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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

KELLY MARIE CLOVER,  
Plaintiff,  
v.  
NANCY A. BERRYHILL,  
Defendant.

Case No. 16-cv-06565-RMI

**ORDER ON DEFENDANT’S MOTION  
TO ALTER OR AMEND JUDGMENT**

Re: Dkt. No. 35

Pending before the court is Defendant’s Motion, filed pursuant to Fed. R. Civ. P. 59(e), to alter or amend the final order and judgment previously entered in this case. (Doc. 35).<sup>1</sup> For the reasons that follow, the court will deny Defendant’s Motion.

**INTRODUCTION**

On February 7, 2018, the court entered its Order (hereafter, “the Order”) granting Plaintiff’s motion for summary judgment and denying Defendant’s cross-motion for summary judgment, while remanding the case to the Commissioner for further proceedings. (Doc. 31). Judgment was entered in accordance with the Order on the same day. (Doc. 32). In ruling on the summary judgment motions, the court noted that Plaintiff had argued that the ALJ erred at Step Three by failing to consider Listing 12.05C (Intellectual Disability), and at Step Two by failing to develop the record as to Plaintiff’s cognitive dysfunction. (Doc. 31 at 5). Having found that the ALJ’s failure to address the medical evidence of Plaintiff’s cognitive dysfunction at Step Two was reversible error, the case was remanded for further proceedings. (*Id.* at 9-10).

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<sup>1</sup> Defendant’s Pleading is mistakenly captioned as a “Memorandum in Opposition to Plaintiff’s Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e).”



1 misapprehends the nature of Plaintiff’s primary argument and the Commissioner’s response to that  
2 argument.” (*Id.* at 6).

3 Notwithstanding the strident manner in which they have been presented, the court is  
4 unpersuaded by Defendant’s arguments. Defendant suggests that diminished cognitive functioning  
5 is not a medically determinable impairment, and that such a “deficit” would be a “limitation” and  
6 not an “impairment.” For this proposition, Defendant cites only to a seemingly unrelated  
7 regulatory provision that merely explains that impairments and related symptoms may cause  
8 physical or mental limitations that may affect what one could do in a work setting. (Doc. 35 at 3)  
9 (citing 20 C.F.R. § 416.945). On the other hand, the Oxford English Dictionary defines  
10 “impairment” as a deterioration, an injurious lessening or weakening.<sup>2</sup> In harmony with this  
11 common understanding of the word, the Social Security Act defines it identically in Titles II and  
12 XVI as such: “[a] physical or mental impairment is one that results from anatomical,  
13 physiological, or psychological abnormalities which are demonstrable by medically acceptable  
14 clinical and laboratory diagnostic techniques.” 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D). In the  
15 capital case context, the Supreme Court’s use of the term, “cognitive impairment,” in discussing  
16 that component of the intellectual disability analysis is the same. *See e.g., Sears v. Upton*, 561  
17 U.S. 945, 950 (2010) (“... Sears suffers from substantial cognitive impairment.”); *Elmore v.*  
18 *Holbrook*, 137 S. Ct. 3, 4 (2016) (“They conducted neuropsychological tests that revealed mild to  
19 moderate cognitive impairments”); *see also Penry v. Lynaugh*, 492 U.S. 302, 336-337 (1989).

20 Additionally, there is a wealth of authority undercutting Defendant’s unusual argument  
21 that sub-normal intellectual functioning is merely a limitation rather than an impairment under the  
22 Social Security Act. In numerous cases, other ALJs, as well as federal courts, have found  
23 claimants to suffer from a mild, moderate, or severe cognitive impairment at Step Two on the  
24 basis of valid IQ scores.<sup>3</sup> Accordingly, the court finds Defendant’s argument in this regard to be

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26 <sup>2</sup> <http://www.oed.com/view/Entry/92055?redirectedFrom=impairment#eid>

27 <sup>3</sup> *See e.g., Johnson v. Comm’r of Soc. Sec.*, 2017 U.S. Dist. LEXIS 43834, \*5, 2017 WL 1130024  
28 (W.D. Mich. 2017) (“At the second step, the ALJ found that plaintiff had severe impairments of:  
mild cognitive impairment with low IQ; ADHD, combined type; history of cannabis abuse; type II  
diabetes mellitus; obesity; status-post surgery for benign retroperitoneal tumor with residual

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dysesthesia of the left leg; and tobacco abuse.”); *Smith v. Comm’r of Soc. Sec.*, 2017 U.S. Dist. LEXIS 28837, \*16 (E.D. Mich. 2017) (“At Step Two, the ALJ found that Smith has the severe impairment of borderline intellectual functioning.”); *Douglas v. Astrue*, 2009 U.S. Dist. LEXIS 9863, \*15 n.10, 2009 WL 330961 (C.D. Cal. 2009) (“The applicable mean, or “norm,” is 100, and the standard deviation is 15. 20 C.F.R. Part 404, Appendix 1, Subpart P § 112.00 Therefore, a valid IQ test score of 70 or below constitutes a marked cognitive impairment.”); *Knoll ex rel. E.G.K. v. Berryhill*, 2018 U.S. Dist. LEXIS 108358, \*15 (M.D. Pa. 2018) (“The Commissioner further avers that E.G.K.’s full scale IQ score demonstrates that he had borderline intellectual functioning, instead of a more severe cognitive impairment.”); *Winnik v. Chater*, 1998 U.S. Dist. LEXIS 4094, \*9 (S.D.N.Y. 1998) (“Therefore, to the extent that the record suggests that Samantha suffered some cognitive impairment, her near-average IQ is of little consequence. Both the ALJ and I relied on this fact.”); *Kimble v. Berryhill*, 2018 U.S. Dist. LEXIS 109492, \*2 (N.D. Cal. 2018) (“The ALJ agreed that Kimble had borderline intellectual functioning and an IQ of 80, cognitive impairment in memory, attention and concentration, and visuospatial constructional ability, depression, and marked difficulties in social functioning.”); *Cournoyer v. Colvin*, 2016 U.S. Dist. LEXIS 33906, \*6 (S.D.S.D. 2016) (“The ALJ found Mr. Cournoyer’s alleged cognitive impairment was not a medically determinable impairment because the record did not contain a valid IQ score, cognitive testing, or treatment notes from claimant’s physicians showing concern of a cognitive impairment.”); *Angelo v. Astrue*, 2012 U.S. Dist. LEXIS 106776, \*9 (S.D. Oh. 2012) (“In her decision, however, the administrative law judge characterized plaintiff’s cognitive impairment as borderline intellectual functioning. [] Although she recognized the apparently qualifying IQ scores on the tests administered by Dr. Wolfgang and Mr. Spindler, the administrative law judge found no evidence of an onset of intellectual impairment or adaptive deficits before age 22.”); *Robles v. Colvin*, 2014 U.S. Dist. LEXIS 73142, \*15 (W.D. Okla. 2014) (“Based on the foregoing analysis, the Court finds that the ALJ erred as a matter of law at step two in failing to expressly acknowledge Plaintiff’s IQ score of 70 and determine whether the score was valid and, therefore, established a severe cognitive impairment.”); *Stormo v. Barnhart*, 377 F.3d 801, 808 (8th Cir. 2004) (“A significant drop in IQ may indicate cognitive impairment, but its alleged severity must be supported by other information in the record about the claimant’s ability to function.”) (citing *Holland v. Apfel*, 153 F.3d 620, 622 (8th Cir. 1998)); *McGee v. Astrue*, 291 Fed. Appx. 783, 788, 2008 U.S. App. LEXIS 19154, \*15 (8th Cir. 2008) (“Absent a valid IQ score, Ms. McGee cannot show a medically determinable cognitive impairment requiring further analysis. Nor can she show an impairment which meets the Listing 12.05C criteria.”); *Ondracek v. Comm’r of Soc. Sec.*, 2017 U.S. Dist. LEXIS 24979, \*4, 2017 WL 2017 (E.D. Cal. 2017) (“At step two, the ALJ found that Plaintiff ‘has the following severe impairments: degenerative disc disease, anxiety disorder, substance abuse disorder, learning disorder, and cognitive disorder.’”); *Wheeler v. Berryhill*, 2017 U.S. Dist. LEXIS 206680, \*3, 2017 WL 6398639 (W.D. Wash. 2017) (“Step two: Mr. Wheeler’s seizures, cognitive disorder, learning disorder, borderline intellectual functioning, and alcohol abuse are severe impairments.”); *Rogal v. Astrue*, 2012 U.S. Dist. LEXIS 186019, \*2, 2012 WL 7141260 (W.D. Wash. 2012) (“Step two: Mr. Rogal had the following severe impairments: degenerative disc disease of the lumbar spine with lumbar spondylosis, chronic fatigue, and cognitive disorder.”); *Baker v. Colvin*, 2016 U.S. Dist. LEXIS 20394, \*7-8, 2016 WL 698156 (W.D. Ark. 2016) (“The Commissioner responds that Plaintiff failed to meet his burden to establish any additional impairment, arguing that an IQ score is only one factor that an ALJ may consider in determining whether a claimant has a severe cognitive impairment; and, that if there is other evidence in the record that is inconsistent with a low IQ score, such as daily activities or prior work history, an ALJ may discount the IQ score and find no severe cognitive impairment.”); and, *Harty v. Colvin*, 2014 U.S. Dist. LEXIS 58485, \*12, 202 Soc. Sec. Rep. Service 110, 2014 WL 1679799 (D. Or. 2014) (“The Court concludes on this record that the ALJ erred when she did not address Plaintiff’s alleged cognitive impairment because the ALJ did not provide legally sufficient reasons supported by substantial evidence in the record for doing so.”).

1 Defendant also contends that Dr. Khalifeh did not diagnose any medical condition related  
2 to Plaintiff's cognitive abilities. However, this argument has no basis in the record as Dr.  
3 Khalifeh's report unmistakably states that, "the following diagnostic and clinical impressions and  
4 disability considerations are offered. The overall clinical presentation is that of an individual with  
5 borderline to impaired cognitive abilities." (Doc. 13, Administrative Record "AR" at 294).  
6 Describing the results from the battery of IQ testing she administered, Dr. Khalifeh noted that  
7 Plaintiff's Full Scale IQ score of 63 placed her within "the extremely low range of cognitive  
8 functioning." (*Id.* at 292). Thus, there was substantial evidence in the record that Plaintiff operates  
9 in the "extreme low range of cognitive functioning," and it was error for the ALJ to fail to address  
10 this evidence at Step Two, such that the evidence and record could then have been properly  
11 developed for a Step Three determination as to meeting or equaling the intellectual disability  
12 listing.

13 Defendant's suggestion that this court "reinterprets Dr. Khalifeh's findings" is wholly  
14 without merit. IQ testing was performed by a trained professional, the validity of the results of  
15 which has never been questioned, and the ALJ failed to even address this evidence of serious  
16 cognitive dysfunction at Step Two. Thus, Defendant has failed to make any showing that the court  
17 has "misunderstood the evidence." Nor is the court persuaded by Defendant's suggestion that the  
18 court "misunderstands what an impairment is under the regulatory disability framework." Based  
19 on the cases cited above, if there is any such "misunderstanding," it is widespread indeed.  
20 Furthermore, the court finds little value in addressing or discussing Defendant's suggestion that  
21 the court has not only misunderstood the evidence in this case, but that the court has  
22 mischaracterized it. Instead, the court will simply remind counsel to avoid using intemperate  
23 language in pleadings.

24 As to Defendant's suggestion that the court has misapprehended Plaintiff's "primary"  
25 argument, the court is likewise unpersuaded. While Plaintiff argued that the ALJ committed  
26 harmful legal error at Step Three by failing to consider the intellectual disability listing (Listing  
27 12.05C), Plaintiff also argued that "[t]he [ALJ] decision did not evaluate deficits in cognitive  
28 functioning as either severe or nonsevere impairments." (Doc. 21 at 3). Plaintiff has maintained

1 that the ALJ failed to adequately develop the record as to her cognitive dysfunction at Step Two,  
2 such that it could be determined at Step Three whether or not she met or equaled the listing for  
3 intellectual disability. (*Id.* at 5-7). Thus, Defendant is incorrect when arguing that Plaintiff never  
4 took exception to the ALJ’s error at Step Two as Plaintiff’s pleading in this court unambiguously  
5 took issue with the ALJ’s failure to “evaluate deficits in cognitive functioning as either severe or  
6 nonsevere impairments” – this is a clear assignment of Step Two error and Defendant’s contention  
7 to the contrary is meritless. Additionally, it should be noted that in articulating the suggestion that  
8 Plaintiff never even raised a Step Two issue, Defendant uses interesting terminology. Despite  
9 spending much energy attempting to make the case that a deficit in cognitive functioning is not so  
10 much of an “impairment” as it is a “limitation,” Defendant’s contention that a Step Two issue was  
11 never raised shows the flaw in this logic. Defendant submits that “Plaintiff’s primary argument,  
12 however, was *not* that the ALJ erred at step two, but that, at step three, she was so cognitively  
13 impaired that she was presumptively disabled by mental retardation (intellectual disability).” (Doc.  
14 35 at 6) (emphasis in original). Putting aside Defendant’s factually incorrect statement that  
15 Plaintiff never raised a Step Two issue, Defendant’s use of the term “cognitively impaired” in the  
16 same document that argues that deficits in cognitive functioning are not impairments but  
17 limitations is curious. Either a deficit in cognitive functioning is an impairment, or it is not,  
18 Defendant cannot have it both ways. Of course, as discussed above, it is.

19 The Step Three evaluation for intellectual disability requires a showing of “(1)  
20 Significantly sub-average general intellectual functioning with deficits in adaptive functioning  
21 initially manifested during the developmental period; i.e., the evidence demonstrates or supports  
22 onset of impairment before age 22; (2) A valid verbal, performance, or full scale IQ score of 60 to  
23 70; and (3) A physical or other mental impairment imposing an additional and significant work-  
24 related limitation of function.” 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.05C. Thus, as the above-  
25 cited cases make clear, the Step Two precursor to a Step Three evaluation for intellectual disability  
26 is an evaluation for deficits in cognitive functioning, or put another way, an evaluation of any  
27 substantial evidence of a claimant’s cognitive dysfunction. Notwithstanding Defendant couching  
28 Plaintiff’s “primary” argument as focusing on the ALJ’s failure to consider the intellectual

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disability listing at Step Three, Plaintiff clearly also took exception to the ALJ's failure to consider her sub-normal intellectual functioning and develop the record at Step Two.

**CONCLUSION**

Accordingly, Defendant's Motion to Alter or Amend (Doc. 35) the judgment in this case is DENIED.

**IT IS SO ORDERED.**

Dated: October 15, 2018.



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ROBERT M. ILLMAN  
United States Magistrate Judge