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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Lori A. Copley,

10 Plaintiff,

11 vs.

12 Michael Astrue, Commissioner of Social
13 Security Administration

14 Defendant.

No. CV 10-1410-PHX-DGC

ORDER

15 Plaintiff was determined ineligible for Supplemental Security Income (“SSI”)
16 benefits by a Social Security Administrative Law Judge (“ALJ”), and the decision
17 became final agency action. Plaintiff argues that the ALJ erred at Step 2 of the sequential
18 evaluation process and in the residual functional capacity assessment (“RFC”). Doc. 13.
19 Defendant argues that the ALJ’s decision was proper and supported by substantial
20 evidence. Doc. 14. The issues have been fully briefed (Docs. 13, 14, 20), and the parties
21 do not request oral argument. For the reasons that follow, the Court will remand for
22 further proceedings.

23 The ALJ found that Plaintiff has severe fibromyalgia and determined the condition
24 to be a severe impairment. Doc. 12-3 at 11.¹ Plaintiff takes no issue with this
25 determination, but challenges the ALJ’s finding that Plaintiff’s migraine headaches,

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27 ¹ The Court’s citations to the record reflect the page numbers generated at the top of a
28 PDF document by the Court’s Electronic Case Filing system, not page numbers appearing on
original exhibits.

1 hyperactive bladder, irritable bowel syndrome, and lumbar degenerative disc disease
2 were non-severe impairments.² Doc. 13 at 10:24-27.

3 An applicant for benefits is deemed not disabled at Step 2 of the evaluation
4 process if she is found not to have a severe impairment. 20 C.F.R. § 416.920(a)(4)(ii). In
5 this case, Plaintiff passed Step 2 as a result of the ALJ's finding that Plaintiff's
6 fibromyalgia was a severe impairment. Therefore, to the extent the ALJ found other
7 impairments non-severe, but nonetheless considered them in the RFC assessment, the
8 Court will review the challenged findings in the context of the RFC assessment. *See* 20
9 C.F.R. § 416.920(e) (stating that an RFC assessment bears on whether an applicant can
10 perform work activities); 20 C.F.R. § 416.945(a)(2) (requiring all impairments be used in
11 an RFC assessment); *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (noting that
12 Social Security regulations define "severity" of an impairment as a function of its effects
13 on applicant's ability to perform work activities).

14 The ALJ concluded that Plaintiff "has the residual functional capacity to perform
15 the full range of light work as defined in 20 C.F.R. § 416.967(b), except that she is
16 limited to occasional postural functions including stooping, kneeling, crouching, and
17 crawling." Doc. 12-3 at 12. Plaintiff argues the ALJ failed to discuss how her
18 impairments "affect her ability to sustain work activities eight hours per day, five days
19 per week," failed properly to weight medical source opinion evidence, and failed properly
20 to weigh Plaintiff's testimony.³ Doc. 13 at 16-24. Defendant responds that Plaintiff's
21 past relevant work as a bookkeeper required walking for 0.5 hours, standing for 0.5
22 hours, sitting for 1.0 hours, reaching for 1.0 hours, and "no climbing, stooping, kneeling,
23 crouching, crawling, or handling/grabbing/grasping big objects." Doc. 14 at 31-32.

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25 ² Plaintiff does not appear to take issue with the ALJ's determination that Plaintiff's
26 history of Bell's Palsy does not constitute a severe impairment (Doc. 12-3 at 11). Doc. 13 at 10
27 (excludes Bell's Palsy finding).

28 ³ Plaintiff also argues that the testimony of the vocational consultant hired by the agency
is not reliable. Doc. 13 at 24. The Court need not reach this issue.

1 Because the ALJ found that Plaintiff would be able to perform these activities despite all
2 her impairments, and the finding is supported by substantial evidence, Defendants argues,
3 the ALJ did not err. *See id.* at 33. Plaintiff replies in part that the ALJ “cherry-picked”
4 evidence and that the record shows “none of the reported activities are done with the
5 consistency or degree of sustained competitive employment.” Doc. 20 at 9.

6 In conducting an RFC assessment, the Commissioner must consider the combined
7 effects of an applicant’s medically-determinable impairments on the applicant’s ability to
8 perform sustainable work. 42 U.S.C. § 423(d)(2)(B) (“In determining whether an
9 individual’s . . . impairments are of sufficient medical severity that such . . . impairments
10 could be the basis of eligibility under this section, the Commissioner of Social Security
11 shall consider the combined effect of *all* of the individual’s impairments without regard
12 to whether any such impairment, if considered separately, would be of such severity.”
13 (emphasis added)); *see* 20 C.F.R. §§ 404.1520(c), 416.920(c) (Commission to consider
14 “combination of impairments”); 20 C.F.R. §§ 404.1545(a)(2), 416.945(a)(2)
15 (Commission to consider “all” impairments); *see also Macri v. Chater*, 93 F.3d 540, 545
16 (9th Cir. 1996) (Commissioner must consider the combined effect of all impairments in
17 determining whether the claimant is disabled) (citing *Gregory v. Bowen*, 844 F.2d 664,
18 666 (9th Cir. 1988)); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (Commissioner
19 “should have considered the combined effect of the claimant’s physical and mental
20 impairments in determining [RFC]”); *Hammock v. Bowen*, 879 F.2d 498, 500 (9th Cir.
21 1989) (error not to “consider the combined effect of all of [applicant’s] impairments on
22 her ability to return to work”). Moreover, an applicant’s ability to perform sustainable
23 work should be assessed against a standard work week in a realistic work setting. SSR
24 96-8p, 1996 WL 374184, at *7 (July 2, 1996) (stating, in part, that “RFC is an assessment
25 of an individual’s ability to do sustained work-related physical and mental activities in a
26 work setting on a regular and continuing basis. A ‘regular and continuing basis’ means 8
27 hours a day, for 5 days a week, or an equivalent work schedule.”); *see also Fair v.*
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1 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (suggesting that an applicant’s ability to
2 perform work tasks should be assessed in the context of “the more grueling environment
3 of the workplace,” and that in some environments “it might be impossible to periodically
4 rest or take medication”).

5 The ALJ found Plaintiff’s medically-determinable impairments – fibromyalgia,
6 migraines, lower back problems, stomach damage, and Bell’s Palsy – “could reasonably
7 be expected to cause” the symptoms Plaintiff alleged. Doc. 12-3 at 12. The ALJ
8 nonetheless concluded that Plaintiff’s “statements concerning the intensity, persistence
9 and limiting effects of these symptoms are not credible to the extent they are inconsistent
10 with the above residual functional capacity assessment.” *Id.* The ALJ held that Plaintiff
11 “failed to provide sufficient evidence to support the alleged severity and duration of [her]
12 symptoms and limitations pertaining to her alleged migraines, lumbar spine and stomach
13 problems, and Bell’s Palsy.” *Id.* The ALJ also observed that “[t]he medical records fail
14 to establish support for such impairments, as the claimant rarely complains about these
15 impairments,” and “[t]he physicians do not address the impairments either.” *Id.* The
16 ALJ noted medical findings from Plaintiff’s treating physician, Dr. Franklin Baroi,
17 findings from State Agency physician Dr. Robert Hirsch, consulting psychologist Dr.
18 Carlos Vega, and consulting physician Dr. Richard Palmer. *Id.* at 13-15. The ALJ also
19 noted testimony by Plaintiff where she “persistently complains of intractable pain,” but
20 the testimony was largely discounted as “not fully credible” due in part to lack of
21 “objective findings to substantiate the severity of her complaints.”⁴ *Id.* at 16. For
22 example, the ALJ opined that “although the claimant undoubtedly experiences some
23 degree of pain, the pain has apparently not altered the use of her muscles and joints to the
24 extent that [it] has resulted in diffuse muscle atrophy,” the latter being a “common side
25 effect[] of prolonged and/or chronic pervasive pain” according to the ALJ. *Id.* at 16.

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27 ⁴ The ALJ’s credibility determination appears aimed at Plaintiff’s conclusions about the
28 extent of her limitations, not at her lack of sincerity: the ALJ noted that “the claimant appeared to
be a sincere witness” (Doc. 12-3 at 16).

1 The Court concludes the ALJ did not adequately compare Plaintiff's residual
2 functional capacity with the requirements of sustainable work during a standard work
3 week in a realistic work setting. The ALJ's analysis focused primarily on the medical
4 evidence disputing the extent of Plaintiff's symptoms, and stopped short of discussing
5 how Plaintiff's symptoms – to the extent they were assessed credible by the ALJ – match
6 up to the type of sustainable work the ALJ deemed Plaintiff able to perform. The ALJ's
7 findings on this point were at best conclusory, asserting in part merely that “the claimant
8 is able to perform [the work] as actually and generally performed.” The ALJ does not
9 discuss the typical work environment in which Plaintiff might perform, the ability of
10 Plaintiff to obtain requisite rest or employ pain-management techniques in that
11 environment, Plaintiff's ability to travel consistently to and from the work site five days
12 per week, or Plaintiff's ability to maintain sustainable employment in a realistic work
13 setting in light of the totality of her impairments. Plaintiff's pain level appeared to be the
14 most pronounced symptom addressed by the ALJ with regard to work limitations, but
15 even there the ALJ's treatment of the pain aspect is somewhat ambiguous. The ALJ
16 acknowledges, for example, that according to Dr. Vega “the claimant is likely to be
17 suffering from a pain disorder that is associated with both psychological factors and
18 fibromyalgia,” and that “claimant's inability to obtain and maintain gainful employment
19 is more likely impeded by physical factors than psychological ones.” Doc. 12-3 at 14.
20 The ALJ also notes that “[t]he documentation basically indicates a worsening in the pain
21 disorder described above.” *Id.* The ALJ does not appear to conclude what pain level the
22 evidence shows Plaintiff as having, and how this pain level factors into Plaintiff's ability
23 to work as discussed above. The same holds true for the other non-pain symptoms
24 reported by Plaintiff and acknowledged by the ALJ.

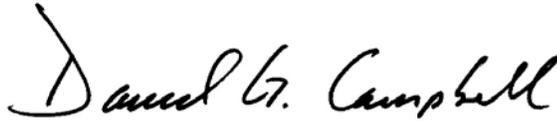
25 For the reasons above, the Court will remand to the Commissioner for additional
26 proceedings consistent with this order. The Commissioner shall consider the combined
27 effects of Plaintiff's impairments on Plaintiff's ability to perform sustainable work during
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a standard work-week in a realistic work setting.

IT IS ORDERED that this case be remanded to the Commissioner for further proceedings consistent with this order.

Dated this 30th day of June, 2011.



David G. Campbell
United States District Judge