

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

Feb 01, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TASHA L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-03047-JTR

ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney D. James Tree represents Tasha L. (Plaintiff); Special Assistant United States Attorney Leisa Wolf represents the Commissioner of Social Security (Defendant). The Parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Plaintiff’s motion for summary judgment and **GRANTS** Defendant’s motion for summary judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on June 23, 2014, Tr. 118, alleging disability since June 1, 2014, Tr. 215, due to migraines, depression, anxiety, asthma, insomnia, stomach problems, and

1 posttraumatic stress disorder.¹ Tr. 239. The application was denied initially and
2 upon reconsideration. Tr. 144-52, 156-61. Administrative Law Judge (ALJ) Keith
3 J. Allred held a hearing on November 2, 2016 and heard testimony from Plaintiff
4 and vocational expert Roni Lenore. Tr. 69-90. The ALJ issued an unfavorable
5 decision on January 5, 2017. Tr. 18-28. The Appeals Council denied review on
6 January 26, 2018. Tr. 1-5. The ALJ's January 5, 2017 decision became the final
7 decision of the Commissioner, which is appealable to the district court pursuant to
8 42 U.S.C. §§ 405(g), 1383(c). Plaintiff initiated this action for judicial review on
9 March 30, 2018. ECF Nos. 1, 4.

10 **STATEMENT OF FACTS**

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

14 Plaintiff was 27 years old at the date of application. Tr. 215. The highest
15 grade Plaintiff completed was the eighth. Tr. 240, 313. Her reported work history
16 includes customer service jobs in food service, retail, and crowd management. Tr.
17 76, 240. When applying for benefits Plaintiff reported that she stopped working on
18 October 31, 2011 because of her conditions. Tr. 239.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

25
26 ¹Plaintiff had a prior application for benefits that was denied following an
27 ALJ hearing, and the Appeal Council denied review on March 19, 2014. Tr. 91-
28 117.

1 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
2 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
3 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
4 another way, substantial evidence is such relevant evidence as a reasonable mind
5 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
6 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
7 interpretation, the court may not substitute its judgment for that of the ALJ.
8 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
9 findings, or if conflicting evidence supports a finding of either disability or non-
10 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
11 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
12 evidence will be set aside if the proper legal standards were not applied in
13 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
14 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); see *Bowen*
18 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
19 proof rests upon the claimant to establish a prima facie case of entitlement to
20 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
21 claimant establishes that physical or mental impairments prevent her from
22 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
23 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
25 other work, and (2) specific jobs which the claimant can perform exist in the
26 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
27 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
28 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

1 **ADMINISTRATIVE DECISION**

2 On January 5, 2017, the ALJ issued a decision finding Plaintiff was not
3 disabled as defined in the Social Security Act from June 23, 2014 through the date
4 of the decision. He found that the presumption of continuing non-disability created
5 by the prior unfavorable ALJ decision did not apply to the current application. Tr.
6 18.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since June 23, 2014, the date of application. Tr. 20.

9 At step two, the ALJ determined that Plaintiff had the following severe
10 impairments: affective disorder and anxiety disorder. Tr. 20-21.

11 At step three, the ALJ found that Plaintiff did not have an impairment or
12 combination of impairments that met or medically equaled the severity of one of
13 the listed impairments. Tr. 21.

14 At step four, the ALJ assessed Plaintiff's residual function capacity and
15 determined she could perform a range of work at all exertional levels with the
16 following nonexertional limitations:

17 she can perform the basic mental demands of competitive, remunerative
18 unskilled work, including the ability to understand, carry out, and
19 remember simple instructions. She can respond appropriately to
20 supervision, coworkers, and usual work situations, and to deal with
21 changes in a routine work setting. She requires work that involves only
22 occasional interaction with the general public and no more than
frequent interaction with supervisors and coworkers.

23 Tr. 24. The ALJ found Plaintiff had no past relevant work. Tr. 26.

24 At step five, the ALJ determined that, considering Plaintiff's age, education,
25 work experience and residual functional capacity, and based on the testimony of
26 the vocational expert, there were other jobs that exist in significant numbers in the
27 national economy Plaintiff could perform, including the jobs of industrial cleaner,
28 hand packager, cleaner housekeeping, and packing line worker. Tr. 27. The ALJ

1 concluded Plaintiff was not under a disability within the meaning of the Social
2 Security Act from June 23, 2014, through the date of the ALJ's decision. Tr. 28.

3 **ISSUES**

4 The question presented is whether substantial evidence supports the ALJ's
5 decision denying benefits and, if so, whether that decision is based on proper legal
6 standards. Plaintiff contends the ALJ erred by (1) failing to find Plaintiff's
7 impairments of obesity and migraines as medically determinable and severe at step
8 two, (2) failing to properly weigh the opinion of Manuel Gomes, Ph.D., (3) failing
9 to properly weigh the evidence provided by Plaintiff's mother, and (4) failing to
10 properly weigh Plaintiff's symptom statements.

11 **DISCUSSION²**

12 **1. Step Two**

13 Plaintiff challenges the ALJ's step two determination by arguing that the
14 ALJ erred by (1) failing to find Plaintiff's obesity a medically determinable
15 impairment and (2) failing to find Plaintiff's migraines severe. ECF No. 5-10.

16 At step two of the sequential process, the ALJ must determine whether a
17 claimant suffers from a "severe" impairment. 20 C.F.R. § 416.920(c). To show a
18 severe impairment, the claimant must first establish the existence of a medically
19 determinable impairment by providing medical evidence consisting of signs,
20

21
22 ²In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 symptoms, and laboratory findings. 20 C.F.R. § 416.921.³ The claimant’s own
2 statement of symptoms, a diagnosis, or a medical opinion is not sufficient to
3 establish the existence of an impairment. Id. “[O]nce a claimant has shown that
4 [she] suffers from a medically determinable impairment, [she] next has the burden
5 of proving that these impairments and their symptoms affect [her] ability to
6 perform basic work activities.” Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th
7 Cir. 2001). If the claimant fulfills this burden, the ALJ must find the impairment
8 “severe.” Id.

9 Plaintiff failed to provide any medical evidence in this case. The record
10 contains seven exhibits. The first is a response to Social Security’s request for
11 records made to Central Washington Comprehensive Mental Health dated July 23,
12 2014 stating that the facility had no records for Plaintiff. Tr. 308. The second is a
13 statement from Diana Cook, Ph.D. that Plaintiff failed to attend a prearranged
14 consultative examination. Tr. 309. The third is a similar statement from William
15 Drenguis, M.D., that Plaintiff failed to attend the prearranged consultative
16 examination. Tr. 310. The fourth is a physiological consultative examination
17 completed by Manuel Gomes, Ph.D. Tr. 311-19. The fifth is a statement from
18 Mary Pellicer, M.D., that Plaintiff failed to attend a prearranged consultative
19 examination. Tr. 320. The sixth is a physical consultative examination completed
20 by Dr. Pellicer. Tr. 321-29. The seventh exhibit is a response to Social Security’s
21 request for records from Yakima Neighborhood Health Services stating that
22 Plaintiff was not a patient at their facility. Tr. 330-33. Plaintiff testified that she
23 had health insurance at the time of the hearing and had received treatment for
24 conditions other than those she alleged on her application. Tr. 84.

25 ///

26
27 ³Prior to March 17, 2017, these requirements were set forth in 20 C.F.R.
28 §416.908, 416.928 (2016).

1 **A. Obesity**

2 The ALJ’s decision is silent regarding the impairment of obesity. Tr. 18-28.
3 Plaintiff argues that the medical evidence establishes obesity as a medically
4 determinable impairment and the ALJ’s failure to consider it at step two and in
5 forming the residual functional capacity determination was harmful error. ECF
6 No. 14 at 5-8.

7 The only height and weight measurements in the file show Plaintiff to be
8 five feet, one and a half inches tall and 193 pounds. Tr. 323. Dr. Pellicer
9 described her as “over weight.” Id. Additionally, Dr. Gomes diagnosed her as
10 “overweight,” but did not measure her height and weight. Tr. 316. The record is
11 sufficient to establish the impairment of obesity as medically determinable under
12 20 C.F.R. § 416.921 based on the height and weight measurements from Dr.
13 Pellicer. See 20 C.F.R. § 416.902(l) (defining “sign” as anatomical, physiological,
14 or psychological abnormalities that can be observed, apart from a claimant’s
15 statements and requiring that they be shown by medically acceptable clinical
16 diagnostic techniques).

17 The ALJ’s failure to list obesity as a medically determinable impairment at
18 step two was an error. However, it was harmless because the Plaintiff failed to
19 allege any functional limitations resulting from her obesity. *Burch v. Barnhart*,
20 400 F.3d 676, 684 (9th Cir. 2005) (The Ninth Circuit found no reversible error in
21 the ALJ’s [residual functional capacity] determination when there was no evidence
22 in the record of any functional limitations due to obesity that the ALJ failed to
23 consider.). While Plaintiff hypothesized about potential functional limitations, she
24 could not point to any specific limitation established in the record. See ECF No.
25 14 at 7-8 (asserting that a person with severe affective and anxiety disorders and
26 obesity “may have reductions in mental clarity that affect her ability to respond
27 appropriately to supervision, deal with changes in the workplace, remain on-task,
28 or complete her work that are not related in the current [residual functional

1 capacity].”).

2 **B. Migraines**

3 Plaintiff asserts that the ALJ erred by finding Plaintiff’s migraines to be non-
4 severe. ECF No. 14 at 8-10.

5 The ALJ acknowledged that Plaintiff had complained of migraines, but
6 stated “I find she has no severe physical impairment. There are simply no
7 treatment records to substantiate her complaints. Furthermore, despite her
8 complaints of having migraines on a weekly basis, she was not on any treatment or
9 prophylaxis.” Tr. 21. The regulations specifically state that a claimant’s
10 statements regarding the existence of an impairment is not sufficient to establish
11 the existence of an impairment, let alone that an impairment is severe. 20 C.F.R. §
12 416.921. The only evidence in the record of migraines, is Plaintiff’s report of
13 migraines. Tr. 311-12 (“She reports having migraines starting when she was 14
14 years old but has been worse since 2006-2007 and she usually gets two to three
15 migraines a week, sometimes more.”), Tr. 321 (“Claimant says that in 2006 she
16 started having problems with migraines. . . She now gets migraines 2-3 times a
17 week and they last all day.”).

18 Plaintiff argues that the lack of evidence should not be held against her since
19 she did not have the financial means to obtain treatment. ECF No. 14 at 9-10. The
20 Ninth Circuit has found that a claimant cannot be denied benefits on the basis of
21 not obtaining treatment she cannot afford, *Gamble v. Chater*, 68 F.3d 319, 321 (9th
22 Cir. 1995); however, the inability to afford treatment cannot negate Plaintiff’s
23 burden of proof, *Tackett*, 180 F.3d at 1098-99 (In steps one through four, the
24 burden of proof rests upon the claimant.). The record demonstrates that Plaintiff
25 sought treatment for migraines at some point prior to her application for benefits.
26 Tr. 321 (“She was [on] Topamax for a while and used Imitrex. The Topamax
27 worked well to prevent he migraines.”); Tr. 312 (“She is no longer able to take
28 Topamax so she tries to treat herself with Excedrin migraine headache because she

1 cannot afford hospital bills.”); Tr. 97 (The prior ALJ’s decision shows that Plaintiff
2 sought treatment for migraines.). Plaintiff failed to provide the evidence required
3 to establish the impairment and its severity. Therefore, the Court will not disturb
4 the ALJ’s step two determination.

5 **2. Manuel Gomes, Ph.D.**

6 Plaintiff argues that the ALJ failed to properly consider and weigh the
7 medical opinion expressed by examining physician Dr. Gomes. ECF No. 14 at 10-
8 14.

9 When an examining physician’s opinion is not contradicted by another
10 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
11 and when an examining physician’s opinion is contradicted by another physician,
12 the ALJ is only required to provide “specific and legitimate reasons” to reject the
13 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
14 met by the ALJ setting out a detailed and thorough summary of the facts and
15 conflicting clinical evidence, stating his interpretation thereof, and making
16 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
17 required to do more than offer his conclusions, he “must set forth his
18 interpretations and explain why they, rather than the doctors’, are correct.”
19 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

20 Dr. Gomes completed a consultative examination of Plaintiff on September
21 29, 2014. Tr. 311-18. He listed her diagnoses as other specified trauma and stress
22 related disorder, generalized anxiety disorder, unspecified sleep-wake disorder,
23 migraine, moderate major depressive disorder, unspecified attention
24 deficit/hyperactivity disorder by history, academic/educational problem,
25 insufficient social insurance or welfare support, overweight, and asthma. Tr. 316.
26 He provided a detailed medical source statement in which he found Plaintiff to
27 have moderate impairments in the following abilities: (1) to perform detailed and
28 complex tasks; (2) to interact with coworkers and the public; (3) to perform work

1 activities on a consistent basis without special or additional instruction; (4) to
2 maintain regular attendance in the workplace; (5) to complete a normal
3 workday/workweek without interruptions from a psychiatric condition; and (6) to
4 deal with usual stress encountered in the workplace. Tr. 317-18.

5 The ALJ assigned only some weight to the opinion finding that the mild to
6 moderate limitations were “generally consistent with [Dr. Gomes’] examination
7 and the other evidence.” Tr. 26. The ALJ specifically addressed the issue of
8 attendance by stating that, “[w]hile Dr. Gomes opined that the claimant had
9 moderate impairment for performing activities on a consistent basis, maintaining
10 attendance, and completing a normal workday/workweek without interruptions, I
11 do not find that these would prevent the claimant from engaging in substantial
12 gainful activity at the simple unskilled level.” Id. The ALJ gave three reasons for
13 rejecting the attendance portion of the opinion: (1) Plaintiff did not require
14 redirection despite admitting to being distracted by the football game on her phone
15 during the exam, (2) Plaintiff’s mood and affect were unremarkable in the two
16 examinations in the record, and (3) there was no treatment for mental health
17 impairments in the record despite Plaintiff’s allegations of mental health
18 symptoms. Id.

19 Dr. Gomes is an examining physician which is contradicted by the opinions
20 of the Agency reviewers. See Tr. 126, 138 (John F. Robinson, Ph.D. and Michael
21 L. Brown, Ph.D. opining no significant limitation in the ability to complete a
22 normal workday and workweek without interruptions from psychologically based
23 symptoms and to perform at a consistent pace without unreasonable number and
24 length of rest periods.). Therefore, the ALJ was only required to provide specific
25 and legitimate reasons for rejecting the opinion. Lester, 81 F.3d at 830-31.

26 The ALJ’s first reason for rejecting the opinion, that Plaintiff did not require
27 redirection, is specific and legitimate. The ALJ found that Plaintiff did not require
28 redirection during the evaluation despite admitting that she was preoccupied by

1 following the football game on her phone. Tr. 26. An ALJ may cite internal
2 inconsistencies in evaluating a physician's report. *Bayliss v. Barnhart*, 427 F.3d
3 1211, 1216 (9th Cir. 2005). Dr. Gomes found that Plaintiff was able to follow a
4 simple three-step command, and was able to spell the word HOUSE both forward
5 and backwards. Tr. 315. Plaintiff was able to complete these concentration
6 portions of the evaluation while "She was fiddling with her mobile phone
7 throughout her evaluation, which she acknowledged at the end was because she
8 was following the New England Patriots football game on her phone." Tr. 314.
9 Despite the distraction of the phone, Dr. Gomes did not report that he had to
10 remind her to stay on task or draw her back into the topic of conversation. Plaintiff
11 argues that Dr. Gomes' observation that Plaintiff was preoccupied with a football
12 game rather than the evaluation supports his finding that she had social limitations.
13 ECF No. 14 at 13. However, the ALJ is not rejecting Dr. Gomes' opinion of
14 Plaintiff's social limitations, but rather the opinion regarding her ability to
15 maintain concentration and attendance.

16 The ALJ's second reason for rejecting the opinion, that it was inconsistent
17 with the two evaluations in the record, is specific and legitimate. Inconsistency
18 with the majority of objective evidence is a specific and legitimate reason for
19 rejecting physician's opinions. *Batson*, 359 F.3d at 1195. Under the section for
20 mood/affect, Dr. Gomes stated "She described her current mood as 'fine, I guess. I
21 don't know.' Her mood appeared to be congruent. She appeared to be distracted,
22 which apparently was because she was attending to her football game while
23 answering questions from her evaluation. She appeared to be of average IQ
24 range." Tr. 314. On October 14, 2014, Dr. Pellicer found she had a normal mood
25 and affect. Tr. 323. The ALJ found that these normal observations were
26 inconsistent with the opined limitation in performing activities on a consistent
27 basis, maintaining attendance, and completing a normal workday/workweek
28 without interruptions. Tr. 26. Here, the ALJ's determination is supported by

1 substantial evidence and meets the specific and legitimate standard.

2 The ALJ's third reason for rejecting the opinion, that Plaintiff failed to seek
3 treatment, is specific and legitimate. The ALJ found that the lack of treatment in
4 the record suggests that Plaintiff's symptoms were stable and/or were not limiting
5 her to the extent that she claimed. Tr. 26. The administrative record contains no
6 treatment records. There is evidence that the agency attempted to gather records,
7 but all responses indicated that there were no records for the period requested. Tr.
8 308, 330. In addition, before attending the September 2014 psychological
9 evaluation with Dr. Gomes, Plaintiff failed to show up for a previously schedule
10 evaluation with Dr. Cook. Likewise, prior to the October 2014 physical evaluation
11 by Dr. Pellicer, Plaintiff failed to show up for two previously scheduled
12 evaluations with Dr. Drenguis and Dr. Pellicer. Plaintiff argues that the ALJ
13 cannot rely on the lack of treatment because Plaintiff did not have the economic
14 means to seek treatment. ECF N. 14 at 13. Plaintiff testified at her hearing that
15 she had medical insurance and had sought treatment for conditions that were not
16 alleged on her application. Tr. 84 (stating that she had medical insurance and had
17 sought care for UTIs). Considering Plaintiff was capable of seeking treatment for
18 physical impairments that caused her discomfort, the ALJ's conclusion that her
19 failure to seek treatment demonstrated a lack of severity is supported by substantial
20 evidence. Furthermore, Plaintiff's inability to afford treatment does not negate her
21 burden of proof at steps one through four. Tackett, 180 F.3d at 1098-99 (In steps
22 one through four, the burden of proof rests upon the claimant.). The Court will not
23 disturb the ALJ's treatment of Dr. Gomes' opinion.

24 **3. Plaintiff's Mother**

25 Plaintiff's mother completed a Function Report in August of 2014. Tr. 262-
26 69. The ALJ reviewed the report and gave it "little weight," for two reasons: (1)
27 her allegations mirrored Plaintiff's allegations and (2) her report was inconsistent
28 with Plaintiff's report to the consultative examiner. Tr. 25.

1 Lay witness testimony is “competent evidence” as to “how an impairment
2 affects [a claimant’s] ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454
3 F.3d 1050 (9th Cir. 2006); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th
4 Cir. 1993) (“[F]riends and family members in a position to observe a claimant’s
5 symptoms and daily activities are competent to testify as to her condition.”). An
6 ALJ must give “germane” reasons to discount evidence from these “other sources.”
7 *Dodrill*, 12 F.3d at 919.

8 The ALJ’s first reason for rejecting the statements of Plaintiff’s mother, that
9 they mirrored Plaintiff’s allegations, is legally sufficient. The Ninth Circuit has
10 found that lay witness testimony which mirrors the claimant’s unreliable testimony
11 can be rejected: “Where lay witness testimony does not describe any limitations
12 not already described by the claimant, and the ALJ’s well-supported reasons for
13 rejecting the claimant’s testimony apply equally well to the lay witness testimony.”
14 *Molina v. Astrue*, 674 F.3d 1104, 1117 (9th Cir. 2012). Here, Plaintiff’s mother
15 and Plaintiff described severe mental health impairments and migraines. Tr. 77-
16 81, 262, 267-69. The ALJ rejected the severity of the symptoms and limitations
17 described by Plaintiff because she has failed to seek treatment despite having
18 insurance, she has not demonstrated any change since the prior application, and her
19 mood has appeared fine in her two examinations. Tr. 25. As discussed below, the
20 first and the third reasons the ALJ provided for rejecting the severity of symptoms
21 Plaintiff reported were legally sufficient. Therefore, it is also legally sufficient to
22 reject the testimony of Plaintiff’s mother to the extent her testimony mirrors that of
23 Plaintiff.

24 The ALJ’s second reason for rejecting the statements of Plaintiff’s mother,
25 that her report was inconsistent with Plaintiff’s report to the consultative examiner,
26 is legally sufficient. While third party testimony that mirrors the claimant’s
27 statements can be rejected for the same reasons the claimant’s statements are
28 rejected, third party testimony can also be rejected because it was inconsistent with

1 the claimant's statements. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).
2 Here, the ALJ compared the statement from Plaintiff's mother that Plaintiff's only
3 chore was to clean her room with help and found this inconsistent with Plaintiff's
4 reports to Dr. Pellicer that she was able to do household chores such as washing
5 dishes, grocery shopping, running errands, vacuuming, mopping, making her bed,
6 preparing meals, and laundry. Tr. 25. Plaintiff's mother reported in August of
7 2014 that "she will clean her room with help from me, she doesn't do any other
8 chores." Tr. 264. However, in October of 2014 Plaintiff reported that her typical
9 day included fixing meals and doing chores. Tr. 322. She stated she was able to:
10 wash dishes, grocery shop, run errands, vacuum, mop, make her bed, prepare
11 meals, and wash the laundry. *Id.* Much like the portions of the testimony that
12 mirror Plaintiff's reported severity, this portion of the testimony, which exceeds
13 the severity Plaintiff reported, renders the testimony unreliable. Therefore, the
14 ALJ's reason is supported by substantial evidence and meets the germane standard.
15 The Court will not disturb the ALJ's treatment of this evidence.

16 **4. Plaintiff's Symptom Statements**

17 Plaintiff contests the ALJ's determination that Plaintiff's symptom
18 statements were unreliable. ECF No. 14 at 17-19.

19 It is generally the province of the ALJ to determinations regarding the
20 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
21 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
22 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
23 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
24 and convincing." *Smolen*, 80 F.3d at 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834.
25 "General findings are insufficient: rather the ALJ must identify what testimony is
26 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
27 F.3d at 834.

28 The ALJ found Plaintiff's statements concerning the intensity, persistence,

1 and limiting effects of her symptoms to be “not entirely consistent with the medical
2 evidence and other evidence in the record.” Tr. 24. Specifically, the ALJ found
3 that (1) Plaintiff’s statements were inconsistent with the lack of medical evidence,
4 (2) there was no significant change since the prior ALJ decision in her case, and
5 (3) Plaintiff failed to exhibit maximum effort in her testing. Tr. 25

6 **A. Medical Evidence**

7 The ALJ’s first reason for finding Plaintiff’s statements unreliable, that
8 Plaintiff’s symptoms were inconsistent with the lack of medical evidence in the
9 record, is specific, clear, and convincing.

10 Unexplained or inadequately explained reasons for failing to seek medical
11 treatment cast doubt on a claimant’s subjective complaints. *Fair v. Bowen*, 885
12 F.2d 597, 603 (9th Cir. 1989); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996)
13 (finding the ALJ’s decision to reject the claimant’s subjective pain testimony was
14 supported by the fact that claimant was not taking pain medication). Here the ALJ
15 found that despite Plaintiff testifying that she had insurance beginning January or
16 February of 2016, Plaintiff failed to seek any treatment. Tr. 25. Additionally, the
17 ALJ found that in October of 2014, she reported that she was getting back on
18 insurance, but there is still no treatment evidence. *Id.* The ALJ also concluded
19 that she failed to appear in to any Emergency Room where she could not be denied
20 treatment due to lack of insurance. *Id.* The ALJ found that “her failure to resume
21 treatment after getting insurance suggests that her symptoms are not as severe as
22 alleged.” *Id.*

23 Plaintiff argues that her failure to seek treatment cannot be held against her
24 because her lack of financial resources prevented her from seeking such treatment
25 and that when she did have medical insurance it too was a barrier to treatment
26 because the locations she sought treatment did not accept her insurance. ECF No.
27 14 at 18-19. The administrative record does not contain a single piece of treatment
28 evidence. Plaintiff reported to Dr. Pellicer that she was “just getting back on

1 insurance and would like to get back into counseling and on meds if she can.” Tr.
2 321. Additionally, at the 2016 hearing she testified that she had received medical
3 insurance in January or February of that year, but could not find places that
4 accepted her insurance. Tr. 79-80, 84-85. Yet in her testimony, Plaintiff reported
5 that she had sought and received treatment for impairments other than those
6 alleged in her application since being covered for insurance. Tr. 84. Considering
7 that despite health insurance, Plaintiff failed to seek any treatment for her
8 symptoms, the ALJ’s determination is specific, clear and convincing.

9 **B. Prior ALJ Decision**

10 The ALJ’s second reason, that Plaintiff demonstrated “no significant change
11 since the prior decision and the limited evidence does not reflect disabling mental
12 health impairments,” Tr. 25, is not specific, clear and convincing. This finding is
13 in direct conflict with the ALJ’s earlier determination that res judicata did not
14 apply in this case. Tr. 18.

15 Under res judicata, an ALJ’s finding that a claimant is not disabled
16 “create[s] a presumption that [the claimant] continued to be able to work after that
17 date.” *Miller v. Heckler*, 770 F.2d 845, 848 (9th Cir. 1985). However, the
18 presumption does not apply if there are “changed circumstances.” *Taylor v.*
19 *Heckler*, 765 F.2d 872, 875 (9th Cir. 1985). “Changed circumstances” include such
20 differences as an increase in the severity of impairment, a change in age category,
21 or the existence of a new impairment. *Id.*; *Chavez v. Bowen*, 844 F.2d 691, 693
22 (9th Cir. 1988); *Gregory v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988).

23 The ALJ cannot find that res judicata does not apply and then reject
24 Plaintiff’s symptom statements based on res judicata. However, any error
25 resulting from this reason would be considered harmless, because the ALJ
26 provided other legally sufficient reasons to reject Plaintiff’s symptom statements.
27 See *Carmickle*, 533 F.3d at 1163 (upholding an adverse credibility finding where
28 the ALJ provided four reasons to discredit the claimant, two of which were

1 invalid); Batson, 359 F.3d at 1197 (affirming a credibility finding where one of
2 several reasons was unsupported by the record); Tommasetti v. Astrue, 533 F.3d
3 1035, 1038 (9th Cir. 2008) (an error is harmless when “it is clear from the record
4 that the . . . error was inconsequential to the ultimate nondisability determination”).

5 **C. Maximum Effort**

6 The ALJ’s third reason for rejecting Plaintiff symptom statements, that she
7 failed to demonstrate maximum effort in her psychological consultative
8 examination with Dr. Gomes, Tr. 25, is specific, clear and convincing. An ALJ
9 may consider a claimant’s failure to give maximum or consistent effort during
10 evaluations. Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002). Here, Dr.
11 Gomes stated that throughout his evaluation Plaintiff was distracted by her phone,
12 which she admitted was because she was following a football game. Tr. 314, 316.
13 The ALJ found that the failure to give maximum effort during the testing
14 undermined Plaintiff’s statements regarding the severity of her impairments. Tr.
15 25. This is a specific, clear and convincing reason to reject Plaintiff’s symptom
16 statements.

17 Defendant argues that the ALJ found Plaintiff’s statements to be unreliable
18 because they were inconsistent with her reported activities. ECF No. 15 at 11-13.
19 The ALJ did not address Plaintiff’s reported daily activities when considering her
20 statements. He only considered these reported activities when addressing the
21 weight assigned to the statements of Plaintiff’s mother. Tr. 25. As such,
22 Defendant’s assertion is a post hoc rationalization, which will not be considered by
23 this Court. See Orn, 495 F.3d at 630 (The Court will “review only the reasons
24 provided by the ALJ in the disability determination and may not affirm the ALJ on
25 a ground upon which he did not rely.”).

26 **CONCLUSION**

27 Having reviewed the record and the ALJ’s findings, the Court finds the
28 ALJ’s decision is supported by substantial evidence and free of harmful legal error.

1 Accordingly, **IT IS ORDERED:**

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

4 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

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

8 DATED February 1, 2019.



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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE