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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHARLET HUDSON,
Plaintiff,

v.

CAROLYN W. COLVIN,
Defendant.

Case No. [15-cv-04921-MEJ](#)

**ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 16, 19

INTRODUCTION

Plaintiff Sharlet Hudson (“Plaintiff”) brings this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of a final decision of Defendant Carolyn W. Colvin (“Defendant”), the Acting Commissioner of Social Security, denying Plaintiff’s claim for disability benefits. Pending before the Court are the parties’ cross-motions for summary judgment. Dkt. Nos. 16, 19. Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers without oral argument. Having carefully reviewed the parties’ positions, the Administrative Record (“AR”), and relevant legal authority, the Court hereby **REMANDS** the case for further proceedings for the reasons set forth below.

BACKGROUND

At the time Plaintiff filed the present claim, she was 30 years old. AR 423. Plaintiff reported attending high school through the 11th grade and dropped out when she became pregnant, though she later obtained a GED. AR 576. She reported last working as a childcare provider for the East Bay Community Recovery Project from 2003 to 2008. AR 345-46. Plaintiff reported that her childcare provider job was becoming increasingly stressful, so she decided to return to school and enrolled at the Academy of Art in 2008. AR 117-18.

1 In 2009, Plaintiff reported developing numbness and tingling in her hands and feet, and
2 providers at Highland Hospital stated she possibly had Carpal Tunnel Syndrome. AR 667. In
3 May 2009, she reported having an episode of prolonged and uncontrollable shaking, with an acute
4 loss of muscle tone, difficulty walking, and slurred speech. AR 423, 667. Following this, Plaintiff
5 went to the Highland Hospital ER and was later hospitalized at Alta Bates Summit Hospital for a
6 week, where she was given a cane and given a rule out diagnosis of Multiple Sclerosis. AR 667.

7 A brain MRI conducted in July 2009 showed “non-specific foci of increased T2 signal in
8 the cerebral white-matter.” AR 424. A cervical spine MRI that month showed “mild reversal of
9 the cervical curvature but was otherwise normal.” *Id.* Cerebrospinal fluid analysis conducted in
10 2009 yielded normal results, and all other labs were normal. *Id.*

11 Plaintiff’s primary care provider is Kaiser Permanente, where she underwent neurological
12 consultations from 2009-2011, physical therapy in 2010, and treatment and testing for a range of
13 somatic symptoms from 2009 to the present. AR 164-165, 481-526, 630-65, 765-72. Kaiser
14 treatment records associated with the current claim begin on January 10, 2012, where Plaintiff
15 presented with paroxysmal headaches that no longer responded to indomethacin, and nausea. AR
16 433-34. At that visit, treating physician Dr. Neal Lischner reported Plaintiff has had “extensive
17 neurological work-ups in the past with at least 3 different neurologist[s] consulting,” suggested a
18 diagnosis of “somatic dysfunction,” and prescribed Clonazepam, a psychiatric medication. AR
19 436.

20 A summary of Plaintiff’s mental health treatment at Family Paths from February to June
21 2012 reports that Plaintiff presented as very anxious and in severe pain from various somatic
22 symptoms, but that she stopped taking Clonazepam after learning that it is addictive. AR 428-29.

23 Plaintiff next visited Kaiser on October 9, 2012, where she complained of body tremors
24 lasting a few minutes, severe headaches, tingling in the back of her right leg, and spasms in her
25 left eye. AR 441. Plaintiff underwent a CT head scan that day, which revealed no acute
26 intracranial pathology. AR 445, 448-49.

27 On November 19, 2012, Plaintiff underwent a neurological evaluation with Dr. Hans-

1 Christian Von Buedingen at UCSF, who conducted a physical examination of Plaintiff and
2 reviewed records. AR 423-25. On physical examination, abnormal findings consisted of reduced
3 ankle jerk reflexes bilaterally, a slightly wide-based gait, a slightly insecure tandem walk, and
4 bilateral ataxia. AR 424. Dr. Von Buedingen concluded that the etiology of the patient's
5 symptoms was not clear, but recommended a number of tests, including an EMG, nerve
6 conduction study, MRI, and retinal evaluation. AR 424-25.

7 Plaintiff visited Kaiser at least 10 times in 2013, presenting with symptoms including
8 severe pain in her eye, gum soreness, alternating sensitivity to heat, hives on her skin when she
9 scratches consistent with dermatographic urticaria, wounds that take excessively long to heal, a
10 painful reaction to a blood draw requiring her to be fit for a sling, and bilateral foot/ankle pain
11 requiring a compression boot, crutches, and a prescription for NSAIDS. AR 465, 467-81, 485-
12 503, 646-62.

13 On April 18, 2013, treating neurologist Dr. Frank Dustin ordered a battery of tests to
14 evaluate various symptoms based on the recommendations from Dr. Von Buedingen, but reported,
15 "[s]ee extensive past neuro notes and work-up. In my estimation she has somatization [disorder]."
16 AR 515.

17 On April 17, 2013, a right upper extremity ultrasound revealed no evidence of deep vein
18 thrombosis. AR 524.

19 An April 22, 2013, ophthalmology evaluation revealed no evidence of retinitis pigmentosa,
20 but Plaintiff was diagnosed with dry eye syndrome. AR 520. A brain MRI conducted on the same
21 day revealed no significant changes from previous findings of non-specific white matter T2
22 hyperintensity foci. AR 525-26.

23 Needle EMG and nerve conduction studies on June 5, 2013, revealed no evidence of
24 polyneuropathy. AR 630-39. A right foot x-ray on July 24, 2013, found no significant osseous
25 abnormality, but did note mild forefoot soft tissue swelling. AR 648.

26 Plaintiff underwent several tests in 2014, including a bilateral hip x-ray, a gynecologic
27 cytology analysis, and an EKG, all of which came back normal. AR 768, 770-71.

1 Kaiser records include a “History” section that states, “daily walking 2 miles,” which
2 Plaintiff contends was later clarified to mean she used to walk “everywhere,” but is now limited to
3 walking a half block before she needs to stop. AR 45, 145-47. Kaiser records indicate that
4 Plaintiff’s “Patient Active Problem List” also includes anemia, gestational proteinuria, obstructive
5 sleep apnea, GERD, and obesity. AR 434-35.

6 In addition to Plaintiff’s treatment at Kaiser, she underwent four forensic evaluations in
7 connection with her current claim. AR 574-78, 580-83, 666-84.

8 On May 8, 2013, Plaintiff met with Farah Rana, M.D. for a neurological examination
9 ordered by the State Agency. AR 580. Dr. Rana conducted a physical examination, reviewed Dr.
10 Von Buedingen’s neurological assessment from UCSF. AR 580-81. During the examination, no
11 lower back tenderness was noted, range of motion in her lumbosacral spine was within normal
12 limits, and strength was 5/5 with normal muscle bulk and tone. AR 582. Abnormal findings
13 during the physical examination included decreased temperature sensation over Plaintiff’s feet,
14 mildly ataxic heel-to-shin testing, slightly wide-based slow gait with the use of a cane, and
15 difficulty with tandem gait. AR 583. Dr. Rana’s clinical impression was that Plaintiff presented
16 with a “complex pattern of neurological symptoms” of questionable etiology, and limited Plaintiff
17 to the light exertion level, with the ability to lift/carry 10 pounds frequently and 20 pounds
18 occasionally, and stand or walk less than 6 hours out of an 8-hour workday with breaks, with a
19 cane indicated for ambulation over one to two blocks. AR 583.

20 On May 9, 2013, Plaintiff met with Carol Fetterman, Ph.D. for a psychological
21 examination ordered by the State Agency. AR 574. Dr. Fetterman conducted a clinical interview,
22 reviewed Dr. Von Buedingen’s neurological evaluation, administered the Folstein Mini Mental
23 State Exam. AR 574-76. On the Folstein Mini Mental State Exam, Plaintiff was able to subtract
24 serial threes although she had to count on her fingers. She took one trial to learn three words, and
25 she recalled one out of these three words after a five-minute delay. AR 576. Plaintiff’s language,
26 abstraction, and thought process were found to be intact, her judgment and insight limited, and her
27 mood and affect irritable. AR 576-77. Dr. Fetterman diagnosed Plaintiff with Mood Disorder

1 NOS, and determined that she has a mildly limited ability to: understand, remember, and carry out
2 instructions; maintain attention, concentration, persistence, and pace; relate and interact with
3 supervisors, coworkers, and the public; and adapt to day-to-day work activities. AR 577. Dr.
4 Fetterman further found that Plaintiff has a “fair ability to maintain regular attendance in the
5 workplace as mental health symptoms may impact attendance,” and a “fair ability to handle
6 normal work related stress . . . as mental health symptoms may impact claimant’s ability to handle
7 work-related stress.” AR 577.

8 On July 30, 2014, Plaintiff underwent a psychological evaluation with Lesleigh Franklin,
9 Ph.D. at the request of Plaintiff’s representative. AR 675. Dr. Franklin conducted a clinical
10 interview and reviewed Dr. Von Buedingen’s neurological evaluation, a confidential
11 psychological report conducted by Dr. Ede Thomsen on April 10, 2012, and treatment records
12 from Family Paths. *Id.* In her review of the records, Dr. Franklin noted that past diagnostic
13 impressions have included Bipolar II Disorder, Bipolar Disorder, Adjustment Disorder with
14 Anxiety, Somatization Disorders and personality disorders. AR 677. Dr. Franklin administered
15 the Repeatable Battery Assessment of Neuropsychological Status (“RBANS”), the Wechsler
16 Abbreviated Scale of Intelligence (“WASI”), the Miller Forensic Assessment of Symptoms Test
17 (“M-FAST”), the Beck Anxiety and Depression Inventories (“BAI” and “BDI”), the Clock
18 Drawing Test, and Trail Making A and B. AR 675.

19 On the WASI, Plaintiff received a Full Scale IQ score of 84, which placed her in the 14th
20 percentile as compared with other adults in her age group. AR 678. On the RBANS, Plaintiff
21 placed in the 0.2 percentile in the area of immediate memory, the 0.1 percentile in delayed
22 memory, the 0.1 percentile in attention, the 7th percentile in language abilities, and the 1st
23 percentile in visuospatial/constructional abilities. AR 683. Plaintiff’s overall RBANS score of 53
24 placed her in the 0.1 percentile, or “extremely low” range of functioning. AR 680. Plaintiff’s
25 performance on Trails A was normal, but her performance on Trails B was impaired, and she also
26 performed poorly on the Clock Drawing Test. AR 679. On the M-FAST, Plaintiff’s score of 9
27 indicates that she was prone to overstate the severity of her symptoms, but Dr. Franklin stated,
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1 “[t]his may reflect that she is experiencing a significant and overwhelming level of distress. Based
2 on the clinical judgment of this evaluator, she was generally telling the truth and putting forth
3 adequate effort.” AR 680. On the Beck Anxiety and Depression Inventories, scores indicated
4 Plaintiff was experiencing severe anxiety and severe depression, and Plaintiff endorsed a range of
5 symptoms including a rapid alternation pattern of moods and auditory, visual, tactile, olfactory,
6 and gustatory hallucinations. AR 681, 683.

7 Dr. Franklin diagnosed Plaintiff with Unspecified Bipolar Disorder, Unspecified Psychotic
8 Disorder, Somatization Disorder, and Borderline Intellectual Functioning. AR 682. Dr. Franklin
9 determined Plaintiff has an extremely limited ability to complete a normal workday and workweek
10 without interruptions from psychologically-based symptoms, and a markedly limited ability to:
11 maintain attention and concentration for two-hour segments; perform at a consistent pace;
12 understand, remember, and carry out detailed instructions; and respond appropriately to changes in
13 a routine work setting and deal with normal work stressors. AR 684.

14 On August 28, 2014, Plaintiff underwent a physical evaluation with Maria Rivero, M.D. at
15 the request of Plaintiff’s representative. AR 666. Dr. Rivero conducted a physical examination
16 and reviewed Dr. Von Buedingen’s neurology consultation, a Kaiser ophthalmology consultation
17 dated April 22, 2013, Kaiser records from 2013 to 2014, and a prior physical evaluation conducted
18 by Dr. Emily Cohen on October 20, 2011. AR 666.

19 Plaintiff told Dr. Rivero she cannot carry grocery bags, is unable to do laundry on her own,
20 can only fold laundry for five minutes, has difficulty cooking due to ankle pain and trouble lifting
21 pots, and experiences other difficulties completing activities of daily living. AR 668-69. On
22 physical examination, Dr. Rivero noted Plaintiff was able to walk to and from the examination but
23 slowly, shifted in her chair frequently, had no difficulty rising from seated position, but had
24 moderate difficulty changing from supine to sitting. AR 670. Dr. Rivero reported Plaintiff had
25 5/5 muscle strength, but bilateral grip strength weakness, measured at 11.2 in her right hand
26 (weak), and 5.8 in her left hand (weak). AR 670, 672. Plaintiff had less than normal range of
27 motion in cervical flexion and extension, left lateral flexion, right lateral flexion, left rotation, right
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1 rotation, lumbar flexion, hip flexion, foot inversion and eversion, and knee flexion. AR 672. She
2 had normal range of motion in lumbar extension, elbow flexion and extension, wrist flexion and
3 extension, hip extension, ankle plantarflexion and dorsiflexion, and knee extension. AR 671-72.
4 Dr. Rivero noted tenderness to palpation in Plaintiff’s bilateral jaw/masseter, right neck, upper
5 back bilaterally, shoulder girdle bilaterally, upper arm bilaterally, lower arm bilaterally,
6 hip/greater trochanter bilaterally, calf bilaterally, and ankle bilaterally. *Id.*

7 Dr. Rivero’s clinical impression was that Plaintiff has Fibromyalgia by meeting American
8 Rheumatologic Criteria with a total symptom score of 27, along with Cluster Headaches,
9 Insomnia, Irritable Bowel Syndrome, Obstructive Sleep Apnea, Obesity, Depression and Anxiety;
10 she ruled out Cerebellar disorder. AR 673. Dr. Rivero determined Plaintiff is limited to less than
11 the full range of sedentary work, with the ability to lift or carry less than 10 pounds, stand or walk
12 up to one hour a day with breaks every 15 minutes, and sit for up to 4 hours a day with breaks
13 every 30 minutes, with additional exertional limitations and an inability to perform tasks requiring
14 normal grip strength. *Id.*

15 On November 5, 2014, Dr. Rivero submitted an addendum explaining the American
16 College of Rheumatology criteria for Fibromyalgia, and providing Plaintiff’s scores on the various
17 sub-parts, including the Widespread Pain Index, symptom severity scale, and durational
18 requirement. AR 775-76.

19 **SOCIAL SECURITY ADMINISTRATION PROCEEDINGS**

20 Plaintiff filed a Title II claim for Social Security Disability Insurance (“SSDI”) benefits on
21 January 15, 2013, alleging an onset date of November 19, 2012. AR 340. Plaintiff’s last-insured
22 date for the purposes of eligibility for SSDI benefits is December 31, 2013. AR 301. Plaintiff
23 filed a Title XVI claim for Supplemental Security Income (“SSI”) benefits on January 29, 2013.
24 AR 334. Both initial claims were denied on June 4, 2013. AR 262, 265. Plaintiff filed a timely
25 request for reconsideration on July 26, 2013. AR 269. The claims were denied upon
26 reconsideration on October 15, 2013. AR 272. Plaintiff filed a timely request for hearing on
27 December 4, 2013. AR 279. A hearing was held on December 8, 2014, in Oakland, California

1 before Administrative Law Judge (“ALJ”) Nancy Lisewski. AR 33. Plaintiff testified in person at
2 the hearing and was represented by counsel, Kyle Kitson. *Id.* The ALJ also heard testimony from
3 Vocational Expert (“VE”) Joel Greenberg. *Id.*

4 **A. Plaintiff’s Testimony**

5 The ALJ asked Plaintiff six questions. AR 36-37. The ALJ asked Plaintiff her age, current
6 address, whether she lives alone or with other people, the ages of her children, whether she is
7 currently working, and what keeps her from being able to work. *Id.* Plaintiff testified she is 30
8 years old and lives in Oakland with her husband and three children, ages 13, 9, and 3 years old.
9 AR 37. She further testified she is not currently working and experiences pain throughout her
10 body, lack of sleep, difficulty concentrating, and difficulty “gathering [her] emotions,” which
11 prevents her from working. AR 37. Upon questioning from her representative, Plaintiff
12 elaborated she experiences headaches that can last all day, pain in her ankles for which she takes
13 Naproxen and receives Cortisone shots, sharp pain in her hips, periodic “tingling” in her limbs,
14 pain in her arms with use, difficulty controlling her wrist, gastrointestinal issues, vision issues
15 including “floaters” and left eye twitching, and itchy, swelling skin. AR 38-43.

16 Plaintiff testified she uses a cane two to three times a week for balance and a compression
17 boot for her right foot, which she sometimes wears all day. AR 44. She further testified she is
18 only able to walk a half block before she needs to stop and rest. AR 44-45. Plaintiff testified she
19 has problems staying asleep, and wakes up constantly throughout the night, despite taking
20 Melatonin. AR 46. She testified she is exhausted throughout the day, and sometimes has
21 difficulty getting out of bed. AR 47.

22 Plaintiff testified that she experiences anxiety, particularly about caring for her children.
23 AR 47. She testified she relies on her husband for help a “tremendous amount” in caring for their
24 children, and that her youngest son stays with his great grandmother most of the time. AR 50-51.
25 Plaintiff testified she is only able to cook meals in the microwave due to past incidents burning her
26 hands while cooking because of issues with depth perception and sensitivity to heat. AR 51. She
27 testified she uses a chair in the shower due to dizzy spells, and that her daughter and her mother
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1 help her do her hair. AR 52.

2 Plaintiff testified she has seen therapists in the past, but that therapy caused her more
3 anxiety. AR 48. She testified that as a patient at Kaiser Permanente, she sees a primary care
4 physician, a neurologist, a gastroenterologist, an obstetrician, and an orthopedic doctor. AR 53-
5 54. Plaintiff testified she does not go to Kaiser as frequently as she used to because of their
6 inability to diagnose or effectively treat her symptoms, and that she had a particularly difficult
7 relationship with her neurologist, who cut her off and questioned whether her symptoms were “in
8 [her] head.” AR 53-55.

9 **B. Vocational Expert’s Testimony**

10 The ALJ then took testimony from VE Joel Greenberg, who categorized Plaintiff’s past
11 work as childcare provider, Dictionary of Occupational Titles (“DOT”) code 359.677-018,¹ and
12 cashier, DOT code 211.462-010.² AR 55-56. The ALJ asked the VE two hypothetical questions.

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14 ¹ “NURSERY SCHOOL ATTENDANT (any industry) alternate titles: child-care leader;
15 child-day-care center worker; day care worker. Organizes and leads activities of prekindergarten
16 children in nursery schools or in playrooms operated for patrons of theaters, department stores,
17 hotels, and similar organizations: Helps children remove outer garments. Organizes and
18 participates in games, reads to children, and teaches them simple painting, drawing, handwork,
songs, and similar activities. Directs children in eating, resting, and toileting. Helps children
develop habits of caring for own clothing and picking up and putting away toys and books.
Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May
assist in preparing food and cleaning quarters.”

19 ² “CASHIER II (clerical) alternate titles: cash clerk; cashier, general; cashier, office; ticket clerk.
20 Receives cash from customers or employees in payment for goods or services and records amounts
21 received: Recomputes or computes bill, itemized lists, and tickets showing amount due, using
22 adding machine or cash register. Makes change, cashes checks, and issues receipts or tickets to
23 customers. Records amounts received and prepares reports of transactions. Reads and records
24 totals shown on cash register tape and verifies against cash on hand. May be required to know
25 value and features of items for which money is received. May give cash refunds or issue credit
26 memorandums to customers for returned merchandise. May operate ticket-dispensing machine.
27 May operate cash register with peripheral electronic data processing equipment by passing
28 individual price coded items across electronic scanner to record price, compile printed list, and
display cost of customer purchase, tax, and rebates on monitor screen. May sell candy, cigarettes,
gum, and gift certificates, and issue trading stamps. May be designated according to nature of
establishment as Cafeteria Cashier (hotel & rest.); Cashier, Parking Lot (automotive ser.); Dining-
Room Cashier (hotel & rest.); Service-Bar Cashier (hotel & rest.); Store Cashier (clerical); or
according to type of account as Cashier, Credit (clerical); Cashier, Payments Received (clerical).
May press numeric keys of computer corresponding to gasoline pump to reset meter on pump and
to record amount of sale and be designated Cashier, Self-Service Gasoline (automotive ser.). May
receive money, make change, and cash checks for sales personnel on same floor and be designated

1 In the first hypothetical, the ALJ asked the VE whether an individual of Plaintiff’s age,
2 education, and work background would be able to perform her past work or any other work if she
3 was limited to simple, routine, light work with no more than occasional stooping, bending,
4 kneeling, crouching, crawling, climbing, and occasional social contact. AR 56. The VE
5 responded that such an individual would not be able to perform their past work, but could perform
6 other work, including order caller, final inspector, and night cleaner, all with an 80 percent
7 reduction in numbers. AR 56-57.

8 In the second hypothetical, the ALJ included the same limitations posed in the first
9 hypothetical but added that the individual would be off-task at least 25 percent of the day. AR 57.
10 The VE responded that no jobs would be available for such an individual. AR 57. Upon
11 questioning from Plaintiff’s representative, the VE testified that no jobs would be available if such
12 an individual were off-task 15 percent of the workday. AR 57.

13 The VE further testified that an individual who is unable to complete a normal workday 10
14 percent of the time would not be employable. AR 58. The VE testified that an individual who is
15 unable to respond appropriately to instructions and criticism from supervisors is unemployable.
16 AR 59. The VE testified he could not think of any entry-level jobs for an individual who is unable
17 to perform tasks requiring normal grip strength. AR 59. The VE testified that an individual who
18 was consistently unable to respond appropriately to routine changes in a work setting is
19 unemployable. AR 60.

20 At the conclusion of the hearing, Plaintiff’s representative asked the ALJ whether she had
21 any concerns about the record or discrepancies that needed to be resolved via further testing, given
22 the differences between the functional assessments provided by the two examining psychologists.
23 The ALJ responded that she would “review everything” and let Plaintiff know whether anything
24 else was needed. AR 60.

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27 Floor Cashier (clerical). May make change for patrons at places of amusement other than
28 gambling establishments and be designated Change-Booth Cashier (amuse. & rec.).”

1 **C. The ALJ’s Findings**

2 The regulations promulgated by the Commissioner of Social Security provide for a five-
3 step sequential analysis to determine whether a Social Security claimant is disabled.³ 20 C.F.R.
4 § 404.1520. The sequential inquiry is terminated when “a question is answered affirmatively or
5 negatively in such a way that a decision can be made that a claimant is or is not disabled.” *Pitzer*
6 *v. Sullivan*, 908 F.2d 502, 504 (9th Cir. 1990). During the first four steps of this sequential
7 inquiry, the claimant bears the burden of proof to demonstrate disability. *Valentine v. Comm’r*
8 *Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five, the burden shifts to the
9 Commissioner “to show that the claimant can do other kinds of work.” *Id.* (quoting *Embrey v.*
10 *Bowen*, 849 F.2d 418, 422 (9th Cir. 1988) (citation omitted).

11 The ALJ must first determine whether the claimant is performing “substantial gainful
12 activity,” which would mandate that the claimant be found not disabled “regardless of medical
13 condition, age, education, and work experience.” 20 C.F.R. § 404.1520(a)(4)(i), (b). Here, the
14 ALJ determined that Plaintiff had not performed substantial gainful activity since November 19,
15 2012. AR 15.

16 At step two, the ALJ must determine, based on medical findings, whether the claimant has
17 a “severe” impairment or combination of impairments within the meaning of the Social Security
18 Act. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.921. If no severe impairment is found, the claimant is
19 not disabled. 20 C.F.R. § 404.1520(c). Here, the ALJ determined that Plaintiff had the following
20 severe impairments: a Somatoform Disorder, Fibromyalgia, obesity, and a Bipolar Disorder. AR
21 15.

22 If the ALJ determines that the claimant has a severe impairment, the process proceeds to
23 the third step, where the ALJ must determine whether the claimant has an impairment or
24 combination of impairments that meet or equals an impairment listed in 20 C.F.R. Pt. 404, Subpt.

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26 ³ Disability is “the inability to engage in any substantial gainful activity” because of a medical
27 impairment which can result in death or “which has lasted or can be expected to last for a
28 continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

1 P, App. 1 (the “Listing of Impairments”). 20 C.F.R. § 404.1520(a)(4)(iii). If a claimant’s
2 impairment either meets the listed criteria for the diagnosis or is medically equivalent to the
3 criteria of the diagnosis, he is conclusively presumed to be disabled, “without considering age,
4 education and work experience.” 20 C.F.R. § 404.1520(d). Here, the ALJ determined that
5 Plaintiff did not have an impairment or combination of impairments that meets the listings. AR
6 15.

7 Before proceeding to step four, the ALJ must determine the claimant’s Residual Functional
8 Capacity (“RFC”). 20 C.F.R. § 404.1520(e). RFC refers to what an individual can do in a work
9 setting, despite mental or physical limitations caused by impairments or related symptoms. 20
10 C.F.R. § 404.1545(a)(1). In assessing an individual’s RFC, the ALJ must consider all of the
11 claimant’s medically determinable impairments, including the medically determinable
12 impairments that are nonsevere. 20 C.F.R. § 404.1545(e). Here, the ALJ determined that Plaintiff
13 has the RFC to perform light work as defined in 20 C.F.R. §§ 404.1567(b)⁴ and 416.967(b), except
14 for the following: “she is limited to occasional stooping, bending, kneeling, crouching, crawling
15 and climbing; work should be simple and routine; she can have no more than occasional social
16 contact.” AR 17.

17 The fourth step of the evaluation process requires that the ALJ determine whether the
18 claimant’s RFC is sufficient to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv);
19 404.1520(f). Past relevant work is work performed within the past 15 years that was substantial
20 gainful activity, and that lasted long enough for the claimant to learn to do it. 20 C.F.R.
21 § 404.1560(b)(1). If the claimant has the RFC to do his past relevant work, the claimant is not
22 disabled. 20 C.F.R. § 404.1520(a)(4)(iv). Here, the ALJ determined that Plaintiff could not

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24 ⁴ “Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of
25 objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this
26 category when it requires a good deal of walking or standing, or when it involves sitting most of
27 the time with some pushing and pulling of arm or leg controls. To be considered capable of
28 performing a full or wide range of light work, you must have the ability to do substantially all of
these activities. If someone can do light work, we determine that he or she can also do sedentary
work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for
long periods of time.” 20 C.F.R. § 404.1567(b).

1 perform past relevant work. AR 26.

2 In the fifth step of the analysis, the burden shifts to the Commissioner to prove that there
3 are other jobs existing in significant numbers in the national economy which the claimant can
4 perform consistent with the claimant’s RFC, age, education, and work experience. 20 C.F.R.
5 §§ 404.1520(g), 404.1560(c). The Commissioner can meet this burden by relying on the
6 testimony of a vocational expert or by reference to the Medical-Vocational Guidelines at 20
7 C.F.R. Pt. 404, Subpt. P, App. 2. *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).
8 Here, based on the testimony of the vocational expert, Plaintiff’s age, education, work experience,
9 and RFC, the ALJ determined the following jobs existing in significant numbers in the national
10 economy that Plaintiff can perform: Order Caller, DOT 209.667-014; Final Inspection, DOT
11 727.687-054; and Night Cleaner, DOT 381.687-014. AR 26-27.

12 **D. ALJ’s Decision and Plaintiff’s Appeal**

13 On February 25, 2015, the ALJ issued an unfavorable decision finding that Plaintiff was
14 not disabled. AR 9. This decision became final when the Appeals Council declined to review it
15 on October 14, 2015. AR 1. Having exhausted all administrative remedies, Plaintiff commenced
16 this action for judicial review pursuant to 42 U.S.C. § 405(g). On March 11, 2016, Plaintiff filed
17 the present Motion for Summary Judgment. On May 11, 2016, Defendant filed a Cross-Motion
18 for Summary Judgment.

19 **LEGAL STANDARD**

20 This Court has jurisdiction to review final decisions of the Commissioner pursuant to 42
21 U.S.C. § 405(g). The ALJ’s decision must be affirmed if the findings are “supported by
22 substantial evidence and if the [ALJ] applied the correct legal standards.” *Holohan v. Massanari*,
23 246 F.3d 1195, 1201 (9th Cir. 2001) (citation omitted). “Substantial evidence means more than a
24 scintilla but less than a preponderance” of evidence that “a reasonable person might accept as
25 adequate to support a conclusion.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)
26 (quoting *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). The
27 court must consider “the administrative record as a whole, weighing the evidence that both

1 supports and detracts from the ALJ’s conclusion.” *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th
2 Cir. 1989) (citation omitted). However, “where the evidence is susceptible to more than one
3 rational interpretation,” “[the court] must uphold the ALJ’s decision.” *Magallanes v. Bowen*, 881
4 F.2d 747, 750 (9th Cir. 1989) (citation omitted). Determinations of credibility, resolution of
5 conflicts in medical testimony, and all other ambiguities are to be resolved by the ALJ. *Id.*

6 Additionally, the harmless error rule applies where substantial evidence otherwise supports
7 the ALJ’s decision. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991). “[A court] may not
8 reverse an ALJ’s decision on account of an error that is harmless.” *Molina v. Astrue*, 674 F.3d
9 1104, 1111 (9th Cir. 2012) (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56
10 (9th Cir. 2006)). “[T]he burden of showing that an error is harmful normally falls upon the party
11 attacking the agency’s determination.” *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409
12 (2009)).

13 **DISCUSSION**

14 Plaintiff raises the following issues in her Motion: (1) whether the ALJ erred in evaluating
15 the medical evidence; (2) whether the ALJ erred in failing to examine Plaintiff’s prior file where it
16 contained relevant, longitudinal evidence of her disability; (3) whether the ALJ erred in evaluating
17 Plaintiff’s credibility; and (4) whether the ALJ failed to consult a medical expert to determine
18 whether Plaintiff meets or equals a Listing. Pl.’s Mot. at 2. Because the ALJ failed to fully
19 develop the record, the Court only considers Plaintiff’s second issue.

20 Plaintiff filed a prior claim for Title II and Title XVI benefits in March 2010, which was
21 denied on June 5, 2012, after two hearings before ALJ Richard Laverdure. AR 156, 159. The
22 Appeals Council denied Plaintiff’s request for review of that decision on September 23, 2013. AR
23 254. The administrative record contains transcripts from both of these prior hearings, as well as
24 ALJ Laverdure’s unfavorable decision and the Appeals Council order denying review of his
25 decision. AR 63-105, 106-55, 156-74, 254-59. However, the record does not contain the exhibits
26 or medical evidence associated with this prior claim, consisting of Exhibits 1A through 21F as
27 outlined in ALJ Laverdure’s “List of Exhibits.” AR 170-74. These exhibits included Kaiser
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1 treatment records from July 23, 2009 to January 10, 2012; Highland Hospital treatment records
2 from May 11, 2006 to September 14, 2009; Alta Bates Summit Medical Center treatment records
3 from May 20 to May 27, 2009; correspondence from Plaintiff’s husband dated February 21, 2012;
4 two psychological reports from Ede Thomsen, Ph.D. dated May 15, 2010 and April 10, 2012;
5 medical evidence from Emily Cohen, M.D. dated October 20, 2011; and a mental impairment
6 questionnaire from Mandeep Kaur at Goals for Women, dated November 3, 2010. AR 173-74.

7 The ALJ references the prior claim and the prior hearing decision when determining
8 whether Plaintiff had demonstrated “changed circumstances” for the subsequent claim. AR 15. In
9 her decision, the ALJ states, “The claimant alleged that her symptoms began in 2009, however
10 beyond an MRI performed in 2009, the record does not contain any medical evidence until
11 January 2012,” and states Plaintiff “first sought treatment for neurological symptoms at Kaiser
12 with Neal Lischner, M.D. on January 10, 2012.” AR 18.

13 While the ALJ references her prior claim, Plaintiff argues she did not actually review it.
14 Pl.’s Mot. at 15. Plaintiff contends: “Even a superficial review of the prior ALJ decision” shows
15 she sought treatment at Kaiser for a range of neurological symptoms in 2009, 2010, 2011, and
16 2012. *Id.* at 16; AR 164-65. Thus, Plaintiff argues the ALJ failed in her duty to fully and fairly
17 develop the record. In response, Defendant argues: “There is no requirement that ALJ’s [sic]
18 incorporate all the evidence from prior decisions. Such a requirement would be both burdensome
19 on the agency and courts of appeal, creating large records and transcripts with information that is
20 not related or relevant to the period at issue in the present case.” Def.’s Mot. at 16.

21 As set forth above, the regulations require that a claimant seeking disability benefits bears
22 the burden of proving disability by providing evidence of medical impairments. 20
23 C.F.R. § 416.912(a), (c). However, “the ALJ has a special duty to develop the record fully and
24 fairly and to ensure that the claimant’s interests are considered, even when the claimant is
25 represented by counsel.” *Mayer v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001) (citations
26 omitted). Thus, the Social Security Administration has its own responsibilities regarding
27 obtaining evidence. Specifically:

1 Before we make a determination that you are not disabled, we will
2 develop your complete medical history for at least the 12 months
3 preceding the month in which you file your application *unless there*
4 *is a reason to believe that development of an earlier period is*
5 *necessary* or unless you say that your disability began less than 12
6 months before you filed your application. We will make every
7 reasonable effort to help you get medical reports from your own
8 medical sources when you give us permission to request the reports.

9 20 C.F.R. § 416.912(d) (emphasis added); *see id.* § 416.945(a)(3) (“We will assess your residual
10 functional capacity based on all of the relevant medical and other evidence. . . . [B]efore we make
11 a determination that you are not disabled, we are responsible for developing your complete
12 medical history, including . . . making every reasonable effort to help you get medical reports from
13 your own medical sources.”). When evaluating the degree of functional limitation for mental
14 impairments, the SSA engages in “a complex and highly individualized process that requires us to
15 consider multiple issues and all relevant evidence to obtain a longitudinal picture of your overall
16 degree of functional limitation” including “all relevant and available clinical signs and laboratory
17 findings, the effects of your symptoms, and how your functioning may be affected by factors
18 including, but not limited to, chronic mental disorders, structured settings, medication, and other
19 treatment.” 20 C.F.R. § 404.1520a(c)(1); *see also* 20 C.F.R. Pt. 404, Subpt. P, App. 1.

20 Here, the ALJ did not determine whether medical records associated with Plaintiff’s prior
21 claim in 2010 are directly relevant to obtaining this longitudinal picture. One of Plaintiff’s
22 diagnoses is a Somatoform Disorder, which the ALJ agreed is one of her severe impairments. AR
23 15. Somatic symptom and related disorders involve a persistent course of symptoms over a long
24 duration that are commonly encountered in primary care rather than psychiatric settings. *See*
25 Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-V”) at 311. It does
26 not appear the ALJ considered Plaintiff’s treatment for neurological symptoms included with her
27 prior claim, which means the ALJ possibly failed to consider evidence that is relevant to
28 Plaintiff’s somatoform disorder and overall degree of functional limitation. As such, there was
29 “reason to believe that development of an earlier period [than the 12 months preceding the month
30 in which Plaintiff filed her application] [wa]s necessary” before the ALJ could make a

1 determination regarding whether she was disabled. 20 C.F.R. § 416.912(d); *see also Kimmins v.*
2 *Colvin*, 2013 WL 5513179, at *8-9 (N.D. Cal. 2013) (“Not only was the ALJ responsible for
3 developing Kimmins’ complete medical history (20 C.F.R. §§ 416.912(d) & 416.945(a)(3)), but
4 the regulations explicitly require that that ALJ consider ‘all relevant evidence to obtain a
5 longitudinal picture of [a claimant’s] overall degree of functional limitation’ for mental
6 impairments. 20 C.F.R. § 404.1520(a), (c)(1). Medical records associated with Plaintiff’s prior
7 award in 2002 are directly relevant to obtaining this longitudinal picture.”).

8 Further, under HALLEX section I-5-3-17, the hearing office will “associate the prior ALJ
9 closed file” and maintain the subsequent application case file in Master Docket until the Appeals
10 Council takes action if a request for review is pending, but upon notification of a denial/dismissal
11 of the request for review, the hearing office will “associate the OHA SUBSEQUENT CLAIM
12 FLAG showing the AC action with the pending subsequent application case file.” I-5-3-17
13 INSTRUCTIONS FOR PROCESSING SUBSEQUENT DISABILITY CLAIMS WHILE A
14 PRIOR CLAIM IS PENDING REVIEW AT THE APPEALS COUNCIL, 2001 WL 34096370, at
15 *3-4. Here, it is not clear whether the hearing office was obligated to associate the entire prior
16 case file or simply associate a subsequent case “flag,” as Plaintiff initially filed the present claim
17 while a review of her prior claim was pending with the Appeals Council, but the Appeals Council
18 had ultimately denied Plaintiff’s request for review by the time this subsequent claim proceeded to
19 the hearing office. AR 254, 279, 334. Regardless, the circumstances of this case demanded that
20 the ALJ review the longitudinal medical evidence associated with the prior file or, at a minimum,
21 thoroughly review the summary of evidence cited in the ALJ’s prior decision. Indeed, Listing
22 12.00, Mental Disorders, explicitly articulates a need for longitudinal evidence of level of
23 functioning:

24 Need for longitudinal evidence. Your level of functioning may vary
25 considerably over time. The level of your functioning at a specific
26 time may seem relatively adequate or, conversely, rather poor.
27 Proper evaluation of your impairment(s) must take into account any
28 variations in the level of your functioning in arriving at a
determination of severity over time. Thus, it is vital to obtain
evidence from relevant sources over a sufficiently long period prior

1 to the date of adjudication to establish your impairment severity.

2 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.00(D)(2).

3 As it is not before this Court, it is not clear whether the medical information underlying
4 Plaintiff's prior claim would affect the ALJ's decision. However, at a minimum, it should have
5 been considered by the ALJ. By not fully developing the record, the ALJ "effectively ignored
6 potentially relevant medical evidence without giving specific, legitimate reasons for doing so. As
7 such, the Court finds error was committed." *Kimmins*, 2013 WL 5513179, at *9.

8 Because the yet-to-be considered evidence could affect other portions of the ALJ's
9 decision, the Court declines to consider Plaintiff's remaining issues at this time.

10 **CONCLUSION**

11 In reviewing a Social Security Commissioner's decision, a court may remand the case
12 "either for additional evidence and findings or to award benefits." *Smolen*, 80 F.3d at 1292.
13 Typically, when a court reverses an ALJ's decision, "the proper course, except in rare
14 circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v.*
15 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Moreover, "[r]emand for further
16 proceedings is appropriate where there are outstanding issues that must be resolved before a
17 disability determination can be made, and it is not clear from the record that the ALJ would be
18 required to find the claimant disabled if all the evidence were properly evaluated." *Taylor v.*
19 *Comm'r of Soc. Sec.*, 659 F.3d 1228, 1235 (9th Cir. 2011) (reversing and remanding for the
20 consideration of new evidence instead of awarding benefits).

21 The Court concludes this case should be remanded for further administrative proceedings
22 so the ALJ can consider the medical evidence associated with Plaintiff's prior claim. *See Harman*
23 *v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000) ("Because neither the ALJ nor the vocational expert
24 had the full picture before them, remand for further proceedings is particularly appropriate."). In
25 addition, because this evidence may affect other portions of the decision, the ALJ shall determine
26 if any further evaluation is required based on the issues Plaintiff raises here.

27 For these reasons, and because the ALJ failed to fully and fairly develop the record when

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evaluating Plaintiff's disability claim, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Cross-Motion for Summary Judgment, and **REVERSES** the ALJ's decision. This case is **REMANDED** for further administrative proceedings in accordance with this Order.

IT IS SO ORDERED.

Dated: **July 15, 2016**



MARIA-ELENA JAMES
United States Magistrate Judge