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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JISELLE A. WATERHOUSE,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting
12 Commissioner of Social Security,

13 Defendant.

CASE NO. C16-5968-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

14 Plaintiff Jiselle A. Waterhouse proceeds through counsel in her appeal of a final decision
15 of the Commissioner of the Social Security Administration (Commissioner). The Commissioner
16 denied in part Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental
17 Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having
18 considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this
19 matter is AFFIRMED.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1961.¹ She has an 11th-grade education and some

22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of
23 Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files,
pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

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1 community college education, and has worked as a waitress, bartender, and wine steward. (AR
2 49-54, 56, 59.)

3 Plaintiff protectively applied for DIB and SSI February 2011. (AR 233-49, 275.) Those
4 applications were denied initially and upon reconsideration, and Plaintiff timely requested a
5 hearing. (AR 155-58, 168-84.)

6 On November 2, 2012, ALJ Rebekah Ross held a hearing, taking testimony from Plaintiff
7 and a vocational expert (VE). (AR 41-98.) On December 26, 2012, the ALJ issued a decision
8 finding Plaintiff not disabled. (AR 21-34.) Plaintiff timely appealed. After reviewing additional
9 evidence, the Appeals Council denied Plaintiff's request for review on August 22, 2014 (AR 1-6),
10 making the ALJ's decision the final decision of the Commissioner.

11 Plaintiff appealed this final decision of the Commissioner to this Court, which granted the
12 parties' stipulation to reverse the ALJ's decision and remand for further proceedings. (AR 964-
13 66.) On March 9, 2016, ALJ Cynthia Rosa held a hearing, taking testimony from Plaintiff and a
14 VE. (AR 869-97.) On August 3, 2016, the ALJ found Plaintiff not disabled from July 31, 2009,
15 through March 11, 2014, but disabled thereafter.² (AR 780-803.) Plaintiff now seeks judicial
16 review.

17 JURISDICTION

18 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

19 DISCUSSION

20 The Commissioner follows a five-step sequential evaluation process for determining
21 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must

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23 ² Plaintiff had been previously found disabled as of August 31, 2014; thus, the period adjudicated
by the ALJ was July 31, 2009, through August 30, 2014. (AR 780 n.1.)

1 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had worked
2 since her alleged onset date, but that work did not constitute substantial gainful activity. (AR 783.)
3 At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
4 found that from July 31, 2009, through August 30, 2014, Plaintiff's asthma, lumbago, mild
5 osteoarthritis of the right hip, post-traumatic stress disorder, and generalized anxiety disorder were
6 severe. (AR 783-84.) Step three asks whether a claimant's impairments meet or equal a listed
7 impairment. The ALJ found that from July 31, 2009, through August 30, 2014, Plaintiff's
8 impairments did not meet or equal the criteria of a listed impairment. (AR 784-86.)

9 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
10 residual functional capacity (RFC) and determine at step four whether the claimant has
11 demonstrated an inability to perform past relevant work. The ALJ found that before March 12,
12 2014, Plaintiff was capable of performing a range of light work, with the following limitations.
13 She could lift no more than 20 pounds at any time, and could lift/carry up to 10 pounds frequently.
14 She could stand/walk for six hours and sit for six hours in an eight-hour workday. She could
15 occasionally crawl, stoop, kneel, crouch, and climb ramps or stairs. She could not climb ladders,
16 ropes, or scaffolds. She could frequently handle and finger bilaterally. She could not have
17 concentrated exposure to wetness/humidity, hazards, and pulmonary irritants like fumes, gases,
18 and dust. She could perform simple, routine tasks. She could have superficial contact with co-
19 workers, and no public contact. (AR 786.) Her RFC was reduced on March 12, 2014, such that
20 she could only occasionally handle and finger bilaterally from that time forward. (AR 799-800.)

21 From July 31, 2009, through August 30, 2014, Plaintiff was unable to perform her past
22 relevant work. (AR 800.) If a claimant demonstrates an inability to perform past relevant work,
23 the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the

1 capacity to make an adjustment to work that exists in significant levels in the national economy.
2 The ALJ found Plaintiff capable of transitioning to other representative occupations, from July 31,
3 2009, through March 11, 2014, such as marker, garment sorter, and mail sorter. (AR 801-02.) On
4 March 12, 2014, and thereafter, Plaintiff could not perform any job that existed in significant
5 numbers in the national economy. (AR 802.)

6 This Court's review of the ALJ's decision is limited to whether the decision is in
7 accordance with the law and the findings supported by substantial evidence in the record as a
8 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
9 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
10 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
11 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
12 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
13 2002).

14 Plaintiff argues the ALJ erred in (1) assessing the medical evidence related to Plaintiff's
15 physical and mental complaints, (2) discounting her subjective testimony, and (3) erred in
16 discounting lay statements.³ The Commissioner argues that the ALJ's decision is supported by
17 substantial evidence and should be affirmed.

18 Medical evidence

19 Plaintiff raises two issues related to the medical evidence. First, she argues that the ALJ
20 erred in finding some of her impairments to be not severe. Dkt. 11 at 3-4. She goes on to argue
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22 ³ Plaintiff's opening brief also challenges the ALJ's RFC assessment and step-five findings, but in
23 doing so only reiterates arguments made elsewhere. Dkt. 11 at 18-19. Accordingly, these issues will not
be analyzed separately.

1 that the ALJ erred in assessing various medical treatment notes and opinion evidence, contending
2 that the ALJ erred in either discounting the evidence or failing to acknowledge an aspect of the
3 evidence. The Court will address Plaintiff's arguments in turn.

4 A. Legal standards

5 In general, more weight should be given to the opinion of a treating physician than to a
6 non-treating physician, and more weight to the opinion of an examining physician than to a non-
7 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
8 by another physician, a treating or examining physician's opinion may be rejected only for "clear
9 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
10 Where contradicted, a treating or examining physician's opinion may not be rejected without
11 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
12 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

13 An ALJ may also consider lay medical sources, such as testimony by nurse practitioners,
14 physicians' assistants, and counselors. *See* 20 C.F.R. § 404.1513(d). Such testimony regarding a
15 claimant's symptoms or how an impairment affects his/her ability to work is competent evidence,
16 and cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir.
17 1993). An ALU must provide "reasons that are germane to each witness" in order to discount a
18 lay medical opinion, and may not simply categorically discredit the testimony. *Dodrill*, 12 F.3d
19 at 919.

20 B. Severe impairments

21 Plaintiff argues that the ALJ erred in finding some of her conditions to be non-severe, and
22 in failing to account for all of her symptoms, even those caused by conditions that are not severe.
23 Dkt. 11 at 3-4. Plaintiff makes no effort to identify which limitations were omitted as a result of

1 the alleged error, or to cite any evidence identifying limitations caused by the conditions in
2 question. *Id.* Plaintiff's bare assertion of an error is insufficient. *See generally Carmickle v.*
3 *Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address issues
4 not argued with any specificity).

5 C. Mark Layton, M.D.

6 Dr. Layton, Plaintiff's treating physician, wrote a letter in February 2013 to Plaintiff's
7 counsel that reads in its entirety:

8 I have treated Ms. Waterhouse for about one year for her joint pains as well as a
9 diffuse pain syndrome referred to as fibromyalgia. Even though her condition is
10 not marked by visible evidence of disease effects, I have found her presentation to
11 be consistent over time. In responding to the questions in your letter of January 28,
12 2013, I do not believe Ms. Waterhouse to have been able to work on a regular and
13 sustained basis at a light or medium level. Her joint symptoms have not sufficiently
14 responded to treatment with antiinflammatory medications and prednisone to
15 enable a consistent work pattern. Her symptoms are consistent with the diagnosis
16 of fibromyalgia and a nonspecific syndrome of arthralgias. Even though her
17 symptoms are not accompanied by visible evidence of inflammation, I believe her
18 complaints to be credible. It is likely that her symptoms would produce a level of
19 absenteeism of greater than three work days per month.

20 (AR 775.)

21 The ALJ gave "partial weight" to Dr. Layton's opinion. (AR 799.) First, the ALJ noted
22 that Dr. Layton did not address the temporal scope of his opinion. Dr. Layton indicated he had
23 been treating Plaintiff for a year in February 2013, but she alleged disability beginning in July
2009. The ALJ did not err in noting that Dr. Layton's opinion does not, on its face, apply to much
of the adjudicated period. *See* 20 C.F.R. § 404.1527(c)(2)(i) (noting that an ALJ may consider the
length of treating relationship, when weighing a medical opinion).

The ALJ also found that Dr. Layton's opinion was inconsistent with his treatment notes,
because his opinion indicating that Plaintiff's symptoms did not respond well enough to

1 medication to permit work, but his treatment notes indicated improvement of pain and swelling
2 symptoms with various medications. (*See* AR 692, 749-50.) This is a legitimate reason to discount
3 Dr. Layton’s opinion, and Plaintiff does not address Dr. Layton’s specific treatment notes, merely
4 stating without citation to the record that his opinion “is fully consistent with his clinical findings
5 as well as the clinical findings of all of Waterhouse’s other treatment providers.” Dkt. 11 at 6.
6 Plaintiff has failed to show that the ALJ’s reasoning is unreasonable or not based on substantial
7 evidence in the record.

8 The ALJ further noted that Dr. Layton did not recommend that Plaintiff try other treatment
9 methods, such as physical therapy, and that he diagnosed her fibromyalgia without a tender-point
10 examination. (AR 799.) Plaintiff contends that the ALJ is not qualified to second-guess Dr.
11 Layton’s treatment methods, and the Court finds that this is a valid argument. But the ALJ did not
12 err in noting that Dr. Layton’s fibromyalgia diagnosis was unsupported by tender-point testing,
13 because such testing is crucial to the establishment of fibromyalgia as a medically determinable
14 impairment. *See* Social Security Ruling (SSR) 12-2p, 2012 WL 3104869 (Jul. 25, 2012). Indeed,
15 the ALJ rejected fibromyalgia as a medically determinable impairment at step two based on the
16 lack of tender-point testing. (AR 784.) The ALJ did not err in discounting Dr. Layton’s opinion
17 on this basis.

18 The ALJ lastly listed some of Plaintiff’s activities which were purportedly inconsistent
19 with Dr. Layton’s opinion, but it is not clear how those activities are inconsistent with the opinion.
20 (AR 799.) This reasoning is harmless error, however, in light of the ALJ’s other valid reasons for
21 discounting Dr. Layton’s opinion. *See Carmickle*, 533 F.3d at 1162-63.

22 D. Margene Fields, ARNP

23 The ALJ noted that Ms. Fields, a treating nurse, completed a form opinion regarding

1 Plaintiff's physical restrictions in June 2011, and responded to counsel's questionnaire in October
2 2012. (AR 796 (citing AR 417-20, 745-46).) The ALJ found that Ms. Fields' opinion regarding
3 Plaintiff's disabling limitations was inconsistent with "rather benign treatment notes" and evidence
4 showing improvement in pain and respiratory symptoms with medication. (AR 796.) The ALJ
5 also indicated that Ms. Fields' opinion was inconsistent with Plaintiff's activities — namely her
6 ability to manage her activities of daily living, babysit her grandchildren, engage in active dog
7 rescue, and care for her elderly mother. (*Id.*) Lastly, the ALJ found that Ms. Fields' opinion was
8 based on Plaintiff's subjective self-reporting. (*Id.*) For these reasons, the ALJ gave little weight
9 to Ms. Fields' opinions.

10 Plaintiff argues that the ALJ failed to acknowledge that many treatment notes support Ms.
11 Fields' opinions, and erred in finding the opinions inconsistent with the treatment record. Dkt. 11
12 at 9. Plaintiff does not cite any particular treatment notes that contradict the ALJ's interpretation
13 of the record, and does not dispute that the record indicates improvement with medication, as found
14 by the ALJ. The ALJ's assessment of the record is reasonable, and provides a germane basis to
15 discount Ms. Fields' opinions. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).

16 Likewise, the record supports the ALJ's finding that Ms. Fields' opinions are based on
17 Plaintiff's self-report. Ms. Fields' June 2011 contemporaneous notes demonstrate reliance on
18 Plaintiff's report; the accompanying examination findings and blood work are normal on the
19 whole. (AR 419-20.) Ms. Fields' October 2012 questionnaire answers also refer to Plaintiff's
20 subjective pain. (AR 745-46.) Because, as explained *infra*, the ALJ did not err in discounting
21 Plaintiff's subjective testimony, the ALJ did not err in discounting opinions that rely on self-report.
22 *See Bray v. Comm'r of Social Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). Even if the ALJ
23 erred in finding Plaintiff's activities to be inconsistent with Ms. Fields' opinions, the other germane

1 reasons to discount Ms. Fields' opinions remain valid and the error is therefore harmless.

2 E. Gary Gaffield, D.O.

3 Dr. Gaffield examined Plaintiff in August 2011 and the ALJ gave significant weight to Dr.
4 Gaffield's report. (AR 427-31, 797.) Plaintiff argues that the ALJ erred crediting Dr. Gaffield's
5 opinion because she testified that Dr. Gaffield examined her for only 10 minutes, and Dr. Gaffield
6 discussed unspecified findings that support Plaintiff's testimony.

7 Plaintiff cites no authority requiring the ALJ to discuss Plaintiff's hearing testimony, nearly
8 five years after the examination, that Dr. Gaffield's examination lasted "a few minutes." (*See* AR
9 895-96.) The Court is not aware of any such requirement.

10 The Court also rejects Plaintiff's assertion that the ALJ should have acknowledged
11 unspecified findings contained within Dr. Gaffield's report. Dkt. 11 at 9 (citing AR 429). The
12 portion of Dr. Gaffield's report cited by Plaintiff contains many normal findings, and Dr. Gaffield
13 accounts for the abnormal findings related to joint stiffness in his conclusions. (AR 429-31.)
14 Plaintiff has not identified error in the ALJ's assessment of Dr. Gaffield's opinion.

15 F. Miscellaneous opinions

16 Mr. Myers, a treating provider, authored two opinions about the existence of Plaintiff's
17 limitations due to chronic obstructive pulmonary disease (COPD). (*See* AR 370, 372-73.) The
18 ALJ gave little weight to Mr. Myers' opinions, finding them inconsistent with the record, which
19 indicates that Plaintiff has asthma, not COPD. (AR 797.) The ALJ also found that Mr. Myers'
20 opinions were contradicted by the evidence of Plaintiff's improvement in respiratory symptoms
21 with medication, as well as examination findings that "did not reveal significant deficits in
22 functioning." (*Id.*) The ALJ also found Mr. Myers' opinions to be inconsistent with Plaintiff's
23 activities. (*Id.*)

1 Plaintiff argues that the ALJ erred in failing to acknowledge that Mr. Myers' opinions are
2 consistent with the opinions of Ms. Fields and Dr. Layton (Dkt. 11 at 9), but cites no authority
3 requiring an ALJ to explicitly discuss how opinions are consistent with other evidence. This
4 rationale applies with equal force to Plaintiff's arguments regarding the opinions of Kristine
5 Harrison, Psy.D., and Pamela Moslin, M.D., that the ALJ should have acknowledged various
6 aspects of their opinions. *See* Dkt. 11 at 10.

7 Likewise, the Court rejects Plaintiff's suggestion that the ALJ erred in failing to explicitly
8 reject the opinion of examining psychologist Keith Krueger, Ph.D., that Plaintiff was "preoccupied
9 with pain." Dkt. 11 at 10 (citing AR 669, 797). Dr. Krueger's observation is not inconsistent with
10 the ALJ's decision, and accordingly did not need to be rejected. *See, e.g., Turner v. Comm'r of*
11 *Social Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (where physician's report did not assign
12 any specific limitations or opinions in relation to an ability to work "the ALJ did not need to
13 provide 'clear and convincing reasons' for rejecting [the] report because the ALJ did not reject any
14 of [the report's] conclusions").

15 Plaintiff has failed to identify an error in the ALJ's reasoning with respect to any of these
16 providers' opinions.

17 G. State agency reviewing consultant

18 Plaintiff argues that the ALJ erred in affording significant weight to an opinion written by
19 State agency consultant Norman Staley, M.D., because his 2011 opinion was rendered without an
20 opportunity to review subsequent evidence. Dkt. 11 at 9-10. But Dr. Staley could not have
21 reviewed evidence that did not exist at the time of his review; the ALJ did review that evidence
22 and considered whether Dr. Staley's opinion was consistent with the remainder of the record. AR
23 at 798. Plaintiff has not identified an error in the ALJ's assessment of Dr. Staley's opinion.

1 H. Jennifer Hensley, M.A.

2 Ms. Hensley, Plaintiff's treating therapist, completed a checkbox medical source statement
3 in January 2012, describing *inter alia* marked limitations in concentration/persistence, social
4 functioning, and adaptation. (AR 617-19.) The ALJ summarized Ms. Hensley's opinion and gave
5 it little weight for several reasons.

6 First, the ALJ noted that Ms. Hensley's treatment notes address the circumstances
7 surrounding Plaintiff's request for documentation for purposes of her disability application: the
8 notes indicate that on September 4, 2012, Ms. Hensley told Plaintiff that she intended to provide
9 mental health counseling, rather than support for a disability application, and that she would have
10 to ask a supervisor about what she was authorized to disclose. (AR 799 (citing AR 723).) The
11 medical source statement was completed in January 2012, however, months before Ms. Hensley
12 indicated a reluctance to complete paperwork. The ALJ also noted that the checkbox form
13 identifies Ms. Hensley as a medical doctor, and Ms. Hensley did not correct it. (AR 799 (citing
14 AR 617, 723).)

15 Plaintiff argues that these are not valid reasons to discount Ms. Hensley's opinion. Dkt.
16 11 at 11. Even if Plaintiff is correct, however, the ALJ went on to provide other germane reasons
17 to discount Ms. Hensley's opinion, namely inconsistency with the record and Plaintiff's activities.
18 As noted by the ALJ, the record indicated that the "primary driver for the claimant's anxiety was
19 the situation involving her ex-boyfriend[.]" and yet Plaintiff did not take any anxiety medication
20 and retained a high level of mental functioning, as demonstrated by her activities. (AR 799.) This
21 reasoning is germane to Ms. Hensley's opinion and provides a valid basis for discounting the
22 opinion. *See Carmickle*, 533 F.3d at 1164 (citing activities inconsistent with a lay opinion is a
23 germane reason to discount the opinion); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)

1 (citing inconsistent medical evidence is a germane reason to discount a lay opinion). Any error in
2 the ALJ's reasoning with respect to Ms. Hensley's reluctance to complete an opinion and/or her
3 failure to correct an error as to her credentials is harmless.

4 Plaintiff's subjective testimony

5 The ALJ discounted Plaintiff's subjective testimony for a number of reasons, including (1)
6 the medical evidence was inconsistent with an allegation of disability; (2) Plaintiff did not take
7 medication to treat her mental health symptoms; (3) Plaintiff's activities were consistent with an
8 ability to perform light work; (4) Plaintiff continued to smoke cigarettes against medical advice,
9 despite her respiratory condition; (5) Plaintiff collected unemployment and applied for jobs in
10 2010 and 2011; and (6) Plaintiff made inconsistent statements about her education history, telling
11 providers she had a GED, but testifying at the administrative hearing that she did not have a GED.
12 (AR 787-95.) Plaintiff argues that these reasons are not clear and convincing, as required in the
13 Ninth Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

14 The Court agrees with Plaintiff that some of the ALJ's reasoning is erroneous, but some of
15 it is not, and the Court will address Plaintiff's arguments in turn.

16 A. Objective evidence

17 First, Plaintiff argues that the ALJ erred in discounting her testimony based on
18 improvement with medication, because she continued to experience symptoms even with
19 medication. Dkt. 11 at 12-13. The ALJ specifically cited evidence of improvement with
20 medication of Plaintiff's respiratory symptoms and pain, but also noted where Plaintiff reported
21 that her symptoms were not entirely alleviated by medication. (AR 788-89, 791-93.) The ALJ
22 acknowledged the context of Plaintiff's improvement, and did not err in considering the effect of
23 Plaintiff's medications. *See* 20 C.F.R. § 404.1529(c)(3).

1 Plaintiff next argues that the ALJ's summary of the medical evidence does not justify
2 discounting her testimony. Dkt. 11 at 13 (citing *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th
3 Cir. 2015)). But, unlike in *Brown-Hunter*, the ALJ did not rely on a summary of medical evidence
4 as a substitute for explaining why the medical evidence undermined Plaintiff's testimony: the ALJ
5 summarized the medical evidence and went on to explain how that evidence showed that she was
6 not disabled. (AR 793-94.)

7 Plaintiff also alleges that the ALJ erred by failing to discuss medical evidence that
8 corroborates her testimony. Dkt. 11 at 13. For example, the ALJ cited records showing that
9 Plaintiff ambulated with a normal gait (AR 793), but Plaintiff points to evidence showing that she
10 had an abnormal gait on other occasions. Dkt. 11 at 13 n.12 (citing AR 637, 643, 644, 647, 649,
11 686, 691, 694, 741, 758, 1210, 1214, 1216, 1218, 1292). Plaintiff also cites evidence that she
12 contends is inconsistent with the ALJ's finding that her range of motion and grip strength were
13 intact. Dkt. 11 at 13-14 n.14 (citing AR 429, 637, 643, 644, 647, 649, 741, 758, 1210, 1214, 1216,
14 1218, 1250). Although some of Plaintiff's citations are duplicates, they nonetheless represent
15 significant findings that the ALJ failed to account for when summarizing the evidence as
16 inconsistent with a finding of disability. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)
17 ("The court must consider both evidence that supports and evidence that detracts from the ALJ's
18 conclusion; it may not affirm simply by isolating a specific quantum of supporting evidence.").
19 This reasoning is therefore erroneous in this respect, but the error is harmless in light of the ALJ's
20 other valid reasons. *See Carmickle*, 533 F.3d at 1162-63.

21 With regard to Plaintiff's testimony about mental symptoms, the Court rejects Plaintiff
22 arguments. Plaintiff contends that the ALJ's citation to normal findings upon mental examination
23 (AR 794) "does not prove that she could function similarly in a competitive work environment"

1 (Dkt. 11 at 14), but this is merely an alternative interpretation of the evidence and does not establish
2 error in the ALJ's decision. The normal findings are relevant to determining Plaintiff's
3 functionality, and the ALJ did not err in considering them.

4 The ALJ further noted that Plaintiff's anxiety symptoms were primarily fueled by a
5 situation with her ex-boyfriend, who would not be present at Plaintiff's workplace, particularly
6 because Plaintiff was restricted from interacting with the public. (AR 794.) Plaintiff
7 misunderstands the ALJ's point, and assumes that the ALJ was finding that Plaintiff's anxiety
8 would not be present at the workplace. Dkt. 11 at 14. Plaintiff has not identified error in the ALJ's
9 findings regarding her mental health testimony.

10 B. Failure to take medication

11 Plaintiff goes on to argue that the ALJ erred in discounting her testimony on account of her
12 failure to take anti-anxiety medication "without first considering her explanation why she was not
13 taking such medication." Dkt. 11 at 14. The ALJ queried Plaintiff about her reasons for not taking
14 medication, and noted in the decision that Plaintiff testified on this topic. (AR 787, 849-51.) Thus,
15 Plaintiff inaccurately contends that the ALJ did not consider her reasons for not taking medication.
16 Plaintiff testified that she preferred to approach her anxiety in a "different manner" that did not
17 rely on medication, but instead focuses on breathing. (AR 850-51.) The ALJ was not obligated
18 to find this explanation reasonable, particularly where the explanation appears to be based on a
19 personal preference. *See Molina v. Astrue*, 674 F.3d 1104, 1113-14 (9th Cir. 2012). Plaintiff has
20 not shown that the ALJ erred in considering her failure to seek pharmacological treatment when
21 considering her subjective allegations. *See SSR 16-3p*, 2016 WL 1119029 (Mar. 16, 2016) ("We
22 will consider an individual's attempts to seek medical treatment for symptoms . . .").

23 ///

1 C. Activities

2 The ALJ found that Plaintiff's activities demonstrate that she could perform light work
3 activity, but as noted by Plaintiff, the ALJ did not identify how Plaintiff's activities contradict her
4 testimony or demonstrate transferable work skills. (AR 794.) The Court agrees with Plaintiff that
5 this portion of the ALJ's findings is erroneous. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
6 2007) (activities may undermine credibility where they (1) contradict the claimant's testimony or
7 (2) "meet the threshold for transferable work skills"). This error is harmless in light of the ALJ's
8 other valid reasons.

9 D. Inconsistencies

10 The ALJ went on to describe two other inconsistencies in the record that do undermine
11 Plaintiff's testimony, however. First, the ALJ noted that Plaintiff continued smoking despite her
12 respiratory condition, up until two days before the first administrative hearing. (AR 794, 833.)
13 Plaintiff argues that her addiction impacted her ability to stop smoking, even though her condition
14 was serious. Dkt. 11 at 15 (citing *Shramek v. Apfel*, 226 F13d 809, 813 (7th Cir. 2000)). But courts
15 throughout the Ninth Circuit have found that smoking against medical advice undermines a
16 claimant's subjective complaints of disability. *See Taylor v. Colvin*, 2016 WL 704352, at *12-13
17 (E.D. Cal. Feb. 23, 2016) (citing *Bybee v. Astrue*, 2011 WL 6703568 at *8 (E.D. Cal. Dec. 21,
18 2011); *Broughton v. Astrue*, 2012 WL 1616891 (C.D. Cal. May 8, 2012); *Wagnon v. Colvin*, 2016
19 WL 356079 (D. Or. Jan. 28, 2016)); *Reeves v. Astrue*, 2012 WL 1032778 at *6 (W.D. Wash. Mar.
20 6, 2012). This reasoning is clear and convincing.

21 The ALJ also noted that Plaintiff collected unemployment benefits during some of the
22 adjudicated period, and applied for full-time jobs. (AR 794-95 (referencing AR 859-60, 879-80).)
23 Although Plaintiff indicated that she did not know how long she would have been able to perform

1 those jobs, the ALJ did not err in considering her efforts to find jobs as inconsistent with her
2 allegation that she could not work. *See Bray v. Comm'r of Social Sec. Admin.*, 554 F.3d 1219,
3 1227 (9th Cir. 2009) (affirming an ALJ's consideration of a claimant's seeking out jobs as
4 undermining claims of debilitating conditions).

5 Finally, the ALJ noted that although Plaintiff testified at the hearing that she did not have
6 a GED, she reported on several occasions that she did. (AR 795 (citing AR 280, 392, 427, 606,
7 1130).) Plaintiff claims that the ALJ failed to ask about this inconsistency at the hearing, and
8 argues that it is not a convincing reason to reject all of her testimony. Dkt. 11 at 15-16. But the
9 ALJ did ask Plaintiff about it at the hearing, questioning her extensively and identifying portions
10 of the record where she had reported obtaining a GED. (AR 820-25.) An ALJ is entitled to
11 consider the consistency of a claimant's reporting, and the ALJ did not err in doing so here. *See*
12 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (indicating that an ALJ may consider
13 any inconsistencies in a claimant's testimony, when weighing that testimony).

14 In sum, because the ALJ provided many clear and convincing reasons to discount
15 Plaintiff's testimony, which remain valid even when the erroneous reasons are excluded, any errors
16 in the ALJ's findings are harmless. *See Carmickle*, 533 F.3d at 1162-63.

17 Lay evidence

18 Plaintiff challenges the ALJ's assessment of records written by Department of Vocational
19 Rehabilitation (DVR) personnel, as well as a statement written by Plaintiff's mother, Navonne
20 Waterhouse. As indicated above, an ALJ must provide germane reasons to discount a lay
21 statement. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996). The Court will consider
22 each statement in turn.

23 ///

1 A. DVR records

2 The record contains Plaintiff's DVR records addressing her eligibility for rehabilitation
3 services. (AR 367-69.) The ALJ rejected these records because they were not based on an
4 examination of Plaintiff or her medical records, and the counselor did not address Plaintiff's
5 specific functional abilities, but was instead focused on DVR eligibility. (AR 795.)

6 Plaintiff argues that these reasons are not germane, because the DVR counselor reviewed
7 Dr. Harrison's psychological evaluation, and described specific accommodations Plaintiff would
8 require. Dkt. 11 at 16. Plaintiff also questions whether the purpose for which the records were
9 written is a germane reason to discount them. *Id.*

10 Plaintiff's arguments are not persuasive. Dr. Harrison's evaluation was performed for
11 purposes of determining DVR eligibility, which does not necessarily have any bearing on whether
12 Plaintiff is disabled. (AR 390.) The DVR report does not identify specific functional abilities that
13 Plaintiff retains, but instead focuses on categories of accommodation that would be necessary.
14 (AR 368.) It therefore has limited probative value for the ALJ's inquiry as to Plaintiff's RFC,
15 which measures the most she can do. *See* 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1) (RFC "is
16 the most you can still do despite your limitations"). In this situation, the purpose for which the
17 record was written is relevant to its probative value, because it does not address issues that pertain
18 to the ALJ's inquiry, namely the most Plaintiff can do despite her limitations. Accordingly, the
19 ALJ's reasoning with respect to the DVR records is germane.

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21 Plaintiff's mother completed two third-party function reports. (AR 302-09, 337-44.) The
22 ALJ gave little weight to the reports, finding them inconsistent with the medical evidence showing
23 that Plaintiff's pain complaints improved with medication and her respiratory symptoms were

1 well-controlled with medication. (AR 795-96.) The ALJ also found Plaintiff's description of
2 manipulative limitations to be inconsistent with Plaintiff's activities, such as her activities of daily
3 living, and caring for grandchildren and dogs. (AR 796.) Lastly, the ALJ found Plaintiff's
4 mother's description of social limitations to be inconsistent with her presentation during treatment
5 appointments as well as her volunteer activities. (*Id.*)

6 Plaintiff argues that the ALJ's reasons are not supported by substantial evidence and are
7 not germane to Plaintiff's mother. Plaintiff is mistaken. The ALJ detailed Plaintiff's improvement
8 with medication in an earlier section of the decision (AR 793), and also described Plaintiff's
9 activities (AR 785). That evidence is inconsistent with Plaintiff's mother's description of
10 Plaintiff's limitations, because she stated, for example, that Plaintiff had no social activities and
11 severe breathing problems. (AR 307, 338, 342.) The ALJ's citation to inconsistent evidence is a
12 germane reason to discount Plaintiff's mother's statements. *See Lewis v. Apfel*, 236 F.3d 503, 511-
13 12 (9th Cir. 2001) (germane reasons for discounting lay testimony included inconsistency with
14 medical evidence, evidence of claimant's activities, and claimant's reports).

15 **CONCLUSION**

16 For the reasons set forth above, this matter is AFFIRMED.

17 DATED this 8th day of August, 2017.

18 

19

Mary Alice Theiler
20 United States Magistrate Judge