

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

Apr 18, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUTH O.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

NO: 1:21-CV-03026-LRS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 17, 19. This matter was submitted for consideration without oral argument. Plaintiff is represented by Attorney D. James Tree. Defendant is

¹Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

ORDER ~ 1

1 represented by Special Assistant United States Attorney Frederick Fripps. The
2 Court has reviewed the administrative record, the parties' completed briefing, and
3 is fully informed. For the reasons discussed below, the Court **GRANTS**
4 Defendant's Motion for Summary Judgment, ECF No. 19, and **DENIES** Plaintiff's
5 Motion for Summary Judgment, ECF No. 17.

6 **JURISDICTION**

7 Plaintiff Ruth O.² protectively filed applications for Disability Insurance
8 Benefits (DIB) and Supplemental Security Income (SSI) on February 15, 2018, Tr.
9 109, 124, alleging an onset date of December 31, 2016, Tr. 316, 323, due to
10 depression, bipolar disorder, sleep apnea, arthritis in her neck, carpal tunnel
11 syndrome, insomnia, and anxiety, Tr. 350. Plaintiff's applications were denied
12 initially, Tr. 180-85, and upon reconsideration, Tr. 193-214. A hearing before
13 Administrative Law Judge Chris Stuber ("ALJ") was conducted on July 14, 2020.
14 Tr. 70-99. Plaintiff was represented by a non-attorney representative and testified
15 at the hearing with the assistance of an interpreter. *Id.* The ALJ also took the
16 testimony of vocational expert William Weiss. *Id.* The ALJ entered an
17 unfavorable decision on July 27, 2020. Tr. 21-36. The Appeals Council denied
18 review on January 4, 2021. Tr. 1-5. Therefore, the ALJ's July 27, 2020 decision

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20 ²In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's
21 first name and last initial, and, subsequently, Plaintiff's first name only, throughout
this decision.

1 became the final decision of the Commissioner. The matter is now before this
2 Court pursuant to 42 U.S.C. §§ 405(g); 1383(c). ECF No. 1.

3 **BACKGROUND**

4 The facts of the case are set forth in the administrative hearing and
5 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.
6 Only the most pertinent facts are summarized here.

7 Plaintiff was 44 years old at the alleged onset date. Tr. 316. Plaintiff
8 graduated from high school in 1990. Tr. 76-77, 315. At the time of her
9 application, she alleged that she spoke Spanish and could not understand or read
10 English. Tr. 77, 349. At application, Plaintiff reported that her work history
11 included the job of housekeeper. Tr. 77, 351. She reported that she stopped
12 working on December 31, 2016, due to her impairments. Tr. 77, 350.

13 **STANDARD OF REVIEW**

14 A district court’s review of a final decision of the Commissioner of Social
15 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
16 limited; the Commissioner’s decision will be disturbed “only if it is not supported
17 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
18 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
19 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
20 (quotation and citation omitted). Stated differently, substantial evidence equates to
21 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and

1 citation omitted). In determining whether the standard has been satisfied, a
2 reviewing court must consider the entire record as a whole rather than searching
3 for supporting evidence in isolation. *Id.*

4 In reviewing a denial of benefits, a district court may not substitute its
5 judgment for that of the Commissioner. “The court will uphold the ALJ’s
6 conclusion when the evidence is susceptible to more than one rational
7 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).
8 Further, a district court will not reverse an ALJ’s decision on account of an error
9 that is harmless. *Id.* An error is harmless where it is “inconsequential to the
10 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).
11 The party appealing the ALJ’s decision generally bears the burden of establishing
12 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

13 **FIVE-STEP EVALUATION PROCESS**

14 A claimant must satisfy two conditions to be considered “disabled” within
15 the meaning of the Social Security Act. First, the claimant must be “unable to
16 engage in any substantial gainful activity by reason of any medically determinable
17 physical or mental impairment which can be expected to result in death or which
18 has lasted or can be expected to last for a continuous period of not less than 12
19 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
20 “of such severity that he is not only unable to do his previous work[,] but cannot,
21 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 423(d)(2)(A).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
5 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
9 404.1520(b), 416.920(b).

10 If the claimant is not engaged in substantial gainful activity, the analysis
11 proceeds to step two. At this step, the Commissioner considers the severity of the
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
13 claimant suffers from “any impairment or combination of impairments which
14 significantly limits [his or her] physical or mental ability to do basic work
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
17 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
18 §§ 404.1520(c), 416.920(c).

19 At step three, the Commissioner compares the claimant’s impairment to
20 severe impairments recognized by the Commissioner to be so severe as to preclude
21 a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
2 severe than one of the enumerated impairments, the Commissioner must find the
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

4 If the severity of the claimant's impairment does not meet or exceed the
5 severity of the enumerated impairments, the Commissioner must pause to assess
6 the claimant's "residual functional capacity." Residual functional capacity (RFC),
7 defined generally as the claimant's ability to perform physical and mental work
8 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
9 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
10 analysis.

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

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

1 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
5 work, analysis concludes with a finding that the claimant is disabled and is
6 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

7 The claimant bears the burden of proof at steps one through four. *Tackett v.*
8 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
9 the burden shifts to the Commissioner to establish that (1) the claimant is capable
10 of performing other work; and (2) such work “exists in significant numbers in the
11 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
12 700 F.3d 386, 389 (9th Cir. 2012).

13 **ALJ’S FINDINGS**

14 At step one, the ALJ found that Plaintiff had engaged in substantial gainful
15 activity since the alleged onset date, December 31, 2016. Tr. 24. At step two, the
16 ALJ found that Plaintiff had the following severe impairments: degenerative disc
17 disease, cervical spine; obesity; bilateral carpal tunnel syndrome, status post
18 release; major depressive disorder; and bipolar disorder. Tr. 25. At step three, the
19 ALJ found that Plaintiff’s impairments or combinations of impairments did not
20 meet or equal the severity of one of the listed impairments. Tr. 26.

21 The ALJ then found that Plaintiff had the RFC to perform light work as

1 defined in 20 C.F.R. § 404.1567(b) and 416.967(b) with the following
2 nonexertional limitations:

3 The claimant is able to lift and/or carry 20 pounds occasionally and 10
4 pounds frequently. She can stand and or walk about six hours in an
5 eight-hour workday and can sit about six hours. She can frequently
6 climb ramps and stairs but only occasionally ladders, ropes, or
7 scaffolds. She can frequently stoop, kneel, crouch, and crawl. She can
8 have only occasional exposure to excessive vibrations. She is limited
9 to frequently handling and fingering bilaterally. She is able to
10 understand, remember, and carryout simple, routine instructions with
11 only occasional changes in the work setting. She can have brief and
12 superficial interactions with the public and occasional interactions with
13 coworkers and supervisors.

9 Tr. 28. At step four, the ALJ identified Plaintiff's past relevant work as a
10 housekeeper, maid and found she is capable of performing this past relevant work.

11 Tr. 35. Based on this, the ALJ found that Plaintiff had not been disabled within the
12 meaning of the Social Security Act at any time from the alleged onset date,
13 December 31, 2016, through the date of the decision. Tr. 36.

14 **ISSUES**

15 Plaintiff seeks judicial review of the Commissioner's final decision denying
16 her DIB under Title II and SSI under Title XVI. ECF No. 17. Plaintiff raises the
17 following issues for this Court's review:

- 18 1. Whether the ALJ properly addressed the medical opinions in the record; and
- 19 2. Whether the ALJ properly addressed Plaintiff's symptom statements.

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1 **DISCUSSION**

2 **1. Medical Opinions**

3 Plaintiff challenges the ALJ’s treatment of the opinions of Thomas Genthe,
4 Ph.D., Ivonne Garcia, MHP, MSW, and Shellie Marthini, ARNP. ECF No. 17 at
5 12-20.

6 For claims filed on or after March 27, 2017, new regulations apply that
7 change the framework for how an ALJ must weigh medical opinion evidence.

8 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
9 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.

10 The new regulations provide that the ALJ will no longer give any specific
11 evidentiary weight to medical opinions or prior administrative medical findings,
12 including those from treating medical sources. 20 C.F.R. §§ 404.1520c(a),
13 416.920c(a). Instead, the ALJ will consider the persuasiveness of each medical
14 opinion and prior administrative medical finding, regardless of whether the
15 medical source is an Acceptable Medical Source. 20 C.F.R. §§ 404.1520c(c),
16 416.920c(c). The ALJ is required to consider multiple factors, including
17 supportability, consistency, the source’s relationship with the claimant, any
18 specialization of the source, and other factors (such as the source’s familiarity with
19 other evidence in the file or an understanding of Social Security’s disability
20 program). *Id.* The regulations emphasize that the supportability and consistency
21 of the opinion are the most important factors, and the ALJ must articulate how he

1 considered those factors in determining the persuasiveness of each medical opinion
2 or prior administrative medical finding. 20 C.F.R. §§ 404.1520c(b), 416.920c(b).
3 The ALJ may explain how he considered the other factors, but is not required to do
4 so, except in cases where two or more opinions are equally well-supported and
5 consistent with the record. *Id.*

6 Supportability and consistency are further defined in the regulations:

7 (1) *Supportability*. The more relevant the objective medical evidence
8 and supporting explanations presented by a medical source are to
9 support his or her medical opinion(s) or prior administrative medical
10 finding(s), the more persuasive the medical opinions or prior
11 administrative medical finding(s) will be.

12 (2) *Consistency*. The more consistent a medical opinion(s) or prior
13 administrative medical finding(s) is with the evidence from other
14 medical sources and nonmedical sources in the claim, the more
15 persuasive the medical opinion(s) or prior administrative medical
16 finding(s) will be.

17 20 C.F.R. §§ 404.1520c(c), 416.920c(c).³

18 ³The parties disagree over whether Ninth Circuit case law continues to be
19 controlling in light of the amended regulations, specifically whether an ALJ is still
20 required to provide specific and legitimate reasons for discounting a contradicted
21 opinion from a treating or examining physician. ECF Nos. 13 at 14-17, 13 at 13-
15. This Court has previously concluded that the regulations displace Ninth
Circuit precedence. *Emilie K. v. Saul*, No. 2:20-CV-00079-SMJ, 2021 WL

1 **A. Thomas Genthe, Ph.D.**

2 On February 11, 2020, Dr. Genthe evaluated Plaintiff and completed a
3 Psychological/Psychiatric Evaluation form for the Washington Department of
4 Social and Health Services (DSHS). Tr. 1010-17. He diagnosed Plaintiff with
5 major depressive disorder, other specific anxiety disorder, and stimulant use
6 disorder (cocaine) in remission. Tr. 1013. He opined that Plaintiff had a moderate
7 limitation in seven basic work activities. Tr. 1013. A moderate limitation is
8 defined as “a significant limitation on the ability to perform the activity.” Tr.
9 1013. He stated that Plaintiff’s limitations would last for six to nine months with
10 available treatment. Tr. 1014. Dr. Genthe concluded his evaluation form with
11 “[a]t this time, her symptoms are not being managed sufficiently, which are likely
12 to interfere with her ability to initiate or maintain future employment. . . she is
13 unlikely to function adequately, and/or consistently in a work setting until her
14 psychological symptoms have been managed more effectively.” Tr. 1014.

15 The ALJ failed to state whether he found the opinion to be persuasive, but he
16 provided four reasons for not adopting all the opined limitations: (1) that Dr.
17 Genthe did not review any treatment records; (2) that Dr. Genthe relied on
18 Plaintiff’s symptom statements; (3) that the opinion was inconsistent with

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20 _____
21 864869, *3-4 (E.D. Wash. Mar. 8, 2021), *reversed on other grounds*, No. 21-35360
(9th Cir. Dec. 10, 2021).

1 Plaintiff's overall performance on mental status examinations; and (4) that the
2 opinion was inconsistent with the minimal observations of psychiatric difficulties.

3 Tr. 34.

4 The ALJ's first reason for not adopting the opinion, that he did not review
5 any treatment records, does not address supportability or consistency but is
6 considered an "other" factor that the ALJ may, but was not required to, consider.
7 20 C.F.R. §§ 404.1520c(c)(5), 416.920c(c)(5) ("This includes, but is not limited to,
8 evidence showing a medical source has familiarity with the other evidence in the
9 claim. . ."). Here, Dr. Genthe stated he did not review other records at the time of
10 his evaluation. Tr. 1010 ("No records were provided for review."). Therefore, this
11 is a valid reason to not adopt the opinion.

12 The ALJ's second reason for not adopting the opinion, that Dr. Genthe relied
13 on Plaintiff's symptom statements, addresses the opinion's supportability. *See* 20
14 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1) ("The more relevant the objective
15 medical evidence and supporting explanations presented by a medical source are to
16 support his or her opinion(s) . . . the more persuasive the medical opinions . . . will
17 be"). Dr. Genthe stated that he based his opinion on the behavioral observations
18 made, information gained during the clinical interview, and the Personality
19 Assessment Inventory (PAI) profile score. Tr. 1014. However, Dr. Genthe's
20 observations were normal except for a depressed affect, Tr. 1015, and the PAI was
21 not interpreted: "For this protocol, the number of uncompleted items is too great

1 (i.e. greater than 5%) to generate a profile that would not have questionable
2 validity. No clinical interpretation is provided for this protocol,” Tr. 1017.
3 Therefore, the only remaining basis for Dr. Genthe’s opinion was information
4 gained during the clinical interview. As such, the ALJ’s determination that Dr.
5 Genthe relied heavily on Plaintiff’s statements is supported by substantial
6 evidence. As discussed at length below, the ALJ provided sufficient reasons for
7 not crediting Plaintiff’s symptom statements. Therefore, this is a valid reason for
8 not adopting the opinion.

9 The third reason the ALJ provided for not adopting Dr. Genthe’s opinion,
10 that it was inconsistent with Plaintiff’s overall performance on mental status
11 examinations, addresses consistency. Plaintiff summarized the mental status
12 exams in depth when discussing Plaintiff’s symptom statements, Tr. 30, and then
13 cited to these examinations when discussing Dr. Genthe’s opinion, Tr. 34. The
14 mental status exams were typically normal. Tr. 30 *citing* Tr. 822 (July 26, 2018
15 normal mental status exam), Tr. 835 (June 7, 2018 normal mental status exam), Tr.
16 842 (May 8, 2018 normal mental status exam), Tr. 974 (August 29, 2018 normal
17 mental status exam).

18 The ALJ also cited Dr. Genthe’s own mental status exam, which speaks to
19 the supportability of the opinion. Tr. 34. Dr. Genthe found several abnormalities
20 in Plaintiff’s mental status exam including understanding, fund of knowledge,
21 abstract thought, concentration, insight, and judgment. Tr. 1015-16. However, the

1 ALJ acknowledged these abnormalities and found that the interview was
2 conducted in English with no evidence of an interpreter. Tr. 30. Plaintiff has
3 difficulty reading and understanding English, and an interpreter was present at the
4 ALJ's hearing. Tr. 72-73, 77. The language difference likely accounts for these
5 abnormal results. To assess fund of knowledge Plaintiff was required to answer
6 the following questions: "President during the US Civil War;" "How are bats able
7 to fly in the dark;" and "Number of weeks in the year." Tr. 1016. Plaintiff
8 answered these questions with "I don't know." Tr. 1016. To assess concentration,
9 Plaintiff was asked to spell the word WORLD forward and backwards, which she
10 was unable to do correctly. Tr. 1016. To assess abstract thought, Plaintiff was
11 asked what a grape and a papaya had in common, to which she replied "nothing."
12 Tr. 1016. Therefore, this is a sufficient reason to not adopt Dr. Genthe's opinion.

13 The fourth reason the ALJ provided for not adopting Dr. Genthe's opinion,
14 that it was inconsistent with the minimal observations of psychiatric difficulties,
15 addresses consistency. The ALJ summarized the psychiatric observations in the
16 record when discussing Plaintiff's symptom statements, Tr. 31, and then cited to
17 these observations when discussing the opinion. Tr. 34. These observations were
18 consistently minimal and displayed normal mood, affect, speech, and/or eye
19 contact. Tr. 537, 560, 570, 624, 629, 633, 759, 766, 774, 788, 827, 863, 870, 879,
20 1030, 1039, 1045, 1110, 1132, 1145, 1259, 1261, 1264, 1284, 1290, 1321.
21 Plaintiff only occasionally presented with a depressed mood. Tr. 899, 1085, 1093,

1 1105. Once Plaintiff presented with a “not so good” mood, poor attention span,
2 and was distractible, Tr. 1358-61, but this was not a consistent state represented in
3 the record. The ALJ discussed all this evidence when determining that the record
4 showed minimal psychiatric observations. Tr. 31. Here, the ALJ’s determination
5 is supported by substantial evidence and will not be disturbed by the Court.

6 **B. Ivonne Garcia, MHP, MSW**

7 On March 10, 2018, Ms. Garcia stated that Plaintiff was diagnosed with
8 major depressive disorder and that she was limited 1-10 hours of work activities a
9 week. Tr. 999. When asked about lifting and carrying restrictions, Ms. Garcia
10 opined that Plaintiff was unable to lift at least two pounds or unable to stand or
11 walk. Tr. 1000. She opined that Plaintiff’s limitations would last for six months.
12 Tr. 1000.

13 On December 21, 2018, Ms. Garcia stated that Plaintiff was diagnosed with
14 major depressive disorder and that she was limited to 1-10 hours of work activities
15 a week. Tr. 995. When asked about lifting and carrying limitations, Ms. Garcia
16 indicated Plaintiff was only capable of light work activities. Tr. 996. She opined
17 that Plaintiff’s limitations would last for six months. Tr. 996. Further, she
18 completed a Mental Source Statement form. Tr. 979-82. She opined that Plaintiff
19 had a marked limitation in five mental work functions and a moderate limitation in
20 thirteen mental work functions. Tr. 979-80. She stated that Plaintiff would likely
21 be off task 21-30% of the time during a 40-hour work week. Tr. 981.

1 On June 20, 2019, Ms. Garcia stated that Plaintiff was diagnosed with major
2 depressive disorder and borderline personality disorder. Tr. 1004. She stated that
3 Plaintiff's work activity was limited to 1-10 hours a week. Tr. 1004. When asked
4 about her limitations in lifting and carrying, and Ms. Garcia stated that Plaintiff
5 was capable of light work. Tr. 1005. She stated that the opined limitations would
6 last for twelve months. Tr. 1005.

7 The ALJ found all of Ms. Garcia's opinions to be not persuasive. Tr. 34.
8 First, the ALJ found that the opinions were provided for DSHS "under their criteria
9 for State benefits, and under our Agency regulations we consider the decision of
10 other agencies and nongovernmental agencies inherently neither valuable nor
11 persuasive." Tr. 34. The ALJ is accurate that determinations by other agencies
12 and nongovernmental agencies are deemed "inherently neither valuable nor
13 persuasive" under the new regulations, 20 C.F.R. §§ 404.1520b(c), 416.920c(c),
14 and the ALJ will not provide any analysis regarding these determinations, 20
15 C.F.R. §§ 404.1504, 416.904. However, the forms completed by Ms. Garcia are
16 medical opinions used to make the ultimate State agency determination and not the
17 State agency determinations themselves. *See* 20 C.F.R. §§ 404.1613(a)(2),
18 416.913(a)(2) ("A medical opinion is a statement from a medical source about
19 what you can still do despite your impairment(s) . . ."). The ALJ is required to
20 consider all medical opinions. 20 C.F.R. §§ 404.1520c(b), 416.920c(b).
21 Therefore, these medical opinions cannot be found not persuasive simply because

1 they were ordered by DSHS.

2 Next, the ALJ found the opinions to be inconsistent with each other by
3 noting that the ability to perform work activities for 1-10 hours a week was
4 inconsistent with being severely limited, which was defined as unable to lift at
5 least 2 pounds or unable to stand or walk.” Tr. 34. The number of hours a person
6 can perform work related activities is not inconsistent with the finding of severely
7 limited. This is because the severity limited response was in relation to a question
8 about Plaintiff’s lifting and carrying limitations, not the ability to sustain work
9 activity. Therefore, this reason is not supported by substantial evidence.

10 Despite the ALJ’s first two reasons for finding the opinions to be not
11 persuasive, the subsequent reasons were sufficient to support his determination.
12 *See Tommasetti*, 533 F.3d at 1038 (An error is harmless when “it is clear from the
13 record that the . . . error was inconsequential to the ultimate nondisability
14 determination.”).

15 The ALJ rejected the December 2018 Mental Source Statement form
16 because it “contains no support or basis for the limitations assigned.” Tr. 34. This
17 speaks directly to supportability, and the form has no discussion of Plaintiff’s
18 impairments or clinical observations to support the opinion. Therefore, this is a
19 sufficient reason to reject the opinion.

20 The ALJ found that the statements made in the 2019 DSHS form were
21 inconsistent with Plaintiff’s later reports. Tr. 34. Ms. Garcia stated that Plaintiff

1 experienced conflict around people, was unable to regulate her emotions, and was
2 easily irritated around people. Tr. 1004-05. This was inconsistent with Plaintiff's
3 statement to Dr. Genthe that she had no significant difficulty getting along with
4 others. Tr. 1010. Therefore, the ALJ's reason is supported by substantial
5 evidence.

6 The ALJ also found that the opinions were inconsistent with Plaintiff's
7 performances on the mental status examinations and the minimal observations of
8 psychiatric difficulties. Tr. 34. As discussed at length above, the overall trend of
9 the medical evidence demonstrates normal mental status examines and minimal
10 observations of psychiatric difficulties. Therefore, this reason addresses
11 consistency and is supported by substantial evidence. Therefore, the Court will not
12 disturb the ALJ's treatment of the opinion.

13 **C. Shellie Marthini, ARNP**

14 On June 18, 2020, Nurse Marthini completed a Medical Report Form. Tr.
15 1352-54. She opined that if Plaintiff attempted to work a 40-hour a week schedule,
16 it was more probably then not that Plaintiff would miss four or more days of work
17 per month due to her medical impairments: "If she's required to use her right hand
18 in repetitive movements it will increase pain [and] swelling causing longer healing
19 time." Tr. 1353. She limited Plaintiff to sedentary work and only frequent
20 handling with the right upper extremity. Tr. 1353. She stated that Plaintiff's
21 opinions had been present since April of 2020: "She had an appointment 6/9/2020

1 with me and stated that she had been having pain since April. However, in
2 previous visits had not complained of this problem or any symptoms.” Tr. 1354.

3 The ALJ found the opinion to be somewhat persuasive stating that “[t]he
4 suggestions the claimant would miss four or more days of work per month and can
5 only perform sedentary work activity include very little support or basis.” Tr. 33.

6 The ALJ is accurate; there is no discussion on the form providing any medical
7 evidence in support of this portion of the opinion. Tr. 1353.

8 The ALJ also found that the opined increased pain resulting from repetitive
9 movements with the right was inconsistent with the opined limitation to frequent
10 handling. Tr. 33. The Court agrees that the narrative addressing repetitive
11 movements with the right hand resulting in missing work four or more days a
12 month is inconsistent with the opined ability to frequently handle with the right
13 upper extremity. Tr. 1353. The ALJ’s reasons address the supportability and
14 consistency of the opinion and are supported by substantial evidence. Therefore,
15 the Court will not disturb the ALJ’s treatment of the opinion.

16 **2. Plaintiff’s Symptom Statements**

17 Plaintiff argues that the ALJ failed to properly address her symptom
18 statements. ECF No. 17 at 4-12.

19 An ALJ engages in a two-step analysis when evaluating a claimant’s
20 testimony regarding subjective pain or symptoms. “First, the ALJ must determine
21 whether the claimant has presented objective medical evidence of an underlying

1 impairment which could reasonably be expected to produce the pain or other
2 symptoms alleged.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). “The
3 claimant is not required to show that [her] impairment could reasonably be
4 expected to cause the severity of the symptom he has alleged; he need only show
5 that it could reasonably have caused some degree of the symptom.” *Id.*

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
10 citations and quotations omitted).

11 The ALJ stated that Plaintiff’s statements about intensity, persistence, and
12 limiting effects of her symptoms “are not entirely consistent with the medical
13 evidence and other evidence in the record for the reasons explained in this
14 decision.” Tr. 29. The ALJ gave five reasons for rejecting Plaintiff’s symptom
15 statements: (1) Plaintiff made inconsistent statements regarding her medication
16 side effects; (2) Plaintiff’s allegations were inconsistent with the minimal and mild
17 physical and psychological examinations; (3) Plaintiff routinely appeared in no
18 acute distress; (4) Plaintiff’s allegations are inconsistent with her daily activities;
19 and (5) Plaintiff’s frequency and extent of treatment is inconsistent with her
20 allegations. Tr. 29-32.

21 The ALJ’s first reason for rejecting Plaintiff’s symptom statements, that she

1 made inconsistent statements regarding her medication side effects, is specific,
2 clear and convincing. The ALJ may consider “ordinary techniques of credibility
3 evaluation, such as the claimant’s reputation for lying, prior inconsistent
4 statements . . . and other testimony by the claimant that appears less than candid.”
5 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). Here, Plaintiff testified at
6 the hearing that she experienced side effects from the medications she takes to treat
7 her mental health symptoms, including sleepiness. Tr. 81-82. However, when
8 asked by her providers, she stated she was not experiencing any side effects. Tr.
9 638 (October 19, 2017, Plaintiff “denies any negative effects from the
10 medication”); Tr. 631 (December 21, 2017, Plaintiff “denies any negative effects
11 from the medication”); and Tr. 627 (January 16, 2018, Plaintiff “denies any
12 negative effects from the medication”). Plaintiff was taking the same mental
13 health medications at the time of the hearing as at the time the comments were
14 made to her providers: trazadone. Tr. 81, 628, 632, 640. Therefore, the ALJ’s
15 observation of inconsistent statements is supported by objective evidence and
16 meets the specific, clear and convincing standard.

17 The ALJ’s second reason for rejecting Plaintiff’s symptom statements, that
18 her allegations were inconsistent with the minimal and mild physical and
19 psychological examinations, is specific, clear and convincing. Objective medical
20 evidence is a “relevant factor in determining the severity of the claimant’s pain and
21 its disabling effects,” but it cannot serve as the only reason for rejecting a

1 claimant’s symptom statements. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
2 2001). As addressed above, the majority of the psychological observations made
3 in the record were normal. Therefore, this meets the specific, clear and convincing
4 standard.

5 The ALJ’s third reason for rejecting Plaintiff’s symptom statements, that she
6 routinely appeared in no acute distress, is specific, clear and convincing. An ALJ
7 may cite inconsistencies between a claimant’s testimony and the objective medical
8 evidence in discounting the claimant’s testimony. *Bray v. Comm’r, Soc. Sec.*
9 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). However, district courts have
10 questioned the applicability of the generic chart note of “no acute distress” to
11 chronic conditions. *See Toni D. v. Saul*, No. 3:19-cv-820-SI, 2020 WL 1923161,
12 at *6 (D. Or. April 21, 2020) *citing*, *Mitchell v. Saul*, No. 2:18-cv-01501-GMN-
13 WGC, 2020 WL 1017907, at *7 (D. Nev. Feb. 13, 2020) (“Moreover, the court
14 agrees with Plaintiff that notations that Plaintiff was healthy ‘appearing’ and in no
15 ‘acute’ distress do not distract from the findings regarding Plaintiff’s chronic
16 conditions.”); *Richard F. v. Comm’r of Soc. Sec.*, No. C19-5220 JCC, 2019 WL
17 6713375, at *7 (W.D. Wash. Dec. 10, 2019) (“Clinical findings of ‘no acute
18 distress’ do not undermine Plaintiff’s testimony. ‘Acute’ means ‘of recent or
19 sudden onset; contrasted with chronic.’ Oxford English Dictionary, acute (3d ed.
20 December 2011). Plaintiff’s impairments are chronic, not acute.”). Here, the ALJ
21 found that “[t]he lack of observations of the claimant presenting in distress or

1 discomfort is inconsistent with the claimant’s allegations of extremely limiting
2 pain and constant symptoms.” Tr. 30. Specifically, Plaintiff cited her pain being a
3 9-10/10 while in provider’s care, yet she appeared with appropriate mood and
4 affect and unlabored breathings. Tr. 30 *citing* Tr. 558-60. Again, the ALJ relied
5 on emergency room records showing Plaintiff had been in abdominal pain for three
6 weeks, but she appeared in no acute distress when presenting in the emergency
7 department. Tr. 30 *citing* Tr. 764-67. The ALJ found that this “demonstrate[s] the
8 claimant was not exhibiting notable external signs of pain or discomfort which is
9 inconsistent with the allegations of disability primarily based on pain. Tr. 30.
10 Here, the ALJ has cited examples of times when Plaintiff was complaining of acute
11 pain (9-10/10 on the pain scale) but her providers failed to observe such acute pain.
12 Therefore, this is not consistent with the above cited cases where the claimant’s
13 impairments were chronic in nature. This is a specific, clear and convincing
14 reason.

15 The ALJ’s fourth reason for rejecting Plaintiff’s symptom statements, that
16 Plaintiff’s allegations are inconsistent with her daily activities, is specific, clear and
17 convincing. A claimant’s daily activities may support an adverse credibility
18 finding if (1) the claimant’s activities contradict her other testimony, or (2) “the
19 claimant is able to spend a substantial part of [her] day engaged in pursuits
20 involving performance of physical functions that are transferable to a work
21 setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*,

1 885 F.2d 597, 603 (9th Cir. 1989)). A claimant need not be “utterly incapacitated”
2 to be eligible for benefits. *Fair*, 885 F.2d at 603. The ALJ found that Plaintiff
3 cared for her mother, had previously applied for disability and was self-employed
4 after being denied, and was able to drive and that these abilities undermined her
5 reported allegations. Tr. 31-32.

6 The Court acknowledges that the Ninth Circuit has warned ALJs against using
7 simple household activities against a person when evaluating their testimony:

8
9 We have repeatedly warned that ALJs must be especially cautious in
10 concluding that daily activities are inconsistent with testimony about
11 pain, because impairments that would unquestionably preclude work and
all the pressures of a workplace environment will often be consistent with
doing more than merely resting in bed all day.

12 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). Here, the ability to care
13 for a family member without some discussion of how the care activities were
14 inconsistent with her allegations is not specific, clear and convincing. The ALJ’s
15 finding that she was able to almost earn substantial gainful activity in 2012 and
16 2013 and substantial gainful activity in 2014 and 2015 after she was denied
17 disability benefits suggests a finding of malingering. Tr. 31. The ALJ failed to
18 discuss the medical evidence surrounding the prior application and a suggestion of
19 malingering is not supported in the record. Therefore, this too is not specific, clear
20 and convincing. The ALJ’s finding that Plaintiff’s ability to drive was inconsistent
21 with her allegations included a discussion of her allegations compared to the skills

1 required to drive. Tr. 31. Therefore, this determination meets the specific, clear
2 and convincing standard.

3 The ALJ's fifth reason for rejecting Plaintiff's symptom statements, that the
4 frequency and extent of treatment was not consistent with her allegations, is
5 specific, clear and convincing. Noncompliance with medical care or unexplained
6 or inadequately explained reasons for failing to seek medical treatment cast doubt
7 on a claimant's subjective complaints. 20 C.F.R. §§ 404.1530, 416.930; *Fair*, 885
8 F.2d at 603; *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ's
9 decision to reject the claimant's subjective pain testimony was supported by the
10 fact that claimant was not taking pain medication). Conservative treatment can
11 also be "sufficient to discount a claimant's testimony regarding [the] severity of an
12 impairment." *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007). Here, Plaintiff
13 sought treatment for her mental health impairments, but the mental health
14 complaints included in the treatment notes are not as severe as those alleged at the
15 hearing. *See supra*. Additionally, Plaintiff testified that she continued to
16 experience severe problems with her wrist, Tr. 78-80, but her treatment records
17 from December 2018 show that this was relieved with a brace, Tr. 1079.
18 Therefore, this meets the specific, clear and convincing standard.

19 In conclusion, the ALJ provided one reason that did not meet the specific,
20 clear and convincing standard, but any error would be considered harmless as the
21 ALJ provided other legally sufficient reasons. *See Carmickle v. Comm'r, Soc. Sec.*

1 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (upholding an adverse credibility
2 finding where the ALJ provided four reasons to discredit the claimant, two of
3 which were invalid); *Batson v. Comm’r. of Soc. Sec. Admin.*, 359 F.3d 1190, 1197
4 (9th Cir. 2004) (affirming a credibility finding where one of several reasons was
5 unsupported by the record); *Tommasetti*, 533 F.3d at 1038 (an error is harmless
6 when “it is clear from the record that the . . . error was inconsequential to the
7 ultimate nondisability determination”). Therefore, the Court will not disturb the
8 ALJ’s decision.

9 CONCLUSION

10 A reviewing court should not substitute its assessment of the evidence for
11 the ALJ’s. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
12 defer to an ALJ’s assessment so long as it is supported by substantial evidence. 42
13 U.S.C. § 405(g). After review, the court finds the ALJ’s decision is supported by
14 substantial evidence and free of harmful legal error.

15 ACCORDINGLY, IT IS HEREBY ORDERED:

- 16 1. Plaintiff’s Motion for Summary Judgment, ECF No. 17, is **DENIED**.
- 17 2. Defendant’s Motion for Summary Judgment, ECF No. 19, is

18 **GRANTED.**


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

4 **DATED** April 18, 2022.

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8 LONNY R. SUKO
9 Senior United States District Judge
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