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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 HEATHER E.,

8 Plaintiff,

9 v.

10 KILOLO KIJAKAZI, Acting  
11 Commissioner of Social Security,

12 Defendant.

NO. 1:23-CV-3064-TOR

ORDER REVERSING  
COMMISSIONER'S DENIAL OF  
BENEFITS

13 BEFORE THE COURT is Plaintiff's Appeal of the Social Security  
14 Commissioner's Denial of Title XVI Benefits (ECF No. 9). The Court has  
15 reviewed the administrative record and the parties' completed briefing, and is fully  
16 informed. For the reasons discussed below, the order of the Social Security  
17 Commissioner is REVERSED.

18 **JURISDICTION**

19 The Court has jurisdiction over this case under 42 U.S.C. §§ 405(g),  
20 1383(c)(3).

1 **STANDARD OF REVIEW**

2 A district court’s review of a final decision of the Commissioner of Social  
3 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
4 limited: the Commissioner’s decision will be disturbed “only if it is not supported  
5 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
6 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means  
7 relevant evidence that “a reasonable mind might accept as adequate to support a  
8 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,  
9 substantial evidence equates to “more than a mere scintilla[,] but less than a  
10 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
11 standard has been satisfied, a reviewing court must consider the entire record as a  
12 whole rather than searching for supporting evidence in isolation. *Id.*

13 In reviewing a denial of benefits, a district court may not substitute its  
14 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
15 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
16 rational interpretation, [the court] must uphold the [administrative law judge’s  
17 (ALJ’s)] findings if they are supported by inferences reasonably drawn from the  
18 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
19 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
20 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate

1 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
2 party appealing the ALJ’s decision generally bears the burden of establishing  
3 harm. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 4 **FIVE STEP SEQUENTIAL EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within  
6 the meaning of the Social Security Act. First, the claimant must be “unable to  
7 engage in any substantial gainful activity by reason of any medically determinable  
8 physical or mental impairment which can be expected to result in death or which  
9 has lasted or can be expected to last for a continuous period of not less than twelve  
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
11 impairment must be “of such severity that [she] is not only unable to do [her]  
12 previous work[,] but cannot, considering [her] age, education, and work  
13 experience, engage in any other kind of substantial gainful work which exists in  
14 the national economy.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to  
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
17 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work  
18 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial  
19 gainful activity,” the Commissioner must find that the claimant is not disabled. 20  
20 C.F.R. § 416.920(b).

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

9           At step three, the Commissioner compares the claimant’s impairment to  
10 several impairments recognized by the Commissioner to be so severe as to  
11 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §  
12 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
13 enumerated impairments, the Commissioner must find the claimant disabled and  
14 award benefits. 20 C.F.R. § 416.920(d).

15           If the severity of the claimant’s impairment does meet or exceed the severity  
16 of the enumerated impairments, the Commissioner must pause to assess the  
17 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),  
18 defined generally as the claimant’s ability to perform physical and mental work  
19 activities on a sustained basis despite his or her limitations (20 C.F.R. §  
20 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

1           At step four, the Commissioner considers whether, in view of the claimant's  
2 RFC, the claimant is capable of performing work that he or she has performed in  
3 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is  
4 capable of performing past relevant work, the Commissioner must find that the  
5 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of  
6 performing such work, the analysis proceeds to step five.

7           At step five, the Commissioner considers whether, in view of the claimant's  
8 RFC, the claimant is capable of performing other work in the national economy.  
9 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
10 must also consider vocational factors such as the claimant's age, education and  
11 work experience. *Id.* If the claimant is capable of adjusting to other work, the  
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §  
13 416.920(g)(1). If the claimant is not capable of adjusting to other work, the  
14 analysis concludes with a finding that the claimant is disabled and is therefore  
15 entitled to benefits. *Id.*

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

1 700 F.3d 386, 389 (9th Cir. 2012).

## 2 **ALJ'S FINDINGS**

3 On January 18, 2018, Plaintiff protectively filed an application for Title XVI  
4 supplemental security income benefits, alleging a disability onset date of  
5 December 31, 2017. Tr. 1197. The application was denied initially and upon  
6 reconsideration. Tr. 38. On July 7, 2020, a telephonic hearing was held before an  
7 ALJ. Tr. 48. On July 30, 2020, the ALJ denied Plaintiff's claim. Tr. 37. On  
8 October 16, 2020, the Appeals Council denied review. Tr. 7.

9 On December 31, 2021, this Court remanded Plaintiff's case for the ALJ to  
10 reconsider the severity of Plaintiff's bilateral carpal tunnel syndrome, reevaluate  
11 Plaintiff's physical symptom testimony, reassess the opinions of Doctors Metoyer,  
12 Hurley, and Kuppussamy, and account for lay witness testimony. Tr. 1266, 1272-  
13 74, 1282-84.

14 A telephonic rehearing was held on January 24, 2023, before a different  
15 ALJ. Tr. 1192. On February 27, 2023, the ALJ concluded Plaintiff was not under  
16 a disability as defined in the Social Security Act. Tr. 1183.

17 At step one of the sequential evaluation analysis, the ALJ found Plaintiff had  
18 not engaged in substantial gainful activity since January 18, 2018, the date of the  
19 application. Tr. 1169. At step two, the ALJ found Plaintiff had the following  
20 severe impairments: chronic obstructive pulmonary disease, bullous lung disease,

1 status post bullectomy, endometriosis, carpal tunnel syndrome, major depressive  
2 disorder, and posttraumatic disorder (PTSD). Tr. 1170. At step three, the ALJ  
3 found that Plaintiff's impairments did not meet or medically equal the severity of a  
4 listed impairment. *Id.* The ALJ then found that the Plaintiff had the RFC to  
5 perform light work with the following limitations:

6 [Plaintiff] can sit, stand, walk 6 hours each; bilateral upper extremity  
7 gross handling is frequently; she is unlimited in all postural activities  
8 except she can occasionally climb ladders, ropes, scaffolds; she [sic]  
9 occasionally stoop and crawl; never climb ladders, ropes, scaffolds;  
10 she must avoid concentrated exposure to extreme heat, humidity,  
11 pulmonary irritants; she can carry out simple routine task work; she  
12 can work superficially and occasionally with the general public; she  
13 can work in the same room with coworkers but no coordination of  
14 work activity; and she can adapt to simple, occasional workplace  
15 changes.

16 Tr. 1172.

17 At step four, the ALJ found that Plaintiff was unable to perform any past  
18 relevant work. Tr. 1181. At step five, the ALJ found that, considering Plaintiff's  
19 age, education, work experience, RFC, and testimony from a vocational expert,  
20 there were other jobs that existed in significant numbers in the national economy  
that Plaintiff could perform, including as a routing clerk and marker. Tr. 1182.

Based on the foregoing, the ALJ concluded Plaintiff was not under a disability, as  
defined in the Social Security Act, from January 18, 2018, through February 27,  
2023. Tr. 1183.

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner’s final decision denying  
3 her supplemental security income benefits under Title XVI of the Social Security  
4 Act. Plaintiff submits the following issues for this Court’s review:

- 5 1. Whether the ALJ properly assessed if Plaintiff met Listing 3.02D;  
6 2. Whether the ALJ properly assessed Plaintiff’s subjective symptom  
7 testimony; and  
8 3. Whether the ALJ properly assessed the medical testimony of Plaintiff’s  
9 treating doctors.

10 ECF No. 9 at 2.

11 **I. Listing 3.02D**

12 Plaintiff argues that the ALJ improperly concluded that she did not have an  
13 impairment or combination of impairments that met or medically equaled the  
14 severity of Listing 3.02D. ECF No. 9 at 4; Tr. 1170.

15 Listing 3.02 includes impairments due to chronic respiratory disorders.

16 Under Listing 3.02D, a claimant may be disabled due to:

17 Exacerbations or complications requiring three hospitalizations within  
18 a 12-month period and at least 30 days apart (the 12-month period must  
19 occur within the period we are considering in connection with your  
20 application or continuing disability review). Each hospitalization must  
last at least 48 hours, including hours in a hospital emergency  
department immediately before the hospitalization.



1 20 C.F.R. Pt. 4, Subpt. P., App. 1 (Listings) § 3.02D.

2 Plaintiff argues she met this requirement because she was hospitalized on  
3 three occasions in a twelve-month period from 2017 to 2018, for at least 48 hours  
4 each, and each visit lasting 30 days apart. ECF No. 9 at 4. She recounts that she  
5 was hospitalized from March 28 to 30, 2017; December 13-14, 22-24, and 25-29,  
6 2017; January 30 to February 1, 2018; and February 1 to February 6, 2018. *Id.*  
7 (citing Tr. 291, 293, 382, 401, 530, 516, 549). Defendant argues Plaintiff did not  
8 meet the requirements of this listing because the relevant period in issue was from  
9 January 18, 2018 (the date Plaintiff filed for disability) forward, and neither the  
10 March nor December hospitalizations took place during that period. ECF No. 13 at  
11 5. Plaintiff responds that she met this because her second cluster of  
12 hospitalizations began in December 2017, mere days before she alleged her  
13 disability first began on December 31, 2017. ECF No. 14 at 4.

14 The Court finds Defendant’s reading of the Listing more persuasive. The  
15 Listing specifically dictates that “the 12-month period must occur within the period  
16 we are considering in connection with your application or continuing disability  
17 review.” § 3.02D. The “period . . . consider[ed] in connecting with [a claimant’s]  
18 application” must naturally refer to the time a claimant alleges disability onset,  
19 while “continuing disability review” is best understood as the time after the  
20 application is filed but before a decision is rendered. Plaintiff’s interpretation

1 impermissibly ignores this language. *See United States v. Nature*, 898 F.3d 1022,  
2 1024 (9th Cir. 2018) (“We construe regulations, like statutes, to give effect to  
3 every word when possible.”). Thus, the relevant period assessed was between  
4 December 31, 2017 (the date of onset) through February 27, 2023 (the date of the  
5 ALJ’s decision).

6 Plaintiff’s first hospitalization was in March 2017—months before her  
7 alleged disability onset at the end of December. Excluding the March  
8 hospitalization, Plaintiff was admitted for 48-hour periods on multiple occasions  
9 between December 2017 through February 2018. However, the December  
10 hospitalizations all took place before the alleged disability onset on December 31.  
11 Thus, under the requirements of the Listing, Plaintiff was only hospitalized twice,  
12 and each period was not the requisite 30 days apart. Accordingly, the Court finds  
13 that the ALJ properly determined that Plaintiff had not met Listing 3.02.

## 14 **II. Subjective Symptom Testimony**

15 Plaintiff alleges that the ALJ erred in evaluating her physical and mental  
16 subjective symptom testimony. ECF No. 9 at 4-13.

17 An ALJ engages in a two-step analysis to determine whether to discount a  
18 claimant’s subjective symptom testimony. SSR 16-3p, 2016 WL 1119029, at \*2.  
19 “First, the ALJ must determine whether there is ‘objective medical evidence of an  
20 underlying impairment which could reasonably be expected to produce the pain or

1 other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quoting *Vasquez v. Astrue*,  
2 572 F.3d 586, 591 (9th Cir. 2009)). “The claimant is not required to show that [the  
3 claimant’s] impairment ‘could reasonably be expected to cause the severity of the  
4 symptom [the claimant] has alleged; [the claimant] need only show that it could  
5 reasonably have caused some degree of the symptom.’” *Vasquez*, 572 F.3d at 591  
6 (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).

7 Second, “[i]f the claimant meets the first test and there is no evidence of  
8 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
9 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
10 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
11 omitted). General findings are insufficient; rather, the ALJ must identify what  
12 symptom claims are being discounted and what evidence undermines these claims.  
13 *Id.* “The clear and convincing [evidence] standard is the most demanding required  
14 in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (quoting *Moore*  
15 *v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting  
17 effects of a claimant’s symptoms include: (1) daily activities; (2) the location,  
18 duration, frequency, and intensity of pain or other symptoms; (3) factors that  
19 precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness, and  
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; (5) treatment, other than medication, an individual receives or has  
2 received for relief of pain or other symptoms; (6) any measures other than  
3 treatment an individual uses or has used to relieve pain or other symptoms; and (7)  
4 any other factors concerning an individual’s functional limitations and restrictions  
5 due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7-\*8; 20  
6 C.F.R. § 416.929(c). The ALJ is instructed to “consider all of the evidence in an  
7 individual’s record” in order “to determine how symptoms limit ability to perform  
8 work-related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

9 **A. Physical Symptoms**

10 In his initial ruling, the ALJ concluded that Plaintiff’s objective medical  
11 evidence, failure to follow treatment, and work history did not support her  
12 subjective symptom testimony. Tr. 1269-78. This Court found that the ALJ’s  
13 analysis of the objective medical evidence was unsupported by substantial  
14 evidence. First, the Court determined that the ALJ’s decision misfocused on  
15 Plaintiff’s “normal” bodily functions which did not pertain to her impairments—  
16 for instance, her gait and spine, which had nothing to do with her lung and  
17 gynecological disorders. *Id.* at 1270. Second, the Court concluded that the ALJ  
18 erred in relying on Plaintiff’s few brief instances of respite from her pulmonary  
19 condition as evidence that the condition was merely “benign” when the  
20

1 longitudinal record as a whole suggested “a sustained period of impairment.” *Id.* at  
2 1271-72.

3 This Court also found that the ALJ’s analysis regarding Plaintiff’s failure to  
4 follow treatment for her pulmonary condition and endometriosis was unsupported  
5 by clear and convincing evidence. *Id.* at 1273-74. Respecting Plaintiff’s  
6 pulmonary condition, the ALJ identified Plaintiff’s failure to undergo lung surgery  
7 for spontaneous pneumothorax of the left lung and failure to stop smoking  
8 cigarettes as evidence of her noncompliance with prescribed treatment. *Id.*  
9 However, this Court explained that the surgery was only recommended and the  
10 ALJ failed to account for Plaintiff’s reported fear of surgery. *Id.* The Court also  
11 described that the Ninth Circuit and Social Security regulations do not require  
12 lifestyle modifications, including smoking cessation, for claimants to comply with  
13 prescribed treatment. *Id.* at 1274.

14 Regarding Plaintiff’s endometriosis, the ALJ had noted that Plaintiff was  
15 “lost to follow-up.” *Id.* The Court asked the ALJ to clarify what specific treatment  
16 Plaintiff failed to follow, as the record on the whole demonstrated Plaintiff sought  
17 continuing care for her condition. *Id.* The Court also instructed the ALJ to  
18 account for whether Plaintiff’s improvements respecting her diagnosis might be  
19 attributed to her pregnancy. *Id.*

20 //

1 Finally, the Court found the ALJ's analysis of Plaintiff's work history  
2 unpersuasive. *Id.* at 1277. The Court observed that while Plaintiff had assumed  
3 some employment during the period of her alleged disability which suggested her  
4 level of impairment was not severe, the ALJ had failed to address that Plaintiff's  
5 periods of employment tended to be truncated and failed to discern whether  
6 Plaintiff's similar work history prior to the onset of disability pertained to the  
7 possibility that Plaintiff was unmotivated to work—which would be a permissible  
8 reason to discredit a claimant's testimony—or some other unexplained factor. *Id.*  
9 at 1277-78.

10 On remand, the new ALJ determined that some of Plaintiff's medically  
11 determinable impairments could be reasonably expected to produce her alleged  
12 physical symptoms but that her claims concerning the intensity, persistence, and  
13 limiting effects of those symptoms were inconsistent with the medical evidence  
14 and other record evidence. Tr. 1173.

15 **i. Pulmonary Symptoms**

16 Plaintiff first challenges the ALJ's findings regarding her pulmonary health  
17 on the basis that the ALJ again singled out impermanent periods of improvement  
18  
19  
20

1 against an otherwise extensive record of impairments.<sup>1</sup> ECF No. 9 at 4-5. The  
2 Court agrees that the ALJ's second analysis of the objective medical evidence of  
3 Plaintiff's pulmonary symptoms was only partially curative. Plaintiff complains  
4 that the ALJ's second order mostly restates the findings of the first regarding her  
5 medical history. ECF No. 9 at 5. Given that Plaintiff's medical history did not  
6 significantly change, however, it is unsurprising that many of the findings

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7  
8 <sup>1</sup> As a threshold but non-dispositive matter, Plaintiff also argues that the ALJ  
9 "violated the law of the case doctrine," which prohibits a court from reconsidering  
10 an issue already decided by the same court or a higher court in the same case. ECF  
11 Nos. 9 at 4-5; 14 at 4-5. Plaintiff contends that the ALJ violated this by copying  
12 the previous ALJ's findings. The ALJ's alleged noncompliance with this Court's  
13 order does not violate this doctrine because the Court did not come to a conclusive  
14 determination about Plaintiff's disability; instead, it remanded the matter for the  
15 ALJ to reconsider. *See Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035,  
16 1042 (9th Cir. 2018) (explaining that the rule precludes lower courts from  
17 reconsidering matters previously decided by a higher court). Similarly, because  
18 the matter was before the ALJ on remand, the Court cannot say it violated some  
19 principle of preclusion for the ALJ to reconsider the issues and draw the same  
20 conclusions, even if those findings were legally erroneous.

1 overlapped. *Compare* Tr. 1233-35 (first order on objective medical evidence) *with*  
2 Tr. 1174-75 (second order). On remand, the ALJ added the following new  
3 findings:

- 4 • [D]uring a follow-up visit in February 2018, Madhan Kumar  
5 Kuppusamy, MD[,] noted the claimant was doing well and had no  
6 evidence of infection, recurrent pneumothorax or effusions after a  
7 recent admission for pleuritic chest pain after moving heavy  
8 furniture at home. He advised the claimant on smoking cessation,  
9 continued walking, and the avoidance of heavy lifting. He advised  
10 the claimant to follow-up in three months. He noted the claimant  
11 would likely continue to improve over the following three to four  
12 months.
- 13 • [O]n exam [in February 2019] the claimant was in no distress. She  
14 had normal respiratory effort, equal expansion, clear and equal  
15 breath sounds, and no wheezes rales or rhonchi.
- 16 • [Plaintiff] had some noted improvement in symptoms while  
17 maintaining a pregnancy . . . Later that same month, she reported  
18 shortness of breath at night mostly dependent on her positioning.  
19 She reported improvement in symptoms with lying on her side with  
20 pillows. However, she denied any episodes of pneumothorax during  
her pregnancy or shortness of breath when awake or with activity.
- A subsequent exam in May 2022 showed normal respiratory  
findings including lungs clear to auscultation without wheezes,  
rhonchi, or rales, normal excursion, and no accessory muscle use  
and no stridor.
- However, in August 2022, the claimant reported dyspnea for the past  
few years. She felt dyspneic with minimal activity like talking and  
walking. She reported she had a 2-year-old son and felt she could  
not keep up with him or play with him the way she would like. Yet,  
she was reportedly smoking five cigarettes per day, previously one  
pack per day. On exam, she was seated comfortably, pleasant and  
in no acute distress. She spoke in full sentences and was breathing



1 comfortably. A CT of the chest was unremarkable and showed no  
2 pneumothorax. Cassandra Rosello, MD . . . indicated overall the  
3 claimant was doing well without known recurrence of  
4 pneumothorax in the last several years. Nevertheless, the  
5 undersigned accounts for the claimant’s pulmonary complaints in  
6 the [RFC] by assessing environmental limitations including  
7 avoiding concentrated exposure to extreme heat, humidity, and  
8 pulmonary irritants.

6 Tr. 1174-75.

7 As instructed, on remand the ALJ omitted reference to “normal” physical  
8 functions having no relation to Plaintiff’s reported impairments (for instance, her  
9 gait) and accounted for her pregnancy as a possible factor supporting her improved  
10 pulmonary condition in 2020. *Id.* Additionally, while the ALJ referenced doctors’  
11 recommendations that Plaintiff quit smoking, the ALJ did not find that Plaintiff’s  
12 continued smoking constituted failure to comply with her prescribed treatment for  
13 pulmonary impairments. *Id.*

14 Plaintiff continues to assert that the new findings were dismissive of the  
15 broader longitudinal record, stating that the ALJ singled out periods of temporary  
16 well-being and ignored her extensive history of surgery, hospitalizations, and other  
17 symptoms of respiratory distress. ECF No. 9 at 5. The Court agrees. The crux of  
18 the ALJ’s added and prior findings—and the Commissioner’s argument now on  
19 appeal—suggest that the Plaintiff experienced improvements in her pulmonary  
20 condition with treatment. ECF No. 13 at 1 (“Plaintiff had significant breathing

1 issues prior to the period at issue that have seemed to lessened with treatment”); 7  
2 (“Plaintiff did not have any severe exacerbations after the beginning of the period  
3 at issue.”). Although “evidence of medical treatment successfully relieving  
4 symptoms can undermine a claim of disability,” *Wellington v. Berryhill*, 878 F.3d  
5 867, 876 (citing 20 C.F.R. §§ 404.1520a(c)(1), 416.920a(c)(1)), the Ninth Circuit  
6 has urged courts to exercise caution in evaluating a claimant’s course of treatment,  
7 *see Garrison*, 759 F.3d at 1017 (“[I]mproved functioning while being treated and  
8 while limiting environmental stressors does not always mean that a claimant can  
9 function effectively in a workplace.”).

10 Here, again, the ALJ did not explain how isolated incidences of  
11 improvement were evaluated against the broader landscape of Plaintiff’s continued  
12 impairments. *See Garrison* at 1018 (ALJs should “describe [a claimant’s]  
13 symptoms, course of treatment, and bouts of remission, and thereby chart a course  
14 of improvement [rather than] singl[ing] out a few periods of temporary well-being  
15 from a sustained period of impairment.”). For example, the order discusses that on  
16 March 19, 2019, Plaintiff’s computed tomography (CT) scan images showed no  
17 pulmonary embolism or other abnormalities, Tr. 792, 1174, but omits the fact that,  
18 days prior, on March 11, patient was evaluated for shortness of breath and chest  
19 tightness and sent to the emergency room with low oxygen saturation and  
20 symptoms “suggestive of pneumomediastinum and possible pneumoperitoneum,”

1 Tr. 831-33. Similarly, as late as August 2022, Plaintiff continued to pursue care  
2 for respiratory pains and labored breathing with “minimal activity, like talking and  
3 walking.” Tr. 1175. While the ALJ focuses on the fact that Plaintiff’s  
4 pneumothorax was in remission at that time, Plaintiff continued to present with  
5 mild emphysematous changes in the lungs and the aforementioned complaints. Tr.  
6 1441. The evidence presented was selective and the ALJ failed to resolve conflicts  
7 in the longitudinal record suggesting that Plaintiff’s pulmonary conditions had not  
8 subsided. *See Del Cielo v. Astrue*, 737 F. Supp. 2d 1271, 1276 (E.D. Wash. 2010)  
9 (“It is the role of the trier of fact, not this Court, to resolve conflicts in the evidence  
10 . . . [but] a decision supported by substantial evidence will still be set aside if the  
11 proper legal standards were not applied in weighing the evidence.”); SSR 16-3p,  
12 2016 WL 1119029 at \*2 (the ALJ must “consider all of the evidence in an  
13 individual’s record”).

14 The ALJ also relied on Plaintiff’s apparent statements about improvements  
15 in her condition to discredit her pulmonary symptom testimony. As this Court  
16 previously dictated, though, Plaintiff’s “reported improved respiratory status at  
17 times does not conflict with events in the record [indicating] that Plaintiff  
18 experienced respiratory distress,” including “her testimony that she would get short  
19 of breath walking between buildings, taking stairs and [using] riding carts in  
20 stores.” Tr. 1271-72. Again, by the ALJ’s own account, these symptoms persisted

1 as late as August 2022. Tr. 1745. The ALJ did not weigh or explain this  
2 contradicting evidence such that the Court can confidently conclude that the  
3 decision was supported by substantial evidence. *See Brown-Hunter v. Colvin*, 806  
4 F.3d 487, 492 (9th Cir. 2015) (“If the ALJ fails to specify his or her reasons for  
5 finding claimant testimony not credible, a reviewing court will be unable to review  
6 those reasons . . . without substitution or speculation.”).

7 **ii. Endometriosis and Gastrointestinal Symptoms**

8 Previously, this Court found that the ALJ improperly determined Plaintiff  
9 was noncompliant with her prescribed endometriosis treatment and failed to  
10 account for the fact that the improvement in her symptoms was possibly due to her  
11 pregnancy. Tr. 1274. Plaintiff now faults the ALJ’s new order, saying it  
12 disregards her reported endometriosis and related gastrointestinal symptoms when  
13 the objective medical evidence presented supports her claims. ECF No. 9 at 7.

14 In evaluating Plaintiff’s endometriosis and gastrointestinal symptoms in the  
15 remand order, the ALJ found that Plaintiff’s “clinical presentation and treatment”  
16 were inconsistent with her reports of being bedridden for two weeks out of the  
17 month. Tr. 1175-76. The findings summarized that Plaintiff had been suffering  
18 from endometriosis since she was 15 and undergone past abdomen surgeries. Tr.  
19 1175. The findings further stated that Plaintiff sometimes experienced pelvic and  
20 stomach pain, but other times presented without any tenderness, pain, or stomach

1 distension. *Id.* The ALJ also noted that Plaintiff’s pain was worse with her  
2 menstrual cycle, but her exams returned normal. *Id.* at 1176. In January 2023,  
3 Plaintiff’s doctor, Katherine Roberts, recommended hormonal birth control or an  
4 intrauterine device (IUD) as potential treatment options, and Plaintiff agreed to  
5 return for IUD placement. *Id.* The ALJ also observed that claimant’s allegation of  
6 being bedridden several weeks out of the month lacked any corresponding  
7 evidence in the record, and that Plaintiff had not sought treatment in recent years.  
8 *Id.*

9 Plaintiff does not allege that this medical summary is incomplete, but instead  
10 argues that the objective evidence cited buoyed her claims of incapacity more than  
11 it undercut them. ECF No. 9 at 10. The Court does not share Plaintiff’s belief that  
12 the ALJ was required to credit her statements simply because some of the evidence  
13 in the record tended to support her claims, especially where there was other  
14 evidence referenced that cut against those allegations, including the fact that  
15 Plaintiff had not pursued further treatment for a period of years. *Magallanes v.*  
16 *Bowen*, 881 F.2d 747, 749 (9th Cir. 1989) (“The ALJ is responsible for . . .  
17 resolving conflicts in medical testimony. We must uphold the ALJ’s decision  
18 where the evidence is susceptible to more than one rational interpretation.”); *Del*  
19 *Cielo*, 737 F. Supp. 2d at 1279 (“An unexplained, or inadequately explained,  
20 failure to seek treatment . . . can cast doubt on a claimant’s sincerity.”). As such,

1 the Court concludes the ALJ's resolution of Plaintiff's endometriosis and  
2 gastrointestinal symptom testimony was supported by clear and convincing  
3 evidence.

4 **iii. Hand and Wrist Symptoms**

5 Plaintiff also alleges that the ALJ erred in dismissing her carpal tunnel  
6 syndrome (CTS) and related hand and wrist symptoms by ignoring medical  
7 evidence which supported her complaints and improperly relying upon her  
8 inconsistent work history, and other activities of daily living. ECF No. 9 at 11. In  
9 its prior order, this Court determined that the ALJ erred in finding Plaintiff's CTS  
10 non-severe at Step Two on the basis that Plaintiff had not obtained a recommended  
11 nerve conduction study in November 2018 because the clinic failed to make the  
12 referral and Plaintiff had a reasonable fear of surgery. Tr. 1265. Additionally, the  
13 Court found that the ALJ failed to resolve conflicting medical evidence where  
14 Plaintiff presented with swollen wrist, positive Tinel's testing, and difficulty  
15 carrying out daily tasks. *Id.* at 1266.

16 At Step Three, this Court ruled that Plaintiff's dotted work history did not  
17 undercut her symptoms of hand/wrist and gastrointestinal pain because some of her  
18 short-lived employment occurred during the period she was alleging disability and  
19 the ALJ undertook no effort to discern whether Plaintiff's employment history  
20

1 prior to the onset of disability was because she had no propensity to work or  
2 instead because of some other factors. Tr. 1277-78.

3 As in its prior order, the Court here concludes that the ALJ's focus on  
4 Plaintiff's work history and activities of daily living was improper, as was her  
5 apparent reliance on Plaintiff's failure to undergo a recommended nerve  
6 conduction study. Tr. 1176-77.

7 Regarding Plaintiff's work history and daily activities, the ALJ observed:

8 Although the claimant has indicated some difficulty with daily  
9 activities due to hand aching and swelling, the record shows she  
10 continued to drive during the relevant period. The record also  
11 documents work activity as a part-time waitress/bartender, and recently  
as a cashier. She testified that she no longer drives. The undersigned  
accounts for the claimants hand complaints by limiting her bilateral  
upper extremity gross handling to frequent in the [RFC].

12 Tr. 1177.

13 This Court previously stressed that any discussion of Plaintiff's work history  
14 needed to account for the duration of the employment and whether the job was  
15 held during Plaintiff's alleged period of disability. *Lingenfelter v. Astrue*, 504 F.3d  
16 at 1039 (ALJs may not discredit claimants who try to work during the period of  
17 alleged disability but fail to retain employment due to their disability).

18 At the hearing, Plaintiff testified that her most recent job was as a part-time  
19 cashier at Express Mart, and that it ended within a few months. Tr. 1198-99. She  
20 added that the only reason she had been hired in the first place was due to the fact

1 that the business was owned by a family friend who wanted to help her, but that  
2 she was let go due to the interference of her symptoms with her work. *Id.* at 1199-  
3 200, 1210. Prior to that, Plaintiff worked part time at a pizza parlor for another  
4 friend, but added that the business was shutting down so she primarily sat behind  
5 the counter and occasionally made drinks. *Id.* at 1200. Plaintiff testified that her  
6 hand pain and gastrointestinal issues hindered her work performance and kept her  
7 from maintaining a job in recent years. *Id.* at 1205-06. Because the ALJ failed to  
8 account for this fact or to consider whether Plaintiff's employment prior to the  
9 alleged onset of disability had any bearing on her analysis, Plaintiff's work history  
10 did not support a finding that her CTS symptoms were not as alleged.

11 Likewise, Plaintiff's activities of daily living, including driving, did not  
12 support an adverse credibility finding. The Ninth Circuit has warned lower courts  
13 to exercise caution in making an adverse finding on the basis of a claimant's  
14 activities of daily living. *Garrison*, 759 F.3d at 1016. The ALJ did not inquire  
15 after or include any information about the frequency of Plaintiff's driving. Tr.  
16 1177. Additionally, the ALJ fixated on Plaintiff's driving without discussing  
17 Plaintiff's allegation that her hand and wrist symptoms interfered with her other  
18 daily activities, including her ability to dress herself during a flare-up or  
19 consistently contribute to household chores. Tr. 1206-09.

20 //



1           The ALJ also mentioned Plaintiff’s failure to undergo a recommended nerve  
2 conduction study for surgical purposes in November 2018 and in December 2020.  
3 Tr. 1176, ¶¶ 1, 3. As the Court previously noted, however, Plaintiff had not  
4 received a referral for the November 2018 study. Respecting the failure to undergo  
5 later nerve conduction studies, Plaintiff contends that she did complete a study.  
6 *See* ECF No. 9 at 15 (citing Tr. 1479). However, the test Plaintiff references is not  
7 actually in the record but was simply reported by Plaintiff to a treatment provider.  
8 Tr. 1485. Additionally, the study only showed Plaintiff was positive for CTS,  
9 which the ALJ credited as true. Nevertheless, the ALJ’s reference to Plaintiff’s  
10 failure to undergo a nerve conduction study in November 2018 was error. *See* Tr.  
11 1265.

12           These errors were not harmless. *See Stout v. Comm’r, Soc. Sec. Admin.*, 454  
13 .3d 1050, 1055 (9th Cir. 2006) (the harmless error doctrine applies “where the  
14 mistake was nonprejudicial to the claimant or irrelevant to the ALJ’s ultimate  
15 disability conclusion”). As discussed below, the ALJ relied upon her findings  
16 pertaining to Plaintiff’s non-participation in a nerve/EMG study and daily life  
17 activities and work history to discredit the opinion of Doctors Wayne Hurley and  
18 Patrick Metoyer. *See* Part III, §§ A, C.

19 //

20 //

1           **B.     Mental Symptoms**

2           The Court previously found that the ALJ’s determination of Plaintiff’s  
3 mental impairments were supported by substantial evidence. *See* Tr. 1273, 1276.  
4 However, Plaintiff asks the Court to reconsider, asserting that the record has been  
5 developed since remand. ECF No. 9 at 13. Notably, Plaintiff alleges that the  
6 second hearing clarified that Plaintiff had difficulty accessing mental health care  
7 due to a shortage of counselors and also because the prescribed medication she  
8 formerly took was not intended to be used on a long-term, daily basis. *Id.*  
9 However, Plaintiff’s testimony at trial on this point was rather vague and  
10 unsupported by any other documents in the record:

11           Q. Are you in counseling?

12           A. We have a shortage here for that. Our mental health is really short-  
13 staffed right now, so it’s really hard to get help here.

14           Q. How long were you on mental health medications?

15           A. A year.

16           Q. Okay.

17           A. Every time they would have me go to the hospital, they would give  
18 me like a shot that would calm me down. Then, my primary gave me a  
19 prescription for it, but I had to find a new doctor. It took me time to  
20 even find a new doctor. I not too long ago got in. I was on the waiting  
list for six to eight months.

Tr. 1214.

1           Respecting Plaintiff's ability to see a counselor, her testimony does not  
2 clarify who she attempted to establish care with, what offices she identified that  
3 were busy, or whether she attempted to even get on a waitlist for counseling in the  
4 first instance. As to Plaintiff's discussion of her time spent on a waitlist to obtain  
5 her prescription, that appears to have had more to do with Plaintiff's physical  
6 symptoms (given the reference to the hospital) and pursuit of a different provider  
7 than her inability to obtain a prescription. On these facts, the Court does not find  
8 that Plaintiff introduced any new evidence into the record that would alter its  
9 former analysis.

### 10 **III. Opinions of Treating Doctors**

11           Plaintiff urges that the ALJ erred by failing to appropriately assess the  
12 medical opinions of Doctors Hurley, Kuppusamy, and Metoyer. ECF No. 9 at 14-  
13 22. This Court previously remanded for the Commissioner to reevaluate Dr.  
14 Hurley's opinion, reassess Dr. Metoyer's opinion, and assess Dr. Kuppusamy's  
15 opinion (which the ALJ did not formerly address). Tr. 1283-84.

16           As indicated in the underlying opinion, the new regulations apply to the  
17 ALJ's evaluation of medical opinion evidence. 20 C.F.R. § 404.1520c; *see also*  
18 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
19 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017). The ALJ applied the new  
20

1 regulations because Plaintiff filed her Title II claim after March 27, 2017. *See* Tr.  
2 1266.

3 Under the new regulations, the ALJ will no longer “give any specific  
4 evidentiary weight . . . to any medical opinion(s).” *Revisions to Rules*, 2017 WL  
5 168819, 82 Fed. Reg. 5844-01, 5867–68 (codified at 20 C.F.R. pt. 404). Instead,  
6 an ALJ must consider and evaluate the persuasiveness of all medical opinions or  
7 prior administrative medical findings from medical sources. 20 C.F.R. §  
8 404.1520c(a)-(b).

9 The factors for evaluating the persuasiveness of medical opinions and prior  
10 administrative medical findings include supportability, consistency, relationship  
11 with the claimant, specialization, and “other factors that tend to support or  
12 contradict a medical opinion or prior administrative medical finding,” including  
13 but not limited to “evidence showing a medical source has familiarity with the  
14 other evidence in the claim or an understanding of our disability program's policies  
15 and evidentiary requirements.” 20 C.F.R. § 404.1520c(c)(1)-(5). The ALJ is  
16 required to explain how the most important factors, supportability and consistency,  
17 were considered. 20 C.F.R. § 404.1520c(b)(2). These factors are defined as  
18 follows:

19 (1) Supportability. The more relevant the objective medical evidence  
20 and supporting explanations presented by a medical source are to  
support his or her medical opinion(s) or prior administrative medical

1 finding(s), the more persuasive the medical opinions or prior  
2 administrative medical finding(s) will be.

3 (2) Consistency. The more consistent a medical opinion(s) or prior  
4 administrative medical finding(s) is with the evidence from other  
5 medical sources and nonmedical sources in the claim, the more  
6 persuasive the medical opinion(s) or prior administrative medical  
7 finding(s) will be.

8 20 C.F.R. § 404.1520c(c)(1)-(2).

9 The ALJ may, but is not required to, explain how “the other most persuasive  
10 factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R. §  
11 404.1520c(b)(2). However, where two or more medical opinions or prior  
12 administrative findings “about the same issue are both equally well-supported ...  
13 and consistent with the record . . . but are not exactly the same,” the ALJ is  
14 required to explain how “the most persuasive factors” were considered. 20 C.F.R.  
15 § 404.1520c(b)(3).

16 These regulations displace the Ninth Circuit's standard requiring an ALJ to  
17 provide “specific and legitimate” reasons for rejecting an examining doctor's  
18 opinion. *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). As a result, the  
19 ALJ's decision for discrediting any medical opinion “must simply be supported by  
20 substantial evidence.” *Id.*

#### 21 **A. Opinion of Dr. Hurley**

22 Plaintiff challenges the second ALJ’s assessment of Dr. Wayne Hurley’s  
23 medical opinion, which the ALJ found partially persuasive. Tr. 1179-80. Plaintiff

1 argues that the ALJ impermissibly rejected Dr. Hurley's opinion respecting her  
2 hand/wrist complaints. ECF No. 9 at 14-15. On that issue, the ALJ wrote:

3 Dr. Hurley opined that the claimant was limited to occasional bilateral  
4 handling due to wrist pain from carpal tunnel syndrome. The  
5 undersigned finds his manipulative assessment unpersuasive. His  
6 opinion is not supported by the objective medical evidence of record.  
7 As noted, there is no EMG/nerve conduction studies in the record.  
8 Physical exams show some mild edema on occasion. However, she has  
9 full grip strength and full active range of motion on exams. She also  
10 continued to drive during the relevant period and worked part-time. For  
11 these reasons, the undersigned finds the assessment by Dr. Virji of  
12 bilateral handling limited to frequent persuasive. His opinion is  
13 supported by the medical evidence. The claimant has some noted  
14 tenderness and mild edema. However, she otherwise has normal exams  
15 including 5/5 grip strength. Her symptoms respond to cortisone  
16 injections. She has declined surgical intervention. Although the  
17 claimant has alleged limited hand functioning, her allegations are not  
18 entirely consistent with her clinical presentation, treatment, and  
19 activities. Nevertheless, the undersigned fully accounts for the  
20 claimant's CTS/hand complaints in the [RFC].

Tr. 1179-80.

21 This opinion is unsupportable and inconsistent with the record because it  
22 rests on impermissible assumptions regarding Plaintiff's activities of daily living,  
23 including her part-time work activity, and fails to account for why Plaintiff failed  
24 to participate in an EMG/nerve conduction study, at least in November 2018. The  
25 Court cannot determine that these errors did not materially inform the ALJ's  
26 assessment of Dr. Hurley's opinion or were not otherwise prejudicial to Plaintiff,  
27 as the RFC did not limit Plaintiff's bilateral upper strength to occasional handling.

1           **B. Opinion of Dr. Kuppusamy**

2           The former ALJ failed to address Dr. Madhan Kumar Kuppusamy’s opinion  
3 regarding Plaintiff’s lifting limitations. Tr. 1283. After Plaintiff’s surgery in 2017,  
4 Dr. Kuppusamy prohibited Plaintiff for work for two weeks and limited her from  
5 lifting more than ten pounds at a time. *Id.* Plaintiff argued—and now realleges—  
6 that Dr. Kuppusamy’s restriction on her lifting more than ten pounds was intended  
7 to be an indefinite restriction and that such a limitation was inconsistent with the  
8 jobs identified by the VE. ECF No. 9 at 17-19. Respecting Dr. Kuppusamy’s  
9 opinion, the ALJ found the weight lift restriction to be “partially supported” in  
10 view of the fact that Plaintiff had recently undergone surgery and sought follow-up  
11 after lifting heavy furniture, adding that, at a follow-up visit, he indicated that “[h]e  
12 expected additional improvement in symptoms over the following three months,  
13 which suggests that his limitation of lifting no more than 10 pounds was only  
14 temporary in nature.” Tr. 1180. She further added that “his opinion is also not  
15 completely consistent with subsequent exams showing full strength or the  
16 claimant’s subsequent work activity at the light exertion level.” *Id.*

17           The Court agrees that interpreting Dr. Kuppusamy’s medical opinion as  
18 imposing an indefinite ten-pound lifting limitation upon Plaintiff would prove  
19 inconsistent with the medical records and larger context surrounding the initial  
20 visit as well as Plaintiff’s follow-up (namely, that Plaintiff was recovering from

1 surgery and had been moving various objects). Again, it is the ALJ's prerogative  
2 to resolve ambiguous or potentially conflicting evidence in the record. As to the  
3 ALJ's discussion of Plaintiff's subsequent work activity, that appears to have been  
4 a secondary consideration for rejecting Dr. Kuppusamy's testimony.

5 **C. Opinion of Dr. Metoyer**

6 Finally, Plaintiff challenges the opinion of Dr. Patrick Metoyer, who  
7 performed a mental health evaluation of Plaintiff. ECF No. 9 at 20-21; Tr. 450.  
8 The ALJ found Dr. Metoyer's assessment was unsupported by her recent work  
9 history and ability to perform personal care. Tr. 1181.

10 The Court agrees with Plaintiff that her work history and personal care  
11 routines or activities of daily living did not provide an appropriate basis for the  
12 ALJ to reject Dr. Metoyer's testimony. As to the workplace concerns, the ALJ  
13 wrote that "her job losses [were attributed] to the frequency of bathroom breaks  
14 and not mental health." While Dr. Metoyer may not have been qualified to opine  
15 on Plaintiff's job losses, given that they were due to her physical impairments, the  
16 ALJ's reliance on Plaintiff's personal care activities as a basis for finding his  
17 opinion unsupported was misplaced. Specifically, Dr. Metoyer wrote:

18 Claimant reports no significant difficulty with personal care and  
19 hygiene. She notes she gets fatigued faster, takes a little bit longer, but  
20 is able to engage in those routines. Claimant notes some difficulty with  
other activities around the house—cooking, cleaning, shopping, and  
laundry. She notes that she does not carry heavy objects, that she paces



1 herself, and takes frequent breaks. Claimant reports some difficulty  
2 managing money, creating a budget, and paying bills.

3 Tr. 453.

4 The ALJ discredited this evidence on the basis that Plaintiff reported “no  
5 significant difficulty,” noting that “[s]he reportedly took a little longer but was able  
6 to engage in those routines . . . [and] to see her friends about once a month.” Tr.  
7 1181. As discussed, a claimant’s ability to engage in basic, daily activities—for  
8 instance, dressing oneself—does not undercut a finding of disability. *Garrison*,  
9 759 F.3d at 1016. The ability to get dressed, perform some household tasks while  
10 taking frequent breaks, and occasionally visit with friends, supports Plaintiff’s  
11 testimony that she was unable to walk far or talk for long periods without breathing  
12 troubles or taking a restroom break and that she could not lift heavy objects. As  
13 such, the ALJ erred in her assessment of Dr. Metoyer’s testimony.

#### 14 **IV. Remedy**

15 The Court finds a remand for benefits is warranted. Under the Ninth  
16 Circuit's “credit-as-true” rule, a remand for an award of benefits is appropriate  
17 when:

18 (1) the record has been fully developed and further administrative  
19 proceedings would serve no useful purpose; (2) the ALJ has failed to  
20 provide legally sufficient reasons for rejecting evidence, whether  
claimant testimony or medical opinion; and (3) if the improperly  
discredited evidence were credited as true, the ALJ would be required  
to find the claimant disabled on remand.

1 *Garrison*, 759 F.3d at 1021-22. When the above conditions are satisfied, a remand  
2 for benefits must be ordered unless “the record as a whole creates serious doubt as  
3 to whether the claimant is, in fact, disabled within the meaning of the Social  
4 Security Act.” *Id.* at 1022.

5 In this case, the record has been fully developed. Two telephonic hearings  
6 have been held, and a wealth of evidence from different treatment providers has  
7 been accepted. At this stage, “the only purpose that further proceedings could  
8 possibly serve is to afford the ALJ an opportunity to revise her [conclusions].”  
9 *Guthrie v. Colvin*, No. 13-CV-3069-TOR, 2014 WL 3640756, at \*5 (E.D. Wash.  
10 July 23, 2014). The Commissioner urges the Court to remand. ECF No. 13 at 13-  
11 14. However, remanding for this purpose—now for a second time—would be both  
12 unfair and inefficient. *Guthrie*, 2014 WL 3640756, at \*5.

13 Second, as discussed, the ALJ failed to provide legally sufficient reasons for  
14 rejecting evidence in the record—now for the second time. Third, crediting as true  
15 Plaintiff’s complaints, the ALJ would be required to find her disabled on remand.  
16 Plaintiff alleged severe pulmonary complaints which interfered with her ability to  
17 maintain employment and complete daily, simple tasks. The VE testified that the  
18 number of breaks Plaintiff averred she required due to these physical impairments  
19 precluded her from competitive employment. Tr. 1220. Accordingly, Plaintiff is  
20 entitled to benefits.

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 2 1. Plaintiff’s motion for summary judgment (ECF No. 9) is **GRANTED**.
- 3 2. This action is **REVERSED** and **REMANDED** to the Commissioner for
- 4 calculation and award of benefits. Plaintiff may apply for attorney’s fees
- 5 and costs by separate motion without moving to reopen the file.
- 6 3. The Commissioner’s Brief (ECF No. 13) is **DENIED**.

7 The District Court Executive is directed to file this Order, enter judgment for

8 Plaintiff, furnish copies to counsel, and **CLOSE** the file.

9 DATED November 2, 2023.



11 *Thomas O. Rice*

12 THOMAS O. RICE

13 United States District Judge

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