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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Deborah O’Grady-Spear,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.
14

No. CV-15-08088-PCT-JAT

ORDER

15 Pending before the Court is Plaintiff Deborah O’Grady-Spear’s appeal from the
16 Social Security Commissioner’s denial of her application for disability benefits, disability
17 insurance benefits, and supplemental security income under the Social Security Act.
18 Plaintiff argues that the administrative law judge (“ALJ”) erred by finding that
19 (1) Plaintiff’s fibromyalgia is neither medically determinable nor severe, (2) Plaintiff’s
20 migraines are not severe, and (3) Plaintiff is not credible. The Court now rules on
21 Plaintiff’s appeal.

22 **I. Background**

23 **A. Procedural Background**

24 On November 24, 2010, Plaintiff filed an application for disability and disability
25 insurance benefits. (Tr. 16).¹ On December 8, 2011, Plaintiff filed an application for
26 supplemental security income. (*Id.*) In her applications, Plaintiff alleged a disability onset
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28 ¹ Citations to “Tr.” are to the certified administrative transcript of record.
(Doc. 17).

1 date of May 31, 2007. (*Id.*) Plaintiff's claims were initially denied on July 18, 2012, and
2 upon reconsideration on November 1, 2012. (*Id.*) Plaintiff timely requested a hearing,
3 which was conducted before ALJ Paula Fow via videoconference on July 16, 2013. (*Id.*)
4 On September 19, 2013, the ALJ issued an unfavorable decision. (Tr. 26). After
5 Plaintiff's request for review by the Social Security Administration Appeals Council was
6 denied, she commenced this action in federal court on May 5, 2015. (Doc. 1).

7 **B. Plaintiff's Background**

8 Plaintiff was born in 1951 and lives with her husband in Flagstaff, Arizona.
9 (Tr. 48, 97). Plaintiff completed high school and multiple years of college before working
10 for several decades as a bookkeeper, auditor, office manager, accounting clerk, and retail
11 manager. (Tr. 48, 61, 72). Currently, Plaintiff's sole source of income is from retirement
12 social security benefits. (Tr. 49).

13 In 2006, an ALJ determined that Plaintiff was disabled and entitled to social
14 security benefits from September 4, 2000 through August 31, 2005. (Tr. 75). During that
15 closed period of disability, Plaintiff suffered from the following impairments:
16 fibromyalgia, asthma, obesity, sinus problems, affective disorder-moderate, and cervical
17 arthritis. (Tr. 73). The ALJ found, however, that on September 1, 2005, Plaintiff
18 "experienced 'medical improvement' related to her ability to work" and "retained the
19 residual functional capacity to perform sedentary exertional work." (Tr. 74).
20 Consequently, as of September 1, 2005, Plaintiff has not been found disabled under social
21 security standards. Plaintiff now seeks disability with an alleged onset date of May 31,
22 2007. (Doc. 1).

23 **II. Legal Standard**

24 The ALJ's decision to deny benefits will be overturned "only if it is not supported
25 by substantial evidence or is based on legal error." *Magallanes v. Bowen*, 881 F.2d 747,
26 750 (9th Cir. 1989) (quotation omitted). "Substantial evidence" means more than a mere
27 scintilla, but less than a preponderance. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir.
28 1998).

1 “The inquiry here is whether the record, read as a whole, yields such evidence as
2 would allow a reasonable mind to accept the conclusions reached by the ALJ.” *Gallant v.*
3 *Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984) (citation omitted). In determining whether
4 there is substantial evidence to support a decision, the Court considers the record as a
5 whole, weighing both the evidence that supports the ALJ’s conclusions and the evidence
6 that detracts from the ALJ’s conclusions. *Reddick*, 157 F.3d at 720. “Where evidence is
7 susceptible of more than one rational interpretation, it is the ALJ’s conclusion which
8 must be upheld; and in reaching his findings, the ALJ is entitled to draw inferences
9 logically flowing from the evidence.” *Gallant*, 753 F.2d at 1453 (citations omitted); *see*
10 *Batson v. Comm’r of the Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). This is
11 because “[t]he trier of fact and not the reviewing court must resolve conflicts in the
12 evidence, and if the evidence can support either outcome, the court may not substitute its
13 judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992);
14 *see Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

15 The ALJ is responsible for resolving conflicts in medical testimony, determining
16 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
17 Cir. 1995). Thus, if on the whole record before the Court, substantial evidence supports
18 the Commissioner’s decision, the Court must affirm it. *See Hammock v. Bowen*, 879 F.2d
19 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g). On the other hand, the Court “may
20 not affirm simply by isolating a specific quantum of supporting evidence.” *Orn v. Astrue*,
21 495 F.3d 625, 630 (9th Cir. 2007) (quotation omitted).

22 Notably, the Court is not charged with reviewing the evidence and making its own
23 judgment as to whether Plaintiff is or is not disabled. Rather, the Court’s inquiry is
24 constrained to the reasons asserted by the ALJ and the evidence relied upon in support of
25 those reasons. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

26 **A. Definition of Disability**

27 To qualify for disability benefits under the Social Security Act, a claimant must
28 show that, among other things, she is “under a disability.” 42 U.S.C. § 423(a)(1)(E). The

1 Social Security Act defines “disability” as the “inability to engage in any substantial
2 gainful activity by reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or can be expected to last for
4 a continuous period of not less than 12 months.” *Id.* § 423(d)(1)(A). A person is:

5 under a disability only if his physical or mental impairment or impairments
6 are of such severity that he is not only unable to do his previous work but
7 cannot, considering his age, education, and work experience, engage in any
8 other kind of substantial gainful work which exists in the national economy.

8 *Id.* § 423(d)(2)(A).

9 **B. Five-Step Evaluation Process**

10 The Social Security regulations set forth a five-step sequential process for
11 evaluating disability claims. 20 C.F.R. § 404.1520(a)(4); *see also Reddick*, 157 F.3d at
12 721. A finding of “not disabled” at any step in the sequential process will end the inquiry.
13 20 C.F.R. § 404.1520(a)(4). The claimant bears the burden of proof at the first four steps,
14 but the burden shifts to the Commissioner at the final step. *Reddick*, 157 F.3d at 721. The
15 five steps are as follows:

16 1. First, the ALJ determines whether the claimant is “doing substantial gainful
17 activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.

18 2. If the claimant is not gainfully employed, the ALJ next determines whether the
19 claimant has a “severe medically determinable physical or mental impairment.” *Id.*
20 § 404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly limit[]
21 [the claimant’s] physical or mental ability to do basic work activities.” *Id.* § 404.1520(c).
22 Basic work activities are the “abilities and aptitudes to do most jobs,” such as lifting,
23 carrying, reaching, understanding, carrying out and remembering simple instructions,
24 responding appropriately to co-workers, and dealing with changes in routine. *Id.*
25 § 404.1521(b). Further, the impairment must either have lasted for “a continuous period
26 of at least twelve months,” be expected to last for such a period, or be expected “to result
27 in death.” *Id.* § 404.1509 (incorporated by reference in *id.* § 404.1520(a)(4)(ii)). The
28 “step-two inquiry is a *de minimis* screening device to dispose of groundless claims.”

1 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a
2 severe medically determinable impairment, then the claimant is not disabled.

3 3. Having found a severe impairment, the ALJ next determines whether the
4 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R.
5 § 404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,
6 before proceeding to the next step, the ALJ will make a finding regarding the claimant’s
7 “residual functional capacity based on all the relevant medical and other evidence in [the]
8 case record.” *Id.* § 404.1520(e). A claimant’s “residual functional capacity” is the most
9 he can still do despite all his impairments, including those that are not severe, and any
10 related symptoms. *Id.* § 404.1545(a)(1).

11 4. At step four, the ALJ determines whether, despite the impairments, the claimant
12 can still perform “past relevant work.” *Id.* § 404.1520(a)(4)(iv). To make this
13 determination, the ALJ compares its “residual functional capacity assessment . . . with the
14 physical and mental demands of [the claimant’s] past relevant work.” *Id.* § 404.1520(f).
15 If the claimant can still perform the kind of work he previously did, the claimant is not
16 disabled. Otherwise, the ALJ proceeds to the final step.

17 5. At the final step, the ALJ determines whether the claimant “can make an
18 adjustment to other work” that exists in the national economy. *Id.* § 404.1520(a)(4)(v). In
19 making this determination, the ALJ considers the claimant’s “residual functional
20 capacity” and his “age, education, and work experience.” *Id.* § 404.1520(g)(1). If the
21 claimant can perform other work, he is not disabled. If the claimant cannot perform other
22 work, he will be found disabled.

23 In evaluating the claimant’s disability under this five-step process, the ALJ must
24 consider all evidence in the case record. *See id.* § 404.1520(a)(3); *id.* § 404.1520b. This
25 includes medical opinions, records, self-reported symptoms, and third-party reporting.
26 *See id.* §§ 404.1527, 404.1529; Social Security Ruling (“SSR”) 06–3p, 71 Fed. Reg.
27 45593-03.

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1 **C. The ALJ’s Evaluation under the Five-Step Process**

2 At step one of the sequential evaluation process the ALJ found that Plaintiff did
3 not engage in substantial gainful activity since her alleged onset date of May 31, 2007.
4 (Tr. 18). At step two, the ALJ concluded that Plaintiff had the following “severe
5 impairments: diabetes mellitus; fibromyalgia; sinus migraines; asthma and obesity.” (*Id.*)
6 The ALJ deemed these impairments “severe” because they “have caused and will
7 continue to cause more than minimal work-related functional limitations.” (Tr. 18–19).
8 At step three, the ALJ determined that Plaintiff’s mental impairments did not meet or
9 equal any of the listed impairments in the Social Security regulations. (Tr. 20).

10 Before moving to step four, the ALJ conducted an RFC determination in light of
11 Plaintiff’s testimony and the objective medical evidence. (*Id.*) The ALJ found that
12 Plaintiff “has the residual functional capacity to perform medium work” with several
13 physical limitations and stated that her fibromyalgia “does not meet the requirements set
14 forth by the Social Security Administration needed for the determination that
15 fibromyalgia is a medically determinable impairment.” (Tr. 20, 22). The also ALJ found
16 that Plaintiff’s “medical records do not contain any objective findings suggesting that her
17 migraines have imposed significant limitation on her ability to perform basic work
18 activities for any continuous 12-month period.” (Tr. 23).

19 At step four, the ALJ found that based on the assessed RFC, Plaintiff could
20 perform her past work of accounting clerk, office manager, and retail manager. (Tr. 25).
21 At step five, the ALJ declined to make an alternative finding that Plaintiff could perform
22 other jobs existing in the national economy. (Tr. 25–26). Because Plaintiff could perform
23 her past work, the ALJ held that Plaintiff was not disabled. (Tr. 26).

24 **III. Analysis**

25 Plaintiff makes three arguments for why the Court should set aside the ALJ’s
26 decision and remand her case for further proceedings. Specifically, Plaintiff asserts that
27 the ALJ erred in her findings regarding Plaintiff’s (1) fibromyalgia, (2) migraines, and
28 (3) credibility. (Doc. 19). The Court will address each argument in turn.

1 **A. Whether the ALJ Properly Considered Plaintiff’s Fibromyalgia**

2 **1. Background**

3 The Court first turns to Plaintiff’s argument that the ALJ erred by finding that
4 Plaintiff’s fibromyalgia was neither “medically determinable” nor “severe.” (Doc. 19 at
5 4–10). Initially, Plaintiff asserts that the ALJ’s fibromyalgia findings were contradictory.
6 (*Id.*) Particularly, Plaintiff finds internally inconsistent the ALJ’s factual finding at step
7 two that Plaintiff’s fibromyalgia was “severe” and the ALJ’s later finding that Plaintiff’s
8 fibromyalgia was “not medically determinable.” (*Id.* at 5–6).² Regardless of the
9 decision’s consistency, Plaintiff contends that the ALJ erred in concluding that her
10 fibromyalgia was not “medically determinable.” (*Id.* at 5). Plaintiff asserts that the ALJ
11 inaccurately found that she failed to establish the requisite number of tender points
12 needed for fibromyalgia and that all other potential causes of her symptoms had been
13 excluded by a licensed physician. (*Id.* at 4–14). Plaintiff insists that the ALJ’s error was
14 not harmless because it made “meaningful judicial review [impossible] since, by
15 definition, the ALJ’s error is an error of omission.” (*Id.* at 9–10).

16 In response, the Commissioner argues that the ALJ’s decision is not contradictory.
17 (Doc. 23 at 4–8). The Commissioner explains that the ALJ found Plaintiff’s fibromyalgia
18 to be a “severe” impairment at step two and “[a]lthough the ALJ’s wording may not have
19 been clear, the ALJ did not conclude that fibromyalgia was not a medically determinable
20 impairment.” (*Id.* at 6). According to the Commissioner, when the ALJ stated that
21 Plaintiff’s fibromyalgia “does not meet the requirements set forth by the Social Security
22 Administration needed for the determination that fibromyalgia is a medically
23 determinable impairment,” (Tr. 22), the ALJ was “explaining that Plaintiff’s medical
24 records during the relevant period detracted from Plaintiff’s claims of disability following
25 her alleged onset date,” (Doc. 23 at 6). The Commissioner also asserts that substantial
26 evidence supports the ALJ’s conclusion that the record evidence did not establish the

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28 ² Due to this inconsistency, Plaintiff argues that the ALJ erred by finding that her
fibromyalgia was “neither ‘medically determinable’ or ‘severe.’” (*Id.* at 4).

1 requisite number of tender points or that a licensed physician excluded all other
2 impairments before diagnosing Plaintiff with fibromyalgia. (*Id.* at 6–8).

3 **2. Analysis**

4 Regarding Plaintiff’s fibromyalgia, the ALJ found, in relevant part:

5 3. The claimant has the following severe impairments: diabetes
6 mellitus; fibromyalgia; sinus migraines; asthma and obesity.

7 The medical evidence of record documents the existence of the
8 above-mentioned impairments. The claimant’s symptoms arising from her
9 diabetes mellitus; fibromyalgia; sinus migraines and asthma have caused
 and will continue to cause more than minimal work-related functional
 limitations. As such, the undersigned finds these impairments ‘severe.’

10 (Tr. 18–19) (internal citations omitted).

11 The record contains several references to the diagnosis of
12 fibromyalgia. However, these medical records do not confirm that the
13 claimant has the requisite number of tender point findings (or any tender
14 points) and there is no evidence that licensed physicians have excluded
15 other impairments as required in SSR 12-2p. Moreover, physical
16 examination shows gait and station as ‘normal’; head and neck as ‘normal’
17 alignment and mobility[;] and the spine, ribs and pelvis show ‘normal’
18 alignment and mobility with no deformity. Consequently, the undersigned
 finds that this impairment does not meet the requirements set forth by the
 Social Security Administration needed for the determination that
 fibromyalgia is a medically determinable impairment.

19 (Tr. 22) (internal citations omitted).

20 The Court agrees with Plaintiff that the ALJ’s findings are internally inconsistent.
21 The Commissioner’s artful attempt to reconcile the findings by rewording them is
22 unpersuasive. As readily seen, the ALJ expressly found at step two that Plaintiff’s
23 fibromyalgia was a “severe impairment,” but when crafting the RFC, stated that her
24 fibromyalgia was not a “medically determinable impairment.” There can be no debate
25 that these findings contradict each another as an “impairment” must be “medically
26 determinable” to be “severe.” *See* 20 C.F.R. § 404.1520(a)(4)(ii). The Court therefore
27 concludes that the ALJ’s findings regarding Plaintiff’s fibromyalgia were in error.

28 Nonetheless, not all errors mandate reversal of an ALJ’s non-disability decision. If

1 an error is “harmless,” i.e., “inconsequential to the ultimate nondisability
2 determination[,]” reversal is prohibited. *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir.
3 2012) (quotations omitted). The burden of establishing that an “error is harmful normally
4 falls upon the party attacking the agency’s determination.” *Id.* at 1111 (citing *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409 (2009)). In this case, the ALJ performed a full five-step
6 evaluation and crafted Plaintiff’s RFC after finding that her fibromyalgia was not a
7 medically determinable impairment. (Tr. 22). Thus, the ALJ’s inconsistent findings did
8 not prevent a complete review of Plaintiff’s application. Accordingly, if substantial
9 evidence supports the ALJ’s finding that Plaintiff’s fibromyalgia was not a medically
10 determinable impairment under the Social Security Rulings (“SSR”), the Court will not
11 reverse the ALJ’s decision because the internal inconsistency would be harmless.

12 For fibromyalgia to be considered a medically determinable impairment, Plaintiff
13 must establish the following three elements: (1) a history of widespread pain, (2) at least
14 eleven positive tender points on physical examination, and (3) evidence that other
15 disorders that could cause the symptoms or signs were excluded by a licensed physician.
16 SSR 12-2p.³ Here, the ALJ found that Plaintiff’s fibromyalgia was not a medically
17 determinable impairment for several reasons. First, the ALJ explained that the record was
18 devoid of any medical evidence establishing the requisite number of tender points.
19 (Tr. 22). Second, the ALJ stated that Plaintiff failed to provide any evidence that a
20 licensed physician excluded all other impairments before diagnosing fibromyalgia. (*Id.*)
21 Third, the ALJ considered that Plaintiff was purportedly diagnosed with fibromyalgia in
22 1985 but was able to work for nearly two dozen years thereafter. (*Id.*) Finally, the ALJ
23 noted that Plaintiff did not see specialists for treatment and her physical examination
24 showed normal findings as to her gait, station, head, neck, spine, ribs, and pelvis. (*Id.*)

25 Plaintiff argues that the ALJ erred in her findings regarding tender points and

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27 ³ The Court notes that even if all three of these elements are proven, SSR 12-2p
28 does not obligate the Social Security Administration to find that a claimant has a
medically determinable impairment of fibromyalgia. Rather, SSR 12-2p states that the
Social Security Administration “may find” same.

1 exclusion of other impairments. (Doc. 19 at 6–8). Plaintiff cites several documents in the
2 record in attempt to show that she established the requisite number of tender points. (*Id.*)
3 However, some of the medical evidence Plaintiff identifies is from several years before
4 Plaintiff’s alleged onset date of May 31, 2007. *See* (Tr. 341). Moreover, the 2010
5 consultative examiner report to which Plaintiff cites does not establish the requisite
6 number of tender points and in fact observes that Plaintiff was capable of working with
7 only minor limitations. (Tr. 375–81) (noting that Plaintiff “was tender at points delineated
8 for fibromyalgia as well as control points in between” but could “stand and/or walk” for
9 six to eight hours per workday and had no limitations sitting).⁴ On the other hand, Glenn
10 R. Kunsman, a 2012 consultative examiner whose opinion was assigned “great weight”
11 by the ALJ, diagnosed Plaintiff with “fibromyalgia with 18 positive tender points.”
12 (Tr. 426). However, Dr. Kunsman concluded that Plaintiff’s conditions would not
13 “impose any limitations for 12 continuous months.” (*Id.*) Because a medically
14 determinable impairment must be expected to last for twelve months or result in death,
15 *see* 20 C.F.R. § 404.1509, substantial evidence supports the ALJ’s finding that Plaintiff
16 failed to establish the requisite number of tender points.

17 Plaintiff also contends she provided evidence that a licensed physician rejected all
18 other potential causes of her symptoms before diagnosing fibromyalgia. (Doc. 19 at 7–8).
19 The Court disagrees. As before, Plaintiff points to medical records that were applicable to
20 her *prior* disability between 2000 and 2005. (*Id.*) However, the ALJ who awarded
21 Plaintiff benefits for that closed period specifically found that Plaintiff improved from her
22 disability and was not disabled as of August 31, 2005. (Tr. 75). Accordingly, any
23 evidence establishing Plaintiff’s fibromyalgia before that date is irrelevant to the present
24 inquiry of whether her fibromyalgia was a medically determinable impairment at the time
25 of the alleged onset date in this case, May 31, 2007. Beyond this material, Plaintiff
26 identifies no other evidence showing that a licensed physician excluded all other causes

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28 ⁴ Similarly, Plaintiff cites to a 2006 report which does not expressly state that all other potential causes of her symptoms had been excluded. *See* (Tr. 337).

1 of her symptoms before diagnosing fibromyalgia.⁵ Accordingly, substantial evidence
2 supports the ALJ’s finding that Plaintiff failed to show that a licensed physician excluded
3 other causes of Plaintiff’s symptoms and signs before diagnosing fibromyalgia.

4 **3. Conclusion for Plaintiff’s Fibromyalgia**

5 For the reasons set forth above, after “look[ing] at the record as a whole to
6 determine whether the ALJ’s error alters the outcome of the case,” the Court concludes
7 that although the ALJ issued contradictory findings as to Plaintiff’s fibromyalgia, the
8 error was harmless as it was “inconsequential to the ultimate nondisability
9 determination.” *Molina*, 674 F.3d at 1115.

10 **B. Whether the ALJ Properly Considered Plaintiff’s Migraines**

11 **1. Background**

12 Plaintiff next argues that the ALJ erred by finding that Plaintiff’s sinus migraines
13 were “severe” but not “vocationally severe.” (Doc. 19 at 10–14) (citing Tr. 18, 23).
14 Plaintiff asserts that “[t]he ALJ provides no explanation for why she found migraines to
15 be ‘severe’ but then concluded that there was no evidence that they ‘imposed limitations.’
16 . . . [I]t is impossible as a matter of law for impairment to be severe and cause no
17 limitations at all.” (Doc. 24 at 4) (citations omitted). Plaintiff further asserts that the ALJ
18 erred by considering “objective medical findings” when reviewing the severity of
19 Plaintiff’s migraines because migraines are a “diagnosis of exclusion.” (Doc. 19 at 12).
20 Plaintiff also insists that the ALJ erred by not expressly considering Listing of
21 Impairment – Adult Listing (“Listing”) 11.03. (*Id.* at 11).

22 In response, the Commissioner explains that “[r]ather than questioning the
23 existence of [Plaintiff’s] headaches, the ALJ noted a lack of evidence that these
24 headaches imposed significant limitation on work activity.” (Doc. 23 at 9). The
25 Commissioner argues the ALJ properly considered objective medical evidence when

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27 ⁵ Plaintiff states that Dr. Kunsman noted that Plaintiff has a “long history of
28 fibromyalgia.” (Doc. 19 at 7). Dr. Kunsman, however, never expressly excluded all other
impairments. (Tr. 421–26).

1 determining the severity of Plaintiff's migraines. (*Id.*) Finally, the Commissioner
2 contends that while the ALJ did not "expressly" consider Listing 11.03, the ALJ
3 "implicitly" analyzed the Listing. (*Id.* at 10).

4 **2. Analysis**

5 The ALJ made the following findings: (1) Plaintiff's migraines were a "severe"
6 impairment at step two, (Tr. 18–19), and (2) Plaintiff "failed to prove she has a
7 vocationally 'severe' migraine condition" because her "medical records do not contain
8 any objective findings suggesting that her migraines have imposed significant limitations
9 on her ability to perform basic work activities for any continuous 12-month period,"
10 (Tr. 23). As with fibromyalgia, the Court agrees with Plaintiff that these findings are
11 internally inconsistent. A "severe" impairment means the impairment "significantly limits
12 [a claimant's] physical or mental ability to do basic work activities." 20 C.F.R.
13 § 404.1520(c). At step two, the ALJ determined that Plaintiff's migraines were a "severe
14 medically determinable impairment" but found expressly to the contrary when crafting
15 Plaintiff's RFC. This was error.

16 Nonetheless, as outlined above, reversal of a non-disability determination is
17 improper if the ALJ's error was harmless. In this regard, Plaintiff asserts that the ALJ
18 erred by reviewing "objective medical findings" as a means to reject Plaintiff's subjective
19 pain testimony. (Doc. 19 at 12). However, although the existence of subjective pain
20 testimony cannot be rejected solely due to lack of corroborating objective medical
21 evidence, an ALJ may properly look to objective medical evidence to determine the
22 vocational severity of an applicant's complaints. *See Rollins v. Massanari*, 261 F.3d 853,
23 857 (9th Cir. 2001) ("While subjective pain testimony cannot be rejected on the sole
24 ground that it is not fully corroborated by objective medical evidence, the medical
25 evidence is still a relevant factor in determining the severity of the claimant's pain and its
26 disabling effects." (citing 20 C.F.R. § 404.1529(c)(2))). Here, the ALJ found that
27 Plaintiff's "medical records do not contain any objective findings suggesting that her
28 migraines have imposed significant limitations on her ability to perform basic work

1 activities for any continuous 12-month period.” (Tr. 23). Beyond her own statements of
2 severity, Plaintiff does not point to any evidence in the record establishing that her
3 migraines imposed more than minimal related work limitations. Thus, assuming the
4 existence of Plaintiff’s migraines, the ALJ properly reviewed the “objective findings” of
5 the medical record and found the severity of the migraines to be nominal. Accordingly,
6 substantial evidence supports the ALJ’s finding that Plaintiff’s migraines were not
7 “vocationally severe” due to the lack of “objective findings” in the medical record. (*Id.*)⁶

8 Moreover, the ALJ did not commit reversible error by not expressly identifying
9 Listing 11.03 in the decision. Listing 11.03 identifies non-convulsive seizures as those
10 which cause significant interference with daytime activities. Here, the ALJ considered the
11 relevant aspects of Listing 11.03 in her analysis by discussing the lack of evidence that
12 Plaintiff’s migraines caused significant interference in basic daily activities. (Tr. 23).

13 **3. Conclusion for Plaintiff’s Migraines**

14 Based on the foregoing, the Court finds that the ALJ erred by issuing contradictory
15 findings as to Plaintiff’s migraines; however, because this error was inconsequential to
16 the ALJ’s ultimate non-disability determination, it was harmless. Therefore, the Court
17 will not remand for further proceedings based on this error.

18 **C. Whether the ALJ Properly Considered Plaintiff’s Credibility**

19 **1. Background**

20 As her final contention of error, Plaintiff argues that the ALJ improperly found her
21 to be non-credible without considering her documented lack of health insurance and
22 “incredibly strong work record.” (Doc. 19 at 14). The Commissioner responds that
23 Plaintiff failed to establish her inability to afford medical coverage. (Doc. 23 at 12). The
24 Commissioner also contends that the ALJ’s analysis of Plaintiff’s work history was a
25 reasonable interpretation of the evidence. (*Id.* at 13–15).

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27 ⁶ The Court notes that following her alleged onset date, Plaintiff consistently and
28 repeatedly denied having any problems with headaches. *See* (Tr. 361, 394, 439, 444, 452,
468, 472). Although the ALJ did not cite these documents in the decision, the ALJ
properly relied upon the lack of evidence as to the severity of Plaintiff’s migraines.

1 **2. Analysis**

2 **a. Health Insurance**

3 Plaintiff argues that the ALJ erred in her credibility determination by failing to
4 consider Plaintiff’s “documented” lack of health insurance. (Doc. 19 at 14). According to
5 Plaintiff, the ALJ erred by “cit[ing] lack of objective evidence in addition to alleged
6 ‘conservative treatment’ as a basis to discredit her symptoms without acknowledging her
7 lack of medical insurance[.]” (*Id.* at 15). The record, however, does not establish that
8 Plaintiff lacked the means to obtain necessary medical treatment. Simply because a
9 claimant does not have medical insurance does not mean that she cannot obtain necessary
10 medical treatment. On the contrary, Plaintiff’s testimony clearly indicates that she has
11 been able to obtain the necessary medications for her ailments. *See* (Tr. 54–56) (listing
12 current medications as estrodiol, metformin, guaifenesin, furosemide, atenolol, Lisinopril,
13 levothyroxine, Effexor XR, albuterol spray, azmacort, and nortriptyline). Plaintiff does
14 not point to evidence that establishes she was unable to afford necessary treatment due to
15 a lack of health insurance, and her treatment records indicate that she has been able to
16 obtain ongoing medical care throughout her alleged disability period. *See* (Tr. 337–39,
17 347–68, 386–420, 438–53, 462–79). Consequently, as Plaintiff failed to establish that she
18 was unable to afford necessary medical treatment, the ALJ did not err by considering
19 Plaintiff’s “conservative treatment” as a factor diminishing Plaintiff’s credibility.

20 **b. Work History**

21 Similarly, Plaintiff asserts that the ALJ erred by failing to consider her “incredibly
22 strong work record” in the credibility analysis. (Doc. 19 at 15). The Court disagrees. The
23 ALJ expressly examined Plaintiff’s testimony that she quit her previous job immediately
24 after she was awarded disability benefits by the prior ALJ. (Tr. 23). This evidence alone
25 is a “clear and convincing” reason for discrediting Plaintiff and, in fact, is “affirmative
26 evidence of malingering.” *See Berry v. Astrue*, 622 F.3d 1228, 1235 (9th Cir. 2010)
27 (holding that ALJ properly found “affirmative evidence of malingering” because the
28 claimant “reported that he wanted to do volunteer work but refrained for fear of

1 impacting his disability benefits, and claimed disability dating from his last day of
2 employment even though he admitted at the hearing that he left his job because his
3 employer went out of business and probably would have worked longer had his employer
4 continued to operate”); *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001), *as*
5 *amended* (Nov. 9, 2001) (finding that ALJ properly discredited a claimant’s testimony
6 because he “stated at the administrative hearing and to at least one of his doctors that he
7 left his job because he was laid off, rather than because he was injured”).

8 To the extent Plaintiff argues that her “incredibly strong work record” establishes
9 that she is credible, the Court disagrees. The ALJ expressly considered Plaintiff’s
10 testimony that she had been able to work for over twenty years with her impairments and
11 determined that this factor detracted from Plaintiff’s credibility. (Tr. 23). An ALJ may
12 properly discredit a social security claimant’s testimony if the claimant was able to work
13 with the allegedly disabling impairments. *See Morgan v. Comm’r of Soc. Sec.*, 169 F.3d
14 595, 601 (9th Cir. 1999) (discrediting a claimant’s testimony in part because he held his
15 previous job while under the same allegedly disabling conditions). Although Plaintiff
16 argues that similar evidence has been interpreted as indicating credibility, the ALJ’s
17 finding was a rationale and permissible interpretation of the evidence that must be
18 upheld. *See Gallant*, 753 F.2d at 1453.

19 3. Conclusion for Plaintiff’s Credibility

20 Based on the foregoing, the Court concludes that the ALJ did not err in finding
21 Plaintiff to be non-credible. The reasons appealed by Plaintiff constitute “clear and
22 convincing” reasons for discrediting her testimony.⁷

23
24 ⁷ Even without considering these two reasons, the ALJ provided multiple other
25 “clear and convincing” reasons for finding Plaintiff’s testimony to be non-credible thus
26 requiring the ALJ’s decision to be upheld. *See Carmickle v. Comm’r of Soc. Sec. Admin.*,
27 533 F.3d 1155, 1162 (9th Cir. 2008). Namely, the ALJ also noted Plaintiff’s daily activity
28 level, ability to effectively control her symptoms with medication, and self-reporting that
her impairments do not impact her daily activities. (Tr. 23). As Plaintiff does not contend
the ALJ erred in these areas, she waived doing so. *See Indep. Towers of Wash. v.*
Washington, 350 F.3d 925, 929 (9th Cir. 2003).

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IV. Conclusion

For the reasons set forth above,

IT IS ORDERED that the final decision of the Commissioner of Social Security is affirmed. The Clerk of Court shall enter judgment accordingly and terminate this case.

Dated this 7th day of September, 2016.

