

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

Sep 27, 2019

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SAMANTHA JEAN S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-03120-RHW

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

Before the Court is Plaintiff’s Motion for Summary Judgment, **ECF No. 10**, and Defendant’s Motion for Remand. **ECF No. 16**. Plaintiff brings this action seeking judicial review pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3) of the Commissioner of Social Security’s final decision, which denied her application for Disabled Adult Child Benefits under Title II of the Social Security Act, 42 U.S.C. § 402(d), and her application for Supplemental Security Income under Title XVI of the Act, 42 U.S.C. §1381-1383F. *See* Administrative Record (AR) at 1297-1310.

ORDER GRANTING DEFENDANT’S MOTION FOR REMAND AND GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT IN PART ~ 1

1 The Commissioner concedes error on one issue and the parties agree that the
2 Administrative Law Judge’s (ALJ’s) decision is not supported by substantial
3 evidence with respect to this issue. ECF No. 10 at 2, No. 16 at 4-8. However, the
4 parties disagree on remedy—whether the Court should remand for further
5 proceedings or for an award of benefits. *Id.* After reviewing the administrative
6 record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for
7 Remand, **GRANTS** Plaintiff’s Motion for Summary Judgment **in part**, and
8 **REMANDS** the case for additional proceedings consistent with this order.

9 **I. Jurisdiction and Procedural History**

10 This case has a lengthy history. On January 26, 2009, Plaintiff filed an
11 application for Disabled Adult Child Benefits based on the earnings of her father,
12 Jimmy S., and an application for Supplemental Security Income. *See* AR 116, 340-
13 42, 343-49. In both applications, Plaintiff’s alleged onset date of disability was
14 January 1, 2008.¹ AR 340, 343. Plaintiff’s applications were initially denied on
15 August 10, 2009, *see* AR 190-96, 197-205, and on reconsideration on October 13,
16 2009. *See* AR 210-14, 215-19.

17 A hearing with ALJ R.J. Payne occurred on February 8, 2011. AR 22, 24. At
18 this hearing, the ALJ heard testimony from medical expert Reuben Beezy, M.D.

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¹ At a later hearing, Plaintiff clarified that she only seeks a closed period of disability for the period of January 1, 2008 to October 1, 2014. AR 1323, 1328.

1 AR 31-38. On May 12, 2011, ALJ Payne issued a decision concluding that
2 Plaintiff was not disabled as defined in the Act and was therefore ineligible for
3 benefits. AR 113-127. The Appeals Council denied Plaintiff's request for review,
4 *see* AR 133-35, and Plaintiff filed a complaint in this district challenging the denial
5 of benefits. AR 140-43; *see Samantha S. v. Astrue*, 2:12-CV-03091-RHW, ECF
6 No. 5 (E.D. Wash. 2012). Thereafter, Plaintiff advised the Commissioner that
7 significant portions of the recording of the hearing—particularly the testimony of
8 Dr. Beezy—were inaudible. AR 151, 184. In light of this, the parties filed a
9 stipulated motion for remand for further proceedings. AR 151-52. The court
10 granted the parties' stipulated motion and remanded the case for the ALJ to
11 conduct a de novo hearing and render a new decision. AR 147-150.

12 On May 16, 2013, ALJ Laura Valente held a second hearing. AR 59, 61. Dr.
13 Beezy submitted a letter and answered written interrogatories, but no medical
14 expert testified at the second hearing. AR 59-72, 1122, 1133-35. On August 30,
15 2013, ALJ Valente issued a decision again concluding that Plaintiff was not
16 disabled as defined in the Act and was therefore ineligible for benefits. AR 163-
17 175. Plaintiff requested review and on January 29, 2014, the Appeals Council
18 remanded the case back to the ALJ because Dr. Beezy did not testify at the new
19 hearing (nor did any other medical expert), and the ALJ also did not address Dr.
20 Beezy's opinion regarding Plaintiff's mental impairments. AR 184-85. The

1 Appeals Council remanded the case for the ALJ to conduct a de novo hearing and
2 issue a new decision. AR 185-86.

3 On July 8, 2014, ALJ Valente held a third hearing. AR 73, 75. On August
4 29, 2014, she issued a decision again concluding that Plaintiff was not disabled as
5 defined in the Act and was therefore ineligible for benefits. AR 1-16. Because the
6 district court had retained jurisdiction over the case, AR 148, Plaintiff moved to
7 reopen proceedings in this district. *See Samantha S. v. Astrue*, 2:12-CV-03091-
8 RHW, ECF No. 12 (E.D. Wash.). The Court granted Plaintiff's request to reopen
9 the case. *Id.*, ECF No. 16.

10 Plaintiff moved for summary judgment, arguing that the ALJ erred by: (1)
11 rejecting Dr. Beezy's revised opinion that she was incapable of full-time work; (2)
12 finding that Plaintiff's fibromyalgia and Weber-Christian disease were non-
13 medically determinable impairments at step two of the sequential evaluation
14 process; and (3) discounting Plaintiff's credibility on the bases of her activities of
15 daily living and drug-seeking behavior. *Id.*, ECF No. 25 at 17.

16 In February 2016, the Court issued a decision rejecting most of Plaintiff's
17 contentions but agreeing with one. *Id.*, ECF No. 37. The Court concluded that the
18 ALJ did not err in rejecting Dr. Beezy's revised opinion or in discounting
19 Plaintiff's credibility on the bases of her daily work activities and drug-seeking
20 behavior. *Id.* at 10-12, 17-22. The Court further concluded that the ALJ did not err

1 in determining that Weber-Christian disease was not a medically determinable
2 impairment. *Id.* at 14-16. The Court reasoned that the medical record did not
3 provide any objective evidence of Weber-Christian disease and that this alleged
4 diagnosis rested entirely on subjective information provided by Plaintiff. *Id.* at 16.

5 However, the Court agreed with Plaintiff that the ALJ erred in concluding
6 that fibromyalgia was not one of her medically determinable impairments. *Id.* at
7 13-14. The Court determined that remand was appropriate for the ALJ to accept
8 the condition of fibromyalgia as a medically determinable impairment, credit the
9 opinion of Plaintiff's rheumatologist (Chad Byrd, M.D.), recalculate Plaintiff's
10 residual functional capacity, and present the new residual functional capacity to a
11 vocational expert. *Id.* at 22-23. Accordingly, the Court granted Plaintiff's motion
12 for summary judgment in part, remanded the case to the Commissioner for
13 additional proceedings, and entered judgment in favor of Plaintiff. *Id.* at 23.

14 In March 2016, the Appeals Council remanded the case to ALJ Glenn G.
15 Meyers with instructions to conduct a new hearing and issue a new decision. AR
16 1427-29. On October 11, 2017, the ALJ held a fourth hearing. AR 1331, 1333. On
17 March 9, 2018, he issued a new decision. AR 1297-1310. Per the Court's
18 instructions, he credited Dr. Byrd's opinion and found that fibromyalgia was one
19 of Plaintiff's severe impairments. AR 1303. Nevertheless, the ALJ concluded that
20 Plaintiff was not disabled as defined in the Act and was therefore ineligible for

1 benefits. AR 1310. Plaintiff did not file written exceptions nor did the Appeals
2 Council opt to review the decision, so the ALJ's decision became administratively
3 final once the period for review expired. AR 1298; *see* 20 CFR § 416.1455; 20
4 CFR § 416.1468(a). On July 6, 2018, Plaintiff timely filed the present action
5 seeking judicial review of the Commissioner's final decision. ECF No. 1.
6 Accordingly, Plaintiff's claims are properly before the Court pursuant to 42 U.S.C.
7 § 1383(c)(3) and 42 U.S.C. § 405(g).

8 **II. Five-Step Sequential Evaluation Process**

9 The Social Security Act defines disability as the "inability to engage in any
10 substantial gainful activity by reason of any medically determinable physical or
11 mental impairment which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than twelve months." 42
13 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
14 under a disability only if the claimant's impairments are so severe that the claimant
15 is not only unable to do his or her previous work, but cannot, considering
16 claimant's age, education, and work experience, engage in any other substantial
17 gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a claimant is disabled within the meaning of the Social
20

1 Security Act. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Lounsbury v. Barnhart*,
2 468 F.3d 1111, 1114 (9th Cir. 2006).

3 Step one inquires whether the claimant is presently engaged in “substantial
4 gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b). Substantial gainful
5 activity is defined as significant physical or mental activities done or usually done
6 for profit. 20 C.F.R. §§ 404.1572, 416.972. If the claimant is engaged in substantial
7 activity, he or she is not entitled to disability benefits. 20 C.F.R. §§ 404.1571,
8 416.920(b). If not, the ALJ proceeds to step two.

9 Step two asks whether the claimant has a severe impairment, or combination
10 of impairments, that significantly limits the claimant’s physical or mental ability to
11 do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). A severe
12 impairment is one that has lasted or is expected to last for at least twelve months,
13 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09,
14 416.908-09. If the claimant does not have a severe impairment, or combination of
15 impairments, the disability claim is denied and no further evaluative steps are
16 required. Otherwise, the evaluation proceeds to the third step.

17 Step three involves a determination of whether one of the claimant’s severe
18 impairments “meets or equals” one of the listed impairments acknowledged by the
19 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
20 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;

1 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
2 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
3 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the
4 fourth step.

5 Step four examines whether the claimant’s residual functional capacity
6 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f),
7 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is
8 not entitled to disability benefits and the inquiry ends. *Id.*

9 Step five shifts the burden to the Commissioner to prove that the claimant is
10 able to perform other work in the national economy, taking into account the
11 claimant’s age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
12 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
13 burden, the Commissioner must establish that (1) the claimant is capable of
14 performing other work; and (2) such work exists in “significant numbers in the
15 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
16 676 F.3d 1203, 1206 (9th Cir. 2012).

17 III. Standard of Review

18 A district court’s review of a final decision of the Commissioner is governed
19 by 42 U.S.C. § 1383(c)(3) and 42 U.S.C. § 405(g). The scope of review under
20 these sections is limited, and the Commissioner’s decision will be disturbed “only

1 if it is not supported by substantial evidence or is based on legal error.” *Hill v.*
2 *Astrue*, 698 F.3d 1144, 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial
3 evidence means “more than a mere scintilla but less than a preponderance; it is
4 such relevant evidence as a reasonable mind might accept as adequate to support a
5 conclusion.” *Id.* at 1159.

6 In reviewing a denial of benefits, a district court may not substitute its
7 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
8 1992). When the ALJ presents a reasonable interpretation that is supported by the
9 evidence, it is not the role of the courts to second-guess it. *Rollins v. Massanari*,
10 261 F.3d 853, 857 (9th Cir. 2001). Even if the evidence in the record is susceptible
11 to more than one rational interpretation, if inferences reasonably drawn from the
12 record support the ALJ’s decision, then the court must uphold that decision.
13 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Thomas v.*
14 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

15 **IV. Statement of Facts**

16 The facts of the case are set forth in detail in the transcript of proceedings
17 and only briefly summarized here. Plaintiff was 18 years old on the alleged date of
18 onset, which the regulations define as a younger person. AR 340, 1334-35; *see* 20
19 C.F.R. §§ 404.1563(c), 416.963(c). She attended school through the 10th grade and
20 can read, write, and communicate in English. AR 55-56, 375, 383, 1355. She has

1 past relevant work as a fast food worker, a hostess, a fast food cook, and a
2 waitress. AR 53-54, 377, 398, 1309.

3 **V. The ALJ's Findings**

4 The ALJ determined that Plaintiff was not under a disability within the
5 meaning of the Act at any time from January 1, 2008 through October 1, 2014 (the
6 requested closed period). AR 1310.

7 **At step one**, the ALJ found that Plaintiff had not engaged in substantial
8 gainful activity during the requested closed period (citing 20 C.F.R. §§ 404.1571 *et*
9 *seq.*, 416.971 *et seq.*). AR 1303.

10 **At step two**, the ALJ found that during the requested closed period, Plaintiff
11 had the following severe impairments: fibromyalgia, asthma, and chronic pain
12 syndrome (citing 20 C.F.R. §§ 404.1520(c), 416.920(c)). AR 1303.

13 **At step three**, the ALJ found that during the requested closed period,
14 Plaintiff did not have an impairment or combination of impairments that met or
15 medically equaled the severity of one of the listed impairments in 20 C.F.R. § 404,
16 Subpt. P, Appendix 1 (citing 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
17 416.920(d), 416.925, 416.926). AR 1304.

18 **At step four**, the ALJ found that during the requested closed period,
19 Plaintiff had the residual functional capacity to perform sedentary work as defined
20 in 20 C.F.R. §§ 404.1567(a), 416.967(a), including the abilities to occasionally

1 conditions of Weber-Christian disease and panniculitis; (4) the ALJ improperly
2 evaluated and weighed the medical opinion evidence; and (5) the ALJ improperly
3 discredited her subjective pain complaint testimony. ECF No. 10 at 4-21.

4 **VII. Discussion**

5 **A. Substantial Evidence does not Support the ALJ’s Step Five Finding that** 6 **Other Jobs Existed in Significant Numbers in the National Economy** 7 **that Plaintiff Could Perform**

8 **1. The parties agree error occurred**

9 Both parties agree that substantial evidence does not support the ALJ’s step
10 five finding that other jobs existed in significant numbers in the national economy
11 that Plaintiff could perform. ECF No. 10 at 5-8, No. 16 at 4-8. The parties both
12 essentially agree to the following: At step five, the ALJ found that Plaintiff—who
13 was limited to sedentary, unskilled work—could perform three different jobs that
14 existed in significant numbers in the national economy: a document preparer, a
15 call-out operator, and a food and beverage order clerk. AR 1310. In making this
16 finding, the ALJ relied on the testimony of vocational expert Casey Kilduff. *See*
17 AR 1310, 1358-1373, 1554-56.

18 However, the ALJ’s reliance on each of these three jobs was error. With
19 respect to the document preparer job, the ALJ stopped counsel’s cross-examination
20 of Ms. Kilduff about aspects of this position and stated that he would “withdraw
the document preparer position” from consideration. AR 1371; *see also* AR 1368.

1 However, the ALJ then relied on this position in the written decision as a job
2 Plaintiff could perform. *See* AR 1310.

3 With respect to the call-out operator job, Ms. Kilduff testified that this
4 position was an umbrella term for four separate occupations, which totaled 13,500
5 jobs nationally. AR 1372. However, the parties agree that three of these four
6 occupations had a Specific Vocational Preparation (SVP) rating² that precluded
7 Plaintiff from actually performing them. ECF No. 10 at 7, No. 16 at 5-6.³ After
8 excluding these three occupations, it is unclear how many jobs were available
9 nationally in the one remaining occupation that Plaintiff could perform. However,
10 the parties agree that the ALJ erred in finding that it was a “significant” number.

11 *Id.*

12 The same error occurred with respect to the food and beverage order clerk
13 job. Ms. Kilduff testified that this position was an umbrella term for eleven
14 separate occupations, which totaled 14,700⁴ jobs nationally. AR 1361, 1372.

16 ² The SVP rating measures how long it takes a typical worker to learn how to do his or
17 her job at an average performance level. There are nine SVP levels; the higher the SVP number
the more training needed to learn the job. Two of these jobs had an SVP 3 rating and the third
had an SVP 5 rating, which are considered semi-skilled and skilled positions.

18 ³ Both parties cite to “Plaintiff’s Exhibit A” for the SVP ratings of the various DOT
19 occupations, and Plaintiff cites to this alleged document for the number of these jobs available
nationally. ECF No. 10 at 7-8, No. 16 at 5-6. “Plaintiff’s Exhibit A” is not attached to any of the
parties’ briefs, nor does it appear to be contained anywhere in the administrative record. Because
the Court does not have access to this document, the Court accepts the veracity of only those
facts to which both parties agree.

20 ⁴ The ALJ’s decision incorrectly stated that 147,000 of these jobs existed nationally. AR
1310.

1 However, the parties agree that Plaintiff could not actually perform either nine or
2 ten⁵ of these eleven occupations. ECF No. 10 at 7-8, No. 16 at 6. After excluding
3 these, it is unclear how many jobs were available nationally in the remaining
4 occupation(s) that Plaintiff could perform. However, the parties agree that the ALJ
5 erred in finding that it was a “significant” number. *Id.*

6 **2. Remedy**

7 While the parties agree that substantial evidence does not support the ALJ’s
8 step five finding, they disagree on remedy—whether the Court should remand for
9 an immediate award of benefits or for further proceedings. *Id.*

10 Errors in the ALJ’s decision do not automatically entitle a claimant to
11 disability benefits. *Strauss v. Comm’r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir.
12 2011). The Court can either remand the case for additional evidence and findings
13 or remand for an award of benefits. *Smolen*, 80 F.3d at 1292. Remand for further
14 administrative proceedings is appropriate when there are outstanding issues that
15 must be resolved before a disability determination can be made, or when there is a
16 need to resolve ambiguities in or otherwise enhance the record. *See Treichler v.*
17 *Comm’r of Soc. Sec.*, 775 F.3d 1090, 1100-01 (9th Cir. 2014); *Taylor v. Comm’r of*
18 *Soc. Sec. Admin.*, 659 F.3d 1228, 1235 (9th Cir. 2011); *Harman v. Apfel*, 211 F.3d

19 ⁵ Plaintiff states that she could not perform nine of these jobs (two light jobs, plus seven
20 with a high SVP rating), ECF No. 10 at 7-8, while the Commissioner states that she could not
perform ten of them. ECF No. 16 at 6. It is unclear which is correct, given that the Court does not
have access to “Plaintiff’s Exhibit A.”

1 1172, 1178 (9th Cir. 2000). Conversely, remand for an immediate award of
2 benefits is appropriate where the record has been developed fully and further
3 administrative proceedings would serve no useful purpose. *Benecke v. Barnhart*,
4 379 F.3d 587 (9th Cir. 2004).

5 In this case, central issues with respect to the vocational evidence are
6 unresolved and the Court finds that further proceedings are necessary for a proper
7 determination to be made. Importantly, the record does not identify how many call-
8 out operator and food and beverage order clerk jobs remained in the national
9 economy after excluding the occupations with SVP ratings that Plaintiff could not
10 actually perform.⁶

11 Moreover, there is no evidence that the three jobs discussed in the ALJ's
12 step five analysis—a document preparer, a call-out operator, and a food and
13 beverage order clerk—are the *only* jobs in the national economy that someone with
14 Plaintiff's residual functional capacity could perform. In fact, at the hearing, Ms.
15 Kilduff testified at length about another job—a “parimutel ticket checker,” who
16 verifies the accuracy and validity of attendees' tickets at events. AR 1371. Ms.
17 Kilduff testified that this was a sedentary job, that someone with Plaintiff's
18 limitations could perform it, and that 34,000 of these positions existed in the

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20 ⁶ Plaintiff states that this information is contained in “Plaintiff's Exhibit A,” but again, Plaintiff fails to provide this document.

1 national economy. AR 1370. After Ms. Kilduff described this job, the ALJ then
2 told Plaintiff's counsel that he would withdraw the document preparer position
3 from consideration. AR 1371. It is unclear why the ALJ never ultimately
4 considered the parimutel ticket checker position in his step five analysis.

5 Because the record has not been fully developed and there is a need to
6 resolve ambiguities, take additional evidence, and re-evaluate step five of the
7 sequential evaluation process, remand for further proceedings is appropriate. *See*
8 *Treichler*, 775 F.3d at 1100-01. As such, Plaintiff's request for remand for an
9 immediate award of benefits is denied. Upon remand, the Commissioner should
10 obtain supplemental vocational expert evidence to clarify the effect of the assessed
11 limitations on Plaintiff's ability to perform other work in the national economy,
12 including the number of jobs available. Once this evidence is obtained, the
13 Commissioner should re-evaluate step five of the sequential evaluation process.

14 **B. The ALJ's Residual Functional Capacity Finding does not**
15 **Unambiguously Compel Disability**

16 Plaintiff argues that her residual functional capacity—specifically, the
17 finding that she would miss 10 days of work per year and be off task eight percent
18 of the time—compels a finding of disability. ECF No. 10 at 4-5. She argues that if
19 someone is off task eight percent of the time during his or her probationary period,
20 he or she would likely be terminated. *Id.* She also argues that if someone missed
work 10 times per year, then statistically he or she would likely miss work at least

1 once during his or her probationary period and would also likely be terminated for
2 that reason. *Id.*

3 Nevertheless, Ms. Kilduff testified that someone who missed work 10 times
4 per year and was off task 8 percent of the time could still gainfully perform the
5 jobs of a document preparer, call-out operator, and food and beverage order clerk.
6 AR 1360. Ms. Kilduff did testify that, generally, if someone missed work
7 consistently or was not productive during the probationary period, then that person
8 would likely be terminated. AR 1362-63. She further testified that generally “there
9 should not be any absences” in the first 90 days of employment, although
10 “[c]ertainly there may be some employers out there that would accommodate for
11 that.” AR 1363. However, Ms. Kilduff never opined that this would in fact happen
12 to Plaintiff, nor did she ever change her opinion that Plaintiff could still maintain
13 these three jobs in spite of her attendance and productivity limitations. AR 1358-
14 1373. Plaintiff’s contention that she would necessarily be terminated is speculative
15 and not supported by Ms. Kilduff’s testimony. Accordingly, the residual functional
16 capacity finding does not unambiguously compel disability.

17 However, given that the Court is remanding this matter for the
18 Commissioner to obtain supplemental vocational expert evidence and re-evaluate
19 step five of the sequential evaluation process, the ALJ is encouraged to inquire
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1 what impact, if any, Plaintiff's attendance and productivity limitations would have
2 on her ability to successfully sustain employment through a probationary period.

3
4 **C. The ALJ's Evaluation of Weber-Christian Disease and Panniculitis**

5 Plaintiff argues the ALJ improperly evaluated her conditions of Weber-
6 Christian disease and panniculitis. ECF No. 10 at 8-13. She raises three different
7 arguments: (1) that Weber-Christian disease and panniculitis are actually the same
8 condition, and the ALJ erred by differentiating the two; (2) that the ALJ erred in
9 finding that her panniculitis was non-severe; and (3) that the ALJ erred by failing
10 to evaluate her panniculitis under Listing 14.06. *Id.*

11 **1. Weber-Christian disease and panniculitis**

12 Plaintiff first argues that Weber-Christian disease and panniculitis are
13 actually the same condition, and that the ALJ erred in finding that she had
14 panniculitis but not Weber-Christian disease. *Id.* at 9-10.

15 This argument fails for several reasons. First, she cites no evidence in the
16 record that supports her claim that the ALJ should have treated Weber-Christian
17 disease and panniculitis identically. *Id.* She cites several internet sources (which
18 are not in the record), a biopsy report, and a chart note from Dr. Marvin Scotvold
19 that documents a physical examination and treatment plan. *Id.* (*citing* AR 1862,

1 1870). The biopsy report and chart note do not support Plaintiff's contention. *See*
2 AR 1862, 1870.

3 Moreover, this Court previously upheld the ALJ's conclusion that Plaintiff
4 did not have Weber-Christian disease. *See Samantha S. v. Astrue*, 2:12-CV-03091-
5 RHW, ECF No. 37 at 14-16 (E.D. Wash.). In doing so, the Court noted that
6 Plaintiff also had panniculitis, but that it was found to be non-severe. *Id.* at 15 n.2.
7 Because the Court (and the parties) treated these conditions as separate in the prior
8 appeal, the Court declines to revisit these determinations now. *See Richardson v.*
9 *United States*, 841 F.2d 993, 996 (9th Cir. 1988).

10 **2. ALJ's finding that Plaintiff's panniculitis was non-severe**

11 Plaintiff also argues the ALJ erred in finding that her panniculitis condition
12 was not severe.⁷ ECF No. 10 at 10-12.

13 At step two in the sequential evaluation, the ALJ must determine whether a
14 claimant has a medically severe impairment or combination of impairments. 20
15 C.F.R. § 416.920(a)(4)(ii). First, the claimant must establish that he or she has a
16 medically determinable impairment. 20 C.F.R. § 416.921. The impairment must be
17 established by objective medical evidence—a claimant's statements regarding his
18 or her symptoms are insufficient. 20 C.F.R. § 416.921. A diagnosis itself does not

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20 ⁷ Because the Court only noted in its last decision that Plaintiff's panniculitis was found
to be non-severe and did not substantively analyze the issue, the law of the case doctrine does not
control this issue. *See Richardson*, 841 F.2d at 996.

1 equate to a finding of severity. *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th
2 Cir. 2001). To be severe, an impairment must significantly limit a claimant's
3 ability to perform basic work activities. 20 C.F.R. § 416.922; *Edlund*, 253 F.3d at
4 1159.

5 In finding that Plaintiff's panniculitis was not severe, the ALJ noted that this
6 skin condition only appeared sporadically throughout the closed period at issue
7 with transient lesions, and that these resolved with treatment. AR 1303. For
8 example, during emergency room visits in November and December 2008,
9 Plaintiff had "small faintly pink spots on her legs," which appeared to be "healing
10 well." AR 751. Although she complained of pain over these areas, the examination
11 of her legs was otherwise "quite benign." AR 751. In January 2009 she had "[m]ild
12 discoloration" and hyperpigmentation in her legs, but no other problems. AR 529.
13 In August 2009 she developed a rash consistent with panniculitis, *see* AR 1028, but
14 by her appointment in November 2009 the rash had gone away, she had no
15 abscesses, and she had "[n]o evidence of a panniculitis at [that] point." AR 1126.
16 Examinations in September 2010, January 2011, March 2011, June 2011, and
17 September 2011 revealed no skin lesions, no rashes, no abscess formation, and,
18 importantly, "no active panniculitis." *See* AR 920, 1683, 1693, 1699, 1720.

19 Plaintiff argues that her symptoms were severe. However, many of the
20 records she cites are grounded in her own subjective symptom reports or

1 conditions other than panniculitis. For example, she notes an emergency room visit
2 where she sought narcotics due to painful leg lesions, ECF No. 10 at 10 (*citing* AR
3 514), but the doctor noted only “some lesion slightly elevated . . . without redness.”
4 AR 514. She notes a number of other emergency room visits, but these were due to
5 a number of other conditions including MRSA, “bilateral knee pain,” and a kidney
6 mass. ECF No. 10 at 10-11; *see* AR 723, 846, 1142.

7 In sum, although Plaintiff offers a rational, alternative interpretation of the
8 record, the Court concludes that the ALJ’s interpretation of the record was also
9 rational and, therefore, must be upheld. *See Crawford v. Berryhill*, 745 F. App’x
10 751, 753 (9th Cir. 2018) (rejecting objections to the ALJ’s findings because they
11 “amount[ed] to advocating for alternatives to the ALJ’s rational interpretation of
12 the record and therefore d[id] not demonstrate error”).

13 **3. ALJ not evaluating panniculitis under Listing 14.06**

14 Finally, Plaintiff argues that the ALJ erred by failing to analyze her
15 panniculitis under Listing 14.06 (undifferentiated and mixed connective tissue
16 disease). ECF No. 10 at 12-13. However, Plaintiff, who was represented by
17 counsel, did not allege or argue at any point to the ALJ that her panniculitis
18 symptoms should have met this listing.⁸ *See* 1331-1373. Claimants have the burden

19 ⁸ The Commissioner argues that Plaintiff cannot meet the criteria for this listing because
20 she cannot show any “clinical features and serologic (blood test) findings, such as rheumatoid
factor or antinuclear antibody (consistent with an autoimmune disorder).” ECF No. 16 at 11. The
Court need not reach this issue.

1 of proving that an impairment meets or equals a listing. *Burch v. Barnhart*, 400
2 F.3d 676, 683 (9th Cir. 2005). Importantly, an ALJ is not required to discuss the
3 combined effects of a claimant’s impairments or compare them to any listing in an
4 equivalency determination unless the claimant presents such an argument and
5 evidence in an effort to establish that a specific listing has been met. *See Burch*,
6 400 F.3d at 683. Because Plaintiff did not present any such argument to the ALJ,
7 either at the hearing or in briefing, the ALJ cannot be faulted for not analyzing this
8 particular listing. *See Lester L. v. Comm’r of Soc. Sec.*, 1:17-cv-03136-RHW, ECF
9 No. 28 at 4-5 (E.D. Wash. 2017).

10 **D. The ALJ did not Err in Weighing the Medical Opinion Evidence**

11 Plaintiff argues that the ALJ erred in evaluating the medical opinion
12 evidence. ECF No. 10 at 13-19. Specifically, she argues the ALJ erred in
13 weighing the medical opinions from five providers: (1) treating physician T. Kent
14 Vye, D.O.; (2) treating physician Billy Nordyke, D.O.; (3) non-examining expert
15 witness Reuben Beezy, M.D.; (4) non-examining physician Howard Platter, M.D.;
16 and (5) treating physician Clark Kwok, M.D. *Id.*

17 **1. Legal standards**

18 Title II’s and XVI’s implementing regulations distinguish among the
19 opinions of three types of physicians: (1) those who treat the claimant (treating
20 physicians); (2) those who examine but do not treat the claimant (examining

1 physicians); and (3) those who neither examine nor treat the claimant but who
2 review the claimant’s file (non-examining physicians). *Holohan v. Massanari*, 246
3 F.3d 1195, 1201-02 (9th Cir. 2001); *see* 20 C.F.R. § 416.927(c)(1)-(2). Generally,
4 a treating physician’s opinion carries more weight than an examining physician’s,
5 and an examining physician’s opinion carries more weight than a non-examining
6 physician’s. *Holohan*, 246 F.3d at 1202.

7 If a treating or examining doctor’s opinion is contradicted by another
8 doctor’s opinion—as is the case here⁹—an ALJ may only reject it by providing
9 “specific and legitimate reasons that are supported by substantial evidence.”
10 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). An ALJ satisfies the
11 “specific and legitimate” standard by “setting out a detailed and thorough summary
12 of the facts and conflicting clinical evidence, stating his [or her] interpretation
13 thereof, and making findings.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.
14 2014). In contrast, an ALJ fails to satisfy the standard when he or she “rejects a
15 medical opinion or assigns it little weight while doing nothing more than ignoring
16 it, asserting without explanation that another medical opinion is more persuasive,
17 or criticizing it with boilerplate language that fails to offer a substantive basis for
18 his [or her] conclusion.” *Id.* at 1012-13.

19 _____
20 ⁹ Plaintiff argues that Dr. Vye’s and Dr. Nordyke’s opinions were uncontradicted and
therefore “clear and convincing reasons were required” to not give them controlling weight. ECF
No. 10 at 15-16. This is incorrect—their opinions were contradicted by Dr. Howard Platter. AR
1308.

1 **2. Treating physician T. Kent Vye, D.O.**

2 Dr. Vye opined that Plaintiff “can work light duty no heavylifting over 20
3 lbs 30 hours per week.” AR 1221. The ALJ discounted Dr. Vye’s opinion to the
4 extent he limited Plaintiff to 30 hours per week, reasoning that Dr. Vye did not
5 explain any basis for this conclusion. This was proper. *Thomas*, 278 F.3d at 957
6 (ALJs may discount opinions that are conclusory, unexplained, or inadequately
7 supported by clinical findings); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d
8 1190, 1195 (9th Cir. 2004); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
9 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992); *see* 20 C.F.R. §
10 404.1527(d)(3) (“The better an explanation a source provides for an opinion, the
11 more weight we will give that opinion.”).

12 Citing *Garrison v. Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014) and *Trevizo v.*
13 *Berryhill*, 871 F.3d 664, 677 n.4 (9th Cir. 2017), Plaintiff argues that the Ninth
14 Circuit has abrogated the long-standing principle that ALJs may discount medical
15 opinions that are conclusory, unexplained, or inadequately supported by clinical
16 findings. ECF No. 10 at 14-15. Neither case did so. Plaintiff mentions in passing
17 that Dr. Vye’s unexplained opinion is based on his “significant experience [with
18 her] and supported by numerous records,” *Id.* at 14 (quoting *Garrison*, 759 F.3d at
19 1013), but fails to explain further or cite any medical records that support this

1 proposition. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2
2 (9th Cir. 2008) (party’s failure to argue with specificity results in waiver of issue).

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5 **3. Treating physician Billy Nordyke, D.O.**

6 In June 2009, Dr. Nordyke submitted forms to the state agency opining on
7 Plaintiff’s limitations. AR 776-77. He opined that Plaintiff’s pain limited her to
8 working “0 hrs (unable to participate).” AR 776. However, he also checked the box
9 indicating that Plaintiff could perform sedentary work, which was the most
10 restrictive option available. AR 776. The form then asked, “How long will the
11 person’s condition likely limit the ability to work?” AR 777. Dr. Nordyke
12 responded, “6 months.” AR 777.

13 The ALJ discounted Dr. Nordyke’s opinion for two reasons. AR 1308. The
14 ALJ reasoned that it was internally inconsistent—*i.e.*, Dr. Nordyke opined Plaintiff
15 could not work, but then checked the box limiting her to sedentary work. AR 1308.
16 The parties dispute whether this was actually inconsistent. ECF No. 10 at 16, No.
17 16 at 13-14. However, the Court need not resolve this issue because the ALJ gave a
18 second reason for discounting Dr. Nordyke’s opinion: that Plaintiff’s condition
19 would only limit her ability to work for six months. AR 1308. Medical opinions
20 that assess only temporary limitations lasting less than 12 months are of little

1 probative value. *See Husnija M. v. Comm’r of Soc. Sec.*, No. 2:18-cv-00147-RHW,
2 ECF No. 15 at 20 (E.D. Wash. 2018) (noting that provider’s six-month restriction
3 from work was valid reason to discount the opinion); *Carmickle*, 533 F.3d at 1165
4 (explaining that doctor’s “two-week excuse from work” was not indicative of
5 “claimant’s long-term functioning”); *Cf.* 42 U.S.C. § 423(d)(1)(A). Plaintiff
6 contends that Dr. Nordyke only opined that her limitations “may” last another six
7 months, ECF No. 10 at 16, but this is incorrect—the question was how long
8 Plaintiff’s conditions would “likely” limit her ability to work. AR 777. The ALJ
9 properly discounted Dr. Nordyke’s opinion.

10 **4. Non-examining expert witness Reuben Beezy, M.D.**

11 The ALJ called Dr. Beezy as a medical expert at the first hearing to provide
12 a medical opinion. AR 28-37. Without seeing the updated medical records, he
13 testified that Plaintiff could perform full-time sedentary work. AR 36. After
14 reviewing the medical records that were unavailable at the first hearing, Dr. Beezy
15 revised his opinion, added several diagnoses, and stated that Plaintiff was limited
16 to less than sedentary work and could not work full time. AR 1122. The next
17 month he revised his opinion again, added several more diagnoses, and opined that
18 Plaintiff could actually perform sedentary work with some restrictions. AR 1133-
19 35.

1 In her first appeal to this Court, Plaintiff argued that the ALJ erred in
2 discounting Dr. Beezy's second opinion that she was incapable of working full
3 time. *See Samantha S. v. Astrue*, 2:12-CV-03091-RHW, ECF No. 25 at 18-22
4 (E.D. Wash.). The Court rejected this argument and concluded that the ALJ did not
5 err "in affording little weight to Dr. Beezy's second opinion." *Id.*, ECF No. 37 at
6 12. Plaintiff repeats this exact argument now, ECF No. 10 at 17-18, and the Court
7 declines to revisit its prior determination. *See Richardson*, 841 F.2d at 996. But in
8 any event, the ALJ again discounted Dr. Beezy's second opinion because it was
9 cursory and did not explain the basis for these limitations. AR 1308; *see* AR 1122.
10 This was proper. *See Thomas*, 278 F.3d at 957.

11 **5. Non-examining physician Howard Platter, M.D.**

12 In October 2009, Dr. Platter reviewed the medical record and concurred with
13 the state agency's initial assessment that Plaintiff was able to perform light work
14 with a variety of restrictions. *See* AR 779-86, 828. The ALJ included some
15 restrictions in addition to those contained in Dr. Platter's opinion, but otherwise
16 adopted his opinion. AR 1308.

17 Plaintiff argues that Dr. Platter simply "rubber stamp[ed]" the state agency
18 single decisionmaker's assessment and that this violated the rule against affording
19 weight to these types of assessments. ECF No. 10 at 18-19. However, Dr. Platter's
20 opinion expressly states that he "reviewed all previous and current medical

1 information on record,” and that with this information, he agreed with the state
2 agency’s determination. AR 828. Plaintiff’s claim that Dr. Platter simply “rubber-
3 stamp[ed]” the single decisionmaker’s assessment lacks evidentiary support.

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6 **6. Treating physician Clark Kwok, M.D.**

7 In January 2010, Dr. Kwok submitted forms opining on Plaintiff’s
8 limitations. AR 829-831. He opined that Plaintiff was pregnant and had “severe
9 anxiety,” but that her anxiety condition did not limit her ability to perform or look
10 for work. AR 829. He also opined that Plaintiff could perform sedentary work. AR
11 830. The ALJ determined that Plaintiff’s anxiety was non-severe, *see* AR 1304, but
12 otherwise adopted the remainder of Dr. Kwok’s opinion. AR 1308.

13 Plaintiff argues that the ALJ erred in crediting Dr. Kwok’s opinion, arguing
14 that Dr. Kwok only evaluated her for anxiety and pregnancy and did not assess her
15 for fibromyalgia, chronic pain, or asthma. ECF No. 10 at 19. This is incorrect. Dr.
16 Kwok’s report does not state that he only evaluated her for anxiety and pregnancy,
17 nor does it state that he did not treat her other conditions. AR 829-31. Plaintiff
18 acknowledges Dr. Kwok was her treating physician. ECF No. 10 at 19. Plaintiff’s
19 argument that his opinion was “irrelevant” is therefore without merit. *Id.* at 19.

20 **E. Plaintiff’s Subjective Symptom Complaints**

1 Plaintiff argues the ALJ erred by discounting the credibility of her testimony
2 regarding her subjective symptoms. ECF No. 10 at 19-21.

3 In her prior appeal to this Court, Plaintiff argued that the ALJ erred in
4 discounting her credibility on the bases of (1) her daily childcare and work
5 activities during the alleged period of disability and (2) her drug-seeking behavior.
6 *See Samantha S. v. Astrue*, 2:12-CV-03091-RHW, ECF No. 25 at 27-32 (E.D.
7 Wash.). The Court held that Plaintiff's daily childcare activities were not a proper
8 reason for discounting her credibility, but that her work activities during the
9 alleged period of disability were. *Id.*, ECF No. 37 at 18-19. The Court also held
10 that Plaintiff's drug-seeking behavior and untruthfulness in an effort to obtain
11 narcotics was also a proper basis for discounting her credibility. *Id.* at 19-22. Thus,
12 the Court upheld the ALJ's credibility determination. *Id.* at 22.

13 Upon remand, the ALJ again concluded that Plaintiff's subjective pain
14 complaints were not entirely credible and that they were belied by her medical
15 improvement, her daily childcare activities, and the medical evidence.¹⁰ AR 1306-
16 07. In finding that Plaintiff's daily activities undermined her subjective symptoms,
17 the ALJ relied entirely on Plaintiff's childcare activities and other daily household
18
19

20 ¹⁰ Because the ALJ relied on different bases for discounting Plaintiff's credibility, apart from the reasons this Court addressed in its prior decision, the law of the case doctrine does not apply. It is unclear why the ALJ did so.

1 chores. AR 1306-07. The ALJ's reliance on these factors conflicted with this
2 Court's prior decision and was clearly error.

3 However, the ALJ offered several additional reasons for discounting
4 Plaintiff's subjective pain complaints. The ALJ reasoned that Plaintiff significantly
5 improved by 2013. AR 1308; *see* AR 1287, 1584, 1829. This was proper. *See, e.g.,*
6 *Burch*, 400 F.3d at 681; 20 C.F.R. §§ 404.1529(c)(3)(v), 416.929(c)(3). Plaintiff
7 argues that "medical improvement" is a term of art that relates to a claimant being
8 initially disabled but then improving so as to no longer qualify for benefits. ECF
9 No. 10 at 20. While "medical improvement" does have a specific regulatory
10 definition in another context, *see* 20 C.F.R. § 404.1594, it is also used colloquially
11 in evaluating pain symptoms. *See Burch*, 400 F.3d at 681.

12 Finally, the ALJ discounted Plaintiff's subjective pain complaints because
13 they were inconsistent with the medical evidence. AR 1307. Plaintiff reported to
14 her doctor in December 2008 that she hurt, but was able to function. AR 515.
15 Despite various pain complaints to her providers, her physical examinations were
16 consistently normal and "quite benign." *See* AR 528-29, 554-57, 700, 729, 737,
17 751, 793, 847, 899, 916, 920, 1023, 1036, 1158, 1727-28. At a pain consultation in
18 September 2010, Dr. Henry Kim noted that Plaintiff "appeared to actively reduce
19 [her] range of motion." AR 920. He also noted that she "demonstrated ratchet-like
20 giving way weakness with poor effort on both sides." AR 920. An ALJ may

1 discount a claimant's subjective symptom testimony when it is inconsistent with
2 the medical evidence. *Carmickle*, 533 F.3d at 1161; *Tonapetyan*, 242 F.3d at 1148.

3 Plaintiff appears to argue that the ALJ rejected her subjective pain
4 complaints because she did not produce objective medical evidence of the pain
5 itself. ECF No. 10 at 21. While Plaintiff is correct that this would be error, *see*
6 *Burch*, 400 F.3d at 680, this is not what the ALJ did. Rather, the ALJ discredited
7 her testimony because the medical records affirmatively contradicted it, which is
8 permissible. AR 1307. Plaintiff also argues that she went to the emergency room
9 over 50 times during the relevant period. ECF No. 10 at 21. However, these visits
10 were often for conditions unrelated to her allegedly disabling impairments and, as
11 discussed above, her examinations during these visits were generally normal. *See*
12 AR 1066, 1084, 1096, 1278, 1582, 1611, 1632, 1673, 1680, 1688, 1696, 1715.

13 For the reasons discussed above, the ALJ erred when considering Plaintiff's
14 daily childcare activities in discounting her subjective pain complaints, but then
15 provided two proper reasons for doing so.

16 **VIII. Order**

17 Having reviewed the record and the ALJ's findings, the Court finds the
18 ALJ's decision is not supported by substantial evidence and contains legal error.

19 Accordingly, **IT IS ORDERED:**

20 1. Defendant's Motion for Remand, **ECF No. 16**, is **GRANTED**.

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 10**, is **GRANTED in**
2 **part.**

3 3. The Commissioner's decision to deny Plaintiff's applications for Social
4 Security benefits is **REVERSED** and **REMANDED** to the Commissioner
5 for further proceedings consistent with this Order, pursuant to sentence four
6 of 42 U.S.C. § 405(g). Because the error is limited to the vocational
7 testimony, the Commissioner should obtain supplemental vocational expert
8 evidence to clarify the effect of the assessed limitations on Plaintiff's ability
9 to perform other work in the national economy, including the number of jobs
10 available.

11 4. Judgment shall be entered in favor of Plaintiff and against Defendant and the
12 file shall be closed.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
14 Order, forward copies to counsel, and **close the file.**

15 **DATED** this 27th day of September, 2019.

16 *s/Robert H. Whaley*
17 **ROBERT H. WHALEY**
Senior United States District Judge