

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

Sep 27, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RIKKI C.,<sup>1</sup>

Plaintiff,

v.

NANCY A. BERRYHILL, Commissioner  
of Social Security,

Defendant.

No. 4:17-CV-05204-EFS

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

Before the Court, without oral argument, are cross-summary-judgment motions. ECF Nos. 14 & 18. Plaintiff Rikki C. appeals the Administrative Law Judge's (ALJ) denial of benefits. ECF No. 1. Plaintiff contends the ALJ: (1) improperly rejected the opinion of Plaintiff's medical providers; (2) improperly rejected Plaintiff's testimony; and (3) conducted an improper Step Five analysis. ECF No. 14 at 9. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision. The Court has reviewed the administrative record and the parties' briefing. For the reasons set forth below, the Court affirms the ALJ's decision and therefore denies Plaintiff's motion and grants the Commissioner's motion.

<sup>1</sup> To protect the privacy of social-security plaintiffs, the Court refers to them by first name and last initial. See proposed draft of LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Plaintiff" for any other identifier that was used.

1 **I. Standard of Review**

2 On review, the Court must uphold the ALJ's determination that the  
3 claimant is not disabled if the ALJ applied the proper legal standards  
4 and there is substantial evidence in the record as a whole to support  
5 the decision.<sup>2</sup> "Substantial evidence means more than a mere scintilla,  
6 but less than a preponderance. It means such relevant evidence as a  
7 reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> The  
8 Court will also uphold "such inferences and conclusions as the [ALJ]  
9 may reasonably draw from the evidence."<sup>4</sup>

10 In reviewing a denial of benefits, the Court considers the record  
11 as a whole, not just the evidence supporting the ALJ's decision.<sup>5</sup> That  
12 said, the Court may not substitute its judgment for that of the  
13 Commissioner. If the evidence supports more than one rational  
14 interpretation, a reviewing court must uphold the ALJ's decision.<sup>6</sup>  
15 Further, the Court "may not reverse an ALJ's decision on account of an  
16 error that is harmless."<sup>7</sup> An error is harmless "where it is  
17 inconsequential to the [ALJ's] ultimate nondisability determination."<sup>8</sup>

18 **II. Five-Step Disability Determination**

19 The ALJ uses a five-step sequential evaluation process to  
20 determine whether an adult claimant is disabled.<sup>9</sup> The burden of proof  
21

22 <sup>2</sup> *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. §  
23 405(g)); *Brawner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th  
24 Cir. 1987).

<sup>3</sup> *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th  
24 Cir. 1988) (citations and internal quotation marks omitted).

<sup>4</sup> *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

<sup>5</sup> *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

<sup>6</sup> *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

<sup>7</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

<sup>8</sup> *Id.* at 1115 (quotation and citation omitted).

<sup>9</sup> See 20 C.F.R. §§ 404.1520, 416.920.

1 shifts during this process. The claimant has the initial burden of  
2 establishing entitlement to disability benefits under steps one through  
3 four.<sup>10</sup> At step five, however, the burden shifts to the ALJ to show  
4 that the claimant is not entitled to benefits.<sup>11</sup>

5 Step one assesses whether the claimant is currently engaged in a  
6 substantial gainful activity.<sup>12</sup> If he is, benefits would be denied.<sup>13</sup> If  
7 he is not, the ALJ proceeds to the second step.

8 Step two assesses whether the claimant has a medically severe  
9 impairment, or combination of impairments, which significantly limit  
10 the claimant's physical or mental ability to do basic work activities.<sup>14</sup>  
11 If he does not, the disability claim is denied. If he does, the  
12 evaluation proceeds to the third step.

13 Step three compares the claimant's impairment to several  
14 recognized by the Commissioner to be so severe as to preclude  
15 substantial gainful activity.<sup>15</sup> If the impairment meets or equals one  
16 of the listed impairments, the claimant is conclusively presumed to be  
17 disabled. If the impairment does not, the evaluation proceeds to the  
18 fourth step.

19 Step four assesses whether the impairment prevents the claimant  
20 from performing work he has performed in the past by determining the  
21 claimant's residual functional capacity (RFC).<sup>16</sup> If the claimant is able  
22 to perform his previous work, the claimant is not disabled. If the

23  
24 <sup>10</sup> See *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971).

<sup>11</sup> See *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984).

<sup>12</sup> 20 C.F.R. § 416.920(a)(4)(i).

<sup>13</sup> 20 C.F.R. §§ 404.1520(b), 416.920(b).

<sup>14</sup> 20 C.F.R. §§ 404.1520(c), 416.920(c).

<sup>15</sup> 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App. 1, 416.920(d).

<sup>16</sup> 20 C.F.R. §§ 404.1520(e), 416.920(e).

1 claimant cannot perform this work, the evaluation proceeds to the fifth  
2 step.

3 Step five, the final step, assesses whether the claimant can  
4 perform other work in the national economy in light of his age,  
5 education, and work experience.<sup>17</sup> The Commissioner has the burden to  
6 show (1) that the claimant can perform other substantial gainful  
7 activity, and (2) that a "significant number of jobs exist in the  
8 national economy" that the claimant can perform.<sup>18</sup> If both these  
9 conditions are met, the disability claim is denied; if not, the claim  
10 is granted.

11 **III. Facts, Procedural History, and the ALJ's Findings**<sup>19</sup>

12 Plaintiff Rikki C. was born on February 6, 1974, and is 44 years  
13 old. See Administrative Record (AR) 72. At the time of the hearing, she  
14 lived with her husband and two-year-old daughter. AR 24. Plaintiff  
15 asserts that she was diagnosed with Multiple Sclerosis (MS) in July,  
16 2002 and has suffered symptoms ever since, preventing her from working.  
17 ECF No. 14 at 2. She worked as a sales associate at Albertson's from  
18 2007 to January of 2010. AR 41-42. She then worked for two weeks at a  
19 temporary job at a paper mill. AR 41-42. On a day to day basis Plaintiff  
20 spends her days taking care of her infant daughter and visiting with  
21 friends at her home. AR 51-52.

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24 <sup>17</sup> 20 C.F.R. §§ 404.1520(g), 416.920(g); see also *Bowen v. Yuckert*, 482 U.S.  
25 137, 142 (1987).

<sup>18</sup> *Kail*, 722 F.2d at 1497-98.

26 <sup>19</sup> The facts are only briefly summarized. Detailed facts are contained in the  
administrative hearing transcript, the ALJ's decision, and the parties'  
briefs.

1 Plaintiff filed an application for supplemental security income,  
2 dated September 11, 2013, alleging a disability onset date of January  
3 1, 2009. AR 20. Plaintiff's claim was initially denied, and upon  
4 reconsideration, Plaintiff requested a hearing before an ALJ on  
5 May 22, 2014, which was held on August 30, 2016. *Id.* On October 3, 2016,  
6 the ALJ, Laura Valente, rendered a decision denying Plaintiff's claim.  
7 AR 31.

8 At step one, the ALJ found the Plaintiff had not engaged in  
9 substantial gainful activity since January 1, 2009, the alleged onset  
10 date. AR 22.

11 At step two, the ALJ found the Plaintiff had the severe medical  
12 impairment of multiple sclerosis (MS). AR 22. She also noted Plaintiff's  
13 history of methamphetamine abuse, but concluded this issue to be non-  
14 severe and non-material to the case. *Id.* Finally, the ALJ noted  
15 Plaintiff's numerous psychological evaluations, but because she is not  
16 alleging a severe psychological impairment and she has not sought any  
17 significant, ongoing treatment for these issues, the ALJ did not find  
18 them to be severe medical impairments. AR 23.

19 At step three, the ALJ found that Plaintiff did not have an  
20 impairment that met the severity of a listed impairment. *Id.*

21 At step four, the ALJ found that Plaintiff had the residual  
22 functional capacity (RFC) to perform sedentary work. *Id.* She found the  
23 Plaintiff capable of: lifting and carrying ten pounds frequently and  
24 occasionally, sitting for six hours and walking for two hours during an  
25 eight-hour workday, and standing and walking for two hours out of an  
26 eight-hour workday. *Id.* The ALJ also found that Plaintiff can perform

1 all postural activities occasionally, but can never climb ladders, ropes  
2 or scaffolds. *Id.* Finally, the ALJ found she can frequently push and  
3 pull with the right lower extremity. *Id.*

4 In reaching these conclusions, the ALJ found that Plaintiff's MS  
5 could be reasonably expected to cause the alleged symptoms, but that  
6 her statements concerning the intensity, persistence and limiting  
7 effects of the symptoms are not entirely consistent with the medical  
8 evidence and other evidence presented in the record. AR 25.

9 When determining Plaintiff's RFC, the ALJ gave some weight to the  
10 opinion of Dr. Gordon Hale, an MD who filed a Disability Determination  
11 report for Plaintiff, as well as the DSHS opinions of examining  
12 Drs. Srinivas Mascall and David Martinez. AR 27-28. The ALJ gave little  
13 weight to the report from treating physician Dr. Hui Zhang, and the  
14 report from Dr. Zhang's physician's assistant Tauni Urdahl. AR 28. She  
15 also gave little weight to ARNP Louise Michels. *Id.*

16 At step five, the ALJ found that Plaintiff was not able to perform  
17 any past relevant work, including her experience as a cashier and  
18 checker, fast food worker, and general clerk. AR 29. However, given her  
19 age, education, work experience, and RFC, the ALJ found that there exist  
20 significant numbers of jobs that Plaintiff may perform. AR 29-30.

21 The ALJ issued its decision to deny Plaintiff benefits on  
22 October 3, 2016. AR 31. The Appeals Council denied Plaintiff's request  
23 for review, AR 1-3, making the ALJ's decision the Commissioner's final  
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25  
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1 decision for the purposes of judicial review.<sup>20</sup> Plaintiff filed this  
2 lawsuit on December 11, 2017. ECF No. 1.

3 **IV. Applicable Law & Analysis**

4 **A. The ALJ did not improperly reject the opinion of treating  
5 physician Dr. Zhang.**

6 Plaintiff alleges the ALJ improperly rejected treating physician  
7 Dr. Zhang's opinion and report. ECF No. 14 at 10. On July 30, 2015,  
8 Dr. Zhang opined that Plaintiff: could not lift more than ten pounds  
9 occasionally and less than ten pounds frequently; could not stand and  
10 walk more than two hours in an eight hour work day; could not sit for  
11 more than three hours in an eight hour work day; would need a sit stand  
12 option; would be off task for more than 50 percent of the work day;  
13 would need to lie down at unpredictable intervals three to four times  
14 per day; could not twist[,] scoop, [or] crouch for more than one third  
15 of the work day; could not climb; would have difficulty with fine  
16 manipulation, pushing, and pulling; and would miss four or more days of  
17 work per month. ECF No. 18 at 9; AR 390-91. If accepted, such an opinion  
18 would preclude Plaintiff from performing sedentary work.<sup>21</sup>

19 The ALJ gave Dr. Zhang's opinion little weight because (1)  
20 Dr. Zhang's report was inconsistent with his own treatment notes; (2)  
21 the report does not account for Plaintiff's improvement in her symptoms  
22 when taking medication; and (3) at the time his opinion was rendered,  
23 Plaintiff was able to "provide full-time care" for her infant daughter.  
24 AR 28. Plaintiff argues that the ALJ was required to give Dr. Zhang  
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26 <sup>20</sup> 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

<sup>21</sup> See 20 C.F.R. § 404.1567(a).

1 great deference because he was her treating physician, and because his  
2 opinion was well-supported by the record. ECF No. 14 at 11.

3 *a. Legal Standard*

4 Treating physicians' opinions are generally assigned a greater  
5 weight than non-treating physicians.<sup>22</sup> However, if the opinions of the  
6 treating and non-treating physicians contradict, the opinion of the  
7 treating physician may be rejected only if the ALJ articulates  
8 "specific, legitimate reasons for doing so that are based on substantial  
9 evidence in the record."<sup>23</sup> Although a non-treating physician's opinion  
10 on its own may not constitute "substantial evidence," an ALJ may reject  
11 a treating physician's opinion if it conflicts with "the overwhelming  
12 weight of the other evidence of record."<sup>24</sup>

13 *b. Analysis*

14 **1) Dr. Zhang's treatment notes are inconsistent with his report**  
15 **and recommendation for Plaintiff's workload.**

16 Here, Dr. Zhang was Plaintiff's treating physician for several  
17 years, and therefore would ordinarily be afforded great deference.<sup>25</sup>  
18 However, Dr. Zhang's opinion contradicted those of two examining  
19 doctors, Dr. Mascal and Dr. Martinez. Dr. Martinez acknowledged  
20 Plaintiff's right arm weakness and numbness, and opined that Plaintiff  
21 was capable of performing "light work," meaning she was able to lift up  
22 to 20 pounds per day, frequently lift up to 10 pounds, and walk, sit  
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25 <sup>22</sup> *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

<sup>23</sup> *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997)(internal quotations  
omitted).

26 <sup>24</sup> *Lester v. Chater*, 81 F.3d 821, 831 (9<sup>th</sup> Cir. 1996).

<sup>25</sup> *Andrews*, 53 F.3d at 1041.



1 stand, push, and pull. AR 425. Dr. Mascal also opined that she could do  
2 "light work" of the same variety. AR 431-32. The limitations outlined  
3 in Dr. Martinez and Dr. Mascal's reports therefore directly contradict  
4 Dr. Zhang's report. Further, as the Commissioner points out, the only  
5 opinion in the record as restrictive as Dr. Zhang's is the 2010 report  
6 from his own physician's assistant, Tauni Urdahl. ECF No. 18 at 10. Ms.  
7 Urdahl issued a contradictory report that Plaintiff was capable of  
8 sedentary work, but also "unable to lift at least 2 pounds or unable to  
9 stand or walk." AR 455-66. Dr. Zhang's opinion therefore contradicted  
10 the opinions of the other examining doctors, and must be weighed against  
11 the "substantial evidence" standard.<sup>26</sup>

12 The Court finds the ALJ's reasons to afford Dr. Zhang's report  
13 little weight to be specific, legitimate, and supported by substantial  
14 evidence in the record.<sup>27</sup> In deciding to afford Dr. Zhang's report little  
15 weight, the ALJ noted that the report is inconsistent with Dr. Zhang's  
16 own "corresponding treatment notes." AR 28. Plaintiff asserts that the  
17 ALJ erred because Dr. Zhang's opinion was "well supported," particularly  
18 because her MRIs between 2009 and 2013 showed increased numbers of  
19 lesions, and she consistently reported "problems with fatigue."  
20 ECF No. 14 at 11-12. The Commissioner asserts that the MRIs that reflect  
21 progression in her lesions are accounted for by the contradicting  
22 examining doctors, and the new lesions did not reflect a marked increase  
23 in her symptoms. ECF No. 18 at 11-12.

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26 <sup>26</sup> See *Jamerson*, 112 F.3d at 1066.

<sup>27</sup> *Id.*

1           The Court finds that the record supports the ALJ's finding that  
2 Dr. Zhang's medical report is inconsistent with his treatment notes.  
3 Dr. Zhang has been Plaintiff's treating physician since 2009. AR 356-  
4 66. On July 30, 2015, Dr. Zhang filled out a medical report for  
5 Plaintiff's disability claim and attributed the aforementioned  
6 limitations to Plaintiff's "weakness, fatigue, pain, [and] gait  
7 difficulty" due to her MS. AR 391. However, Dr. Zhang's treating notes  
8 from July 30, 2015—the same day he issued his medical report for  
9 Plaintiff's disability claim—states that although Plaintiff was  
10 experiencing fatigue, she denied "difficulty with speech, vision loss,  
11 . . . weakness, [and] spasticity." AR 400. She also did not have visual  
12 disturbances, back pain, neck pain, or a gait problem. AR 401. Plaintiff  
13 also reported that she was "overall stable," and Dr. Zhang noted that  
14 she did not have any new lesions. AR 400.

15           Furthermore, although Plaintiff's MRIs reflect an increase in  
16 lesions between 2009 and 2013, AR 370, Plaintiff acknowledges that  
17 Dr. Zhang noted that the "lesion burden" was "stable" after reviewing  
18 her MRI from April, 2015. ECF No. 14 at 12; AR 400. And although an MRI  
19 from 2016 showed a new lesion, Dr. Zhang's treating notes from that date  
20 reflect that she was experiencing "minimal residual symptoms" from a  
21 recent exacerbation, and denied issues with her speech, weakness, vision  
22 loss, hearing loss, spasticity, dysphasia, and other symptoms. AR 494.  
23 She had no back or neck pain and, although Dr. Zhang noted her gait was  
24 "wide based," and "unsteady," he considered her "negative" for "gait  
25 problems." *Id.* The record therefore does not support Dr. Zhang's report  
26

1 that her medical lesions would cause symptoms leading to her disability.

2 See AR 391.

3 **2. Plaintiff's symptoms are generally controlled by medication.**

4 The ALJ specifically and legitimately reasoned that she should  
5 afford Dr. Zhang's report little weight because his report does not  
6 account for Plaintiff's apparent improvement in her symptoms when she  
7 was taking her medication as prescribed. Plaintiff correctly points out  
8 that "[o]ccasional symptom-free periods—and even the sporadic ability  
9 to work—are not inconsistent with disability."<sup>28</sup> However, impairments  
10 that can be controlled effectively with medication are not disabling.<sup>29</sup>  
11 There is substantial evidence in the record to support the ALJ's finding  
12 that Plaintiff's symptoms that may otherwise prevent her from working  
13 are controlled by medication.

14 Plaintiff argues that she did not have adequate symptom control  
15 while taking medication because she continued to have fatigue and gait  
16 difficulty. ECF No. 14 at 13. The Commissioner argues that exam notes  
17 show that Plaintiff's symptoms have consistently stabilized when she  
18 has taken Avonex—one of her prescribed medications. ECF No. 18 at 12.  
19 In November, 2013, Dr. Zhang's PA-C Tauni Urdahl noted that Plaintiff  
20 had been taking Avonex since the end of August and had "done well." AR  
21 375. Plaintiff emphasizes that she continued to have fluctuations of  
22 her symptoms while she was taking Avonex, ECF No. 14 at 13, but Ms.  
23 Urdahl notes that Plaintiff's cognitive ability was only mildly impaired  
24 and Plaintiff reported no new neurological symptoms or changes. AR 375.

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<sup>28</sup> *Lester*, 81 F.3d at 833.

26 <sup>29</sup> *Warre ex rel. E.T. IV v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006  
(9th Cir. 2006).

1 Ms. Urdahl also reported that Plaintiff had responded well to "multiple  
2 [past] exacerbations" with the medication Solumedrol IV. AR 375.

3 Although Plaintiff's symptoms appeared to worsen in early 2016  
4 after she restarted Avonex, she reported on March 8, 2016 that after  
5 she was treated with Solumedrol IV for three days she experienced "good  
6 benefit" and "her symptoms improved in about two weeks." AR 492. Apart  
7 from this benefit, Plaintiff contends that her continued fatigue and  
8 "wide, unsteady gait" reflect a lack of symptom control after this  
9 episode. ECF No. 14 at 13-14. However, she did not report any difficulty  
10 with pain or weakness, and Dr. Zhang noted she had no abnormal movement  
11 in her legs. AR 494. And, as the Commissioner points out, ECF No. 18 at  
12 17, the ALJ did not conclude that the medication stopped all of  
13 Plaintiff's symptoms, but it effectively controlled the symptoms that  
14 Dr. Zhang described as limiting her working ability when she took it as  
15 prescribed. See AR 28.

16 **3. Plaintiff was able to provide full-time care for her daughter.**

17 Finally, the ALJ afforded Dr. Zhang's opinion little weight because  
18 Plaintiff is able to care for her daughter almost full-time without  
19 noted difficulty. AR 28. The credibility of a treating physician's  
20 restrictions may be evaluated against the Plaintiff's activity at home.<sup>30</sup>  
21 At the time of the hearing, Plaintiff stated that she was the primary  
22 caregiver for her daughter while her husband worked during the day.  
23 AR 47. She stated that she was able to take care of her daughter when  
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25 <sup>30</sup> See *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) ("[T]he  
26 restrictions appear to be inconsistent with the level of activity that [the  
Plaintiff] engaged in by maintaining a household and raising two young  
children, with no significant assistance from her ex husband.").

1 she was an infant, and as a toddler the Plaintiff only required help  
2 from friends to care for her daughter two to three times a month. AR 47.  
3 Furthermore, she stated she was mostly able to keep up with housework  
4 and her own personal hygiene, with occasional help from her husband.  
5 AR 48. The substantial evidence in the record that Plaintiff provided  
6 pertaining to her ability to care for her child and take care of herself  
7 is therefore inconsistent with Dr. Zhang's limitations.

8 Because substantial evidence in the record exists that is  
9 inconsistent with Dr. Zhang's opinion, the ALJ did not err by assigning  
10 his report little weight.

11 **B. The ALJ did not improperly discredit Plaintiff's testimony.**

12 Plaintiff asserts that the ALJ erred by discrediting her symptom  
13 testimony.

14 *a. Standard of Review*

15 The ALJ engages in a two-step analysis to determine whether a  
16 claimant's testimony regarding subjective pain or symptoms is credible.  
17 "First, the ALJ must determine whether there is objective medical  
18 evidence of an underlying impairment which could reasonably be expected  
19 to produce the pain or other symptoms alleged."<sup>31</sup> In the present case,  
20 because the ALJ determined Plaintiff's medical impairment could  
21 "reasonably be expected to cause the alleged symptoms," she has met step  
22 one. AR 25.

23 Second, "[i]f the claimant meets the first test and there is no  
24 evidence of malingering, the ALJ can only reject the claimant's  
25 testimony about the severity of the symptoms if [the ALJ] gives

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<sup>31</sup> *Molina*, 674 F.3d at 1112 (internal quotations and citations omitted).

1 'specific, clear and convincing reasons' for the rejection."<sup>32</sup> An ALJ  
2 must make sufficiently specific findings "to permit the court to  
3 conclude that the ALJ did not arbitrarily discredit [the] claimant's  
4 testimony."<sup>33</sup> General findings are insufficient.<sup>34</sup> Courts may not second-  
5 guess ALJ findings that are supported by substantial evidence.<sup>35</sup>

6 In making an adverse credibility determination, an ALJ may  
7 consider, among other things, (1) the claimant's reputation for  
8 truthfulness; (2) inconsistencies in the claimant's testimony or between  
9 her testimony and her conduct; (3) the claimant's daily living  
10 activities; (4) the claimant's work record; and (5) the nature,  
11 severity, and effect of the claimant's condition.<sup>36</sup>

12 b. Analysis

13 **1) Gaps in treatment and non-compliance with medication reflect a**  
14 **lack of intensity of symptoms.**

15 The ALJ specifically discredited Plaintiff's testimony partially  
16 due to the long periods of time she goes between treatments and her  
17 noncompliance with her treatment. AR 25. "[U]nexplained, or inadequately  
18 explained, failure to seek treatment or follow a prescribed course of  
19 treatment" may be relied on to discredit a plaintiff's alleged  
20 symptoms.<sup>37</sup> However, a Plaintiff's "failure to receive medical treatment  
21 during the period that [she] had no medical insurance cannot support an

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24 <sup>32</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
*Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).

25 <sup>33</sup> *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008)(citation omitted).

26 <sup>34</sup> *Lester*, 81 F.3d at 834.

<sup>35</sup> *Id.*

<sup>36</sup> *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

<sup>37</sup> *See Fair v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989).

1 adverse credibility finding.”<sup>38</sup> Accordingly, “[d]isability benefits may  
2 not be denied because of the claimant’s failure to obtain treatment  
3 [s]he cannot obtain for lack of funds.”<sup>39</sup>

4 Plaintiff has explained the gaps in her treatment between 2009 and  
5 2013 as being due to her methamphetamine abuse and lack of insurance.  
6 See ECF No. 14 at 16-17. However, there is substantial evidence in the  
7 record to support the ALJ’s findings that, despite her lack of  
8 insurance, she was able to access free treatment through medical access  
9 programs.

10 The ALJ noted that Plaintiff had not had any “significant”  
11 treatment for her MS between 2009 and 2013. AR 25-26. In November, 2009,  
12 Plaintiff’s medical records note that she could not afford the  
13 recommended Tysabri treatment for her MS. AR 354. However, her treating  
14 physician “arranged [for] her to contact Biogen [a treatment provider]  
15 for [an] assistance program” for Tysabri. AR 356. She met with her  
16 physician on several occasions between during 2009 and 2010 after this  
17 recommendation, see, e.g., AR 360, 361, 362, 367. On each occasion, her  
18 physician encouraged her to enroll in the Tysabri assistance program.  
19 *Id.* Despite her access to insurance, and the medical assistance program  
20 when she could not afford the treatment, she never sought out the Tysabri  
21 program or treatment and lost contact with her physician until 2013.  
22 AR 368.

23 Furthermore, although Plaintiff argues that she had gaps in  
24 insurance between 2012 and 2016, as stated previously, the medical  
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26 <sup>38</sup> *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007).

<sup>39</sup> *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995).

1 records show she could access Tysabri through the assistance program  
2 even if she could not afford treatment. See AR 356. She also testified  
3 at her hearing that she had been receiving free medical assistance, as  
4 the drug company for Avonex had been sponsoring her and sending her free  
5 treatment. AR 58. She reported she had recently switched to Tysabri,  
6 but she testified that the treatment was very expensive and she did not  
7 know whether Tysabri had an assistance program. AR 58. This directly  
8 contradicts the records that reflect numerous attempts to encourage  
9 Plaintiff to enter the Tysabri assistance program, and supports the  
10 ALJ's finding that she had access to medical assistance. See AR 360,  
11 361, 365, 367. Because Plaintiff did not seek out treatment even with  
12 access to the medical assistance plans, the ALJ properly discounted  
13 Plaintiff's testimony regarding the severity of her symptoms as  
14 inconsistent with her claims.<sup>40</sup>

15 **2) Plaintiff's living activities are inconsistent with the degree**  
16 **of impairment she alleges.**

17 As the Court has noted previously, the ALJ found that Plaintiff's  
18 ability to care for her daughter with only minimal help from family and  
19 friends was inconsistent with the degree of limitations Plaintiff was  
20 claiming. AR 27. The Ninth Circuit has "repeatedly warned that ALJs must  
21 be especially cautious in concluding that daily activities are  
22 inconsistent with testimony about pain, because impairments that would  
23 unquestionably preclude work and all the pressures of a workplace  
24 environment will often be consistent with doing more than merely resting

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<sup>40</sup> See *Fair*, 885 F.2d at 603-04.



1 in bed all day."<sup>41</sup> To that end, "many home activities are not easily  
2 transferable to what may be the more grueling environment of the  
3 workplace, where it might be impossible to periodically rest or take  
4 medication."<sup>42</sup> Accordingly, a claimant's daily activities should not  
5 have a negative impact on credibility unless those activities contradict  
6 the claimant's other testimony or are transferable to a work setting.<sup>43</sup>

7 Plaintiff argues that her "bad days" where she is required to lay  
8 down and cannot brush her hair or shower due to fatigue would preclude  
9 her from performing full-time work. ECF No. 14 at 18-19. However,  
10 Plaintiff also testified that on a day-to-day basis she cares full-time  
11 for her daughter, AR 47, is capable of "get[ting] up and doing things  
12 in spurts," AR 56, will go outside and play with her daughter if she is  
13 "feeling up to it," and "usually" visits with friends. AR 52. While she  
14 testified that she sits for most of the day, AR 56, her symptoms do not  
15 prevent her from typing on a computer. AR 54. There is therefore  
16 substantial evidence that Plaintiff's fatigue would not preclude her  
17 from performing sedentary work.

18 Furthermore, Plaintiff testified that she required assistance from  
19 her friends or husband on her symptomatic "bad days," which occur only  
20 two to three times per month. AR 55. And, as this Court analyzed  
21 previously, Plaintiff's symptoms are well-controlled when she is taking  
22 her medication as prescribed. See, e.g., AR 375; 492. Plaintiff's  
23 activities are relevant because they contradict the severity and  
24 persistence of the limitations alleged. The ALJ therefore properly

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25 <sup>41</sup> *Garrison*, 759 F.3d at 1016.

26 <sup>42</sup> *Fair*, 885 F.2d at 603.

<sup>43</sup> *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

1 considered Plaintiff's daily activities in discrediting her symptom  
2 testimony.

3 **C. The ALJ did not fail to meet her step five burden.**

4 At step five, the Commissioner has the burden to "identify specific  
5 jobs existing in substantial numbers in the national economy that [the]  
6 claimant can perform despite her identified limitations."<sup>44</sup> At an  
7 administrative hearing, an ALJ may solicit vocational expert (VE)  
8 testimony as to the availability of jobs in the national economy.<sup>45</sup> The  
9 ALJ's decision regarding the number of alternative occupations must be  
10 supported by substantial evidence.<sup>46</sup> A VE's testimony may constitute  
11 substantial evidence of the number of jobs that exist in the national  
12 economy.<sup>47</sup>

13 Plaintiff alleges that the ALJ failed to meet her step five burden  
14 because she denied Plaintiff's claim partially on the basis of the  
15 vocational expert's testimony. ECF No. 14 at 19-20. Plaintiff argues  
16 that the testimony was provided in response to an incomplete  
17 hypothetical because it did not take into account all limitations  
18 presented by Dr. Zhang. *Id.* However, as the Court previously addressed,  
19 this argument merely restates Plaintiff's earlier allegation of error  
20 in assigning weight to Dr. Zhang's testimony, which is not supported by  
21  
22  
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24

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25 <sup>44</sup> *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).

<sup>45</sup> *Tackett v. Apfel*, 180 F.3d 1094, 1100-01 (9th Cir. 1999).

26 <sup>46</sup> *See Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012); *see also Farias v. Colvin*, 519 F. Appx 439, 440 (9th Cir. 2013).

<sup>47</sup> *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005).

1 the record. Accordingly, the ALJ's hypothetical properly accounted for  
2 the limitations supported by the record.<sup>48</sup>

3 Plaintiff further alleges that when additional limitations were  
4 presented to the VE at the hearing, the VE testified that Plaintiff's  
5 limitations would preclude employment. ECF No. 14 at 20; AR 67-68.  
6 However, as the Commissioner noted, the hypothetical containing the  
7 additional limitations was given to the VE by Plaintiff's counsel.  
8 ECF No. 18 at 15; AR 67-68. The hypothetical that the ALJ posed to the  
9 VE "contained all of the limitations that the ALJ found credible and  
10 [was] supported by substantial evidence in the record."<sup>49</sup> The ALJ's  
11 reliance on the VE's answer to the hypothetical she posed was therefore  
12 proper.<sup>50</sup>

13 **V. Conclusion**

14 In summary, the Court finds the record contains substantial  
15 evidence from which the ALJ properly concluded, when applying the  
16 correct legal standards, that Plaintiff does not qualify for benefits.

17 Accordingly, **IT IS HEREBY ORDERED:**

- 18 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is  
19 **DENIED**.
- 20 2. The Commissioner's Motion for Summary Judgment, **ECF No. 18**,  
21 is **GRANTED**.
- 22 3. **JUDGMENT** is to be entered in the Commissioner's favor.
- 23 4. The case shall be **CLOSED**.

24 \_\_\_\_\_  
25 <sup>48</sup> See *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989) (holding it  
is proper for the ALJ to limit a hypothetical to those restrictions supported  
by substantial evidence in the record).

26 <sup>49</sup> *Bayliss*, 427 F.3d at 1217; AR 63.

<sup>50</sup> *Bayliss*, 427 F.3d at 1217.

