

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

Mar 20, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANN MARIE R.,

No. 2:20-CV-00266-JAG

Plaintiff,

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND REMANDING
FOR ADDITIONAL
PROCEEDINGS

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 18, 19. Attorney Chad Hatfield represents Ann Marie R. (Plaintiff); Special Assistant United States Attorney Joseph J. Langkamer represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 and **REMANDS** the matter to the Commissioner for additional proceedings
2 pursuant to 42 U.S.C. § 405(g).

3 I. JURISDICTION

4 Plaintiff protectively filed an application for Supplemental Security Income
5 on October 30, 2017, alleging disability since March 27, 2014 due to diabetes,
6 hepatitis C, back pain, asthma, depression, and anxiety.² Tr. 15, 343-48, 362. The
7 applications were denied initially and upon reconsideration. Tr. 248-51, 255-57.
8 Administrative Law Judge (ALJ) Jesse K. Shumway held a hearing on May 29,
9 2019, Tr. 120-46, and issued an unfavorable decision on June 19, 2019. Tr. 12-28.
10 Plaintiff requested review by the Appeals Council and the Appeals Council denied
11 the request for review on May 29, 2020. Tr. 1-6. Accordingly, the ALJ's June
12 2019 decision became the final decision of the Commissioner, which is appealable
13 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
14 judicial review on July 31, 2020. ECF No. 1.

15 II. STATEMENT OF FACTS

16 The facts of the case are set forth in detail in the transcript of proceedings
17 and the ALJ's decision and only briefly summarized here. Plaintiff was born in
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19 ² Plaintiff previously applied for Title XVI benefits on April 14, 2008; the
20 application was denied initially and on reconsideration and resulted in an October
21 16, 2009 unfavorable decision from an ALJ. Tr. 147-67. Plaintiff appealed the
22 decision and, in an order dated February 25, 2011, the Appeals Council remanded
23 the case to the ALJ. Tr. 168-71. The ALJ denied her claim in an October 12, 2011
24 unfavorable decision. Tr. 172-99. Plaintiff appealed the decision to the Appeals
25 Council and then to this Court; the appeal resulted in a judgement for the
26 Commissioner of the Social Security Administration. *See Ann Marie R. v. Comm'r*
27 *of Soc. Sec.*, No. 2:12-CV-0611-TOR (E.D. Wash. Mar. 7, 2014).
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1 1968 and was 48 years old on the date the application was filed; she turned 50
2 during the period at issue. Tr. 23. She has a 9th grade education. Tr. 363.

3 **III. STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in
5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
6 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
7 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
9 only if it is not supported by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
11 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
12 1098. Put another way, substantial evidence is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
15 rational interpretation, the Court may not substitute its judgment for that of the
16 ALJ. *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d
17 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
21 substantial evidence will be set aside if the proper legal standards were not applied
22 in weighing the evidence and making the decision. *Brawner v. Sec'y of Health and*
23 *Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **IV. SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
27 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant
28

1 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
2 at 1098-1099. This burden is met once a claimant establishes that a physical or
3 mental impairment prevents the claimant from engaging in past relevant work. 20
4 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
5 proceeds to step five, and the burden shifts to the Commissioner to show (1) that
6 Plaintiff can perform other substantial gainful activity and (2) that a significant
7 number of jobs exist in the national economy which Plaintiff can perform. *Kail v.*
8 *Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d
9 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work in
10 the national economy, the claimant will be found disabled. 20 C.F.R. §
11 416.920(a)(4)(v).

12 V. ADMINISTRATIVE FINDINGS

13 On June 19, 2019 the ALJ issued a decision finding Plaintiff was not
14 disabled as defined in the Social Security Act. Tr. 12-28.

15 At *step one*, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since October 30, 2017, the application date. Tr. 17.

17 At *step two*, the ALJ determined Plaintiff had the following severe
18 impairments: lower back pain; hepatitis C with mild liver disease; chronic
19 obstructive pulmonary disease; gastroesophageal reflux disease/peptic ulcer
20 disease; abscesses; seizure disorder secondary to substance use/abuse;
21 diverticulosis with evidence of polyps on colonoscopy; obesity; polysubstance
22 abuse; major depressive disorder; and an unspecified trauma related disorder.
23 Tr. 18.

24 At *step three*, the ALJ found Plaintiff did not have an impairment or
25 combination of impairments that met or medically equaled the severity of one of
26 the listed impairments. Tr. 18-19.
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1 The ALJ then found that the prior (2011) ALJ's Residual Functional
2 Capacity (RFC) "accurately captures the [Plaintiff's] functioning, as demonstrated
3 by the new evidence in the file. No new or material evidence has been submitted
4 that would allow me to deviate from the prior ALJ's [RFC] finding." Tr. 21. The
5 ALJ therefore adopted the prior ALJ's finding that Plaintiff could perform light
6 work, but with the following nonexertional limitations:

7 [Plaintiff] is limited to no more than occasional stooping, crouching,
8 crawling, kneeling, balancing or climbing of ramps or stairs; she should
9 never climb ladders, ropes or scaffolds; she should avoid even moderate
10 exposure to respiratory irritants or workplace hazards; she is limited to
11 understanding, remembering and carrying out simple routine, repetitive
12 tasks requiring no more than superficial contact with the public and no
13 more than occasional interaction with co-workers; her work tasks must
14 be able to be performed in an isolated environment; and she must be
15 permitted additional time to adapt to changes in routine.

16 Tr. 20.

17 At *step four*, the ALJ found Plaintiff had no past relevant work. Tr. 22.

18 At *step five*, the ALJ "partially adopted the prior [2011] finding," noting that
19 while Plaintiff changed age categories during the period at issue, that the medical-
20 vocational rules, used as a framework, still directed a conclusion of "not disabled,"
21 and that, based on the testimony of the vocational expert at the 2011 hearing, and
22 considering Plaintiff's age, education, work experience, and RFC, Plaintiff could
23 perform jobs that existed in significant numbers in the national economy, including
24 the jobs of housekeeper cleaner, laundry worker, and conveyor operator.

25 Tr. 23-24.

26 The ALJ thus concluded Plaintiff was not under a disability within the
27 meaning of the Social Security Act at any time from the date the application was
28 filed, October 30, 2017, through the date of the decision. Tr. 24.

VI. ISSUES

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2 The question presented is whether substantial evidence supports the ALJ's
3 decision denying benefits and, if so, whether that decision is based on proper legal
4 standards. Plaintiff raises the following issues for review (1) whether the ALJ
5 properly evaluated the medical opinion evidence; (2) whether the ALJ properly
6 applied *Chavez*; (3) whether the ALJ properly evaluated Plaintiff's symptom
7 complaints; (4) whether the ALJ conducted a proper step-two analysis; (5) whether
8 the ALJ conducted a proper step-three analysis; and (6) whether the ALJ
9 conducted a proper step-five analysis.

VII. DISCUSSION

A. Medical Opinions.

11
12 Plaintiff contends the ALJ erred by improperly disregarding the opinion of
13 Kayleen Islam-Zwart, Ph.D., and failing to properly evaluate the limitations
14 assessed by Samantha Chandler, Psy.D. ECF No. 18 at 10-15.

15 For claims filed on or after March 27, 2017, pursuant to the applicable
16 regulations, the ALJ gives no specific evidentiary weight to medical opinions or
17 prior administrative medical findings. 20 C.F.R. § 416.920c(a). Instead, the ALJ
18 considers and evaluates the persuasiveness of all medical opinions or prior
19 administrative medical findings from medical sources. 20 C.F.R. § 416.920c(a)
20 and (b). The factors for evaluating the persuasiveness of medical opinions and
21 prior administrative findings include supportability, consistency, the source's
22 relationship with the claimant, any specialization of the source, and other factors
23 (such as the source's familiarity with other evidence in the file or an understanding
24 of Social Security's disability program). 20 C.F.R. § 416.920c(c)(1)-(5). The
25 regulations make clear that the supportability and consistency of the opinion are
26 the most important factors, and the ALJ must articulate how they considered both
27 factors in determining the persuasiveness of each medical opinion or prior
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1 administrative medical finding. 20 C.F.R. § 416.920c(b)(2). The ALJ may explain
2 how they considered the other factors, but is not required to do so, except in cases
3 where two or more opinions are equally well-supported and consistent with the
4 record. *Id.*

5 Supportability and consistency are explained in the regulations:

6 (1) *Supportability*. The more relevant the objective medical evidence
7 and supporting explanations presented by a medical source are to
8 support his or her medical opinion(s) or prior administrative medical
9 finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

10 (2) *Consistency*. The more consistent a medical opinion(s) or prior
11 administrative medical finding(s) is with the evidence from other
12 medical sources and nonmedical sources in the claim, the more
13 persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

14 20 C.F.R. § 416.920c(c)(1)-(2).

15 The Ninth Circuit addressed the issue of whether the new regulatory
16 framework displaces the longstanding case law requiring an ALJ to provide
17 specific and legitimate reasons to reject an examining provider's opinion. *Woods*
18 *v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). The Court held that the new
19 regulations eliminate any hierarchy of medical opinions, and the specific and
20 legitimate standard no longer applies. *Id.* at 788-89, 792. The Court reasoned the
21 "relationship factors" remain relevant under the new regulations, and thus the ALJ
22 can still consider the length and purpose of the treatment relationship, the
23 frequency of examinations, the kinds and extent of examinations that the medical
24 source has performed or ordered from specialists, and whether the medical source
25 has examined the claimant or merely reviewed the claimant's records. *Id.* at 790,
26 792. Even under the new regulations, an ALJ must provide an explanation
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1 supported by substantial evidence when rejecting an examining or treating doctor's
2 opinion as unsupported or inconsistent. *Id.* at 792.

3 **1. Dr. Islam-Zwart.**

4 On August 22, 2017, Dr. Islam-Zwart conducted a psychological/psychiatric
5 evaluation of Plaintiff for Washington State DSHS and rendered an opinion on
6 Plaintiff's level of functioning. Tr. 435-42. Dr. Islam-Zwart diagnosed Plaintiff
7 with posttraumatic stress disorder (PTSD); opioid dependence use disorder,
8 moderate on methadone maintenance; major depressive disorder, recurrent,
9 moderate; social phobia; borderline intellectual functioning (provisional); and
10 alcohol use disorder, moderate, in sustained remission. Tr. 436, 442. She opined
11 Plaintiff had marked limits in her ability to perform activities within a schedule,
12 maintain regular attendance, and be punctual within customary tolerances without
13 special supervision, to adapt to changes in a routine work setting, to communicate
14 effectively in a work setting and to maintain appropriate behavior in a work
15 setting, and in her ability to complete a normal workday and work week without
16 interruptions from psychologically based symptoms; and she had moderate limits
17 in her ability to understand, remember, and persist in tasks by following detailed
18 instructions, learn new tasks, make simple work related decisions, ask simple
19 questions or request assistance, and in her ability to set realistic goals and plan
20 independently. Tr. 436. Dr. Islam-Zwart indicated the overall severity of
21 Plaintiff's diagnosed impairments was severe, and that her impairments were not
22 primarily the result of alcohol or drug use within the past 60 days. Tr. 437. She
23 opined Plaintiff would be so limited for "12 to indefinite" months. *Id.*

24 In a narrative supplement attached to the DSHS form, Dr. Islam-Zwart
25 opined Plaintiff "presents indicating continued problems with depression and
26 social anxiety," along with symptoms of PTSD and history of substance misuse.
27 Tr. 442. She noted there was "indication of cognitive difficulties ... and she
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1 reports difficulty interacting in social situations and in leaving her home.” *Id.* She
2 opined Plaintiff’s “presentation is such that she is unable to work at this time and
3 her prognosis for the future seems guarded,” that a medical evaluation would be
4 necessary to determine her the degree of her physical concerns, and that “given the
5 nature of her problems, referral for SSI seems warranted.” *Id.*

6 The ALJ found Dr. Islam-Zwart’s opinion unpersuasive because it was
7 provided on a checkbox form with little explanation for the ratings given, her
8 opinion was not supported by her exam with minimal objective testing, testing was
9 generally within normal limits, and her opinion is inconsistent with the
10 longitudinal record. Tr. 22. Plaintiff argues the form Dr. Islam-Zwart used is used
11 by most examiners, she supported the assessed limitations with detailed notes from
12 a clinical interview and psychological testing, the ALJ replaced her detailed
13 findings with his own lay opinion, and that records cited as inconsistent were
14 related to physical not mental impairments. ECF No. 18 at 11-13. Defendant
15 argues the ALJ reasonably found the opinion unpersuasive because it lacked
16 support and consistency. ECF No. 19 at 18-19.

17 The Court finds the ALJ’s reasons for finding Dr. Islam-Zwart’s opinion
18 unpersuasive are not supported by substantial evidence. First, the ALJ discounted
19 Dr. Islam-Zwart’s opinion because it was “checkbox form with little explanation
20 for the ratings given.” Tr. 22. “An ALJ need not accept the opinion of any
21 physician ... if that opinion is brief, conclusory, and inadequately supported by
22 clinical findings.” *Thomas v. Barnhart*, 278.F3d 947, 957 (9th Cir. 2002).
23 Plaintiff points out that Dr. Islam-Zwart used the same DSHS form used by many
24 examining providers, and she also provided detailed notes and a narrative summary
25 explaining her opinion. ECF No. 18 at 11. The ALJ does not discuss the narrative
26 summary detailing her clinical interview, objective findings from mental status and
27 other psychological testing, and her impression and prognosis for the future.
28

1 Tr. 439-42. The ALJ’s dismissal of Dr. Islam-Zwart’s opinion because it was
2 provided on a checkbox form with little explanation is not supported by substantial
3 evidence.

4 Next, the ALJ concluded that Dr. Islam-Zwart’s opinion was “not supported
5 by her cursory evaluation with minimal objective testing, and that testing was
6 generally within normal limits.” Tr. 22. The more relevant objective evidence and
7 supporting explanations that support a medical opinion, the more persuasive the
8 medical opinion is. 20 C.F.R. § 416.920c(c)(1). Here, Dr. Islam-Zwart supported
9 her opinion with a clinical interview and administered a mental status exam and
10 other psychological testing, which showed abnormal findings including severely
11 impaired performance on Trails testing. Tr. 441-42. Upon mental status exam, Dr.
12 Islam-Zwart observed anxious and distressed affect, psychomotor agitation, and
13 “indication of cognitive difficulty.” Tr. 441. While the ALJ notes Plaintiff’s
14 performance on testing for memory malingering was “exactly above the cutoff,”
15 Dr. Islam-Zwart explained her performance was not indicative of malingering or
16 memory. Tr. 22, 442. Dr. Islam-Zwart’s opinion is supported by a clinical
17 interview along with mental status exam and other psychological testing, and she
18 documented her objective findings in a supplemental narrative report; the ALJ’s
19 dismissal of Dr. Islam-Zwart’s opinion because she performed only a cursory exam
20 and minimal testing is not supported by substantial evidence.

21
22 Finally, the ALJ determined that Dr. Islam-Zwart’s opinion was inconsistent
23 with the longitudinal medical record, particularly treatment notes that consistently
24 showed normal psychological status. Tr. 22. The more consistent an opinion is
25 with the evidence from other sources, the more persuasive the opinion. 20 C.F.R.
26 § 416.920c(c)(2).

27 Here, Plaintiff points out the ALJ only cites to records from appointments
28 focused on her physical problems; these treatment notes also show history of

1 “mental health problem,” reports of increasing depression and anxiety during the
2 period at issue, and recommendations for Plaintiff to reconnect with mental health
3 treatment including a psychiatric provider for medication management. *See e.g.*,
4 408-09, 412, 424, 514. Further, while limited, mental health treatment records
5 during the periods at issue appear consistent with Dr. Islam-Zwart’s opinion, and
6 so is the evidence from the other psychological evaluation during the period at
7 issue. At an intake assessment with her behavioral health provider in April 2018,
8 for example, she was observed to be anxious with depressed affect, history of
9 trauma was noted, and she was diagnosed with PTSD, major depression, an
10 unspecified anxiety disorder, and opiate use disorder on maintenance therapy. Tr.
11 491-92. At a psychological diagnostic evaluation with Dr. Chandler in March
12 2018, upon mental status exam the psychologist observed Plaintiff had difficulty
13 remembering information, sustaining consistent attention, and she presented with a
14 somewhat restricted affect and depressed and very anxious mood. Tr. 450-51.
15 Both psychologists who evaluated Plaintiff during the period at issue also noted
16 further psychological testing would be necessary to assess her level of intellectual
17 functioning, and both psychologists opined her psychological prognosis was poor.
18 Tr. 441, 453. Accordingly, the ALJ’s conclusion that Dr. Islam-Zwart’s opinion
19 was inconsistent with the longitudinal record is not support by substantial
20 evidence.
21

22 Upon remand the ALJ is instructed to reconsider the persuasiveness of Dr.
23 Islam-Zwart’s opinion and incorporate the opinion into the RFC or give reasons
24 supported by substantial evidence to reject the opinion.

25 **2. Dr. Chandler.**

26 In March 2018, Dr. Chandler conducted a psychological diagnostic
27 evaluation of Plaintiff and rendered an opinion on Plaintiff’s level of functioning.
28 Tr. 448-53. Dr. Chandler diagnosed Plaintiff with social anxiety with paranoid

1 features; major depressive disorder; unspecified trauma and stressor related
2 disorder; opioid use disorder, on maintenance therapy (methadone); stimulant use
3 disorder, amphetamine-type substance, in (self-reported) sustained remission,
4 alcohol use disorder, in (self-reported) sustained remission. Tr. 452. Dr. Chandler
5 opined Plaintiff's ability to interact appropriately with supervisors, coworkers, and
6 the public within a work environment would likely depend on the number of people
7 (especially males) and degree of interpersonal interactions required; she had
8 cognitive ability to remember some information, understand simple concepts and
9 follow simple three-step instructions; and she is likely to have difficulty in the
10 areas of remote memory and concept formation. *Id.* Dr. Chandler opined her
11 ability to follow complex multi-step instructions, sustain concentration, mentally
12 cope with and tolerate work related stressors, quickly process and adjust to changes
13 in task requirements, and maintain consistent performance would be affected by
14 her psychological symptoms; and she noted further psychological testing may be
15 helpful in regard to her level of intellectual functioning. *Id.* She opined "her
16 psychological prognosis seems poor." *Id.* at 453.

17
18 The ALJ found Dr. Chandler's opinion "persuasive as far as it goes, but it
19 provides little to no concrete, qualified limitations"; the ALJ concluded the opinion
20 was "generally consistent" with the RFC of the 2011 ALJ's decision, and that the
21 2011 RFC limitations "address and account for Dr. Chandler's proposed
22 limitations." Tr. 21-22. Plaintiff argues the ALJ erred by finding Dr. Chandler's
23 opinion persuasive and well supported, then failing to include any of Dr.
24 Chandler's assessed limitations in the RFC and failing to order recommended
25 testing or hold the record open for review of scheduled testing despite Dr.
26 Chandler's findings regarding intellectual functioning. ECF No. 18 at 15-16.
27 Defendant argues the ALJ reasonably found Dr. Chandler's opinion persuasive and
28

1 that the ALJ included multiple limitations in the RFC that account for Dr.
2 Chandler's opinion. ECF No. 19 at 15-17.

3 As the claim is being remanded for reconsideration of Dr. Islam-Zwart's
4 opinion, the ALJ shall also reconsider Dr. Chandler's opinion, taking into
5 consideration the factors as required by the regulations and considering the record
6 as a whole.

7 **3. Prior Administrative Findings.**

8 In March and June 2018, the state agency physical and mental consultants
9 reviewed the available records and assessed Plaintiff's level of functioning.
10 Tr. 206-25, 227-46. The ALJ found the opinions of the state agency physical and
11 mental consultants persuasive "to the extent that they match the prior ALJ
12 decision." Tr. 21. An ALJ is required to articulate how they considered the
13 consistency and supportability factors in determining the persuasiveness of each
14 medical opinion or prior administrative medical finding. 20 C.F.R. § 416.920a(b).
15 The ALJ did not articulate his assessment of either factor with respect to the prior
16 administrative findings.

17 As the claim is being remanded for reconsideration of the opinions of Dr.
18 Islam-Zwart and Dr. Chandler, the ALJ shall reassess all medical opinions and
19 prior administrative medical findings, setting forth an analysis of the consistency
20 and supportability of these opinions as required by the regulations. The ALJ will
21 incorporate the opinions into the RFC or give reasons supported by substantial
22 evidence to reject them.

23 **B. Chavez v. Bowen.**

24 Plaintiff contends the ALJ erred in his application of *Chavez* and AR 97-
25 4(9). ECF No. 18 at 7-10. "The principles of res judicata apply to administrative
26 decisions, although the doctrine is applied less rigidly to administrative
27 proceedings than to judicial proceedings." *Chavez v. Bowen*, 844 F.2d 691, 693
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1 (9th Cir. 1998) (citing *Lyle v. Sec’y of Health and Human Servs.*, 700 F.2d 566,
2 568 n.2 (9th Cir. 1983)). Under the doctrine of res judicata, a prior, final
3 determination of nondisability bars relitigation of that claim through the date of the
4 prior decision. *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995). Furthermore, in
5 the Ninth Circuit, a prior, final determination of nondisability “create[s] a
6 presumption that [the claimant] continued to be able to work after that date.” *Id.*
7 (citation and internal quotation marks omitted).³

8 “[T]he authority to apply res judicata to the period *subsequent* to a prior
9 determination [however] is much more limited.” *Id.* (emphasis in original). “The
10 claimant, in order to overcome the presumption of continuing nondisability arising
11 from the first administrative law judge’s findings of nondisability, must prove
12 ‘changed circumstances’ indicating a greater disability.” *Chavez*, 844 F.2d at 693
13 (citation omitted). Examples of changed circumstances include “[a]n increase in
14 the severity of the claimant’s impairment,” “a change in the claimant’s age
15 category,” and a new issue raised by the claimant, “such as the existence of an
16 impairment not considered in the previous application.” *Lester*, 81 F.3d at 827-28
17 (citations omitted); *see also* Acquiescence Ruling (AR) 97-4(9), 1997 WL 742758,
18 at *3 (Dec. 3, 1997). Even where the presumption is rebutted because of changed
19 circumstances, an adjudicator must adopt certain findings which were made in a
20

21 _____
22 ³ Acquiescence Ruling (AR) 97-4(9) explains how *Chavez* differs from the Social
23 Security Administration’s (SSA) interpretation of Social Security policy requiring
24 de novo review of claims for unadjudicated periods. The SSA applies the *Chavez*
25 presumption only as to claimants residing in the Ninth Circuit. AR 97-4(9),
26 available at 1997 WL 742758 at *3.
27
28

1 final decision by an ALJ or the Appeals Council under the same title of the Act
2 “unless there is new and material evidence” related to the finding. AR 97-4(9),
3 1997 WL 742758, at *3; *see also* HALLEX 1-5-4-60, *Implementation of the*
4 *Chavez Acquiescence Ruling (Ninth Circuit)*, 1998 WL 34083439, at *4 (Dec. 28,
5 1998).

6 On October 12, 2011, a prior ALJ found Plaintiff was not disabled.
7 Tr. 172-99. The ALJ in the present case found Plaintiff rebutted the presumption
8 of continuing nondisability, because “the relevant listings have changed and the
9 [Plaintiff] has alleged both worsening and additional impairments.” Tr. 15.
10 Continuing the analysis, the ALJ concluded he could not adopt the prior ALJ’s
11 findings at steps two, three, or four, because Plaintiff had new mental health
12 impairments, the agency had promulgated new rules and regulations related to the
13 evaluation of mental health impairments, and Plaintiff’s past work could no longer
14 considered past relevant work, because it was no longer within the last 15 years.
15 Tr. 18-19, 22-23. The ALJ found, however, that no new or material evidence had
16 been submitted that would allow him to deviate from the prior ALJ’s findings at
17 step one, Plaintiff’s RFC, and step five, and he adopted those findings. Tr. 15-16,
18 17-18, 21.

19 Plaintiff argues the updated medical evidence of record establishes a
20 worsening of existing impairments, new impairments, and disabling contemporary
21 medical source opinions, all of which constitute new and material evidence and a
22 changed condition that warrants reanalysis of the prior ALJ’s findings. ECF
23 No. 18 at 7-10.

24 As this claim is being remanded for further consideration of the medical
25 opinion evidence, the ALJ is instructed to reconsider all medical evidence, reapply
26 *Chavez* and AR 97-4, and perform the five-step analysis anew, taking into
27 consideration any other evidence or testimony relevant to Plaintiff’s claim.
28

1 **C. Plaintiff's Subjective Statements.**

2 Plaintiff contends the ALJ erred by improperly rejecting her subjective
3 complaints. ECF No. 18 at 19-21. It is the province of the ALJ to make
4 determinations regarding a claimant's subjective statements. *Andrews*, 53 F.3d at
5 1039. However, the ALJ's findings must be supported by specific, cogent reasons.
6 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
7 produces medical evidence of an underlying medical impairment, the ALJ may not
8 discredit testimony as to the severity of an impairment merely because it is
9 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
10 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
11 the claimant's testimony must be "specific, clear and convincing." *Smolen*, 80
12 F.3d at 1281; *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the
13 ALJ must identify what testimony is not credible and what evidence undermines
14 the claimant's complaints." *Lester* at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918
15 (9th Cir. 1993).

16 The ALJ concluded Plaintiff's statements concerning the intensity,
17 persistence and limiting effects of her symptoms were not consistent with the
18 medical evidence and other evidence in the record. Tr. 20. The ALJ found
19 Plaintiff's allegations were inconsistent with the evidence of record, evidence since
20 the prior hearing did not show evidence of deterioration in her functioning, and she
21 had had/sought very little treatment and she was noncompliant with treatment. *Id.*

22 The ALJ's evaluation of Plaintiff's symptom claims and the resulting
23 limitations largely relies on the ALJ's assessment of the medical evidence. Having
24 determined a remand is necessary to readdress the medical evidence, any
25 reevaluation must necessarily entail a reassessment of Plaintiff's subjective
26 symptom claims. Thus, the Court need not reach this issue and on remand the ALJ
27 must also carefully reevaluate Plaintiff's symptom claims in the context of the
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1 entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) (“Because
2 we remand the case to the ALJ for the reasons stated, we decline to reach
3 [plaintiff’s] alternative ground for remand.”).

4 **D. Step Two and Step Three.**

5 Plaintiff also contends the ALJ erred at step two and step three by rejecting
6 evidence of numerous additional severe impairments and making inadequate step
7 three findings. ECF No. 18 at 16-18. As this claim is being remanded for
8 reevaluation of the medical evidence and to perform the sequential analysis anew,
9 upon remand the ALJ will reconsider Plaintiff’s impairments at step two and
10 reassess whether any of Plaintiff’s impairments meet or equal a listing at step
11 three.

12 **E. Step Five.**

13 Plaintiff contends the ALJ erred by failing to conduct an adequate analysis at
14 step five, including failing to call a vocational expert. ECF No. 18 at 21. “[I]f a
15 claimant establishes an inability to continue [his] past work, the burden shifts to
16 the Commissioner in step five to show that the claimant can perform other
17 substantial gainful work.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)
18 (*citing Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989)). At step five, “the
19 ALJ ... examines whether the claimant has the [RFC] ... to perform any other
20 substantial gainful activity in the national economy.” *Id.* “If the claimant is able to
21 do other work, then the Commissioner must establish that there are a significant
22 number of jobs in the national economy that claimant can do.” *Tackett*, 180 F.3d
23 at 1099. “There are two ways for the Commissioner to meet the burden of
24 showing that there is other work in ‘significant numbers’ in the national economy
25 that claimant can do: (1) by the testimony of a [VE], or (2) by reference to the
26 Medical-Vocational Guidelines....” *Id.* “If the Commissioner meets this burden,
27 the claimant is not disabled and therefore not entitled to ... benefits.” *Id.* (citation
28

1 omitted). “If the Commissioner cannot meet this burden, then the claimant is
2 disabled and therefore entitled to ... benefits.” *Id.* (citation omitted).

3 As the case is being remanded for the ALJ to reconsider the medical
4 evidence and perform the five-step analysis anew, the ALJ is also instructed to
5 reconsider the step-five analysis with the assistance of vocational expert testimony.

6 **VIII. CONCLUSION**

7 Plaintiff argues the decision should be reversed and remanded for the
8 payment of benefits. The Court has the discretion to remand the case for additional
9 evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court
10 may award benefits if the record is fully developed and further administrative
11 proceedings would serve no useful purpose. *Id.* Remand is appropriate when
12 additional administrative proceedings could remedy defects. *Rodriguez v. Bowen*,
13 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that further
14 proceedings are necessary for the ALJ to reconsider the medical evidence,
15 including conflicting medical opinion evidence.

16 The ALJ’s decision is not supported by substantial evidence. On remand,
17 the ALJ shall reevaluate the medical evidence of record, including all medical
18 opinion evidence, reassess and apply *Chavez* and AR 97-4 as appropriate, and
19 perform the sequential analysis anew, making findings on each of the five steps of
20 the sequential evaluation process and taking into consideration any other evidence
21 or testimony relevant to Plaintiff’s disability claim.

22 Accordingly, **IT IS ORDERED:**

23 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 18**, is
24 **GRANTED.**

25 2. Defendant’s Motion for Summary Judgment, **ECF No. 19**, is
26 **DENIED.**

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

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

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

7 **IT IS SO ORDERED.**

8 DATED March 20, 2023.





JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE