 in 2007 was irrelevant to the case because she did not claim an inability to work
14 until her stroke in 2010. ECF No. 19 at 2. Plaintiff is accurate that her reasons for
15 leaving her employment in 2007 is not in direct conflict with an allegation of
16 disability beginning in 2010. However, the ALJ’s reliance on her reason for leaving
17 her last job when combined with her very limited work history supports the
18 determination that Plaintiff had little motivation to work. As such, this reason meets
19 the specific, clear and convincing standard.

20 **2. Medical Opinions**

21 Plaintiff argues the ALJ failed to properly consider and weigh the medical
22 opinion expressed by John Arnold, Ph.D., and the Global Assessment of Functioning
23 (GAF) scores assessed by Dr. Arnold and Charles Ragan, M.D. ECF No. 14 at 13-
24 15.

25 In weighing medical source opinions, the ALJ should distinguish between
26 three different types of physicians: (1) treating physicians, who actually treat the
27 claimant; (2) examining physicians, who examine but do not treat the claimant; and,
28 (3) nonexamining physicians who neither treat nor examine the claimant. Lester, 81

1 F.3d at 830. The ALJ should give more weight to the opinion of a treating physician
2 than to the opinion of an examining physician. *Orn v. Astrue*, 495 F.3d 625, 631
3 (9th Cir. 2007). Likewise, the ALJ should give more weight to the opinion of an
4 examining physician than to the opinion of a nonexamining physician. *Id.*

5 When an examining physician’s opinion is not contradicted by another
6 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
7 and when an examining physician’s opinion is contradicted by another physician, the
8 ALJ is only required to provide “specific and legitimate reasons” to reject the
9 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be met
10 by the ALJ setting out a detailed and thorough summary of the facts and conflicting
11 clinical evidence, stating her interpretation thereof, and making findings.
12 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do
13 more than offer her conclusions, she “must set forth [her] interpretations and explain
14 why they, rather than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418,
15 421-22 (9th Cir. 1988).

16 **A. John Arnold, Ph.D.**

17 On January 9, 2013, Dr. Arnold completed a Psychological Assessment
18 Report. Tr. 499-509. He diagnosed Plaintiff with a rule out undifferentiated
19 somatoform disorder, major depression, panic disorder with PTSD features,
20 cognitive disorder rule out malingering with respect to severity, personality disorder
21 and rule out borderline intellectual functioning. Tr. 503. He completed a Mental
22 Medical Source Statement opining that Plaintiff had a severe limitation in the ability
23 to maintain attention and concentration for extended periods, a marked limitation in
24 eleven areas of mental functioning, and a moderate limitation in an additional four
25 areas of mental functioning. Tr. 504-06.

26 The ALJ gave Dr. Arnold’s responses on the Mental Medical Source
27 Statement little weight because the ratings were unsupported by (1) the longitudinal
28 evidence and (2) Dr. Arnold’s own findings. Tr. 531. Both these reasons meet the

1 specific and legitimate standard required to address the contradicted opinion of an
2 examining physician. See *Batson*, 359 F.3d at 1195 (Inconsistency with the majority
3 of objective evidence is a specific and legitimate reason for rejecting physician’s
4 opinions.); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (finding that an
5 ALJ may cite internal inconsistencies in evaluating a physician’s report).

6 Plaintiff’s challenge to the ALJ’s treatment of Dr. Arnold’s opinion amounts
7 to an assertion that the pattern of malingering identified by the ALJ is not supported
8 by substantial evidence. ECF No. 14 at 15. Therefore, the Plaintiff failed to assert
9 any specific challenge to the ALJ’s first reason, that the opinion was not supported
10 by the longitudinal evidence. As such, this Court will not consider the issue further.
11 See *Carmickle*, 533 F.3d at 1161 n.2 (The Court may refuse to address issues that are
12 not argued specifically in the briefing).

13 Plaintiff arguably challenged the ALJ’s second reason for rejecting the
14 opinion, that it was inconsistent with Dr. Arnold’s own findings, in her assertion that
15 pattern of malingering was not supported by substantial evidence. ECF No. 14 at
16 15. Here, the ALJ found that “Dr. Arnold’s conclusions are based on incomplete
17 testing and the claimant’s attempt to impede accurate testing of her mental
18 limitations.” *Id.* The ALJ determined that Dr. Arnold’s findings did not support his
19 opinion because (1) Plaintiff only completed two-thirds of the first three tests, (2) his
20 report that Plaintiff’s efforts appeared “questionable” at times, and (3) his report that
21 Plaintiff’s headaches could have “delusional or quasi-delusional features, along with
22 some secondary gain dynamics,” Tr. 531 citing Tr. 502. The ALJ also relied on Dr.
23 Arnold’s diagnosis of rule out malingering with respect to severity of any cognitive
24 disorder, Tr. 503, as further support for her rejection of the opinion, Tr. 531. The
25 ALJ also referred to Plaintiff reporting misinformation regarding her substance
26 abuse throughout the record, Tr. 532, which has been addressed above as supported
27 by substantial evidence.

28 In response, Plaintiff asserts that Dr. Arnold found this potentially

1 malingering behavior as part of her disorder and that Dr. Veraldi did not find
2 Plaintiff to be malingering. ECF No. 14 at 15. However, this argument amounts to
3 an alternative interpretation of the evidence. In an April 8, 2011 evaluation, Joyce
4 Everhart, Ph.D. found Plaintiff had “some clear evidence of malingering” based on
5 the results of the TOMM and diagnosed her with malingering. Tr. 347-49. At the
6 October 2, 2012 hearing, Dr. Veraldi testified that Plaintiff’s TOMM results “does
7 raise questions about her level of effort on some of the other tests of memory, so that
8 does become a concern.” Tr. 46. Dr. Arnold stated that “[t]hese behaviors, along
9 with Dr. Everhart’s report findings, suggest, albeit unsophisticated, some attempt at
10 appearing more impaired than warranted. Although seen by this examiner as
11 probably more an extension of her personality dynamics, these issues need
12 consideration in her overall diagnostic picture.” Tr. 502. If the evidence is
13 susceptible to more than one rational interpretation, the court may not substitute its
14 judgment for that of the ALJ. Tackett, 180 F.3d at 1097. Here, considering the
15 evidence can rationally be interpreted either way, the Court upholds the ALJ’s
16 determination that Plaintiff exhibited a pattern of malingering. Thus, the ALJ’s
17 determination was supported by substantial evidence.

18 **B. GAF Scores**

19 Plaintiff asserts that the ALJ erred in her treatment of the GAF scores of Dr.
20 Arnold and Dr. Ragan. ECF No. 14 at 15.

21 At the end of his evaluation, Dr. Arnold gave Plaintiff a current GAF score of
22 50 and a past year score of 50. Tr. 503. At the hospital following Plaintiff’s
23 attempted suicide by overdose, Dr. Ragan completed a psychological evaluation. Tr.
24 748-51. He gave her a GAF score of “estimated to be 30 and in the past year 45.”
25 Tr. 750.

26 Plaintiff’s challenge to these scores consists of a single sentence with no
27 citation to the evidence or legal analysis for support: “While the ALJ afforded little
28 to no weight to the low GAF ratings found by Dr. Arnold and the doctor who treated

1 [Plaintiff] at the hospital at the time of her suicide attempt, the fact is the GAF
2 ratings are entirely consistent with the record.” ECF No. 14 at 15. This is
3 insufficient briefing for the Court to efficiently assess the challenge to the ALJ’s
4 treatment of the GAF scores. Therefore, the Court declines to consider the issue.
5 See Carmickle, 533 F.3d at 1161 n.2. The Ninth Circuit explained the necessity for
6 providing specific argument:

7
8 The art of advocacy is not one of mystery. Our adversarial system relies
9 on the advocates to inform the discussion and raise the issues to the
10 court. Particularly on appeal, we have held firm against considering
11 arguments that are not briefed. But the term “brief” in the appellate
12 context does not mean opaque nor is it an exercise in issue spotting.
13 However much we may importune lawyers to be brief and to get to the
14 point, we have never suggested that they skip the substance of their
15 argument in order to do so. It is no accident that the Federal Rules of
16 Appellate Procedure require the opening brief to contain the
17 “appellant’s contentions and the reasons for them, with citations to the
18 authorities and parts of the record on which the appellant relies.” Fed.
19 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
20 reasons.

21 Independent Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003).³
22 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
23 “manufacture arguments for an appellant” and therefore will not consider claims that
24 were not actually argued in appellant’s opening brief. Greenwood v. Fed. Aviation
25 Admin., 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to provide
26 adequate briefing, the court declines to consider this issue.

27 CONCLUSION

28 Having reviewed the record and the ALJ’s findings, the Court finds the ALJ’s
decision is supported by substantial evidence and free of harmful legal error.

³Under the current version of the Federal Rules of Appellate Procedure, the
appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 Accordingly, **IT IS ORDERED:**

2 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
3 **GRANTED.**

4 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

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

8 DATED March 19, 2019.



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

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE