

1 I.

2 BACKGROUND

3 Plaintiff filed applications for DIB and SSI on July 1, 2014, both alleging
4 disability commencing on December 12, 2013. Administrative Record (“AR”)
5 172-75, 176-81. After her applications were denied initially and on
6 reconsideration (AR 67-74, 85-93, 105-08, 115-20), Plaintiff requested an
7 administrative hearing (AR 121-22), which was held on October 28, 2016. AR
8 34-66. Plaintiff, represented by an attorney, appeared and testified before an
9 Administrative Law Judge (“ALJ”).

10 On December 14, 2016, the ALJ issued a written decision finding
11 Plaintiff was not disabled. AR 7-23. The ALJ found Plaintiff had not engaged
12 in substantial gainful employment since December 12, 2013 and suffered from
13 the severe impairments of gastro-esophageal reflux disease, internal
14 hemorrhoids, ulcerative colitis, Crohn’s disease, and diabetes mellitus. AR 12.
15 The ALJ found Plaintiff did not have an impairment or combination of
16 impairments that met or medically equaled a listed impairment. AR 13. The
17 ALJ also found Plaintiff had the residual functional capacity (“RFC”) to
18 perform the demands of light work as defined in 20 C.F.R. § 404.1567(b) and
19 416.967(b) with the following limitations:

20 [Plaintiff] can lift and carry up to 20 pounds occasionally and 10
21 pounds frequently; can stand and walk for about six hours in an
22 eight-hour workday and sit for six hours in an eight-hour workday
23 with normal breaks; can never climb ladders, ropes, or scaffolds; can
24 occasionally climb ramps and stairs; can occasionally balance,
25 stoop, kneel and crouch; can never crawl; should have only
26 occasional exposure to environmental irritants, such as fumes,
27 dusts, gases, and odors such as mostly cooking odors; should have
28 only occasional exposure to poorly ventilated areas; should have

1 only occasional use of moving, hazardous machinery such as large
2 construction machinery and production machinery with large
3 moving parts; and needs availability to a restroom in the same
4 location as the individual, such as an office setting.

5 AR 13-14.

6 The ALJ determined Plaintiff could perform her past relevant work as a
7 general office clerk. AR 18. Accordingly, the ALJ concluded Plaintiff was not
8 under a “disability,” as defined in the Social Security Act, from December 12,
9 2013 through the date of the ALJ’s decision. AR 19.

10 On January 24, 2018, the Appeals Council denied Plaintiff’s request for
11 review, making the ALJ’s decision the Commissioner’s final decision. AR 1-6.
12 This action followed.

13 II.

14 LEGAL STANDARDS

15 A. Standard of Review

16 Under 42 U.S.C. § 405(g), a district court may review the
17 Commissioner’s decision to deny benefits. The ALJ’s findings and decision
18 should be upheld if they are free from legal error and supported by substantial
19 evidence based on the record as a whole. Brown-Hunter v. Colvin, 806 F.3d
20 487, 492 (9th Cir. 2015) (as amended); Parra v. Astrue, 481 F.3d 742, 746 (9th
21 Cir. 2007). Substantial evidence means such relevant evidence as a reasonable
22 person might accept as adequate to support a conclusion. Lingenfelter v.
23 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less
24 than a preponderance. Id. To determine whether substantial evidence supports
25 a finding, the reviewing court “must review the administrative record as a
26 whole, weighing both the evidence that supports and the evidence that detracts
27 from the Commissioner’s conclusion.” Reddick v. Chater, 157 F.3d 715, 720
28 (9th Cir. 1998). “If the evidence can reasonably support either affirming or

1 reversing,” the reviewing court “may not substitute its judgment” for that of
2 the Commissioner. Id. at 720-21; see also Molina v. Astrue, 674 F.3d 1104,
3 1111 (9th Cir. 2012) (“Even when the evidence is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.”).

6 Lastly, even if an ALJ errs, the decision will be affirmed where such
7 error is harmless (Molina, 674 F.3d at 1115), that is, if it is “inconsequential to
8 the ultimate nondisability determination,” or if “the agency’s path may
9 reasonably be discerned, even if the agency explains its decision with less than
10 ideal clarity.” Brown-Hunter, 806 F.3d at 492 (citation omitted).

11 **B. Standard for Determining Disability Benefits**

12 When the claimant’s case has proceeded to consideration by an ALJ, the
13 ALJ conducts a five-step sequential evaluation to determine at each step if the
14 claimant is or is not disabled. See Molina, 674 F.3d at 1110.

15 First, the ALJ considers whether the claimant currently works at a job
16 that meets the criteria for “substantial gainful activity.” Id. If not, the ALJ
17 proceeds to a second step to determine whether the claimant has a “severe”
18 medically determinable physical or mental impairment or combination of
19 impairments that has lasted for more than twelve months. Id. If so, the ALJ
20 proceeds to a third step to determine whether the claimant’s impairments
21 render the claimant disabled because they “meet or equal” any of the “listed
22 impairments” set forth in the Social Security regulations at 20 C.F.R. Part 404,
23 Subpart P, Appendix 1. See Rounds v. Comm’r Soc. Sec. Admin., 807 F.3d
24 996, 1001 (9th Cir. 2015). If the claimant’s impairments do not meet or equal a
25 “listed impairment,” before proceeding to the fourth step the ALJ assesses the
26 claimant’s RFC, that is, what the claimant can do on a sustained basis despite
27 the limitations from his impairments. See 20 C.F.R. §§ 404.1520(a)(4),
28 416.920(a)(4); Social Security Ruling (“SSR”) 96-8p.

1 After determining the claimant’s RFC, the ALJ proceeds to the fourth
2 step and determines whether the claimant has the RFC to perform his past
3 relevant work, either as he “actually” performed it when he worked in the past,
4 or as that same job is “generally” performed in the national economy. See
5 Stacy v. Colvin, 825 F.3d 563, 569 (9th Cir. 2016). If the claimant cannot
6 perform his past relevant work, the ALJ proceeds to a fifth and final step to
7 determine whether there is any other work, in light of the claimant’s RFC, age,
8 education, and work experience, that the claimant can perform and that exists
9 in “significant numbers” in either the national or regional economies. See
10 Tackett v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999). If the claimant can
11 do other work, he is not disabled; but if the claimant cannot do other work and
12 meets the duration requirement, the claimant is disabled. See id. at 1099.

13 The claimant generally bears the burden at each of steps one through
14 four to show he is disabled, or he meets the requirements to proceed to the
15 next step; and the claimant bears the ultimate burden to show he is disabled.
16 See, e.g., Molina, 674 F.3d at 1110; Johnson v. Shalala, 60 F.3d 1428, 1432
17 (9th Cir. 1995). However, at Step Five, the ALJ has a “limited” burden of
18 production to identify representative jobs that the claimant can perform and
19 that exist in “significant” numbers in the economy. See Hill v. Astrue, 698
20 F.3d 1153, 1161 (9th Cir. 2012); Tackett, 180 F.3d at 1100.

21 III.

22 DISCUSSION

23 The parties present one issue: Did the ALJ properly consider Plaintiff’s
24 subjective statements regarding her symptoms and limitations in assessing her
25 RFC? Jt. Stip. at 4. Plaintiff contends the ALJ erred in discounting Plaintiff’s
26 subjective symptom testimony by improperly relying upon Plaintiff’s daily
27 activities and the absence of objective medical evidence, resulting an
28 inadequate RFC. Jt. Stip. at 5-9.

1 **A. Applicable Law**

2 Where a disability claimant produces objective medical evidence of an
3 underlying impairment that could reasonably be expected to produce the pain
4 or other symptoms alleged, absent evidence of malingering, the ALJ must
5 provide “specific, clear and convincing reasons for rejecting the claimant’s
6 testimony regarding the severity of the claimant’s symptoms.” Treichler v.
7 Comm’r Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014) (citation
8 omitted); Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also 20
9 C.F.R. § 416.929. The ALJ may consider, among other factors: (1) ordinary
10 techniques of credibility evaluation, such as the claimant’s reputation for lying,
11 prior inconsistent statements, and other testimony by the claimant that appears
12 less than candid; (2) unexplained or inadequately explained failure to seek
13 treatment or to follow a prescribed course of treatment; (3) the claimant’s daily
14 activities; (4) the claimant’s work record; and (5) testimony from physicians
15 and third parties. Rounds, 807 F.3d at 1006.

16 The ALJ’s findings “must be sufficiently specific to allow a reviewing
17 court to conclude that the [ALJ] rejected [the] claimant’s testimony on
18 permissible grounds and did not arbitrarily discredit the claimant’s testimony.”
19 Moisa, 367 F.3d at 885 (citation omitted). Furthermore, a “lack of medical
20 evidence cannot form the sole basis for discounting pain testimony.” Burch v.
21 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); see also Rollins v. Massanari, 261
22 F.3d 853, 857 (9th Cir. 2001).

23 However, if the ALJ’s assessment of the claimant’s testimony is
24 reasonable and is supported by substantial evidence, it is not the Court’s role to
25 “second-guess” it. See Rollins, 261 F.3d at 857. Finally, the ALJ’s credibility
26 finding may be upheld even if not all of the ALJ’s reasons for rejecting the
27 claimant’s testimony are upheld. See Batson v. Comm’r Soc. Sec. Admin., 359
28 F.3d 1190, 1197 (9th Cir. 2004).

1 **B. Analysis**

2 During the 2016 hearing, Plaintiff testified she must use the restroom
3 frequently because of her impairments and that she has “good” days and “bad”
4 days. AR 39. On a bad day, Plaintiff asserted she might use the restroom
5 between five and ten times per hour; on a good day, she might use the
6 restroom two to three times per hour. AR 44. Plaintiff stated she has “bad
7 days” two to three times per week. Id. She asserted she has twenty to thirty
8 seconds of warning at most before she must use the restroom, or she will
9 potentially soil herself. AR 49. Plaintiff also testified she can drive a vehicle,
10 shop, leave her house one to two times per week, dust, vacuum, read, and
11 walk. AR 40-43, 51.

12 The ALJ analyzed Plaintiff’s subjective symptoms and the medical and
13 opinion evidence regarding those symptoms for approximately four pages in
14 her decision, concluding the testimony was “not entirely consistent” with the
15 evidence. The ALJ agreed Plaintiff “had significant symptoms around her
16 initial diagnosis,” but found the evidence did “not demonstrate uncontrollable,
17 disabling limitations for any 12-month period.” AR 15-16.

18 The ALJ noted numerous instances when Plaintiff failed to follow
19 recommended treatment, including failing to pick up prescribed medication,
20 refusing recommended medication, missing a follow-up appointment,
21 cancelling scheduled colonoscopies, and refusing to reschedule testing. AR 15-
22 18 (citing AR 363, 481, 556, 662, 664, 778). Plaintiff’s failures were so
23 significant that treating physician Dr. Charles Thomas Chaya wrote, on
24 December 1, 2014, “I am reluctant to extend off work beyond 12/31/2014 if
25 there is not any conscious effort [on Plaintiff’s] part to take the medications in
26 trying to get better,” and again, on February 4, 2015, he would “not extend her
27 disability a third time if [Plaintiff] is not willing to have tests done to determine
28 if additional therapy is needed.” AR 16-17 (citing AR 620, 664). Dr. Chaya

1 concluded: “the issue with [Plaintiff] not getting better is that she is not taking
2 the medications soon after seeing me,” and “[Plaintiff] hasn’t demonstrated
3 any effort of trying to get better”; “[i]t would be fraud to excuse [Plaintiff] off
4 of work for the above reasons.” AR 622. Similarly, after Plaintiff declined
5 continued medication for diarrhea, Angela Denise Martin, M.D. explained she
6 “may not have much more to offer [Plaintiff] as extensive testing has been
7 done [and is] negative.” AR 778.

8 In assessing a claimant’s subjective testimony, “the ALJ may consider
9 . . . unexplained or inadequately explained failure . . . to follow a prescribed
10 course of treatment.” See Molina, 674 F.3d at 1112; see also Bunnell v.
11 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (same); Edlin v. Colvin, 2014 WL
12 5500311, at *5 (E.D. Wash. Oct. 30, 2014) (ALJ properly relied on claimant’s
13 lack of compliance with treatment in discounting credibility); 20 C.F.R. §§
14 404.1530, 416.930. As detailed immediately above, the ALJ noted repeated
15 instances of Plaintiff follow recommended treatment options—failures that
16 were so serious that one doctor raised the specter of fraud. The ALJ’s finding
17 regarding failure to follow treatment was a clear and convincing reason,
18 supported by substantial evidence, to discount Plaintiff’s statements of a
19 disabling impairment.

20 In addition, the ALJ found that after the initial diagnosis, Plaintiff’s
21 symptoms were “managed fairly well when [Plaintiff] followed treatment.” AR
22 15. The ALJ noted: (1) stool and blood testing showing Plaintiff’s stools were
23 solid, she had “normal” bowel movements of three to four per day, and her
24 colitis was “well controlled.” AR 15 (citing AR 873, 898-99, 921-22). The ALJ
25 afforded “significant weight” to the opinions of Office of Disability
26 Determination (“ODD”) physicians, who found that Plaintiff’s “condition had
27 improved to the point that she was capable of performing light work with
28 availability of restroom access and the ability to perform postural activities

1 occasionally,” and found those conclusions were consistent with the record
2 which “showed stabilization with treatment compliance.” AR 18. As noted,
3 Dr. Martin concluded she “may not have much more to offer [Plaintiff] as
4 extensive testing has been done [and is] negative.” AR 778.

5 “Impairments that can be controlled effectively with medication are not
6 disabling for the purpose of determining eligibility” for benefits. Warre v.
7 Comm'r of Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th Cir. 2006). As the
8 regulations direct, “[i]n order to get benefits, [claimants] must follow treatment
9 prescribed by [their] medical source(s) if this treatment is expected to restore
10 [their] ability to work. 20 C.F.R. § 404.1530(a). The ALJ properly discounted
11 Plaintiff’s subjective symptom testimony based upon evidence that showed
12 “improved control and stabilization” of those conditions. AR 15.

13 The ALJ also discounted Plaintiff’s subjective symptom testimony based
14 on her reported daily activities. AR 15. The Ninth Circuit has “repeatedly
15 warned that ALJs must be especially cautious in concluding that daily
16 activities are inconsistent with testimony about pain, because impairments that
17 would unquestionably preclude work and all the pressures of a workplace
18 environment will often be consistent with doing more than merely resting in
19 bed all day.” Garrison v. Colvin, 759 F.3d 995, 1016 (9th Cir. 2014); Vertigan
20 v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (“This court has repeatedly
21 asserted that the mere fact that a plaintiff has carried on certain daily activities,
22 such as grocery shopping, driving a vehicle, or limited walking for exercise,
23 does not in any way detract from her credibility as to her overall disability.”).
24 “[O]nly if his level of activity [was] inconsistent with [a claimant’s] claimed
25 limitations would these activities have any bearing on his credibility.”
26 Garrison, 759 F.3d at 1016

27 Here, without reaching the issue, even if the ALJ erred in relying on
28 Plaintiff’s activities of daily living as a basis for discounting her symptom

1 testimony, as long as there remains “substantial evidence supporting the ALJ’s
2 conclusions” and the error “does not negate the validity of the ALJ’s ultimate
3 [credibility] conclusion,” the error is deemed harmless and does not warrant
4 reversal. Batson, 359 F.3d at 1195-97; Williams v. Comm’r Soc. Sec. Admin.,
5 2018 WL 1709505, at *3 (D. Or. Apr. 9, 2018) (“Because the ALJ is only
6 required to provide a single valid reason for rejecting a claimant’s pain
7 complaints, any one of the ALJ’s reasons would be sufficient to affirm the
8 overall credibility determination.”) As there are two other proper bases for the
9 ALJ’s discounting of Plaintiff’s subjective symptom testimony, the Court does
10 not consider the purported basis based upon activities of daily living.

11 The ALJ provided sufficiently specific, clear, and convincing reasons for
12 discounting Plaintiff’s symptom testimony, specifically, the Plaintiff’s failure to
13 follow treatment and improvement with treatment. Those grounds, together,
14 are sufficient to affirm the ALJ’s findings with respect to Plaintiff’s symptom
15 testimony and the RFC assessment based upon those findings.²

18 ² Plaintiff also asserts, in two sentences, that the ALJ erred by not discussing
19 “in any meaningful way” the possibility of a closed period of disability. Jt. Stip. at 6.
20 An ALJ is required to consider a closed period of disability if evidence in the record
21 supports a finding that a person is disabled for a period of not less than twelve
22 months. See Reynoso v. Astrue, 2011 WL 2554210, at *3 (C.D. Cal. June 27, 2011).
23 Here, the ALJ stated, “the evidence does not demonstrate uncontrolled, disabling
24 limitations for any 12-month period.” AR 16. As noted above, the ALJ afforded
25 “[s]ignificant weight” to the DDS opinions which found Plaintiff’s condition had
26 improved to permit light work, with restrictions, within twelve months of the alleged
27 onset date, opinions the ALJ found were “consistent with the record.” AR 18 (citing
28 AR 70-72, 78-80, 89-91, 98-100). Accordingly, the ALJ did consider whether Plaintiff
was disabled for any twelve-month period and properly concluded, based upon
substantial evidence, that Plaintiff was not disabled for any closed period of
disability. See Rosales v. Colvin, 2013 WL 1410387, at *4-5 (D. Ariz. Apr. 8, 2013)
(finding the ALJ did not err in failing to consider a closed period of disability where
the ALJ’s decision was supported by substantial evidence).

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IV.
ORDER

IT THEREFORE IS ORDERED that Judgment be entered affirming the decision of the Commissioner and dismissing this action with prejudice.

Dated: March 12, 2019



JOHN D. EARLY
United States Magistrate Judge