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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

REBECCA J. GRASSER,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C24-0407-SKV

ORDER AFFIRMING THE  
COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of her application for Supplemental Security Income (SSI). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the case with prejudice.

**BACKGROUND**

Plaintiff was born in 1981 and completed the eleventh grade of high school. AR 256. Her last reported earnings are dated in 2005. AR 245, 247.

On November 10, 2020, Plaintiff protectively applied for benefits, alleging disability beginning October 9, 2014. AR 237-43. Her application was denied initially and on reconsideration and, upon Plaintiff's request, the ALJ conducted a hearing, *see* AR 39-67. At the

1 hearing, Plaintiff amended her alleged onset date to November 10, 2020. AR 48. The ALJ  
2 thereafter issued a decision finding Plaintiff not disabled. AR 17-32.

### 3 THE ALJ'S DECISION

4 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

5 **Step one:** Plaintiff has not engaged in substantial gainful activity since the November  
6 10, 2020 application date.

7 **Step two:** Plaintiff has the following severe impairments: dextroscoliosis/cervicalgia;  
8 post-traumatic stress disorder (PTSD); anxiety; bipolar disorder; and panic disorder.

9 **Step three:** These impairments do not meet or equal the requirements of a listed  
10 impairment.<sup>2</sup>

11 **Residual Functional Capacity:** Plaintiff can perform light work with the following  
12 limitations: can sit, stand, and walk for six hours each in an eight-hour workday; can  
13 perform all postural activities without limitation, but is limited to occasionally climbing  
14 ladders, ropes, or scaffolds, and can occasionally reach overhead bilaterally; must avoid  
15 concentrated exposure to hazards such as heights and dangerous machinery; able to  
16 understand, remember, and carry out simple, routine tasks in two-hour increments; can  
17 work in the same room with coworkers, but no coordination of work activity; can work  
18 superficially and occasionally with the general public, with superficial meaning that  
19 working with the public is not the focus of the job; and can adapt to simple workplace  
20 changes as may be required for simple, routine task work.

21 **Step four:** Plaintiff has no past relevant work.

22 **Step five:** As there are jobs that exist in significant numbers in the national economy that  
23 Plaintiff can perform, Plaintiff is not disabled.

AR 17-32.

The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the  
Commissioner's final decision. AR 1-5. Plaintiff appealed the final decision of the  
Commissioner to this Court. Dkts. 1, 4. The parties consented to proceed before the  
undersigned Magistrate Judge. Dkt. 2.

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<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P., App. 1.

1 **LEGAL STANDARDS**

2 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social  
3 security benefits when the ALJ’s findings are based on harmful legal error or not supported by  
4 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir.  
5 2005). As a general principle, an ALJ’s error may be deemed harmless where it is  
6 “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104,  
7 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to “the record as a whole to  
8 determine whether the error alters the outcome of the case.” *Id.*

9 Substantial evidence is “more than a mere scintilla. It means - and means only - such  
10 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”  
11 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d  
12 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving  
13 conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v.*  
14 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record  
15 as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
16 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
17 susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that  
18 must be upheld. *Id.*

19 **DISCUSSION**

20 Plaintiff argues the ALJ erred in considering the presumption of continuing nondisability  
21 from a prior ALJ decision, in determining her severe impairments, in concluding she did not  
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1 meet or equal a listing, and in assessing her RFC.<sup>3</sup> The Commissioner argues the ALJ’s decision  
2 is free of harmful legal error, supported by substantial evidence, and should be affirmed.

3 **A. The ALJ Did Not Err In Considering the Presumption of Continuing**  
4 **Nondisability**

5 The doctrine of res judicata applies to administrative decisions, albeit less stringently  
6 than in judicial contexts. *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988) (citing *Lyle v.*  
7 *Secretary of Health and Human Servs.*, 700 F.2d 566, 568 n. 2 (9th Cir.1983)). Where an ALJ  
8 previously found a claimant not disabled, there is a presumption the claimant remains non-  
9 disabled after the adjudicated period. Social Security Acquiescence Ruling (AR) 97-4(9), 1997  
10 WL 742758, at \*2 (Dec. 3, 1997) (discussing *Chavez*).<sup>4</sup> To overcome this presumption, a  
11 claimant “must prove ‘changed circumstances’ indicating a greater disability.” *Chavez*, 844 F.2d  
12 at 693 (citation omitted). Changed circumstances may include, for example, a change in age  
13 category, an increase in the severity of an impairment, an impairment not previously considered,  
14 or a change in the criteria for determining disability. AR 97-4(9), 1997 WL 742758, at \*3.  
15 Further, even where the claimant rebuts the presumption by showing changed circumstances, the  
16 ALJ must continue to adopt certain findings from the prior final order “unless there is new and  
17 material evidence relating to such a finding or there has been a change in the law, regulations or  
18 rulings affecting the finding or the method for arriving at the finding.” *Id.*

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21 <sup>3</sup> Plaintiff’s additional assertion that the ALJ’s decision is not supported by substantial evidence  
is derivative of her specific allegations and need not be separately addressed.

22 <sup>4</sup> AR 97-4(9) followed *Chavez* and explains that it “applies only to cases involving a subsequent  
23 disability claim with an unadjudicated period arising under the same title of the [Social Security] Act as a  
prior claim on which there has been a final decision by an ALJ or the Appeals Council that the claimant is  
not disabled.” AR 97-4(9), 1997 WL 742758, at \*3.

1 In this case, the ALJ explained that, because a prior SSI application filed by Plaintiff  
2 resulted in a final decision of nondisability dated October 8, 2019, *see* AR 71-86, a rebuttable  
3 presumption of continuing nondisability applied to the unadjudicated period under the new SSI  
4 application. AR 17. The ALJ noted that he had provided counsel for Plaintiff the opportunity to  
5 brief the issue after the hearing, and that the brief submitted “contained no specific citations to  
6 the evidence to rebut the presumption of non-disability.” AR 18. *See also* AR 373-74. The ALJ  
7 found Plaintiff failed to rebut the presumption of continuing nondisability with a showing of  
8 changed circumstances. AR 17-18. The ALJ further found there was no new and material  
9 evidence relating to the ALJ’s findings and no change in the law, regulations or rulings affecting  
10 those findings, and adopted the ALJ decision regarding steps one through four of the sequential  
11 evaluation process. AR 18.

12 Plaintiff argues the ALJ erred in reaching these conclusions. In support, Plaintiff  
13 describes therapy and other treatment records dated after the prior ALJ decision, contends that  
14 they show a change in circumstances and new and material evidence, and asserts that the ALJ  
15 therefore should have made his own findings at steps two, three, and four.

16 Plaintiff fails to demonstrate error. As the Commissioner observes, the ALJ thoroughly  
17 examined and discussed the records now cited by Plaintiff in support of her contention of error.  
18 *See* AR 20-28 (finding, for example, that Plaintiff did not satisfy the criteria for a severe  
19 impairment of fibromyalgia at step two, had discontinued trigger point injections because they  
20 caused a skin rash, improved with but was discharged from physical therapy due to non-  
21 compliance, showed improvement for mood and anxiety with medication, and that records  
22 showed generally normal mental status examinations (MSEs) through July 2022). Plaintiff  
23 recounts the content of records and offers a contrary interpretation of the evidence, but does not

1 demonstrate that the ALJ’s interpretation was not rational or show an absence of substantial  
2 evidence support for the ALJ’s conclusion.

3 Moreover, even if Plaintiff could show the ALJ erred in finding no changed  
4 circumstances rebutting the presumption of continuing nondisability, any such error would be  
5 harmless. As noted above, the ALJ examined and considered the evidence postdating the 2019  
6 ALJ decision in reaching his conclusions. Accordingly, any error would be “‘inconsequential  
7 because it did not end or control’” the ALJ’s evaluation of Plaintiff’s claim. *Arnott v. O’Malley*,  
8 No. 23-15814, 2024 WL 2237720, at \*1 (9th Cir. May 17, 2024) (quoting *Plummer v. Berryhill*,  
9 747 F. App’x 631, 632 (9th Cir. 2019) (“The ALJ’s decision did not rest solely on res judicata;  
10 rather, the ALJ also conducted a thorough review of the medical records and testimony to make  
11 an independent nondisability finding.”)). Plaintiff does not, in sum, demonstrate harmful error in  
12 the ALJ’s consideration of the presumption of continuing nondisability.

13 **B. The ALJ Did Not Err at Step Two**

14 At step two, claimants must make a threshold showing that their medically determinable  
15 impairments significantly limit their ability to perform basic work activities. *See Bowen v.*  
16 *Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work  
17 activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§  
18 404.1522(b), 416.922(b). “An impairment or combination of impairments can be found ‘not  
19 severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal  
20 effect on an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)  
21 (quoted source omitted). An ALJ is required to consider the “combined effect” of an  
22 individual’s impairments in considering severity. *Id.* A diagnosis alone is not sufficient to  
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1 establish a severe impairment. Instead, claimants must show that their medically determinable  
2 impairments are severe. 20 C.F.R. §§ 404.1521, 416.921.

3 Plaintiff first argues the ALJ erred with respect to her borderline personality disorder.  
4 She notes that, at hearing, her counsel clarified he had mistakenly confused her borderline  
5 personality disorder with bipolar disorder in his pre-hearing brief. *See* AR 47-48. She notes the  
6 ALJ's failure to discuss borderline personality disorder in the decision, and asserts error in the  
7 failure to determine whether she has bipolar disorder, borderline personality disorder, or both,  
8 and to assess her associated limitations.

9 "Step two is merely a threshold determination meant to screen out weak claims. It is not  
10 meant to identify the impairments that should be taken into account when determining the RFC."  
11 *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017) (internal citation to *Yuckert*, 482 U.S.  
12 at 146-47). "In fact, in assessing RFC, the adjudicator must consider limitations and restrictions  
13 imposed by all of an individual's impairments, even those that are not severe." *Id.* (cleaned up  
14 and quoted source omitted).

15 In this case, the ALJ adopted the findings in the 2019 decision, wherein the ALJ noted  
16 that "treating and evaluating professionals had differed with regard to the appropriate psychiatric  
17 diagnosis" for plaintiff, and explained that the ALJ addressed all limitations alleged or opined in  
18 relation to, "no matter the diagnostic label." AR 73. Plaintiff here notes the inclusion of  
19 diagnoses for both borderline personality disorder and bipolar disorder, but does not identify any  
20 additional mental limitations attributed to borderline personality disorder that were not already  
21 considered in relation to the severe impairments of PTSD, anxiety, bipolar disorder, and panic  
22 disorder. Plaintiff thus fails to demonstrate harmful error in the ALJ's failure to address and  
23 discuss a different diagnostic label at step two. *See, e.g., Jennie M. v. Comm'r of Soc. Sec.*, C20-

1 1661-BAT, 2021 WL 3525159, at \*1-2 (W.D. Wash. Aug. 11, 2021) (finding no harmful error  
2 given the failure to show the ALJ “ignored any particular symptoms or limitations caused by  
3 diagnoses not included at step two”); *Stacy S. v. Comm’r of Soc. Sec.*, C20-346-BAT, 2020 WL  
4 5988493, at \*2 (W.D. Wash. Oct. 9, 2020) (same).

5 Plaintiff also asserts error in relation to fibromyalgia. Specifically, Plaintiff argues the  
6 ALJ erred in finding her fibromyalgia did not satisfy the criteria of Social Security Ruling (SSR)  
7 12-2p, “as there are no tender point findings or exclusion of other causes for the claimant’s  
8 pain[,]” and in concluding fibromyalgia was not a medically determinable impairment based on  
9 the absence of objective evidence. AR 21.

10 Fibromyalgia may be established as a medically determinable impairment where the  
11 record contains (1) a diagnosis by a licensed physician; (2) evidence satisfying one of two sets of  
12 diagnostic criteria, one of which requires at least eleven out of eighteen positive tender points  
13 and the other of which requires a showing of a “history of widespread pain” and repeated  
14 manifestations of at least six fibromyalgia symptoms, signs, or co-occurring conditions; and (3)  
15 evidence that other disorders that could cause the symptoms, signs, or co-occurring conditions  
16 were excluded. SSR 12-2p. In asserting error, Plaintiff notes her reporting of symptoms  
17 associated with fibromyalgia, the evidence she was diagnosed with fibromyalgia, and evidence  
18 showing she received multiple injections and was found to have diffuse tenderness over and  
19 between her joints on examination. *See* Dkt. 9 at 10 (citing AR 59, 107, 1269, 1277, 1379).  
20 Plaintiff does not, however, identify evidence showing eleven positive tender points on  
21 examination, repeated manifestations of six or more fibromyalgia symptoms, signs, or co-  
22 occurring conditions in addition to widespread pain, or evidence showing other disorders were  
23 ruled out. Nor does Plaintiff identify any specific additional fibromyalgia-related limitations she



1 contends should have been included in the RFC. Plaintiff, for this reason and for the reason  
2 stated above, fails to identify harmful error at step two.

3 **C. The ALJ Did Not Err at Step Three**

4 At step three, the ALJ considers whether one or more of a claimant’s impairments meet  
5 or medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. 20 C.F.R.  
6 Pt. 404, Subpt. P, App. 1 (“the Listings”). The Listings define impairments that would preclude  
7 a claimant “from performing *any* gainful activity, not just ‘substantial gainful activity.’”  
8 *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (emphasis in original; citations omitted).

9 Plaintiff bears the burden of proof at step three. *Yuckert*, 482 U.S. at 146 n.5. A mere  
10 diagnosis does not suffice. *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). To meet a  
11 listing, an impairment must meet all specified medical criteria for that listing, and, to establish  
12 equivalency, a claimant “must present medical findings equal in severity to *all* the criteria” for  
13 the listing. *Sullivan*, 493 U.S. at 530-31 (emphasis in original). *See also Tackett v. Apfel*, 180  
14 F.3d 1094, 1099 (9th Cir. 1999) (to equal a listing, a claimant “must establish symptoms, signs  
15 and laboratory findings ‘at least equal in severity and duration’ to the characteristics of a relevant  
16 listed impairment[.]”)

17 Plaintiff argues the ALJ erred in concluding that her mental impairments did not satisfy  
18 the “paragraph B” criteria to meet or equal Listings 12.04 (Depressive, bipolar and related  
19 disorders), 12.06 (Anxiety and obsessive compulsive disorders), or 12.15 (Trauma- and stressor-  
20 related disorders).<sup>5</sup> To satisfy the paragraph B criteria, a claimant must show her impairments  
21 result in two “marked” or one “extreme” limitation in the following areas of mental functioning:  
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23 <sup>5</sup> To meet or equal these listings, a claimant must satisfy the diagnostic criteria of paragraph A and either the paragraph B or paragraph C criteria. *See* 20 C.F.R., pt. 404, Subpart P, Appendix 1, § 12.00A. The parties do not here dispute the findings as to either paragraph A or paragraph C.

1 (1) understanding, remembering, or applying information; (2) interacting with others; (3)  
2 concentrating, persisting, or maintaining pace; and (4) adapting or managing oneself. 20 C.F.R.  
3 Pt. 404, Subpt. P, App. 1, §§ 12.00E, 12.04, 12.06, 12.15.

4 In concluding Plaintiff's mental impairments did not meet or medically equal the criteria  
5 for Listings 12.04, 12.06, or 12.15, the ALJ found moderate limitations in each domain of mental  
6 functioning. AR 22-24. The ALJ explained: (1) Plaintiff indicated her engagement in a variety  
7 of activities of daily living that required her ability to function in each of the relevant areas of  
8 mental functioning, including caring for her pet, preparing light meals, doing laundry and light  
9 cleaning, shopping in stores, handling finances, reading, watching movies, living with a  
10 roommate, and socializing over phone and by text; (2) longitudinal MSEs noted she had some  
11 deficits in mood, but intact impaired memory, logical thought processes, normal speech, was  
12 attentive to interview, and was oriented to person, place, and time; and (3) State agency  
13 consultants Drs. Renee Eisenhauer and Eugene Kester both opined she had moderate limitation  
14 in these categories. *Id.*

15 In asserting error, Plaintiff points to her own testimony and reporting as to her symptoms  
16 and impairment in functioning, and to a statement provided by her roommate. *See* Dkt. 9 at 12-  
17 13 (citing AR 22-23, 57-58, 61-62, 97, 108, 278-82, 326, 328, 1237). However, the ALJ  
18 discounted Plaintiff's subjective symptom testimony and the lay testimony of her roommate for  
19 reasons Plaintiff does not directly challenge. *See* AR 26-29 (noting, *inter alia*, MSEs generally  
20 within normal limits, reported improvement with medication, unchanged MSEs even when she  
21 was unable to take her medications, and the ability to perform a wide array of activities despite  
22 impairments in concluding that the longitudinal evidence of record did not support Plaintiff's  
23 allegations as to the intensity, persistence, and limiting effects of her symptoms; finding function

1 report completed by lay witness reflected Plaintiff’s ability to perform a wide array of activities  
2 despite her impairments, and the level of activity not consistent with Plaintiff’s reported  
3 limitations and level of symptomatology, and not consistent with or supported by the medical  
4 evidence, including “rather mild and minimal findings on imaging and limited findings with  
5 respect to any clinical examinations[,]” and generally routine and conservative treatment).  
6 Plaintiff’s mere recounting of her subjective symptom reporting and the lay testimony does not  
7 suffice to demonstrate error in either the ALJ’s assessment of that evidence, or in relation to the  
8 ALJ’s conclusion at step three. *See generally Carmickle v. Commissioner*, 533 F.3d 1155, 1161  
9 n.2 (9th Cir. 2008) (declining to address issues not argued with any specificity) (citing *Paladin*  
10 *Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003) (the court “ordinarily will  
11 not consider matters on appeal that are not specifically and distinctly argued in an appellant’s  
12 opening brief”)).

13 In addition, and as with her symptom reporting and the lay testimony, Plaintiff does not  
14 assign error to the ALJ’s consideration of the medical opinion evidence of record. The medical  
15 opinion evidence would not, moreover, support a different conclusion at step three. As the ALJ  
16 observed, the only medical opinion assessing any more than moderate limitations in mental  
17 functioning, from consultative examiner Dan Neims, Psy.D., was offered in March 2014, a time  
18 “significantly predat[ing]” the November 2020 amended onset date of disability, was not  
19 supported by Plaintiff’s “current treatment records showing some deficits in mood, but  
20 longitudinal [MSEs] otherwise within normal limits[,]” and was not consistent with the more  
21 recent opinions of Drs. Eisenhauer and Kester. AR 30-31 (citing AR 375-80 (Dr. Neims’ March  
22 11, 2014 Medical Source Statement), AR 2541-2752 (treatment records dated between March  
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1 2020 and July 2022), and AR 95-115 (opinions of State agency physicians)). Plaintiff, for this  
2 reason and for the reasons stated above, fails to demonstrate error at step three.

3 **D. The ALJ Did Not Err in Assessing Plaintiff's RFC**

4 RFC is the most a claimant can do despite limitations and is assessed based on all  
5 relevant evidence in the record. 20 C.F.R. § 416.945(a)(1). The “final responsibility” for  
6 deciding issues such as an individual's RFC “is reserved to the Commissioner.” 20 C.F.R. §§  
7 416.927(d)(2), 416.946(c).

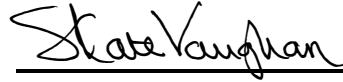
8 Plaintiff asserts the ALJ erred in failing to include several exertional and nonexertional  
9 limitations in the RFC. However, she does not support this contention. Plaintiff offers a  
10 summary of evidence purportedly supporting the existence of additional or greater limitations,  
11 without citing to any specific medical evidence of record. *See* Dkt. 9 at 16 (citing AR 370 (page  
12 of pre-hearing brief submitted to ALJ and containing similar summary of evidence)). She also  
13 misconstrues a summary of her reported symptoms as reflecting a medical opinion of her  
14 limitations. *Compare* Dkt. 9 at 16 (stating that Dr. Eisenhower, who opined as to Plaintiff's  
15 mental limitations, found she could only walk for ten-to-fifteen minutes before needing to rest  
16 and had ““bad balance””), *with* AR 97, 99 (State agency physician description of Plaintiff's  
17 reporting of her activities of daily living) and AR 296 (Plaintiff's function reports as described  
18 by State agency physician). Nor, as stated above, does Plaintiff assign any error to the ALJ's  
19 assessment of the medical opinion evidence. Plaintiff, finally, points to her testimony at hearing,  
20 but does not specifically assign or otherwise demonstrate error in relation to the ALJ's  
21 assessment of that testimony. *See* Dkt. 9 at 16-17 (citing AR 25, 55-63). Plaintiff, in so doing,  
22 fails to demonstrate error in the ALJ's assessment of her RFC.

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1 **CONCLUSION**

2 For the reasons set forth above, the Commissioner’s final decision is **AFFIRMED** and  
3 this case is **DISMISSED** with prejudice.

4 Dated this 7th day of January, 2025.

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7 S. KATE VAUGHAN  
8 United States Magistrate Judge  
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