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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOHANNA HORNING,

Plaintiff,

v.

NANCY A. BERRYHILL  
(PREVIOUSLY CAROLYN W.  
COLVIN),  
Acting Commissioner of Social  
Security,<sup>1</sup>

Defendant.

No. 2:16-CV-00290-RHW

**ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court are the parties’ cross-motions for summary judgment, ECF Nos. 12 & 13. Ms. Horning brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner’s final decision, which denied her application for Disability Insurance Benefits under Title II and her application for

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<sup>1</sup> Nancy A. Berryhill became the Acting Commissioner of Social Security on January 20, 2017. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is substituted for Carolyn W. Colvin as the defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 Supplemental Security Income under Title XVI of the Social Security Act, 42  
2 U.S.C §§ 401-434, 1381-1383F. After reviewing the administrative record and  
3 briefs filed by the parties, the Court is now fully informed. For the reasons set forth  
4 below, the Court **GRANTS** Defendant’s Motion for Summary Judgment and  
5 **DENIES** Ms. Horning’s Motion for Summary Judgment.

### 6 **I. Jurisdiction**

7 Ms. Horning filed her applications for Disability Insurance Benefits and  
8 Supplemental Security Income in August 2014 and December 2014. AR 21, 200-  
9 208. Her alleged onset date is October 22, 2013, AR 21, 200, 202. Ms. Horning’s  
10 applications were initially denied on December 3, 2014, AR 136-38, and on  
11 reconsideration on January 21, 2015, AR 141-51.

12 A hearing with Administrative Law Judge (“ALJ”) R.J. Payne occurred on  
13 March 18, 2016. AR 39-90. On March 29, 2016, the ALJ issued a decision finding  
14 Ms. Horning ineligible for disability benefits. AR 18-38. The Appeals Council  
15 denied Ms. Horning’s request for review on June 23, 2016, AR 1-3, making the  
16 ALJ’s ruling the “final decision” of the Commissioner.

17 Ms. Horning timely filed the present action challenging the denial of  
18 benefits, on August 12, 2016. ECF No. 3. Accordingly, Ms. Horning’s claims are  
19 properly before this Court pursuant to 42 U.S.C. § 405(g).



1 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§  
2 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

3 Step two asks whether the claimant has a severe impairment, or combination  
4 of impairments, that significantly limits the claimant's physical or mental ability to  
5 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe  
6 impairment is one that has lasted or is expected to last for at least twelve months,  
7 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &  
8 416.908-09. If the claimant does not have a severe impairment, or combination of  
9 impairments, the disability claim is denied, and no further evaluative steps are  
10 required. Otherwise, the evaluation proceeds to the third step.

11 Step three involves a determination of whether any of the claimant's severe  
12 impairments "meets or equals" one of the listed impairments acknowledged by the  
13 Commissioner to be sufficiently severe as to preclude substantial gainful activity.  
14 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;  
15 20 C.F.R. § 404 Subpt. P. App. 1 ("the Listings"). If the impairment meets or  
16 equals one of the listed impairments, the claimant is *per se* disabled and qualifies  
17 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the  
18 fourth step.

19 Step four examines whether the claimant's residual functional capacity  
20 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f) &

1 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is  
2 not entitled to disability benefits and the inquiry ends. *Id.*

3 Step five shifts the burden to the Commissioner to prove that the claimant is  
4 able to perform other work in the national economy, taking into account the  
5 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),  
6 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this  
7 burden, the Commissioner must establish that (1) the claimant is capable of  
8 performing other work; and (2) such work exists in "significant numbers in the  
9 national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,  
10 676 F.3d 1203, 1206 (9th Cir. 2012).

### 11 III. Standard of Review

12 A district court's review of a final decision of the Commissioner is governed  
13 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the  
14 Commissioner's decision will be disturbed "only if it is not supported by  
15 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1144,  
16 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than a  
17 mere scintilla but less than a preponderance; it is such relevant evidence as a  
18 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*  
19 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d  
20 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining

1 whether the Commissioner’s findings are supported by substantial evidence, “a  
2 reviewing court must consider the entire record as a whole and may not affirm  
3 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*  
4 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879  
5 F.2d 498, 501 (9th Cir. 1989)).

6 In reviewing a denial of benefits, a district court may not substitute its  
7 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.  
8 1992). If the evidence in the record “is susceptible to more than one rational  
9 interpretation, [the court] must uphold the ALJ's findings if they are supported by  
10 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,  
11 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9<sup>th</sup> Cir.  
12 2002) (if the “evidence is susceptible to more than one rational interpretation, one  
13 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,  
14 a district court “may not reverse an ALJ's decision on account of an error that is  
15 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is  
16 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.  
17 The burden of showing that an error is harmful generally falls upon the party  
18 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

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1 **IV. Statement of Facts**

2 The facts of the case are set forth in detail in the transcript of proceedings,  
3 and only briefly summarized here. Ms. Horning was 50 years old at the alleged  
4 date of onset. AR 30, 200, 202. She attended high school and received her GED.  
5 AR 30, 62. Ms. Horning is able to communicate in English. AR 30. The ALJ found  
6 Ms. Horning to suffer from major depressive disorder, anxiety disorder, substance  
7 abuse disorder in partial remission, morbid obesity, exercise-induced asthma, and  
8 migraine headaches. AR 23. Ms. Horning previously worked as a lab technician  
9 and a city bus driver. AR 30, 246, 316.

10 **V. The ALJ's Findings**

11 The ALJ determined that Ms. Horning was not under a disability within the  
12 meaning of the Act from October 22, 2013, her alleged date of onset. AR 31-32.

13 **At step one**, the ALJ found that Ms. Horning had not engaged in substantial  
14 gainful activity since October 22, 2013 (citing 20 C.F.R. §§ 404.1571 et seq. &  
15 416.971 et seq.). AR 23.

16 **At step two**, the ALJ found Ms. Horning had the following severe  
17 impairments: major depressive disorder, anxiety disorder, substance abuse disorder  
18 in partial remission, morbid obesity, exercise-induced asthma, and migraine  
19 headaches (citing 20 C.F.R. §§ 404.1520(c) & 416.920(c)). AR 23-24.

1           At **step three**, the ALJ found that Ms. Horning did not have an impairment  
2 or combination of impairments that meets or medically equals the severity of one  
3 of the listed impairments in 20 C.F.R. § 404, Subpt. P, App. 1. AR 24-25.

4           At **step four**, the ALJ found Ms. Horning had the residual functional  
5 capacity to perform light work as defined in 20 CFR §§ 404.1567(b) and  
6 416.967(b) with these exceptions: (1) she can lift up to twenty pounds occasionally  
7 and lift or carry ten pounds frequently; (2) she can sit six hours and stand and walk  
8 six hours total, in any combination, in an eight hour workday with normal breaks;  
9 (3) she can occasionally climb ramps and stairs, balance, stoop, kneel, and crouch;  
10 (4) she can never crawl, or climb ropes, ladders, or scaffolds; (5) she should avoid  
11 concentrated exposure to loud noise, fumes, odors, dusts, gases, and poor  
12 ventilation, and avoid all exposure to hazards. She can understand, remember, and  
13 carry out simple routine repetitive work instructions; she can handle superficial  
14 contact with the general public; she could work with small groups of co-workers (4  
15 to 6 in number) but not in a team-work type work setting; she could handle normal  
16 supervision, but no over-the-shoulder or confrontational type supervision; no fast  
17 paced or strict production-quota type work; and little or no change in the work  
18 setting. AR 25.

19           The ALJ determined that Ms. Horning is unable to perform any of her past  
20 relevant work. AR 30.



1 At **step five**, the ALJ found that, in light of her age, education, work  
2 experience, and residual functional capacity, in conjunction with the Medical-  
3 Vocational Guidelines, there are jobs that exist in significant numbers in the  
4 national economy that she can perform. AR 30-31.

## 5 **VI. Issues for Review**

6 Ms. Horning argues that the Commissioner's decision is not free of legal  
7 error and not supported by substantial evidence. Specifically, she argues the ALJ  
8 erred by: (1) improperly assessing Ms. Horning's subjective complaint testimony  
9 credibility; (2) improperly weighing the lay statements of her friend, Rosa Lopez;  
10 and (3) improperly assessing Ms. Horning's residual functioning capacity, failing  
11 to pose a proper hypothetical to the vocational expert, and failing to identify jobs,  
12 available in significant numbers, that Ms. Horning could perform despite her  
13 functional limitations.

## 14 **VII. Discussion**

### 15 **A. The ALJ Properly Discounted Ms. Horning's Credibility.**

16 An ALJ engages in a two-step analysis to determine whether a claimant's  
17 testimony regarding subjective symptoms is credible. *Tommasetti v. Astrue*, 533  
18 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective  
19 medical evidence of an underlying impairment or impairments that could  
20 reasonably be expected to produce some degree of the symptoms alleged. *Id.*

1 Second, if the claimant meets this threshold, and there is no affirmative evidence  
2 suggesting malingering, “the ALJ can reject the claimant’s testimony about the  
3 severity of [her] symptoms only by offering specific, clear, and convincing reasons  
4 for doing so.” *Id.*

5 In weighing a claimant's credibility, the ALJ may consider many factors,  
6 including, “(1) ordinary techniques of credibility evaluation, such as the claimant's  
7 reputation for lying, prior inconsistent statements concerning the symptoms, and  
8 other testimony by the claimant that appears less than candid; (2) unexplained or  
9 inadequately explained failure to seek treatment or to follow a prescribed course of  
10 treatment; and (3) the claimant's daily activities.” *Smolen*, 80 F.3d at 1284. When  
11 evidence reasonably supports either confirming or reversing the ALJ's decision, the  
12 Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180  
13 F.3d 1094, 1098 (9th Cir.1999). Here, the ALJ found that the medically  
14 determinable impairments could reasonably be expected to produce the symptoms  
15 Ms. Horning alleges; however, the ALJ determined that Ms. Horning’s statements  
16 regarding intensity, persistence, and limiting effects of the symptoms were not  
17 entirely credible. AR 27.

18 The ALJ noted several activities of daily living that are inconsistent with  
19 Ms. Horning’s allegations. Activities transferable to a work setting are a proper  
20 ground for questioning the credibility of an individual’s subjective allegations. *See*

1 *Molina*, 674 F.3d at 1113 (“[e]ven where those activities suggest some difficulty  
2 functioning, they may be grounds for discrediting the claimant’s testimony to the  
3 extent that they contradict claims of a totally debilitating impairment”).

4 Ms. Horning testified that she cannot be around others and did not like to  
5 leave her house. AR 27, 80. However, the ALJ noted several inconsistencies with  
6 the alleged severity of her disability. In particular, the ALJ noted that Ms. Horning  
7 reported a fairly active social life, she has friends she sees regularly, she  
8 occasionally went out with friends and ex-coworkers, and she was able to fly  
9 across the country and go on a seven day cruise. AR 27, 76, 82, 693.

10 Additionally, Ms. Horning alleges a complete inability to work, but the ALJ  
11 found her activities and medical reports to not indicate a complete inability to  
12 work. AR 27. The ALJ noted that Ms. Horning has numerus pets that she cares for,  
13 including three dogs, she lives alone, and does her own shopping and chores. AR  
14 27, 421-23. Further, the ALJ noted allegations contradicted by the medical record,  
15 stating that there is nothing to support her allegations of hand and feet limitations,  
16 and her alleged frequency of her migraine headaches is contradicted by the record  
17 which shows they have improved. AR 27, 668, 678.

18 In consideration of Ms. Horning’s credibility, the ALJ noted the infrequency  
19 of her treatment. AR 26-27. A claimant’s statements may be less credible when  
20 treatment is inconsistent with the level of complaints or a claimant is not following

1 treatment prescribed without good reason. *Molina*, 674 F.3d at 1114. When  
2 refusing prescribed treatment, the reasons presented for not following the treatment  
3 must be related to the mental impairment and not a matter of personal preference.  
4 *Id.* “Unexplained, or inadequately explained, failure to seek treatment . . . can cast  
5 doubt on the sincerity of [a] claimant’s pain testimony.” *Fair v. Bowen*, 885 F.2d  
6 597, 603 (9th Cir. 1989).

7 The ALJ points out that Ms. Horning has received little mental health  
8 treatment. AR 26. Ms. Horning received mental health counseling in an effort to  
9 keep her job, but stopped when she lost her job, then began again in October 2015  
10 in order to obtain medical documentation for her disability claim rather than to  
11 improve her mental condition, and even then she refused to do group counseling.  
12 AR 26, 27, 693, 728.

13 The Court does not find the ALJ erred when assessing Ms. Horning’s  
14 credibility because Ms. Horning’s activities reflect a level of functioning that is  
15 inconsistent with her claims of disability, as well as inconsistencies with the record  
16 and a failure to treat her alleged impairments.

17 **B. The ALJ Properly Weighed the Lay Witness Testimony.**

18 Ms. Horning does not present this as an issue but she does quickly state, in  
19 her brief argument addressing her own credibility, that she takes issue with the  
20 ALJ’s rejection of the functional report completed by Rosa Lopez. The opinion

1 testimony of Ms. Horning’s friend, Rosa Lopez, falls under the category of “other  
2 sources.” “Other sources” for opinions include nurse practitioners, physicians’  
3 assistants, therapists, teachers, social workers, spouses, and other non-medical  
4 sources. 20 C.F.R. §§ 404.1513(d), 416.913(d). An ALJ is required to “consider  
5 observations by non-medical sources as to how an impairment affects a claimant's  
6 ability to work.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.1987). Non-  
7 medical testimony can never establish a diagnosis or disability absent  
8 corroborating competent medical evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467  
9 (9th Cir.1996). An ALJ is obligated to give reasons germane to “other source”  
10 testimony before discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir.1993).

11         The ALJ afforded little weight to the testimony of Ms. Lopez in assessing  
12 the severity of Ms. Horning’s impairments. AR 30. The ALJ noted that Ms. Lopez  
13 stated that Ms. Horning was not a people person, did not like to be outside, and  
14 spent a lot of time on the couch. AR 30, 270-77. However, the ALJ also notes that  
15 Ms. Lopez states that Ms. Horning went out with ex-coworkers for drinks on a  
16 fairly regular basis. AR 30, 274. The ALJ states that Ms. Lopez’s report is also  
17 given little weight for the same reasons Ms. Horning was not found credible. AR  
18 30. *See Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009)  
19 (upholding the ALJ’s rejection of a lay witness for the same reasons the ALJ  
20 rejected the claimant’s credibility); *See also Molina*, 674 F.3d at 1117.

1 Additionally, the ALJ states that Ms. Lopez did not describe someone who is  
2 unable to work. AR 30.

3 The ALJ properly provided germane reasons for assigning little weight to  
4 Ms. Lopez's report. The ALJ properly rejected Ms. Horning's testimony and  
5 credibility, and as the information provided by Ms. Lopez is cumulative to that  
6 provided by Ms. Horning, the ALJ's well-reasoned explanations for rejecting Ms.  
7 Horning's testimony properly apply equally well to the assignment of little weight  
8 to Ms. Lopez's report.

9 **C. The ALJ did not fail to conduct a proper assessment at steps four and**  
10 **five of the sequential evaluation process.**

11 Ms. Horning briefly attempts to argue that her assessed residual functioning  
12 capacity, the hypothetical posed to the vocational expert, and the resulting step five  
13 finding did not account for all of her limitations, based on Ms. Horning's  
14 subjective complaints and testimony.

15 Ms. Horning contends that the ALJ failed to identify jobs, available in  
16 significant numbers that Ms. Horning could perform despite her functional  
17 limitations. Specifically, Ms. Horning contends that the hypothetical provided to  
18 the vocational expert is incomplete because it fails to take into account additional  
19 limitations from which she has suggested she suffers; however, the Court has  
20 already found no error in the ALJ's treatment of Ms. Horning's subjection

1 complaint testimony and determined that the ALJ properly discounted her  
2 credibility. *See supra* at 9-12. The Court will uphold the ALJ's findings when a  
3 claimant attempts to restate the argument that the residual functional capacity  
4 finding did not account for all limitations. *Stubbs-Danielson v. Astrue*, 539 F.3d  
5 1169, 1175-76 (9th Cir. 2008).

6 The ALJ properly framed the hypothetical question addressed to the  
7 vocational expert. Additionally, the vocational expert identified jobs in the national  
8 economy that exist in significant numbers that match the abilities of Ms. Horning,  
9 given her limitations. Thus, the Court finds the ALJ met the step five burden and  
10 did not err in his analysis.

### 11 **VIII. Conclusion**

12 Having reviewed the record and the ALJ's findings, the Court finds the  
13 ALJ's decision is supported by substantial evidence and is free from legal error.

14 Accordingly, **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

16 2. Defendant's Motion for Summary Judgment, **ECF No. 13**, is

17 **GRANTED.**

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