

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 MARILYN C.,

9 Plaintiff,

CASE NO. C18-5469-MAT

10 v.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

11 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

12 Defendant.
13

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

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1951.¹ She completed high school and a year of college, and
21 previously worked as a retail store manager, district manager, room service clerk, retail sales clerk,
22 and jewelry store manager. (AR 34, 196.)

23
¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff protectively filed a DIB application on March 9, 2015, alleging disability
2 beginning October 29, 2013. (AR 180.) Her application was denied at the initial level and on
3 reconsideration.

4 On October 20, 2016, ALJ Allen Erickson held a hearing, taking testimony from plaintiff
5 and a vocational expert (VE). (AR 36-91.) On January 12, 2017, the ALJ issued a decision finding
6 plaintiff not disabled. (AR 24-35.)

7 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
8 April 17, 2018 (AR 1-5), making the ALJ's decision the final decision of the Commissioner.
9 Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

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

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
15 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
16 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
17 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's status
18 post cerebrovascular accidents; status post myocardial infarctions; and coronary artery disease
19 severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The
20 ALJ found plaintiff's impairments did not meet or equal a listing.

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant has
23 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform

1 light work, subject to the following limitations: cannot climb ladders, ropes, or scaffolds, but can
2 occasionally climb ramps and stairs, crawl, and balance; can tolerate occasional exposure to
3 vibration, temperature, and humidity extremes, and concentrated levels of dust, fumes, gases, and
4 other pulmonary irritants; and can understand, remember, and carry out detailed, but not complex
5 instructions. With that assessment, and with consideration of the VE's testimony, the ALJ found
6 plaintiff able to perform her past relevant work as a room service clerk, a sedentary job, both as
7 actually and normally performed.

8 If a claimant demonstrates an inability to perform past relevant work, or has no past
9 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
10 retains the capacity to make an adjustment to work that exists in significant levels in the national
11 economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step five.

12 This Court's review of the ALJ's decision is limited to whether the decision is in
13 accordance with the law and the findings supported by substantial evidence in the record as a
14 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
15 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
16 by substantial evidence in the administrative record or is based on legal error.") Substantial
17 evidence means more than a scintilla, but less than a preponderance; it means such relevant
18 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
19 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
20 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
21 F.3d 947, 954 (9th Cir. 2002).

22 Plaintiff argues the ALJ erred in assessing her symptom testimony and that the errors were
23 not harmless given the impact on the RFC assessment. She does not specify the relief requested.

1 The Commissioner argues the ALJ's decision has the support of substantial evidence and should
2 be affirmed.

3 Symptom Testimony

4 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing
5 reasons to reject a claimant's testimony. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).
6 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and
7 what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th
8 Cir. 1996). In considering the intensity, persistence, and limiting effects of a claimant's symptoms,
9 the ALJ "examine[s] the entire case record, including the objective medical evidence; an
10 individual's statements about the intensity, persistence, and limiting effects of symptoms;
11 statements and other information provided by medical sources and other persons; and any other
12 relevant evidence in the individual's case record." Social Security Ruling (SSR) 16-3p.²

13 The ALJ here found plaintiff's statements concerning the intensity, persistence, and
14 limiting effects of her symptoms not entirely consistent with the medical and other evidence in the
15 record. (AR 30.) Contrary to plaintiff's contention, the ALJ provided several specific, clear, and
16 convincing reasons in support of that conclusion.

17 A. Medical Evidence

18 While the ALJ may not reject subjective symptom testimony based solely on the absence
19 of corroborating objective medical evidence, the medical evidence remains a relevant factor in
20 determining the severity of a claimant's symptoms and their disabling effects. *See Rollins v.*
21 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 16-3p. An ALJ therefore properly considers

22
23 ² Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term
"credibility" from its policy and clarified the evaluation of a claimant's subjective symptoms is not an
examination of character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term
credibility.

1 whether the medical evidence supports or is consistent with a claimant's allegations. *Id.*; 20 C.F.R.
2 § 404.1529(c)(4) (symptoms are determined to diminish capacity for basic work activities only to
3 the extent the alleged functional limitations and restrictions "can reasonably be accepted as
4 consistent with the objective medical evidence and other evidence.") An ALJ may reject subjective
5 testimony upon finding it contradicted by or inconsistent with the medical record. *Carmickle v.*
6 *Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148
7 (9th Cir. 2001).

8 The ALJ here found plaintiff's statements concerning her symptoms "to affect the
9 claimant's ability to work only to the extent they can be reasonably accepted as consistent with the
10 objective medical and other evidence." (AR 30.) His discussion of the medical evidence, included,
11 *inter alia*, the minimal objective findings following plaintiff's cardiovascular and cerebrovascular
12 events prior to the alleged onset date, the relatively normal September 9, 2013 neurological
13 evaluation, and a June 22, 2015 psychological evaluation in which plaintiff did not evidence any
14 cognitive, memory, or mental health concerns. (AR 30-32.)

15 Plaintiff did not challenge the ALJ's consideration of this evidence in her opening brief.
16 In reply, plaintiff states the phrase "objective medical evidence" does not appear in the decision,
17 and that the ALJ could not rely, alone, on an absence of corroborating objective medical evidence
18 to reject her symptom testimony. Because the ALJ explicitly stated he accepted plaintiff's
19 testimony only to the extent consistent with the objective medical and other evidence, and because
20 he also offered other reasons for his conclusion, plaintiff's arguments do not withstand scrutiny.
21 The ALJ properly discounted plaintiff's symptom testimony based on its inconsistency with the
22 medical evidence.

23 ///

1 B. Activities

2 An ALJ may discount a claimant's testimony with consideration of activities inconsistent
3 with the alleged degree of impairment. *See Bray v. Comm'r of SSA*, 554 F.3d 1219, 1227 (9th Cir.
4 2009) ("In reaching a credibility determination, an ALJ may weigh inconsistencies between the
5 claimant's testimony and his or her conduct, daily activities, and work record, among other
6 factors."); *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may undermine credibility
7 where they (1) contradict the claimant's testimony or (2) "meet the threshold for transferable work
8 skills[.]") Previous ability to work with alleged symptoms is a relevant consideration. *See, e.g.*,
9 *Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992) ("She was able to hold two previous jobs
10 with a fair amount of success, and even if those particular jobs are, as she claims, too taxing for
11 her, the vocational counselor testified that she is qualified for thousands of less strenuous jobs.")

12 The ALJ found plaintiff's activities following her medical issues inconsistent with a
13 finding of disability. (AR 32.) Her last stroke occurred in June 2013, she returned to work quickly
14 after the incident, and continued to work until October 2013. While plaintiff testified she had
15 some assistance and was unsure whether she would have been able to perform the job without that
16 support, the record did not contain information regarding the degree of support provided. Plaintiff
17 emphasized during a June 2015 evaluation "that she was fired for allegedly lying, and not for an
18 inability to perform her job, which suggests that her supervisors or employees did not notice the
19 alleged deficiencies." (*Id.* (citing AR 429 (also noting plaintiff fought the termination and won
20 damages in lieu of back pay pursuant to a settlement, and reported she was "not interested in
21 attempting any other position other than 'management' and feels she 'can't run things as a manager
22 anymore.'")) The ALJ found this work activity to suggest plaintiff was not as physically or
23 mentally limited as asserted, and indicated her ability to maintain a schedule and generally meet

1 the demands of work.

2 Plaintiff argues that, because she did not allege onset of disability until October 29, 2013,
3 it is irrelevant whether she worked prior to that date. This argument is not persuasive. As the
4 Commissioner observes, plaintiff claimed disability based primarily on issues stemming from her
5 heart attack and strokes (*see, e.g.*, AR 195, 427), all of which occurred prior to her alleged onset
6 date. The ALJ properly considered the fact plaintiff worked after those events and up until the
7 month of her alleged onset date, and that she stopped working for reasons other than her disability,
8 as evidence inconsistent with her allegations. The mere fact “plaintiff did not claim to be disabled
9 until after she quit working” (Dkt. 10 at 2) does not render irrelevant her ability to work after the
10 events giving rise to her disability claim.

11 The ALJ’s decision also reflects consideration of plaintiff’s other activities. Plaintiff, for
12 example, testified she is generally independent in her activities of daily living, can drive and
13 grocery shop independently, and walks regularly, while her sister-in-law attested plaintiff had no
14 difficulty with personal care, could shop for groceries and personal care items, drive a car, play
15 some board games, read, and watch television, attends church and movies regularly, and could
16 walk about a mile. (AR 29-30.) In evaluations conducted in June 2015, plaintiff reported
17 exercising frequently, including walking long distances on a treadmill daily and four miles around
18 the waterfront at least twice a week, that she was a voracious reader, and had an active lifestyle.
19 (AR 31-32.) The ALJ properly discounted plaintiff’s symptom testimony in light of the evidence
20 of her activities.

21 C. Treatment

22 An ALJ properly considers evidence associated with a claimant’s treatment. 20 C.F.R. §
23 416.929(c)(3), SSR 96-7p and SSR 16-3p. The ALJ here found plaintiff’s lack of treatment

1 supporting a finding her limitations were not as severe as alleged. (AR 32.) Plaintiff had not
2 participated in physical or occupational therapy. The ALJ considered factors associated with this
3 lack of treatment. At hearing, plaintiff testified she did not have insurance until 2014, but treatment
4 notes indicated she was insured by Hawaii Medical Services Association. (AR 377-84 (October-
5 November 2013 treatment notes).) Treatment notes from her January 2013 hospital stay indicate
6 she had no physical therapy needs and no indication for occupational therapy services. (AR 362,
7 364.) After the June 2013 stroke, her speech improved after therapy. (AR 297 (also noting
8 problem with recall and sometimes saying the wrong words was “very mild.”)) Even after her
9 insurance reinstatement in 2014, plaintiff did not discuss the option of therapies for her limitations.
10 “This lack of treatment, even once the claimant reinstated insurance, suggests her impairments are
11 not as limiting as she asserts.” (AR 32.)

12 Plaintiff argues the lack of physical or occupational therapy evidences a lack of need, not
13 a lack of participation, and that the ALJ inconsistently relied on evidence she did participate in
14 speech therapy. She maintains she engaged in the appropriate, recommended treatment by
15 following her anticoagulant therapy since the June 2013 stroke. She further asserts that, given the
16 fact her neurologist did not recommend occupational or physical therapy in September 2013, her
17 failure to inquire about such therapy does not negatively impact her symptom testimony.

18 The Court finds no reversible error. The ALJ’s decision is reasonably read as considering
19 not only absent treatment, but also the minimal amount of treatment and the conservative nature
20 of the treatment prescribed and received as inconsistent with plaintiff’s allegations as to the degree
21 of her limitations. He considered not only the fact plaintiff had not received physical or
22 occupational therapy following the incidents giving rise to her disability claim, but also that such
23 treatment was not necessary. He considered that the therapy plaintiff did receive, for her speech,

1 improved her condition. These considerations were appropriate and the ALJ's interpretation of
2 the evidence was rational. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40 (9th Cir. 2008)
3 (favorable response to conservative treatment undermines reports of disabling nature of pain);
4 *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) ("evidence of 'conservative treatment' is
5 sufficient to discount a claimant's testimony regarding severity of an impairment"); *Meanel v.*
6 *Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints where petitioner's
7 "claim that she experienced pain approaching the highest level imaginable was inconsistent with
8 the 'minimal, conservative treatment' that she received"). The ALJ also properly considered, as a
9 part of this analysis, that the absent, minimal, and conservative treatment was not attributable to a
10 lack of insurance or some other factor. SSR 16-3p ("[I]f the frequency or extent of the treatment
11 sought by an individual is not comparable with the degree of the individual's subjective
12 complaints, . . . we may find the alleged intensity and persistence of an individual's symptoms are
13 inconsistent with the overall evidence of record. We will not find an individual's symptoms
14 inconsistent with the evidence in the record on this basis without considering possible reasons he
15 or she may not . . . seek treatment consistent with the degree of his or her complaints.")

16 Finally, while the ALJ utilized only the phrase "lack of treatment," rather than identifying
17 the treatment as minimal and/or conservative, the word choice does not alone undermine the
18 substantial evidence support for the ALJ's conclusion. "As a reviewing court, we are not deprived
19 of our faculties for drawing specific and legitimate inferences from the ALJ's opinion."
20 *Magallanes*, 881 F.2d at 755. "Even when an agency 'explains its decision with "less than ideal
21 clarity,"' we must uphold it 'if the agency's path may reasonably be discerned.'" *Molina v. Astrue*,
22 674 F.3d 1104, 1121 (9th Cir. 2012) (quoted sources omitted). *See also Benskin v. Bowen*, 830
23 F.2d 878, 883 (8th Cir. 1987) ("An arguable deficiency in opinion-writing technique is not a

1 sufficient reason for setting aside an administrative finding where, as here, the deficiency probably
2 had no practical effect on the outcome of the case.”) Because the language used cannot be said to
3 have altered the outcome of this case, any error is properly deemed harmless. *Molina*, 674 F.3d at
4 1115 (ALJ’s error may be deemed harmless where it is “‘inconsequential to the ultimate
5 nondisability determination.’”)

6 D. Hearing Observations

7 The ALJ stated: “The undersigned further notes the claimant did present with some word
8 finding difficulty during the hearing; however, this did not prevent the claimant from providing
9 answers to questions, and was not overly distracting.” (AR 32.) The Commissioner argues the
10 ALJ, in so doing, properly relied on his personal observations at hearing as a basis for discounting
11 plaintiff’s testimony. *See, e.g., Thomas*, 278 F.3d at 960 (ALJ properly considered claimant’s
12 “demeanor” at hearing and found “‘she seemed to engage in considerable histrionic
13 exaggeration.’”) Plaintiff avers the ALJ included the observation for a different purpose, as well
14 as that the Ninth Circuit disapproves of such a rationale. *See Gallant v. Heckler*, 753 F.2d 1450,
15 1455 (9th Cir. 1984) (“The fact that a claimant does not exhibit physical manifestations of
16 prolonged pain at the hearing provides little, if any, support for the ALJ’s ultimate conclusion that
17 the claimant is not disabled or that his allegations of constant pain are not credible.”)

18 An ALJ may not employ a “‘sit and squirm’” test and reject a claimant’s symptom
19 testimony based solely on the failure to exhibit alleged symptoms at hearing. *Perminter v. Heckler*,
20 765 F.2d 870, 872 (9th Cir. 1985). However, the inclusion of an ALJ’s observations does not
21 render the decision improper. *See Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999); *Morgan*
22 *v. Commissioner of the SSA*, 169 F.3d 595, 600 (9th Cir. 1999). Personal observations may be
23 included as part of the overall evaluation, *Orn*, 495 F.3d at 639-40, but should not be “used as a

1 substitute for medical diagnosis.” *Marcia v. Sullivan*, 900 F.2d 172, 177, n.6 (9th Cir. 1990) (cited
2 sources omitted). *See, e.g., Verduzco*, 188 F.3d at 1090 (claimant exhibited symptoms inconsistent
3 with both the medical evidence and other behavior at hearing); *Quang Van Han v. Bowen*, 882
4 F.2d 1453, 1458 & n.8 (9th Cir. 1989) (claimant was “overdramatizing” alleged pain by
5 “dishonestly attempting to display too *much* pain.”).

6 As plaintiff asserts, it is not entirely clear the ALJ included the observation as a reason for
7 discounting symptom testimony. He included the observation in the context of discussing the
8 differences in plaintiff’s presentation to two different examining doctors, and the consistency of
9 her minimal difficulties in one examination with her “earlier reports that her word finding
10 difficulties happened only ‘now and then’ and were ‘minor’ and providers descriptions of her
11 symptoms as mild.” (AR 32 (citing AR 297 (abnormality mild), 371-72 (“At this point, she still
12 notices these minor speech things now and again. She has returned to work.”)) He had noted
13 plaintiff’s testimony that “when she does not have any external pressures and was able to do things
14 by rote she is generally fine[,]” and that the testing in the examination in which plaintiff evidenced
15 minimal, if any, difficulties with her speech³ would “have been out of the ordinary and caused
16 stress to the claimant.” (AR 32.) After describing his own observation, the ALJ stated: “Thus,
17 the overall evidence supports some limitation in this regard, but does not support limitations
18 beyond those in the above [RFC].” (*Id.*)

19 Considering the decision and record as a whole, the Court does not find the inclusion of

20
21 ³ (*See* AR 429 (“She kept trying to report that she was having ‘word finding difficulty,’ but it was
22 noted that she had an excellent vocabulary and was very articulate in her communication skills. On
23 occasion, she had to think for a few seconds about a word that she wanted to use, but then was able to come
up with the word she wanted. Additionally, she claimed that she had trouble ‘understanding words,’ but at
no time during the multi-hour evaluation process did she ever use words that were not appropriate in
sentences, nor did she ever have to inquire as to what I meant by certain words. She was able to easily
understand simple and complex task instructions, as well as multi-layered questions and multi-component
tasks. She was able to use her cell phone to research and retrieve information.”))

1 the ALJ's personal observation to render the decision improper. Nor does the Court find
2 consideration of this observation necessary to uphold the ALJ's conclusion. That is, even finding
3 its inclusion improper or unrelated to the symptom testimony assessment, the three above-
4 described specific, clear, and convincing reasons provide substantial evidence support for the
5 ALJ's conclusion. *See Carmickle*, 533 F.3d at 1162-63 (where ALJ provides specific reasons
6 supporting an assessment and substantial evidence supports the conclusion, error in assessment
7 may be deemed harmless; the relevant inquiry "is not whether the ALJ would have made a different
8 decision absent any error, . . . [but] whether the ALJ's decision remains legally valid, despite such
9 error.") In addition, having found no reversible error in the ALJ's assessment, plaintiff's assertion
10 of related error in the RFC assessment also fails. *See Batson v. Comm'r of the SSA*, 359 F.3d 1190,
11 1197 (9th Cir. 2004) (ALJ need not include in RFC properly discounted claimant testimony), and
12 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008) (mere restating of argument
13 does not identify error).

14 CONCLUSION

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

16 DATED this 19th day of February, 2019.

17 
18 Mary Alice Theiler
19 United States Magistrate Judge
20
21
22
23