

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

Jan 25, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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7 KIRSTI S.,¹

8 Plaintiff,

9 v.

10 KILOLO KIJAKAZI, ACTING
11 COMMISSIONER OF SOCIAL
SECURITY,²

12 Defendant.

No. 1:20-cv-03165-MKD

ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

ECF Nos. 16, 17

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14 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
15 identifies them by only their first names and the initial of their last names. *See*
16 LCivR 5.2(c).

17 ² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9,
18 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo
19 Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further
20 action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

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ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 16, 17. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court grants
4 Plaintiff's motion, ECF No. 16, and denies Defendant's motion, ECF No. 17.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
5 416.902(a). Further, a district court “may not reverse an ALJ’s decision on
6 account of an error that is harmless.” *Id.* An error is harmless “where it is
7 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
8 (quotation and citation omitted). The party appealing the ALJ’s decision generally
9 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
10 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,] but cannot,
19 considering his age, education, and work experience, engage in any other kind of
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant’s impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
6 defined generally as the claimant’s ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant’s
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant’s
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant’s age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
2 analysis concludes with a finding that the claimant is disabled and is therefore
3 entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On May 12, 2016, Plaintiff applied for Title XVI supplemental security
12 income benefits alleging a disability onset date of April 7, 2009.³ Tr. 19, 96, 228-
13 34. The application was denied initially, and on reconsideration. Tr. 122-24, 128-
14 30. Plaintiff appeared before an administrative law judge (ALJ) on October 17,

15 _____
16 ³ Plaintiff previously applied for benefits on February 9, 2011, which resulted in a
17 2012 unfavorable decision from an ALJ, Tr. 71-89, and the Appeals Council
18 declined to review the decision, Tr. 90-95. Plaintiff applied again for benefits on
19 May 27, 2014; the application was denied initially and on reconsideration, and
20 Plaintiff did not appeal the denial. Tr. 98.

1 2019. Tr. 42-70. On November 25, 2019, the ALJ denied Plaintiff's claim. Tr.
2 16-36.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff has
4 not engaged in substantial gainful activity since May 12, 2016. Tr. 21. At step
5 two, the ALJ found that Plaintiff has the following severe impairments:
6 degenerative disc disease of the cervical spine; degenerative joint disease of the
7 right hip; osteoporosis; dextroscoliosis; and carpal tunnel syndrome of the right
8 hand. Tr. 22.

9 At step three, the ALJ found Plaintiff does not have an impairment or
10 combination of impairments that meets or medically equals the severity of a listed
11 impairment. Tr. 23. The ALJ then concluded that Plaintiff has the RFC to perform
12 sedentary work with the following limitations:

13 [Plaintiff] would have the ability to change position during normal
14 breaks and once between breaks to stand up and stretch, if working in
15 a seated position. She can frequently climb ramps or stairs, and
16 occasionally climb ladders, ropes or scaffolds. She can frequently
17 push or pull with [the] right upper extremity. She can frequently
18 stoop, kneel [and] crouch, she can occasionally balance and crawl; she
can frequently handle and finger with [the] right hand (unlimited
handling and fingering with the left). [She] [s]hould avoid
concentrated exposure to extreme cold, excessive vibration, and
workplace hazards such as working with dangerous machinery and
working at unprotected heights.

19 Tr. 24.
20
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1 At step four, the ALJ found Plaintiff is unable to perform any of her past
2 relevant work. Tr. 29. At step five, the ALJ found Plaintiff had transferrable skills
3 from her past work as a general clerk, including the skills of “basic computer
4 skills, basic telephone skills, basic information and client skills . . . and basic
5 customer service skills.” Tr. 30. The ALJ found that, considering Plaintiff’s age,
6 education, work experience, RFC, and testimony from the vocational expert, there
7 were jobs that existed in significant numbers in the national economy that Plaintiff
8 could perform, such as receptionist and information clerk. Tr. 31. Therefore, the
9 ALJ concluded Plaintiff was not under a disability, as defined in the Social
10 Security Act, from the date of the application through the date of the decision. *Id.*

11 On August 11, 2020, the Appeals Council denied review of the ALJ’s
12 decision, Tr. 1-6, making the ALJ’s decision the Commissioner’s final decision for
13 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

14 ISSUES

15 Plaintiff seeks judicial review of the Commissioner’s final decision denying
16 her supplemental security income benefits under Title XVI of the Social Security
17 Act. Plaintiff raises the following issues for review:

- 18 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 19 2. Whether the ALJ conducted a proper step-two analysis; and
- 20 3. Whether the ALJ properly evaluated Plaintiff’s symptom claims.

1 ECF No. 16 at 2.

2 **DISCUSSION**

3 **A. Medical Opinion Evidence**

4 Plaintiff contends the ALJ erred in her consideration of the opinions of
5 Caryn Jackson, M.D.; Brent Packer, M.D.; and Amelia Rutter, ARNP. ECF No.
6 16 at 16-22.

7 There are three types of physicians: “(1) those who treat the claimant
8 (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant
10 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
11 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
12 Generally, a treating physician’s opinion carries more weight than an examining
13 physician’s, and an examining physician’s opinion carries more weight than a
14 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
15 to opinions that are explained than to those that are not, and to the opinions of
16 specialists concerning matters relating to their specialty over that of
17 nonspecialists.” *Id.* (citations omitted).

18 If a treating or examining physician’s opinion is uncontradicted, the ALJ
19 may reject it only by offering “clear and convincing reasons that are supported by
20 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

1 “However, the ALJ need not accept the opinion of any physician, including a
2 treating physician, if that opinion is brief, conclusory and inadequately supported
3 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
4 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
5 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
6 may only reject it by providing specific and legitimate reasons that are supported
7 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
8 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
9 serve as substantial evidence if it is supported by other independent evidence in the
10 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

11 *1. Dr. Jackson and Dr. Packer*

12 On November 6, 2017, Dr. Jackson, a treating provider, conducted an
13 examination and rendered an opinion on Plaintiff’s functioning. Tr. 586-97. Dr.
14 Jackson diagnosed Plaintiff with degenerative disc disease of the lumbar spine,
15 scoliosis, fibromyalgia, and osteoporosis. Tr. 587. Dr. Jackson opined Plaintiff is
16 severely limited, which is defined as “unable to meet the demands of sedentary
17 work.” Tr. 588. She opined Plaintiff’s limitations were expected to last 12 months
18 with treatment. *Id.*

19 On November 22, 2017, Dr. Packer reviewed records from Dr. Jackson and
20 Dr. Cline, and opined Dr. Jackson’s opinion that Plaintiff is capable of less than

1 sedentary work is reasonable and agreed the limitations were expected to last 12
2 months. Tr. 600. The ALJ gave the opinions of Dr. Jackson and Dr. Packer little
3 weight. Tr. 28. As Dr. Jackson is a treating provider, whose opinion is
4 contradicted by the opinions of Dr. Fernandez, Tr. 103-05, and Dr. Schofield, Tr.
5 117-19, the ALJ was required to give specific and legitimate reasons, supported by
6 substantial evidence, to reject Dr. Jackson's opinion. *See Bayliss*, 427 F.3d at
7 1216. As Dr. Packer is a non-examining source, the ALJ must consider the
8 opinion and whether it is consistent with other independent evidence in the record.
9 *See* 20 C.F.R. § 416.927(b),(c)(1); *Tonapetyan*, 242 F.3d at 1149; *Lester*, 81 F.3d
10 at 830-31.

11 First, the ALJ found the opinions were unsupported by specific functional
12 assessments of Plaintiff's limitations beyond a conclusory assessment of back pain.
13 *Id.* The Social Security regulations "give more weight to opinions that are
14 explained than to those that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ
15 need not accept the opinion of any physician, including a treating physician, if that
16 opinion is brief, conclusory and inadequately supported by clinical findings."
17 *Bray*, 554 at 1228. As discussed *supra*, Dr. Jackson diagnosed Plaintiff with
18 multiple conditions, and she also noted Plaintiff experiences multiple symptoms,
19 not just back pain. Tr. 586-97. On examination, Plaintiff had limited range of
20 motion in her lumbar spine. Tr. 589.

1 Dr. Packer noted Plaintiff had diagnoses of chronic spine pain, with failed
2 injections; fibromyalgia; scoliosis; osteoporosis; hypertension; COPD; possible
3 right elbow epicondylitis; and hand osteoarthritis. Tr. 600. He also noted the
4 imaging documented lumbar spine degenerative joint disease that is most severe at
5 L4-5, L5-S1, where there is vacuum disc phenomenon and facet degenerative joint
6 disease. *Id.* The ALJ's finding that the opinions were supported only by an
7 assessment of back pain is not supported by substantial evidence.

8 Second, the ALJ found the opinions were inconsistent with the medical
9 records. Tr. 28. A medical opinion may be rejected if it is unsupported by medical
10 findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
11 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
12 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Matney v.*
13 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). The ALJ stated Plaintiff's imaging
14 does not coincide with serious physical limitations. Tr. 28. Plaintiff's 2016
15 imaging documented multilevel degenerative disc disease with a disc abutting the
16 left S1 nerve; 2017 imaging of her lumbar spine indicated mild levoscoliosis,
17 decreased bone density, and multilevel lumbar spine degenerative changes, which
18 is moderate to severe at L4-5 and L5-S1 with vacuum disc formation; and by 2019,
19 imaging documented multilevel degenerative disc disease, marked bone marrow

1 edema indicating a probable endplate compression fracture, and severe canal
2 stenosis at L3-4. Tr. 468-69, 598, 716.

3 The ALJ cited to a string of records in support of her conclusion that
4 Plaintiff's imaging does not coincide with physical limitations. Tr. 28 (citing, e.g.,
5 Tr. 389, 423, 427, 436, 439). However, most of the cited records do not lend any
6 support to the ALJ's conclusion. Plaintiff had limited range of motion, "exquisite
7 pain to palpation," and decreased strength, Tr. 389, tenderness in the low back with
8 ongoing treatment for her pain, Tr. 426-27, and decreased grip strength, Tr. 435-
9 36. Several of the cited visits do not contain musculoskeletal examinations, and
10 thus do not contain objective evidence that is inconsistent with a disabling back
11 impairment; the visits note Plaintiff's "exercise is very limited due to lumbar disc
12 disease and subsequent back pain," and states she was seeing a spine center, she
13 was taking gabapentin 300 mg three times per day with ongoing radiating pain, and
14 she was being scheduled for epidural injections. Tr. 423, 438-39. Plaintiff has had
15 limited lumbar, cervical, shoulder, and finger range of motion, tenderness to
16 palpitation, decreased strength, an antalgic gait, difficulty getting onto the
17 examination table, and a positive straight leg raise test at some appointments. Tr.
18 389, 534-38, 589, 624, 629, 637, 644, 649, 693, 699-700. While the ALJ noted
19 there is little medical evidence of Plaintiff using a cane, Tr. 27, Plaintiff used a
20 single point cane in physical therapy to improve her gait, Tr. 699.

1 Although Plaintiff's symptoms waxed and waned, and the ALJ cited to some
2 normal examinations, the ALJ's summary of the evidence ignores a significant
3 amount of the evidence that supports a finding that Plaintiff's back impairment
4 causes serious physical limitations. An ALJ must consider all of the relevant
5 evidence in the record and may not point to only those portions of the records that
6 bolster her findings. *See, e.g., Holohan*, 246 F.3d at 1207-08 (holding that an ALJ
7 cannot selectively rely on some entries in plaintiff's records while ignoring others).
8 The ALJ is not permitted to selectively choose from mixed evidence to support a
9 denial of benefits. *Garrison v. Colvin*, 759 F.3d 995, 1017 n.23 (9th Cir. 2014).
10 As such, the ALJ erred in finding Dr. Jackson and Dr. Packer's opinions were
11 inconsistent with the objective medical evidence, without addressing probative
12 evidence.

13 The ALJ did not set forth specific and legitimate reasons, supported by
14 substantial evidence, to reject Dr. Jackson's opinion. Additionally, the ALJ's
15 finding that Dr. Packer's opinion is inconsistent with the evidence is not supported
16 by substantial evidence. The Court finds remand for immediate benefits is
17 appropriate due the ALJ's improper rejection of the opinions, for the reasons
18 discussed herein.

1 2. *Ms. Rutter*

2 Ms. Rutter, a treating provider, rendered three opinions on Plaintiff's
3 functioning. Tr. 8-10, 490-92, 709-11. In 2018, Ms. Ritter stated Plaintiff was
4 diagnosed with degenerative disc disease of the lumbar spine, central canal
5 stenosis of the cervical spine, fibromyalgia, hypertension, PTSD, and osteoporosis.
6 Tr. 490. She opined Plaintiff was limited to sedentary work and stated the
7 limitations had existed since at least November 2017. Tr. 491-92. In 2018, Ms.
8 Rutter stated Plaintiff was diagnosed with cervicalgia, thoracalgia, and lumbar
9 degenerative disc disease. Tr. 709. She opined Plaintiff was unable to maintain
10 even sedentary work, she would need to lie down every two hours off and on, and
11 she would be absent four or more days per month. Tr. 709-11. She stated the
12 limitations had existed since at least April 7, 2009. Tr. 711. In a 2020 opinion
13 submitted to the Appeals Council, Ms. Ritter stated Plaintiff was diagnosed with
14 lumbar radicular pain, and spondylolisthesis of the cervical region. Tr. 8. She
15 opined Plaintiff was unable to maintain even sedentary work, she would miss four
16 or more days per month of work, and she would need to lie down on and off every
17 two hours. Tr. 8-9. She again stated the limitations had existed since at least April
18 7, 2009. The ALJ gave Ms. Rutter's opinions little weight. Tr. 29. An ALJ may

1 reject the opinion of a non-acceptable medical source by giving reasons germane to
2 the opinion. *Ghanim*, 763 F.3d at 1161.

3 The Court finds it is unnecessary to address the entirety of the ALJ's
4 analysis of Ms. Rutter's opinions, as remand for immediate benefits is appropriate
5 based on the rejection of Dr. Jackson and Dr. Packer's opinions. However, the
6 Court notes the ALJ rejected Ms. Rutter's opinions in part because the opinions
7 were rendered by a non-acceptable medical source. Tr. 29. That reason alone is
8 not a sufficient reason to reject an opinion. *See* 20 C.F.R. § 416.927 (2012). The
9 ALJ also rejected Ms. Rutter's opinions because they were inconsistent with the
10 objective medical evidence. Tr. 29. However, the ALJ cited to the same string of
11 medical records cited to when she rejected Dr. Jackson and Dr. Packer's opinions.
12 *Id.* As discussed *supra*, the citations do not amount to substantial evidence to
13 support a rejection of a disabling opinion.

14 **B. Step Two**

15 Plaintiff contends the ALJ erred at step two by failing to identify her
16 depression and anxiety as severe impairments. ECF No. 16 at 4-10. At step two of
17 the sequential process, the ALJ must determine whether claimant suffers from a
18 "severe" impairment, i.e., one that significantly limits her physical or mental
19 ability to do basic work activities. 20 C.F.R. § 416.920(c).

1 When a claimant alleges a severe mental impairment, the ALJ must follow a
2 two-step “special technique” at steps two and three. 20 C.F.R. § 416.920a. First,
3 the ALJ must evaluate the claimant’s “pertinent symptoms, signs, and laboratory
4 findings to determine whether [he or she has] a medically determinable
5 impairment.” 20 C.F.R. § 416.920a(b)(1). Second, the ALJ must assess and rate
6 the “degree of functional limitation resulting from [the claimant’s] impairments” in
7 four broad areas of functioning: understand, remember, or apply information;
8 interact with others; concentrate, persist, or maintain pace; and adapt or manage
9 oneself. 20 C.F.R. § 416.920a(b)(2)-(c)(4). Functional limitation is measured as
10 “none, mild, moderate, marked, and extreme.” 20 C.F.R. § 416.920a(c)(4). If
11 limitation is found to be “none” or “mild,” the impairment is generally considered
12 to not be severe. 20 C.F.R. § 416.920a(d)(1). If the impairment is severe, the ALJ
13 proceeds to determine whether the impairment meets or is equivalent in severity to
14 a listed mental disorder. 20 C.F.R. § 416.920a(d)(2)-(3).

15 As the case is being remanded for immediate benefits on other grounds, the
16 Court declines to address this issue in its entirety, but the Court notes that Plaintiff
17 raises multiple supported arguments on this issue. The ALJ’s string cites largely
18 do not provide support for her findings. *See* ECF No. 16 at 5-6; Tr. 22-23. There
19 is evidence that could support a finding of a severe mental impairment. *See, e.g.,*
20 Tr. 480, 482, 500-01, 507, 585. If the ALJ had found Plaintiff’s mental

1 impairments were severe, and included a limitation in the RFC that limited her
2 ability to engage in semi-skilled work, Plaintiff would have been found disabled.
3 ECF No. 16 at 10; Tr. 66.

4 **C. Plaintiff's Symptom Claims**

5 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
6 convincing in discrediting her symptom claims. ECF No. 16 at 10-17. An ALJ
7 engages in a two-step analysis to determine whether to discount a claimant's
8 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
9 "First, the ALJ must determine whether there is objective medical evidence of an
10 underlying impairment which could reasonably be expected to produce the pain or
11 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
12 "The claimant is not required to show that [the claimant's] impairment could
13 reasonably be expected to cause the severity of the symptom [the claimant] has
14 alleged; [the claimant] need only show that it could reasonably have caused some
15 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

16 Second, "[i]f the claimant meets the first test and there is no evidence of
17 malingering, the ALJ can only reject the claimant's testimony about the severity of
18 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
19 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
20 omitted). General findings are insufficient; rather, the ALJ must identify what

1 symptom claims are being discounted and what evidence undermines these claims.
2 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to
3 sufficiently explain why it discounted claimant’s symptom claims)). “The clear
4 and convincing [evidence] standard is the most demanding required in Social
5 Security cases.” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc.*
6 *Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

7 Factors to be considered in evaluating the intensity, persistence, and limiting
8 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
9 duration, frequency, and intensity of pain or other symptoms; 3) factors that
10 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
11 side effects of any medication an individual takes or has taken to alleviate pain or
12 other symptoms; 5) treatment, other than medication, an individual receives or has
13 received for relief of pain or other symptoms; 6) any measures other than treatment
14 an individual uses or has used to relieve pain or other symptoms; and 7) any other
15 factors concerning an individual’s functional limitations and restrictions due to
16 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
17 416.929(c). The ALJ is instructed to “consider all of the evidence in an
18 individual’s record,” to “determine how symptoms limit ability to perform work-
19 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

1 The ALJ found that Plaintiff’s medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s
3 statements concerning the intensity, persistence, and limiting effects of her
4 symptoms were not entirely consistent with the evidence. Tr. 25.

5 As the case is being remanded for immediate benefits on other grounds, the
6 Court declines to address this issue in its entirety, but the Court notes that Plaintiff
7 raises multiple supported arguments on this issue. The ALJ’s citation strings do
8 not support the contention that the objective evidence is inconsistent with
9 Plaintiff’s claims and does not amount to a clear and convincing reason to reject
10 Plaintiff’s symptom claims. *See* ECF No. 16 at 14-15. The ALJ’s statement that
11 Plaintiff’s independence in her activities of daily living, without any analysis of the
12 activities and their alleged conflicts with Plaintiff’s claims, is also not a clear and
13 convincing reason to reject Plaintiff’s claims. *See* ECF No. 16 at 10-12.

14 **D. Remedy**

15 Plaintiff urges this Court to remand for an immediate award of benefits.
16 ECF No. 16 at 21.

17 “The decision whether to remand a case for additional evidence, or simply to
18 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
19 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
20 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must

1 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
2 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the
3 proper course, except in rare circumstances, is to remand to the agency for
4 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
5 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
6 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
7 discretion for a district court not to remand for an award of benefits” when three
8 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
9 credit-as-true rule, where (1) the record has been fully developed and further
10 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
11 to provide legally sufficient reasons for rejecting evidence, whether claimant
12 testimony or medical opinion; and (3) if the improperly discredited evidence were
13 credited as true, the ALJ would be required to find the claimant disabled on
14 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
15 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
16 the Court will not remand for immediate payment of benefits if “the record as a
17 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
18 F.3d at 1021. Here, the Court finds that each of the credit-as-true factors is
19 satisfied and that remand for the calculation and award of benefits is warranted.

1 As to the first element, administrative proceedings are generally useful
2 where the record “has [not] been fully developed,” *Garrison*, 759 F.3d at 1020,
3 there is a need to resolve conflicts and ambiguities, *Andrews*, 53 F.3d at 1039, or
4 the “presentation of further evidence . . . may well prove enlightening” in light of
5 the passage of time, *I.N.S. v Ventura*, 537 U.S. 12, 18 (2002). *Cf. Nguyen v.*
6 *Chater*, 100 F.3d 1462, 1466-67 (9th Cir. 1996) (remanding for ALJ to apply
7 correct legal standard, to hear any additional evidence, and resolve any remaining
8 conflicts); *Byrnes v. Shalala*, 60 F.3d 639, 642 (9th Cir. 1995) (same); *Bunnell v.*
9 *Sullivan*, 947 F.2d 341, 348 (9th Cir. 1991) (en banc) (same).

10 Defendant did not present an argument regarding a need for additional
11 proceedings should the case be remanded. *See* ECF No. 17. There are multiple
12 disabling records in the file, as well as Plaintiff’s testimony regarding her disabling
13 limitations, and the opinions and Plaintiff’s testimony provide support for a finding
14 of disabling limitations from the application date onward. Plaintiff alleges
15 disability beginning in 2009. Tr. 19, 96. However, there is a prior unfavorable
16 decision that was rendered in 2012. Tr. 71-89. Plaintiff then reapplied for benefits
17 on May 27, 2014, which resulted in unfavorable decisions at the initial and
18 reconsideration level. Tr. 110. Plaintiff did not appeal the July 23, 2015
19 unfavorable decision. Plaintiff filed the new application for benefits on May 12,
20 2016.

1 Plaintiff's alleged onset date could be interpreted as an implied request for
2 reopening of the prior applications, but the prior claims are not able to be
3 reopened. A prior determination may be reopened in one of three circumstances:
4 (1) within 12 months of the date of the notice of the initial determination, for any
5 reason; (2) within two years of the date of the notice of the initial determination for
6 "good cause"; or (3) at any time if the decision involved fraud. 20 C.F.R. §
7 416.1488. None of the three circumstances apply to the 2012 determination.
8 While the current application for benefits was filed within one year of the 2015
9 denial, there is no evidence counsel has requested reopening of the prior
10 application. There are minimal medical records related to the prior application's
11 adjudicative period, and the records contain no evidence of Plaintiff's current
12 severe impairments. *See* Tr. 365-72, 396-400. As such, there is no medical
13 evidence to support a finding that the prior claim should be reopened, and no
14 arguments presented from Plaintiff regarding why the claim should be reopened.
15 Further, Title XVI benefits cannot be paid prior to the filing date. *See* POMS DI
16 25501.370. Plaintiff's filing date is May 12, 2016 and there are opinions and
17 testimony that cover the entire relevant period regarding her disabling limitations;
18 thus, an inquiry into Plaintiff's ability to qualify for Title XVI benefits prior to the
19 filing date is unnecessary and there is not an outstanding issue requiring resolution
20 through a remand hearing. *See* Tr. 19, 96.

1 Ms. Rutter initially opined Plaintiff was limited to sedentary work, Tr. 490,
2 but stated she was unsure and unable to quantify an answer for several questions,
3 Tr. 490-92. After additional time treating Plaintiff, she rendered disabling
4 opinions. Tr. 8-10, 709-11. Ms. Rutter's later opinions state Plaintiff was disabled
5 for the entire relevant period, contradicting her earlier opinion that Plaintiff could
6 sustain sedentary work. *See* Tr. 8-10, 709-11. Additionally, during the time period
7 Ms. Rutter stated Plaintiff was capable of performing sedentary work, Dr. Jackson,
8 who is an acceptable medical source, rendered a disabling opinion. Tr. 586-97. As
9 such, there is sufficient evidence to determine the medical opinions support a
10 finding of disability for the entire relevant period, and remand to address conflicts
11 in the opinions is unnecessary.

12 As to the second prong, the ALJ failed to provide legally sufficient reasons,
13 supported by substantial evidence, to reject Dr. Jackson and Dr. Packer's opinions.
14 Therefore, the second prong of the credit-as-true rule is met. The third prong of
15 the rule is satisfied because if Dr. Jackson and Dr. Packer's opinions were credited
16 as true, the ALJ would be required to find Plaintiff disabled, as the doctors opined
17 Plaintiff is unable to maintain even sedentary work.

18 Finally, the record as a whole does not leave serious doubt as to whether
19 Plaintiff is disabled. *Garrison*, 759 F.3d at 1021. Plaintiff has not engaged in
20 substantial gainful activity during the relevant period. *See* Tr. 252. There is

1 evidence of ongoing significant physical limitations in the record, as discussed
2 *supra*. While the ALJ stated Plaintiff offered exaggerated information relevant to
3 the issue of disability, Tr. 26, the ALJ did not explain this assertion by citing to any
4 evidence of exaggeration. The ALJ merely asserted Plaintiff exaggerated her
5 fibromyalgia pain responses with no evidence to support the assertion. Tr. 22.

6 Moreover, the credit-as-true rule is a “prophylactic measure” designed to
7 motivate the Commissioner to ensure that the record will be carefully assessed and
8 to justify “equitable concerns” about the length of time which has elapsed since a
9 claimant has filed their application. *Treichler*, 775 F.3d at 1100 (internal citations
10 omitted). In *Vasquez*, the Ninth Circuit exercised its discretion and applied the
11 “credit as true” doctrine because of Claimant’s advanced age and “severe delay” of
12 seven years in her application. *Vasquez*, 572 F.3d at 593-94. Here, Plaintiff is
13 now over 55-years-old, and the delay of over six and a half years from the date of
14 the application make it appropriate for this Court to use its discretion and apply the
15 “credit as true” doctrine pursuant to Ninth Circuit precedent. While waiting for a
16 decision on her application for benefits, Plaintiff was diagnosed with cancer. Tr.
17 22. As such, the Court finds it is appropriate to remand for immediate benefits.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ’s findings, the Court concludes the
3 ALJ’s decision is not supported by substantial evidence and is not free of harmful
4 legal error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
6 Defendant and update the docket sheet.

7 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**.

8 3. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

9 4. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff
10 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
11 Security for immediate calculation and award of benefits.

12 The District Court Executive is directed to file this Order, provide copies to
13 counsel, and **CLOSE THE FILE**.

14 DATED January 25, 2023.

15 *s/Mary K. Dimke*
16 MARY K. DIMKE
17 UNITED STATES DISTRICT JUDGE
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