UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARRIE N., Plaintiff, v. ANDREW M. SAUL, Commissioner of Social Security Administration, Defendant.	Case No. ED CV 19-2129-SP MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

On November 6, 2019, plaintiff Carrie N. filed a complaint against defendant, the Commissioner of the Social Security Administration ("Commissioner"), seeking review of a denial of a period of disability and disability insurance benefits ("DIB"). The parties have fully briefed the issues in dispute, and the court deems the matter suitable for adjudication without oral argument.

Plaintiff presents two disputed issues for decision: (1) whether the Administrative Law Judge ("ALJ") failed to properly consider the evidence in the

record in assessing plaintiff's residual functional capacity ("RFC"); and (2) whether the ALJ improperly discounted plaintiff's testimony. Plaintiff's Memorandum in Support of Complaint ("P. Mem.") at 3-15; *see* Defendant's Memorandum in Support of Answer ("D. Mem.") at 1-9.

Having carefully studied the parties' memoranda, the Administrative Record ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ did not properly evaluate plaintiff's testimony, and also erred in determining plaintiff's RFC. The court therefore reverses the decision of the Commissioner denying benefits and remands the matter for further administrative action consistent with this decision.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was 54 years old on the alleged disability onset date, is a high school graduate with some college. AR at 32, 48. Plaintiff has past relevant work in a composite job consisting of customer complaint clerk, customer service supervisor, appointment clerk, and data entry clerk. AR at 42.

On July 22, 2016, plaintiff filed an application for a period of disability and DIB, claiming she suffered from postural tachycardia syndrome, headaches, fainting episodes, and nausea. AR at 48-49. Plaintiff's application was denied initially and on reconsideration. AR at 58, 69.

Plaintiff requested a hearing, which the assigned ALJ held on August 15, 2018. AR at 30. Plaintiff, represented by counsel, appeared and testified at the hearing. AR at 32-42. The ALJ also heard testimony from Mary Jesko, a vocational expert. AR at 40-46. The ALJ denied plaintiff's claim for benefits on October 24, 2018. AR at 15-23.

Applying the well-established five-step sequential evaluation process, the ALJ found, at step one, that plaintiff had not engaged in substantial gainful activity

since February 1, 2016, the alleged onset date. AR at 17.

At step two, the ALJ found plaintiff suffered from the following severe impairments: migraines; left leg impairment; postural orthostatic tachycardia syndrome ("POTS"); asthma and chronic asthmatic bronchitis; episodes of syncope and near-syncope; and generalized anxiety disorder ("GAD"). *Id.*

At step three, the ALJ found plaintiff's impairments, whether individually or in combination, did not meet or medically equal one of the listed impairments set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.*

The ALJ then assessed plaintiff's RFC,[1] and determined plaintiff had the RFC to perform a full range of work at all exertional levels, but with the nonexertional limitations that she: requires the freedom to sit at will when either standing or walking, without being off-task; can occasionally climb stairs and ramps; can never climb ladders or scaffolds; and can occasionally balance, stoop, kneel, crouch, and crawl. AR at 19. The ALJ further precluded plaintiff from: exposure to heavy vibrations, unprotected heights, and workplace hazards; operating a motor vehicle commercially; exposure to extreme temperatures; exposure to more than moderate noise levels; concentrated exposure to dust, odors, fumes, and pulmonary irritants; exposure to open bodies of water such as swimming pools and lakes; and more than occasional exposure to direct sunlight. *Id.* The ALJ determined plaintiff would be best suited for an occupation without high production quotas, and not in a fast-paced work environment. *Id.*

The ALJ found, at step four, that plaintiff was able to perform past relevant

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[1] Residual functional capacity is what a claimant can do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007).

work in a composite position consisting of the sedentary occupations of customer complaint clerk, supervisor, appointment clerk, and data entry clerk. AR at 23. Accordingly, the ALJ concluded plaintiff was not under a disability, as defined in the Social Security Act, at any time from February 1, 2016 through the date of decision. *Id.*

Plaintiff filed a timely request for review, which the Appeals Council denied. AR at 1-3. Accordingly, the ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

"Substantial evidence is more than a mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035 (citation omitted). Substantial evidence is such "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998) (citations omitted); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ's finding, the reviewing court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes*, 276 F.3d at

459. The ALJ's decision "cannot be affirmed simply by isolating a specific quantum of supporting evidence." *Aukland*, 257 F.3d at 1035 (internal quotation marks omitted). If the evidence can reasonably support either affirming or reversing the ALJ's decision, the reviewing court "may not substitute its judgment for that of the ALJ." *Id.* (internal quotation marks omitted).

IV.

DISCUSSION

A. The ALJ Failed to Properly Evaluate Plaintiff's Testimony

Plaintiff argues the ALJ essentially ignored her subjective testimony or, at best, failed to consider it in any meaningful way. P. Mem. at 11. Plaintiff contends the ALJ's reasons for discounting her testimony – that it was inconsistent with the evidence and lacked supporting objective medical evidence – were not proper reasons under the law. *See id.* at 11-12.

In response, defendant claims the ALJ had several reasons for discounting plaintiff's testimony, including a lack of objective evidence establishing the frequency and severity of her symptoms, no supporting evidence regarding physical limitations, the conservative nature of her treatment, and the effectiveness of her medications. D. Mem. at 8. Defendant argues these reasons were sufficient to conclude plaintiff's subjective allegations about the limiting effects of her impairments did not warrant additional limitations to the RFC. *Id.*

The court looks to Social Security Ruling ("SSR") 16-3p for guidance on evaluating plaintiff's alleged symptoms. SSR 16-3p rescinded and superseded SSR 96-7p and applies to decisions made on or after March 28, 2016. SSR 16-3p, 2017 WL 5180304, at *1 (Oct. 25, 2017). "Although SSRs do not have the same force and effect as statutes or regulations, they are binding on all components of the Social Security Administration." *Id.* (citing 20 C.F.R. § 402.35(b)(1)).

In adopting SSR 16-3p, the Social Security Administration sought to "clarify

that subjective symptom evaluation is not an examination of an individual's character." *Id.* at *2.

> [SSR 16-3p] makes clear what our precedent already required: that assessments of an individual's testimony by an ALJ are designed to evaluate the intensity and persistence of symptoms after the ALJ finds that the individual has a medically determinable impairment(s) that could reasonably be expected to produce those symptoms, and not to delve into wide-ranging scrutiny of the claimant's character and apparent truthfulness.

Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (internal quotation marks and alterations omitted).

To evaluate a claimant's symptom testimony, the ALJ engages in a two-step analysis. *Christine G. v. Saul*, 402 F. Supp. 3d 913, 921 (C.D. Cal. 2019) (quoting *Trevizo*, 871 F.3d at 678). First, the ALJ must determine whether the claimant produced objective medical evidence of an underlying impairment that could reasonably be expected to produce the symptoms alleged. *Id.* Second, if the claimant satisfies the first step, and there is no evidence of malingering, the ALJ must evaluate the intensity and persistence of the claimant's symptoms and determine the extent to which they limit her ability to perform work-related activities. *Id.* In assessing intensity and persistence, the ALJ may consider: a claimant's daily activities; the location, duration, frequency, and intensity of the symptoms; precipitating and aggravating factors; the type, dosage, effectiveness, and side effects of medication taken to alleviate the symptoms; other treatment received; other measures used to relieve the symptoms; and other factors concerning the claimant's functional limitations and restrictions due to the symptoms. *Id.* (citing 20 C.F.R. § 416.929; SSR 16-3p, 2017 WL 5180304, at *4; *Smolen v. Chater*, 80 F.3d 1273, 1283-84 & n.8 (9th Cir. 1996)). If the ALJ rejects

the claimant's subjective symptom statements at step two, the ALJ must provide "specific, clear, and convincing" reasons, supported by substantial evidence in the record, for doing so. *Id.* at 921, 929.

At the first step, the ALJ found plaintiff's medically determinable impairments could reasonably be expected to cause the symptoms alleged. AR at 21. At the second step, the ALJ discounted plaintiff's testimony concerning the intensity, persistence, and limiting effects of her symptoms as not entirely consistent with the evidence in the record. AR at 22. Because plaintiff cleared step one and the ALJ found no evidence of malingering, the ALJ's reasons for discounting plaintiff's testimony had to be specific, clear, convincing, and supported by substantial evidence.

The ALJ first purported to have found inconsistencies between plaintiff's testimony and the record, but even construing the ALJ's decision generously, she at most listed only one such consistency. Namely, the ALJ noted plaintiff worked for many years after the onset of her migraine headaches.[2] *See* AR at 22. But this reason is far from specific, clear, and convincing. The ALJ did not specify what parts of plaintiff's testimony are inconsistent, and the court does not find any. *See* AR at 34-35 (plaintiff's testimony about her migraines). Nothing in plaintiff's testimony is inconsistent with the fact that plaintiff continued working for years after the onset of her severe headaches in 1981 (AR at 182). In fact, plaintiff did

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[2] In fact, it is unclear whether the ALJ actually relied on this reason given her conclusion that plaintiff's statements "are inconsistent because there is no objective evidence" of her alleged limitations. *See* AR at 22. Those are two separate concepts. Just because testimony lacks objective, supporting evidence does not necessarily mean it is inconsistent with the record. Indeed, it is for this reason that a lack of objective medical evidence by itself is not a sufficient basis to discount a claimant's testimony. *Trevizo*, 871 F.3d at 679; *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009) (lay testimony is particularly important where the objective medical evidence does not support alleged symptoms).

not stop working because of her migraines but rather because she kept fainting while at work. *See* AR at 33-34.

Moreover, focusing on the onset of plaintiff's migraines improperly assumes that their intensity, persistence, and limiting effects have remained the same since 1981. In fact, plaintiff reported to her physician in March of 2016 that the severity of her migraines has fluctuated over the years. *See* AR at 1620; *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) ("Cycles of improvement and debilitating symptoms are a common occurrence, and in such circumstances it is error for an ALJ to pick out a few isolated instances of improvement over a period of months or years and to treat them as a basis for concluding a claimant is capable of working." (citation omitted)). And at the hearing, plaintiff testified her migraines are triggered more often now due to her anxiety, and her flare ups can last up to a couple of days. *See* AR at 34-35. For these reasons, the ALJ's vague reference to inconsistencies and later reference to plaintiff's long history of working since the onset of her migraines was not a specific, clear, and convincing reason to discount plaintiff's testimony.

Aside from that unconvincing reason, the bulk of the ALJ's analysis of plaintiff's testimony is spent listing examples of how her statements lack objective, supporting evidence. *See* AR at 22. But ALJs "may not disregard a claimant's testimony solely because it is not substantiated affirmatively by objective medical evidence." *Trevizo*, 871 F.3d at 679 (internal quotation marks omitted). Thus, absent additional, proper reasons, the ALJ's discounting of plaintiff's testimony was erroneous.

In its memorandum, defendant lists several other reasons for discounting plaintiff's testimony. For instance, defendant argues there is evidence of conservative treatment in the record with respect to plaintiff's anxiety and panic attacks. *See* D. Mem. at 6. Defendant also raises a discrepancy between plaintiff's

testimony and the medical evidence concerning the duration of her dizziness episodes. *See id.* But the ALJ did not actually rely on any of these reasons in her evaluation of plaintiff's testimony. It is well-established that the court is "constrained to review the reasons the ALJ asserts." *Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014) (internal quotation marks omitted).

Accordingly, the court concludes the ALJ failed to provide specific, clear, and convincing reasons, supported by substantial evidence, for discounting plaintiff's testimony.

B. The ALJ's RFC Determination Did Not Properly Account for All the Evidence of Record

Plaintiff argues the ALJ failed to properly consider both objective and subjective evidence in assessing plaintiff's RFC. P. Mem. at 3. Plaintiff complains the ALJ compressed 1,400 pages of medical evidence into two pages of her decision by cherry picking supportive medical records. *Id.* at 4. In doing so, plaintiff argues the ALJ failed to properly consider medical evidence documenting her recurrent severe migraine headaches, syncope episodes, weakness in the lower extremities, buckling of the knees, and mental impairments such as her GAD. *See id.* at 10. Plaintiff further contends the ALJ erred in concluding plaintiff has no exertional limitations despite finding multiple severe physical impairments. *See id.* at 3-4. Ultimately, Plaintiff claims each of her impairments prevents her from working the combination of occupations the ALJ identified in step four. *See id.* at 10. Specifically, plaintiff argues it would be impossible for her to endure full-time work, as evidenced by her failed attempt to return to work in 2016. *See id.*

Defendant counters that the fact the ALJ determined some of plaintiff's impairments were severe does not mean they must result in RFC limitations. *See* D. Mem. at 1. Defendant also argues at least some of plaintiff's impairments are adequately controlled with medication, such as her asthma and migraines, and

points to the opinion of the state agency consultant as support for the ALJ's RFC determination. *See id.* at 1-3. Finally, defendant contends the ALJ considered all of the evidence, even if she did not specifically discussed it in her decision. *See id.* at 4-5.

The court already found the ALJ failed to properly consider plaintiff's testimony. This error alone warrants remand for the ALJ to reassess plaintiff's RFC. But the court also here considers whether the ALJ adequately accounted for the medical evidence.

1. Effect of Step Two Finding

As an initial matter, the court rejects plaintiff's argument that the ALJ's finding of a severe impairment at step two must necessarily result in some sort of limitation for purposes of determining the RFC. Step two is a "de minimis screening device used to dispose of groundless claims." *Webb*, 433 F.3d at 687 (internal quotation marks and alteration omitted). "[A] finding that a[n impairment] is severe at step two only raises a prima facie case of a disability." *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007) (citation omitted). The proper question is whether substantial evidence supports the ALJ's RFC determination.

2. The ALJ's RFC Determination

RFC is what one can "still do despite [his or her] limitations." 20 C.F.R. § 416.945(a)(1)-(2). The ALJ reaches an RFC determination by reviewing and considering all of the relevant evidence, including non-severe impairments. *Id.* When the record is ambiguous, the Commissioner has a duty to develop the record. *See Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005); *see also Mayes*, 276 F.3d at 459-60 (ALJ has a duty to develop the record further only "when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence"). This may include retaining a medical expert or

ordering a consultative examination. 20 C.F.R. § 404.1519a(a).

In assessing plaintiff's RFC here, the ALJ analyzed the medical opinions of two state agency physicians and several pieces of objective and subjective medical evidence.

a. Medical Evidence

First, as to plaintiff's migraine headaches, the ALJ noted that in March 2016, plaintiff's head CT scan was normal. AR at 20 (citing AR at 1620). Moreover, in July 2017, plaintiff underwent a 24-hour EEG, which showed results in the "broad normal range." *Id.* (citing AR at 1294). As previously discussed, the ALJ appears to have concluded that plaintiff's migraines were not severely limiting due to the fact she worked for many years after the onset of severe headaches. *See* AR at 22.

Second, concerning plaintiff's near-syncope and syncope episodes, the ALJ acknowledged plaintiff's POTS diagnosis and her positive test for orthostatic hypotension. AR at 20 (citing AR at 1620). Additionally, the ALJ noted that in March 2016, plaintiff had normal head and angio CT scans. *Id.* In January 2017, plaintiff reported fainting spells whenever she stood or sat for about an hour. *Id.* (citing AR at 639).

The ALJ noted at least some of plaintiff's syncope and near-syncope events are associated with and possibly triggered by anxiety, and are sometimes treated with anti-anxiety medications. AR at 18, 20 (citing AR at 785-87, 843). For example, in February 2017, plaintiff had an episode of near-syncope in the presence of ER doctor Scott Walker. AR at 20, 785. Because plaintiff's heart rate and blood pressure remained stable, Dr. Walker determined the episode was not consistent with POTS or dangerous arrhythmia. AR at 20, 785-87. Dr. Walker treated plaintiff with Ativan, an anti-anxiety medication, and discharged her, noting her clinical scenario did not suggest a serious etiology. *See id.* The treatment notes for that visit show plaintiff appeared anxious, alert, oriented to

person, place, and time, and had a full range of motion. AR at 20 (citing AR at 785-87).

A few days later, plaintiff once again presented to the ER with episodes of "generalized shaking of her body followed by slumping over" with no hypotension or tachycardia. *Id.* (citing AR at 843). In July 2017, plaintiff underwent a 24-hour EEG, which showed results in the "broad normal range." *Id.* (citing AR at 1294).

Third, with respect to plaintiff's mental impairments, the ALJ accepted plaintiff has been diagnosed with GAD. AR at 18 (citing AR at 1235). The ALJ reviewed psychotherapy notes showing approximately weekly treatment in March and April of 2017. *Id.* During those therapy sessions, plaintiff reported panic attacks and anxiety, but was otherwise cooperative and showed normal speech, intact attention and concentration, affect, thought form and content, fund of information, abstraction and generalization, recent and remote memory, insight and judgment, alertness, and orientation to person, place, time, and situation. *See id.* (citing AR at 416-37).

At a November 2017 follow-up appointment, plaintiff appeared to be anxious, depressed, and agitated. *Id.* (citing AR at 1521). Notwithstanding, she again showed normal memory and judgment. *Id.*

Fourth, as to plaintiff's problems with her extremities, including buckling of her knees, the ALJ noted that in December 2016, plaintiff exhibited a normal gait, range of motion in her back, and negative straight leg raise testing. AR at 20 (citing AR at 550). In January 2017, plaintiff reported she could climb at least one flight of stairs and walk at least two blocks. *Id.* (citing AR at 639).

In May 2018, plaintiff exhibited buckling and an astasia-abasia gait. AR at 20, 1625. The treating doctor noted plaintiff's pain was consistent with lumbosacral radiculopathy starting in April 2018. *See* AR at 20, 1625, 1680. Plaintiff reported she began using a single-point cane in approximately January

2018. AR at 20 (citing AR at 1625, 1680). Her doctor also prescribed a 12-week course of physical therapy to decrease her symptoms and limitations, but there is no evidence she completed the therapy, or that if she did it objectively reduced her limitations. *See id.* (citing AR at 1680). The ALJ did not find any objective imaging or other studies showing radiculopathy or any impairment of the lumbosacral spine. *Id.*

b. Medical Opinions

The ALJ reviewed the opinions of two state agency physicians, Dr. K. Sin and Dr. H. Vu. Dr. Sin's opinion is dated August 8, 2016 (AR at 48-58), and Dr. Vu's is from September 27, 2016 (AR at 59-69). Thus, neither physician reviewed all of the evidence in the record at the time of the hearing, including most of the medical evidence cited by the ALJ in support of her RFC determination. *Compare* AR at 48-69 (assessments completed in 2016) *with* AR at 18-22 (citing mostly medical evidence from 2017 and 2018). Nevertheless, the ALJ gave great weight to Dr. Vu's opinion and little weight to Dr. Sin's opinion. AR at 22.

Dr. Vu opined plaintiff had no exertional limitations that would interfere with her ability to lift, carry, push, pull, or perform other exertional activities. *See* AR at 22, 64. Further, Dr. Vu opined plaintiff could perform occasional postural activities but had to avoid climbing ladders and scaffolds, extreme temperatures, noise, vibration, pulmonary irritants, and hazards due to her postural tachycardia, migraines, and risk of syncope. *See* AR at 22, 64-66. The ALJ concluded that Dr. Vu's opinion was consistent with the evidence, which included no imaging or other objective evidence of a spine or physical impairment. AR at 22.

Dr. Sin's opinion was similar in some respects, except it concluded plaintiff could only work at the light exertional level. AR at 22, 54-55. Dr. Sin also suggested less environmental limitations than Dr. Vu. AR at 22, 55. The ALJ determined Dr. Sin failed to explain why plaintiff's impairments limited her to

light work, especially given that the medical evidence did not support exertional limitations. AR at 22. The ALJ also concluded Dr. Sin did not sufficiently support the finding of less environmental limitations. *Id.*

3. The ALJ Failed to Properly Consider Later Medical Evidence

The only medical opinions in this case were provided by physicians who did not review approximately two years of medical evidence. An ALJ may not act as her own medical expert since she is "simply not qualified to interpret raw medical data in functional terms." *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999); *see also Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975) (ALJ should not make her "own exploration and assessment" as to a claimant's impairments); *Miller v. Astrue*, 695 F. Supp. 2d 1042, 1048 (C.D. Cal. 2010) (it is improper for the ALJ to act as the medical expert); *Padilla v. Astrue*, 541 F. Supp. 2d 1102, 1106 (C.D. Cal. 2008) (ALJ is not qualified to extrapolate functional limitations from raw medical data). But that is not what the ALJ did here. Instead, she relied on Dr. Vu's opinion. That Dr. Vu rendered his opinion before all the medical evidence ultimately in the record existed is not unusual. *See Owen v. Saul*, 808 Fed. App'x 421, 423 (9th Cir. 2020) (no error in giving weight to opinions of state agency physicians who did not review later evidence; "there is always some time lapse between a consultant's report and the ALJ hearing and decision").

Nonetheless, in this case there appear to have been significant changes in plaintiff's condition after Dr. Vu's review of the medical records that existed in September 2016. Whether those changes were enough to warrant a change in plaintiff's RFC may be disputed, but at a minimum those changes made the ALJ's reliance on Dr. Vu's opinion in the absence of any later opinion questionable. The absence of a complete medical opinion is not necessarily fatal, but the RFC determination still must be supported by substantial evidence. *See Tackett v. Apfel*, 180 F.3d 1094, 1102-03 (9th Cir. 1999) (ALJ must provide evidentiary support for

his interpretation of medical evidence). That is not the case here.

To begin, the medical record shows, and the ALJ seemed to agree, that plaintiff's GAD diagnosis may be to blame for many of plaintiff's symptoms, including her episodes of near-syncope and syncope. *See, e.g.*, AR at 20, 785-87, 843. Yet there is no medical opinion in the record concerning that diagnosis. *See Afanador v. Barnhart*, 2002 WL 31497570, at *4 (N.D. Cal. Nov. 6, 2002) (ALJ failed to develop the record when she did not obtain a medical opinion concerning claimant's specific diagnosis).

Moreover, neither of the state agency physicians had an opportunity to review all of the medical evidence concerning plaintiff's severe left leg impairment. *See* AR at 17. Although that condition appeared to be mild in 2016 and 2017 (*see* AR at 550, 639), by 2018 plaintiff was experiencing multiple instances of buckling and began to use a cane (*see* AR at 1625, 1680). *See Garrison*, 759 F.3d at 1017 (error for ALJ to focus on few isolated instances of mild impairment given that cycles of improvement and debilitating symptoms are common). The medical evidence also showed progression in plaintiff's migraines and syncope episodes in 2017 and 2018.

Defendant is correct that ALJs do not have to discuss each piece of evidence considered. *See Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003). But they do have to discuss significant and probative evidence. *See id*; *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). The ALJ failed to discuss seemingly significant and probative objective medical evidence here. For example, plaintiff notes one of her treating physicians opined that an MRI of her brain would not be helpful since POTS typically has no structural abnormalities. P. Mem. at 6 (citing AR at 294). Although the ALJ did not address this evidence, it may help explain why, as the ALJ noted, plaintiff's head CT scan was normal. The ALJ also failed to consider potentially probative evidence showing plaintiff was having

trouble finding an effective medicine to treat her migraines. AR at 1534 (treatment with Toradol injection), 1656 (treatment with Solumedrol and Prednisone); *Trevizo*, 871 F.3d at 679 (error to dismiss impairment as not severe where medical record showed failure to respond to aggressive treatments).

In short, in assessing plaintiff's RFC, the ALJ failed to adequately consider some of the later medical evidence and further develop the record as needed. In addition, the court already found the ALJ erred in discounting plaintiff's testimony. Consequently, the ALJ must reassess plaintiff's RFC on remand.

V.

REMAND IS APPROPRIATE

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this discretion to direct an immediate award of benefits where: "(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinions; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand." *Garrison*, 759 F.3d at 1020 (setting forth three-part credit-as-true standard for remanding with instructions to calculate and award benefits). But where there are outstanding issues that must be resolved before a determination can be made, or it is not clear from the record that the ALJ would be required to find a plaintiff disabled if all the evidence were properly evaluated, remand for further proceedings is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must "remand for further proceedings when, even though all conditions of the credit-as-true rule are satisfied, an evaluation of

the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1021.

Here, remand is required to fully develop the record. On remand, the ALJ shall reconsider plaintiff's testimony and either accept it or provide specific, clear, and convincing reasons supported by substantial evidence for rejecting it. The ALJ shall also reconsider all the medical evidence of record, and if necessary shall further develop the record by retaining a consultative examiner or medical expert. The ALJ shall then proceed through steps two, three, four, and, if necessary, five to determine what work, if any, plaintiff was capable of performing.

VI.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered REVERSING the decision of the Commissioner denying benefits, and REMANDING the matter to the Commissioner for further administrative action consistent with this decision.

DATED: March 31, 2021

SHERI PYM
United States Magistrate Judge