

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

Apr 01, 2019

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRIGETTE C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-CV-05040-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 12 & 16. Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision, which denied her application for Disability Insurance Benefits and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C §§ 401-434 & 1381-1383f. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set forth below, the Court

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 **GRANTS** Plaintiff’s Motion for Summary Judgment and **DENIES** Defendant’s
2 Motion for Summary Judgment.

3 **I. JURISDICTION**

4 Plaintiff filed her application for Disability Insurance Benefits and
5 Supplemental Security Income on October 28, 2014. AR 308-15. Her alleged onset
6 date of disability is September 1, 2006. AR 308, 310. Plaintiff’s application was
7 initially denied on January 20, 2015, AR 167-68, 177, and on reconsideration on
8 April 14, 2015, AR 18, 189, 198.

9 A hearing with Administrative Law Judge (“ALJ”) Mark Kim occurred on
10 March 7, 2017. AR 118-57. On May 17, 2017, the ALJ issued a decision finding
11 Plaintiff ineligible for disability benefits. AR 16-30. The Appeals Council denied
12 Plaintiff’s request for review on January 9, 2018, AR 1-5, making the ALJ’s ruling
13 the “final decision” of the Commissioner.

14 Plaintiff timely filed the present action challenging the denial of benefits, on
15 February 7, 2018. ECF No. 3. Accordingly, Plaintiff’s claims are properly before
16 this Court pursuant to 42 U.S.C. § 405(g).

17 **II. SEQUENTIAL EVALUATION PROCESS**

18 The Social Security Act defines disability as the “inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than twelve months.” 42
2 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
3 under a disability only if the claimant’s impairments are of such severity that the
4 claimant is not only unable to do his previous work, but cannot, considering
5 claimant's age, education, and work experience, engage in any other substantial
6 gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

7 The Commissioner has established a five-step sequential evaluation process
8 for determining whether a claimant is disabled within the meaning of the Social
9 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
10 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

11 Step one inquires whether the claimant is presently engaged in “substantial
12 gainful activity.” 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
13 activity is defined as significant physical or mental activities done or usually done
14 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
15 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
16 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

17 Step two asks whether the claimant has a severe impairment, or combination
18 of impairments, that significantly limits the claimant’s physical or mental ability to
19 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe
20 impairment is one that has lasted or is expected to last for at least twelve months,

1 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
2 416.908-09. If the claimant does not have a severe impairment, or combination of
3 impairments, the disability claim is denied, and no further evaluative steps are
4 required. Otherwise, the evaluation proceeds to the third step.

5 Step three involves a determination of whether any of the claimant’s severe
6 impairments “meets or equals” one of the listed impairments acknowledged by the
7 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
8 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
9 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
10 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
11 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the
12 fourth step.

13 Step four examines whether the claimant’s residual functional capacity
14 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f) &
15 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is
16 not entitled to disability benefits and the inquiry ends. *Id.*

17 Step five shifts the burden to the Commissioner to prove that the claimant is
18 able to perform other work in the national economy, taking into account the
19 claimant’s age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
20 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this

1 burden, the Commissioner must establish that (1) the claimant is capable of
2 performing other work; and (2) such work exists in “significant Gallo in the
3 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
4 676 F.3d 1203, 1206 (9th Cir. 2012).

5 **III. STANDARD OF REVIEW**

6 A district court's review of a final decision of the Commissioner is governed
7 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
8 Commissioner's decision will be disturbed “only if it is not supported by
9 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1144,
10 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than a
11 mere scintilla but less than a preponderance; it is such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v.*
13 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
14 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
15 whether the Commissioner’s findings are supported by substantial evidence, “a
16 reviewing court must consider the entire record as a whole and may not affirm
17 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
18 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
19 F.2d 498, 501 (9th Cir. 1989)).

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
3 1992). If the evidence in the record “is susceptible to more than one rational
4 interpretation, [the court] must uphold the ALJ's findings if they are supported by
5 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
6 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
7 2002) (if the “evidence is susceptible to more than one rational interpretation, one
8 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
9 a district court “may not reverse an ALJ's decision on account of an error that is
10 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
11 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
12 The burden of showing that an error is harmful generally falls upon the party
13 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

14 IV. STATEMENT OF FACTS

15 The facts of the case are set forth in detail in the transcript of proceedings
16 and only briefly summarized here. Plaintiff was 28 years old on the date the
17 application was filed. AR 16, 28, 308, 310. She has at least a high school
18 education. *Id.* Plaintiff is able to communicate in English. AR 28, 330. Plaintiff has
19 past relevant work as a housekeeping cleaner/maid. AR 28.

20 //

1 the public and coworkers; and she must avoid all exposure to odors and chemicals.
2 AR 21.

3 The ALJ determined that Plaintiff was unable to perform any past relevant
4 work. AR 28.

5 **At step five**, the ALJ found that in light of Plaintiff's age, education, work
6 experience, and residual functional capacity, there are jobs that exist in significant
7 numbers in the national economy that he can have perform. AR 30. These include,
8 final assembler, small products assembler, and hand packager. AR 28-29.

9 **VI. ISSUES FOR REVIEW**

10 Plaintiff argues that the Commissioner's decision is not free of legal error
11 and not supported by substantial evidence. Specifically, she argues the ALJ erred
12 by: (1) Improperly assessing Plaintiff's symptom testimony; (2) improperly
13 assessing the medical opinion evidence; (3) improperly concluding that Plaintiff's
14 migraines do not medically equal Listing 11.02 at step three of the sequential
15 evaluation.

16 **VII. DISCUSSION**

17 **A. The ALJ Erred by Improperly Assessing Plaintiff's Migraine** 18 **Headaches at Step Three of the Five Step Sequential Evaluation.**

19 Plaintiff testified to experiencing her first migraine at eight years old. AR 131,
20 430, 564. Plaintiff claims that her migraines have continued throughout her life and
that they have worsened over time. AR 131. She has taken multiple prescriptions

1 for her migraines, undergone physical therapy, Botox injection, and steroid
2 injection. AR 56, 82, 87, 91, 97, 106, 521-31, 586, Plaintiff argues that she is
3 presumptively disabled at step three because her migraines meet or exceed the
4 criteria of Listing 11.02.

5 **1. Legal standard.**

6 A claimant is presumptively disabled and entitled to benefits if he or she
7 meets or equals a listed impairment. To meet a listed impairment, a disability
8 claimant must establish that his condition satisfies each element of the listed
9 impairment in question. *See Sullivan v. Zebley*, 493 U.S. 521, 530 (1990); *Tackett*
10 *v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.1999). To equal a listed impairment, a
11 claimant must establish symptoms, signs, and laboratory findings at least equal in
12 severity and duration to each element of the most similar listed impairment.
13 *Tackett*, 180 F.3d at 1099-1100 (quoting 20 C.F.R. 404.1526).

14 The SSA's Program Operations Manual System ("POMS") sets forth
15 multiple ways for the SSA to determine medical equivalence where the claimant
16 has an impairment that is not described in the Listing of Impairments. POMS DI
17 24505.015(B)(2)(b). POMS also provides the following rationale requirements for
18 use in determining medical equivalence for unlisted impairments; the ALJ should:
19 (1) discuss the claimant's impairment, medical findings, and non-medical findings;
20 (2) discuss the listing considered the most closely analogous listing; (3) compare

1 the findings of claimant's impairment to the findings of the most closely analogous
2 listing; (4) explain why the findings of the claimant's impairment are at least of
3 equal medical significance to the most closely analogous listing; and (5) cite the
4 most closely analogous listing. *Id.* at 24505.015(B)(6)(c).

5 **2. The ALJ properly determined that epilepsy is the most**
6 **analogous listing to migraines.**

7 Under the regulations because no listing for migraine headaches exists, the
8 ALJ was required to compare the findings to “closely analogues listed
9 impairments.” 20 C.F.R. §§ 404.1526(b)(2), 404.1526(2)(3). The “responsibility
10 for deciding medical equivalence rests with the administrative law judge or
11 Appeals Council.” 20 C.F.R. § 404.1526(2)(3). The POMS indicates that Listing
12 11.02 is the most closely analogous listed impairment to migraine headaches.
13 POMS DI 24505.015; *see* 20 C.F.R Pt. 404, Subpt. P, App. 1, Listing 11.02.

14 Notably, out of all unlisted impairments, the SSA used chronic migraines to
15 provide an illustrative example of how the above rationale could be applied:

16 A claimant has chronic migraine headaches for which she sees her
17 treating doctor on a regular basis. Her symptoms include aura,
18 alteration of awareness, and intense headache with throbbing and
19 severe pain. She has nausea and photophobia and must lie down in a
20 dark and quiet room for relief. Her headaches last anywhere from 4 to
72 hours and occur at least 2 times or more weekly. Due to all of her
symptoms, she has difficulty performing her ADLs. The claimant
takes medication as her doctor prescribes. The findings of the
claimant's impairment are very similar to those of 11.03, Epilepsy,
non-convulsive. Therefore, 11.03 is the most closely analogous listed

1 impairment. Her findings are at least of equal medical significance as
2 those of the most closely analogous listed impairment. Therefore, the
claimant's impairment medically equals Listing 11.02.

3 POMS DI 24505.015(B)(7)(b), Example 2.¹

4
5 Thus, the SSA provides specific guidance regarding the applicability of
6 Listing 11.02 to the step three medical equivalence analysis for migraine
7 headaches. An ALJ's failure to specifically consider Listing 11.02 constitutes legal
8 error when a claimant's migraine headaches were found to be severe at step two.
9 *Edwards v. Colvin*, 2014 WL 7156846, at *3 (W.D. Wash. Sept. 15, 2014); *Spiteri*
10 *v. Colvin*, 2016 WL 7425924, at *10 (N.D. Cal. Dec. 23, 2016); *Mesecher v.*
11 *Berryhill*, 2017 WL 998373, at *5 (the failure to consider a relevant listing is
12 error). While the ALJ did note that 11.02 was the appropriate Listing, the ALJ
13 failed to specifically consider Plaintiff's subjective complaints as elements of the
14 Listing. Further, the ALJ did not consider all of the elements required by Listing
15 11.02 because the record was not fully developed with regard to one element; the
16 headaches must be "documented by detailed description of a typical [migraine
17

18 ¹ The Court notes that Listing 11.03 referenced in this Example is a former operating section that
19 was removed just to prior the ALJ's decision in this case. In 2017, the SSA combined Listing
20 11.03, non-convulsive epilepsy, and Listing 11.02, conclusive epilepsy, into 11.02 removing
11.03. *See Revised Medical Criteria for Evaluating Neurological Disorders*, 81 FR 43048-01,
2016 WL 3551949, at *43056 (July 1, 2016). However, the Example may still be looked to as a
useful tool when determining whether a plaintiff's headaches meet an analogous Listing.

1 headache], including all associated phenomena.” 20 C.F.R Pt. 404, Subpt. P, App.
2 1, listing 11.02.

3 **3. The ALJ improperly analyzed Plaintiff’s migraines under the**
4 **Listing and erred by failing to fully and fairly develop the**
5 **record.**

6 It is important to note that, at step three of the sequential evaluation process,
7 it is still the claimant's burden to prove that her impairment meets or equals one of
8 the impairments listed in 20 C.F.R. § 404, Subpart P. *Oviatt v. Com'r of Soc. Sec.*
9 *Admin.*, 303 F. App'x 519, 523 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d 1071,
10 1074–75 (9th Cir.2007); *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir.2005).

11 However, in Social Security cases, the ALJ has a special duty to develop the record
12 fully and fairly and to ensure that the claimant's interests are considered, even
13 when the claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144,
14 1150 (9th Cir.2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983).

15 The regulations provide that the ALJ may attempt to obtain additional
16 evidence when the evidence as a whole is insufficient to make a disability
17 determination, or if after weighing the evidence the ALJ cannot make a disability
18 determination. 20 C.F.R. § 404.1527(c)(3); see also 20 C.F.R. § 404.1519a.

19 Importantly, “[a]n ALJ's duty to develop the record further is triggered only when
20 there is ambiguous evidence or when the record is inadequate to allow for proper
evaluation of the evidence.” *Mayer v. Massanari*, 276 F.3d 453, 459–60 (9th Cir.

1 2001); *Tonapetyan*, 242 F.3d at 1150. “The ALJ may discharge this duty in several
2 ways, including: subpoenaing the claimant’s physicians, submitting questions to
3 the claimant’s physicians, continuing the hearing, or keeping the record open after
4 the hearing to allow supplementation of the record.” *Tonapetyan*, 242 F.3d at 1150
5 (citing *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998); *Smolen v. Chater*, 80
6 F.3d 1273, 1288 (9th Cir. 1996)). The ALJ failed to develop the record in the case
7 at hand.

8 The ALJ determined that Plaintiff’s migraines did not meet or equal any of
9 the neurological listings, including epilepsy, Listing 11.02. AR 19. To support her
10 determination, the ALJ pointed to the lack of medical evidence, particularly from a
11 medical professional, of a detailed description based on personal observation of
12 one of claimant’s headache events. *Id.* Listing 11.02 does require migraine
13 headaches be “documented by detailed description of a typical [migraine
14 headache], including all associated phenomena.” 20 C.F.R Pt. 404, Subpt. P, App.
15 1, listing 11.02. The ALJ further noted mostly normal neurological scans and a
16 normal CT scan, and that the majority of the evidence consisted of Plaintiff’s
17 subjective complaints. *Id.* For the following reasons, the ALJ incorrectly analyzed
18 Plaintiff’s migraines at step three.

19 With regard to Plaintiff’s normal scans, while there may not be a laboratory
20 or blood test to confirm a migraine disorder, and it may be that radiologic studies

1 do not always reveal an objectively-defined source of migraine pain, it is possible
2 to present objective-like evidence to establish the severity of the claimed
3 impairment such as the treating physician's personal observations of any physical
4 manifestations of pain, chart notes reflecting ongoing attempts at treatment with
5 medication(s), trips to the emergency room or hospital admissions for disabling
6 migraine pain, a record of associated symptoms, or other similar evidence.

7 *Mehrnoosh v. Astrue*, 2011 WL 2173809, at *7 (D. Or. June 2, 2011). There are
8 several notations in the record with regard to Plaintiff's pain during appointments
9 and ongoing attempts at treatment and medications. AR 52, 88, 109, 112, 429-30,
10 452, 455, 496, 527, 564. Further, neither the SSA nor the federal courts require that
11 an impairment, including migraines, be proven through objective clinical findings.²

12 *Thompson v. Barnhart*, 493 F. Supp. 2d 1206, 1215 (S.D. Ala. 2007).

13 ² See, e.g., *Ortega v. Chater*, 933 F.Supp. 1071, 1075 (S.D.Fla.1996) (noting that “present-day
14 laboratory tests cannot prove the existence of migraine headaches[]” and holding that an ALJ
15 improperly discounted a treating physician's opinion that a claimant was disabled by migraines,
16 despite the fact that there were no laboratory tests confirming the existence or severity of the
17 headaches, where the opinion of the treating physician was consistent, extensive, and
18 substantiated by objective medical evidence that the claimant suffered from symptoms that were
19 associated with severe migraine headaches); see also e.g., *Stebbins v. Barnhart*, 2003 WL
20 23200371, *10–11 (W.D.Wis. Oct. 21, 2003) (remanding the ALJ's decision because it was
based on errors, “foremost of which was a fundamental misunderstanding of the diagnosis and
treatment of migraine headaches[]”); *Diaz v. Barnhart*, 2002 WL 32345945, *6 (E.D.Pa. Mar. 7,
2002) (stating that migraines “do not stem from a physical or chemical abnormality which can be
detected by imaging techniques or laboratory tests, but are linked to disturbances in cranial blood
flow []”); *Federman v. Chater*, 1996 WL 107291, at *2, 1996 U.S. Dist. LEXIS 2893, at *6
(S.D.N.Y. Mar. 7, 1996) (noting that because there is no test for migraines, “ ‘when presented
with documented allegations of symptoms which are entirely consistent with the
symptomatology for evaluating the claimed disorder, the Secretary cannot rely on the ALJ's
rejection of the claimant's testimony based on the mere absence of objective evidence[] ’ ”).

1 Additionally, the POMS Example for migraines shows heavy reliance and
2 consideration of a plaintiff’s subjective complaints regarding his or her
3 headaches/migraines. *See supra* pp. 10-11. In the case at hand, the ALJ failed to
4 substantially consider Plaintiff’s subjective complaint testimony along with the
5 corroborating medical evidence in the record.

6 The ALJ owes a duty to claimants to fully and fairly develop the record.
7 Because the ALJ based her determination most prominently on the missing
8 detailed description of the headaches and lack of objective medical evidence, she
9 should have provided or allowed an appropriate cure for the inadequacy prior to
10 rendering her decision. *Massanari*, 276 F.3d at 459–60; *Tonapetyan*, 242 F.3d at
11 1150. There are multiple avenues provided to ALJ’s to cure such inadequacies. *See*
12 20 C.F.R. § 404.1527(c)(3); *see also* 20 C.F.R. § 404.1519a. Namely, she could
13 have continued the hearing and called an expert to testify at the subsequent
14 hearing. At the very least, she could have notified Plaintiff that the record was
15 lacking and allowed Plaintiff an opportunity to cure the inadequacy. *Id.*

16 Without a detailed description of Plaintiff’s headaches/migraines, the ALJ
17 should have determined that the record was inadequate to allow for proper
18 evaluation of the evidence. Faced with similarly deficient analysis by ALJs, courts
19 have remanded for further administrative proceedings because the ALJ “is in a
20 better position to evaluate the medical evidence” than a district court. *Santiago v.*

1 *Barnhart*, 278 F. Supp. 2d 1049, 1058 (N.D. Cal. 2003); *see also, e.g., Galaspi-*
2 *Bey v. Barnhart*, No. C-01-01770-BZ, 2002 WL 31928500, at *3 (N.D. Cal. Dec.
3 23, 2002).

4 **B. Remand is the Appropriate Remedy.**

5 The Court has the discretion to remand the case for additional evidence and
6 findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court may award
7 benefits if the record is fully developed and further administrative proceedings
8 would serve no useful purpose. *Id.* Remand is appropriate when additional
9 administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d
10 759, 763 (9th Cir. 1989). In this case, the Court finds that further proceedings are
11 necessary for a proper determination to be made. *Taylor v. Comm’r of Soc. Sec.*
12 *Admin.*, 659 F.3d 1228, 1235 (9th Cir. 2011) (“Remand for further proceedings is
13 appropriate where there are outstanding issues that must be resolved before a
14 disability determination can be made, and it is not clear from the record that the
15 ALJ would be required to find the claimant disabled if all the evidence were
16 properly evaluated.”). Further, Plaintiff’s request for an immediate award of
17 benefits is denied as further proceedings are necessary to develop the record.

18 Because the Court finds that the ALJ erred in her assessment at step three
19 and the error was not harmless, the Court need not address Plaintiff’s remaining
20 allegations of error. Instead, the Court remands.

1 **VIII. CONCLUSION**

2 Having reviewed the record and the ALJ’s findings, the Court finds the ALJ
3 erred by failing to fully and fairly develop the record. Accordingly, **IT IS**

4 **ORDERED:**

5 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**.

6 2. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

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

9 4. This matter is **REMANDED** to the Commissioner for further proceedings
10 consistent with this Order.

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

13 **DATED** this 1st day of April, 2019.

14 *s/Robert H. Whaley*
15 **ROBERT H. WHALEY**
Senior United States District Judge