

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

May 17, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALISIA C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:21-CV-3069-RMP

ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT, without oral argument, are cross-motions for summary judgment from Plaintiff Alisia C.¹, ECF No. 12, and Defendant the Commissioner of Social Security (“Commissioner”), ECF No. 16. Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3), of the Commissioner’s denial of her claim for Social Security Disability Insurance Benefits (“DIB”) and Social Security Income (“SSI”) under Titles II and XVI of the Social

¹ In the interest of protecting Plaintiff’s privacy, the Court uses Plaintiff’s first name and last initial.

1 Security Act (the “Act”). *See* ECF No. 12 at 1. Having considered the parties’
2 motions, the administrative record, and the applicable law, the Court is fully
3 informed. For the reasons set forth below, the Court grants summary judgment in
4 favor of the Commissioner.

5 **BACKGROUND**

6 ***General Context***

7 Plaintiff applied for DIB and SSI on approximately March 29, 2019, alleging
8 disability beginning on September 5, 2018. Administrative Record (“AR”)² 187.
9 Plaintiff maintained that she was unable to work due to depression, anxiety, post-
10 traumatic stress disorder, back issues, herniated disc, shoulder pain, and neck pain.
11 AR 208. Before Plaintiff stopped working in September 2018, she worked as a sales
12 associate at Wal-Mart for approximately nineteen years. AR 209. The application
13 was denied initially and upon reconsideration, and Plaintiff requested a hearing. *See*
14 AR 140–41.

15 On September 3, 2020, Plaintiff appeared at a hearing, represented by attorney
16 Robert Tree, before Administrative Law Judge (“ALJ”) Raymond Souza in Seattle,
17 Washington. AR 34. Due to the exigencies of the COVID-19 pandemic, Plaintiff
18 and her counsel appeared telephonically and by video over Microsoft Teams. AR
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20 ² The AR is filed at ECF No. 10.

1 The ALJ also heard telephonically from vocational expert Frederick Cutler. AR 48.
2 Plaintiff and Mr. Cutler responded to questions from ALJ Souza and counsel. AR
3 40–53.

4 ***ALJ’s Decision***

5 On August 25, 2020, ALJ Souza issued an unfavorable decision. AR 15–27.

6 Applying the five-step evaluation process, ALJ Souza found:

7 **Step one:** Plaintiff meets the insured status requirements of the Social
8 Security Act through September 30, 2023, and the Plaintiff has not engaged in
9 substantial gainful activity since September 5, 2018, the alleged onset date. AR 17.

10 **Step two:** Plaintiff has the following severe impairments that are medically
11 determinable and significantly limit her ability to perform basic work activities:
12 disorders of the neck and back; fibromyalgia; depression; anxiety; and post-
13 traumatic stress disorder (“PTSD”), under 20 C.F.R. §§ 404.1520(c) and 416.920(c).
14 AR 18. The ALJ further found that:

15 The claimant also has a nicotine addiction, symptoms related to
16 menopause, lice, and COVID-19, but as the evidence does not show
17 these conditions have had more than a minimal effect on her ability to
perform basic work activities for at least 12 continuous months, they
cannot be considered ‘severe’ for purposes of this decision.

18 AR 18 (internal citations to record omitted).

19 **Step three:** The ALJ concluded that Plaintiff does not have an impairment or
20 combination of impairments that meets or medically equals the severity of one of the
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1 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R.
2 404.1520(d), 404.1525, 404.1526(d), 416.925 and 416.926).

3 **Residual Functional Capacity (“RFC”)**: The ALJ found that Plaintiff had
4 the RFC to: perform light work as defined in 20 C.F.R. § 404.1567(b) and
5 416.967(a) except that she must be allowed to sit or stand alternatively at will
6 provided she is not off task more than ten percent of the work period; cannot climb
7 ladders, ropes or scaffolds; can occasionally climb ramps and stairs; can
8 occasionally stoop, crouch, kneel, and crawl; cannot use unshielded moving,
9 hazardous machinery; cannot have exposure to unprotected heights; is able to
10 remember, understand, and carry out simple and routine instructions and tasks
11 consistent with the learning and training requirements of SVP levels 1 and 2 type
12 jobs; cannot have strict production quotas with the emphasis being on a per shift,
13 rather than per hour, basis; and can have only occasional interaction with the general
14 public, co-workers, and supervisors. AR 20.

15 In determining Plaintiff’s RFC, the ALJ found that Plaintiff’s statements
16 concerning the intensity, persistence, and limiting effects of her alleged symptoms
17 “are not entirely consistent with the medical evidence and other evidence in the
18 record” for several reasons that the ALJ discussed. AR 21.

19 **Step four**: The ALJ found that Plaintiff has past relevant work as a sales
20 clerk. AR 25. The ALJ further found that Plaintiff no longer can meet the demands
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1 of her past work, “as the claimant is limited to sedentary work at the SVP 1 or 2
2 level only[.]” AR 25.

3 **Step five:** The ALJ found that Plaintiff has a high school education; was 45
4 years old on her alleged disability onset date and is currently 47 years old, which is
5 defined as a younger individual (age 18-49); and that transferability of job skills is
6 not material to the determination of disability because the application of the
7 Medical-Vocational Guidelines to Plaintiff’s case supports a finding that Plaintiff is
8 “not disabled,” whether or not Plaintiff has transferable job skills. AR 25. The ALJ
9 found that there are jobs that exist in significant numbers in the national economy
10 that Plaintiff can perform considering her age, education, work experience, and
11 RFC. AR 25–26. Specifically, the ALJ recounted that the VE identified the
12 following representative occupations that Plaintiff would be able perform with the
13 RFC: agricultural produce sorter, office helper, and mail clerk. AR 26. The ALJ
14 concluded that Plaintiff had not been disabled within the meaning of the Social
15 Security Act at any time from September 5, 2018, through the date of the ALJ’s
16 decision. AR 25.

17 The Appeals Council denied review. AR 1–6.

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1 **LEGAL STANDARD**

2 ***Standard of Review***

3 Congress has provided a limited scope of judicial review of the
4 Commissioner’s decision. 42 U.S.C. § 405(g). A court may set aside the
5 Commissioner’s denial of benefits only if the ALJ’s determination was based on
6 legal error or not supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d
7 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). “The [Commissioner’s]
8 determination that a claimant is not disabled will be upheld if the findings of fact are
9 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
10 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
11 but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10
12 (9th Cir. 1975); *McCallister v. Sullivan*, 888 F.2d 599, 601–02 (9th Cir. 1989).
13 Substantial evidence “means such evidence as a reasonable mind might accept as
14 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
15 (citations omitted). “[S]uch inferences and conclusions as the [Commissioner] may
16 reasonably draw from the evidence” also will be upheld. *Mark v. Celebrezze*, 348
17 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole,
18 not just the evidence supporting the decisions of the Commissioner. *Weetman v.*
19 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

1 A decision supported by substantial evidence still will be set aside if the
2 proper legal standards were not applied in weighing the evidence and making a
3 decision. *Browner v. Sec’y of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir.
4 1988). Thus, if there is substantial evidence to support the administrative findings,
5 or if there is conflicting evidence that will support a finding of either disability or
6 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*,
7 812 F.2d 1226, 1229–30 (9th Cir. 1987).

8 ***Definition of Disability***

9 The Social Security Act defines “disability” as the “inability to engage in any
10 substantial gainful activity by reason of any medically determinable physical or
11 mental impairment which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than 12 months.” 42
13 U.S.C. §§ 423(d)(1)(A). The Act also provides that a claimant shall be determined
14 to be under a disability only if her impairments are of such severity that the claimant
15 is not only unable to do her previous work, but cannot, considering the claimant’s
16 age, education, and work experiences, engage in any other substantial gainful work
17 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A). Thus, the
18 definition of disability consists of both medical and vocational components. *Edlund*
19 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

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1 ***Sequential Evaluation Process***

2 The Commissioner has established a five-step sequential evaluation process
3 for determining whether a claimant is disabled. 20 C.F.R. §§ 416.920, 404.1520.
4 Step one determines if he is engaged in substantial gainful activities. If the claimant
5 is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§
6 416.920(a)(4)(i), 404.1520(a)(4)(i).

7 If the claimant is not engaged in substantial gainful activities, the decision
8 maker proceeds to step two and determines whether the claimant has a medically
9 severe impairment or combination of impairments. 20 C.F.R. §§ 416.920(a)(4)(ii),
10 404.1520(a)(4)(ii). If the claimant does not have a severe impairment or combination
11 of impairments, the disability claim is denied.

12 If the impairment is severe, the evaluation proceeds to the third step, which
13 compares the claimant's impairment with listed impairments acknowledged by the
14 Commissioner to be so severe as to preclude any gainful activity. 20 C.F.R. §§
15 416.920(a)(4)(iii), 404.1520(a)(4)(iii); *see also* 20 C.F.R. § 404, Subpt. P, App. 1. If
16 the impairment meets or equals one of the listed impairments, the claimant is
17 conclusively presumed to be disabled.

18 If the impairment is not one conclusively presumed to be disabling, the
19 evaluation proceeds to the fourth step, which determines whether the impairment
20 prevents the claimant from performing work that he has performed in the past. If the
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1 claimant can perform her previous work, the claimant is not disabled. 20 C.F.R. §§
2 416.920(a)(4)(iv), 404.1520(a)(4)(iv). At this step, the claimant’s RFC assessment
3 is considered.

4 If the claimant cannot perform this work, the fifth and final step in the process
5 determines whether the claimant is able to perform other work in the national
6 economy considering her residual functional capacity and age, education, and past
7 work experience. 20 C.F.R. §§ 416.920(a)(4)(v), 404.1520(a)(4)(v); *Bowen v.*
8 *Yuckert*, 482 U.S. 137, 142 (1987).

9 The initial burden of proof rests upon the claimant to establish a prima facie
10 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
11 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
12 is met once the claimant establishes that a physical or mental impairment prevents
13 him from engaging in her previous occupation. *Meanel*, 172 F.3d at 1113. The
14 burden then shifts, at step five, to the Commissioner to show that (1) the claimant
15 can perform other substantial gainful activity, and (2) a “significant number of jobs
16 exist in the national economy” which the claimant can perform. *Kail v. Heckler*, 722
17 F.2d 1496, 1498 (9th Cir. 1984).

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1 **ISSUES ON APPEAL**

2 The parties’ motions raise the following issues regarding the ALJ’s decision:

3 1. Did the ALJ erroneously determine that there are other jobs available in
4 the national economy at step five?

5 2. Was the ALJ’s decision based on substantial evidence, considering the
6 additional evidence added to the record after the ALJ’s decision and before the
7 Appeals Council denied review?

8 3. Did the ALJ erroneously evaluate Plaintiff’s subjective symptom
9 testimony?

10 **DISCUSSION**

11 ***Step Five Analysis***

12 Plaintiff argues that the ALJ did not meet his step-five burden of identifying
13 specific jobs in substantial numbers in the national economy because one of the jobs
14 he identified does not match the RFC that he formulated. ECF No. 12 at 4.
15 Specifically, Plaintiff asserts that the mail clerk job is not compatible with the RFC’s
16 limitation of ““simple and routine instructions and tasks,”” because that job requires
17 a reasoning level of three. *Id.* (quoting AR 20). Plaintiff continues that omitting the
18 mail clerk job results in only 20,000 jobs that the ALJ identified as being available
19 in the national economy, which, Plaintiff argues, does not suffice for the “substantial
20 numbers” requirement. *Id.* at 4–5 (citing *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d
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1 519, 528–29 (9th Cir. 2014)). Plaintiff maintains that the appropriate remedy for the
2 ALJ’s alleged error at Step Five is a remand for benefits because “there were no
3 applicable sedentary jobs the VE could name and even of the light jobs only
4 performed to the hypothetical’s exertional limitations—there were insufficient
5 national numbers[.]” *Id.* at 5 (citing *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir.
6 1981) (“Where, however, a rehearing would simply delay receipt of benefits reversal
7 is appropriate.”)).

8 The Commissioner responds that Plaintiff truncated the relevant portion of the
9 RFC, and that the full sentence provides that Plaintiff could “remember, understand,
10 and carry out simple and routine instructions and tasks *consistent with the learning*
11 *and training requirements of SVP levels 1 and 2 type jobs.*” ECF No. 16 at 4
12 (quoting AR 20) (emphasis added by Commissioner). The Commissioner contends
13 that this language in the RFC limits Plaintiff to unskilled work because unskilled
14 work corresponds to a Specific Vocational Preparation (“SVP”) of 1-2 in the
15 Dictionary of Occupational Titles (“DOT”). *Id.* (citing Social Security Ruling
16 (“SSR”) 00-4p, *available at* 2000 WL 1898704 at *3, 2000 SSR LEXIS 8 at *7).

17 The Commissioner argues that Plaintiff “conflates two entirely different
18 concepts from the DOT and [Selected Characteristics of Occupations (“SCO”)] (a
19 companion volume to the DOT): Reasoning/General Educational Development
20 (“GED”) level and SVP.” ECF No. 16 at 5. The concept of Reasoning/GED levels
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1 is a six-level scale assessing “the reasoning ability required to perform the job,” with
2 Level 1 requiring the least reasoning ability. *Id.* at 5–6 (citing *Zavalin v. Colvin*,
3 778 F.3d 842, 846 (9th Cir. 2015); DOT, App. C, 1991 WL 688702). Separately,
4 SVP is measured according to a nine-level scale, with Level 1 requiring a typical
5 worker a “short demonstration only” to learn the techniques, acquire the
6 information, and develop the facility needed for average performance and Level 9
7 requiring over ten years. *Id.* at 6 (citing SSR 00-4p, 2000 WL 1898704 at *3). The
8 Commissioner contends that the ALJ made no findings about Plaintiff’s
9 reasoning/GED level and instead found that she was limited to jobs that can be
10 learned in a short period of time, namely unskilled work at SVP Levels 1 and 2. *Id.*
11 at 6. The Commissioner distinguishes *Zavalin* as inapplicable because, in that case,
12 the Ninth Circuit found an apparent conflict between the RFC formulated for the
13 claimant in that case and the demands of a reasoning/GED Level 3, not an SVP
14 level. *Id.*

15 The Commissioner also argues that the ALJ properly relied on vocational
16 expert testimony regarding the three representative jobs after addressing, and
17 resolving, any potential conflicts between the vocational expert’s testimony and the
18 DOT. *Id.* at 7 (citing AR 26, 50–51, 52). Lastly, the Commissioner maintains that,
19 even disregarding the mail clerk job, the 20,000 representative jobs available
20 nationally, as either an agricultural produce sorter or office helper are significant.

1 *Id.* at 7. The Commissioner disputes that the case that Plaintiff relies on, *Gutierrez*,
2 supports that 20,000 is an insignificant number of jobs at Step Five and counters that
3 that the Ninth Circuit ultimately held 25,000 was a significant number even if it was
4 a “close call.” *Id.* at 7 (citing *Gutierrez*, 740 F.3d at 528–29 and noting that
5 *Gutierrez* cited with approval an Eighth Circuit case holding that 10,000 jobs
6 nationally was a significant number).

7 Plaintiff replies: “Because the ALJ specifically limited Cortez to ‘simple and
8 routine instructions and tasks,’ merely adding that she is also limited to SVP 1 and 2
9 jobs does not mean the RFC is not in conflict with jobs with Reasoning level 3 jobs.
10 *Zavalin* must control here, and the mail clerk job conflicts with the RFC.” ECF No.
11 17 at 3. Plaintiff also argues that, with respect to whether 20,000 national numbers
12 from the remaining two jobs is sufficient, “[u]ntil the Ninth Circuit presents another
13 figure, *Gutierrez*’s figure of 25,000 jobs is binding upon this Court, and Defendant’s
14 argument must fail.” *Id.* at 3.

15 As noted above, a claimant is disabled for purposes of the Act only if she is
16 “not only unable to do [her] previous work but cannot, considering [her] age,
17 education, and work experience, engage in any other kind of substantial gainful
18 work which exists in the national economy.” 42 U.S.C. §§ 423(d)(2)(A),
19 1382c(a)(3)(B). The phrase “work which exists in the national economy” means
20 “work which exists in significant numbers either in the region where such individual
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1 lives or in several regions of the country.” *Id.* The Commissioner bears the burden
2 of establishing that other work exists nationally in “significant numbers.” *See*
3 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012) (citing *Tackett v. Apfel*, 180
4 F.3d 1094, 1099 (9th Cir. 1999)).

5 Contrary to Plaintiff’s argument in her reply and consistent with the
6 Commissioner’s Motion for Summary Judgment, *Gutierrez* does not support that
7 any figure below 25,000 jobs nationally is an insignificant number. The Ninth
8 Circuit noted in *Gutierrez* that 25,000 jobs presented a “close call” because other
9 cases had found 64,000, 622,000, and 125,000 nationwide jobs to be sufficient but
10 had found 1,680 jobs to be insufficient. 740 F.3d at 528–29. However, the Ninth
11 Circuit held: “A finding of 25,000 jobs likely does not fall into the category of
12 ‘isolated jobs’ existing in ‘very limited numbers.’ Accordingly, the ALJ’s national
13 job finding satisfies § 1382c(a)(3)(B), because it represents a significant number of
14 jobs in several regions of the country.” *Id.* at 529.

15 The ALJ relied on the VE’s testimony to find that Plaintiff can perform three
16 light jobs, performed at the sedentary level and that allow a sit/stand option,
17 including:

- 18 • Agricultural Produce Sorter (DOT#: 529.687-186; unskilled (SVP 2);
light; 7,000–10,000 positions nationally)
- 19 • Office Helper (DOT#: 239.567-010; unskilled (SVP 2); light;
approximately 10,000 positions nationally)
- 20 • Mail Clerk (DOT#: 209.687-026; unskilled (SVP 2); light; 10,000
positions nationally).

1 AR 26. Even were the Court to find, as Plaintiff argues, that the Mail Clerk position
2 is in conflict with the RFC, the parties do not dispute that 17,000 to 20,000 positions
3 nationally remain. The caselaw that Plaintiff relies on to argue that 20,000 positions
4 is insignificant does not set a bright-line minimum of 25,000 positions to satisfy 42
5 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B), and, instead held that 25,000, a figure
6 within close proximity to the 20,000-position figure at issue here, qualified as a
7 significant number of jobs. *Gutierrez*, 740 F.3d at 529. Moreover, the number of
8 jobs found by the Ninth Circuit to be insignificant in *Beltran*, 1,680 jobs nationwide,
9 is much smaller than the 20,000 jobs at issue in this case. *Beltran*, 700 F.3d 386,
10 390 (9th Cir. 2012); *see also Rivera v. Comm'r of Soc. Sec.*, No. 20-1374 (MEL),
11 2022 U.S. Dist. LEXIS 43476, at *31 (D.P.R. Mar. 9, 2022) (“While perhaps
12 occupations with 30,000, 16,000, and 15,000 jobs in the national economy are not
13 indicative of abundance, occupations with this number of positions available
14 nationally are nevertheless in lockstep with the number of jobs which courts have
15 recognized as sufficient for the purposes of step five.”). In sum, the number of jobs
16 that the ALJ found available nationwide in this case is sufficient, even without
17 including the mail clerk positions, for a finding that there are jobs that Plaintiff can
18 perform in the national economy. Any error with respect to identifying the mail
19 clerk job as suitable to Plaintiff’s RFC, therefore, would be harmless.
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1 Accordingly, the Court denies Plaintiff’s Motion for Summary Judgment on
2 this ground and grants summary judgment to the Commissioner with respect to the
3 ALJ’s alleged error at Step Five.

4 ***Additional Evidence***

5 Plaintiff argues that reversible error occurred when the Appeals Council failed
6 to consider new evidence in the form of a medical report from Plaintiff’s treating
7 provider Irma Mejia, ARNP from November 16, 2020, after the ALJ’s decision in
8 September 2020. ECF No. 12 at 6. Plaintiff maintains that this Court should credit
9 as true Ms. Mejia’s opinion that Plaintiff would need to lay down for up to six hours
10 each day and would miss four or more days of work per month. *Id.* at 7–8. Plaintiff
11 argues that Ms. Mejia’s assessment of disabling limitations is consistent with the
12 ALJ’s own RFC and that the record as a whole supports a finding of disability. ECF
13 No. 17 at 5–6.

14 The Commissioner responds that federal courts “do not have jurisdiction to
15 review a decision of the Appeals Council denying a request for review of an ALJ’s
16 decision, because the Appeals Council decision is a non-final agency decision.”
17 ECF No. 16 at 8 (quoting *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157,
18 1159–60 (9th Cir. 2012)). However, the Commissioner continues, the ALJ’s
19 decision, which is the final agency decision, is supported by substantial evidence
20 when Ms. Mejia’s opinion is considered alongside the remaining administrative
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1 record. *Id.* at 8–9. Specifically, the Commissioner maintains that Ms. Mejia’s
2 minimally explained assessment that Plaintiff would miss at least four days of work
3 per month is inconsistent with the remainder of the record and does not support such
4 an extreme limitation. *Id.* at 11–12. The Commissioner adds that frequent medical
5 appointments cannot alone support a finding of disability. *Id.* at 12 (citing *Goodman*
6 *v. Berryhill*, No. C17-5115 BAT, 2017 WL 4265685, at *3 (W.D. Wash.
7 Sept. 25, 2017), *aff’d*, 741 F. App’x 530 (9th Cir. 2018)). In sum, the Commissioner
8 contends that the Appeals Council appropriately concluded that there was not a
9 “reasonable probability” that Ms. Mejia’s opinion would change the outcome of the
10 decision. *Id.* at 9.

11 As an initial matter, as the Commissioner argues, this Court does not have
12 jurisdiction to review the Appeals Council’s non-final agency action. *Taylor v.*
13 *Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011). “[W]hen the
14 Appeals Council considers new evidence in deciding whether to review a decision of
15 the ALJ, that evidence becomes part of the administrative record, which the district
16 court must consider when reviewing the Commissioner’s final decision for
17 substantial evidence.” *Brewes*, 682 F.3d 1157, 1163 (9th Cir. 2012). “‘Substantial
18 evidence’ means more than a mere scintilla, but less than a preponderance. It means
19 such relevant evidence as a reasonable mind might accept as adequate to support a
20 conclusion.” *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th
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1 Cir. 1988) (internal quotation marks and citations omitted). Nevertheless, “in
2 rejecting [new] evidence, the Appeals Council is not required to make any particular
3 evidentiary finding.” *Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996), superseded
4 by regulation on other grounds as stated in *Hudson v. Astrue*, CV 11-0025-CI, 2012
5 U.S. Dist. LEXIS 154871, 2012 WL 5328786, at *4 n.4 (E.D. Wash. Oct. 29, 2012).

6 Following the issuance of ALJ Souza’s September 30, 2020 decision, Plaintiff
7 submitted to the Appeals Council a medical report from Ms. Mejia dated November
8 16, 2020. AR 32–33. To the best of the Court’s ability to decipher Ms. Mejia’s
9 handwritten report, Ms. Mejia wrote that she had treated Plaintiff since late 2014 for
10 depression, fibromyalgia, pain in the low back, and anxiety. AR 32. Ms. Mejia
11 noted that Plaintiff was “seeing psychiatrist [sic],” and a 2017 MRI showed a disc
12 bulge and degeneration. AR 32. Ms. Mejia opined that due to back pain, Plaintiff
13 needs to lie down for “up to” six hours during the day. AR 32. She also opined that
14 since at least September 5, 2018, Plaintiff would miss four or more days of work per
15 month because she “needs treatment” such as physical therapy. In denying
16 Plaintiff’s request to review the ALJ’s decision, the Appeals Council found that Ms.
17 Mejia’s medical report “does not show a reasonable probability that it would change
18 the outcome of the decision.” AR 1–2.

19 The ALJ reviewed the medical opinion evidence in the record at the time of
20 the ALJ’s decision, and Plaintiff does not challenge the ALJ’s assessment of that
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1 evidence. *See* AR 23–24. The ALJ considered and found persuasive opinions from
2 state agency medical consultants and a treating physician that Plaintiff could stand,
3 walk, and/or sit for only about six hours in an eight-hour workday, and that Plaintiff
4 should avoid lifting more than ten pounds. AR 23–24. The ALJ subsequently
5 limited Plaintiff to sedentary work, rather than light work, and included in the
6 residual functional capacity a sit/stand option at will. AR 20, 24. The only
7 explanation provided by Ms. Mejia for her opinion that Plaintiff would miss work
8 entirely for four or more days per month is that Plaintiff needs treatment, including
9 physical therapy. AR 33. However, requiring treatment does not, without more,
10 support a finding of disability. Accordingly, the Appeals Council gave adequate
11 reasons for denying review of the ALJ's ruling, and the Court finds no reversible
12 error on this basis. The Court denies Plaintiff's Motion for Summary Judgment on
13 this ground and grants summary judgment to the Commissioner on this issue.

14 *Subjective Symptom Testimony*

15 Plaintiff contends that the ALJ did not provide adequate or legitimate reasons
16 for discounting Plaintiff's statements regarding the severity of her symptoms
17 because examination findings and testing support Plaintiff's statements, Plaintiff's
18 treatment has not been "conservative," and any improvement was temporary. ECF
19 No. 12 at 10–15 (citing to numerous materials in the administrative record).

1 The Commissioner responds that the ALJ appropriately considered that the
2 medical records showed generally mild objective findings and unremarkable
3 physical examinations. ECF No. 16 at 16 (citing AR 21, 307, 379–81, 386, and
4 411). The Commissioner continues that effectiveness of treatment is a relevant
5 factor in determining the severity of a claimant’s symptoms, and “even if the ALJ
6 erred in describing some treatments, such as epidural injections, as ‘conservative,’”
7 any error was harmless because they nonetheless were effective. *Id.* at 17 (citing AR
8 22). The Commissioner also argues that the ALJ cited to substantial evidence in the
9 record when he found that Plaintiff’s mental health symptoms improved with
10 counseling and medication and that her providers generally recorded normal mental
11 status examinations. *Id.* (citing AR 22–24, 63–65, 76–77, 91–92, 106–07, 354, 411–
12 12, 416, 418–20, 531, 532–33, 570, and 603). Lastly, the Commissioner maintains
13 that the ALJ relied on substantial evidence to find that Plaintiff’s statements to
14 medical sources were inconsistent with statements that she made pursuing her
15 disability application. AR 22 (citing AR 21–22, 230–39, 259–67, 428, and 431).

16 To reject a claimant’s subjective complaints, the ALJ must provide “specific,
17 cogent reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)
18 (internal citation omitted). The ALJ “must identify what testimony is not credible
19 and what evidence undermines the claimant’s complaints.” *Id.* Subjective symptom
20 evaluation is “not an examination of an individual’s character,” and an ALJ must
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1 consider all of the evidence in an individual’s record when evaluating the intensity
2 and persistence of symptoms. *See* SSR 16-3p, 2016 SSR LEXIS 4 (2016).

3 In deciding whether to accept a claimant’s subjective pain or symptom
4 testimony, an ALJ must perform a two-step analysis. *Smolen v. Chater*, 80 F.3d
5 1273, 1281 (9th Cir. 1996). First, the ALJ must evaluate “whether the claimant has
6 presented objective medical evidence of an underlying impairment ‘which could
7 reasonably be expected to produce the pain or other symptoms alleged.’”
8 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v.*
9 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). Second, if the first test is met and there
10 is no evidence of malingering, “the ALJ can reject the claimant’s testimony about
11 the severity of her symptoms only by offering specific, clear and convincing reasons
12 for doing so.” *Smolen*, 80 F.3d at 1281.

13 The ALJ noted repeated unremarkable physical and mental status
14 examinations in the record. AR 21. The ALJ also thoroughly recited the portions of
15 the medical record supporting that treatment that Plaintiff received had “been helpful
16 in relieving her symptoms.” AR 21–22; *see Hanes v. Colvin*, 651 F. App’x 703, 705
17 (9th Cir. 2016) (the ALJ properly discredited the claimant's subjective symptom
18 testimony by citing her “conservative treatment plan, which consisted primarily of
19 minimal medication, limited injections, physical therapy, and gentle exercise”). The
20 ALJ further determined that Plaintiff did not report to her treating providers

1 “difficulties to the extent she has in connection with her disability applications,” and
2 that Plaintiff “made some inconsistent statements and has acknowledged engaging in
3 activities which suggest she is not as limited as she has alleged.” AR 22 (citing AR
4 304, 307, 428, and 431); *see* 20 C.F.R. § 416.929(c)(3) (after considering
5 consistency with the objective medical evidence, the ALJ considers whether and to
6 what extent the claimant's subjective statements are consistent with “other evidence”
7 in the record, such as treatment, daily activities, and other factors).

8 The Court finds that the ALJ provided sufficient, cogent reasons for
9 discounting Plaintiff’s claims of more extreme limitation than reflected in the RFC,
10 and the ALJ’s decision reflects that he thoroughly considered the record. Therefore,
11 the Court denies Plaintiff’s Motion for Summary Judgment and grants summary
12 judgment to the Commissioner with respect to the alleged erroneous treatment of
13 Plaintiff’s subjective symptom testimony.

14 CONCLUSION

15 Having reviewed the record and the ALJ’s findings, this Court concludes that
16 the ALJ’s decision is supported by substantial evidence and free of harmful legal
17 error. Accordingly, **IT IS HEREBY ORDERED** that:

- 18 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.
- 19 2. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is

20 **GRANTED.**

1 3. Judgment shall be entered for Defendant.

2 Accordingly, **IT IS HEREBY ORDERED** that:

3 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
4 Order, enter judgment as directed, provide copies to counsel, and **close the file** in
5 this case.

6 **DATED** May 17, 2022.

7 *s/ Rosanna Malouf Peterson*
8 ROSANNA MALOUF PETERSON
9 Senior United States District Judge
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