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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANNETTE R.,¹

Plaintiff,

v.

ANDREW M. SAUL,²
Commissioner of Social Security,
Defendant.

Case No. 5:19-cv-00797-MAA

**MEMORANDUM DECISION AND
ORDER REVERSING DECISION OF
THE COMMISSIONER AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS**

On April 29, 2019, Plaintiff filed a Complaint seeking review of the Social Security Commissioner's final decision denying her application (1) for a period of disability and disability insurance benefits pursuant to Title II of the Social Security Act; and (2) Supplemental Security Income benefits pursuant to Title XVI of the Social Security Act. This matter is fully briefed and ready for decision. For the

¹ Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

² The Commissioner of Social Security is substituted as the Defendant pursuant to Federal Rule of Civil Procedure 25(d).

1 reasons discussed below, the Commissioner’s final decision is reversed, and this
2 action is remanded for further administrative proceedings.

3 4 **PROCEDURAL HISTORY**

5 On March 23, 2015, Plaintiff filed an application for a period of disability
6 and disability insurance benefits. (Administrative Record (“AR”) 225-28.)
7 Plaintiff filed an application for Supplemental Security Income benefits on the same
8 date. (AR 229-34.) In both applications, Plaintiff alleged disability beginning on
9 November 30, 2012. (AR 225, 229.) Plaintiff alleged disability because of morbid
10 obesity, back injury, depression, arthritis, scoliosis, fibromyalgia, sleep apnea,
11 Hashimoto’s disease, heart disease, and high cholesterol. (AR 264.)

12 Plaintiff’s applications were denied initially and on reconsideration. (AR
13 111-12, 156-62.) Plaintiff requested a hearing before an Administrative Law Judge
14 (“ALJ”). (AR 163-65.) At a hearing held on April 3, 2018, at which Plaintiff
15 appeared with counsel, ALJ Paul Isherwood heard testimony from Plaintiff. (AR
16 34-74.)

17 In a decision issued on April 26, 2018, the ALJ denied Plaintiff’s application.
18 (AR 7-27.) The ALJ made the following findings pursuant to the Commissioner’s
19 five-step evaluation: first, Plaintiff had not engaged in substantial gainful activity
20 since her alleged disability onset date. (AR 12.) Second, she had the following
21 severe impairments: asthma; obesity; back pain/joint disorder; and sleep apnea.
22 (AR 13-15.) Third, she did not have an impairment or combination of impairments
23 that met or medically equaled the requirements of one of the impairments from the
24 Commissioner’s Listing of Impairments. (AR 15.) Fourth, Plaintiff had a residual
25 functional capacity (“RFC”) to perform light work with the following limitations:
26 lifting or carrying no more than 20 pounds occasionally and 10 pounds frequently;
27 and standing or walking for six hours in an eight-hour workday. Further, while
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1 Plaintiff was able to climb ramps and stairs frequently, Plaintiff could never climb
2 ladders, ropes, or scaffolds, and she could never kneel, crouch, or crawl. (AR 15-
3 21.) Fifth, Plaintiff could perform her past relevant work as a bookkeeper, clerical
4 assistant, social worker, and schoolteacher. (AR 21.) Thus, the ALJ concluded that
5 Plaintiff was not disabled as defined by the Social Security Act. (*Id.*)

6 On March 22, 2019, the Appeals Council denied Plaintiff's request for
7 review. (AR 1-6.) Thus, ALJ's decision became the final decision of the
8 Commissioner.

10 **DISPUTED ISSUES**

11 The parties raise the following disputed issues:

12 1. Whether the ALJ properly considered the relevant medical evidence of
13 record in assessing Plaintiff's RFC; and

14 2. Whether the ALJ properly considered Plaintiff's subjective statements of
15 record and testimony under oath regarding her impairments, symptoms, and
16 limitations in assessing plaintiff's RFC.

17 (Joint Stipulation ("JS") 4.)

19 **STANDARD OF REVIEW**

20 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's final
21 decision to determine whether the Commissioner's findings are supported by
22 substantial evidence and whether the proper legal standards were applied. *See*
23 *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.
24 2014). Substantial evidence means "more than a mere scintilla" but less than a
25 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter*
26 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is "such
27 relevant evidence as a reasonable mind might accept as adequate to support a
28 conclusion." *Richardson*, 402 U.S. at 401. The Court must review the record as a

1 whole, weighing both the evidence that supports and the evidence that detracts from
2 the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is
3 susceptible of more than one rational interpretation, the Commissioner’s
4 interpretation must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
5 2007).

7 DISCUSSION

8 For the reasons discussed below, reversal and remand for further
9 administrative proceedings are warranted for Issue One. Thus, the Court declines
10 to address Plaintiff’s remaining arguments. *See Hiler v. Astrue*, 687 F.3d 1208,
11 1212 (9th Cir. 2012) (“Because we remand the case to the ALJ for the reasons
12 stated, we decline to reach [plaintiff’s] alternative ground for remand”); *see also*
13 *Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147, 1153 n.7 (C.D. Cal.
14 2008) (“[The] Court need not address the other claims plaintiff raises, none of
15 which would provide plaintiff with any further relief than granted, and all of which
16 can be addressed on remand”).

17 18 **I. Residual Functional Capacity.**

19 **A. Legal Standards.**

20 **(1) Assessing severity of impairments at step two.**

21 At step two of the five-step sequential inquiry, the Commissioner determines
22 whether the claimant has a medically severe impairment or combination of
23 impairments. *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996); *see* 20
24 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An impairment or combination of
25 impairments is not severe if it is merely “a slight abnormality (or combination of
26 slight abnormalities) that has no more than a minimal effect on the ability to do
27 basic work activities.” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005)
28 (internal quotation marks omitted); *see* 20 C.F.R. §§ 404.1520(c), 416.920(c).

1 Basic work activities are “abilities and aptitudes necessary to do most jobs,
2 including, for example, walking, standing, sitting, lifting, pushing, pulling,
3 reaching, carrying or handling.” 20 C.F.R. §§ 404.1522(b), 416.922(b).

4 “Important here, at the step two inquiry, is the requirement that the ALJ must
5 consider the combined effect of all of the claimant's impairments on her ability to
6 function, without regard to whether each alone was sufficiently severe.” *Smolen*,
7 80 F.3d at 1290 (citing, *inter alia*, 42 U.S.C. § 423(d)(2)(B)). In addition, the ALJ
8 must consider the claimant’s subjective symptoms, such as pain or fatigue, in
9 determining severity. *Smolen*, 80 F.3d at 1290. An impairment or combination of
10 impairments can be found “not severe” only if the evidence establishes a slight
11 abnormality that has “no more than a minimal effect on an individual’s ability to
12 work.” Social Security Ruling (“SSR”) 85-28 (S.S.A. 1985), 1985 WL 56856 at
13 *3; see *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). A nonseverity
14 determination “requires a careful evaluation of the medical findings that describe
15 the impairment(s) (*i.e.*, the objective medical evidence and any impairment-related
16 symptoms), and an informed judgment about the limitations and restrictions the
17 impairment(s) and related symptom(s) impose on the individual’s physical and
18 mental ability to do basic work activities.” SSR 96-3p (S.S.A. July 2, 1996), 1996
19 WL 374181 at *2.

20 (2) Assessing RFC at step three.

21 A claimant’s RFC is the most the claimant can do in a work setting despite
22 the physical and mental limitations caused by the claimant’s impairments and
23 related symptoms, such as pain. 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The
24 ALJ’s RFC finding “must be based on all of the relevant evidence in the case
25 record,” including, *inter alia*, medical signs and laboratory findings; medical source
26 statements; and effects of symptoms, including pain, that are reasonably attributable
27 to a medically determinable impairment. SSR 96-8p, (S.S.A. July 2, 1996), 1996
28 WL 374184 at *5. The ALJ must consider all record-supported limitations imposed

1 by the claimant’s medically determinable impairments, even those impairments that
2 are not severe. *Carmickle v. Commissioner, Soc. Sec. Admin.*, 533 F.3d 1155,
3 1164-65 (9th Cir. 2008); *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017);
4 SSR 96-8p, 1996 WL 374184 at *5.

5 **B. Background.**

6 Fibromyalgia “is a complex medical condition characterized primarily by
7 widespread pain in the joints, muscles, tendons, or nearby soft tissues that has
8 persisted for at least 3 months.” SSR 12-2p (S.S.A. July 25, 2012), 2012 WL
9 3104869 at *2. The Commissioner “will” find that a person has a medically
10 determinable impairment of fibromyalgia if (1) his or her treating physician
11 diagnosed fibromyalgia and provides certain supporting evidence; and (2) the
12 physician's diagnosis “is not inconsistent with the other evidence in the person’s
13 case record.” *Id.* at *2. Very briefly stated, the evidence necessary to support a
14 fibromyalgia diagnosis is (1) a history of widespread pain, at least 11 “tender
15 points” on physical examination, and evidence that other possible diagnoses were
16 excluded; *or* (2) a history of widespread pain, repeated manifestations of six or
17 more fibromyalgia symptoms, and evidence that other possible diagnoses were
18 excluded. *Id.* at 2-3. As well, the evidence must document that the physician
19 reviewed the person’s medical history and conducted a physical exam. *Id.*

20 Plaintiff’s treatment records reflect that she had a fibromyalgia diagnosis.
21 On April 15, 2015, Plaintiff sought treatment from Rajeev Yelamanchi, M.D., for
22 sleep apnea. (AR 550-53.) As relevant, Plaintiff complained of fatigue, joint pain,
23 muscle weakness, constipation, chronic back pain, and daytime sleepiness. (AR
24 552, 556-57.) Dr. Yelamanchi took note of plaintiff’s medical history and

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1 conducted a physical examination.³ (AR 553.) Dr. Yelamanchi listed fibromyalgia
2 among Plaintiff’s diagnoses. (AR 550.)

3 Dr. Yelamanchi included fibromyalgia among Plaintiff’s diagnoses in
4 treatment notes dated May 20, 2015, June 3, 2015 and August 18, 2015. (AR 560,
5 563, 572.) On a November 18, 2015 visit, Dr. Yelamanchi referred to a diagnosis
6 of chronic pain syndrome rather than fibromyalgia. (AR 567.) Dr. Yelamanchi
7 emphasized to Plaintiff that adequate control of her chronic pain was necessary, as
8 chronic pain can disturb sleep. (*Id.*) The orthopedic consultative examiner took
9 note of plaintiff’s fibromyalgia and asserted that she was diagnosed with the
10 impairment “about five or six years ago” by physicians at Kaiser Permanente in
11 Victorville.⁴ (AR 585.)

12 C. Analysis

13 Plaintiff contends that the ALJ erred by (1) failing to determine the severity
14 of her fibromyalgia/chronic pain syndrome (hereinafter, Plaintiff’s “fibromyalgia”)
15 at step two; and (2) failing to properly consider the medical evidence of her
16 fibromyalgia in assessing her RFC at step 4. (JS 4.) The Court agrees. As Plaintiff
17 asserts, the ALJ found that her asthma, obesity, back pain/joint disorder, and sleep
18 apnea were severe impairments, whereas her hypothyroidism, hypertension, and
19 depression were nonsevere. (AR 13-14.) The ALJ did not discuss, or even
20 mention, Plaintiff’s fibromyalgia, singly or in combination with her other

21 ³ The record does not indicate whether Dr. Yelamanchi palpated Plaintiff’s possible
22 tender points. (*See* AR 553.)

23 ⁴ The record does not include treatment notes from the referenced Kaiser
24 Permanente visit(s), which evidently predated Plaintiff’s disability onset date. (*See*
25 *generally* AR.) At the hearing, Plaintiff testified that a “Beverly Richau from the
26 Public Health Department” had conducted tender point testing approximately 18
27 months previously. (AR 50.) The record does not appear to include any treatment
28 notes from that visit either. (*See generally* AR.) The Court notes that if the ALJ
believed that the medical evidence was insufficient to properly evaluate Plaintiff’s
fibromyalgia, it behooved him to develop the record. **See Error! Main Document
Only.** *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).

1 impairments. (*See id.*) As there was substantial evidence that Plaintiff had a
2 medically determinable impairment of fibromyalgia, the ALJ’s failure to address it
3 at step two was error. *See Smolen*, 80 F.3d at 1290; *see also Vincent v. Heckler*,
4 739 F.2d 1393, 1394-95 (9th Cir. 1984) (ALJ must explain why “significant
5 probative evidence has been rejected”).

6 An ALJ’s failure to designate an impairment as severe at step two may be
7 harmless if the ALJ nonetheless incorporates the functional limitations from that
8 impairment in the remaining steps of the five-step evaluation. *See Lewis v. Astrue*,
9 498 F.3d 909, 911 (9th Cir. 2007) (concluding that any failure to list bursitis as
10 severe at step two was harmless error where ALJ considered any functional
11 limitations imposed by bursitis at step four); *Burch v. Barnhart*, 400 F.3d 676, 682-
12 84 (9th Cir. 2005) (concluding that any failure to list obesity as severe at step two
13 was harmless error where ALJ considered any functional limitations imposed by
14 obesity at steps three and five and in RFC determination). As well, an error is
15 generally harmless where it is “inconsequential to the ultimate nondisability
16 determination.” *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th
17 Cir. 2006). Here, the error was not harmless, because the ALJ neither incorporated
18 Plaintiff’s claimed fibromyalgia limitations at step four nor provided sufficient
19 reasons for failing to do so.

20 At step four, the ALJ acknowledged that Plaintiff alleged fibromyalgia as a
21 basis for her claimed disability. (AR 16.) He noted that, at the hearing, Plaintiff
22 testified that she had “received testing for fibromyalgia” and that she had pain her
23 hands, neck, head, feet, legs, and whole body due to the impairment. (AR 17.) The
24 ALJ noted, as well, that Plaintiff reported being in “constant pain” from the
25 fibromyalgia. (AR 16.) However, the ALJ did not otherwise address Plaintiff’s
26 fibromyalgia. (*See* AR 16-21.) Rather, he addressed, and purported to reject,
27 Plaintiff’s claims of limited daily functioning. As well, he specifically rejected her
28 claimed subjective symptoms regarding her other impairments. (*See* AR 18-20.)

1 Finally, he asserted as a general proposition that Plaintiff’s statements were “not
2 entirely consistent with the medical evidence and other evidence in the record.”
3 (AR 18.)

4 The ALJ did not properly find Plaintiff incredible as to her fibromyalgia
5 symptoms. Once a claimant produces medical evidence of an underlying
6 impairment that is reasonably likely to cause alleged subjective symptoms, the ALJ
7 may reject a claimant’s allegations upon: (1) finding evidence of malingering; or
8 (2) providing clear and convincing reasons, supported by substantial record
9 evidence, for so doing. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003);
10 *see Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). The ALJ’s
11 determination must be “sufficiently specific to allow a reviewing court to conclude
12 the adjudicator rejected the claimant’s testimony on permissible grounds and did
13 not arbitrarily discredit a claimant’s testimony” *Bunnell*, 947 F.2d at 345
14 (internal quotation marks omitted).

15 Here, the ALJ’s boilerplate statement regarding Plaintiff’s subjective claims
16 does not meet the required level of specificity for discounting her subjective
17 symptoms. And his grounds for rejecting Plaintiff’s report of constant fibromyalgia
18 pain are not entirely clear. The ALJ merely recited Plaintiff’s self-reported
19 activities and limitations, without stating how such matters undermined her claims
20 of debilitating pain. (AR 16-17.) To the extent the ALJ meant that Plaintiff’s
21 activities, such as going outside once or twice a week, were inconsistent with her
22 claimed pain, the Court is not convinced. An ALJ may discredit a claimant’s
23 allegations by pointing to evidence that she is able to engage in activities that would
24 translate to a workplace setting, upon making specific findings relating to those
25 activities. *Burch*, 400 F.3d at 680-81. However, the relevant question is whether
26 the physical activities at issue consume a “substantial part” of the claimant’s day,
27 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001), as “many home activities
28 are not easily transferrable to what may be the more grueling environment of the

1 workplace, where it may be impossible to periodically rest or take medication,”
2 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff did not report or testify
3 that she spent a substantial part of the day in the activities at issue. (See AR 36-74,
4 289-309.) Therefore, her self-reported functioning did not undermine her claims of
5 pain that prevented her from working.

6 The Ninth Circuit has held that where an ALJ properly rejects a claimant’s
7 testimony using “ordinary techniques of credibility evaluation” (*Bunnell*, 947 F.2d
8 at 346), and provides record-supported, clear and convincing reasons for finding the
9 claimant incredible, the finding that the claimant generally lacks credibility may be
10 a permissible basis for rejecting a claimant’s testimony as to specific symptoms,
11 especially where no objective medical evidence supports the claimant’s claims of
12 severity. *Thomas v. Barnhart*, 278 F.3d 947, 960 (9th Cir. 2002) (“*Thomas*”); *Light*
13 *v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997), *as amended on reh’g*
14 (Sept. 17, 1997).⁵ In *Thomas*, for example, the ALJ found that the claimant was
15 generally not credible because she showed “little propensity to work in her
16 lifetime,” was not a “reliable historian,” failed to give maximum effort in physical
17 capacity evaluations, and “seemed to engage in considerable histrionic exaggeration
18 at the hearing.” *Thomas*, 278 F.3d at 958-960. Given this general credibility
19 finding, the Ninth Circuit concluded that the ALJ did not err in excluding the
20 plaintiff’s claimed medication side effects, which entirely lacked objective medical
21 support. *Thomas*, 278 F.3d at 958-960.

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24 ⁵ The Ninth Circuit has not overruled the foregoing precedent. That said, its
25 continuing viability is perhaps questionable in light of SSR 16-3p (S.S.A. Mar. 16,
26 2016), 2016 WL 1119029, which eliminated the term “credibility” from the
27 Administration’s sub-regulatory policy. See *Trevizo v. Berryhill*, 871 F.3d 664, 679
28 n.5 (9th Cir. 2017) (SSR 16-3p makes clear that assessments of individual’s
testimony by ALJ are “not [designed] to delve into wide-ranging scrutiny of the
claimant’s character and apparent truthfulness”).

1 In the instant case, although the ALJ discussed plaintiff’s other claimed
2 impairments and subjective symptoms at length, the ALJ did not make a general
3 credibility finding comparable to the one in *Thomas*. *Compare* AR 16-21 to
4 *Thomas*, 278 F.3d at 958-60. The Court therefore finds that the ALJ did not
5 properly reject Plaintiff’s claims regarding her fibromyalgia symptoms. *See Light*,
6 119 F.3d at 793 (finding reversible error where ALJ “failed to articulate an
7 acceptable reason either for disbelieving [the plaintiff’s] testimony in general or for
8 discrediting his pain testimony specifically”). In turn, his failure to incorporate her
9 claimed fibromyalgia limitations in determining her RFC was error. *See Lewis*,
10 *supra*.

11 Defendant contends that any error was harmless. As Defendant sees it,
12 Plaintiff “fails to cite any evidence in the record suggesting that her fibromyalgia
13 diagnosis requires any further limitations than those already identified by the ALJ.”
14 (JS 7.) Defendant argues, as well, that the record does not show that the
15 impairment was severe, because there are no treatment notes showing tender points
16 on examination or active treatment for fibromyalgia. (*Id.*) These arguments do not
17 avail Defendant. First, neither the existence nor the severity of fibromyalgia can be
18 discounted by the lack of significant X-ray findings or other objective findings.
19 *Rollins v. Massanari*, 261 F.3d 853, 855 (9th Cir. 2001); *see also Benecke v.*
20 *Barnhart*, 379 F.3d 587, 589-90 (9th Cir. 2004). As the Ninth Circuit has
21 explained, fibromyalgia’s symptoms are “entirely subjective.” *Rollins*, 379 F.3d at
22 855. Second, as set forth above, a claimant may demonstrate fibromyalgia by
23 means other than tender points on examination. Third, the ALJ did not cite a lack
24 of treatment for fibromyalgia, or a lack of objective evidence of the impairment, as
25 grounds for his decision. The Court cannot affirm the Commissioner’s decision on
26 grounds upon which the ALJ did not rely. *Tommasetti v. Astrue*, 533 F.3d 1035,
27 1039 n.2 (9th Cir. 2008).

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1 In sum, the ALJ committed reversible error by failing to properly address
2 Plaintiff's fibromyalgia at steps two and four of the sequential evaluation.
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4 **II. Remand for Further Administrative Proceedings.**

5 Ninth Circuit case law "precludes a district court from remanding a case for
6 an award of benefits unless certain prerequisites are met." *Dominguez v. Colvin*,
7 808 F.3d 403, 407 (9th Cir. 2015) (citations omitted). "The district court must first
8 determine that the ALJ made a legal error, such as failing to provide legally
9 sufficient reasons for rejecting evidence." *Id.* "If the court finds such an error, it
10 must next review the record as a whole and determine whether it is fully developed,
11 is free from conflicts and ambiguities, and all essential factual issues have been
12 resolved." *Id.* (citation and internal quotation marks omitted).

13 Here, all essential factual issues have not been resolved. Thus, it is
14 inappropriate to credit Plaintiff's testimony as true. *See Leon v. Berryhill*, 880 F.3d
15 1041, 1046 (9th Cir. 2017). The record raises factual conflicts about the severity of
16 Plaintiff's fibromyalgia and Plaintiff's level of functioning that "should be resolved
17 through further proceedings on an open record before a proper disability
18 determination can be made by the ALJ in the first instance." *See Brown-Hunter*,
19 806 F.3d at 496; *see also Treichler*, 775 F.3d at 1101 (stating that remand for an
20 award of benefits is inappropriate where "there is conflicting evidence, and not all
21 essential factual issues have been resolved") (citation omitted); *Strauss v.*
22 *Commissioner of the Social Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011)
23 (same where the existing record does not clearly demonstrate that the claimant is
24 disabled within the meaning of the Social Security Act).

25 Therefore, based on its review and consideration of the entire record, the
26 Court has concluded on balance that a remand for further administrative
27 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. It is
28 not the Court's intent to limit the scope of the remand.

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ORDER

It is ordered that Judgment be entered reversing the final decision of the Commissioner of Social Security and remanding this matter for further administrative proceedings.

DATED: July 13, 2020



MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE