

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

Apr 06, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MELISSA M.,

Plaintiff,

-vs-

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,

Defendant.

No. 2:22-CV-0181-WFN

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

Pending before the Court are cross-motions for summary judgment. ECF Nos. 11, 12. Attorney Maren Bam represents Melissa M., and Special Assistant United States Attorney Katherine Watson represents the Commissioner of Social Security. After reviewing the administrative record and the briefs filed by the parties, the Court GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on December 17, 2019, Tr. 314–28, alleging disability since January 9, 2019, Tr. 329, 336, due to acid reflux, fibromyalgia, migraines, attention deficit disorder, depression, anxiety disorder, post-traumatic stress disorder, irritable bowel syndrome, heart problems, and bipolar disorder, Tr. 361. The applications were denied initially, Tr. 113–52, and on reconsideration, Tr. 153–96. Administrative Law Judge Elizabeth Watson held a hearing on May 11, 2021, Tr. 62–85, and issued an unfavorable decision on June 30, 2021, Tr. 38–52. Plaintiff requested review by the Appeals Council, and the

1 Appeals Council denied the request for review on June 1, 2022. Tr. 1–6. The ALJ's June  
2 2021 decision became the Commissioner' final decision, which is appealable to the district  
3 court under 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 27,  
4 2022. ECF No. 1.

### 5 **STATEMENT OF FACTS**

6 Plaintiff was born in 1968. Tr. 115, 134. She was 50 years old as of her alleged  
7 onset date, Tr. 115, 134, and has a high school education, Tr. 67. She worked in retail at  
8 Walmart from 2009 to 2017. Tr. 50, 67–69, 347–49. Plaintiff says she was assigned to the  
9 jewelry and fitting-room departments after her physical ailments prevented her from  
10 continuing as a stock clerk, and that she was eventually terminated when migraines made  
11 her miss too much work. Tr. 69.

### 12 **STANDARD OF REVIEW**

13 The ALJ is responsible for determining credibility, resolving conflicts in medical  
14 testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
15 1995). The Court reviews the ALJ's legal conclusions *de novo* but gives deference to a  
16 reasonable interpretation of a statute the agency is charged with administering. *See McNatt*  
17 *v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The ALJ's decision will be reversed only if  
18 it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*,  
19 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is more than a scintilla, but less  
20 than a preponderance. *Id.* at 1098. Put another way, "[i]t means such relevant evidence as  
21 a reasonable mind might assess as adequate to support a conclusion." *Richardson v.*  
22 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197,  
23 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the  
24 Court may not substitute its judgment for the ALJ's. *Tackett*, 180 F.3d at 1097; *Morgan v.*  
25 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). The ALJ's decision  
26 is conclusive if it is supported by substantial evidence, even if conflicting evidence  
27 supports a finding of either disability or non-disability. *Sprague v. Bowen*, 812 F.2d 1226,  
28 1229–30 (9th Cir. 1987). But a decision supported by substantial evidence will still be set

1 aside if it is based on legal error. *Browner v. Sec'y of Health & Hum. Servs.*, 839 F.2d 432,  
2 433 (9th Cir. 1988).

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Commissioner has established a five-step sequential evaluation process for  
5 determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen*  
6 *v. Yuckert*, 482 U.S. 137, 140–42 (1987). In steps one through four the claimant bears the  
7 burden of establishing disability. *Tackett*, 180 F.3d at 1098–99. This burden is met once a  
8 claimant establishes that a physical or mental impairment prevents her from engaging in  
9 past relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot  
10 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the  
11 Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the  
12 claimant can perform specific jobs that exist in the national economy. *Batson v. Comm'r*  
13 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193–94 (9th Cir. 2004). If a claimant cannot make  
14 an adjustment to other work in the national economy, she will be found disabled. 20 C.F.R.  
15 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 16 ADMINISTRATIVE FINDINGS

17 On June 30, 2021, the ALJ issued a decision finding Plaintiff was not disabled as  
18 defined in the Social Security Act. Tr. 38–52.

19 At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity  
20 since the alleged onset date. Tr. 41.

21 At step two, the ALJ determined Plaintiff had the following severe impairments:  
22 degenerative disc disease of the lumbar spine with radiculopathy, restless leg syndrome,  
23 chronic obstructive pulmonary disease, migraine headaches, obstructive sleep apnea,  
24 hypertension, "status-post a cerebrovascular accident," depression, anxiety, personality  
25 disorder, and cannabis use disorder. *Id.*

26 At step three, the ALJ found Plaintiff did not have an impairment or combination  
27 of impairments that met or medically equaled the severity of one of the listed impairments.  
28 Tr. 42–44.

1 The ALJ found Plaintiff had the Residual Functional Capacity [RFC] to  
2 perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) where  
3 she can lift and/or carry up to twenty pounds occasionally and ten pounds  
4 frequently. She retains the ability to stand and/or walk for a total of six hours  
5 in an eight-hour workday, with normal breaks. She retains the ability to sit  
6 for six hours in an eight-hour workday, with normal breaks. She can  
7 frequently climb ramps or stairs. She can occasionally climb ladders, ropes,  
8 or scaffolds. She can frequently kneel, crouch, and crawl. She can  
9 occasionally stoop. She must avoid concentrated exposure to temperature  
10 extremes. She is limited to occasional, concentrated exposure to atmospheric  
11 conditions as defined in the Selected Characteristics of Occupations of the  
12 Dictionary of Occupational Titles. She must avoid concentrated exposure to  
13 workplace hazards such as unprotected heights and the operational control of  
14 moving machinery. She is limited to understanding and carry[ing] out simple  
15 instructions with a reasoning level of one or two. She is limited to occasional  
16 contact with the general public. She is limited to a work environment with  
17 few changes.

18 Tr. 44.

19 At step four, the ALJ found Plaintiff was unable to perform past relevant work as a  
20 home attendant, cook helper, sales attendant, cashier, and stock clerk. Tr. 50.

21 At step five, the ALJ found, based on the testimony of the vocational expert,  
22 and considering Plaintiff's age, education, work experience, and RFC, Plaintiff was  
23 capable of performing jobs that existed in significant numbers in the national economy,  
24 including the jobs of marker, small products assembler, and electrical accessories  
25 assembler. Tr. 51.

26 The ALJ thus concluded Plaintiff was not under a disability within the meaning of  
27 the Social Security Act at any time from the alleged onset date through the date of the  
28 decision. Tr. 51–52.



1 persuasive the medical opinions or prior administrative medical finding(s)  
2 will be.

3 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
4 administrative medical finding(s) is with the evidence from other medical  
5 sources and nonmedical sources in the claim, the more persuasive the medical  
6 opinion(s) or prior administrative medical finding(s) will be.

7 20 C.F.R. § 404.1520c(c).

8 The Ninth Circuit has held that the new regulatory framework displaces the  
9 longstanding case law requiring an ALJ to provide "specific and legitimate" or "clear and  
10 convincing" reasons for rejecting a treating or examining doctor's opinion. *Woods v.*  
11 *Kijakazi*, 32 F.4th 785 (9th Cir. 2022).

12 **(1) Andrew Tsoi, M.D.**

13 Dr. Tsoi examined Plaintiff and completed a Physical Function Evaluation form on  
14 February 4, 2020. Tr. 1179–87. He noted diagnoses of low back pain, atrial fibrillation,  
15 obesity, and high blood pressure, 1180, and opined Plaintiff would be limited to sedentary  
16 work for three months with available treatment. Tr. 1181.

17 The ALJ found Dr. Tsoi's opinion unpersuasive. Tr. 48–49. She noted that  
18 Gordon Hale, M.D., and Guillermo Rubio, M.D., opined Plaintiff could perform light  
19 work with some limitations, and explained that their opinions were well-supported by  
20 the record. Tr. 48. Dr. Tsoi's opinion, on the other hand, was not. *Id.* Studies and  
21 examination notes indicated Plaintiff could perform light work: she had normal gait  
22 and strength and there was no evidence of atrophy. *Id.* The ALJ also discounted Dr.  
23 Tsoi's opinion because he did not explain it and because "Dr. Tsoi did not have the  
24 opportunity to review and consider the entire medical record before forming his opinion."  
25 Tr. 48–49.

26 Plaintiff argues the ALJ did not adequately explain her consideration of the  
27 consistency factor. ECF No. 11 at 10. The Court disagrees. The ALJ discussed Dr. Hale's  
28 and Dr. Rubio's opinions that Plaintiff could perform light work, explained how those

1 opinions were supported by the record, and, in the next paragraph, rejected Dr. Tsoi's  
2 contrary opinion. Tr. 48. It is clear from the written decision that the ALJ found Dr. Tsoi's  
3 opinion inconsistent with Dr. Hale's and Dr. Rubio's. *See id.*; *cf. Magallanes v. Bowen*,  
4 881 F.2d 747, 755 (9th Cir. 1989). The ALJ was not required to use any specific verbal  
5 formula to explain that Dr. Tsoi's opinion was inconsistent with evidence from other  
6 medical sources. *See Magallanes*, 881 F.2d at 755. Because the ALJ's decision explains  
7 how Dr. Tsoi's opinion is inconsistent with evidence from other medical sources, the Court  
8 rejects Plaintiff's argument. *See id.*; *see also Molina v. Astrue*, 674 F.3d 1104, 1112 (9th  
9 Cir. 2012) ("Even when an agency 'explains its decision with less than ideal clarity,' we  
10 must uphold it 'if the agency's path may reasonably be discerned.'" (quoting *Alaska Dep't*  
11 *of Env'tl. Conservation v. EPA*, 540 U.S. 461, 497 (2004))).

12 Plaintiff also argues the ALJ erred because she did not explain *why* the record did  
13 not support Dr. Tsoi's opinion. ECF No. 11 at 11. But the ALJ discussed the record at  
14 length and explained why it was more consistent with the opinion that Plaintiff could do  
15 light work. Tr. 45–48. Plaintiff's migraines were well managed with medication. Tr. 46.  
16 Examination notes showed Plaintiff's strength, mobility, range of motion, and body  
17 mechanics were all fairly normal and that they improved with physical therapy. *Id.*  
18 Likewise, Plaintiff's imaging results showed only minor abnormalities. Tr. 45–46. The  
19 ALJ also noted that Plaintiff's conservative treatment indicated her symptoms were not as  
20 severe as claimed. Tr. 46. The paragraph dedicated to Dr. Tsoi's opinion does not repeat  
21 this entire discussion, Tr. 48–49, but the ALJ's explanation is sufficient because her  
22 reasons are clear. *See Molina*, 674 F.3d at 1112.

23 Similarly, Plaintiff argues the ALJ erred by ignoring evidence that supports Dr.  
24 Tsoi's opinion. ECF No. 11 at 12. Although Plaintiff concedes the ALJ discussed this  
25 evidence in her opinion, she argues the ALJ erred by "articulat[ing] no consideration of  
26 this probative evidence in her analysis of the consistency of the opinion[] of Dr. Tsoi." *Id.*  
27 But the ALJ thoroughly discussed this evidence and explained why it was more consistent  
28 with the opinion that Plaintiff could perform light work. Tr. 45–48. Because the ALJ

1 explained her consideration of the evidence, her articulation was sufficient. *See Molina*,  
2 674 F.3d at 1112.

3 Finally, Plaintiff argues the evidence supported Dr. Tsoi's opinion. ECF No. 11 at  
4 12. The Court rejects this argument. The ALJ's decision must be upheld because it is  
5 supported by substantial evidence, even if there is also evidence that would support a  
6 contrary conclusion. *See Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2018).

7 Because the ALJ's decision to reject Dr. Tsoi's opinion was not error, it is affirmed.

8 Defendant also argues any error in rejecting Dr. Tsoi's opinion would have been  
9 harmless. ECF No. 12 at 8. The Court agrees. An error is harmless if "it is 'inconsequential  
10 to the ultimate nondisability determination.'" *Molina*, 674 F.3d at 1115 (quoting *Carmickle*  
11 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)). Here, Dr. Tsoi opined  
12 Plaintiff's limitations would last only three months with available treatment. Tr. 1181. And  
13 claimants are only qualified for disability if their impairments are expected to last at least  
14 twelve months. 42 U.S.C. § 423(d)(1)(A); *Barnhart v. Walton*, 535 U.S. 212, 214, 221–  
15 22 (2002). Therefore, even if the ALJ had fully credited Dr. Tsoi's opinion, it could not  
16 have reasonably changed the ultimate nondisability determination. *See Molina*, 674 F.3d  
17 at 1115; *cf. Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

18 Plaintiff characterizes Defendant's harmlessness argument as a *post-hoc*  
19 rationalization and argues that the Court can only affirm the ALJ's decision based on  
20 reasons the ALJ supplied herself. ECF No. 14 at 2–3. Plaintiff's characterization is  
21 incorrect. The Court is not merely finding that an alternative rationale could have  
22 supported the ALJ's decision. The Court is finding that, even if Dr. Tsoi's opinion were  
23 credited as true, it could not have reasonably changed the ALJ's ultimate nondisability  
24 determination. Therefore, any error was harmless. *See Molina*, 674 F.3d at 1115; *cf. Stout*,  
25 454 F.3d at 1056.

26 Plaintiff also argues mischaracterization of the record can never be harmless error,  
27 citing *Kristal A. v. Comm'r of Soc. Sec.*, No. C22-0453-SKV, 2022 WL 17818706, at \*12  
28 (W.D. Wash. Dec. 20, 2022). ECF No. 14 at 3–4. But the ALJ did not mischaracterize the



1 record. Plaintiff simply disagrees with the ALJ's characterization and argues the ALJ's  
2 reasoning was insufficient. Because the ALJ did not mischaracterize the record, the Court  
3 rejects Plaintiff's argument.

4 This conclusion is consistent with *Kristal A.*, 2022 WL 17818706. There, the ALJ  
5 improperly rejected opinions that, if credited, could have changed the ultimate  
6 nondisability determination. *See id.* at \*10–12. Here, in contrast, Dr. Tsoi opined  
7 Plaintiff's limitations would last less than the twelve months required to qualify for  
8 disability. Tr. 1181; *cf. Molina*, 674 F.3d at 1115 ("[I]n each case we look at the record as  
9 a whole to determine whether the error alters the outcome of the case."). Because Plaintiff  
10 has not explained how crediting Dr. Tsoi's opinion could have altered the ALJ's ultimate  
11 determination, *see* ECF No. 14, the ALJ's decision is affirmed, *see Shinseki v. Sanders*,  
12 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally  
13 falls upon the party attacking the agency's determination.").

14 **(2) R. Renee Eisenhauer, Ph.D.**

15 Dr. Eisenhauer reviewed Dr. Tsoi's report on February 5, 2020, Tr. 1177–93, and  
16 agreed Plaintiff would be limited to sedentary work, Tr. 1190. Dr. Eisenhauer expected  
17 Plaintiff's limitations to last nine months. Tr. 1188. The ALJ rejected Dr. Eisenhauer's  
18 opinion limiting Plaintiff to sedentary work because "it is outside her area of expertise,"  
19 but gave no other reasons for doing so. Tr. 49.

20 Defendant concedes the ALJ erred by rejecting Dr. Eisenhauer's opinion without  
21 discussing consistency and supportability, but argues the error was harmless. ECF No. 12  
22 at 8–9. The Court agrees. The ALJ's error was harmless for the same reason any error in  
23 rejecting Dr. Tsoi's opinion would have been harmless. Like Dr. Tsoi, Dr. Eisenhauer  
24 opined Plaintiff's limitations would last less than the twelve months necessary to qualify  
25 for disability. *See* 42 U.S.C. § 423(d)(1)(A); *Walton*, 535 U.S. at 214, 221–22. Because  
26 crediting Dr. Eisenhauer's opinion could not have reasonably changed the ALJ's ultimate  
27 nondisability determination, the error was harmless. *See Molina*, 674 F.3d at 1115; *cf.*  
28 *Stout*, 454 F.3d at 1056. Defendant argues the rejection of Dr. Eisenhauer's opinion is not

1 harmless for the same reasons Defendant argues the rejection of Dr. Tsoi's opinion is not  
2 harmless. ECF No. 14 at 2–4. The Court disagrees for the same reasons discussed above.

3 Because Plaintiff has not explained how crediting Dr. Eisenhower's opinion could  
4 have altered the ALJ's ultimate determination, *see* ECF No. 14, the ALJ's decision is  
5 affirmed, *see Sanders*, 556 U.S. at 409.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's findings, the Court finds the ALJ's  
8 decision is supported by substantial evidence and free of harmful legal error and is  
9 affirmed. Accordingly,

10 **IT IS ORDERED** that:

- 11 1. Defendant's Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**.  
12 2. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

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

16 **DATED** this 6th day of April, 2023.

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20 WM. FREMMING NIELSEN  
21 SENIOR UNITED STATES DISTRICT JUDGE

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