

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ELIZABETH MARIE MARTINEZ,

Plaintiff,

v.

NANCY A. BERRYHILL,  
Acting Commissioner of Social Security,<sup>1</sup>

Defendant.

Case No. 1:16-cv-01777-SKO

ORDER ON PLAINTIFF’S SOCIAL  
SECURITY COMPLAINT

(Doc. 1)

---

**I. INTRODUCTION**

On November 21, 2016, Plaintiff Elizabeth Marie Martinez (“Plaintiff”) filed a complaint under 42 U.S.C. §§405(g) and 1383(c) seeking judicial review of a final decision of the Commissioner of Social Security (the “Commissioner” or “Defendant”) denying her application for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) benefits. (Doc. 1.) The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Sheila K. Oberto, United States

---

<sup>1</sup> On January 23, 2017, Nancy A. Berryhill became the Acting Commissioner of the Social Security Administration. See <https://www.ssa.gov/agency/commissioner.html> (last visited by the court on February 27, 2017). She is therefore substituted as the defendant in this action. See 42 U.S.C. § 405(g) (referring to the “Commissioner’s Answer”); 20 C.F.R. § 422.210(d) (“the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant”).

1 Magistrate Judge.<sup>2</sup>

2 **II. BACKGROUND**

3 On August 24, 2012, Plaintiff filed an application for DIB and SSI, alleging that she  
4 became disabled on April 24, 2012, due to diabetes, arthritis, vertigo, and migraines.  
5 (Administrative Record (“AR”) 209, 216, 242.) Plaintiff was 52 years old when she filed the  
6 application. (AR 209 (listing Plaintiff’s date of birth as July 15, 1960).) Plaintiff has a high  
7 school education, and she previously worked as a retail manager from 1998 to 1999 and a retail  
8 demo technician from 2000 to 2010. (AR 243.)

9 **A. Relevant Medical Evidence<sup>3</sup>**

10 On June 19, 2012, Plaintiff visited the emergency room at Adventist Medical Center,  
11 experiencing pain and swelling in her hands. (AR 362-63.) Examinations revealed that Plaintiff  
12 had tenderness and swelling in her hands, but a normal range of motion. (AR 362.) However,  
13 the results of x-rays showed that Plaintiff’s hands were normal, and all other physical and mental  
14 examinations were normal. (AR 362-63, 365, 410.) Plaintiff was diagnosed with arthritis and  
15 hand pain. (AR 363.) Plaintiff was prescribed Ibuprofen and Vicodin. (AR 363.)

16 On July 11, 2012, Plaintiff presented at Community Medical Centers, where she had  
17 previously established care in September 2011, and was examined by Nargis Naheed, M.D. (AR  
18 385, 396.) Dr. Naheed found tenderness in Plaintiff’s wrists and hands, swelling, and decreased  
19 range of motion in her hands, wrists, shoulders and ankles. (AR 395.) Dr. Naheed diagnosed  
20 Plaintiff with diabetes mellitus, hypertension, migraines, fatty liver, eczema, unspecified asthma,  
21 arthritis sicca, and low back pain. (AR 396.) Dr. Naheed found that Plaintiff’s migraines,  
22 hypertension, and diabetes were well controlled with medication, diet, and lifestyle  
23 modifications. (AR 393-95.)

24 On August 15, 2012, Plaintiff presented at Community Medical Centers for a follow-up,  
25 and was examined by Dominic T. Dizon, M.D. (AR 398.) Plaintiff reported swelling in her  
26

---

27 <sup>2</sup> The parties consented to the jurisdiction of a U.S. Magistrate Judge. (Docs. 7, 8.)

28 <sup>3</sup> As Plaintiff’s assertion of error is limited to the Administrative Law Judge’s purported failure to address medical evidence of Plaintiff’s carpal tunnel syndrome and fibromyalgia, only evidence relevant to that argument is set forth below.

1 finger joints, wrists, knees, ankles, and cervical spine. (AR 396.) Plaintiff's laboratory results  
2 were positive for rheumatoid arthritis, and Dr. Dizon diagnosed Plaintiff with rheumatoid  
3 arthritis. (AR 396.) Plaintiff was prescribed prednisone and methotrexate. (AR 396.)

4 On October 2, 2012, Plaintiff returned to Community Medical Centers, and was examined  
5 by Paj Shekhar, M.D. (AR 401-02.) Plaintiff reported an increase in her morning stiffness. (AR  
6 401.) Dr. Shekhar found swelling of Plaintiff's hand joints, and assessed that she was only  
7 partially responding to the prednisone and methotrexate, "[s]uggest[ing] possible concomitant  
8 fibromyalgia." (AR 401.) Dr. Shekhar increased Plaintiff's dosage of methotrexate, reduced her  
9 dosage of prednisone, and prescribed Plaintiff two new medications, including weekly injections  
10 of Enbrel. (AR 402.)

11 **1. Roger Wagner, M.D.**

12 On October 16, 2012, Plaintiff was examined by internist Roger Wagner, M.D. (AR 410-  
13 15.) Plaintiff reported that she lived with her boyfriend, prepared simple meals, cleaned around  
14 the house, shopped, walked for exercise, and needed no help with personal hygiene except to  
15 occasionally put on a bra and button clothing. (AR 410-11.) Plaintiff complained of numbness  
16 and tingling in the soles of her feet, inflamed finger joints, morning stiffness, pain in her  
17 knuckles, wrists, ankles, and shoulders, and difficulty climbing stairs. (AR 410-11.)

18 Dr. Wagner initially observed that Plaintiff's face was round and puffy (perhaps  
19 associated with a hormonal condition), she rose easily from her chair, walked normally, although  
20 she avoided moving her hands and arms while doing so, used both hands with some dexterity,  
21 and successfully bent over to remove her shoes and socks. (AR 411.) Upon examination, Dr.  
22 Wagner noted that Plaintiff's gait and station were normal, she used no assistive device, and she  
23 had minimum swelling in her ankles. (AR 413.) Plaintiff demonstrated discomfort when flexing  
24 her elbows, but was not limited. (AR 413.) She had mild tenderness and swelling in her wrists,  
25 but no tenderness or swelling in her finger joints (AR 413). Plaintiff demonstrated normal motor  
26 strength and muscle bulk in both arms and legs, good motor strength in both hands, and  
27 reasonably good hand dexterity. (AR 413-14.) She had reduced grip strength in both hands, but  
28 she was able to pick up a paper clip. (AR 413-14.) Dr. Wagner diagnosed Plaintiff with diabetes

1 and rheumatoid arthritis. (AR 414.)

2 With regard to Plaintiff's functional capacity, Dr. Wagner opined that Plaintiff could  
3 stand and walk up to four hours in an eight-hour workday, given her rheumatoid arthritis, sit with  
4 no limitations in an eight-hour workday, occasionally lift and carry 20 pounds, frequently lift and  
5 carry ten pounds, given her polyarthritis, and frequently perform postural and manipulative  
6 activities. (AR 414.)

7 **2. Richard D. Bertken, M.D.**

8 On January 15, 2013, Plaintiff presented for follow-up care with rheumatologist Richard  
9 D. Bertken. (AR 418.) Plaintiff complained of widespread pain, increased morning stiffness, and  
10 morning pain in her shoulder and groin. (AR 418.) Dr. Bertken performed a musculoskeletal  
11 examination, which revealed mild-to-moderate proximal muscle tenderness. (AR 418.) Dr.  
12 Bertken noted that Plaintiff's rheumatoid arthritis was controlled, but that her pain symptoms  
13 may be a side effect of "statin myopathy" or "statin medication." (AR 418.) Dr. Bertken  
14 substituted Plaintiff's statin prescription with fish oil. (AR 418.)

15 On May 16, 2013, Plaintiff returned to Dr. Bertken for a follow-up. (AR 432.) Plaintiff  
16 complained of shooting pain in her fingers, and examinations revealed widespread tenderness—a  
17 "full complement of [fibromyalgia] symptoms." (AR 432.) Dr. Bertken noted that Plaintiff's  
18 rheumatoid arthritis was "in good control." (AR 432.)

19 On March 27, 2014, Dr. Bertken examined Plaintiff, and noted that the results revealed  
20 classic symptoms of carpal tunnel syndrome, and moderate inflammation of her  
21 metacarpophalangeal joints. (AR 448.) Plaintiff was diagnosed with carpal tunnel syndrome,  
22 and given a steroid injection. (AR 448.)

23 On July 3, 2014, Plaintiff reported to Dr. Bertken that her symptoms had been stable since  
24 her prior visit, that she had not experienced further joint swelling, but that she continued to  
25 experience occasional joint pain. (AR 439.) Plaintiff further reported that the injection she  
26 received during her prior visit "helped a lot in controlling her symptoms." (AR 439.) Dr.  
27 Bertken diagnosed Plaintiff with chronic bilateral carpal tunnel syndrome, more on the right than  
28 left, and prescribed wrist splints. (AR 443.)

1                   **3. State Agency Physicians**

2                   On April 10, 2013, W. Jackson, M.D., a state agency physician, found that Plaintiff had  
3 the severe impairments of inflammatory arthritis and diabetes mellitus, but that the “overall  
4 evidence suggest[ed] improvement with treatment,” and that “[h]er recent flare appears due to a  
5 different medication which should improve with discontinuation.” (AR 100.) Dr. Jackson  
6 assessed Plaintiff’s residual functional capacity (“RFC”)<sup>4</sup> and found that Plaintiff was able to sit,  
7 stand, or walk for six hours in an eight-hour workday, occasionally lift or carry 20 pounds,  
8 frequently lift or carry ten pounds, occasionally climb ramps, stairs, ladders, ropes, and scaffolds,  
9 occasionally stoop, kneel, crouch, and crawl, and frequently handle and finger “due to arthritis of  
10 the hands.” (AR 101-02.) Dr. Jackson opined that Plaintiff should avoid concentrated exposure  
11 to extreme cold and vibration. (AR 102.)

12                   On October 16, 2013, R. Fast, M.D., a state agency physician, issued an opinion affirming  
13 Dr. Jackson’s opinion that Plaintiff could perform light work with frequent handling and  
14 fingering. (AR 132.) Dr. Fast opined that “there is no evidence that show[ed] any worsening of  
15 [Plaintiff’s] condition.” (AR 128.)

16                   **B. Administrative Proceedings**

17                   The Commissioner denied Plaintiff’s applications for DIB and SSI initially on April 15,  
18 2013, and again on reconsideration on October 17, 2013. (AR 138-42, 148-53.) Consequently,  
19 on November 19, 2013, Plaintiff requested a hearing before an Administrative Law Judge  
20 (“ALJ”). (AR 154-56.) At the hearing on March 12, 2015, Plaintiff appeared with counsel and  
21 testified before an ALJ as to her alleged disabling conditions. (AR 22, 36-81.)

22                   **1. Plaintiff’s Testimony**

23                   Plaintiff testified that she has been diagnosed with rheumatoid arthritis, migraines, type  
24 2 diabetes, and asthma. (AR 46, 47, 54, 59.) Plaintiff also testified that she underwent

---

25 \_\_\_\_\_  
26 <sup>4</sup> RFC is an assessment of an individual’s ability to do sustained work-related physical and mental activities in a  
27 work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule.  
28 Social Security Ruling 96-8p. The RFC assessment considers only functional limitations and restrictions that result  
from an individual’s medically determinable impairment or combination of impairments. *Id.* “In determining a  
claimant’s RFC, an ALJ must consider all relevant evidence in the record including, inter alia, medical records, lay  
evidence, and ‘the effects of symptoms, including pain, that are reasonably attributed to a medically determinable  
impairment.’” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

1 successful arthroscopic surgery for a hernia in 2010. (AR 47-48.) Plaintiff described  
2 experiencing stiffness and swelling in her hands, as well as a sensation like “they’re on fire,” as  
3 a result of her rheumatoid arthritis. (AR 48.) For several months in 2012, Plaintiff was unable  
4 to move her fingers. (AR 55.) Plaintiff testified that she can use her hands to write, but she  
5 cannot type. (AR 51.) Plaintiff further described experiencing pain, spasms, and stiffness in  
6 her back and legs as a result of her rheumatoid arthritis. (AR 49, 51.) Plaintiff testified that the  
7 symptoms “flare up” every day, and she rated the severity of the pain as an eight out of ten.  
8 (AR 49, 56.)

9 Plaintiff stated she experiences migraines once or twice per week, and that her migraines  
10 last all day. (AR 64.) Plaintiff testified that her migraines have worsened over the years. (AR  
11 65.) When experiencing a migraine, Plaintiff cannot eat or watch television, and she cannot  
12 tolerate light or movement. (AR 64-65.)

13 With regard to treatment, Plaintiff was initially prescribed Enbrel and prednisone for her  
14 rheumatoid arthritis, but at the time of the hearing she was taking HUMIRA, Lexapro,  
15 methotrexate, and hydroxychloroquine. (AR 49-50, 55-56, 65.) Plaintiff testified that the  
16 medications reduce the severity of her pain from an eight to a five, but the swelling and stiffness  
17 remain. (AR 50, 56.) However, Plaintiff received no injections, underwent no surgeries, and  
18 used no splints, brace, assistive device, or a Transcutaneous Electrical Nerve Stimulation  
19 (“TENS”) unit. (AR 56.) Plaintiff does not apply a hot or cold compress to her hands or legs to  
20 relieve the pain. (AR 66.) Plaintiff was also prescribed Imitrex for her migraines. (AR 59.)  
21 Plaintiff testified that she was prescribed “a pill” for her diabetes, but that she received no  
22 insulin injections. (AR 59.) At the time of the hearing, Plaintiff was seeing only one doctor—a  
23 rheumatologist. (AR 53.) Plaintiff testified that neither her rheumatologist nor any other doctor  
24 has advised her that she cannot work as a result of her impairments. (AR 53.)

25 Plaintiff testified to the following physical capabilities. She can lift and carry small  
26 items, such as her purse and a gallon of milk. (AR 59-60.) She can use her hands, and reach  
27 overhead, side to side, and front to back. (AR 60-61.) Plaintiff testified that she walks  
28 approximately one block, two to three times per day. (AR 57.) However, Plaintiff cannot

1 stoop, kneel, crawl, or crouch. (AR 61.)

2 In her prior work as an assistant manager at Walmart and a demo technician at Sam's  
3 Club, Plaintiff regularly lifted up to 50 pounds, stocking bags of dog food and appliances, and  
4 unloading trucks. (AR 43-44.) Plaintiff performed these jobs from 2001 to 2010 until she was  
5 laid off from her job at Sam's Club. (AR 45.)

6 Plaintiff lives with her adult son. (AR 41.) She does not drive, but instead rides public  
7 transportation and receives rides from other people. (AR 43.) With regard to her daily  
8 activities, Plaintiff testified that she cleans the house, including mopping, sweeping, vacuuming,  
9 and wiping counters. (AR 62.) Typically, she can perform these chores for only 20 minutes at  
10 a time without becoming fatigued, and then she rests for approximately an hour. (AR 64.) Also  
11 due to fatigue, Plaintiff lies down approximately three times per day for approximately an hour  
12 or two each time. (AR 64.) She walks approximately one block, two to three times per day.  
13 (AR 57.) She does participate in social activities, such as the movies or church. (AR 63.)  
14 Plaintiff grocery shops with the assistance of her son. (AR 63.)

## 15 2. Vocational Expert's Testimony

16 A Vocational Expert ("VE") testified at the hearing that Plaintiff has past work as (1) a  
17 department manager, Dictionary of Operational Titles ("DOT") code 299.137-010, which was  
18 medium work, with a specific vocational preparation ("SVP") of 7; and (2) a demonstrator,  
19 DOT code 297.354-010, which was semiskilled light work, with an SVP of 3. (AR 72-73.)

20 The ALJ asked the VE one hypothetical question, in which the VE was to consider a  
21 person of Plaintiff's age, education, and work experience, who can occasionally lift or carry 20  
22 pounds, frequently lift or carry 10 pounds, stand or walk four hours in an eight-hour workday  
23 with normal breaks, sit for six hours in an eight-hour workday, frequently perform postural  
24 activities, and frequently perform manipulative activities bilaterally. (AR 73.) The ALJ then  
25 asked the VE whether, given this, such a person could perform any of Plaintiff's past work.  
26 (AR 73.) The VE testified that such a hypothetical person could not perform Plaintiff's past  
27 jobs as defined by the DOT or as performed. (AR 73.) The VE further testified that such a  
28 person could, however, perform the following other jobs: (1) sewing machine operator, DOT

1 code 787.685-046, light unskilled work, SVP of 2, for which there exists 42,000 jobs nationally;  
2 (2) cashier II, DOT code 211.462-010, light unskilled work, SVP of 2, for which there exists  
3 835,000 jobs nationally; and (3) sub assembler, DOT code 729.684-054, light unskilled work,  
4 SVP of 2, for which there exists 10,300 jobs nationally. (AR 74-75.)

5 The ALJ then asked the VE a second hypothetical question considering the same person  
6 with the same capabilities as outlined in the first hypothetical, but who must avoid concentrated  
7 exposure to extreme cold, vibrations, fumes, odors, dust, gases, moisture, and humidity. (AR  
8 75-76.) The VE testified that such limitations would not affect the person's abilities to perform  
9 the jobs identified in response to the first hypothetical. (AR 76.)

10 The ALJ asked the VE a third hypothetical question considering the same person with  
11 the same capabilities as outlined in the second hypothetical, but who can occasionally stoop,  
12 kneel, crouch, crawl, and climb ladders, ropes, and scaffolding. (AR 76.) The VE testified that  
13 such limitations would not affect the person's abilities to perform the jobs identified in answer  
14 to the first hypothetical—that such a person could still perform light work with an SVP of 2.  
15 (AR 77.)

### 16 **C. The ALJ's Decision**

17 In a decision dated May 7, 2015, the ALJ found that Plaintiff was not disabled. (AR 22-  
18 31.) The ALJ conducted the five-step disability analysis set forth in 20 C.F.R. § 416.920. (AR  
19 22.) The ALJ found that Plaintiff had not engaged in substantial gainful activity during the  
20 period from her alleged disability onset date, April 24, 2012, to the date when she was last  
21 insured, December 31, 2015. (AR 24.)

22 At Step Two, the ALJ found that Plaintiff's rheumatoid arthritis, diabetes mellitus, distal  
23 arthritis, and arthritis sicca were severe. (AR 24.) The ALJ further found, however, that  
24 Plaintiff's hypertension, migraines, fatty liver, eczema, asthma, and low back pain were non-  
25 severe. (See AR 24-25.) At Step Three, the ALJ determined that Plaintiff had the RFC

26 to perform less than the full range of light work as defined in 20  
27 CFR 404.1567(a) and 416.967(b) except the claimant can lift  
28 and/or carry 20 pounds occasionally and 10 pounds frequently,  
stand and/or walk for 4 hours in an 8-hour day, and sit for 6 hours



1 in an 8-hour day. She can occasionally climb, balance, stoop,  
2 kneel, crouch, and crawl and frequently reach, handle, finger, and  
3 feel. She should avoid concentrated exposure to extreme cold,  
vibration, and pulmonary irritants such as fumes, gases, odors,  
dusts, and poor ventilation.

4 (AR 25.) In determining Plaintiff's RFC, the ALJ considered the statements and hearing  
5 testimony of Plaintiff, third party statements by Plaintiff's friend, Virginia Gonzalez-Rodriguez,  
6 Plaintiff's niece, Elissa Ramirez, Plaintiff's common-law husband, Louis Castro, Plaintiff's adult  
7 son, Juan Pulido, and Plaintiff's relative, Greg Borunda, and the medical opinions of state agency  
8 physicians, and physicians Roger Wagner, M.D. and Richard Bertken, M.D. (AR 25-29.) The  
9 ALJ ultimately found, given Plaintiff's RFC, that she was not disabled because she could perform  
10 jobs that existed in significant numbers in the national economy. (AR 29.)

11 Plaintiff sought review of this decision before the Appeals Council, which denied review  
12 on September 15, 2016. (AR 1-6.) Therefore, the ALJ's decision became the final decision of  
13 the Commissioner. 20 C.F.R. §§ 404.981, 416.1481.

#### 14 **D. Plaintiff's Appeal**

15 On November 21, 2016, Plaintiff filed a complaint before this Court seeking review of the  
16 ALJ's decision. (Doc. 1.) Plaintiff claims that the ALJ failed consider her fibromyalgia and  
17 carpal tunnel syndrome. (Doc. 14 at 14.) Specifically, Plaintiff contends that the ALJ did not  
18 address Dr. Wagner's October 2012 progress notes indicating "possible concomitant  
19 fibromyalgia," and Dr. Bertken's findings of fibromyalgia and carpal tunnel syndrome. (Doc. 14  
20 at 14.)

### 21 **III. SCOPE OF REVIEW**

22 The ALJ's decision denying benefits "will be disturbed only if that decision is not  
23 supported by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599,  
24 601 (9th Cir. 1999). In reviewing the Commissioner's decision, the Court may not substitute its  
25 judgment for that of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996).  
26 Instead, the Court must determine whether the Commissioner applied the proper legal standards  
27 and whether substantial evidence exists in the record to support the Commissioner's findings.  
28

1 See *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). “Substantial evidence is more than a  
2 mere scintilla but less than a preponderance.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198  
3 (9th Cir. 2008).

4 “Substantial evidence” means “such relevant evidence as a reasonable mind might accept  
5 as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting  
6 *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court “must consider the  
7 entire record as a whole, weighing both the evidence that supports and the evidence that detracts  
8 from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum  
9 of supporting evidence.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citation  
10 and internal quotation marks omitted).

#### 11 IV. APPLICABLE LAW

12 An individual is considered disabled for purposes of disability benefits if he or she is  
13 unable to engage in any substantial, gainful activity by reason of any medically determinable  
14 physical or mental impairment that can be expected to result in death or that has lasted, or can be  
15 expected to last, for a continuous period of not less than twelve months. 42 U.S.C.  
16 §§ 423(d)(1)(A), 1382c(a)(3)(A); see also *Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The  
17 impairment or impairments must result from anatomical, physiological, or psychological  
18 abnormalities that are demonstrable by medically accepted clinical and laboratory diagnostic  
19 techniques and must be of such severity that the claimant is not only unable to do his previous  
20 work, but cannot, considering his age, education, and work experience, engage in any other kind  
21 of substantial, gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)–(3),  
22 1382c(a)(3)(B), (D).

23 The regulations provide that the ALJ must undertake a specific five-step sequential  
24 analysis in the process of evaluating a disability. In the First Step, the ALJ must determine  
25 whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§  
26 404.1520(b), 416.920(b). If not, in the Second Step, the ALJ must determine whether the  
27 claimant has a severe impairment or a combination of impairments significantly limiting him  
28 from performing basic work activities. *Id.* §§ 404.1520(c), 416.920(c). If so, in the Third Step,

1 the ALJ must determine whether the claimant has a severe impairment or combination of  
2 impairments that meets or equals the requirements of the Listing of Impairments (“Listing”), 20  
3 C.F.R. 404, Subpart P, App. 1. *Id.* §§ 404.1520(d), 416.920(d). If not, in the Fourth Step, the  
4 ALJ must determine whether the claimant has sufficient residual functional capacity despite the  
5 impairment or various limitations to perform his past work. *Id.* §§ 404.1520(f), 416.920(f). If  
6 not, in Step Five, the burden shifts to the Commissioner to show that the claimant can perform  
7 other work that exists in significant numbers in the national economy. *Id.* §§ 404.1520(g),  
8 416.920(g). If a claimant is found to be disabled or not disabled at any step in the sequence, there  
9 is no need to consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir.  
10 1999); 20 C.F.R. §§ 404.1520, 416.920.

## 11 V. DISCUSSION

12 Plaintiff contends that the ALJ failed to consider the medical evidence in the record of her  
13 fibromyalgia and carpal tunnel syndrome. (Doc. 14 at 14.) The Commissioner counters that the  
14 ALJ considered all of the medical evidence in the record, and particularly the record evidence of  
15 Plaintiff’s symptoms and limitations associated with fibromyalgia and carpal tunnel syndrome.  
16 (Doc. 15 at 7-10.)

### 17 A. Plaintiff Failed to Identify Fibromyalgia and Carpal Tunnel Syndrome.

18 The ALJ has a duty to consider and evaluate every medical opinion in the record. *See* 20  
19 C.F.R. § 404.1527(b)-(c); *Madrigal v. Berryhill*, No. CV 16-8714-E, 2017 WL 3120257, at \*3  
20 (C.D. Cal. Jul. 21, 2017). The ALJ has a further duty to develop the record fully and fairly to  
21 assure that the claimant’s interests are considered, and to inform herself about facts relevant to  
22 her decision. *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983); *Tonapetyan v. Halter*, 242 F.3d  
23 1144, 1150 (9th Cir. 2001); *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996); *Brown v.*  
24 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). However, the ALJ’s duty to develop the record is  
25 triggered only when there exists a gap in the evidence or the evidence cannot otherwise be  
26 properly evaluated. *Tonapetyan*, 242 F.3d at 1150; *see also Widmark v. Barnhart*, 454 F.3d  
27 1063, 1069 (9th Cir. 2006) (ALJ has duty to develop record where there is a “perceived gap in the  
28 record”). The ALJ is under no obligation to consider impairments not raised by the claimant.

1 *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). A claimant’s failure to raise a claim before  
2 the ALJ, when represented by counsel, constitutes waiver. *Id.*

3 Here, Plaintiff did not allege in her applications for SSI and DIB that she suffered from  
4 fibromyalgia and carpal tunnel syndrome. Rather, Plaintiff’s disability claim prior to this appeal  
5 related only to her arthritis, vertigo, migraines, and diabetes. (AR 209, 216, 242.) Nor did  
6 Plaintiff indicate at the hearing that she suffered from fibromyalgia and carpal tunnel syndrome,  
7 even when the ALJ specifically asked her to identify her impairments. (See AR 46, 47, 54, 59  
8 (testifying that she has been diagnosed with rheumatoid arthritis, migraines, type 2 diabetes, and  
9 asthma).) Plaintiff was represented by counsel, who, when given the opportunity to question  
10 Plaintiff, asked Plaintiff no questions about fibromyalgia or carpal tunnel syndrome. Plaintiff’s  
11 failure to identify, at the very least, fibromyalgia and carpal tunnel syndrome either in her  
12 disability applications, in her hearing testimony, or through her attorney, renders such claims  
13 waived. See, e.g., *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (finding no error where  
14 ALJ did not consider plaintiff’s PTSD because plaintiff, represented by counsel, failed to raise  
15 PTSD prior to his appeal); *Lualhati v. Astrue*, No. C-10-0341 EMC, 2010 WL 3001208, at \*8-9  
16 (plaintiff’s failure to identify fibromyalgia or Sjogren’s prior to her district court appeal resulted  
17 in waiver of those claims); *Legrand v. Astrue*, No. 4:08-cv-326 FRB, 2009 WL 801599, at \*26-27  
18 (E.D. Mo. Mar. 25, 2009) (noting that “[p]aintiff did not allege a mental impairment in his  
19 application, nor did he testify to a mental impairment at the hearing before the ALJ”). The ALJ  
20 was therefore not required to consider Plaintiff’s fibromyalgia and carpal tunnel syndrome.

21 **B. The ALJ Considered Limitations Associated with Fibromyalgia and Carpal Tunnel**  
22 **Syndrome.**

23 Even to the extent that the ALJ was sufficiently on notice of Plaintiff’s fibromyalgia and  
24 carpal tunnel syndrome, the ALJ did not err in his RFC analysis simply because he did not  
25 discuss these impairments in his decision. Once a claimant prevails at the Second Step of the  
26 sequential evaluation—as Plaintiff did here—by achieving a finding of some severe impairment,  
27 regardless of which condition is found to be severe, the ALJ proceeds with the sequential  
28 evaluation, considering at each step all other alleged impairments *and symptoms* that may impact

1 the claimant's ability to work. *See* 42 U.S.C. § 423(d)(2)(B) (“In determining whether an  
2 individual's physical or mental impairment or impairments are of a sufficient medical severity  
3 that such impairment or impairments could be the basis of eligibility under this section, the  
4 Commissioner of Social Security shall consider the combined effect of all of the individual's  
5 impairments without regard to whether any such impairment, if considered separately, would be  
6 of such severity.”).

7 Plaintiff prevailed at the Second Step. Therefore, any purported error by the ALJ in  
8 failing to consider Plaintiff’s fibromyalgia and carpal tunnel syndrome at the Second Step was  
9 harmless because the ALJ found four severe impairments—rheumatoid arthritis, diabetes  
10 mellitus, distal arthritis, and arthritis sicca—and continued to consider all of Plaintiff’s symptoms  
11 in the remaining steps. (AR 24); *see generally Lewis*, 498 F.3d 909 (concluding that the ALJ’s  
12 classification of one of claimant’s impairments as non-severe at the Second Step was harmless  
13 error, because claimant was found to have other severe impairments, and the ALJ extensively  
14 discussed claimant’s non-severe impairments symptoms in the Fourth Step); *Smolen*, 80 F.3d at  
15 1290 (recognizing that, if one severe impairment exists, all medically determinable impairments  
16 an symptoms must be considered in the remaining steps of the sequential analysis). Thus, the  
17 question becomes whether the ALJ properly considered the functional limitations associated with  
18 Plaintiff’s fibromyalgia and carpal tunnel syndrome at the remaining steps.

19 Treatment notes from October 2, 2012, stated that the swelling in Plaintiff’s hand joints  
20 and her partial response to prednisone and methotrexate “[s]uggest[ed] possible concomitant  
21 fibromyalgia.” (AR 401.) Although the ALJ did not specifically identify these treatment notes,  
22 as Plaintiff contends, the ALJ did address the swelling in Plaintiff’s hand joints and her response  
23 to prednisone and methotrexate. *See Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th  
24 Cir. 2003) (“[I]n interpreting the evidence and developing the record, the ALJ does not need to  
25 ‘discuss every piece of evidence.’”) (quoting *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998),  
26 and citing *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984)). The ALJ stated,  
27 “[Plaintiff] went to the emergency room in June 2012 with complaints of pain and swelling in her  
28 hands. Bilateral x-rays were normal. The affected joints were primarily in the knuckles in the

1 hands, the wrists, the ankles, and the shoulders. She had a history of very inflamed  
2 metacarpophalangeal joints in the hands that had very significantly improved.” (AR 28.)  
3 Plaintiff was prescribed methotrexate and prednisone during her August 2012 hospital visit, and  
4 the ALJ discussed the notes taken during that visit. (AR 25.)

5 The ALJ also addressed the fibromyalgia and carpal tunnel syndrome symptoms  
6 identified by treating rheumatologist Dr. Bertken. In May 2013, Dr. Bertken noted that Plaintiff’s  
7 “shooting pain in her fingers” and widespread tenderness suggested a “full complement of  
8 [fibromyalgia] symptoms.” (AR 432.) In March and July 2014, Dr. Bertken diagnosed Plaintiff  
9 with carpal tunnel syndrome. (AR 443, 448.) The ALJ expressly acknowledged that Dr. Bertken  
10 noted “a dominant symptom of fibromyalgia,” and that “[t]here was widespread tenderness  
11 [suggesting a] full complement of fibromyalgia.” (AR 29.) The ALJ considered, though, that  
12 “[i]n July 2014, the claimaint[] . . . [had] no flare-ups or joint swelling but occasional joint  
13 pains,” and that “[s]he had intermittent pain and numbness at the right hand/fingers and had an  
14 injection in the right wrist in March 2014 that helped in controlling her symptoms.” (AR 29.)  
15 Further, Dr. Bertken noted, after performing a musculoskeletal examination, that Plaintiff’s pain  
16 symptoms may be a side effect of Plaintiff’s statin medication. (AR 418.)

17 Moreover, Plaintiff has not identified any limitations arising from her fibromyalgia and  
18 carpal tunnel syndrome that the ALJ did not consider in determining her RFC. *See Burch v.*  
19 *Barnhart*, 400 F.3d 676, 684 (9th Cir. 2005) (noting that plaintiff “has not set forth, and there is  
20 no evidence in the record, of any functional limitations as a result of her obesity that the ALJ  
21 failed to consider); *Lualhati*, 2010 WL 3001208, at \*8-9 (finding no error in ALJ’s failure to  
22 specifically consider fibromyalgia, Sjogren’s, and incontinence, in part, because plaintiff did not  
23 identify any limitations arising from those impairments that the ALJ did not take into account).

24 Accordingly, in light of the record and Plaintiff’s failure to raise these physical  
25 impairments, the Court finds that the ALJ did not err in specifically discussing fibromyalgia and  
26 carpal tunnel syndrome. Consequently, reversal of the ALJ’s decision on this ground is not  
27 warranted.

28 //

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**VI. CONCLUSION AND ORDER**

After consideration of Plaintiff's and Defendant's briefs and a thorough review of the record, the Court finds that the ALJ's decision is supported by substantial evidence and is, therefore, AFFIRMED. The Clerk of this Court is DIRECTED to enter judgment in favor of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, and against Elizabeth Marie Martinez.

IT IS SO ORDERED.

Dated: March 20, 2018

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE