

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

May 03, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KRYSTAL M.,  
  
Plaintiff,  
  
v.  
  
COMMISSIONER OF SOCIAL  
SECURITY,  
  
Defendant.

No.1:18-CV-03127-JTR  
  
ORDER GRANTING, IN PART,  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 18. Attorney D. James Tree represents Krystal M. (Plaintiff); Special Assistant United States Attorney Justin Lane Martin 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; **DENIES** Defendant’s Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on May 30, 2014, alleging disability since May 15,

1 2014, due to hyperthyroidism, degenerative changes to her spine, bone spurs,  
2 migraines, learning disability, ADHD, anxiety, depression with mood swings, and  
3 varicose veins. Tr. 376. The applications were denied initially and upon  
4 reconsideration. Tr. 205-12, 216-26. Administrative Law Judge (ALJ) Ilene Sloan  
5 held a hearing on May 30, 2017, Tr. 76-110, and issued an unfavorable decision on  
6 June 20, 2017, Tr. 15-20. The Appeals Council denied Plaintiff's request for  
7 review on May 24, 2018. Tr. 1-5. The ALJ's June 2017 decision thus became the  
8 final decision of the Commissioner, which is appealable to the district court  
9 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on  
10 July 16, 2018. ECF No. 1, 4.

### 11 **STATEMENT OF FACTS**

12 Plaintiff was born in 1979 and was 34 years old as of the alleged onset date.  
13 Tr. 140. She attended school through the eleventh grade, and never completed a  
14 GED. Tr. 81-82. She has worked as a cashier, caregiver, security guard, machine  
15 cleaner in a meat plant, fast food worker, laundry and dry-cleaning attendant, stock  
16 clerk, ticket taker, telemarketer, and janitor. Tr. 101, 378, 401.

### 17 **STANDARD OF REVIEW**

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

1 rational interpretation, the Court may not substitute its judgment for that of the  
2 ALJ. Tackett, 180 F.3d at 1097; Morgan v. Commissioner of Social Sec. Admin.,  
3 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
4 administrative findings, or if conflicting evidence supports a finding of either  
5 disability or non-disability, the ALJ's determination is conclusive. Sprague v.  
6 Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision  
7 supported by substantial evidence will be set aside if the proper legal standards  
8 were not applied in weighing the evidence and making the decision. Brawner v.  
9 Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

### 10 **SEQUENTIAL EVALUATION PROCESS**

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

### 25 **ADMINISTRATIVE DECISION**

26 On June 20, 2017, the ALJ issued a decision finding Plaintiff was not  
27 disabled as defined in the Social Security Act.  
28

1 At step one, the ALJ found Plaintiff had engaged in substantial gainful  
2 activity from January 2015 to November 2016. Tr. 18.

3 Having found no continuous 12-month period during which Plaintiff had not  
4 engaged in substantial gainful activity, the ALJ found Plaintiff was not under a  
5 disability as defined in the Social Security Act. Tr. 19-20.

### 6 ISSUES

7 The question presented is whether substantial evidence supports the ALJ's  
8 decision denying benefits and, if so, whether that decision is based on proper legal  
9 standards.

10 Plaintiff contends the ALJ erred by (1) finding Plaintiff's work for her uncle  
11 to constitute substantial gainful activity; and (2) failing to consider a prospective  
12 period of disability after Plaintiff's work activity ended.

### 13 DISCUSSION<sup>1</sup>

#### 14 1. Finding of substantial gainful activity

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

1 was not accommodated, the ALJ made mathematical mistakes, and the ALJ failed  
2 to fully develop the record.<sup>2</sup> ECF 14 at 5-12.

3 At step one of the sequential evaluation process, an ALJ must determine if a  
4 claimant is engaged in SGA. 20 C.F.R. §§ 404.1520(b), 416.920(b). Substantial  
5 gainful activity is defined as work activity that is both substantial and gainful:  
6 work that involves doing significant physical or mental activities and is the kind of  
7 work done for pay or profit, whether or not a profit is realized. 20 C.F.R. §§  
8 404.1572(a)-(b), 416.972(a)-(b); Social Security Ruling 83-33. In determining  
9 whether work activity qualifies as SGA, the primary consideration is the claimant's  
10 earnings record. 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1). When a claimant  
11 has earnings at a level equal to or above SGA, a rebuttable presumption arises that  
12 she is engaged in SGA. *Keyes v. Sullivan*, 894 F.2d 1053 (9th Cir. 1990).

13 A claimant may rebut the presumption of SGA by presenting evidence that  
14 her work activity is being performed under circumstances that indicate it is not  
15 substantial. *Id.*; *see also Katz v. Sec'y of Health & Human Servs.*, 972 F.2d 290,  
16 293-94 (9th Cir. 1992). The Regulations establish a number of factors to be  
17 considered, including how well one performs the job, whether the individual is  
18 self-employed, the time spent working, and any special conditions. 20 C.F.R. §§  
19 404.1573, 416.973. Examples of special conditions include being allowed to work  
20 irregular hours or take frequent rest periods, being permitted to work at a lower  
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22 <sup>2</sup> Plaintiff also argues, for the first time in her Reply Brief, that her work  
23 could qualify as an unsuccessful work attempt. ECF No. 19 at 2-3. This argument  
24 was not raised in the Opening Brief and therefore is waived. *See Carmickle*, 533  
25 F.3d at 1161 n.2. However, as the Court finds remand to be appropriate, Plaintiff  
26 may assert this argument before the ALJ on remand, in light of the need for  
27 resolution of the discrepancies in the earnings records.  
28

1 standard of productivity or efficiency than other employees, or being given the  
2 work opportunity because of family relationship or the employer's concern for the  
3 individual's welfare. 20 C.F.R. §§ 404.1573(c)(1)-(6), 416.1573(c)(1)-(6). The  
4 Regulations make clear none of these conditions alone is sufficient to establish that  
5 an individual is not engaged in SGA; the agency must consider the totality of the  
6 circumstances. *Id.*; see also *Katz*, 972 F.2d at 293; *Keyes*, 894 F.2d at 1056.

7 Plaintiff worked part time for her uncle throughout most of 2015 and 2016.  
8 Tr. 82. She testified at the hearing:

9 that was kind of a pity job, I needed money and he's my uncle, so he  
10 put me on the books to do light housekeeping and garden work and  
11 stuff for him. But I haven't, I wasn't keeping up with it so kind of  
12 agreed that I didn't, wouldn't work with it anymore. I couldn't keep  
13 up with his yard and house and stuff.

14 Tr. 82. She also testified that she was only working two weeks out of each month,  
15 Tr. 82, and that it took her significantly longer to complete the work than it did for  
16 her uncle's regular housekeeper. Tr. 94.

17 The ALJ failed to discuss all of these circumstances. After analyzing the  
18 various earnings record statements in the file, the ALJ stated in one sentence that  
19 "the claimant testified that Oasis Drilling/her uncle did not provide her with any  
20 type of special accommodation other than allowing her to perform the work on a '2  
21 weeks on, 2 weeks off' schedule." Tr. 19. This was the ALJ's only analysis of  
22 whether the work performed was substantial. Read in isolation, the ALJ's decision  
23 implies a normal part-time work arrangement that just happened to be between  
24 family members. However, a substantial evidence analysis requires the Court to  
25 consider whether there "is relevant evidence that, considering the entire record, a  
26 reasonable person might accept as adequate to support a conclusion." *Lewis v.*  
27 *Apfel*, 236 F.3d 503, 509 (9th Cir. 2001) (emphasis added). When considering the  
28 record as a whole, Plaintiff's testimony raises a factual question as to whether she

1 was performing duties that consisted of significant physical and mental activities to  
2 warrant a designation of “substantial.” The ALJ failed to explain how she resolved  
3 the various other factors, including Plaintiff’s reportedly minimal responsibilities,  
4 the familial relationship, and her uncle’s apparent desire to assist a family member  
5 in a difficult situation.<sup>3</sup> Tr. 82-83, 93-94. Defendant does not dispute that the ALJ  
6 considered some—but not all—of the factors. ECF No. 18 at 7. The ALJ’s failure  
7 to consider all of the relevant factors renders the decision unsupported by  
8 substantial evidence.

9 The Court acknowledges that the record is lacking in detail on the specifics  
10 of Plaintiff’s employment. On remand, the ALJ is directed to further develop the  
11 record as to Plaintiff’s duties and the conditions under which she obtained and  
12 performed the work. The ALJ is also directed to resolve the discrepancies in  
13 Plaintiff’s various earnings records before relying on the records to find SGA.<sup>4</sup>

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15 <sup>3</sup> The record also reflects that Plaintiff’s boyfriend, who was himself  
16 disabled, occasionally performed work for Plaintiff’s uncle as well. Tr. 86.

17 <sup>4</sup> The Detailed Earnings Record, Tr. 374, documents different total earnings  
18 amounts for 2015 and 2016 than the New Hire Query, Tr. 363, 365. Plaintiff  
19 testified that she worked for her uncle for nearly two years, Tr. 82, yet the records  
20 only include earnings for four quarters. The parties should address this  
21 discrepancy on remand.

22 With respect to the ALJ’s calculation errors at Tr. 18, the Court finds such  
23 errors harmless. The New Hire Query at Tr. 363 indicates \$10,406 in earnings  
24 over three quarters of 2015, resulting in average monthly earnings of \$1,156.22  
25 (\$10,406 ÷ 9 months). The Detailed Earnings Query at Tr. 374 indicates \$14,136  
26 in earnings for the year, resulting in average monthly earnings of \$1,178 (\$14,136  
27 ÷ 12 months). By either calculation, Plaintiff’s earnings records indicate wages  
28 over the presumptive SGA level of \$1,090 for 2015. See 20 C.F.R. § 404.1574a.

1 **2. Prospective period of disability**

2 Plaintiff additionally submits that, even if the ALJ was correct in finding  
3 SGA, the ALJ erred in not considering a prospective period of disability following  
4 the end of Plaintiff’s work for her uncle. ECF 14 at 15-17.

5 The Social Security Act defines disability as “the inability to do any  
6 substantial gainful activity by reason of any medically determinable physical or  
7 mental impairment which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than 12 months.” 20  
9 C.F.R. §§ 404.1505, 416.905.

10 As the Court finds the ALJ erred in denying this claim at step one, it is  
11 unnecessary to resolve this issue. On remand, the ALJ shall reassess step one and  
12 complete the remainder of the step five process as needed.

13 **CONCLUSION**

14 Plaintiff argues the ALJ’s decision should be reversed and remanded for the  
15 payment of benefits. The Court has the discretion to remand the case for additional  
16 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
17 (9th Cir. 1996). The Court may award benefits if the record is fully developed and  
18 further administrative proceedings would serve no useful purpose. *Id.* Remand is  
19 appropriate when additional administrative proceedings could remedy defects.  
20 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
21 finds that further development is necessary for a proper determination to be made.

22 The ALJ’s step one determination is not supported by substantial evidence  
23 and must be reevaluated. On remand, the ALJ shall reassess Plaintiff’s work  
24 activity, including whether special conditions existed to justify deeming the work  
25 not to be substantial. The ALJ shall continue the five-step analysis, as necessary,  
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27  
28

1 and take into consideration any other evidence or testimony relevant to Plaintiff's  
2 disability claim.

3 Accordingly, **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is  
5 **GRANTED, IN PART.**

6 2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is  
7 **DENIED.**

8 3. The matter is **REMANDED** to the Commissioner for additional  
9 proceedings consistent with this Order.

10 4. An application for attorney fees may be filed by separate motion.

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

14 **IT IS SO ORDERED.**

15 DATED May 3, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE