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

Apr 09, 2019

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

JERI T.,¹
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 4:18-cv-05103-MKD

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

ECF Nos. 15, 16

Before the Court are the parties’ cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 3. The Court, having reviewed the administrative record and the parties’ briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff’s motion, ECF No. 15, and denies Defendant’s motion, ECF No. 16.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them only by their first names and the initial of their last names.

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
3 1383(c)(3).

4 **STANDARD OF REVIEW**

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

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

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
13 impairment must be "of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy."
16 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b), 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [her] physical or mental ability to do basic work activities,” the
9 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
10 claimant’s impairment does not satisfy this severity threshold, however, the
11 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
12 404.1520(c), 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite her limitations, 20 C.F.R. §§ 404.1545(a)(1),
4 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that she has performed in the past
7 (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
8 claimant is capable of performing past relevant work, the Commissioner must find
9 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
10 claimant is incapable of performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
14 the Commissioner must also consider vocational factors such as the claimant's age,
15 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
16 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
17 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
4 capable of performing other work; and 2) such work “exists in significant numbers
5 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
6 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 On January 29, 2014, Plaintiff protectively filed applications for Title II
9 disability insurance benefits and Title XVI supplemental security income benefits,
10 alleging an onset date of June 1, 2013. Tr. 288-300. The applications were denied
11 initially, Tr. 186-89, and on reconsideration, Tr. 194-204. Plaintiff appeared at a
12 hearing before an administrative law judge on January 6, 2017. Tr. 37-97. On
13 May 1, 2017, the ALJ denied Plaintiff’s claims. Tr. 12-33.

14 At step one, the ALJ found that Plaintiff had not engaged in substantial
15 gainful activity since June 1, 2013. Tr. 17. At step two, the ALJ found Plaintiff
16 had the following severe impairments: mild hand arthritis, mild carpal tunnel
17 syndrome, degenerative joint disease in the hips with status post total hip
18 replacement, degenerative disc disease, and chronic obstructive pulmonary disease.
19 Tr. 17. At step three, the ALJ found Plaintiff did not have an impairment or
20 combination of impairments that meets or medically equals the severity of a listed

1 impairment. Tr. 19. The ALJ then concluded that Plaintiff had the RFC to
2 perform light work with the following limitations:

3 [she] can climb ramps/stairs, balance, stoop, kneel, crouch, and crawl
4 occasionally; she cannot climb ladders, ropes, or scaffolds; she can reach
5 overhead bilaterally on an occasional basis; she can frequently handle; and
she must have no concentrated exposure to extreme hold [sic], vibration,
pulmonary irritants, and hazards.

6 Tr. 19.

7 At step four, the ALJ found Plaintiff was capable of performing past relevant
8 work as an accounting clerk, inventory clerk, dispatcher maintenance service,
9 locker room attendant, order filler, appointment clerk, reservation clerk,
10 receptionist, and pharmacy deliverer. Tr. 25. Therefore, without proceeding to
11 step five, the ALJ concluded Plaintiff was not under a disability, as defined in the
12 Social Security Act, from June 1, 2013, through May 1, 2017, the date of the ALJ's
13 decision. Tr. 26.

14 On April 24, 2018, the Appeals Council denied review, Tr. 1-6, making the
15 ALJ's decision the Commissioner's final decision for purposes of judicial review.
16 *See* 42 U.S.C. § 1383(c)(3).

17 ISSUES

18 Plaintiff seeks judicial review of the Commissioner's final decision denying
19 her disability insurance benefits under Title II and supplemental security income
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1 benefits under Title XVI of the Social Security Act. ECF No. 15. Plaintiff raises
2 the following issues for this Court’s review:

- 3 1. Whether the ALJ properly weighed the medical opinion evidence; and
- 4 2. Whether the ALJ properly weighed Plaintiff’s symptom claims.

5 ECF No. 15 at 2.

6 DISCUSSION

7 A. Medical Opinion Evidence

8 Plaintiff challenges the ALJ’s consideration of the medical opinions of
9 Wendy Eider, M.D., Nichole McAllister, PA-C, and Amber Barnes, ARNP. ECF
10 No. 15 at 3-13.

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

3 If a treating or examining physician’s opinion is uncontradicted, the ALJ
4 may reject it only by offering “clear and convincing reasons that are supported by
5 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
6 “However, the ALJ need not accept the opinion of any physician, including a
7 treating physician, if that opinion is brief, conclusory and inadequately supported
8 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
9 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
10 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
11 may only reject it by providing specific and legitimate reasons that are supported
12 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
13 F.3d 821, 830-831 (9th Cir. 1995)). The opinion of a nonexamining physician may
14 serve as substantial evidence if it is supported by other independent evidence in the
15 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

16 “Only physicians and certain other qualified specialists are considered
17 ‘[a]cceptable medical sources.’ ” *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir.

1 2014) (alteration in original); *see* 20 C.F.R. § 416.902² (acceptable medical
2 sources are licensed physicians, licensed or certified psychologists, licensed
3 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
4 audiologists, licensed advanced practice registered nurses, and licensed physician
5 assistants). However, an ALJ is required to consider evidence from non-acceptable
6 medical sources. 20 C.F.R. § 416.927(f).³ An ALJ may reject the opinion of a
7 non-acceptable medical source by giving reasons germane to the opinion. *Ghanim*,
8 763 F.3d at 1161.

9 *1. Dr. Eider*

10 Dr. Eider examined Plaintiff on January 16, 2014, and diagnosed Plaintiff
11 with osteoarthritis of multiple sites, including the cervical and lumbar spine, and
12 fibromyalgia. Tr. 471. Dr. Eider opined that Plaintiff needed to pace her activities
13 and take frequent rest periods during the day to control her pain and thus as a result

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16 ² Prior to March 27, 2017, the definition of an acceptable medical source was
17 located at 20 C.F.R. § 416.913.

18 ³ Prior to March 27, 2017, the requirement that an ALJ consider evidence from
19 non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),
20 416.913(d).

1 was unable to “participate in the work force” and recommended that Plaintiff seek
2 disability. Tr. 471.

3 The ALJ failed to discuss Dr. Eider’s opinion or assign a level of weight to
4 it. The ALJ must evaluate every medical opinion received according to a list of
5 factors set forth by the Social Security Administration. 20 C.F.R. §§ 404.1527(c),
6 416.927(c) (2012). “Where an ALJ does not explicitly reject a medical opinion or
7 set forth specific, legitimate reasons for crediting one medical opinion over
8 another, he errs.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citing
9 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)). The Commissioner
10 argues that Dr. Eider’s report was not a medical opinion as it did not opine as to
11 Plaintiff’s functional capacities. ECF No. 16 at 3. This argument is not
12 persuasive. Dr. Eider’s report was a medical opinion: a “statement[] from [an]
13 acceptable medical source[] that reflect[s] judgments about the nature and severity
14 of [Plaintiff’s] impairment(s), including [her] symptoms, diagnosis, and prognosis,
15 what [she] can still do despite impairments(s) and [her] physical or mental
16 restrictions.” 20 C.F.R. §§ 404.1527(a)(1), 416.927(a)(1). In failing to discuss Dr.
17 Eider’s opinion, the ALJ erred.

18 The Commissioner argues this error is harmless. ECF No. 16 at 3. The
19 harmless error analysis may be applied where even a treating source’s opinion is
20 disregarded without comment. *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir.

1 2015). An error is harmful unless the reviewing court “can confidently conclude
2 that no ALJ, when fully crediting the [evidence], could have reached a different
3 disability determination.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056
4 (9th Cir. 2006). Here, Dr. Eider, a rheumatologist, was the only acceptable
5 medical source in the record to opine that Plaintiff had physical limitations that
6 required her to pace her activities and also take frequent rest breaks to control her
7 pain. Tr. 471; *see also* Tr. 463 (noting that Plaintiff was seen by Dr. Eider, who
8 recommended that narcotic pain medications be avoided if possible); Tr. 1137
9 (noting that Plaintiff was seen by Dr. Eider, a rheumatologist who diagnosed
10 fibromyalgia). The ALJ did not discuss this opined limitation—an opinion that is
11 consistent with Ms. McAllister’s opinion that Plaintiff was severely limited and
12 Ms. Barnes’ opinion that Plaintiff must lie down during the day and would have
13 absenteeism problems. Tr. 19, 616-17, 697-98. Moreover, contrary to Plaintiff
14 being treated by Dr. Eider, a rheumatologist, the ALJ noted that Plaintiff “never
15 sought an evaluation by a rheumatologist, as her provider had recommended.” Tr.
16 18. Thus, the ALJ determined that fibromyalgia—a condition, which the ALJ
17 failed to recognize had been diagnosed by Dr. Eider—was not a severe medical
18 condition. Tr. 18. While later in 2015, Ms. McAllister again referred Plaintiff to a
19 rheumatologist, the medical notes indicate that Plaintiff had difficulty scheduling
20 this second rheumatology appointment because the only rheumatologist then taking

1 new patients whom also accepted Plaintiff's insurance was located in Seattle and
2 Plaintiff was unsure whether she could travel from her home in Kennewick to
3 Seattle. Tr. 1133, 1141, 1153. Based on this record, without a pace or break
4 limitation incorporated into the RFC, the Court cannot confidently conclude that
5 the disability determination would remain the same were the ALJ to fully credit
6 Dr. Eider's opinion. The ALJ's error was not harmless.

7 The Commissioner contends that there is "no meaningful inconsistency
8 between Dr. Elder's [sic] statement and the RFC finding." ECF No. 16 at 2-3.
9 The Court is unable to reconcile the source's conclusion that Plaintiff cannot
10 participate in the workforce with the ALJ's RFC that results in employability.

11 The Commissioner next urges the Court to determine the ALJ would have
12 rejected Dr. Eider's opinion if it had been specifically considered because it is
13 inconsistent with Plaintiff's activities in caring for a disabled individual and farm
14 animals. ECF No. at 3. However, the Court cannot affirm the ALJ's decision
15 based on findings not made by the ALJ. *See Stout*, 454 F.3d at 1054.

16 On remand, in light of Plaintiff's degenerative disc and joint diseases and the
17 passage of time since the ALJ's May 2017 decision, the ALJ is instructed to
18 schedule a consultative examination pursuant to 20 C.F.R. §§ 404.1512 and
19 416.917, take testimony from a medical expert if warranted, reconsider the medical
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1 evidence, including Dr. Eider’s opinion, and, if necessary, resolve conflicts in the
2 evidence.

3 **B. Other Challenges**

4 Plaintiff raises several other challenges to the ALJ’s evaluation of the
5 medical opinion evidence and Plaintiff’s symptom testimony. ECF No. 15 at 5-20.
6 The Court declines to address these challenges here. However, the Court briefly
7 addresses the following. First, if the ALJ is to discount Ms. McAllister’s and Ms.
8 Barnes’ opinions on the grounds that they were inadequately supported, the ALJ
9 must consider not only the explanations, if any, offered in these opinions but
10 whether the opinions were supported by the provider’s treatment records or the
11 records reviewed by that provider. *See Garrison*, 759 F.3d at 1014 n.17; *Trevizo v.*
12 *Berryhill*, 871 F.3d 664, 667 n.4 (9th Cir. 2017). Second, if the ALJ is to find that
13 Ms. Barnes’ opinion contained an inconsistency because it mentioned that Plaintiff
14 began treatment in July 2004, the ALJ must offer a meaningful analysis of this
15 found inconsistency, particularly in light of Ms. Barnes’ note that Plaintiff was not
16 treated at Ms. Barnes’ clinic until February 2013. Tr. 616; *see Embrey v. Bowen*,
17 849 F.2d 418, 421–22 (9th Cir. 1988) (recognizing that conclusory reasons do not
18 “achieve the level of specificity” required to justify an ALJ’s rejection of an
19 opinion); *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) (“We require the
20 ALJ to build an accurate and logical bridge from the evidence to her conclusions

1 so that we may afford the claimant meaningful review of the SSA's ultimate
2 findings."). Third, if the ALJ discounts Plaintiff's claims of disabling pain on the
3 grounds that Plaintiff cared for her blind, elderly friend, the record must identify
4 the nature, scope, and duration of the care involved after the alleged disability
5 onset date and the ALJ must identify how the care and activities are inconsistent
6 with Plaintiff's reported symptoms. *See, e.g.*, Tr. 449, 805, 1141. *see Trevizo*, 871
7 F.3d at 675-76; *Garrison*, 759 F.3d at 1016; *Fair v. Bowen*, 885 F.2d 597, 603 (9th
8 Cir. 1989) (recognizing that a claimant's ability to engage in activities that were
9 sporadic or punctuated with rest, such as housework, occasional weekend trips, and
10 some exercise, do not necessarily support a finding that she can engage in regular
11 work activities). Finally, if the ALJ is to discount Plaintiff's testimony because of
12 noncompliance with treatment, the ALJ must assess whether any reasons offered
13 constitute good cause for failure to follow or seek treatment. *See Orn v. Astrue*,
14 495 F.3d 625, 638 (9th Cir. 2007); *Holohan*, 246 F.3d at 1205; 20 C.F.R. §§
15 404.1529(c)(2), 416.929(c)(2).

16 **C. Remedy**

17 Plaintiff urges this Court to remand for an immediate award of benefits.
18 ECF No. 17 at 10.

19 "The decision whether to remand a case for additional evidence, or simply to
20 award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d

1 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir.
2 1985)). When the Court reverses an ALJ’s decision for error, the Court “ordinarily
3 must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d
4 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.
5 2004) (“[T]he proper course, except in rare circumstances, is to remand to the
6 agency for additional investigation or explanation”); *Treichler v. Comm’r of Soc.*
7 *Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social
8 Security cases, the Ninth Circuit has “stated or implied that it would be an abuse of
9 discretion for a district court not to remand for an award of benefits” when three
10 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
11 credit-as-true rule, where (1) the record has been fully developed and further
12 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
13 to provide legally sufficient reasons for rejecting evidence, whether claimant
14 testimony or medical opinion; and (3) if the improperly discredited evidence were
15 credited as true, the ALJ would be required to find the claimant disabled on
16 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
17 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
18 the Court will not remand for immediate payment of benefits if “the record as a
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1 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
2 F.3d at 1021.

3 Here, further proceedings are necessary. As discussed *supra*, the ALJ erred
4 by failing to evaluate Dr. Eider’s opinion regarding physical functional limitations.
5 However, Dr. Eider’s opinion was contradicted by the nonexamining opinions of
6 Steven Haney, M.D., and Gordon Hale, M.D., who both opined that Plaintiff could
7 perform a reduced range of light work, did not have pace restrictions, and did not
8 need non-standard breaks. Tr. 145-50, 163-65 The ALJ gave Dr. Haney’s and Dr.
9 Hale’s opinions significant weight. Tr. 24. Even if the ALJ were to have fully
10 credited Dr. Eider’s opinion, the evidence would present an outstanding conflict
11 for the ALJ to resolve. Therefore, further proceedings are necessary for the ALJ to
12 resolve potential conflicts in the evidence. The ALJ is instructed to conduct a new
13 sequential analysis on remand, including reconsidering step two, step three, and
14 Plaintiff’s symptom testimony in light of the new analysis of the medical evidence.

15 CONCLUSION

16 Having reviewed the record and the ALJ’s findings, the Court concludes the
17 ALJ’s decision is neither supported by substantial evidence nor free of harmful
18 legal error. Accordingly, **IT IS HEREBY ORDERED:**

- 19 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.
- 20 2. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

