

1
2
3 **UNITED STATES DISTRICT COURT**
4 **EASTERN DISTRICT OF WASHINGTON**

5 Case No. CV-14-331-JPH

6 REBECA GARZA,

7 Plaintiff,

8 vs.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

12
13 **BEFORE THE COURT** are cross-motions for summary judgment. ECF No.
14 14, 19. Attorney David Church represents plaintiff (Garza). Special Assistant United
15 States Attorney Danielle R. Mroczek represents defendant (Commissioner). The
16 parties consented to proceed before a magistrate judge. ECF No. 6. On July 6, 2015
17 Garza replied. ECF No. 22. Defendant moved to file a surreply, which the Court
18 granted. ECF No. 24, 25. Plaintiff objected and moved for reconsideration. ECF No.
19 27, 28. After reviewing the administrative record and the briefs filed by the parties,
20 the court **grants in part plaintiff's motion for reconsideration, ECF No. 27, and**
grants defendant's motion for summary judgment, ECF No. 19.

ORDER ~ 1

1 **JURISDICTION**

2 On January 11, 2012 Garza applied for disability income benefits (DIB) and
3 supplemental security income benefits (SSI) beginning October 25, 2010 (Tr. 128-
4 34). The claims were denied initially and on reconsideration (Tr. 79-82, 86-87).
5 Administrative Law Judge (ALJ) Marie Palachuk held a hearing May 21, 2013.
6 Garza was represented by counsel and used an interpreter. An orthopedic surgeon
7 and a vocational expert testified (Tr. 32-52). An unidentified person sat through the
8 hearing, including during Garza’s testimony, and was not introduced. Counsel
9 sought to have her testify on Garza’s behalf. The ALJ ruled because the person sat
10 through the hearing he or she was not permitted to testify (Tr. 46). On June 14, 2013,
11 the ALJ issued an unfavorable decision (Tr. 16-31). In August 2014 the Appeals
12 Council accepted additional evidence, including an affidavit purportedly written by
13 the friend who was not allowed to testify. They denied review (Tr. 1-6). Garza
14 appealed pursuant to 42 U.S.C. §§ 405(g) on October 9, 2014. ECF No. 1, 4.

15 **STATEMENT OF FACTS**

16 The facts appear in the administrative hearing transcript, the decisions below
17 and the parties’ briefs. They are only briefly summarized here and throughout this
18 order as necessary to explain the Court’s decision.

19 Garza was 46 years old at onset and 49 at the hearing. She was born in
20 Mexico and attended school in the United States through the eighth or ninth grade.

1 She last worked in 2010 as an agricultural supervisor. She has also worked as an
2 agricultural worker. She worked for about three years as a taco truck
3 owner/manager, and for three months as an in home caregiver. Garza testified she
4 cannot write in English. A cousin completed her application paperwork for her. She
5 testified she is five foot four and weighs 240 pounds. At the time of the hearing she
6 was separated from her spouse and living with a friend. She applied for benefits
7 alleging back pain (Tr. 26, 38-45, 47-48, 128, 136-37, 161-62).

8 **SEQUENTIAL EVALUATION PROCESS**

9 The Social Security Act (the Act) defines disability as the “inability to engage
10 in any substantial gainful activity by reason of any medically determinable physical
11 or 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 twelve months.” 42
13 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall
14 be determined to be under a disability only if any impairments are of such severity
15 that a plaintiff is not only unable to do previous work but cannot, considering
16 plaintiff’s age, education and work experiences, engage in any other substantial
17 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
18 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

20 The Commissioner has established a five-step sequential evaluation process

1 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
2 one determines if the person is engaged in substantial gainful activities. If so,
3 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
4 decision maker proceeds to step two, which determines whether plaintiff has a
5 medically severe impairment or combination of impairments. 20 C.F.R. §§
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination of impairments,
8 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
9 the third step, which compares plaintiff's impairment with a number of listed
10 impairments acknowledged by the Commissioner to be so severe as to preclude
11 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20
12 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
13 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
14 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
15 step, which determines whether the impairment prevents plaintiff from performing
16 work which was performed in the past. If a plaintiff is able to perform previous work
17 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
18 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
19 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
20 the process determines whether plaintiff is able to perform other work in the national

1 economy in view of plaintiff's residual functional capacity, age, education and past
2 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
3 *Yuckert*, 482 U.S. 137 (1987).

4 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
5 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
6 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
7 met once plaintiff establishes that a mental or physical impairment prevents the
8 performance of previous work. The burden then shifts, at step five, to the
9 Commissioner to show that (1) plaintiff can perform other substantial gainful
10 activity and (2) a "significant number of jobs exist in the national economy" which
11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a Commissioner's
14 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,
15 made through an ALJ, when the determination is not based on legal error and is
16 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
17 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
18 determination that a plaintiff is not disabled will be upheld if the findings of fact are
19 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
20 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,

1 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a
2 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
3 Substantial evidence “means such evidence as a reasonable mind might accept as
4 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401
5 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]
6 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,
7 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a
8 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*
9 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
10 526 (9th Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.
12 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
13 interpretation, the Court may not substitute its judgment for that of the
14 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
15 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
16 set aside if the proper legal standards were not applied in weighing the evidence and
17 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
18 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
19 administrative findings, or if there is conflicting evidence that will support a finding

1 of either disability or nondisability, the finding of the Commissioner is conclusive.
2 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

3 **ALJ'S FINDINGS**

4 ALJ Palachuk found Garza was insured through December 31, 2015. At step
5 one, the ALJ found Garza did not work at substantial gainful activity levels after
6 onset (Tr. 19, 21). At steps two and three, she found Garza suffers from degenerative
7 disease of the spine without neurological compromise, morbid obesity, diabetes
8 mellitus and carpal tunnel syndrome (CTS), impairments that are severe but do not
9 meet or medically equal a Listed impairment (Tr. 21, 23). The ALJ found Garza
10 less than fully credible and assessed an RFC for a range of sedentary work (Tr. 23-
11 25). At step four, the ALJ found Garza is unable to do any past work (Tr. 26). At
12 step five, she found Garza can do other work such as document preparer, escort
13 vehicle driver and cashier (Tr. 27-28). Accordingly, the ALJ found Garza was not
14 disabled as defined by the Act (Tr. 28).

15 **ISSUES**

16 Garza alleges the ALJ erred when she assessed credibility, weighed the
17 evidence and did not permit a witness to testify. At step five she alleges the ALJ
18 should have found her disabled pursuant to Grid Rule 201.17. ECF No. 14 at 2, 18.
19 The Commissioner responds that because the ALJ's findings are factually supported
20 and free of harmful legal error, this court should affirm. ECF No. 19 at 27.

1 **DISCUSSION**

2 *A. Credibility*

3 When presented with conflicting medical opinions, the ALJ must determine
4 credibility and resolve the conflict. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
5 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ’s credibility findings must be
6 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
7 Cir. 1990). Absent affirmative evidence of malingering, the ALJ’s reasons for
8 rejecting the claimant’s testimony must be “clear and convincing.” *Lester v. Chater*,
9 81 F.3d 821, 834 (9th Cir. 1995).

10 Garza alleges the ALJ’s reasons are not clear and convincing. ECF No. 14 at
11 7-13. The Commissioner answers that ALJ Palachuk’s reasons both meet this
12 standard and are supported by substantial evidence. ECF No. 19 at 8-13. The
13 Commissioner notes some of the ALJ’s reasons include the unexplained failure to
14 follow recommended treatment, lack of motivation to be independent in self-care
15 and inconsistencies between Garza’s allegations and other evidence. ECF No. 19 at
16 9.

17 The record shows Garza admitted to providers she did not follow a diet or
18 exercise as directed to treat diabetes. She has admitted not taking prescribed
19 medication and failing to monitor blood sugar levels. At times diabetes is described
20 as uncontrolled (Tr. 247, 252, 341, 402, 440, 443, 450, 454, 520, 525, 537, 559).

1 Although Garza has alleged lack of insurance is the reason for noncompliance,
2 this does not adequately explain failing to exercise.

3 Activities include preparing simple meals, driving, shopping, light housework,
4 watching television and visiting with friends in her home or on the phone. The
5 ALJ notes Garza has the ability to prepare meals when she must – that is, when a
6 meal is not prepared by someone else for her. This may indicate a lack of motivation
7 for self-care since this is a task Garza is able to perform. Similarly, Garza’s refusal
8 to follow recommended medical treatment may indicate a lack of motivation to work
9 and that symptoms and that limitations are not as dire as alleged (Tr. 24-25).

10 Garza has stated she gets migraine headaches that last a minimum of one
11 week. She can only walk a block or two. If she tries to do any heavy lifting she is
12 paralyzed for three to five days at a time (Tr. 24, 44, 197-204, 212).

13 Yet medical records do not support such extreme limitations. In July 2012 it is
14 noted Garza has had no physical therapy. In 2013 she “has had physical therapy in
15 the past.” There are no physical therapy records. In 2013 she thought eyestrain was
16 causing headaches. Treatment has consisted of medications and injections. A record
17 in December 2012 indicates “no MRI findings show structural abnormalities that
18 correlate with the patient’s complaints or that would indicate a need for surgical
19 intervention.” Exam results have shown leg strength of 4/5, full range of motion in
20 all joints and no acute distress and full sensation (Tr. 344, 355, 362, 377, 422, 453,

1 456, 463, 468, 475, 481, 490, 493, 503, 515, 518, 524, 546, 552).

2 The ALJ opined Garza has been less than forthright with respect to her ability
3 to understand and communicate in English (Tr. 25). This too is supported by the
4 record. For example, the ALJ notes Garza testified she attended school through the
5 eighth grade in this state. She also testified she could not understand or communicate
6 very well in English, which seems contradictory and undermines credibility. *See*
7 *also below at C.*

8 The ALJ's reasons are clear, convincing and supported by substantial
9 evidence. *See Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005)(proper to
10 consider unexplained or inadequately explained failure to follow recommended
11 medical treatment and lack of consistent treatment; *Thomas v. Barnhart*, 278 F.3d
12 947, 958-59 (9th Cir. 2002) (inconsistencies between statements and conduct and the
13 extent of daily activities are properly considered).

14 Garza fails to show the ALJ arbitrarily discounted her testimony.

15 *B. Medical evidence*

16 Garza alleges the ALJ erred when she failed to properly credit the opinion of
17 her treating physician, Bashar Elali, M.D. ECF No. 14 at 16-18. The Commissioner
18 answers that the ALJ properly relied on the opinions of the medical expert, Darius
19 Ghazi, M.D., and agency reviewing doctor Elizabeth St. Louis, M.D., when she
20 adopted Elali's RFC for sedentary work but rejected his assessed marked limitations.

1 ECF No. 19 at 21-23.

2 The ALJ disagreed with his check box assessment that Garza's back
3 conditions "very significantly" interfere with the ability to perform many basic work
4 activities because the opinion fails to explain the bases for the assessed limitations. It
5 is also internally inconsistent (Tr. 26). The ALJ is correct that the form does not
6 explain the bases for the limitations assessed. The opinion is also inconsistent. Dr.
7 Elali assesses both an RFC for sedentary work (Tr. 488) and marked interference
8 with the ability to perform many basic work-related activities (Tr. 489). His
9 treatment notes do not identify any work-related functional limitations, as the
10 Commissioner correctly observes. ECF No. 19 at 20. Although he states imaging
11 and other diagnostic test results are "all listed in her chart" (Tr. 489), the test results
12 show *at most* moderate spinal stenosis and do not support the marked interference
13 assessed. Most of his records reflect "in no acute distress." *See* Tr. 26, 419, 493, 503,
14 511, 530.

15 These reasons are proper. An ALJ may reject check-off reports that do not
16 contain any explanation of the bases of their conclusions. *See Molina v. Astrue*, 674
17 F.3d 1104, 1111 (9th Cir. 2012). An ALJ may properly reject any opinion that is
18 brief, conclusory and inadequately supported by clinical findings. *Bayliss v.*
19 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). Opinions that are internally
20

1 inconsistent may properly be given less weight. *Morgan v. Commissioner of Social*
2 *Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999).

3 The ALJ notes the testifying expert, Dr. Ghazi, opined Garza could perform
4 sedentary work (Tr. 25, 38). The ALJ credited this opinion because Dr. Ghazi was
5 the only doctor who reviewed all of the evidence, he is board certified as an
6 orthopedic surgeon and his conclusions are based on objective findings in the
7 medical record (Tr. 25). This was proper.

8 Agency reviewing doctor St. Louis also assessed an RFC for sedentary work
9 (Tr. 25, 73-77). The ALJ properly credited this evidence because it is consistent
10 overall with opinions by treating and reviewing sources.

11 The ALJ is responsible for determining credibility, resolving conflicts in
12 medical testimony and resolving ambiguities. *Tommasetti v. Astrue*, 533 F.3d 1035,
13 1041-42 (9th Cir. 2008)(internal citations omitted).]

14 The court will uphold the ALJ's conclusion when the evidence is susceptible
15 to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th
16 Cir. 2005).

17 The ALJ properly weighed the contradictory evidence. The record fully
18 supports the assessed RFC. Although Garza alleges the ALJ should have weighed
19 the evidence differently, the ALJ is responsible for reviewing the evidence and
20 resolving conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747,

1 751 (9th Cir. 1989). It is the role of the trier of fact, not this court, to resolve conflicts
2 in evidence. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). If evidence supports
3 more than one rational interpretation, the Court may not substitute its judgment for
4 that of the Commissioner. *Tackett*, 180 F.3d 1094, 1097 (9th Cir. 1999); *Allen v.*
5 *Heckler*, 749 F.2d 577, 579 (9th 1984). If there is substantial evidence to support the
6 administrative findings, or if there is conflicting evidence that will support a finding
7 of either disability or nondisability, the finding of the Commissioner is conclusive.
8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

9 *C. Procedural due process and lay witness testimony*

10 Garza alleges the ALJ's refusal to permit Garza's friend (unnamed in the
11 record) to testify violated her right to due process. ECF No. 14 at 5-7. The
12 Commissioner responds that error if any was invited and harmless. ECF No. 19 at 3-
13 8.

14 A letter dated May 24, 2013, three days after the hearing, was written by
15 Garza's friend and considered by the Appeals Council. The court has considered the
16 evidence presented for the first time to the Appeals Council to determine whether
17 the ALJ's decision is supported by substantial evidence. *See Brewes v. Comm'r of*
18 *Soc. Sec. Admin.*, 659 F.3d 1157, 1159-60, 1162-63 (9th Cir. 2011).

19 Garza's friend Cedelia Cano states Garza has problems reading, writing and
20 speaking English. Ms. Cano has known Garza more than twenty years. She opines

1 Garza reads English at a first or second grade level and her writing contains many
2 spelling and grammatical errors. Garza often asks Cano to translate for her and uses
3 an interpreter for all medical appointments (Tr. 234).

4 As noted, the witness who was not allowed to testify is not named in the
5 record. The Commissioner alleges it is Ms. Cano. ECF No. 19 at 6, citing Tr. 235
6 and ECF No. 14 at 5-7, 14-15.

7 The ALJ did not permit the witness to testify because the witness was present
8 in the hearing while testimony was taken and should have been excluded. Garza's
9 counsel did not introduce the witness as a witness until other testimony had been
10 taken.

11 This is clearly invited error since only counsel, the witness and probably Ms.
12 Garza knew the person seated in the hearing room was going to testify. The ALJ said
13 she "was told the other person was there as a friend" (Tr. 46). One may not complain
14 on review of errors below for which he is responsible. *See Sovak v. Chugai Pharm.*
15 *Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002).

16 Any error here is harmless, in any event. The ALJ asked the vocational expert
17 if a person with limited education could perform the jobs identified at step five (Tr.
18 48). The VE was also asked whether the inability to communicate in writing in
19 English would impact the ability to perform these jobs (Tr. 50). The VE was asked
20 whether a limited ability to speak and understand English would affect the ability to

1 do these jobs (Tr. 51). The VE answered that none of these would impact the ability
2 to perform the jobs identified. Plaintiff fails to establish harmful error. The evidence
3 of functional literacy is discussed below.

4 *D. Functional illiteracy*

5 Garza alleges the ALJ should have found she is functionally illiterate because
6 such a finding is supported by substantial evidence, and would entitle her to a
7 finding of disability at step five under Grid Rule 201.17. ECF No. 14 at 14-15. The
8 Commissioner responds that the ALJ weighed and properly discounted this
9 evidence. ECF No. 19 at 23-24.

10 Garza was hospitalized in June 2010 (abdominal pain); October 2010
11 (appendectomy); March 2011 (fell) and July 2011 (herniated disc). All discharge
12 instructions are in English (Tr. 239, 244, 265-27, 282-84, 295, 314). Garza indicated
13 she could speak, understand and read English, and write more than her name in it
14 (Tr. 160). English is listed as her preferred language (Tr. 274). Garza cites two
15 places in the record that indicate her preferred language is Spanish. ECF No. 22 at
16 10, citing Tr. 286, 297. This is not substantial evidence.

17 Last, Garza alleges the ALJ's hypothetical failed to include all of her
18 limitations. ECF No. 14 at 18-19.

19 In "hypotheticals posed to a vocational expert, the ALJ must only include
20 those limitations supported by substantial evidence." *Robbins v. Soc. Sec. Admin.*,

1 466 F.3d 880, 886 (9th Cir. 2006). The ALJ properly weighed the evidence.

2 *E. Remand*

3 It is within the Court's discretion to reverse with or without remand for further
4 administrative proceedings. 42. U.S.C. § 405(g); *Shalala v. Schaefer*, 509 U.S. 292,
5 296 (1993)(citations omitted).

6 It is appropriate to remand for payment of benefits if (1) the ALJ failed to
7 provide legally sufficient reasons for rejecting medical opinions or a claimant's
8 testimony; (2) there are no outstanding issues to be resolved before a disability
9 determination can be made, and (3) it is clear from the record that the ALJ would be
10 required to find the claimant disabled were such evidence credited. *See Smolen v.*
11 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).

12 In this case the ALJ's determinations are supported by the record and free of
13 harmful legal error. The Commissioner is correct that a subsequent award of benefits
14 is irrelevant to the time frame addressed by the ALJ's June 14, 2013 decision.

15 **CONCLUSION**

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

18 **IT IS ORDERED:**

19 Defendant's motion for summary judgment, **ECF No. 19**, is **granted**.

1 Plaintiff's motion for summary judgment, ECF No. 14, is denied.

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

4 DATED this 6th day of August, 2015.

5 *S/ James P. Hutton*

6 JAMES P. HUTTON
7 UNITED STATES MAGISTRATE JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20