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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PATRICIA LANGFORD,

Plaintiff,

v.

CAROLYN W. COLVIN, ¹ Acting
Commissioner of Social Security
Administration,

Defendant.

No. CV-11-3095-RHW

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

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 12, 15. James Tree represents Plaintiff Patricia Langford. Assistant United States Attorney Pamela J. DeRusha and Special Assistant United States Attorney Thomas S. Inman represent the Defendant Commissioner of Social Security (the "Commissioner"). Plaintiff brings this action seeking judicial review under 42 U.S.C. § 405(g) of the Commissioner's final decision, which denied her application for Disability Insurance Benefits ("DIB"). After reviewing the administrative record and the parties' briefs, the Court is now fully informed.

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Fed. R. Civ. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

**ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT * 1**

1 For the reasons set forth below, the Court denies Defendant’s Motion for
2 Summary Judgment, and directs entry of judgment in favor of Plaintiff.

3 **I. Jurisdiction and Procedural History**

4 On July 2, 2008, Plaintiff protectively filed an application for DIB, alleging
5 disability beginning on March 31, 2006. Transcript (hereafter “Tr.”) 12, 31, 117.
6 Plaintiff’s claim was denied initially on July 2, 2008, and upon reconsideration on
7 November 4, 2008. Tr. 12. Thereafter, Plaintiff timely requested a hearing before
8 an administrative law judge (“ALJ”). *Id.* Plaintiff then appeared with counsel and
9 testified at a video hearing held May 25, 2010. Tr. 27-67. ALJ Marie Palachuk
10 presided over the hearing and took testimony from medical expert (“ME”) Steven
11 Gerber, M.D., vocational expert (“VE”) Daniel R. McKinney, and Plaintiff’s
12 husband Thomas Langford. *Id.* On June 11, 2010, the ALJ issued a decision
13 denying benefits. Tr. 12-21. Subsequently, on July 23, 2011, the Appeals Council
14 denied Plaintiff’s request for review, which made the ALJ’s decision the
15 Commissioner’s final decision and subject to judicial review. Tr. 1-3. Thus,
16 Plaintiff’s claim is properly before this Court pursuant to 42 U.S.C. § 405(g).

17 **II. Sequential Evaluation Process**

18 The Social Security Act (the “Act”) defines disability as the “inability to
19 engage in any substantial gainful activity by reason of any medically determinable
20 physical or mental impairment which can be expected to result in death or which
21 has lasted or can be expected to last for a continuous period of not less than twelve
22 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be
23 determined to be under a disability only if her impairments are of such severity that
24 the claimant is not only unable to do his previous work, but cannot, considering
25 claimant's age, education and work experiences, engage in any other substantial
26 gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
27 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4)(i)-(v),
3 416.920; *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

4 **Step 1:** Is the claimant engaged in substantial gainful activities? 20 C.F.R.
5 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
6 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
7 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
8 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
9 416.920(b). If she is not, the ALJ proceeds to step two.

10 **Step 2:** Does the claimant have a medically-severe impairment or
11 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
12 claimant does not have a severe impairment or combination of impairments, the
13 disability claim is denied. A severe impairment is one that lasted or must be
14 expected to last for at least 12 months and must be proven through objective
15 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
16 severe, the evaluation proceeds to the step three.

17 **Step 3:** Does the claimant's impairment meet or equal one of the listed
18 impairments acknowledged by the Commissioner to be so severe as to preclude
19 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
20 § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or equals one of
21 the listed impairments, the claimant is conclusively presumed to be disabled. *Id.* If
22 the impairment is not one conclusively presumed to be disabling, the evaluation
23 proceeds to the step four.

24 **Step 4:** Does the impairment prevent the claimant from performing work
25 she has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the
26 claimant is able to perform her previous work, she is not disabled. *Id.* If the
27 claimant cannot perform this work, the ALJ proceeds to the final step five.

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1 inferences reasonably drawn from the record.” *Molina*, 674 F.3d at 1111. Further,
2 a district court “may not reverse an ALJ's decision on account of an error that is
3 harmless.” *Id.* An error is harmless “where it is inconsequential to the [ALJ's]
4 ultimate nondisability determination.” *Id.* at 1115 (internal citation omitted). The
5 party appealing the ALJ's decision generally bears the burden of establishing that it
6 was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

7 **IV. Statement of Facts**

8 The facts of the case are set forth in detail in the transcript of proceedings,
9 and only briefly summarized here. Plaintiff was born on July 21, 1951, and was 54
10 years-old as of her alleged onset date of disability. Tr. 117. Plaintiff, a high school
11 graduate, worked primarily as a legal assistant, but also as an owner/manager of a
12 café. Tr. 128-130.

13 Plaintiff suffered a heart attack in August of 2005. Tr. 43, 225. Thereafter,
14 Plaintiff attempted to return to work part-time, but alleges she could not maintain
15 her prior employment. Plaintiff alleges that she is unable to work due to a
16 combination of physical impairments, including: coronary artery disease (“CAD”),
17 diabetes, morbid obesity, hypothyroidism, hypertension, hyperlipidemia,
18 dyslipidemia, peripheral neuropathy in both feet, gastro esophageal reflux disease
19 (“GERD”), left C6 radiculopathy with pain, osteophytes at C5-6, and anemia. ECF
20 No. 13 at 3.

21 **V. The ALJ’s Findings**

22 The ALJ determined Plaintiff was not disabled under sections 216(i) and
23 223(d) of the Act, and denied her application for DIB, protectively filed on July 2,
24 2008. *See* ALJ’s Decision, June 11, 2010, Tr. 12-21.

25 At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful
26 activity during the period from her alleged onset date of March 31, 2006, through
27 her date last insured determined to be September 30, 2007. Tr. 14.

28 **ORDER GRANTING PL.’S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEF.’S MOTION FOR SUMMARY JUDGMENT * 5**

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2 At **step two**, the ALJ found Plaintiff’s coronary artery disease (“CAD”) with
3 hypercholesterolemia and hyperlipidemia, hypertension, gastro esophageal reflex
4 disease (“GERD”), diabetes, hypothyroidism, obesity, and possible degenerative
5 disc disease with C5-6 spondylosis were severe impairments according to the
6 Social Security Act’s definition. Tr. 14 (citing 20 C.F.R. §§ 404.1520(c)).

7 At **step three**, the ALJ found that Plaintiff did not have an impairment or
8 combination of impairments that met or medically equaled one of the listed
9 impairments in 20 C.F.R. § 404, Subpt. P, App. 1 (the “Listings”). Tr. 15-16.

10 As to her CAD, the ALJ considered whether Plaintiff’s impairment met the
11 severity of listing 4.04 – Ischemic Heart Disease, or any other cardiovascular
12 listing, and determined that it did not because Plaintiff’s records from her heart
13 center reported “that [she] was doing extremely well and she had no angina.” Tr.
14 15. As to high blood pressure, the ALJ determined there is no medical listing for
15 high blood pressure and concluded no evidence existed that Plaintiff has any
16 hypertension symptoms that equal any other listing. Tr. 16.

17 Additionally, as to diabetes, the ALJ concluded Plaintiff did not meet the
18 severity of medical listing 9.08 – Diabetes Mellitus, because no evidence existed,
19 during the time at issue, “of significant and persistent disorganization of motor
20 function in two extremities resulting in sustained disturbance of gross and
21 dexterous movements or gait and station, acidosis occurring at least on the average
22 of once every two months[.]” *Id.*

23 Moreover, as to hypothyroidism, the ALJ determined Plaintiff’s impairment
24 did not meet the listing for hypothyroidism because no evidence existed indicating
25 Plaintiff has any symptoms from hypothyroidism that equaled any other listing for
26 an affected body system. *Id.* Further, as to her obesity, the ALJ concluded that the
27 effects of Plaintiff’s obesity do not medically equal a listing, nor do the combined
28

1 effects of her impairment meet or medically equal a medical listing. *Id.* Finally, as
2 to her cervical impairment, the ALJ considered whether Plaintiff’s spinal
3 impairments met a listing for 1.04 – Disorders of the Spine, and determined that
4 they did not because Plaintiff’s medical records do not document any neurological
5 deficits related to a spinal disorder. *Id.*

6 At **step four**, relying on the VE’s testimony, the ALJ found Plaintiff had the
7 residual functional capacity (“RFC”) to perform sedentary work ² as defined in 20
8 CFR 404.1567(a). Tr. 16. However, the ALJ also found Plaintiff could
9 occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and crawl, but
10 could not climb ladders, ropes, or scaffolds. *Id.*

11 The ALJ then found that Plaintiff was unable to perform her past relevant
12 work as a legal assistant or coffee maker barista. Tr. 19.

13 At **step five**, after considering her age, education, work experience, and
14 RFC, the ALJ found Plaintiff had acquired work skills from past relevant work that
15 were transferable to other occupations with jobs existing in significant numbers in
16 the national economy. Tr. 19. The ALJ based this decision on the VE’s testimony
17 and his review of the Dictionary of Occupational Title (“DOT”) that individuals
18 with Plaintiff’s age, education, work experience, and RFC can perform jobs like
19 receptionist and information clerk. *Id.* at 20. As a result of these findings, the ALJ
20 concluded Plaintiff was not disabled under the meaning of the Act. *Id.*

21 VI. Issues for Review

22 Plaintiff alleges the ALJ erred by: (1) improperly rejecting the opinions of
23 her treating medical providers; (2) failing to consider the side effects of her
24 medication; (3) improperly rejecting the lay witness testimony of her husband; (4)

25 _____
26 ² Sedentary work involves lifting no more than 10 pounds at a time and
27 occasionally lifting or carrying articles like docket files, ledgers, and small tools.
28 *See* 20 C.F.R. §§ 404.1567(a), 416.967(a)

1 improperly rejecting Plaintiff's subjective complaints; and (5) failing to meet the
2 ALJ's burden at step five of the sequential evaluation process. ECF No. 13 at 7-8.
3 Defendant responds the ALJ's decision was supported by substantial evidence and
4 free of harmful legal error. ECF No. 16 at 11.

5 **VII. Discussion**

6 **A. The ALJ Properly Evaluated the Medical Opinion of Dennis 7 McCullough, PA-C**

8 Plaintiff argues the ALJ improperly rejected the opinion of her treating
9 medical provider, Dennis McCullough, PA-C, as the ALJ failed to provide valid
10 reasons for rejecting Mr. McCullough's opinion. ECF No. 13 at 10-12. Mr.
11 McCullough assessed Plaintiff on January 15, 2010, and completed a medical
12 source statements related to her physical ability to complete work related activities.
13 Tr. 339-345, 461-67. Mr. McCullough opined, *inter alia*, that Plaintiff could sit for
14 one hour, stand for 5-10 minutes, and would have to get up and move around for
15 45 minutes, due to chronic knee pain. Tr. 340.

16 Mr. McCullough is a certified physician's assistant which is considered an
17 "other source" opinion by the Commissioner. *See* C.F.R. § 404.1513(d); SSR 06-
18 03p. Thus, to properly reject this opinion, the ALJ need only provide "germane"
19 reasons because Mr. McCullough is not a physician and classified as a non-medical
20 source. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

21 Despite Plaintiff's argument, the ALJ satisfied her burden as to the medical
22 opinion evidence by resolving conflicts in the medical record and setting forth
23 valid reasons based on substantial evidence in the record. Here, the ALJ rejected
24 Mr. McCullough's opinion because it was internally inconsistent, failed to provide
25 a sensible explanation of Plaintiff's functional ability, and no evidence existed that
26 the limitations addressed the relevant period at issue. Tr. 18.

1 First, the Court agrees with Defendant that the functional limitations
2 regarding sitting/standing/walking assessed by Mr. McCullough do not provide a
3 sensible explanation of Plaintiff's physical limitations. In fact, the only medical or
4 clinical findings which were listed in support of the assessment, chronic knee pain,
5 do not fully account for the limitations assessed or explain why knee pain would
6 limit Plaintiff's ability to sit. *See Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th
7 Cir. 2001) (“[T]he regulations give more weight to opinions that are explained than
8 to those that are not.”).

9 Second, the Court agrees with the ALJ's reasoning that Mr. McCullough's
10 report did not cover the relevant time period, as it dates to 2010, and not the time
11 period at issue, March 31, 2006 to September 31, 2007. Although the report
12 indicated Plaintiff was diagnosed with diabetes in 2005, cervical spine disease in
13 2008, and CAD in 2005, Mr. McCullough assessed the postural limitations noted
14 above based on knee pain and not CAD. Thus, the report was internally
15 inconsistent and failed to provide adequate evidence that the limitations assessed
16 applied to the relevant time period. *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th
17 Cir. 2012).

18 In sum, the Court finds no error in the rejection of a physician's assistant's
19 opinion that is inadequately supported by clinical findings and internally
20 inconsistent where it is unclear whether the limitations assessed relate to the period
21 of alleged disability.

22 **B. The ALJ's Failure to Discuss the Side Effects of Plaintiff's Medication**

23 Plaintiff next argues the ALJ erred by failing to consider the side effects of
24 her medication, such as the frequent need to urinate throughout the work-day. ECF
25 No. 13 at 12-14. At the hearing, Plaintiff testified that she was prescribed diuretics
26 in response to the swelling in her feet, after suffering a heart attack. Tr. 45-46.
27 Consequently, Plaintiff testified that after taking her medication she “would be up
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1 and down at least every 10 to 20 minutes,” which equated to five or six times per
2 hour, based on an eight hour work-day. Tr. 46. In addition, Plaintiff’s husband
3 testified to the similar limitations regarding her frequent urination. Tr. 65. Despite
4 this testimony, the ALJ failed to address Plaintiff’s subjective complaints regarding
5 the side effects of her medication.

6 Defendant concedes the ALJ erred by failing to discuss the testimony of
7 Plaintiff, and her husband, concerning the side effects of the medication, but
8 submits such error was harmless as it was not supported by the medical records.
9 ECF No. 16 at 14-16.

10 According to the Ninth Circuit, the ALJ must “consider *all* factors that might
11 have a ‘significant impact on an individual's ability to work.’” *Erickson v. Shalala*,
12 9 F.3d 813, 817 (9th Cir.1993) (quoting *Varney v. Sec'y of Health & Human*
13 *Servs.*, 846 F.2d 581, 585 (9th Cir.), *relief modified*, 859 F.2d 1396 (1988)). Such
14 factors “may include side effects of medications [.]” *Id.* at 818. When the ALJ
15 disregards the claimant's testimony as to subjective limitations of side effects, he
16 must support that decision with specific findings similar to those required for
17 excess pain testimony, as long as the side effects are in fact associated with the
18 claimant's medications. *See Varney*, 846 F.2d at 545. *Varney* is a case in which the
19 claimant testified that her medications caused fairly severe side effects. *Id.* at 585.
20 The *Varney* court concluded:

21 Like pain, the side effects of medications can have a significant
22 impact on an individual's ability to work and should figure in the
23 disability determination process. Also like pain, side effects can be a
24 “highly idiosyncratic phenomenon” and a claimant's testimony as to
25 their limiting effects should not be trivialized. Therefore, if the
26 Secretary chooses to disregard a claimant's testimony as to the
27 subjective limitations of side effects, he must support that decision
28 with specific findings similar to those required for excess pain
testimony, as long as the side effects are in fact associated with the
claimant's medication(s).

1 Because no such findings were made here, we remand the matter so
2 that, as in the case of the pain testimony, the ALJ may either accept
3 Varney's evidence regarding side effects or make specific findings
4 rejecting such evidence. Again, any specific findings rejecting her
5 testimony must be supported by the record and will be subject to
6 further review by the courts.

7 *Varney*, 846 F.2d 581, 585-86 (internal citations omitted).

8 The Court finds that *Varney* applies to the facts of this case. Here, as in
9 *Varney*, the ALJ did not address the claimant's complaint of her medication's side
10 effects. *Id.* Although Defendant argues such error was harmless, and identifies
11 reasons for rejecting or discounting Plaintiff's testimony (*e.g.*, such limitations
12 were not supported by objective medical evidence), these reasons were not invoked
13 by the ALJ. As a result, this Court cannot consider those reasons where the ALJ
14 did not justify her decision to reject Plaintiff's testimony without making specific
15 findings. *See Connett v. Barnhart*, 340 F.3d 871, 873-74 (9th Cir. 2003).

16 Moreover, as the record reveals, Plaintiff's counsel examined the VE
17 extensively regarding her frequent urination, which the VE determined would
18 negatively affect Plaintiff's RFC and her ability to maintain employment. *See Tr.*
19 *59-60.* Thus, the failure to discuss the side effects of Plaintiff's medication was not
20 harmless and remand is required to reassess the ALJ's RFC findings at step 4 and
21 possibly step 5. On remand, the ALJ is directed to consider Plaintiff's testimony
22 regarding her frequent urination.

23 **C. Plaintiff's Remaining Arguments**

24 As remand is necessary to properly assess the side effects of Plaintiff's
25 medications, which in turn requires the ALJ to reassess Plaintiff's credibility and
26 possibly her RFC; the Court need not consider Plaintiff's remaining arguments that
27 the ALJ improperly rejected the lay witness testimony of her husband, improperly
28 rejected her subjective complaints, and failed to meet the ALJ's burden at step 5 by
incorrectly assessing her RFC. ECF No. 13 at 14-20. Although set forth as separate

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1 claims, Plaintiff's remaining arguments are, in fact, related as they turn on the
2 reassessment of Plaintiff's credibility regarding her testimony related to frequent
3 urination.

4 **VIII. Remand**

5 With error established, the Court has the discretion to remand for further
6 proceedings or reverse and order an immediate award of benefits. *Harman v. Apfel*,
7 211 F.3d 1172, 1175–78 (9th Cir.2000). Where no useful purpose would be served
8 by further administrative proceedings, or where the record has been fully
9 developed, it is appropriate to exercise this discretion to direct an immediate award
10 of benefits. *Id.* at 1179 (“[T]he decision of whether to remand for further
11 proceedings turns upon the likely utility of such proceedings.”). However, where
12 there are outstanding issues that must be resolved before a determination of
13 disability can be made, and it is not clear from the record that the ALJ would be
14 required to find the claimant disabled if all the evidence were properly evaluated,
15 remand is appropriate. *Id.* at 1179–81.

16 Here, remand is the appropriate remedy to allow the ALJ the opportunity to
17 remedy the aforementioned error. On remand, the ALJ is directed to evaluate
18 Plaintiff's subjective limitations regarding her frequent urination as a side effect of
19 the diuretics prescribed to stem the swelling of her feet. *See* Tr. 45-46, 59-60. This
20 reevaluation should also include the lay testimony of claimant's husband who
21 testified to the same limitations regarding her frequent urination. *See* Tr. 65. In
22 addition, enhancement of the record may be necessary to resolve outstanding
23 issues at steps four, and possibly five that must be remedied before a determination
24 of disability can be made.

25 **IX. Conclusion**

26 Based on the foregoing, the Court finds the Commissioner's decision is not
27 free of legal error or supported by substantial evidence. Therefore, the case is

28 **ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND
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1 reversed and remanded to the Commissioner for further proceedings not
2 inconsistent with the Court's instructions noted above.

3 Accordingly, IT IS HEREBY ORDERED:

4 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

5 2. Defendant's Motion for Summary Judgment, ECF No. 15, is **DENIED**.

6 3. The Commissioner's decision denying Plaintiff benefits is **REVERSED**,
7 and this case is **REMANDED** for further proceedings consistent with this Order.

8 4. The District Court Executive is directed to enter judgment in favor of
9 Plaintiff and against Defendant.

10 5. An application for attorney's fees may be filed by separate motion.

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

13 **DATED** this 7th day of March, 2014.

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15 *s/Robert H. Whaley*

16 ROBERT H. WHALEY

17 Senior United States District Judge
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**ORDER GRANTING PL.'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEF.'S MOTION FOR SUMMARY JUDGMENT * 13**