

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

Sep 29, 2020

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

KIMBERLY P.,¹
Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²
Defendant.

No. 4:19-cv-05046-MKD

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

ECF Nos. 14, 15

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant. *See* Fed. R. Civ. P. 25(d).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No.
3 6. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
5 motion, ECF No. 14, and denies Defendant's motion, ECF No. 15.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

8 STANDARD OF REVIEW

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

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

12 **FIVE-STEP EVALUATION PROCESS**

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

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 423(d)(2)(A).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
6 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
7 “substantial gainful activity,” the Commissioner must find that the claimant is not
8 disabled. 20 C.F.R. § 404.1520(b).

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

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 404.1520(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education, and
19 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of
20 adjusting to other work, the Commissioner must find that the claimant is not

1 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
2 other work, analysis concludes with a finding that the claimant is disabled and is
3 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
7 capable of performing other work; and 2) such work “exists in significant numbers
8 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
9 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On July 14, 2014, Plaintiff applied for Title II disability insurance benefits
12 alleging a disability onset date of July 31, 2013. Tr. 290-96. The application was
13 denied initially and on reconsideration. Tr. 233-35; Tr. 237-38. Plaintiff appeared
14 before an administrative law judge (ALJ) on January 17, 2017. Tr. 171-207. On
15 February 14, 2018, the ALJ denied Plaintiff’s claim. Tr. 13-46.

16 At step one of the sequential evaluation process, the ALJ found Plaintiff,
17 who met the insured status requirements through December 31, 2017, has not
18 engaged in substantial gainful activity since July 31, 2013. Tr. 18-19. At step two,
19 the ALJ found that Plaintiff has the following severe impairments: degenerative
20

1 disc disease, status post rotator cuff repair, status post left cubital tunnel release,
2 bilateral carpal tunnel syndrome, and breast cancer. Tr. 19.

3 At step three, the ALJ found Plaintiff does not have an impairment or
4 combination of impairments that meets or medically equals the severity of a listed
5 impairment. Tr. 21-22. The ALJ then concluded that Plaintiff has the RFC to
6 perform light work with the following limitations:

7 [Plaintiff] can lift or carry up to twenty pounds occasionally and up to
8 ten pounds frequently, and can stand or walk for approximately six
9 hours, and sit for approximately six hours, per eight hour work day
10 with normal breaks. Pushing or pulling with the left upper extremity
11 [sic] limited to twenty pounds. She can occasionally climb ramps,
12 stairs, ladders, ropes or scaffolds, frequently balance, stoop, kneel,
13 and crouch, and occasionally crawl. [Plaintiff] can frequently reach
14 and finger, but can perform only occasional overhead reaching.
15 [Plaintiff] is capable of performing simple routine tasks, in a routine
16 work environment, with simple work-related decisions.

17 Tr. 22.

18 At step four, the ALJ found Plaintiff was unable to perform any of her past
19 relevant work. Tr. 33. At step five, the ALJ found that, considering Plaintiff's
20 age, education, work experience, RFC, and testimony from the vocational expert,
there were light jobs that existed in significant numbers in the national economy
that Plaintiff could perform, such as cashier, cleaner/housekeeper, and outside
deliverer. Tr. 34. In the alternative, the vocational expert also testified there were
sedentary jobs available that could accommodate one short stretch break of a
minute or two between the normal breaks occurring every two hours, including

1 telephone information clerk, document preparer, and toy stuffer. Tr. 34-35.

2 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
3 Social Security Act, from the alleged onset date of July 31, 2013, through the date
4 last insured, December 31, 2017. Tr. 35.

5 On February 12, 2019, the Appeals Council denied review of the ALJ's
6 decision, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for
7 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying
10 her disability insurance benefits under Title II of the Social Security Act. Plaintiff
11 raises the following issues for review:

- 12 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 13 2. Whether the ALJ properly evaluated the medical opinion evidence; and
- 14 3. Whether the ALJ conducted a proper step-five analysis.

15 ECF No. 14 at 3-4.

16 DISCUSSION

17 A. Plaintiff's Symptom Claims

18 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
19 convincing in discrediting her symptom claims. ECF No. 14 at 6-10. An ALJ
20 engages in a two-step analysis to determine whether to discount a claimant's

1 testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at *2.

2 “First, the ALJ must determine whether there is objective medical evidence of an
3 underlying impairment which could reasonably be expected to produce the pain or
4 other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation marks omitted).

5 “The claimant is not required to show that [the claimant’s] impairment could
6 reasonably be expected to cause the severity of the symptom [the claimant] has
7 alleged; [the claimant] need only show that it could reasonably have caused some
8 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

9 Second, “[i]f the claimant meets the first test and there is no evidence of
10 malingering, the ALJ can only reject the claimant’s testimony about the severity of
11 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
12 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
13 omitted). General findings are insufficient; rather, the ALJ must identify what
14 symptom claims are being discounted and what evidence undermines these claims.
15 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
16 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
17 explain why it discounted claimant’s symptom claims)). “The clear and
18 convincing [evidence] standard is the most demanding required in Social Security
19 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
20 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

1 Factors to be considered in evaluating the intensity, persistence, and limiting
2 effects of a claimant's symptoms include: 1) daily activities; 2) the location,
3 duration, frequency, and intensity of pain or other symptoms; 3) factors that
4 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
5 side effects of any medication an individual takes or has taken to alleviate pain or
6 other symptoms; 5) treatment, other than medication, an individual receives or has
7 received for relief of pain or other symptoms; 6) any measures other than treatment
8 an individual uses or has used to relieve pain or other symptoms; and 7) any other
9 factors concerning an individual's functional limitations and restrictions due to
10 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
11 404.1529(c). The ALJ is instructed to "consider all of the evidence in an
12 individual's record," "to determine how symptoms limit ability to perform work-
13 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

14 The ALJ found that Plaintiff's medically determinable impairments could
15 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
16 statements concerning the intensity, persistence, and limiting effects of his/her
17 symptoms were not entirely consistent with the evidence. Tr. 23.

18 *1. Inconsistency with Objective Medical Evidence*

19 The ALJ found the minimal physical examination findings were inconsistent
20 with Plaintiff's allegations of extremely limiting physical conditions. Tr. 23-24.

1 An ALJ may not discredit a claimant's symptom testimony and deny benefits
2 solely because the degree of the symptoms alleged is not supported by objective
3 medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001);
4 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d
5 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).
6 However, the objective medical evidence is a relevant factor, along with the
7 medical source's information about the claimant's pain or other symptoms, in
8 determining the severity of a claimant's symptoms and their disabling effects.
9 *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2).

10 Here, the ALJ found that Plaintiff's reported physical symptoms were not as
11 severe as she claimed. Tr. 23-24. The ALJ considered the generally normal
12 findings on examination, including normal strength, gait, and muscle tone, with no
13 atrophy. Tr. 24 (citing Tr. 698, 814, 2175, 2221, 2223, 2226). While there were
14 some positive findings, they were generally minimally abnormal. Tr. 24 (citing Tr.
15 698, 814, 1457, 2198). Though an EMG and nerve conduction test showed
16 moderate left elbow neuropathy, the physical examinations were only mildly
17 abnormal. Tr. 24 (citing Tr. 698). The ALJ considered Plaintiff's more significant
18 findings, including examinations with reduced range of motion and strength, but
19 found Plaintiff also had many normal findings at those same examinations. Tr. 24
20 (citing Tr. 889, 914, 1348-53, 2238). Multiple providers also noted Plaintiff's

1 subjective complaints far outweighed the objective findings. Tr. 24 (citing Tr.
2 1287, 1319, 1989).

3 While Plaintiff's symptoms naturally waxed and waned, the ALJ's finding
4 that the objective findings were out of proportion with and did not corroborate
5 Plaintiff's report of severe restrictions is reasonable. Plaintiff offers an alternative
6 interpretation of the evidence, citing to evidence such as Plaintiff's need for
7 surgery for her cubital tunnel syndrome. ECF No. 14 at 8-9. Plaintiff's provider
8 noted the surgery would likely not cause any permanent restrictions nor require
9 retraining. Tr. 708. The ALJ's interpretation of the evidence was reasonable.
10 This was a clear and convincing reason, coupled with the additional reasons
11 discussed *infra*, to discount Plaintiff's symptom reports.

12 2. *Motivated by Secondary Gain*

13 The ALJ reasoned Plaintiff sought out medical care from providers who
14 would support her allegations and attempted to undermine evidence that was
15 inconsistent with her allegations. Tr. 24-25. Evidence of being motivated by
16 secondary gain is sufficient to support an ALJ's rejection of testimony evidence.
17 *See Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).
18 Therefore, the tendency to exaggerate or engage in manipulative conduct during
19 the process is a permissible reason to discount the credibility of the claimant's
20 reported symptoms. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

1 Plaintiff did not challenge this reason; thus, any challenge is waived. *See*
2 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).
3 Despite the waiver, the Court considered the reasoning and finds it is supported by
4 substantial evidence. Plaintiff submitted a statement in April 2015 that included
5 Plaintiff stating the February 2014 examination by Dr. Bauer and Dr. Wray was
6 not thorough and she was upset about the examination. Tr. 24 (citing Tr. 566-67).
7 The ALJ observed that the statement was not submitted until over a year after the
8 examination, and it was not submitted until Plaintiff’s attorney objected to one of
9 Dr. Bauer’s examinations and the insurance administrator responded that there had
10 not been any reports of a negative experience with the exam. Tr. 25 (citing Tr.
11 564-65). The claims manager also documented inconsistent statements made by
12 Plaintiff. Tr. 25 (citing Tr. 568-71). The ALJ noted Plaintiff became upset when
13 providers opined she could return to work, and she ended appointments and care
14 with providers who did not agree she could not work. Tr. 25 (citing Tr. 2020).

15 The claims manager found Plaintiff wrote a statement disagreeing with Dr.
16 Bauer’s statements, but later gave different reasons for disagreeing with the
17 examination results. Tr. 570, 574. The claims manager also noted Plaintiff
18 misrepresented Dr. Bauer’s report. Tr. 568-69. Plaintiff refused to be examined
19 by Dr. Bauer again. *Id.* After Ms. Glenn opined Plaintiff could return to work,
20 Plaintiff also walked out on an appointment with Ms. Glenn and refused to be

1 treated by her again. Tr. 2020. The ALJ reasonably concluded that Plaintiff
2 appeared to engage in behavior intended to undermine the evidence in her case.
3 This finding is supported by substantial evidence and was a clear and convincing
4 reason to discount Plaintiff's symptoms complaints.

5 *3. Inconsistent with Treatment Notes*

6 The ALJ found the record's lack of observations of Plaintiff being in distress
7 or discomfort was inconsistent with Plaintiff's allegations of constant, limiting
8 pain. Tr. 25-26. Minimal objective evidence is a factor which may be relied upon
9 in discrediting a claimant's testimony, although it may not be the only factor. *See*
10 *Burch*, 400 F.3d at 680. Plaintiff did not challenge this reason; thus, any challenge
11 is waived. *See Carmickle*, 533 F.3d at 1161 n.2. Despite the waiver, the Court
12 considered the reasoning and finds it is supported by substantial evidence. The
13 ALJ found Plaintiff routinely appeared in no apparent distress, appeared "well" at
14 many appointments, and at most was described as appearing in mild pain. Tr. 25
15 (citing, e.g., Tr. 698, 711, 887, 1313). The ALJ also noted Plaintiff's subjective
16 complaints of pain were more severe than what was documented in the records
17 from the same appointments, which noted only mild pain. Tr. 26 (citing Tr. 882-
18 88, 1325-47, 1459-75). At an October 2014 visit, Plaintiff reported her pain was a
19 five out of 10, and in the past week it had been as high as an eight. Tr. 1325.
20 Though there were some abnormalities on exam, Plaintiff was noted as appearing

1 in only mild pain. *Id.* At an October 2015 visit, Plaintiff reported her pain at a six
2 out of 10, with the highest pain being a seven. Tr. 1459. However, Plaintiff was
3 again noted as appearing in only mild pain. Tr. 1460. This was a clear and
4 convincing reason, supported by substantial evidence, to reject Plaintiff's symptom
5 claims.

6 *4. Activities of Daily Living*

7 The ALJ found Plaintiff's activities of daily living were inconsistent with
8 her symptom complaints. Tr. 26. The ALJ may consider a claimant's activities
9 that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can
10 spend a substantial part of the day engaged in pursuits involving the performance
11 of exertional or non-exertional functions, the ALJ may find these activities
12 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
13 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to
14 be eligible for benefits, the ALJ may discount a claimant's symptom claims when
15 the claimant reports participation in everyday activities indicating capacities that
16 are transferable to a work setting" or when activities "contradict claims of a totally
17 debilitating impairment." *Molina*, 674 F.3d at 1112-13. Plaintiff did not challenge
18 this reason; thus, any challenge is waived. *See Carmickle*, 533 F.3d at 1161 n.2.
19 Despite the waiver, the Court considered the reasoning and finds it is supported by
20 substantial evidence.

1 The ALJ reasoned Plaintiff's reported ability to walk five miles three times
2 per week, without any reported pain, was inconsistent with her allegations of
3 disabling symptoms. Tr. 25 (citing Tr. 863). Though the analysis did not include
4 any further analysis of Plaintiff's activities, an ability to walk five miles at a
5 moderate pace, three times per week, without reported difficulty or symptoms, is
6 inconsistent with Plaintiff's reports of disabling pain. Tr. 863. Plaintiff reported
7 additional activities, including bicycling or walking at least three times weekly. Tr.
8 865. Plaintiff reported cooking dinner daily, doing laundry, mowing the lawn with
9 a riding mower, and doing some of the household cleaning. Tr. 393. She also
10 reported shopping weekly and taking her dog for a walk one to two times per
11 week. Tr. 394-95. The ALJ's finding that Plaintiff's activities of daily living were
12 inconsistent with her symptom claims is a clear and convincing reason, supported
13 by substantial evidence, to reject Plaintiff's symptom complains.

14 *5. Improvement with Conservative Treatment*

15 The ALJ reasoned Plaintiff's improvement with conservative treatment was
16 inconsistent with her symptom claims. Tr. 26. The effectiveness of treatment is a
17 relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. §
18 404.1529(c)(3); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th
19 Cir. 2006) (determining that conditions effectively controlled with medication are
20 not disabling for purposes of determining eligibility for benefits); *Tommasetti v.*

1 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response
2 to treatment can undermine a claimant’s complaints of debilitating pain or other
3 severe limitations). The ALJ found Plaintiff reported significant improvement in
4 her left upper extremity with minimal treatment. Tr. 26 (citing Tr. 762). Plaintiff
5 had increased range of motion, decreased discomfort and increased function after
6 physical therapy in 2013, though she later reported physical therapy provided only
7 minimal relief. Tr. 26 (citing Tr. 762, 1349). Plaintiff argues she did not have
8 significant improvement with conservative treatment, as demonstrated by her need
9 for surgery. ECF No. 14 at 8-9. While Plaintiff later needed surgery, the medical
10 records demonstrate Plaintiff had a period of improvement with physical therapy
11 prior to the surgery. Further, in the years after the surgery, Plaintiff reported her
12 pain was relieved well by pain medications and lidocaine patches, and she reported
13 she only “occasionally” needed to take pain medications during the day when she
14 worked her left shoulder too hard. Tr. 26 (citing Tr. 1506). Further, any error is
15 harmless where, as discussed *supra*, the ALJ lists additional reasons, supported by
16 substantial evidence, for discrediting Plaintiff’s symptom complaints. *See*
17 *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115 (“[S]everal of our cases
18 have held that an ALJ’s error was harmless where the ALJ provided one or more
19 invalid reasons for disbelieving a claimant’s testimony, but also provided valid
20 reasons that were supported by the record.”); *Batson v. Comm’r of Soc. Sec.*

1 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (holding that any error the ALJ
2 committed in asserting one impermissible reason for claimant’s lack of credibility
3 did not negate the validity of the ALJ’s ultimate conclusion that the claimant’s
4 testimony was not credible).

5 *6. Motivation to Work*

6 The ALJ found Plaintiff’s motivation to work inconsistent with her
7 allegations. Tr. 26-27. Evidence of a poor work history that suggests a claimant is
8 not motivated to work is a permissible reason to discredit a claimant’s testimony
9 that she is unable to work. *Thomas*, 278 F.3d at 959; SSR 16-3p³ (factors to
10 consider in evaluating credibility include “prior work record and efforts to work”);
11 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); 20 C.F.R. § 404.1529 (work
12 record can be considered in assessing credibility). Additionally, “receipt of
13 unemployment benefits can undermine a claimant’s alleged inability to work
14 fulltime.” *Carmickle*, 533 F.3d at 1161-62 (citing *Copeland v. Bowen*, 861 F.2d
15 536, 542 (9th Cir. 1988)). But where the record “does not establish whether [the
16 claimant] held himself out as available for full-time or part-time work,” such a
17 “basis for the ALJ’s credibility finding is not supported by substantial evidence,”

18
19 ³ SSR 16-3p superseded SSR 96-7p effective March 28, 2016. The Court applies
20 the regulation in effect at the time of the ALJ’s decision.

1 as “[o]nly the former is inconsistent with his disability allegations.” *Id.* The ALJ
2 noted that Plaintiff received more income when receiving worker’s compensation
3 than she had received in her year of employment in 2011, and her worker’s
4 compensation benefits were almost as much as Plaintiff earned working in 2012.
5 Tr. 26 (citing Tr. 305, 598-604). Plaintiff also earned less working than she
6 received in worker’s compensation benefits during most of her working years, with
7 several years of earnings below \$10,000, including one year with no earnings. Tr.
8 305. The ALJ reasonably considered Plaintiff’s earnings record in determining
9 Plaintiff lacked motivation to work.

10 The ALJ also reasoned Plaintiff’s receipt of unemployment benefits in 2016,
11 which required she certify she was willing and able to work, was inconsistent with
12 her reported inability to work. Tr. 26 (citing Tr. 882). The record does not
13 establish whether Plaintiff held herself out as available for full-time or part-time
14 work. However, any error in the analysis is harmless as discussed *supra*, as the
15 ALJ gave other clear and convincing reasons for rejecting Plaintiff’s symptoms
16 claims. *See Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115.

17 *7. Inconsistent Statements Regarding Work History*

18 Lastly, the ALJ considered Plaintiff’s inconsistent statements regarding her
19 work history. Tr. 27. In evaluating a claimant’s symptom claims, an ALJ may
20 consider the consistency of an individual’s own statements made in connection

1 with the disability-review process with any other existing statements or conduct
2 under other circumstances. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
3 (The ALJ may consider “ordinary techniques of credibility evaluation,” such as
4 reputation for lying, prior inconsistent statements concerning symptoms, and other
5 testimony that “appears less than candid.”). Plaintiff did not challenge this reason;
6 thus, any challenge is waived. *See Carmickle*, 533 F.3d at 1161 n.2. Despite the
7 waiver, the Court considered the reasoning and finds it is supported by substantial
8 evidence. Plaintiff testified she worked as a correctional officer for only two days,
9 though she reported elsewhere she worked as a correctional officer for eight
10 months. *Id.* (citing Tr. 199, 355, 357, 371). Plaintiff reported on one occasion that
11 she worked the job for three days and the remainder of her time was in training, Tr.
12 605, but this is inconsistent with her other reports where Plaintiff reported the
13 position without any mention of a special training period, Tr. 579. The ALJ also
14 found Plaintiff made inconsistent statements as to where her workplace injury took
15 place. Tr. 27 (citing Tr. 1449). This finding is supported by substantial evidence
16 in the record.

17 In sum, the ALJ gave numerous clear and convincing reasons, supported by
18 substantial evidence, to discount Plaintiff's symptoms complaints.
19
20

1 **B. Medical Opinion Evidence**

2 Plaintiff contends the ALJ improperly considered the opinions of P. Alex
3 Stone, PA-C; Jean You, M.D.; Kirk Holle, P.T.; Michael Sherfey, D.O.; Desiree
4 Ang, A.R.N.P.; Arthur Thiel, M.D.; Tracey Glenn, MS, A.R.N.P.; and Phillip
5 Drussel, P.T. ECF No. 14 at 10-15.

6 There are three types of physicians: “(1) those who treat the claimant
7 (treating physicians); (2) those who examine but do not treat the claimant
8 (examining physicians); and (3) those who neither examine nor treat the claimant
9 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
10 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
11 Generally, a treating physician’s opinion carries more weight than an examining
12 physician’s, and an examining physician’s opinion carries more weight than a
13 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
14 to opinions that are explained than to those that are not, and to the opinions of
15 specialists concerning matters relating to their specialty over that of
16 nonspecialists.” *Id.* (citations omitted).

17 If a treating or examining physician’s opinion is uncontradicted, the ALJ
18 may reject it only by offering “clear and convincing reasons that are supported by
19 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
20 “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported
2 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
3 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
5 may only reject it by providing specific and legitimate reasons that are supported
6 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
7 31). The opinion of a nonexamining physician may serve as substantial evidence if
8 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
9 53 F.3d 1035, 1041 (9th Cir. 1995).

10 “Only physicians and certain other qualified specialists are considered
11 ‘[a]cceptable medical sources.’” *Ghanim*, 763 F.3d at 1161 (alteration in original);
12 *see* 20 C.F.R. § 404.1502 (2013).⁴ However, an ALJ is required to consider
13 evidence from non-acceptable medical sources, such as therapists. 20 C.F.R. §
14
15
16
17

18 ⁴ The regulation that defines acceptable medical sources is found at 20 C.F.R. §
19 404.1502 for claims filed after March 27, 2017. The Court applies the regulation
20 in effect at the time the claim was filed.

1 404.1527(f) (2013).⁵ An ALJ may reject the opinion of a non-acceptable medical
2 source by giving reasons germane to the opinion. *Ghanim*, 763 F.3d at 1161.

3 *1. Ms. Stone*

4 Ms. Stone opined on March 10, 2015 that repetitive heavy living, as required
5 by Plaintiff's work as a certified nursing assistant, aggravated or caused Plaintiff's
6 neck and left upper extremity symptoms. Tr. 1438 (duplicated at Tr. 1942). She
7 stated Plaintiff reported the injury initially only involved left shoulder pain but
8 progressed to both neck and shoulder pain and paresthesia. *Id.* On March 31,
9 2015, Ms. Stone opined that Plaintiff's cervical spine and left upper extremity
10 impairments had not reached medical stability. Tr. 906 (duplicated at Tr. 1943).
11 She stated the objective evidence of Plaintiff's conditions included positive
12 bilateral Spurling's, decreased triceps reflexes, hypoesthesia of left C5, C6 and C8
13 dermatomes, 1+ brachioradialis, positive Hoffman's and decreased strength in the
14 biceps. *Id.* She stated Plaintiff was on "minimal" opiate medication with no plan
15 to decrease the medication. *Id.*

16
17
18 ⁵ The regulation that requires an ALJ's consider opinions from non-acceptable
19 medical sources is found at 20 C.F.R. § 404.1502c for claims filed after March 27,
20 2017. The Court applies the regulation in effect at the time the claim was filed.

1 The ALJ gave Ms. Stone’s opinions no weight. Tr. 28. As Ms. Stone is not
2 an acceptable medical source, the ALJ was required to give germane reasons to
3 reject the opinions. *See Ghanim*, 763 F.3d at 1161.

4 First, the ALJ found Ms. Stone’s March 31, 2015 opinion that Plaintiff’s
5 conditions were not stable inconsistent with Dr. Sherfey’s opinion. Tr. 28. An
6 ALJ may choose to give more weight to an opinion that is more consistent with the
7 evidence in the record. 20 C.F.R. § 404.1527(c)(4) (“[T]he more consistent a
8 medical opinion is with the record as a whole, the more weight we will give to that
9 medical opinion.”); *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).

10 Relevant factors when evaluating a medical opinion include the amount of relevant
11 evidence that supports the opinion, the quality of the explanation provided in the
12 opinion, and the consistency of the medical opinion with the record as a whole.
13 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495
14 F.3d 625, 631 (9th Cir. 2007); 20 C.F.R. § 404.1527(b)(6) (assessing the extent to
15 which a medical source is “familiar with the other information in [the claimant’s]
16 case record”).

17 While Ms. Stone opined Plaintiff’s shoulder and spine conditions were not
18 stable, Tr. 906, Dr. Sherfey opined Plaintiff’s shoulder was “fixed and stable,” Tr.
19 28 (citing Tr. 814). The ALJ reasoned Dr. Sherfey’s opinion was entitled to more
20 weight as he was a treating specialist and a physician. Tr. 28. While opinions

1 from sources that are not acceptable medical sources are not automatically entitled
2 to lesser weight than opinions from acceptable medical sources, specialists'
3 opinions about issues related to their specialty are entitled to more weight than
4 opinions from non-specialists. 20 C.F.R. § 404.1527(c)(5), (f)(1). As a treating
5 orthopedic specialist, Dr. Sherfey's opinion was entitled to more weight than Ms.
6 Stone's opinion. This was a germane reason to reject Ms. Stone's opinion that
7 Plaintiff's shoulder condition is not stable. However, Dr. Sherfey opined Plaintiff
8 needed further evaluation and possible treatment for her spinal conditions, and he
9 deferred on the issue as it was outside his expertise. Tr. 814. There is no conflict
10 between Dr. Sherfey's opinion and Ms. Stone's opinion regarding Plaintiff's spinal
11 conditions. However, any error is harmless as the ALJ gave other germane reasons
12 to reject the opinion. *See Molina*, 674 F.3d at 1115.

13 Second, the ALJ found Ms. Stone's opinions lacked any functional
14 limitations. Tr. 28-29. An ALJ may reject an opinion that does "not show how [a
15 claimant's] symptoms translate into specific functional deficits which preclude
16 work activity." *See Morgan*, 169 F.3d at 601. Ms. Stone's March 10, 2015
17 opinion stated only that Plaintiff's conditions were not stable but did not indicate
18 any functional limitations due to the conditions. Tr. 1438. Ms. Stone's March 31,
19 2015 opinion stated that Plaintiff's shoulder and neck impairments were caused or
20 aggravated by her work as a certified nursing assistant but did not provide any

1 functional limitations due to the impairments. Tr. 906. This was a germane reason
2 to decline to give weight to Ms. Stone's opinions.

3 Third, the ALJ found Ms. Stone's opinions lacked any reference to medical
4 data and did not contain any rationale for her conclusions. Tr. 29. The Social
5 Security regulations "give more weight to opinions that are explained than to those
6 that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion
7 of any physician, including a treating physician, if that opinion is brief, conclusory
8 and inadequately supported by clinical findings." *Bray*, 554 at 1228. Ms. Stone's
9 March 10, 2015 opinion contains references to Plaintiff's self-report but no
10 references to any objective evidence and does not provide any additional
11 explanation. Tr. 1438. Ms. Stone's March 31, 2015 opinion references Plaintiff's
12 objective medical findings, and plan for "possible" cervical epidural steroid
13 injections but does not provide further explain as to why Plaintiff's condition was
14 not stable. Tr. 906. The questionnaire asks when maximum medical improvement
15 was expected, but Ms. Stone did not answer the question. *Id.*

16 Plaintiff argues Ms. Stone's treating records provide data and rationale to
17 support the opinion. ECF No. 14 at 11. The records demonstrate Plaintiff reported
18 varying levels of pain, but she also reported in December 2015 her medications
19 helped her to continue doing "well enough," and she felt her current treatment
20 regimen was "adequate" and she was satisfied with it. Tr. 1473-74 (duplicated at

1 Tr. 2346-47). Ms. Stone noted Plaintiff seemed to be in mild pain and had
2 limitations in her cervical range of motion, but otherwise had a normal physical
3 exam. *Id.* Ms. Stone found at two other appointments that Plaintiff had limited
4 cervical range of motion, tenderness in her cervical spine, spasm in the left
5 trapezius muscle, and decreased strength in the triceps. Tr. 2350, 2354.

6 While the records demonstrate Plaintiff had continued pain and some
7 continued limitations, such level of pain and limitation was also noted by Dr.
8 Sherfey and he still found Plaintiff's condition stable. Tr. 814. The ALJ's
9 interpretation, finding Ms. Stone did not provide objective support that Plaintiff's
10 condition was unstable, is reasonable. This was a germane reason to reject Ms.
11 Stone's opinion.

12 Plaintiff argues the ALJ failed to address Ms. Stone's "remaining opinions"
13 but does not cite to any opinions. ECF No. 14 at 11. While both of Ms. Stone's
14 opinions are each duplicated, the record does not appear to contain any other
15 opinions from Ms. Stone. Further, any error in the ALJ's analysis of Ms. Stone's
16 opinions would be harmless. The two existing opinions do not contain any
17 functional limitations and Plaintiff does not provide any analysis of any harmful
18 impact of the rejection of Ms. Stone's opinions. Plaintiff generally argues the
19 opinions were improperly considered and should have been given greater weight
20 but does not point to any part of Ms. Stone's opinion that would have impacted the

1 RFC. ECF No. 14 at 14-15. While Plaintiff contends other opinions exist in the
2 record, Plaintiff does not demonstrate any harmful error from the rejection of any
3 opinions. Thus, any error is harmless. *See Molina*, 674 F.3d at 1115.

4 *2. Dr. You*

5 On November 11, 2016, Dr. You, Plaintiff's treating pain specialist, opined
6 Plaintiff can: sit 45 minutes at one time, for a total of four hours in an eight-hour
7 day; stand 30 minutes at one time, for a total of standing/walking two hours in a
8 day; lift less than 10 pounds frequently, 10 pounds occasionally, 20 pounds rarely
9 and never 50 pounds; rarely lift above shoulders and reach to the floor, and
10 frequently reach to waist level and handle objects. Tr. 2021-22. She further
11 opined Plaintiff would: need unscheduled breaks of 30 minutes every 45 minutes,
12 during which she would need to lie down; miss more than four days of work per
13 month; have difficulty squatting, kneeling and pulling; and would be unable to
14 return to her previous work or perform other work. *Id.* Dr. You opined the
15 impairments began in January 2013 and are permanent. Tr. 2022.

16 The ALJ gave Dr. You's opinion no weight. Tr. 29. As Dr. You's opinion
17 is contradicted by the opinions of William Stump, M.D., Tr. 933, and R. David
18 Bauer, M.D., Tr. 1303-27, the ALJ was required to give specific and legitimate
19 reasons, supported by substantial evidence, to reject the opinion. *See Bayliss*, 427
20 F.3d at 1216.

1 First, the ALJ reasoned Dr. You's opinion was based on Plaintiff's self-
2 report. Tr. 29. A physician's opinion may be rejected if it is too heavily based on
3 a claimant's properly discounted complaints. *Tonapetyan*, 242 F.3d at 1149. Here,
4 Dr. You wrote at the end of the questionnaire she completed, "according to
5 patient's subjective report." Tr. 2022. Dr. You did not complete the section
6 asking for Plaintiff's medical impairments to be listed, nor did she fill in the
7 sections asking for explanations if necessary, and she did not add any other
8 comments. Tr. 2021-22. While Plaintiff argues Dr. You's opinion was also based
9 on her review of objective evidence, ECF No. 14 at 12, Dr. You's written
10 statement does not support Plaintiff's contention, given the statement it is based on
11 Plaintiff's subjective report, and a lack of any reference to objective evidence or
12 further explanation in the opinion. The ALJ reasonably found that the opinion was
13 based on Plaintiff's self-report. This was a specific and legitimate reason to reject
14 Dr. You's opinion.

15 Second, the ALJ found Dr. You had only been seeing Plaintiff for two
16 months at the time she rendered the opinion. Tr. 29. The number of visits a
17 claimant had with a particular provider is a relevant factor in assigning weight to
18 an opinion. 20 C.F.R. § 404.1527(c)(2)(i). Here, the ALJ gave significant weight
19 to non-examining medical consultants, Tr. 27, and to providers who examined
20 Plaintiff on only one occasion, Tr. 30. The ALJ also reasonably gave significant

1 weight to the January 2014 and October 2014 opinions of treating physician Dr.
2 Sherfey, who had a longer treating relationship with Plaintiff than Dr. You. Tr. 28.
3 Any potential error in giving more weight to providers who had not examined
4 Plaintiff, or who had seen her on fewer occasions than Dr. You, would be harmless
5 because the ALJ properly gave greater weight to Dr. Sherfey's opinions and gave
6 other specific and legitimate reasons for rejecting the opinion. *See Molina*, 674
7 F.3d at 1115.

8 Third, the ALJ found Dr. You's records did not contain findings that
9 supported her opinion. Tr. 29 (citing Tr. 2181, 2186, 2191-92). A medical opinion
10 may be rejected if it is unsupported by medical findings. *Bray*, 554 F.3d at 1228;
11 *Batson*, 359 F.3d at 1195; *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149;
12 *Matney*, 981 F.2d at 1019. Furthermore, a physician's opinion may be rejected if it
13 is unsupported by the physician's treatment notes. *Connett v. Barnhart*, 340 F.3d
14 871, 875 (9th Cir. 2003). Dr. You's records indicate Plaintiff reported she requires
15 minimal assistance with activities of daily living, handles housework two to three
16 days per week, and exercises by walking one mile. Tr. 2191. Plaintiff reported
17 pain, fatigue, numbness, tingling and anxiety, but she had a normal exam except an
18 unsteady gait and tenderness in the cervical spine. Tr. 2191-92. At another exam,
19 Plaintiff had a normal physical exam except she had more than 11 positive tender
20 points, though she reported worsening symptoms. Tr. 2184-86. Plaintiff has also

1 reported she is able to work or volunteer a few hours a day, take part in family life,
2 and does limited social activities. Tr. 2184. Plaintiff's physical exams were
3 generally normal, with cervical tenderness observed at some appointments but not
4 others. Tr. 2175, 2181. This was a specific and legitimate reason to reject the
5 opinion.

6 In sum, the ALJ gave specific and legitimate reasons, supported by
7 substantial evidence, to reject Dr. You's opinion.

8 *3. Mr. Holle*

9 On December 14, 2016, Mr. Holle, Plaintiff's treating physical therapist,
10 opined Plaintiff can: sit for one hour at a time, for a total of four hours in an eight-
11 hour work day; stand for 30 to 45 minutes at a time for a total of standing/walking
12 two hours in a day; occasionally lift up to 10 pounds, rarely lift 20 pounds, and
13 never lift 50 pounds; and rarely reach above shoulders, to waist level or to floor
14 level and frequently handle objects with fingers. Tr. 2024-25. Mr. Holle also
15 opined Plaintiff cannot tolerate a full work day and could only work four to six
16 hours at most, she would need two unscheduled breaks per day for 30 minutes,
17 during which she would need to lie down, and Plaintiff would miss more than four
18 days per month if she worked full-time. Tr. 2024. He also stated Plaintiff's
19 impairments began January 11, 2013 and are permanent. Tr. 2025.

1 The ALJ gave Mr. Holle’s opinion no weight. Tr. 29. As Mr. Holle is not
2 an acceptable medical source, the ALJ was required to give germane reasons to
3 reject the opinion. *See Ghanim*, 763 F.3d at 1161.

4 First, the ALJ found Mr. Holle had only been treating Plaintiff for two
5 months for one impairment, yet opined Plaintiff’s impairments had begun in
6 January 2013. Tr. 29 (citing Tr. 2024-25, 2195-96). Although retrospective
7 assessments should not be disregarded solely because they are rendered
8 retrospectively, in *Magallanes*, the Ninth Circuit found that when a treating
9 physician opines about a claimant’s condition prior to the date that the treating
10 physician had direct personal knowledge of the condition, the treating physician is
11 “scarcely different from any non-treating physician with respect to that time
12 period.” *Magallanes v. Bowen*, 881 F.2d 747, 754 (9th Cir. 1989) (ALJ properly
13 discounted doctor’s retrospective opinion about a disability onset date in light of
14 the fact that the doctor did not see the claimant until two years later and there was
15 no other objective medical evidence of disability during the time alleged); *Johnson*
16 *v. Shalala*, 60 F.3d 1428, 1432-1433 (9th Cir. 1995) (concluding that because a
17 physician’s retrospective assessment included no specific assessment of claimant’s
18 functional capacity prior to that date, the ALJ’s rejection of his testimony was
19 reasonable); *see also Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th
20

1 Cir. 1984) (ALJ properly ignored opinion of psychiatrist who examined Plaintiff
2 because “[a]fter-the-fact psychiatric diagnoses are notoriously unreliable.”).

3 Mr. Holle began treating Plaintiff in October 2016 for bilateral Achilles
4 tendinitis. Tr. 2218. He rendered his opinion in December 2016, and opined
5 Plaintiff’s impairments began in January 2013. Tr. 2025. Plaintiff argues that Mr.
6 Holle performed a functional capacity test and thus his opinion was based on all of
7 Plaintiff’s impairments. ECF No. 14 at 12. However, the functional capacity test
8 was performed in December 2016. Tr. 2197-98. Mr. Holle did not examine or
9 treat Plaintiff prior to October 2016, thus his opinion regarding Plaintiff’s
10 impairments and limitations prior to that date was not based on his personal
11 knowledge of her conditions. This was a germane reason to reject Mr. Holle’s
12 opinion.

13 Second, the ALJ found Mr. Holle’s opinion relied on Plaintiff’s self-report.
14 Tr. 29. An opinion may be rejected if it is too heavily based on a claimant’s
15 properly discounted complaints. *Tonapetyan*, 242 F.3d at 1149. The ALJ
16 reasoned Mr. Holle did not provide any support for his opinion that Plaintiff cannot
17 complete a normal workday/workweek, nor that her impairments had been so
18 limiting since January 2013. Tr. 29. While Mr. Holle provided comments
19 regarding Plaintiff’s difficulties with shoulder strength, and some difficulties with
20 lower extremity weakness and using stairs, he did not explain why Plaintiff cannot

1 sustain a full-time work day. Tr. 29, 2024-25. While Mr. Holle stated Plaintiff
2 cannot resume her past work as a certified nursing assistant, he also noted Plaintiff
3 may be able to perform other work such as working with computers but stated a
4 vocational counselor would need to make such a determination. Tr. 2025.

5 Plaintiff argues Mr. Holle performed a functional capacity exam and thus the
6 opinion was not based only on Plaintiff's self-report. ECF No. 14 at 12. However,
7 as discussed above, the exam was not performed until December 2016, though the
8 opinion addresses as early as January 2013. During the exam, Plaintiff reported
9 neck and shoulder pain and burning, as well as lower extremity weakness and
10 neuropathy. Tr. 2197. Mr. Holle's physical examination only examined Plaintiff's
11 lower extremities, and he previously only treated her for Achilles tendinitis. Tr.
12 2197-98. Mr. Holle opined on Plaintiff's ability to use her upper extremities,
13 despite not examining or treating her for her reported upper extremity impairments.
14 Tr. 2024-25. The ALJ's finding that Mr. Holle's opinion was based on Plaintiff's
15 self-report was reasonable and is a germane reason to reject the opinion.

16 Third, the ALJ found Mr. Holle's opinion was inconsistent with the
17 treatment records. Tr. 29. A medical opinion may be rejected if it is unsupported
18 by medical findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at 1195; *Thomas*,
19 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d at 1016. The
20 ALJ reasoned Mr. Holle's opinion that Plaintiff's impairments were permanent is

1 inconsistent with his treatment note that Plaintiff had good “rehab potential.” Tr.
2 29 (citing Tr. 2198). The ALJ further reasoned Mr. Holle’s opinion was
3 inconsistent with the records in general, which demonstrated generally normal
4 physical exams with minimal abnormal physical findings, as discussed above. Tr.
5 29. The ALJ gave germane reasons to reject Mr. Holle’s opinion.

6 *4. Dr. Sherfey and Dr. Thiel*

7 Dr. Sherfey, a treating orthopedic specialist, gave multiple opinions
8 regarding Plaintiff’s functioning. As Dr. Sherfey’s opinions are contradicted by
9 the opinions of Dr. Stump, Tr. 933, and Dr. Bauer, Tr. 1303-27, the ALJ was
10 required to give specific and legitimate reasons, supported by substantial evidence,
11 to reject the opinions. *See Bayliss*, 427 F.3d at 1216.

12 *a. Dr. Sherfey’s December 2015 Opinions*

13 In December 2015, Dr. Sherfey opined Plaintiff could perform her past work
14 as a certified nursing assistant, without any restrictions. Tr. 1476. However, that
15 same month, he also opined Plaintiff was released to modified duty, as she could
16 never lift more than 10 pounds. Tr. 1477. The ALJ gave these opinions partial
17 weight. Tr. 28.

18 While Plaintiff asserts the ALJ improperly gave varying weights to Dr.
19 Sherfey’s opinions, Plaintiff does not mention the December 2015 opinions nor set
20 forth any argument regarding the opinions. ECF No. 14 at 13. Thus, any

1 challenge to those findings is waived. *See Carmickle*, 533 F.3d at 1161 n.2.

2 However, the Court conducted an independent review of the ALJ's analysis of the
3 opinion and finds the ALJ's determination is supported by substantial evidence in
4 the record.

5 The ALJ found Dr. Sherfey's opinions were inconsistent with one another.
6 Tr. 28. Relevant factors to evaluating any medical opinion include the amount of
7 relevant evidence that supports the opinion, the quality of the explanation provided
8 in the opinion, and the consistency of the medical opinion with the record as a
9 whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Dr. Sherfey opined
10 on December 9, 2015 that Plaintiff could return to work as a certified nursing
11 assistant with no restrictions. Tr. 1476. The same day, he opined on a separate
12 form that Plaintiff could return to work with modified duties, as she can never lift
13 more than ten pounds. Tr. 1477. It also appears he indicated that though she could
14 return to work with modified duties, she had a "poor prognosis for return to work
15 at the job of injury at any date." *Id.* Dr. Sherfey did not provide any explanation
16 for the differences between the two forms or his varying statements. The ALJ's
17 determination that Dr. Sherfey's opinions were inconsistent was reasonable.

18 The ALJ also found Dr. Sherfey's opinion would not have impacted the
19 outcome, as even if Plaintiff was limited to lifting no more than ten pounds, the
20 vocational expert testified there would be sedentary work Plaintiff was able to

1 perform. Tr. 28. The ALJ reasoned Plaintiff would have been found not disabled
2 even if she was limited to a sedentary RFC. Tr. 34-35. However, that statement
3 does not consider that Plaintiff was closely approaching retirement age at her date
4 last insured and a sedentary RFC would have been disabling if no transferrable
5 skills were found, under Grid Rule 201.14.⁶ See 20 C.F.R. § 404, Appendix 2 to
6 Subpart P. It is unclear if the ALJ would have weighed Dr. Sherfey's opinion
7 differently had he understood that Dr. Sherfey's sedentary opinion would be
8 disabling. On remand, the ALJ is directed to reconsider Dr. Sherfey's December
9 2015 opinion that Plaintiff can never lift more than 10 pounds. The ALJ is
10 directed to incorporate the limitation into the RFC or give specific and legitimate
11 reasons, supported by substantial evidence, to reject the opinion.

14 ⁶ Plaintiff was born on May 16, 1966. Tr. 360. Plaintiff's date last insured is
15 December 31, 2017. Tr. 306. Given her date of birth, Plaintiff was 51 years-old
16 on her date last insured. Grid Rule 201.14 applies to claimants who are
17 "approaching retirement age," which is defined as individuals between 50 years-
18 old and 54 years-old and directs a finding of disability if the claimant is limited to
19 sedentary work and does not have transferrable skills to sedentary work. 20 C.F.R.
20 § 404, Appendix 2 to Subpart P.

1 b. Dr. Sherfey's Other Opinions

2 Dr. Sherfey rendered other opinions regarding Plaintiff's functioning,
3 including opinions in January 2014 and August 2014. As this case is being
4 remanded to reconsider Dr. Sherfey's December 2015 opinion, the ALJ is directed
5 to also reconsider Dr. Sherfey's other opinions, including the January 2014 and
6 August 2014 opinions, and incorporate the limitations into the RFC or give specific
7 and legitimate reasons, supported by substantial evidence, to reject the opinions.

8 c. Dr. Thiel's Opinions

9 Dr. Thiel, a treating orthopedic specialist, completed multiple forms
10 regarding Plaintiff's ability to return to work. He opined Plaintiff had the
11 following limitations during the following time periods: she could not work from
12 August 7, 2013 through August 15, 2013, with a return to light duty, meaning no
13 lifting or carrying over five pounds with the left arm, on August 16, 2013, Tr. 840;
14 she could not work from September 15, 2013 through November 24, 2013, Tr. 837;
15 she could return to work November 27, 2013, with an indefinite limitation to light
16 duty work, meaning no lifting over 15 pounds and no carrying over 10 pounds, Tr.
17 836.

18 Dr. Sherfey also gave multiple opinions about Plaintiff's ability to return to
19 work. He opined Plaintiff could work regular duty with no left arm lifting January
20 17, 2013 through March 23, 2013, Tr. 848-51; she could not work from April 11,

1 2013 through May 10, 2013, Tr. 847; she could return to light work, with no use of
2 her left arm for lifting, on May 13, 2013, Tr. 846; she could return to regular duty
3 work June 24, 2013, Tr. 845; and she could not work from July 12, 2013 through
4 August 16, 2013, Tr. 841-42, 844.

5 The ALJ considered all of the above work restriction opinions together;
6 though he stated they were all from Dr. Sherfey, he cited to the opinions from Dr.
7 Thiel as well and gave the opinions no weight. Tr. 28. As the opinions were
8 contradicted, the ALJ was required to give specific and legitimate reasons,
9 supported by substantial evidence, to reject the opinions. *See Bayliss*, 427 F.3d at
10 1216.

11 The ALJ reasoned the opinions did not meet the durational requirements.
12 Tr. 28. Temporary limitations are not enough to meet the durational requirement
13 for a finding of disability. 20 C.F.R. § 404.1505(a) (requiring a claimant's
14 impairment to be expected to last for a continuous period of not less than twelve
15 months); 42 U.S.C. § 423(d)(1)(A) (same); *Carmickle*, 533 F.3d at 1165 (affirming
16 the ALJ's finding that treating physicians' short-term excuse from work was not
17 indicative of "claimant's long-term functioning").

18 Dr. Thiel and Dr. Sherfey's opinions specifically regarding Plaintiff's ability
19 to return to work span 11 months in 2013. Tr. 836-51. However, in January 2014,
20 Dr. Sherfey opined Plaintiff had ongoing limitations. Tr. 814. The opinions all

1 related to Plaintiff's limitations due to her shoulder impairment, and demonstrate
2 Plaintiff had limitations in her ability to lift with her left arm that spanned 12
3 months or longer. Thus, the opinion that Plaintiff was limited in her ability to lift
4 with her left arm was improperly rejected as temporary in nature.

5 Further, Dr. Thiel rendered his final opinion in December 2013, in which he
6 opined Plaintiff is restricted to light duty work indefinitely, which met the
7 durational requirement. The ALJ did not give any reason for rejecting Dr. Thiel's
8 opinion other than finding the opinions were temporary. The ALJ's rejection of
9 Dr. Thiel's opinions is not harmless.

10 Dr. Thiel opined Plaintiff could not lift more than 15 pounds and could not
11 carry more than 10 pounds. Tr. 836. The ALJ found Plaintiff can lift and carry up
12 to 20 pounds occasionally and 10 pounds frequently. Tr. 22. The ALJ also
13 alternatively obtained a list of jobs from the vocational expert that Plaintiff could
14 perform if she was limited to sedentary work; as sedentary work requires lifting no
15 more than 10 pounds, this alternative finding would account for Dr. Thiel's
16 opinion. *See* 20 C.F.R. § 404.1567(a). However, as discussed *supra*, the ALJ
17 applied the incorrect age category when considering if a sedentary RFC would be
18 disabling.

1 On remand, the ALJ is directed to reconsider all of Dr. Thiel's opinions and
2 incorporate them into the RFC or give specific and legitimate reasons, supported
3 by substantial evidence, to reject the opinions.

4 5. *Ms. Ang*

5 On April 7, 2015, Ms. Ang, a treating nurse practitioner, opined Plaintiff
6 can: sit without restriction; seldomly work from a ladder, climb ladders or climb
7 stairs; frequently lift, carry or push/pull five pounds, occasionally 10 pounds,
8 seldom 20 pounds and never 25 pounds; occasionally twist, bend/stoop, crawl,
9 reach, work over shoulders, keyboard, use her wrist, grasp, and engage in fine
10 manipulation; and frequently squat/kneel, operate foot controls, and handle
11 vibratory tasks. Tr. 1348. Ms. Ang did not provide an opinion on Plaintiff's
12 ability to stand/walk. *Id.* Ms. Ang opined Plaintiff had a poor prognosis for
13 returning to work at the job of injury at any date, and opined Plaintiff's limitations
14 would last longer than 30 days but would not be permanent. *Id.*

15 The ALJ gave Ms. Ang's opinion little weight. Tr. 31. As Ms. Ang is not
16 an acceptable medical source, the ALJ was required to give germane reasons to
17 reject the opinion. *See Ghanim*, 763 F.3d at 1161.

18 The ALJ reasoned Ms. Ang's opinion did not meet the durational
19 requirement. Tr. 31-32. Temporary limitations are not enough to meet the
20 durational requirement for a finding of disability. 20 C.F.R. § 404.1505(a)

1 (requiring a claimant’s impairment to be expected to last for a continuous period of
2 not less than twelve months); 42 U.S.C. § 423(d)(1)(A) (same); *Carmickle*, 533
3 F.3d at 1165 (affirming the ALJ’s finding that treating physicians’ short-term
4 excuse from work was not indicative of “claimant’s long-term functioning”).

5 The ALJ found Ms. Ang’s opinion did not meet the duration requirement
6 because she did not opine Plaintiff’s limitations are permanent. Tr. 31-32.

7 However, Ms. Ang opined the limitations would last greater than 30 days and did
8 not give an end date. Tr. 1348. Ms. Ang also opined Plaintiff had a poor prognosis
9 for returning to work at the job of injury at any date. *Id.* There is no clear
10 indication as to the length of time to which Ms. Ang’s opinion applied, and as such
11 the ALJ erred in rejecting Ms. Ang’s opinion due to it being temporary.

12 While the ALJ offered additional reasons to reject Ms. Ang’s opinion, the
13 Court finds the ALJ’s error in the analysis of Ms. Ang’s opinion is not harmless.
14 Moreover, as the case is being remanded to reconsider other opinions, the ALJ is
15 also directed to reconsider Ms. Ang’s opinion and incorporate the limitations into
16 the RFC or give germane reasons to reject the opinion. For the purposes of the
17 remand, the Court notes that Ms. Ang is a treating nurse practitioner, and not an
18 examining provider as the ALJ stated.

1 6. *Ms. Glenn*

2 Ms. Glenn gave several opinions regarding Plaintiff’s impairments. In June
3 2016, Ms. Glenn opined that Plaintiff’s conditions caused by her workplace injury
4 were fixed and stable, and Plaintiff has a two percent permanent partial impairment
5 of her left upper extremity. Tr. 624. In March 2016, Ms. Glenn opined that from
6 March 23, 2016 through April 23, 2016, Plaintiff could perform modified duty,
7 with seldomly lifting, carrying and pushing/pulling 20 pounds and frequently one-
8 quarter of a pound, occasional left reaching, no work above the left shoulder and
9 seldom left grasping. Tr. 2018. In June 2016, Ms. Glenn opined that from June
10 13, 2016 through July 13, 2016, Plaintiff could not climb or work on a ladder,
11 could occasionally reach with the left arm, never work above her left shoulder,
12 seldomly grasp with the left, seldomly lift, carry and push/pull 20 pounds and
13 frequently one-quarter of a pound. Tr. 2359. Later in June 2016, Ms. Glenn
14 opined that Plaintiff could lift up to 75 pounds and carry up to 40 pounds. Tr.
15 2404. Finally, in July 2016, Ms. Glenn opined that Plaintiff could seldomly
16 perform work above her left shoulder and could lift no more than 50 pounds. Tr.
17 2019.

18 The ALJ gave Ms. Glenn’s earlier opinions that Plaintiff had more “serious
19 limitations” no weight and gave her later opinions, which suggested Plaintiff is
20 capable of more activity, significant weight. Tr. 32. As Ms. Glenn is not an

1 acceptable medical source, the ALJ was required to give germane reasons to reject
2 the opinions. *See Ghanim*, 763 F.3d at 1161.

3 The ALJ found Ms. Glenn’s earlier opinions inconsistent with the evidence,
4 while the later opinions were more consistent with the evidence. Tr. 32. An ALJ
5 may choose to give more weight to an opinion that is more consistent with the
6 evidence in the record. 20 C.F.R. § 404.1527(c)(4) (“[T]he more consistent a
7 medical opinion is with the record as a whole, the more weight we will give to that
8 medical opinion.”); *Nguyen*, 100 F.3d at 1464. Relevant factors to evaluating any
9 medical opinion include the amount of relevant evidence that supports the opinion,
10 the quality of the explanation provided in the opinion, and the consistency of the
11 medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*,
12 495 F.3d at 631.

13 The ALJ noted Ms. Glenn’s later opinions were based on additional and
14 updated information, including the thorough exam conducted by someone Ms.
15 Glenn found to be a “well respected shoulder specialist.” Tr. 32 (citing Tr. 2020).
16 The exam from the shoulder specialist, Dr. Lynch, found there was no objective
17 evidence that Plaintiff was incapable of lifting up to 50 pounds and returning to
18 work up to the medium category of work. Tr. 2010. The examination
19 demonstrated Plaintiff had generally normal strength, sensation, reflexes and no
20 tenderness, with some range of motion limitations. Tr. 2005. Dr. Lynch stated the

1 objective evidence demonstrated Plaintiff had a prior injury but Plaintiff's
2 subjective complaints "far exceed the minimal orthopedic diagnoses." Tr. 2009.
3 The ALJ further reasoned Ms. Glenn's later opinions were more consistent with
4 the physical examination findings and lack of observations of Plaintiff being in
5 distress, as discussed above. Tr. 32. While Plaintiff argues the ALJ should not
6 have given Ms. Glenn's later opinion weight and should have given more weight to
7 Ms. Glenn's earlier opinions, ECF No. 14 at 14, the ALJ reasonably weighed Ms.
8 Glenn's opinions. As such, the ALJ gave germane reasons to reject Ms. Glenn's
9 opinions.

10 *7. Mr. Drussel*

11 Mr. Drussel opined Plaintiff can rarely lift (from waist to floor or waist to
12 crown) 15 pounds and carry 22.5 pounds, occasionally lift 12.5 pounds and carry
13 17.5 pounds, and frequently lift 5 pounds from the floor and 7.5 pounds from waist
14 to crown and carry 10 pounds. Tr. 855. Mr. Drussel found Plaintiff had no to
15 slight limitation in her ability to engage in other physical activities like standing,
16 walking and sitting. *Id.* He further opined Plaintiff temporarily could not perform
17 her work as a correctional officer but did not indicate what limitations prevented
18 her from performing the job nor when he anticipated she would be released to
19 work. Tr. 861.

1 The ALJ gave Mr. Drussel’s opinion significant weight “with some minor
2 exceptions.” Tr. 30. The ALJ differed in Plaintiff’s weight limitations accounted
3 for in the RFC, and assigned additional postural and manipulative limitations,
4 though Mr. Drussel did not find Plaintiff had such limitations. *Id.* As Mr. Drussel
5 is not an acceptable medical source, the ALJ was required to give germane reasons
6 to reject the opinions. *See Ghanim*, 763 F.3d at 1161.

7 The ALJ reasoned Mr. Drussel’s opinion would not impact the RFC as it
8 was close to light work, and even if she was limited to sedentary work, Plaintiff
9 would not be found disabled. Tr. 32. As discussed *supra*, this reasoning is flawed.
10 While the ALJ offered additional reasons to reject Mr. Drussel’s opinion, the Court
11 finds the ALJ’s error in the analysis of Mr. Drussel’s opinion is not harmless.
12 Moreover, as the case is being remanded to reconsider other opinions, the ALJ is
13 also directed to reconsider Mr. Drussel’s opinion and incorporate the limitations
14 into the RFC or give germane reasons to reject the opinion.

15 **C. Step-Five**

16 Plaintiff argues the ALJ erred at step five. ECF No. 14 at 15-19. At step
17 five of the sequential evaluation analysis, the burden shifts to the Commissioner to
18 establish that 1) the claimant can perform other work, and 2) such work “exists in
19 significant numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2);
20 *Beltran*, 700 F.3d at 389. In assessing whether there is work available, the ALJ

1 must rely on complete hypotheticals posed to a vocational expert. *Nguyen*, 100
2 F.3d at 1467. The ALJ’s hypothetical must be based on medical assumptions
3 supported by substantial evidence in the record that reflects all of the claimant’s
4 limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The
5 hypothetical should be “accurate, detailed, and supported by the medical record.”
6 *Tackett*, 180 F.3d at 1101.

7 The hypothetical that ultimately serves as the basis for the ALJ’s
8 determination, i.e., the hypothetical that is predicated on the ALJ’s final RFC
9 assessment, must account for all the limitations and restrictions of the claimant.
10 *Bray*, 554 F.3d at 1228. As discussed above, the ALJ’s RFC need only include
11 those limitations found credible and supported by substantial evidence. *Bayliss*,
12 427 F.3d at 1217 (“The hypothetical that the ALJ posed to the VE contained all of
13 the limitations that the ALJ found credible and supported by substantial evidence
14 in the record.”). “If an ALJ’s hypothetical does not reflect all of the claimant’s
15 limitations, then the expert’s testimony has no evidentiary value to support a
16 finding that the claimant can perform jobs in the national economy.” *Id.* However,
17 the ALJ “is free to accept or reject restrictions in a hypothetical question that are
18 not supported by substantial evidence.” *Greger v. Barnhart*, 464 F.3d 968, 973
19 (9th Cir. 2006). Therefore, the ALJ is not bound to accept as true the restrictions
20 presented in a hypothetical question propounded by a claimant’s counsel if they are

1 not supported by substantial evidence. *Magallanes*, 881 F.2d at 756-57; *Martinez*
2 *v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). A claimant fails to establish that a
3 step five determination is flawed by simply restating argument that the ALJ
4 improperly discounted certain evidence, when the record demonstrates the
5 evidence was properly rejected. *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-
6 76 (9th Cir. 2008).

7 As the case is being remanded on other grounds, on remand, the ALJ is
8 instructed to reconsider the impact the medical opinion evidence has on step five of
9 the evaluation. The ALJ is further instructed to apply the relevant grid rule in
10 determining Plaintiff's ability to perform other work at step five.

11 **D. Remedy**

12 Plaintiff urges this Court to remand for an immediate award of benefits.
13 ECF No. 14 at 19. "The decision whether to remand a case for additional
14 evidence, or simply to award benefits is within the discretion of the court."
15 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,
16 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ's decision for
17 error, the Court "ordinarily must remand to the agency for further proceedings."
18 *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379
19 F.3d 587, 595 (9th Cir. 2004) ("the proper course, except in rare circumstances, is
20 to remand to the agency for additional investigation or explanation"); *Treichler v.*

1 *Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a
2 number of Social Security cases, the Ninth Circuit has “stated or implied that it
3 would be an abuse of discretion for a district court not to remand for an award of
4 benefits” when three conditions are met. *Garrison v. Colvin*, 759 F.3d 995, 1020
5 (9th Cir. 2014) (citations omitted). Under the credit-as-true rule, where (1) the
6 record has been fully developed and further administrative proceedings would
7 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons
8 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if
9 the improperly discredited evidence were credited as true, the ALJ would be
10 required to find the claimant disabled on remand, the Court will remand for an
11 award of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even
12 where the three prongs have been satisfied, the Court will not remand for
13 immediate payment of benefits if “the record as a whole creates serious doubt that
14 a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

15 Given the numerous conflicting medical opinions, there are conflicts in the
16 evidence that still require resolution by the ALJ. As such, the case is remanded to
17 the ALJ for reconsideration of the medical opinion evidence and reevaluation of
18 the step five analysis.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ’s findings, the Court concludes the
3 ALJ’s decision is not supported by substantial evidence and free of harmful legal
4 error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. The District Court Executive is directed to substitute Andrew M. Saul as
6 the Defendant and update the docket sheet.

7 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.

8 3. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

9 4. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff
10 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
11 Security for further proceedings consistent with this recommendation pursuant to
12 sentence four of 42 U.S.C. § 405(g).

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED September 29, 2020.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20