

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

Nov 30, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NICOLE L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-03211-JTR

ORDER GRANTING, IN PART,
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
GRANTING DEFENDANT’S
MOTION FOR REMAND

BEFORE THE COURT are Plaintiff’s Motion for Summary Judgment, ECF Nos. 14, and Defendant’s Motion for Remand, ECF No. 19. Attorney D. James Tree represents Nicole L. (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff’s Motion for Summary Judgment; **GRANTS** Defendant’s Motion for Remand; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. §§ 405(g), § 1383(c).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and

1 Disability Insurance Benefits (DIB) on March 9, 2011, Tr. 257, alleging disability
2 since August 15, 2005, Tr. 219, 228, due to attention deficit disorder, depression,
3 borderline personality disorder, anxiety, panic attacks, a back injury, and post-
4 traumatic stress disorder. Tr. 261. The applications were denied initially and upon
5 reconsideration. Tr. 139-46, 151-68. Administrative Law Judge (ALJ) M.J.
6 Adams held a hearing on October 8, 2013 and heard testimony from Plaintiff and
7 vocational expert Merrill Cohen. Tr. 42-82. At this hearing, Plaintiff amended her
8 onset date to February 23, 2011. Tr. 46. The ALJ issued an unfavorable decision
9 on January 21, 2014. Tr. 20-37. The Appeals Council denied review on March 30,
10 2015. Tr. 1-5. The ALJ's January 21, 2014 decision became the final decision of
11 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C.
12 §§ 405(g), 1383(c). Plaintiff filed an action for judicial review in this district on
13 May 28, 2015. Tr. 657-59. This Court remanded the case to the Commissioner for
14 additional proceedings. Tr. 667. The ALJ held a second hearing on February 28,
15 2017 and heard testimony from Plaintiff, witness Bijon Bowels, medical expert A.
16 Stephen Genest, M.D., F.I.C.S., and vocational expert Kimberly Mullinax. The
17 ALJ issued an unfavorable decision on August 17, 2017. Tr. 569-93. The Appeals
18 Council did not assume jurisdiction within the prescribed period so the ALJ's
19 August 17, 2017 decision became the final decision of the Commissioner. 20
20 C.F.R. §§ 404.984(a), 416.1484(a). Plaintiff initiated this action for judicial
21 review on December 15, 2017. ECF Nos. 1, 3.

22 **STATEMENT OF FACTS**

23 The facts of the case are set forth in the administrative hearing transcript, the
24 ALJ's decision, and the briefs of the parties. They are only briefly summarized
25 here.

26 Plaintiff was 37 years old at the amended date of onset. Tr. 219. She
27 completed her GED in 2000 and reported some nursing training completed in
28 2000. Tr. 262. She reported that her work history includes the jobs of adult care

1 provider, bus driver's aid, nursing assistant, preschool teaching assistant, a
2 temporary worker, and cashier. Tr. 262, 285. She stopped working on February
3 23, 2011. Tr. 261.

4 On August 12, 2011, Dr. Kumar completed a psychological consultative
5 evaluation of Plaintiff and provided the following opinion based solely on
6 Plaintiff's Mental Status Examination performed that day:

7
8 She has no psychiatric impairment in her ability to perform simple and
9 repetitive tasks. She may have moderate difficulty with detailed and
10 complex tasks due to significant problems with memory and
11 concentration, which could be a combination of both a history of
12 [attention deficit disorder], as well as cognitive manifestations of
13 depression.

14 The claimant's ability to accept instructions from supervisors appears
15 mildly to moderately impaired due to a history of having problems with
16 authority figures, irritability, and a low threshold for work stress.
17 Similarly, her ability to interact with coworkers and the public is
18 moderately to severe[ly] impaired primarily due to her anxiety
19 spectrum issues.

20 The claimant's ability to perform work activities on a consistent basis
21 without special or additional instruction is also moderately impaired
22 due to the episodic nature of depression in which she would likely not
23 be able to have a very consistent attendance at work.

24 Similarly, I would expect her psychiatric conditions, primarily her
25 anxiety, to be disruptive in a normal workday or workweek.

26 The claimant's ability to deal with the usual stress encountered in the
27 workplace is also moderately to severely impaired due to a history of
28 very poor coping skills, being easily emotionally overwhelmed, and
having significant depression and anxiety comorbidities.

Tr. 354-60.

Plaintiff experienced her first seizure in October of 2011. Tr. 382, 403, 534.

1 On June 15, 2012, Plaintiff was evaluated by her treating provider K. Scott
2 Reinmuth, M.D. Tr. 865-69. He opined that Plaintiff was severely limited,
3 defined as “[u]nable to meet the demands of sedentary work” until she was seizure
4 free for six months and then limited to sedentary work for any period of time after
5 she was seizure free for six months. Tr. 867.

6 On March 5, 2013, Dr. Reinmuth completed a second opinion stating that
7 Plaintiff’s impairments, including epilepsy, and side effects from her medications
8 resulted in the need to lie down for an hour or so and that she would likely miss
9 work four or more days a month if she attempted a forty-hour work week. Tr. 408-
10 09. He stated that “she hasn’t worked since 2005, [and] couldn’t tolerate a 40 hour
11 week at this stage.” Tr. 409. Dr. Reinmuth stated that these limitations had been
12 present since June of 2005 based on Plaintiff’s statements. Id.

13 At the February 28, 2017 hearing, Dr. Genest testified that Plaintiff’s
14 seizures met listing 11.02A as of October of 2011. Tr. 624.

15 **STANDARD OF REVIEW**

16 The ALJ is responsible for determining credibility, resolving conflicts in
17 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
18 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,
19 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
20 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
21 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
22 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
23 being more than a mere scintilla, but less than a preponderance. Id. at 1098. Put
24 another way, substantial evidence is such relevant evidence as a reasonable mind
25 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
26 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
27 interpretation, the court may not substitute its judgment for that of the ALJ.
28 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative

1 findings, or if conflicting evidence supports a finding of either disability or non-
2 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
3 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
4 evidence will be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
6 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

7 **SEQUENTIAL EVALUATION PROCESS**

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
10 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
11 through four, the burden of proof rests upon the claimant to establish a prima facie
12 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
13 burden is met once the claimant establishes that physical or mental impairments
14 prevent her from engaging in her previous occupations. 20 C.F.R. §§
15 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,
16 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
17 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
18 which the claimant can perform exist in the national economy. *Batson v. Comm'r*
19 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
20 cannot make an adjustment to other work in the national economy, a finding of
21 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

22 **ADMINISTRATIVE DECISION**

23 On August 17, 2017, the ALJ issued a decision finding Plaintiff was not
24 disabled as defined in the Social Security Act.

25 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
26 activity since February 23, 2011, the amended date of onset. Tr. 572.

27 At step two, the ALJ determined Plaintiff had the following severe
28 impairments: seizure disorder; back condition; depressive disorders; anxiety

1 disorder; and personality disorder. Tr. 572.

2 At step three, the ALJ found Plaintiff did not have an impairment or
3 combination of impairments that met or medically equaled the severity of one of
4 the listed impairments. Tr. 573.

5 At step four, the ALJ assessed Plaintiff's residual function capacity and
6 determined she could perform a range of light work with the following limitations:

7
8 she is limited to frequent overhead reaching with the right upper
9 extremity, but otherwise has no reaching or other manipulative
10 limitations. She can stand, walk, or sit for at least 2 hours at a time for
11 a total of 6 hours in an 8-hour day; in other words, in an 8-hour
12 workday, she has the ability walk for a total 6 hours, stand for total of
13 6 hours, and sit for a total of 6 hours. She can frequently climb ramps
14 and stairs; can occasionally climb ladders, ropes, or scaffolds; and can
15 occasionally stoop, kneel, crouch, and crawl. She should never work at
unprotected heights or around moving mechanical parts that could
expose her to injury. She cannot operate motor vehicles.

16 She can understand, remember, and carry out simple instructions. She
17 can make decisions commensurate with the functions of unskilled
18 work. That is, work that needs little or no judgment to do simple duties
19 and that a person can learn to do in 30 days. Little specific vocational
20 preparation or judgment is needed. She can respond to supervision but
21 should not be required to work in close coordination with coworkers
22 where teamwork is required. She can deal with occasional changes in
the work environment and can do work that requires no contact with
the general public.

23
24 Tr. 575-76. The ALJ identified Plaintiff's past relevant work as a bus monitor and
25 concluded that Plaintiff was not able to perform this past relevant work. Tr. 592.

26 At step five, the ALJ determined that, considering Plaintiff's age, education,
27 work experience and residual functional capacity, and based on the testimony of
28 the vocational expert, there were other jobs that exist in significant numbers in the

1 national economy Plaintiff could perform, including the jobs of housekeeping
2 cleaner, mail clerk, and hand packager. Tr. 592-93. The ALJ concluded Plaintiff
3 was not under a disability within the meaning of the Social Security Act at any
4 time from February 23, 2011, through the date of the ALJ's decision. Tr. 593.

5 **ISSUES**

6 The initial question presented was whether substantial evidence supported
7 the ALJ's decision denying benefits and, if so, whether that decision was based on
8 proper legal standards. Plaintiff argued that the ALJ erred by failing to properly
9 weigh the medical source opinions. ECF No. 14. Defendant conceded that the
10 ALJ's decision was not supported by substantial evidence and Plaintiff is entitled
11 to judgment. ECF No. 19 at 1-2. Therefore, the issue before the Court is whether
12 the case should be remanded for an immediate award of benefits or if the case
13 should be remanded for further proceedings.

14 **DISCUSSION¹**

15 Plaintiff alleged that the ALJ erred in the treatment of the opinions from A.
16 Stephen Genest, M.D., Karl Scott Reinmuth, M.D., Tushar Kumar, M.D., Mark
17 Duris, Ph.D., Dick Moen, MSW, William R. Drenguis, M.D., and the State agency
18 psychological consultants. ECF No. 14 at 14-20. Defendant concedes that the
19 ALJ erred in his treatment of the medical opinions and in the treatment of
20 Plaintiff's subjective statements and argued that the opinions of Dr. Genest and Dr.

21 _____
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 Reinmuth were in conflict and medical evidence needed further consideration.
2 ECF No. 19 at 4-13.

3 The decision whether to remand for further proceedings or reverse and
4 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
5 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
6 where “no useful purpose would be served by further administrative proceedings,
7 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
8 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
9 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
10 (9th Cir. 1990); see also *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
11 (noting that a district court may abuse its discretion not to remand for benefits
12 when all of these conditions are met). This policy is based on the “need to
13 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
14 outstanding issues that must be resolved before a determination can be made, and it
15 is not clear from the record that the ALJ would be required to find a claimant
16 disabled if all the evidence were properly evaluated, remand is appropriate. See
17 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
18 F.3d 1172, 1179-80 (9th Cir. 2000).

19 Here, the Court finds that Plaintiff is likely eligible for benefits, but that
20 there is an outstanding issue that must be resolved before a determination can be
21 made. The Court specifically finds that Plaintiff likely meets listing 11.02A as of
22 October 28, 2011, the onset of her epilepsy. See Tr. 382. However, because it is
23 unclear if Plaintiff is disabled between her alleged date of onset, February 23,
24 2011, and the onset of her epilepsy in October of 2011, the Court must remand for
25 additional proceedings.

26 In June of 2012, Dr. Reinmuth opined that Plaintiff was unable to meet the
27 demands of sedentary work, but his opinion was silent as to when this severe
28 limitation began. Tr. 865-69. However, the opinion is clearly based on Plaintiff’s

1 epilepsy because the opinion changed based on the period of time Plaintiff could
2 go without a seizure. Tr. 867. Therefore, this opinion provides no insight into her
3 functional ability prior to October of 2011.

4 Dr. Reinmuth's second opinion states that the opined limitations were
5 present since "about June of 2005, [Plaintiff] thinks," and stated that "she hasn't
6 worked since 2005 [and] couldn't tolerate a 40 hour week at this stage." Tr. 409.
7 This is inconsistent with Plaintiff's earnings records and her statements that she
8 worked until February 23, 2011. Tr. 241-42, 261. Therefore, this cannot establish
9 an onset prior to the October 2011 onset of epilepsy.

10 Dr. Kumar's August 12, 2011 opinion clearly reflected Plaintiff's
11 impairments as of the evaluation. While he stated he reviewed previous records,
12 Tr. 354, he qualified his opinion with "The following opinion is based solely on
13 the claimant's psychiatric Mental Status Examination." Tr. 359. Therefore, this
14 Court cannot extrapolate the opined limitations back six months to the alleged date
15 of onset.

16 While the evidence in this case likely establishes disability, it is remanded
17 for additional proceedings to establish the appropriate onset date. Upon remand,
18 the case is to be assigned to a new ALJ.

19 CONCLUSION

20 Accordingly, **IT IS ORDERED:**

- 21 1. Defendant's Motion for Remand, **ECF No. 19**, is **GRANTED**.
- 22 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
23 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
24 additional proceedings consistent with this Order.
- 25 3. Application for attorney fees may be filed by separate motion.

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1 The District Court Executive is directed to file this Order and provide a copy
2 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
3 and the file shall be **CLOSED**.

4 DATED November 30, 2018.



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6 JOHN T. RODGERS
7 UNITED STATES MAGISTRATE JUDGE
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