

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

May 17, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KELLY L. M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

NO: 4:18-CV-5061-FVS

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

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 11 and 12. This matter was submitted for consideration without oral argument. The plaintiff is represented by Attorney Nicholas D. Jordan. The defendant is represented by Special Assistant United States Attorney Franco L. Becia. The Court has reviewed the administrative record, the parties' completed briefing, and is fully informed. For the reasons discussed below, the Court **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 12, and **DENIES** Plaintiff's Motion for Summary Judgment, ECF No. 11.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Plaintiff Kelly M.<sup>1</sup> filed for supplemental security income and disability  
3 insurance benefits on January 27, 2012, alleging an onset date of June 1, 2011. Tr.  
4 289-90, 292-98. Benefits were denied initially, Tr. 136-43, and upon  
5 reconsideration, Tr. 146-56. A hearing before an administrative law judge (“ALJ”)  
6 was conducted on May 15, 2014. Tr. 32-48. Plaintiff was represented by counsel  
7 but did not appear at the hearing. *Id.* The ALJ denied benefits in a decision dated  
8 June 23, 2014. Tr. 111-29. On April 26, 2016, the Appeals Council remanded the  
9 case after new evidence was submitted by Plaintiff indicating “a new impairment  
10 of breast cancer.” Tr. 130-35. On November 21, 2016, an additional hearing was  
11 held before a different ALJ. Tr. 49-74. Plaintiff was represented by counsel but  
12 did not appear at the hearing, and a medical expert testified at the hearing. *Id.* The  
13 ALJ denied benefits, Tr. 12-30, and the Appeals Council denied review. Tr. 1.  
14 The matter is now before this court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

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19 <sup>1</sup> In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first  
20 name and last initial, and, subsequently, Plaintiff’s first name only, throughout this  
21 decision.

1 **BACKGROUND**

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

5 Plaintiff was 43 years old on the date of her alleged onset of disability. Tr.  
6 77. She completed high school. Tr. 334. At the time of the hearing, she lived by  
7 herself. Tr. 47. Plaintiff has work history as an office manager, banquet server,  
8 and nursery school attendant. Tr. 41-42, 92, 99-100. In a June 2014 letter,  
9 Plaintiff reported that she is unable to work because of neuropathy in her feet “up  
10 to [her] middle torso” and muscular vascular disease, which causes numbness,  
11 pain, tingling, and a feeling she is “unable to move.” Tr. 365. Plaintiff also  
12 reported that walking even short distances requires her to take breaks and results in  
13 swelling in her ankles and legs; she is unable to run or jog; she cannot go down to  
14 her knees from a standing position or stand back up without help; she experiences  
15 “pain and discomfort in all of [her] muscles and joints each and [sic] everyday”;  
16 she is not able to sleep more than two to three hours straight; and she has swelling  
17 in her hands and problems gripping things. Tr. 343, 347, 365-66.

18 The record also indicates that Plaintiff’s medical history includes “cirrhosis  
19 secondary to chronic alcoholism”; she has been hospitalized for alcoholic  
20 pancreatitis; and at one point she was treated for acute renal failure due to  
21 dehydration. Tr.383-84, 404, 426-48. In 2015, Plaintiff underwent treatment for

1 breast cancer, which included a mastectomy, chemotherapy, and radiation therapy.  
2 *See* Tr. 20-21, 1198, 1418, 1815-20, 1826.

### 3 **STANDARD OF REVIEW**

4 A district court’s review of a final decision of the Commissioner of Social  
5 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
6 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
7 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
8 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
9 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
10 (quotation and citation omitted). Stated differently, substantial evidence equates to  
11 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
12 citation omitted). In determining whether the standard has been satisfied, a  
13 reviewing court must consider the entire record as a whole rather than searching  
14 for supporting evidence in isolation. *Id.*

15 In reviewing a denial of benefits, a district court may not substitute its  
16 judgment for that of the Commissioner. If the evidence in the record “is  
17 susceptible to more than one rational interpretation, [the court] must uphold the  
18 ALJ’s findings if they are supported by inferences reasonably drawn from the  
19 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
20 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
21 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate

1 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
2 party appealing the ALJ’s decision generally bears the burden of establishing that  
3 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within  
6 the meaning of the Social Security Act. First, the claimant must be “unable to  
7 engage in any substantial gainful activity by reason of any medically determinable  
8 physical or mental impairment which can be expected to result in death or which  
9 has lasted or can be expected to last for a continuous period of not less than twelve  
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
11 impairment must be “of such severity that he is not only unable to do his previous  
12 work[,] but cannot, considering his age, education, and work experience, engage in  
13 any other kind of substantial gainful work which exists in the national economy.”  
14 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to  
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
17 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
18 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
19 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
21 404.1520(b), 416.920(b).

1           If the claimant is not engaged in substantial gainful activity, the analysis  
2 proceeds to step two. At this step, the Commissioner considers the severity of the  
3 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
4 claimant suffers from “any impairment or combination of impairments which  
5 significantly limits [his or her] physical or mental ability to do basic work  
6 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
7 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
9 §§ 404.1520(c), 416.920(c).

10           At step three, the Commissioner compares the claimant’s impairment to  
11 severe impairments recognized by the Commissioner to be so severe as to preclude  
12 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
14 severe than one of the enumerated impairments, the Commissioner must find the  
15 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

16           If the severity of the claimant’s impairment does not meet or exceed the  
17 severity of the enumerated impairments, the Commissioner must pause to assess  
18 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
19 defined generally as the claimant’s ability to perform physical and mental work  
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
21

1 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
2 analysis.

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

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing other work in the national economy.  
12 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
13 the Commissioner must also consider vocational factors such as the claimant's age,  
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
15 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
17 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
18 work, analysis concludes with a finding that the claimant is disabled and is  
19 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

20 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
21 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,

1 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
2 of performing other work; and (2) such work “exists in significant numbers in the  
3 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,  
4 700 F.3d 386, 389 (9th Cir. 2012).

### 5 **ALJ’S FINDINGS**

6 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
7 activity since June 1, 2011, the alleged onset date. Tr. 18. At step two, the ALJ  
8 found Plaintiff has the following severe impairments: peripheral neuropathy, right  
9 carpal tunnel syndrome, bilateral thumb arthritis, deep vein thrombosis, migraine  
10 headaches, alcohol abuse, and breast cancer. Tr. 18. At step three, the ALJ found  
11 that Plaintiff does not have an impairment or combination of impairments that  
12 meets or medically equals the severity of a listed impairment. Tr. 18. The ALJ  
13 then found that Plaintiff had the RFC

14 to perform sedentary work as defined in 20 CFR 404.1567(a) and  
15 416.967(a) except the individual can never climb ladders, ropes, or  
16 scaffolds, work at unprotected heights or in proximity to hazards such  
17 as heavy machinery. The claimant can occasionally climb ramps and  
18 stairs, balance, stoop, kneel, crouch and crawl. She can frequently  
19 handle and finger. The claimant can perform work in which  
20 concentrated exposure to extreme cold, heat, and/or respiratory irritants  
21 is not present.

Tr. 19. At step four, the ALJ found that Plaintiff is capable of performing past  
relevant work as an office manager. Tr. 22. In the alternative, at step five, the ALJ  
found that considering Plaintiff’s age, education, work experience, and RFC, there  
are other jobs that exist in significant numbers in the national economy that



1 Plaintiff can perform, including: general clerk, data examination clerk, and clerical  
2 sorter. Tr. 22-23. On that basis, the ALJ concluded that Plaintiff has not been  
3 under a disability, as defined in the Social Security Act, from June 1, 2011,  
4 through the date of this decision. Tr. 23.

## 5 **ISSUES**

6 Plaintiff seeks judicial review of the Commissioner's final decision denying  
7 her disability insurance benefits under Title II of the Social Security Act and  
8 supplemental security income benefits under Title XVI of the Social Security Act.  
9 ECF No. 11. Plaintiff raises the following issues for this Court's review:

- 10 1. Whether the ALJ properly weighed the medical opinion evidence;
- 11 2. Whether the ALJ properly considered Plaintiff's symptom claims; and
- 12 3. Whether the ALJ erred at step five.

## 13 **DISCUSSION**

### 14 **A. Medical Opinions**

15 There are three types of physicians: "(1) those who treat the claimant  
16 (treating physicians); (2) those who examine but do not treat the claimant  
17 (examining physicians); and (3) those who neither examine nor treat the claimant  
18 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."  
19 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001) (citations omitted).  
20 Generally, a treating physician's opinion carries more weight than an examining  
21 physician's, and an examining physician's opinion carries more weight than a  
reviewing physician's. *Id.* If a treating or examining physician's opinion is

1 uncontradicted, the ALJ may reject it only by offering “clear and convincing  
2 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
3 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's  
4 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
5 providing specific and legitimate reasons that are supported by substantial  
6 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

7 Plaintiff argues that the prior ALJ decision, remanded by the Appeals  
8 Council, “incorrectly weighed the various medical opinion evidence,” and because  
9 the “current decision on appeal adopts the weight analyses from the prior ALJ  
10 decision[,] . . . Plaintiff contests those weight analyses with a specific emphasis on  
11 Dr. [C]abasug.”<sup>2</sup> ECF No. 11 at 9. As an initial matter, as noted by Defendant,  
12 Plaintiff’s general contention that the ALJ “improperly evaluated the evidence as a  
13 whole” was not argued with specificity in the opening brief; thus, the Court  
14 declines to address medical opinion evidence from the prior ALJ decision, aside

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16 <sup>2</sup> The Court notes that the Appeals Council did not identify any error in the prior  
17 ALJ’s consideration of the medical opinion evidence. *See* Tr. 132-33.

18 Accordingly, as indicated herein, the current ALJ found the opinions in the record  
19 at the time of the prior decision “were addressed and adequate[ly] discussed in the  
20 prior ALJ decision.” Tr. 22. However, the parties consider the prior ALJ’s  
21 findings regarding Dr. Cabasug’s opinion; thus, the Court will do the same.

1 from Dr. Cabasug's opinions. ECF No. 12 at 17 (citing *See Carmickle v. Comm'r*  
2 *of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)).

3 In February 2014, treating physician Dr. Michael Cabasug noted that  
4 Plaintiff had moderate limitations in her ability to stand and walk due to peripheral  
5 neuropathy; and moderate limitations in her ability to carry, handle, push, pull, and  
6 reach due to bilateral carpal tunnel syndrome. Tr. 719-20. Dr. Cabasug opined that  
7 Plaintiff's ability to perform work in a regular predictable manner despite her  
8 impairment was "severely limited," which was further defined as "unable to meet  
9 the demands of sedentary work." Tr. 721. In April 2014, Dr. Cabasug completed  
10 a "medical questionnaire," which was entirely comprised of a single checked box  
11 indicating Dr. Cabasug "[does] not believe that [Plaintiff] is capable of performing  
12 any type of work on a reasonably continuous, sustained basis (e.g., eight hours a  
13 day, five days a week, or approximately 40 hours per week, consistent with a  
14 normal work routine)." Tr. 717 (emphasis in original). The prior ALJ gave Dr.  
15 Cabasug's opinions little weight for several reasons, and upon remand by the  
16 Appeals Council, the subsequent ALJ found Dr. Cabasug's opinions "were  
17 addressed and adequate[ly] discussed in the prior ALJ decision." Tr. 22, 122.

18 First, the prior ALJ gave Dr. Cabasug's opinion little weight because  
19 his conclusion is inconsistent with his examinations of [Plaintiff].  
20 Although testing shows [Plaintiff] has peripheral neuropathy and carpal  
21 tunnel syndrome, physical examinations show these impairments are  
not as limiting as [Plaintiff] alleges. She regularly maintains full  
strength, sensation, range of motion and deep tendon reflexes despite  
the alleged severity of her impairments. Dr. Cabasug's conclusion is

1 inconsistent with his own findings during a physical examination  
2 showing [Plaintiff's] impairments provide only moderate limitations in  
[Plaintiff's] ability to perform work-related activities.

3 Tr. 122. The ALJ may properly reject a medical opinion if it is inconsistent with  
4 the provider's own treatment notes. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041  
5 (9th Cir. 2008); *Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.  
6 2004) (ALJ may discount an opinion that is conclusory, brief, and unsupported by  
7 the record as a whole, or by objective medical findings). Plaintiff generally argues  
8 the ALJ “failed to adequately consider” Dr. Cabasug’s opinion because he was  
9 “familiar with her condition” as Plaintiff’s treating provider, and his “chart notes  
10 have been consistent in the information they provide, as well as the conclusion that  
11 that due to her medical conditions and the resulting physical limitations, [Plaintiff]  
12 is incapable of returning to gainful, sustainable full-time employment.” ECF No.  
13 13 at 4-5. “However, the ALJ need not accept the opinion of any physician,  
14 including a treating physician, if that opinion is brief, conclusory and inadequately  
15 supported by clinical findings.” *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d  
16 1219, 1228 (9th Cir. 2009) (quotation and citation omitted). Moreover, the ALJ  
17 explicitly cited ongoing physical examination findings by Dr. Cabasug that were  
18 inconsistent with the severity of his conclusion, including: normal gait and station;  
19 no abnormal strength or tone in the head, neck, spine, ribs, pelvis or extremities; no  
20 decreased range of motion; normal deep tendon reflexes in upper and lower  
21 extremities; normal coordination; and some decreased sensation in her toes at one

1 examination, but generally normal sensation with peripheral pulses intact. Tr. 120-  
2 22, 655, 658, 710, 723.

3 Thus, regardless of evidence that could be considered more favorable for the  
4 Plaintiff, the ALJ reasonably concluded that the severity of Dr. Cabasug's opinion  
5 was inconsistent with his own clinical findings. Tr. 122; *Burch*, 400 F.3d at 679  
6 (“[W]here evidence is susceptible to more than one rational interpretation, it is the  
7 [Commissioner's] conclusion that must be upheld.”). This was a specific and  
8 legitimate reason to give Dr. Cabasug's opinion little weight.

9 In addition, the ALJ found that Dr. Cabasug's opinion is “vague and fails to  
10 identify specific limitations that would prevent [Plaintiff] from performing work.”  
11 Tr. 122. The Court may decline to address this issue because Plaintiff did not  
12 challenge the reason with specificity in her opening brief. *See Carmickle*, 533 F.3d  
13 at 1161 n.2. Moreover, if a physician's report did not assign any specific  
14 limitations or opinions in relation to an ability to work, “the ALJ did not need to  
15 provide 'clear and convincing reasons' for rejecting [the] report because the ALJ  
16 did not reject any of [the report's] conclusions”. *See, e.g., Turner v. Comm'r of*  
17 *Soc. Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010). For all of these reasons,  
18 the Court finds no error in the consideration of Dr. Cabasug's opinion.

19 As a final matter, Plaintiff generally argues that the ALJ “failed to consider”  
20 medical records pertaining to Plaintiff's treatment for breast cancer, and how that  
21

1 evidence might have impacted her RFC prior to her diagnosis in 2015.<sup>3</sup> ECF No.  
2 11 at 10-11. However, despite Plaintiff’s claims to the contrary, the ALJ outlined  
3 Plaintiff’s breast cancer treatment, including a mastectomy and subsequent  
4 chemotherapy and radiation. ECF No. 11 at 11; Tr. 20. The ALJ additionally  
5 found that this medical evidence was consistent with medical expert testimony  
6 from Dr. William Cirksena, who noted that subsequent to her chemotherapy,  
7 Plaintiff suffered a clot in a vein leading to her chemotherapy port, “which was  
8 treated successfully.” Tr. 20, 58. Moreover, as noted by Defendant, Plaintiff  
9 “never explains why each piece of evidence identified is significant, probative, and  
10 resulted in harmful error.” ECF No. 12 at 17. In other words, Plaintiff failed to  
11 identify any evidence of specific limitations due to Plaintiff’s breast cancer  
12 treatment, at any point in the relevant adjudicatory period, that were not properly  
13 accounted for in the assessed RFC. *Molina*, 674 F.3d at 1111 (an error is harmless  
14 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination”);

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16 \_\_\_\_\_  
17 <sup>3</sup> Plaintiff contends that although Plaintiff “was diagnosed with breast cancer in  
18 July 2015, the cancer was likely present in some form for more than two years.”  
19 ECF No. 11 at 10. However, Plaintiff fails to support this claim with citation to the  
20 medical record; nor does she offer evidence of actual functional limitations during  
21 this period due to the “presence” of breast cancer before it was diagnosed in July  
2015.

1 *see also Turner*, 613 F.3d at 1223. Thus, the Court finds no error in the ALJ's  
2 consideration of the medical evidence pertaining to Plaintiff's treatment for breast  
3 cancer, and concludes that the RFC is supported by substantial evidence from the  
4 entire adjudicatory period. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir.  
5 2005) (RFC determination will be affirmed if supported by substantial evidence).

### 6 **B. Plaintiff's Symptom Claims**

7 An ALJ engages in a two-step analysis when evaluating a claimant's  
8 testimony regarding subjective pain or symptoms. "First, the ALJ must determine  
9 whether there is objective medical evidence of an underlying impairment which  
10 could reasonably be expected to produce the pain or other symptoms alleged."  
11 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not  
12 required to show that her impairment could reasonably be expected to cause the  
13 severity of the symptom he has alleged; he need only show that it could reasonably  
14 have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591  
15 (9th Cir. 2009) (internal quotation marks omitted).

16 Second, "[i]f the claimant meets the first test and there is no evidence of  
17 malingering, the ALJ can only reject the claimant's testimony about the severity of  
18 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
19 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
20 citations and quotations omitted). "General findings are insufficient; rather, the  
21 ALJ must identify what testimony is not credible and what evidence undermines

1 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v.*  
2 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility  
3 determination with findings sufficiently specific to permit the court to conclude  
4 that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and  
5 convincing [evidence] standard is the most demanding required in Social Security  
6 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*  
7 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

8 Here, the ALJ found Plaintiff’s medically determinable impairments could  
9 reasonably be expected to cause some of the alleged symptoms; however,  
10 Plaintiff’s “statements concerning the intensity, persistence and limiting effects of  
11 these symptoms are not entirely consistent with the objective medical and other  
12 evidence in the record” for several reasons. Tr. 20.

### 13 1. *Lack of Objective Medical Evidence*

14 First, the ALJ reviewed the medical evidence submitted since the prior ALJ  
15 decision, which Plaintiff’s counsel confirmed at the hearing, consisted entirely of  
16 Plaintiff’s treatment for breast cancer, and found that “post treatment for breast  
17 cancer,” the evidence was consistent with the assessed RFC at the sedentary level  
18 with additional exertional restrictions. Tr. 20-21. The ALJ also found the  
19 objective evidence regarding Plaintiff’s claimed impairments of peripheral  
20 neuropathy, carpal tunnel syndrome, bilateral thumb arthritis, and migraines “was  
21 adequately discussed in the prior decision and without evidence of changed



1 circumstances additional discussion is moot.” Tr. 21 (citing Tr. 111-29). An ALJ  
2 may not discredit a claimant’s pain testimony and deny benefits solely because the  
3 degree of pain alleged is not supported by objective medical evidence. *Rollins v.*  
4 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,  
5 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).  
6 However, the medical evidence is a relevant factor in determining the severity of a  
7 claimant’s pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §  
8 404.1529(c)(2).

9         Here, the ALJ set out, in detail, the medical evidence contradicting  
10 Plaintiff’s claims of disabling limitations. Tr. 26-28. For example, the “new  
11 additional evidence” added to the record since the prior ALJ decision indicates that  
12 in July 2015 Plaintiff was diagnosed with breast cancer and underwent a “right  
13 radical mastectomy”; she completed a 12-week course of chemotherapy; and, after  
14 a three month delay, she agreed to undergo radiation therapy in September 2016.  
15 Tr. 20, 1827, 1839, 1844. As noted by the ALJ, while this treatment “clearly  
16 affected her functional ability, at the end of her course of radiation, [Plaintiff’s]  
17 oncologist found [Plaintiff] at a 0/10 pain level and limited her to ‘no physically  
18 strenuous activity, but ambulatory and able to carry out light or sedentary work  
19 (e.g. office work, light house work).’” Tr. 20-21 (citing Tr. 1828). As to her  
20 additional claimed impairments of alcohol abuse and carpal tunnel syndrome, the  
21 ALJ cited the medical expert testimony, and evidence from the prior ALJ decision,

1 that Plaintiff's liver function tests were within normal range, and her right carpal  
2 tunnel syndrome "responded moderately well to a brace." Tr. 21, 473, 619, 704-  
3 05. Similarly, the ALJ noted that Plaintiff's claimed impairments of peripheral  
4 neuropathy, bilateral thumb arthritis and migraine headaches "were adequately  
5 discussed in the prior decision and without evidence of changed circumstances  
6 additional discussion is moot." Tr. 21. In the prior decision, the ALJ found  
7 Plaintiff's "allegations regarding the severity of her impairments are not consistent  
8 with the objective medical evidence," including: normal CT scan of Plaintiff's  
9 abdomen; liver biopsy showing minimal inflammation and no well-developed  
10 cirrhosis after she discontinued her alcohol abuse; electrodiagnostic testing  
11 showing only mild carpal tunnel in her right upper extremity; x-rays showing CMC  
12 arthritis more pronounced on right than left; and "[p]hysical examinations  
13 consistently showed that she had good strength, range of motion, sensation and  
14 deep tendon reflexes despite her complaints of numbness and pain." Tr. 119-21  
15 (citing Tr. 471, 473, 582, 589, 639, 642, 655, 658, 704, 710, 716, 723).

16 Plaintiff argues that due to "the lack of testimony from the [second] hearing  
17 from the Plaintiff regarding her symptoms we are left with the symptom testimony  
18 via her reports to her treating providers. The first hearing in this case came prior to  
19 Plaintiff's diagnosis of breast cancer and as a result lacked a basis for a discussion  
20 on fatigue." ECF No. 11 at 13. Plaintiff correctly notes that she did not appear,  
21 and therefore did not testify, at either hearing. *See* Tr. 34, 51. However, as noted

1 by Defendant, Plaintiff was given the opportunity to testify at both hearings; she  
2 did not appear at either hearing; she was represented by council at both hearings;  
3 and the record was left open for Plaintiff to submit additional evidence or  
4 statements. ECF No. 12 at 5-6 (citing Tr. 34-35, 51-53). Moreover, Plaintiff did  
5 submit an additional statement after she failed to appear at the first hearing, which  
6 was properly considered in both ALJ decisions. Tr. 20, 119. Finally, Plaintiff does  
7 not offer, nor does the Court discern, legal authority to support Plaintiff's general  
8 contention that Plaintiff's "testimony [cannot be] inconsistent with the medical  
9 record when the testimony never occurred." ECF No. 13 at 2. Rather, as indicated  
10 in Social Security Ruling ("SSR") 16-3p, "adjudicators must base their findings  
11 solely on the evidence in the case record, *including* any testimony from the  
12 individual or other witnesses at a hearing before an [ALJ]." SSR 16-3p, available  
13 at 2017 WL 5180304 at \*10 (October 25, 2017) (emphasis added). Here, the ALJ  
14 properly outlined Plaintiff's "statements" in the case record regarding her  
15 symptoms, which included: neuropathy in her feet causing pain, numbness, and  
16 tingling in her lower extremities; inability to walk short distances; very little  
17 strength and mobility especially in her lower extremities, and difficulty with motor  
18 movement and gripping due to her alleged carpal tunnel syndrome. Tr. 20 (citing  
19 Tr. 343, 365-66).

20 Plaintiff also generally argues that "the ALJ at no point indicates how or  
21 why [the medical records cited by the ALJ] are inconsistent with specific symptom

1 statements by [Plaintiff] and are, therefore, not specific, clear, or convincing”  
2 reasons to discount Plaintiff’s symptom testimony. ECF No. 13 at 2-3; *Lester*, 81  
3 F.3d at 834 (“General findings are insufficient; rather the ALJ must identify what  
4 testimony is not credible and what evidence undermines the claimant’s  
5 complaints.”). However, in the prior decision, the ALJ specifically noted that  
6 Plaintiff’s symptoms “quickly improved” when she discontinued alcohol use; and,  
7 as discussed in detail above, “despite her complaints of numbness and pain,”  
8 physical examinations showed good strength, normal range of motion, normal  
9 sensation and deep tendon reflexes, and normal gait. Tr. 121. Moreover, as noted  
10 by the ALJ, Plaintiff had “allege[d] difficulty using her hands, but objective testing  
11 showed only mild carpal tunnel syndrome on the right.” Tr. 21, 121. In the most  
12 recent decision, the ALJ specifically found that these “impairments were  
13 adequately discussed in the prior decision and without evidence of changed  
14 circumstances additional discussion is moot.” Tr. 21. Plaintiff fails to identify or  
15 challenge this finding. *See Carmickle*, 533 F.3d at 1161 n.2 (Court may decline to  
16 address this issue because it was not raised with specificity in Plaintiff’s briefing).  
17 The Court finds the ALJ properly identified the discounted symptom claims, and  
18 the evidence undermining those claims. *See Lester*, 81 F.3d at 834.

19 Finally, as noted by Defendant, Plaintiff “argues in a brief and conclusory  
20 fashion that the ALJ erred by not articulating reasons to discredit the symptom  
21 testimony provided within the medical records regarding her symptoms from her

1 breast cancer treatment.” ECF No. 12 at 8. However, Plaintiff fails to offer  
2 evidence of symptom claims, specifically as a result of her breast cancer treatment,  
3 that were not properly considered by the ALJ. *See Molina*, 674 F.3d at 1111 (an  
4 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability  
5 determination”). Moreover, Plaintiff fails to consider the medical evidence cited  
6 by the ALJ, and noted to be consistent with Dr. Cirksena’s expert testimony,  
7 indicating that after Plaintiff underwent surgery, chemotherapy, and radiation  
8 treatment, she was at a 0/10 pain level and was deemed able to carry out light or  
9 sedentary work by her treating oncologist. Tr. 20-21 (citing Tr. 1828).

10 Thus, based on the foregoing, and regardless of evidence that could be  
11 interpreted more favorably to the Plaintiff, it was reasonable for the ALJ to  
12 discount Plaintiff symptom claims as inconsistent with objective medical evidence  
13 during the relevant adjudicatory period. *See Burch*, 400 F.3d at 679 (ALJ’s  
14 conclusion must be upheld where evidence is susceptible to more than one rational  
15 interpretation). This lack of corroboration of Plaintiff’s claimed limitations by the  
16 medical evidence was a clear and convincing reason, supported by substantial  
17 evidence, for the ALJ to discount Plaintiff’s symptom claims.

## 18 2. *Failure to Comply with Treatment*

19 Second, the ALJ noted that Plaintiff initially “declined” radiation therapy,  
20 and “[d]uring the course, she ‘continued to miss treatments prolonging her overall  
21 course,’ indicating that [Plaintiff] was not compliant with her treatment protocols.”

1 Tr. 20, 1826-27, 1830-33, 1836. Dr. Cirksena testified that it was “unclear” if  
2 Plaintiff actually completed her recommended course of radiation therapy. Tr. 20,  
3 58. In addition, Dr. Cirksena noted that Plaintiff may have difficulty walking due  
4 to ankle arthrodesis, “although some of that is self-inflicted, in terms of her failure  
5 to keep the cast on as she was prescribed, and her failure to stay off weight bearing  
6 for the period of time to allow the ankle fusion to heal.”. Tr. 60, 1907 (noting  
7 “noncompliance with medical treatment” after Plaintiff walked on her right foot  
8 after surgery, despite counseling “about the necessity to remain nonweightbearing  
9 to the right lower extremity during the healing process.”), 1917-19 (noting  
10 “noncompliance with medical treatment” after Plaintiff removed her cast at home  
11 and walked on her foot without the cast). The Court also notes that in January  
12 2016, Plaintiff attempted to “sign” out of the hospital against medical advice. Tr.  
13 1197.

14 The Court may decline to address this issue because Plaintiff did not  
15 challenge the reason with specificity in his opening brief. *See Carmickle*, 533 F.3d  
16 at 1161 n.2. Regardless, unexplained, or inadequately explained, failure by  
17 Plaintiff to seek treatment or follow a prescribed course of treatment may be the  
18 basis for an adverse credibility finding unless there is a showing of a good reason  
19 for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). It was reasonable  
20 for the ALJ to rely on Plaintiff’s failure to comply with treatment as a reason to  
21 discredit her symptom claims.

1 The Court concludes that the ALJ provided clear and convincing reasons,  
2 supported by substantial evidence, for rejecting Plaintiff's symptom claims.

### 3 **C. Step Five**

4 Finally, Plaintiff argues the ALJ improperly rejected the medical opinions  
5 and Plaintiff's subjective testimony, and therefore erred at step five by posing an  
6 incomplete hypothetical to the vocational expert. ECF No. 11 at 14-15. Plaintiff is  
7 correct that "[i]f an ALJ's hypothetical does not reflect all of the claimant's  
8 limitations, the expert's testimony has no evidentiary value to support a finding that  
9 the claimant can perform jobs in the national economy." *Bray*, 554 F.3d at 1228  
10 (citation and quotation marks omitted). However, as discussed in detail above, the  
11 ALJ's rejection of the medical opinions, and Plaintiff's symptom claims, was  
12 supported by the record and free of legal error. The hypothetical proposed to the  
13 vocational expert contained the limitations reasonably identified by the ALJ and  
14 supported by substantial evidence in the record. The ALJ did not err at step five

### 15 **CONCLUSION**

16 A reviewing court should not substitute its assessment of the evidence for  
17 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must  
18 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42  
19 U.S.C. § 405(g). As discussed in detail above, the ALJ properly weighed the  
20 medical opinion evidence; provided clear and convincing reasons to discount  
21 Plaintiff's symptom testimony; and did not err at step five. After review the court

1 finds the ALJ's decision is supported by substantial evidence and free of harmful  
2 legal error.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

5 2. Defendant's Motion for Summary Judgment, **ECF No. 12**, is

6 **GRANTED.**

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

10 **DATED** May 17, 2019.

11  
12 *s/ Rosanna Malouf Peterson*  
13 ROSANNA MALOUF PETERSON  
14 United States District Judge  
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