UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JUANITA LOLA DIAZ, Plaintiff, v. CAROLYN W. COLVIN, Defendant.	NO: 1:14-CV-3050-FVS ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 15 and 18. This matter was submitted for consideration without oral argument. Plaintiff was represented by Thomas A. Bothwell. Defendant was represented by L. Jamala Edwards. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff Juanita Lola Diaz protectively filed for supplemental security income ("SSI") and disability insurance benefits on March 19, 2010. Tr. 208-209, 211-217. Plaintiff alleged an onset date of December 1, 2008. Tr. 208, 211. Benefits were denied initially and upon reconsideration. Tr. 129-142, 144-156. Plaintiff requested a hearing before an administrative law judge ("ALJ"), which was held before ALJ Kimberly Boyce on September 18, 2012. Tr. 53-100. Plaintiff was represented by counsel and testified at the hearing. Tr. 38-56. Vocational expert Trevor Duncan also testified. Tr. 57-62. The ALJ denied benefits (Tr. 10-29) and the Appeals Council denied review (Tr. 1). The matter is now before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and will therefore only be summarized here.

Plaintiff was 34 years old at the time of the hearing. Tr. 38. She testified that she dropped out of high school in the ninth grade but later obtained her GED. Tr. 44. Plaintiff previously worked as a home care provider and as a receptionist/front desk employee. Tr. 44-46, 231. Plaintiff claims she is disabled due to back problems, diabetes, liver damage and depression. *See* Tr. 147. She testified that she

can only take "short walks" and needs to lie down for approximately two hours per day due to "pain and pressure" in her neck, lower back, and lower extremities. Tr. 48, 55. Plaintiff can lift 8-10 pounds; and her family members help her with grocery shopping, give her rides, and remind her to take her medications. Tr. 50-51. She testified that she has been homeless for eight months prior to the hearing and sleeps on the couches of friends or family. Tr. 39-40.

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue,* 698 F.3d 1153, 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible

to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

FIVE–STEP SEQUENTIAL EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that he is not only unable to do his previous work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-(v); 416.920(a)(4) (i)-(v). At step one, the Commissioner considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. § § 404.1520(b); 416.920(b).

If the claimant is not engaged in substantial gainful activities, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c); 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. *Id.*

At step three, the Commissioner compares the claimant's impairment to several impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii); 416.920(a) (4)(iii). If the impairment is as severe or more

severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416 .920(d).

If the severity of the claimant's impairment does meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess the claimant's "residual functional capacity." Residual functional capacity ("RFC"), defined generally as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations (20 C.F.R. §§ 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § § 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a) (4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age,

education and work experience. *Id.* If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § § 404.1520(g)(1); 416.920(g) (1). If the claimant is not capable of adjusting to other work, the analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir.2010). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work "exists in significant numbers in the national economy." 20 C.F.R. § § 404.1560(c); 416.960(c)(2); *Beltran v. Astrue,* 700 F.3d 386, 389 (9th Cir.2012).

ALJ'S FINDINGS

At step one, the ALJ found Plaintiff has not engaged in substantial gainful activity since December 1, 2008, the application date. Tr. 15. At step two, the ALJ found Plaintiff has the following severe impairments: degenerative disc disease, obesity, diabetes mellitus, diabetic neuropathy, affective disorder, and anxiety disorder. Tr. 15. At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App'x 1. Tr. 16. The ALJ then found that Plaintiff had the RFC

> to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except she can lift and carry a total of 10 pounds frequently. The claimant can stand and walk for a total of 2 hours and sit for about 6 hours in an 8 hour work day with normal breaks. She can never climb ladders, ropes or scaffolds and can occasionally climb ramps and stairs, stoop, kneel, and crawl. She can frequently handle, finger, and feel with both upper extremities. The claimant should be exposed no more than occasionally to extreme cold, heat and vibration. She should never be exposed to hazards such as unprotected heights and heavy machinery. The claimant can perform work that does not require driving a motorized vehicle. In order to maintain attention, concentration, persistence and pace in an ordinary work setting on a regular and continuing basis and remain within customary tolerances of employers' rules regarding sick leave and absence, she can understand, remember and carry out routine, repetitive and unskilled work. In order to respond appropriately to coworkers and supervision, she can have occasional interactions with supervisors. She can work in proximity to co-workers, but not in a team or cooperative effort. She can perform work that does not require more than occasional interaction with the general public.

Tr. 18. At step four, the ALJ found Plaintiff is unable to perform any past relevant work. Tr. 23. At step five, the ALJ found that considering the Plaintiff's age, education, work experience, and RFC, there are jobs that exist in significant numbers in the national economy that Plaintiff can perform. Tr. 23. The ALJ concluded that Plaintiff has not been under a disability, as defined in the Social Security Act, from December 1, 2008, through the date of this decision. Tr. 24.

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, Plaintiff asserts: (1) the ALJ erred by improperly rejecting the opinions of Plaintiff's treating and examining medical providers, Dr. David A. Lindgren and Gabriela Mondragon, M.S.W.; and (2) the

ALJ failed to meet her step five burden. ECF No. 17 at 10-18. Defendant argues: (1) the ALJ properly discredited Plaintiff's subjective complaints of disability; [1] (2) the ALJ properly evaluated the medical evidence; and (3) the ALJ's RFC and disability findings were proper. ECF No. 18 at 6-20.

DISCUSSION

A. Medical Opinions

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001)(citations omitted). Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a

[1] In her reply brief Plaintiff confirms that she "did not contend in her opening brief that the ALJ failed to meet his legal burden" as to Plaintiff's credibility, and therefore argues that "[Plaintiff's] credibility is not at issue in this appeal." ECF No. 19 at 2. However, as discussed briefly below, the court did review the credibility findings in order to assess the ALJ's reasoning that Ms. Mondragon's opinion was entitled to little weight because it was based in large part on Plaintiff's properly discounted subjective complaints. *See Tommasetti*, 533 F.3d at 1041.

reviewing physician's. *Id.* If a treating or examining physician's opinion is uncontradicted, the ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.2005). Conversely, "[i]f a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)). Plaintiff argues the ALJ improperly rejected the opinions of Plaintiff's treating and examining providers, Dr. David A. Lindgren and Gabriela Mondragon, M.S.W. ECF No. 15 at 10-17.

1. Dr. David A. Lindgren

In September 2012, Plaintiff's treating physician Dr. Lindgren completed a one-page "medical questionnaire," which consisted solely of checking a box stating that he "do[es] not believe that the patient is capable of performing any type of work on a reasonably continuous, sustained basis (e.g. eight hours a day, five days a week, or approximately 40 hours per week, consistent with a normal work routine)." Tr. 407. The ALJ accorded "no weight" to Dr. Lindgren's opinion for several reasons. Tr. 22. First, the ALJ rejected Dr. Lindgren's opinion because it was "on a check-box form, which does not contain any explanation of the bases for his conclusion." Tr. 22. Plaintiff argues that "[t]he fact that an opinion is rendered

on a check box form does not, by itself, render a medical opinion invalid. What matters is whether the check box assessment is supported by the record." ECF No. 15 at 11. Plaintiff offers no legal authority for the proposition, nor is the court aware of any requirement that the ALJ consider the entire medical record before reasoning that a check-box form was not adequately supported by an explanation for the conclusions *in that opinion*. Indeed, it is widely held in the Ninth Circuit that opinions on a check-box form that do not contain significant explanation of the basis for the conclusions may be accorded little or no weight. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). Here, Dr. Lindgren merely checked a single box indicating that Plaintiff was not capable of performing any type of work, with no explanation whatsoever of the basis for this conclusions. Tr. 407. This was a specific and legitimate reason for the ALJ to reject Dr. Lindgren's opinion.

Second, the ALJ found that Dr. Lindgren's treatment notes did not support his opinion that Plaintiff was not capable of performing any type of work.[2] Tr. 22

[2] Defendant surmises that "[w]ithout detailed notes indicating what tests or examinations, if any, Dr. Lindgren may have performed to reach his conclusions; it appears more likely than not that he rendered his opinions based solely on Plaintiff's subjectively reported discredited symptoms." ECF No. 18 at 16. However, the ALJ did not offer this reasoning in the decision, and the court

(citing 395-406). In support of this reasoning, the ALJ specifically noted that "Dr. Lindgren's treatment notes indicate that the claimant has normal gait and station and normal strength in her lower extremities." Tr. 22 (citing 399, 403, 406). An ALJ may reject a physician's opinion if it is not supported by his or her own treatment notes. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). As an initial matter, the court may decline to address this issue as it was not raised with specificity in Plaintiff's briefing. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). After an independent review of the record, the court notes that the largely normal exam results reported by Dr. Lindgren in his treatment notes are moderated by one finding of "tenderness to palpation" in the thoracic and lumbar spinal areas. Tr. 403. However, even Plaintiff's extensive list of medical evidence allegedly supporting Dr. Lindgren's opinion does not include any citation to Dr. Lindgren's own treatment notes. See ECF No. 15 at 11-14. Moreover, even if Dr. Lindgren's treatment notes could be interpreted more favorably to Plaintiff, "where evidence is susceptible to more than one rational interpretation, it is the [Commissioner's] conclusion that must be

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"review[s] the ALJ's decision based on the reasoning and factual findings offered by the ALJ – not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." ECF No. 15 at 2 (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009)).

upheld." *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). This was a specific and legitimate reason for the ALJ to reject Dr. Lindgren's opinion.

2. Gabriela Mondragon, M.S.W.

In January 2010, Ms. Mondragon completed a psychological/psychiatric evaluation of the Plaintiff that assessed marked limitations in Plaintiff's ability to understand, remember and follow complex (more than two step) instructions; exercise judgment and make decisions; relate appropriately to co-workers and supervisors; interact appropriately in public contacts; and respond appropriately to the pressures and expectations of a normal work setting. Tr. 269. The ALJ gave "little weight" to Ms. Mondragon's opinion for several reasons. Tr. 22-23.

First, the ALJ rejected Ms. Mondragon's opinion because she is not an acceptable medical source. Tr. 22. Plaintiff argues this was not a valid reason to reject Ms. Mondragon's opinion. ECF No. 15 at 14-15. The court agrees in part. Ms. Mondragon is a social worker, and thus in accordance with 20 C.F.R. § 416.913(a), the ALJ is correct that she is not an "acceptable medical source." Instead, Ms. Mondragon qualifies as an "other source" as defined in 20 C.F.R. § 416.913(d). The ALJ need only provide "germane reasons" for disregarding an "other source" opinion. *Molina*, 674 F.3d at 1111. However, the ALJ is required to "consider observations by nonmedical sources as to how an impairment affects a claimant's ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.

1987). Moreover, "[t]he fact that a medical opinion is from an 'acceptable medical source' is a factor that may justify giving that opinion greater weight than an opinion from a medical source who is not an 'acceptable medical source'…. However, depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, an opinion from a medical source who is not an 'acceptable medical source' may outweigh the opinion of an 'acceptable medical source.'" SSR 06-03p (Aug. 9, 2006), *available at* 2006 WL 2329939 at *5. Thus, while the ALJ may give less weight to Ms. Mondragon's opinion because it is not from an "acceptable medical source;" it would be error to reject Ms. Mondragon's opinion *solely* on this basis. However, any error is harmless in this case because the ALJ gave several additional germane reasons for granting Ms. Mondragon's opinion little weight. *See Carmickle*, 533 F.3d at 1162-63.

Next, the ALJ found that "Ms. Mondragon provides no explanation for listing marked severity for some of the claimant's functional limitations." Tr. 22. As noted in the previous section, opinions on a check-box form that do not contain significant explanation of the basis for the conclusions may be accorded little or no weight. *See Crane*, 76 F.3d at 253; *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) ("an ALJ need not accept a [] physician's opinion that is conclusory and brief and unsupported by clinical findings"). Plaintiff briefly argues that Ms. Mondragon did give sufficient explanation for finding marked limitations

because on her report she noted symptoms including sadness daily, sleep disturbance, and fatigue; and then opined that these respective symptoms "may exasperate" work activities including concentration, decision making, energy, and working with others. Tr. 207. However, the symptoms identified by Ms. Mondragon were based almost entirely on Plaintiff's self-report that she is "sad and tearful on a daily basis" which "makes it difficult to interact with friends and family;" and "unable to sleep at night;" and "has difficulty sustaining energy to maintain own health." Tr. 207. The only symptom Ms. Mondragon actually observed during the examination was Plaintiff's alleged sadness. Tr. 207. Additionally, aside from the portion of the evaluation noted by Plaintiff, every single explanatory remark by Ms. Mondragon is a direct restatement of Plaintiff's own subjective reports, which does not clarify Ms. Mondragon's reasoning behind her opined marked functional limitations. Tr. 266-271. Finally, on the attached "adult mental status summary" Ms. Mondragon reports that Plaintiff is "well groomed," "clean and casual," and cooperative; and while she notes Plaintiff was "tearful" and her eye contact was limited, Ms. Mondragon comments that it was difficult to determine Plaintiff's behavior because she did not remove her sunglasses. Tr. 272. The court finds Ms. Mondragon's notes are minimal and based in large part on Plaintiff's properly rejected subjective complaints (see discussion *supra*), and therefore the ALJ reasonably found insufficient explanation for the

marked functional limitations assessed in Ms. Mondragon's evaluation. Moreover, this evidence could be susceptible to more than one rational interpretation, and therefore the ALJ's conclusion must be upheld. *See Burch*, 400 F.3d at 679.

Finally, the ALJ found that "Ms. Mondragon mostly relied on the claimant's subjective statements to form the basis for her opinion." Tr. 22. "An ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti*, 533 F.3d at 1041. As an initial matter, it is notable that Plaintiff fails to assign error to the ALJ's adverse credibility finding in this case. *See Carmickle*, 533 F.3d at 1161 n.2 (the court need not address issue not argued with specificity in Plaintiff's brief). The ALJ's credibility findings in this case are specific, clear and convincing, and unchallenged. Tr. 18-21. As noted by Defendant, the ALJ properly supported the adverse credibility finding with reasons supported by substantial evidence, including: the objective evidence did not support Plaintiff's claim of disability; Plaintiff failed to follow through with recommended treatment and pursued narcotic pain medication to the exclusion of other available treatment options; her daily activities were inconsistent with her alleged limitations; and she provided inconsistent statements about her substance abuse. *See id*.; ECF No. 18 at 6-15. Plaintiff argues that this was not a valid reason to reject Ms. Mondragon's opinion because "there is nothing to suggest that Ms. Mondragon unduly relied on

[Plaintiff's subjective] statements without engaging in critical thinking." ECF No. 15 at 15-16. Plaintiff then proceeds to cite portions of the medical record that she argues provide support for Ms. Mondragon's assessment of marked limitations. ECF No. 15 at 16-17. However, general support for Plaintiff's claims drawn from the longitudinal record is irrelevant to an analysis of the ALJ's finding that the *specific* evaluation form completed by Ms. Mondragon was based largely on claimant's self-reported symptoms. This was a germane reason to reject Ms. Mondragon's opinion.

B. Step Five

The ALJ may meet his burden of showing the claimant can engage in other substantial activity at step five by propounding a hypothetical to a vocational expert "that is based on medical assumptions supported by substantial evidence in the record that reflects all the claimant's limitations. The hypothetical should be 'accurate, detailed, and supported by the medical record.'" *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). However, "[i]f an ALJ's hypothetical does not reflect all of the claimant's limitations, then the expert's testimony has no evidentiary value to support a finding that the claimant can perform jobs in the national economy." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)(citation and quotation marks omitted).

Plaintiff argues that the ALJ erred at step five by failing to account for the limitations identified by Dr. Lindgren and Ms. Mondragon in the RFC and hypothetical. ECF No. 15 at 17-18. However, Plaintiff's arguments are based on the assumption that the ALJ erred in considering the medical opinion evidence. As discussed in detail above, the ALJ's reasons for rejecting Dr. Lindgren's and Ms. Mondragon's opinions were legally sufficient and supported by substantial evidence. Thus, the ALJ did not err by excluding the limitations assessed by those providers from the RFC and hypothetical posed to the vocational expert ("VE"), and the ALJ properly relied on the VE's testimony at step five.

CONCLUSION

After review the court finds the ALJ's decision is supported by substantial evidence and free of harmful legal error.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.
2. Defendant's Motion for Summary Judgment, ECF No. 18, is **GRANTED**.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE** the file.

DATED this 30th day of April, 2015.

s/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge