

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3
4 CYNTHIA D. FAULKNER,

5 Plaintiff,

6 vs.

7 CAROLYN W. COLVIN, Acting

8 Commissioner of Social Security,

9 Defendant.

No. 14-cv-3040-JPH

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

10 BEFORE THE COURT are cross-motions for summary judgment. ECF No.
11 14, 19. The parties have consented to proceed before a magistrate judge. ECF No.
12 6. After reviewing the administrative record and the parties' briefs, the court
13 **grants** plaintiff's motion for summary judgment, **ECF No. 14**.

14 **JURISDICTION**

15 Faulkner protectively applied for supplemental security income (SSI)
16 benefits May 26, 2010. She alleged onset beginning January 29, 2009 (Tr. 154-58).
17 Benefits were denied initially and on reconsideration (Tr. 109-113, 122-23). ALJ
18 Moira Ausems held a hearing May 3, 2012 (Tr. 55-83) and issued an unfavorable
19 decision July 23, 2012 (Tr. 28-41). The Appeals Council denied review January

ORDER - 1

1 31, 2014 (Tr. 1-6). The matter is now before the Court pursuant to 42 U.S.C. §
2 405(g). Plaintiff filed this action for judicial review March 31, 2014. ECF No. 1
3 and 4.

4 **STATEMENT OF FACTS**

5 The facts have been presented in the administrative hearing transcript, the
6 ALJ's decision and the briefs of the parties. They are only briefly summarized as
7 necessary to explain the court's decision.

8 Faulkner was 23 years old when she applied for benefits and 25 at the
9 hearing. [The ALJ declined reopening a prior application that was denied and not
10 appealed. Tr. 28.] Faulkner was in special education classes from preschool
11 through high school. On her only job she worked eight to twelve hours a week as a
12 child care aide. She alleges disability based on physical and mental limitations.
13 These include infantile cerebral palsy with weak ankles and wrists, migraines,
14 eczema, anxiety and problems with understanding and memory. She has been
15 diagnosed with borderline intellectual functioning (BIF). (Tr. 40, 68, 86, 167, 174-
16 75, 179-80, 209, 217, 260, 266, 270).

16 **SEQUENTIAL EVALUATION PROCESS**

17 The Social Security Act (the Act) defines disability as the "inability to
18 engage in any substantial gainful activity by reason of any medically determinable
19 physical or mental impairment which can be expected to result in death or which

1 has lasted or can be expected to last for a continuous period of not less than twelve
2 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
3 plaintiff shall be determined to be under a disability only if any impairments are of
4 such severity that a plaintiff is not only unable to do previous work but cannot,
5 considering plaintiff’s age, education and work experiences, engage in any other
6 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
7 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
8 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
9 (9th Cir. 2001).

10 The Commissioner has established a five-step sequential evaluation process
11 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
12 one determines if the person is engaged in substantial gainful activities. If so,
13 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
14 decision maker proceeds to step two, which determines whether plaintiff has a
15 medically severe impairment or combination of impairments. 20 C.F.R. §§
16 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe
17 impairment or combination of impairments, the disability claim is denied.

18 If the impairment is severe, the evaluation proceeds to the third step, which
19 compares plaintiff’s impairment with a number of listed impairments
acknowledged by the Commissioner to be so severe as to preclude substantial

1 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
2 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
3 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
4 not one conclusively presumed to be disabling, the evaluation proceeds to the
5 fourth step, which determines whether the impairment prevents plaintiff from
6 performing work which was performed in the past. If a plaintiff is able to perform
7 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
8 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
9 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
10 final step in the process determines whether plaintiff is able to perform other work
11 in the national economy in view of plaintiff's residual functional capacity, age,
12 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
13 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

14 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
15 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
16 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
17 met once plaintiff establishes that a physical or mental impairment prevents the
18 performance of previous work. The burden then shifts, at step five, to the
19 Commissioner to show that (1) plaintiff can perform other substantial gainful
activity and (2) a "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

2 STANDARD OF REVIEW

3 Congress has provided a limited scope of judicial review of a
4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the
5 Commissioner's decision, made through an ALJ, when the determination is not
6 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
7 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
8 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be
9 upheld if the findings of fact are supported by substantial evidence." *Delgado v.*
10 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g). Substantial
11 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
12 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
13 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence "means such evidence
14 as a reasonable mind might accept as adequate to support a conclusion."
15 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch
16 inferences and conclusions as the [Commissioner] may reasonably draw from the
17 evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir.
18 1965). On review, the Court considers the record as a whole, not just the evidence
19 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980).

1 It is the role of the trier of fact, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
3 interpretation, the Court may not substitute its judgment for that of the
4 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
5 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
6 set aside if the proper legal standards were not applied in weighing the evidence
7 and making the decision. *Brawner v. Secretary of Health and Human Services*, 839
8 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
9 administrative findings, or if there is conflicting evidence that will support a
10 finding of either disability or nondisability, the finding of the Commissioner is
11 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

12 At step one, ALJ Ausems found Faulkner did not work at SGA levels after
13 she applied for benefits (Tr. 30). At steps two and three, she found Faulkner suffers
14 from mild cerebral palsy and borderline intellectual functioning, impairments that
15 are severe but do not meet or medically equal a listed impairment (Tr. 30, 33). The
16 ALJ found Faulkner can perform a range of sedentary work, limited to standing
17 and/or walking 4 hours in an 8-hour day, simple, routine tasks, superficial contact
18 with the public and no more than cooperative teamwork with coworkers (Tr. 35).
19 At step four, the ALJ found Faulkner has no past relevant work (Tr. 40). At step

1 five, she relied on the VE's testimony and found there are jobs Faulkner can
2 perform, such as final assembler, charge account clerk and document preparer (Tr.
3 40-41). The ALJ concluded Faulkner was not disabled after May 26, 2010 (Tr. 41).

4 **ISSUES**

5 Faulkner alleges the ALJ should have found her impairments met or equaled
6 the listing for cerebral palsy. She alleges the ALJ improperly rejected a treatment
7 provider's opinion, erred when she failed to weigh lay testimony, assessed
8 credibility and failed to include all limitations at step five. ECF No. 14 at 6-7. The
9 Commissioner asks the Court to affirm, asserting the ALJ properly weighed the
10 evidence and committed no harmful error. ECF No. 19 at 21.

11 Faulkner is correct that the ALJ's decision contains harmful error.

12 **DISCUSSION**

13 *A. Step Three*

14 Faulkner alleges the ALJ should have found at step three that her
15 impairments met or equaled listing 11.07 (Cerebral Palsy). ECF No. 14 at 9-10; 20
16 C.F.R., Subpart P, Appendix 1. The Commissioner responds that the ALJ's finding
17 was appropriate and supported by substantial evidence. ECF No. 19 at 6-8.

18 Faulkner states medical expert James Haynes, M.D., testified it was
19 "borderline" whether she met Listing 11.07; he acknowledged that if Faulkner
experienced migraines at least fairly frequently and functioned intellectually at the

1 borderline level, the argument could be made that her impairments equaled the
2 listing. ECF No. 14 at 9, referring to Tr. 64. Faulkner alleges this testimony, in
3 addition to evidence of cerebral palsy, migraines, severe eczema, bilateral ankle
4 weakness and BIF, shows her impairments met or equaled Listing 11.07. ECF No.
5 14 at 9-10, citing to Tr. 263, 270, 331.

6 The Commissioner reads Dr. Haynes' testimony differently. She asserts his
7 meaning is that this case was "very borderline" to even suggest a listing. She
8 alleges that Dr. Haynes assessed RFC shows he did not believe a listing was met or
9 equaled. ECF No. 19 at 6-7.

10 The Court agrees with Faulkner's interpretation. It appears Dr. Haynes
11 meant this case was close to meeting Listing 11.07 based on Faulkner's
12 combination of impairments.

13 The record indicates Faulkner was observed to have difficulty with balance
14 when walking and walked with a wide gait. At times both ankles had mild limited
15 range of motion with weakness (Tr. 262-63). She has been diagnosed with
16 borderline intellectual functioning (BIF). Pace is noted to be slower than average
17 (Tr. 268, 270, 337). The record shows the Administration has described Faulkner
18 as delayed in answering questions and "had difficulty answering questions" (Tr.
19 164-65). In addition, she suffers occasional migraines and eczema, the latter
limiting her ability to perform certain job functions. She is noted to be "quite

1 childlike in her mannerisms” and “developmental delay features are evident” (Tr.
2 74, 189, 260, 266, 321, 349-54).

3 The ALJ found at step two that Faulkner suffers from cerebral palsy and
4 borderline intellectual functioning.

5 Symptoms of cerebral palsy include difficulty walking, such as a wide gait.
6 People with CP may also have intellectual disabilities. *See e.g.*,
7 www.mayoclinic.org/. On this record the Court is unable to clearly determine
8 whether the impairment of cerebral palsy with BIF meets or medically equals
9 Listing 11.07. On remand a medical expert should be consulted to help make this
10 determination.

11 *B. Weighing treating doctor’s opinion*

12 Faulkner alleges the ALJ’s reasons for rejecting the opinion of treating
13 doctor, Wendy Owens, M.D., are inadequate. ECF No. 14 at 10-13. Dr. Owens
14 opined Faulkner’s generalized weakness and cognitive impairment precluded
15 gainful employment (Tr. 328, 331, 334, 337).

16 The Commissioner responds that the ALJ gave specific, legitimate reasons
17 supported by substantial evidence for discrediting Dr. Owens’ opinion.

18 Dr. Owens opined Faulkner was unable to work due to a combination of
19 physical and mental impairments. In April 2011 she opined generalized weakness
and cognitive impairments preclude employment. Dr. Owens noted Faulkner had

1 been unable to pass the driving exam and has problems focusing and following
2 directions (Tr. 328-29). In February 2012 she opined Faulkner is unable to work
3 and Owens believed the condition would worsen. She opined standing and walking
4 were both limited to two hours a day (Tr. 334). In May 2012 she opined
5 neurological exam findings support the infantile CP diagnosis, with weakness in
6 gross and fine motor strength of the upper and lower extremities (Tr. 337).

7 The ALJ rejected Dr. Owens' opinions because (1) her treatment records do
8 not contain clinical testing or studies to substantiate assessed limitations; (2) she
9 only saw Faulkner on a semi-annual basis; (3) her opinions are inconsistent with
10 those of Drs. Hamilton, Garrison and Haynes, and (4) her assessed limitations are
11 inconsistent with Faulkner's daily activities (Tr. 39).

12 The ALJ erred by stating:

13 "... the undersigned notes that no treating or examining physician has ever
14 identified any significant functional loss with respect to claimant's cerebral palsy,
15 which significantly limits her ability to perform basic work activities." (Tr. 36).

16 As noted, treating doctor Owens opined generalized weakness from cerebral
17 palsy and cognitive impairments preclude employment.

18 The ALJ further erred by relying on semi-annual examinations as a
19 legitimate reason to reject the treating doctor's opinion. It is far from clear that
there is any effective treatment for either cerebral palsy or BIF. The ALJ is correct,

1 however, that Dr. Owens' records do not contain clinical testing or studies to
2 substantiate assessed limitations, and this is a legitimate reason to give the opinion
3 less weight.

4 The ALJ's next cited reason is that Owens' opinions are inconsistent with
5 those of Drs. Hamilton, Garrison and Haynes (Tr. 39). The Court notes the ALJ is
6 required to give more credit to the opinions of treating than examining and
7 reviewing doctors. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The Court
8 notes the ability to perform independent daily living activities on this record is not
9 a legitimate reason to reject Dr. Owens' opinions. Faulkner's ability to bathe and
10 play computer games, for example, are consistent with Dr. Owens' opinions.
11 Finally, Dr. Haynes' testimony that Faulkner's condition is "borderline" for
12 meeting Listing 11.07 does not directly refute Dr. Owens' opinions, as the ALJ
13 suggests (Tr. 39). The ALJ's reasons for rejecting Dr. Owens' opinions are not
14 supported by substantial evidence and contain legal error. Remand for further
15 proceedings is required.

15 *C. Credibility and lay testimony*

16 Faulkner alleges the ALJ erred when she assessed credibility and failed to
17 discuss her spouse's testimony. ECF No. 14 at 13-18.

18 *Credibility.* The ALJ found Faulkner less than fully credible because her
19 daily activities were inconsistent with the degree of limitation claimed, medical

1 evidence was inconsistent with claimed limitations, she sought little treatment for
2 both physical and mental problems, and when she received treatment it was
3 generally conservative and objective findings were consistently minimal (Tr. 37-
4 38).

5 Faulkner asserts because the ALJ stated at the hearing she was impressed
6 with the “very credible and sincere person” before her, it was error to then find her
7 incredible in the written decision. ECF No. 14 at 14, referring to Tr. 77.

8 On remand the ALJ should reevaluate credibility.

9 *Spouse’s testimony.* Faulkner alleges the ALJ erred when she failed to
10 provide any reasons for rejecting the opinion of her spouse, Brent Faulkner. ECF
11 No. 14 at 18, Tr. 190-97. She is correct that the ALJ did not discuss his testimony.

12 Lay testimony as to a claimant’s symptoms or how an impairment affects the
13 claimant’s ability to work is competent evidence that the ALJ must take into
14 account. *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) (citations omitted).

15 When an ALJ discounts the testimony of lay witnesses, “he [or she] must
16 give reasons that are germane to each witness.” *Valentine v. Comm’r of Soc. Sec.*
17 *Admin.*, 574 F.3d 685, 694 (9th Cir. 2009), citing *Dodrill v. Shalala*, 12 F.3d 915,
18 919 (9th Cir. 1993)). It can be rejected if it conflicts with medical evidence. *Lewis*
19 *v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001).

Here, the ALJ failed to mention the lay testimony and so did not give

1 reasons for rejecting it. On remand the ALJ is directed to consider and weigh this
2 evidence.

3 *D. Step five*

4 Last, Faulkner alleges the ALJ erred at step five by relying on the VE's
5 response to an incomplete hypothetical. ECF No. 14 at 19-20. This too should be
6 addressed on remand after reassessing Faulkner's RFC.

7 **CONCLUSION**

8 After review the Court finds the ALJ's decision is not supported by
9 substantial evidence and contains legal error.

10 **IT IS ORDERED:**

11 1. Plaintiff's motion for summary judgment, **ECF No. 14**, is granted. The
12 case is reversed and remanded pursuant to sentence four for further administrative
13 proceedings.

14 2. Defendant's motion for summary judgment, ECF No. 19, is denied.

15 The District Executive is directed to file this Order, provide copies to
16 counsel, enter judgment in favor of plaintiff, and **CLOSE** the file.

17 DATED this 5th day of January, 2015.

18 *s/James P. Hutton*

19 JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE