

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

Apr 02, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIELLE CHARLOTTE L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00166-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14, 16. Attorney Rosemary B. Schurman represents Danielle Charlotte L. (Plaintiff); Special Assistant United States Attorney Jeffrey Eric Staples 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.

JURISDICTION

On March 25, 2014, Plaintiff filed an application for Supplemental Security Income benefits. Tr. 13, 175-83, 242. Plaintiff alleged a disability onset date of June 28, 2009, Tr. 13, 57, 193, 197, due to Wrist, Arm, Elbow, Snapped Wrist Out, Double-Jointed but Hyper Extended and Snapped, Could Not Get PT and Trouble Using Arm, Constant Pain, Non-Epileptic Seizures – Diagnosis, Anxiety,

1 Depression, ADHD, Eating Disorder, Referred to Emory Program, and Get
2 Overwhelmed Very Easily. Tr. 197. Plaintiff's applications were denied initially
3 and upon reconsideration.

4 Administrative Law Judge (ALJ) Caroline Siderius held a hearing on
5 December 20, 2016, Tr. 29-56, and issued an unfavorable decision on April 5,
6 2017. Tr. 13-23. The Appeals Council denied review on May 2, 2018. Tr. 1-6.
7 The ALJ's April 5, 2017, decision thus became the final decision of the
8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
9 405(g). Plaintiff filed this action for judicial review on May 22, 2018. ECF No. 1,
10 4.

11 **STATEMENT OF FACTS**

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

15 Plaintiff was born on June 28, 1992 and was 21 years old on the date the
16 application was filed, March 25, 2014. Tr. 57, 175. She has a high school
17 education. Tr. 44, 66. She testified that she was in 12th grade for three years
18 because she moved a lot, went to 16 different schools, and did not do well in
19 school. Tr. 44. However, she reported to a medical provider that she graduated at
20 age 19 due to moving around a lot. Tr. 296. She testified that she considered
21 going to college but did not go mainly because of her anxiety. Tr. 45. Plaintiff's
22 only past employment was as a cashier at a craft store from October 2010 to
23 November 2010, and as a member of the cleaning crew at a stadium from
24 December 2010 to January 2011. Tr. 234.

25 Plaintiff testified that she never obtained her driver's license because she did
26 not have the time when she was 16, and then she started having seizures. Tr. 45.
27 She testified that, although she did not go to a doctor for her seizures, she
28 understood that she could not risk other peoples' lives by driving. Tr. 45. She

1 testified that she was thinking of getting a driver's permit because she may be able
2 to get a license after six months without seizures. Tr. 45.

3 Plaintiff testified that she is unable to work because "pretty much
4 everything" she does causes physical pain, and she is terrified of people. Tr. 46.
5 Plaintiff testified that she generally has to get up and walk around about every 30
6 minutes when she is sitting. Tr. 47. She testified that her back, hips, and legs hurt
7 when she is standing. Tr. 47. She said that she usually gets into a laying down
8 position while watching television or cross-stitching. Tr. 47. She testified that she
9 has had anxiety since she was a teenager, but it became a lot worse when she was
10 18. Tr. 48. She testified that she does not do well with confrontation and gets
11 scared. Tr. 46. She testified that, although it had been recommended that she
12 receive mental health counseling, she had "been lazy about that," but did call
13 someone about mental health counseling the week before the administrative
14 hearing. Tr. 45-46.

15 She testified that she wants to work because she thinks it would be better for
16 her to go out and do things, but she cannot think of anything she could do because
17 she is unable to sit or stand for very long, and unable to lift things. Tr. 46.

18 Plaintiff testified that she wanted to become a veterinarian tech and her dream job
19 was to work at a zoo, but she is unable to lift much so she "most likely can't do
20 that." Tr. 42. She has thought about working as a receptionist because she would
21 not have to lift anything, but she was not sure if she could sit long enough to do
22 that type of a job. Tr. 47.

23 Plaintiff lives with her mother and her grandmother. Tr. 44. She testified
24 that she watches television, plays video games, and has one friend online. Tr. 40-
25 42. She also spends time painting and cross-stitching, although she testified that it
26 hurts to paint and cross-stitch. Tr. 40, 42-43; see Tr. 40 ("It does hurt, but it's at
27 least productive"); Tr. 40 ("[cross-stitch] hurts while I'm doing it, but, you know, I
28 want to get it done by Christmas for my sister"); Tr. 43 ("it's uncomfortable

1 painting for more than about 10, 20 minutes, but I still push through it when I do it,
2 so I mean I might be able to try an Internet program at a college to help with that”).
3 Plaintiff testified that she shovels snow from her driveway, although she “pretty
4 much sleep[s] the whole next day” because she is in so much pain. Tr. 40-41. She
5 testified that she goes shopping or to the grocery store with her mother or
6 grandmother. Tr. 47. She testified that she and her boyfriend would socialize “[a]
7 bit” with friends, but that was always a little difficult. Tr. 48.

8 **STANDARD OF REVIEW**

9 The ALJ is responsible for determining credibility, resolving conflicts in
10 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
11 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed de novo, with
12 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
13 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
14 only if it is not supported by substantial evidence or if it is based on legal error.
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
16 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
17 1098. Put another way, substantial evidence is such relevant evidence as a
18 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
19 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
20 rational interpretation, the Court may not substitute its judgment for that of the
21 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Soc. Sec. Admin.*, 169
22 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative
23 findings, or if conflicting evidence supports a finding of either disability or non-
24 disability, the ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d
25 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
26 substantial evidence will be set aside if the proper legal standards were not applied
27 in weighing the evidence and making the decision. *Brawner v. Secretary of Health*
28 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

1 **SEQUENTIAL EVALUATION PROCESS**

2 The Commissioner has established a five-step sequential evaluation process
3 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a),
4 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
5 four, the burden of proof rests upon the claimant to establish a prima facie case of
6 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
7 met once a claimant establishes that a physical or mental impairment prevents the
8 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
9 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
10 to step five, and the burden shifts to the Commissioner to show that the claimant
11 can perform other jobs present in significant numbers in the national economy.
12 *Batson v. Commissioner of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If
13 a claimant cannot make an adjustment to other work in the national economy, a
14 finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

15 **ADMINISTRATIVE DECISION**

16 On April 5, 2017, the ALJ issued a decision finding Plaintiff was not
17 disabled as defined in the Social Security Act.

18 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
19 activity since the application date, March 25, 2014. Tr. 15.

20 At step two, the ALJ determined Plaintiff had the following severe
21 impairments: Ehler Danlos Syndrome (EDS), depression, and anxiety. Tr. 15.

22 At step three, the ALJ found Plaintiff did not have an impairment or
23 combination of impairments that meets or medically equals the severity of one of
24 the listed impairments. Tr. 17.

25 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and
26 determined that she could perform light work, but with the following limitations:
27 she can lift 20 pounds occasionally and 10 pounds frequently; she can sit up to
28 eight hours a day, stand and walk up to six hours a day with the ability to change

1 position once an hour; she cannot climb ladders, ropes, or scaffolds, or work at
2 unprotected heights; she would need to avoid working with heavy machinery or
3 equipment; she could occasionally crawl; she could frequently but not constantly
4 handle, grasp, and grip with both hands; she is capable of superficial brief contact
5 with the general public and coworkers; she would work better with things rather
6 than people; she could do simple, routine, and repetitive tasks with only occasional
7 changes in work duties or in the work setting. Tr. 18.

8 At step four, the ALJ determined Plaintiff had no past relevant work. Tr. 22.

9 At step five, the ALJ determined that, considering Plaintiff's age, education,
10 work experience, and RFC, and based on the testimony of the vocational expert
11 (VE), Plaintiff could perform other jobs present in significant numbers in the
12 national economy, including the light exertion level jobs of mail clerk, small parts
13 assembler, and office cleaner I. Tr. 22-23. The ALJ thus concluded that Plaintiff
14 had not been under a disability within the meaning of the Social Security Act since
15 March 25, 2014, the date the application was filed. Tr. 23.

16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's
18 decision denying benefits and, if so, whether that decision is based on proper legal
19 standards. Plaintiff contends the ALJ erred by (1) improperly finding that
20 Plaintiff's seizure disorder was not severe at step two; (2) failing to properly
21 formulate an RFC that considered all of Plaintiff's limitations, which the Court
22 construes as assigning error in considering and weighing the medical source
23 opinion evidence; and (3) failing to properly evaluate the vocational expert's
24 testimony at step five. ECF No. 14 at 6, 10, 15.

25 DISCUSSION¹

26
27 ¹ In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
28 that ALJs of the Securities and Exchange Commission are "Officers of the United

1 **A. Step Two**

2 Plaintiff argues the ALJ erred at step two of the sequential evaluation
3 process by failing to identify her seizure disorder as a severe impairment. ECF No.
4 14 at 5-10.

5 Plaintiff has the burden of proving she has a severe impairment at step two
6 of the sequential evaluation process. 20 C.F.R. § 416.912. In order to meet this
7 burden, Plaintiff must furnish medical and other evidence to show her impairment
8 is severe. 20 C.F.R. § 416.912(a). The regulations provide that an impairment is
9 severe if it significantly limits a claimant’s ability to perform basic work activities.
10 20 C.F.R. § 416.920(c). “Basic work activities” are defined as the abilities and
11 aptitudes necessary to do most jobs. 20 C.F.R. § 416.922(b).

12 Step two is “a de minimis screening device [used] to dispose of groundless
13 claims,” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an ALJ may
14 find that a claimant lacks a medically severe impairment or combination of
15 impairments only when this conclusion is “clearly established by medical
16 evidence.” SSR 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).
17 Applying the normal standard of review to the requirements of step two, the Court
18 must determine whether the ALJ had substantial evidence to find that the medical
19 evidence clearly established that Plaintiff did not have a severe impairment.
20 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (“Despite the deference
21 usually accorded to the Secretary’s application of regulations, numerous appellate
22

23 _____
24 States” and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant’s opening brief).

1 courts have imposed a narrow construction upon the severity regulation applied
2 here.”); Webb, 433 F.3d at 687.

3 Here, the ALJ determined Plaintiff had the severe impairments of Ehler
4 Danlos syndrome, depression, and anxiety. Tr. 15. However, the ALJ concluded
5 that Plaintiff’s non-epileptic seizures were imposing no more than a minimal
6 limitation upon her ability to perform work-related activities and thus, her seizure
7 disorder was not a severe impairment. Tr. 17. Specifically, the ALJ noted that
8 Plaintiff’s EEGs were negative other than one non-epileptic event consistent with
9 pseudoseizures, and that Plaintiff’s reports of seizure activity varied from provider
10 to provider. Tr. 17 (citing Tr. 276, 295, 350, 357, 361). The ALJ indicated that
11 there was no evidence of witnessed seizures or documentation of more than one of
12 these seizures that would result in any work-related limitations, despite Plaintiff’s
13 statements that she had experienced these seizures since she was 14 years old.² Tr.
14 17. The ALJ also noted that Plaintiff reported fewer seizures with medication. Tr.
15 17 (citing Tr. 375). The ALJ reasonably concluded that this evidence showed

17 ² Plaintiff argues that the ALJ made a mistake by stating that there was no
18 evidence of witnessed seizures. ECF No. 14 at 8-9, Tr. 17. Plaintiff notes, and the
19 record shows, that Plaintiff’s roommate accompanied her to an appointment at
20 Columbia Medical Associates on May 7, 2013, where he reported that Plaintiff
21 may have had a seizure two days earlier. Tr. 257. Plaintiff contends “the ALJ’s
22 attempt to infer that the seizures are nonexistent is unsupported by the evidence.”
23 ECF No. 14 at 8-9. However, the ALJ stated that there was no evidence of
24 witnessed seizures or documentation of more than one of these seizures “that
25 would result in any work-related limitations.” Tr. 17. It does not appear that the
26 ALJ is attempting to infer that the seizures are nonexistent, but rather to state that
27 there is no evidence that her seizure disorder would result in any work-related
28 limitations. Tr. 17.

1 Plaintiff's seizure disorder caused no more than a minimal limitation on Plaintiff's
2 ability to perform basic work-related tasks. Tr. 16-17.

3 Plaintiff contends the evidence that satisfies her burden to prove a severe
4 impairment includes documentation of one pseudoseizure, a diagnosis of non-
5 epileptic seizures, and the prescription of an anti-seizure medication. ECF No. 14
6 at 7. However, a diagnosis alone does not establish the existence of a severe
7 impairment and Plaintiff fails to identify how her non-epileptic seizures had more
8 than a slight functional impact. See *Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir.
9 1985); 20 C.F.R. § 416.921. Plaintiff also argues that no physician has ever
10 disputed the existence of her seizures or found that she is malingering. ECF No.
11 14 at 9. This argument is misplaced, as step two requires Plaintiff to present
12 medical and other evidence to show that her impairment is severe, rather than
13 simply point out that no one disputes the claimed impairment. 20 C.F.R. §
14 416.912(a).

15 Plaintiff asserts that her seizure disorder is a severe impairment because
16 Nurse Holstein opined that the combined effects of her seizure disorder, Ehler
17 Danlos syndrome, post-traumatic stress disorder, and depression with anxiety
18 would result in Plaintiff being absent from work five days a month, unable to
19 complete an eight-hour workday for five days a month, able to perform sustained
20 work activities for less than 50 percent of the time, and "off-task" more than 30
21 percent of the time. ECF No. 14 at 9-10. As discussed *infra*, the ALJ gave no
22 weight to this portion of Nurse Holstein's opinion, noting that Nurse Holstein
23 stated the most significant clinical findings and objective signs were subjective.
24 Tr. 21, 336. The ALJ also determined that mental status examinations contained
25 minimal objective findings to support Nurse Holstein's limitations. Tr. 21 (citing
26 342, 253, 268, 266, 263, 261, 284, 291, 293, 299-300, 307, 323, 327-28, 332, 363,
27 352, 359). Nurse Holstein's opinion does not establish Plaintiff's seizure disorder
28 as a severe impairment.

1 Even if the failure to list her seizure disorder as severe was error, the error
2 would be harmless because step two was resolved in Plaintiff's favor, and Plaintiff
3 fails to identify any credited limitation associated with non-epileptic seizures that
4 was not considered by the ALJ and incorporated into the RFC at step four. See
5 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch*
6 *v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). The ALJ's step two finding is
7 legally sufficient.

8 **B. Medical Source Opinions**

9 Plaintiff argues that the ALJ's RFC was based upon a legally deficient
10 assessment of the medical opinions. ECF No. 14 at 15. Specifically, Plaintiff
11 asserts the ALJ erred by rejecting without comment the treating nurse's opinions
12 about the combined effect of physical and mental impairments, and instead relying
13 on the opinions of the nonexamining state agency physician and psychologist.
14 ECF No. 14 at 13-15.

15 In a disability proceeding, the courts distinguish among the opinions of three
16 types of acceptable medical sources: treating physicians, physicians who examine
17 but do not treat the claimant (examining physicians), and those who neither
18 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
19 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight
20 than an examining physician's opinion, and an examining physician's opinion is
21 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
22 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. The Ninth Circuit has
23 held that "[t]he opinion of a nonexamining physician cannot by itself constitute
24 substantial evidence that justifies the rejection of the opinion of either an
25 examining physician or a treating physician." *Lester*, 81 F.3d at 830; *Pitzer v.*
26 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) (finding a nonexamining doctor's
27 opinion "with nothing more" does not constitute substantial evidence).

1 In weighing the medical opinion evidence of record, the ALJ must make
2 findings setting forth specific, legitimate reasons for doing so that are based on
3 substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
4 Cir. 1989). The ALJ must also set forth the reasoning behind his or her decisions
5 in a way that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d
6 487, 492 (9th Cir. 2015) (finding a clear statement of the agency’s reasoning is
7 necessary because the Court can affirm the ALJ’s decision to deny benefits only on
8 the grounds invoked by the ALJ). “Although the ALJ’s analysis need not be
9 extensive, the ALJ must provide some reasoning in order for us to meaningfully
10 determine whether the ALJ’s conclusions were supported by substantial evidence.”
11 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

12 The opinion of an acceptable medical source such as a physician or
13 psychologist is given more weight than that of an “other source.” 20 C.F.R. §
14 416.927. “Other sources” include nurse practitioners, physicians’ assistants,
15 therapists, teachers, social workers, spouses and other non-medical sources. 20
16 C.F.R. § 416.913(d) (2013).³ However, the ALJ is required to “consider
17 observations by non-medical sources as to how an impairment affects a claimant’s
18 ability to work.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Non-
19 medical testimony can never establish a diagnosis or disability absent
20 corroborating competent medical evidence. *Nguyen v. Chater*, 100 F.3d 1462,
21 1467 (9th Cir. 1996). An ALJ is obligated to give reasons germane to “other
22 source” testimony before discounting it. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
23 Cir. 1993).

24
25
26 ³ Prior to March 27, 2017, the definition of a medical source, as well as the
27 requirement that an ALJ consider evidence from non-acceptable medical sources,
28 were located at 20 C.F.R. § 416.913(d).

1 **1. State Reviewers – Dr. Hale and Dr. Nelson**

2 In October 2014, state agency medical consultant Dr. Hale and state agency
3 psychological consultant Dr. Nelson reviewed the record and opined Plaintiff was
4 capable of less than the full range of light exertion, including frequent handling,
5 fingering, and environmental limits, and was capable of a 40-hour work week with
6 work that was simple and routine with no more than superficial interaction with
7 supervisors, coworkers, and the general public. Tr. 21, 69-80.

8 The ALJ gave great weight to the opinions of both doctors. Tr. 21-22. The
9 ALJ noted that state agency medical and psychological consultants are highly
10 qualified and experts in disability evaluation. Tr. 22. The ALJ stated that,
11 although records were received subsequent to their opinions, the only opinion
12 evidence was from Nurse Holstein, and the physical portion of her opinion, to
13 which the ALJ assigned some weight, generally agreed with that of Dr. Hale. Tr.
14 20-22. The ALJ stated that there were no other mental health treatment records to
15 contradict Dr. Nelson’s opinion, and Plaintiff’s mental status examinations were
16 not indicative of any significant cognitive or social problems. Tr. 22 (citing 352,
17 359, 363).

18 Plaintiff argues the ALJ should have credited the opinion of Plaintiff’s
19 treating nurse over the opinions of the reviewing doctors. However, as discussed
20 infra, the ALJ provided legally sufficient reasons for giving less weight to Nurse
21 Holstein and for giving more weight to the reviewing doctors’ opinions.

22 **2. Treating Nurse Practitioner – Nurse Holstein**

23 Nurse Holstein began treating Plaintiff in September 2016 and completed a
24 residual functional capacity statement after Plaintiff’s second visit in November
25 2016. Tr. 20 (citing Tr. 336-38). Nurse Holstein reported Plaintiff was limited to a
26 wide range of light exertion, with frequent lift and carry of up to 15 pounds and
27 occasional of 20 pounds or more. Tr. 20, 339. Plaintiff could climb ramps or
28 stairs, but not ladders, ropes, or scaffolds; could sit for about eight hours in an

1 eight-hour workday; and could stand and walk for about four hours in an eight-
2 hour workday for 30-60 minutes at one time. Tr. 20, 337-39. The ALJ assigned
3 some weight to the physical portion of Nurse Holstein’s opinion set forth in the
4 residual functional capacity statement. Tr. 20-21.

5 Nurse Holstein does not qualify as an acceptable medical source. 20
6 C.F.R. § 416.902⁴ (Acceptable medical sources are licensed physicians, licensed or
7 certified psychologists, licensed optometrists, licensed podiatrists, qualified
8 speech-language pathologists, licensed audiologists, licensed advanced practice
9 registered nurses, and licensed physician assistants). An ALJ is required to
10 consider evidence from non-acceptable medical sources. 20 C.F.R. § 416.927(f).⁵
11 An ALJ must give reasons “germane” to each source in order to discount evidence
12 from non-acceptable medical sources. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th
13 Cir. 2014).

14 Here, while the ALJ noted that the physical portion of Nurse Holstein’s
15 opinion was generally supported by the opinion of the state agency medical
16 consultant, the ALJ also highlighted some inconsistencies between Nurse
17 Holstein’s physical examination and other medical evidence in the record. Tr. 21.
18 Inconsistency with the medical evidence is a germane reason for rejecting lay
19 witness testimony. See *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th 2005). The
20 ALJ stated that a physical examination done by Nurse Holstein on October 10,
21 2016 was notable for poor posture and poor strength, laxity in all joints with stress
22 testing, hypermobility in all joints, and low tone. Tr. 20-21 (citing Tr. 342-43).
23 However, the ALJ identified medical evidence in the record that supported a less
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25 ⁴ Prior to March 27, 2017, the definition of an acceptable medical source
26 was located at 20 C.F.R. § 416.913.

27 ⁵ Prior to March 27, 2017, the requirement that an ALJ consider evidence
28 from non-acceptable medical sources was located at 20 C.F.R. § 416.913(d).

1 restrictive finding than Nurse Holstein opined. Tr. 21; see, e.g., Tr. 251-52, 282-
2 84, 290-91(Plaintiff's physical exams showed no ongoing weakness or sensation
3 loss), Tr. 349 (hypermobility noted at her elbow, thumb, and pinky, and mild
4 scoliosis but normal sensation), Tr. 352 (good range of motion in Plaintiff's hips,
5 no particular joint tenderness, normal sensation, intact motor function without
6 weakness, intact skin, slight laxity with ankles), Tr. 356 (no focal neurologic
7 deficits, normal sensation, reflexes, coordination, muscle strength and tone). This
8 was a germane reason to discredit Nurse Holstein's opinions as to Plaintiff's
9 physical limitations.

10 Nurse Holstein provided an opinion on more than Plaintiff's physical
11 limitations. She also opined in the residual functional capacity statement from
12 November 2016 that stress would interfere with Plaintiff's attention and
13 concentration for simple work tasks occasionally; Plaintiff would be limited from
14 loud noises and temperature extremes; would be expected to be off task more than
15 30% of a workday; would be unable to complete an eight-hour workday five days
16 or more per month; would perform a job eight hours per day, five days per week at
17 less than 50% efficiency; would need to lie down and/or recline during the day
18 three hours at one time due to stress; and needed to take unscheduled breaks three
19 times per week for one to two hours at a time. Tr. 21 (citing Tr. 336-38). The ALJ
20 accorded no weight to the non-physical portion of Nurse Holstein's opinion set
21 forth in the residual functional capacity statement. Tr. 21.

22 First, the ALJ discredited this portion of the opinion due to Nurse Holstein's
23 admission that the most significant clinical findings and objective signs were
24 subjective. Tr. 21. A physician's opinion may be rejected if it is based on a
25 claimant's subjective complaints which were properly discounted. *Tonapetyan v.*
26 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan*, 169 F.3d at 602; *Fair v.*
27 *Bowen*, 885 F.2d 597, 605 (9th Cir. 1989). The ALJ found that Plaintiff's
28 medically determinable impairments could reasonably be expected to cause the

1 alleged symptoms, however, Plaintiff’s assertion of total disability under the Social
2 Security Act was not supported by the weight of the evidence. Tr. 19. Plaintiff
3 does not dispute the ALJ’s credibility determination. A review of Nurse Holstein’s
4 treatment notes shows the notes largely contain Plaintiff’s self-reports, and little to
5 no objective observation. Tr. 334-35. Further, Nurse Holstein reported in her
6 treatment notes on November 7, 2016 that “again, I do not know this [patient], but
7 will continue to follow up to ensure needs are being met.” Tr. 335. Because the
8 ALJ provided legally sufficient reasons to discredit Plaintiff’s symptom
9 complaints, Nurse Holstein’s reliance on Plaintiff’s subjective symptom
10 complaints was a germane reason to discredit Nurse Holstein’s opinion.

11 Second, the ALJ stated that mental status examinations contained in the
12 record showed minimal objective findings to support Nurse Holstein’s limitations.
13 Tr. 21. Inconsistency with the medical evidence is a germane reason for rejecting
14 lay witness testimony. See Bayliss, 427 F.3d at 1218. The ALJ cited numerous
15 examples of inconsistencies between Nurse Holstein’s opinion and the medical
16 evidence. Tr. 21; see, e.g., Tr. 253 (not anxious or fidgety), Tr. 268 (appeared
17 nervous and fidgety, but was alert and oriented), Tr. 266 (appeared slightly
18 anxious, but within normal limits), Tr. 263 (seemed nervous, anxious), Tr. 261
19 (Plaintiff reports medication is finally “kicking in” and she feels much improved
20 with depression and anxiety), Tr. 284 (alert and oriented, no unusual anxiety or
21 evidence of depression), Tr. 291 (good eye contact, normal speech, appropriate
22 affect, logical, dressed appropriately with good hygiene), Tr. 293 (self-perception
23 is realistic, thought processes logical, content unremarkable, no suicidal or
24 homicidal ideation), Tr. 299-300 (appropriate appearance, unremarkable behavior,
25 unremarkable psychomotor behaviors, appropriate speech and affect, euthymic
26 mood, intact memory, clear consciousness, average intellect, cooperative, good
27 reasoning, impulse control, judgment, and insight, logical thought processes), Tr.
28 307 (alert and oriented, no unusual anxiety or evidence of depression, good eye

1 contact, affect appropriate, logical, dressed appropriately with good hygiene,
2 interacting well with significant other, behavior “very comfortable”), Tr. 323 (alert
3 and oriented, no unusual anxiety or evidence of depression, pleasant, cooperative,
4 good eye contact, appropriate affect), Tr. 327-28 (oriented, cooperative,
5 appropriate speech, euthymic mood, intact memory, average intellect, fair
6 reasoning, impulse control, judgment, insight), Tr. 332 (cooperative, good eye
7 contact, judgment and insight good, no acute distress, despite reporting significant
8 PTSD symptoms), Tr. 363 (alert and oriented, good fluency, comprehension,
9 concentration, memory, and knowledge), Tr. 352, 359 (alert and cooperative,
10 normal mood and affect, normal attention span and concentration). This was a
11 germane reason to discredit Nurse Holstein’s opinion.

12 Third, the ALJ noted that Nurse Holstein’s own mental status examination
13 was normal. Tr. 21 (citing Tr. 334-35). An ALJ may reject opinions that are
14 internally inconsistent. *Nguyen*, 100 F.3d at 1464. An ALJ is not obligated to
15 credit medical opinions that are unsupported by the medical source’s own data
16 and/or contradicted by the opinions of other examining medical sources.
17 *Tommasetti*, 533 F.3d at 1041. A review of Nurse Holstein’s treatment notes from
18 Plaintiff’s mental status examination reveal that Plaintiff was “pleasant, polite,
19 thought content without suicidal ideation, delusions, alert, oriented, cognitive
20 function intact, cooperative with exam, good eye contact, judgment, and insight
21 impaired in regards to her declining to address PTSD.” Tr. 335. Nurse Holstein
22 also reported that Plaintiff’s thought process was logical and goal directed. Tr.
23 335. The inconsistencies between her opinion and her own treatment notes was a
24 germane reason to discredit Nurse Holstein’s opinion.

25 Having reviewed the ALJ’s evaluation of the medical evidence, the Court
26 finds the ALJ’s interpretation was based on substantial evidence, and the ALJ
27 properly supported the findings with germane reasons.

1 **C. Step Five**

2 Plaintiff challenges the ALJ's evaluation of the vocational expert's
3 testimony at step five. ECF No. 14 at 15-17.

4 At step five of the sequential evaluation analysis, the burden shifts to the
5 Commissioner to establish that 1) the claimant can perform other work, and 2)
6 such work "exists in significant numbers in the national economy." 20 C.F.R. §
7 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). In assessing
8 whether there is work available, the ALJ must rely on complete hypotheticals
9 posed to a vocational expert. *Nguyen*, 100 F.3d at 1467. The ALJ's hypothetical
10 must be based on medical assumptions supported by substantial evidence in the
11 record that reflects all of the claimant's limitations. *Osenbrook v. Apfel*, 240 F.3d
12 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate, detailed, and
13 supported by the medical record." *Tackett*, 180 F.3d at 1101.

14 "In some disability claims, the medical facts lead to an assessment of RFC
15 which is compatible with the performance of either sedentary or light work except
16 that the person must alternate between periods of sitting and standing." SSR 83-
17 12, 1983 WL 31253, at *4. "In cases of unusual limitation of ability to sit or stand,
18 a [vocational specialist] should be consulted to clarify the implications for the
19 occupational base." *Id.* Additionally, "[w]hen there is an apparent unresolved
20 conflict between [vocational expert] or [vocational specialist] evidence and the
21 DOT, the adjudicator must elicit a reasonable explanation for the conflict before
22 relying on the [vocational expert] or [vocational specialist]." SSR 00-4p, 2000 WL
23 1898704, at *2. However, where the DOT is "silent on whether the jobs in
24 question allow for a sit/stand option," there is no conflict with a vocational expert's
25 testimony that a claimant can perform a job with a sit/stand option. *Dewey v.*
26 *Colvin*, 650 F. App'x 512, 514 (9th Cir. 2016) (unpublished); see also *Meyer v.*
27 *Astrue*, No. CV 12-89-M-DLC-JCL, 2013 WL 1615893, at *7-*8 (D. Mont. Feb.
28 22, 2013) (SSR 00-4p satisfied where DOT did not address sit/stand option and

1 ALJ consulted vocational expert about limitation of claimant’s ability to sit or
2 stand pursuant to SSR 83-12).

3 Here, Plaintiff asserts the ALJ erred by failing to resolve a conflict between
4 the vocational expert’s testimony and the DOT. ECF No. 14 at 15. Specifically,
5 Plaintiff argues the ALJ’s determination that Plaintiff can perform modified light
6 work is not supported by substantial evidence based upon Plaintiff’s need to
7 change positions once an hour. ECF No. 14 at 15-16; Tr. 18. The ALJ consulted
8 the vocational expert, who testified that an individual with Plaintiff’s RFC would
9 be capable of performing the jobs of mail clerk, small parts assembler, and office
10 cleaner I. Tr. 51. The DOT is silent as to whether the three jobs identified by the
11 vocational expert allow for a sit/stand option. DOT 222.687-022, Routing Clerk,
12 1991 WL 672133; DOT 706.684-022, Assembler, Small Products I, 1991 WL
13 679050; DOT 323.687-014, Cleaner, Housekeeping, 1991 WL 672783. Therefore,
14 there was no conflict for the ALJ to resolve. The ALJ satisfied SSR 83-12 by
15 seeking the testimony of a vocational expert. SSR 83-12, 1983 WL 31253, at *4.

16 Even if there had been an apparent conflict, the vocational expert testified
17 based on her professional experience, stating that her testimony about each
18 identified job was “based on [her] experience in assisting and observing
19 individuals, actually doing this job.” Tr. 51-54. She testified that the mail clerk
20 position selected for Plaintiff allowed employees the “opportunity to sit, stand, and
21 move around, while they’re performing this job,” resolving any apparent conflict
22 with Plaintiff’s need to change positions once an hour. Tr. 51. The ALJ did not
23 err by relying on the vocational expert’s testimony at step five.

24 Plaintiff also argues that the ALJ erred by failing to ask the vocational expert
25 if her testimony was consistent with the DOT. ECF No. 14 at 15; SSR 00-4p, 2000
26 WL 1898704. SSR 00-4p imposes on the ALJ “an affirmative responsibility to ask
27 about any possible conflict between that [vocational expert] or [vocational
28 specialist] evidence and information provided in the DOT.” SSR 00-4p, 2000 WL

1 1898704, at *4. Here, although the ALJ stated in the decision, “Pursuant to SSR
2 00-4p, the undersigned has determined that the vocational expert’s testimony is
3 consistent with the information contained in the [DOT],” a review of the vocational
4 expert’s testimony reveals that the ALJ failed to affirmatively ask the expert
5 whether there was a conflict. Tr. 23, 49-55. The ALJ erred by failing to ask the
6 vocational expert if her testimony was consistent with the DOT.

7 An ALJ’s error is harmless where it is “inconsequential to the ultimate
8 nondisability determination.” Stout, 454 F.3d at 1055. Although the ALJ erred in
9 failing to ask the vocational expert whether her testimony was consistent with the
10 DOT, the error was harmless. Plaintiff’s ability to perform the duties of mail clerk
11 (695,000 jobs available in the U.S.), small parts assembler (241,000 jobs available
12 in the U.S), and office cleaner I (434,000 jobs available in the U.S.) is sufficient to
13 establish that Plaintiff can perform work which exists in significant numbers in the
14 national economy. Tr. 51.

15 CONCLUSION

16 Having reviewed the record and the ALJ’s findings, the Court finds the
17 ALJ’s decision should be affirmed. Therefore, **IT IS HEREBY ORDERED:**

- 18 1. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is
19 **GRANTED.**
20 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

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

24 **IT IS SO ORDERED.**

25 DATED April 2, 2019.



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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE