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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ANAMARIA LIZARRAGA,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. 16-cv-06561-BLF

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING
DEFENDANT'S CROSS-MOTION FOR
SUMMARY JUDGMENT; REVERSING
THE DENIAL OF BENEFITS; AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS**

[Re: ECF 12, 14]

Plaintiff Anamaria Lizarraga, proceeding through counsel, appeals a final decision of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying her application for a period of disability and disability insurance benefits under Title II of the Social Security Act. Before the Court are Plaintiff's motion for summary judgment (ECF 12) and Defendant's cross-motion for summary judgment (ECF 14). Plaintiff did not file a reply brief within the time provided in the procedural order issued by the Court (ECF 3). The matter was submitted without oral argument pursuant to Civil Local Rule 16-5.

For the reasons discussed below, the Court GRANTS IN PART AND DENIES IN PART Plaintiff's motion; DENIES Defendant's cross-motion; REVERSES the denial of benefits; and REMANDS for further administrative proceedings.

1 **I. BACKGROUND**

2 Plaintiff was born on November 15, 1963, graduated from high school, and completed
3 college courses. Admin. Record (“AR”) 42. She is married and has no dependent children. *Id.*
4 She has past relevant work as a Case Aide and an ESL Teacher.¹ AR 69.

5 Plaintiff filed a claim for disability insurance benefits on December 27, 2012, alleging
6 disability beginning May 1, 2011. AR 166-72, 181. She claims several impairments, including a
7 history of recurrent strokes, symptoms associated with migraine headaches, piriformis syndrome,
8 myofascial pain syndrome, fibromyalgia syndrome, asthma, and a depressive disorder. AR 15.

9 Plaintiff’s application was denied initially and upon reconsideration. AR 89, 106. She
10 requested and received a hearing before an administrative law judge (“ALJ”), which was held on
11 December 9, 2014. AR 13. The ALJ heard testimony from three individuals: Plaintiff; Irvin
12 Belzer, M.D., a medical expert; and Thomas Dachelet, a vocational expert (“VE”). *Id.* The ALJ
13 issued a written decision on March 19, 2015, finding that Plaintiff was not disabled and therefore
14 was not entitled to benefits. AR 13-27. The Appeals Council affirmed the ALJ’s decision,
15 making it the final decision of the Commissioner. AR 1-7. Plaintiff filed this action on November
16 11, 2016.

17 **II. LEGAL STANDARD**

18 **A. Standard of Review**

19 Pursuant to sentence four of 42 U.S.C. § 405(g), district courts “have power to enter, upon
20 the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the
21 decision of the Commissioner of Social Security, with or without remanding the cause for a
22 rehearing.” 42 USC § 405(g). However, “a federal court’s review of Social Security
23 determinations is quite limited.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015).
24 Federal courts “leave it to the ALJ to determine credibility, resolve conflicts in the testimony, and
25 resolve ambiguities in the record.” *Id.* (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775

26
27 _____
28 ¹ Plaintiff claimed past relevant work as a “social worker,” AR 42, but because she was not certified, the vocational expert who testified at the administrative hearing classified that position as a “case aide,” AR 68-69.

1 F.3d 1090, 1098 (9th Cir. 2014)).

2 A court “will disturb the Commissioner’s decision to deny benefits only if it is not
3 supported by substantial evidence or is based on legal error.” *Brown-Hunter*, 806 F.3d at 492
4 (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence as
5 a reasonable mind might accept as adequate to support a conclusion, and must be more than a
6 mere scintilla, but may be less than a preponderance.” *Rounds v. Comm’r of Soc. Sec. Admin.*,
7 807 F.3d 996, 1002 (9th Cir. 2015) (internal quotation marks and citations omitted). A court
8 “must consider the evidence as a whole, weighing both the evidence that supports and the
9 evidence that detracts from the Commissioner’s conclusion.” *Id.* (internal quotation marks and
10 citation omitted). If the evidence is susceptible to more than one rational interpretation, the ALJ’s
11 findings must be upheld if supported by reasonable inferences drawn from the record. *Id.*

12 Finally, even when the ALJ commits legal error, the ALJ’s decision will be upheld so long
13 as the error is harmless. *Brown-Hunter*, 806 F.3d at 492. However, “[a] reviewing court may not
14 make independent findings based on the evidence before the ALJ to conclude that the ALJ’s error
15 was harmless.” *Id.* The court is “constrained to review the reasons the ALJ asserts.” *Id.*

16 **B. Standard for Determining Disability**

17 “To determine whether a claimant is disabled, an ALJ is required to employ a five-step
18 sequential analysis, determining: (1) whether the claimant is doing substantial gainful activity;
19 (2) whether the claimant has a severe medically determinable physical or mental impairment or
20 combination of impairments that has lasted for more than 12 months; (3) whether the impairment
21 meets or equals one of the listings in the regulations; (4) whether, given the claimant’s residual
22 functional capacity, the claimant can still do his or her past relevant work; and (5) whether the
23 claimant can make an adjustment to other work.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th
24 Cir. 2014) (internal quotation marks and citations omitted). The residual functional capacity
25 (“RFC”) referenced at step four is what a claimant can still do despite his or her limitations. *Id.* at
26 1160 n.5. “The burden of proof is on the claimant at steps one through four, but shifts to the
27 Commissioner at step five.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir.
28 2009).

1 **III. DISCUSSION**

2 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
3 activity from her alleged onset date, May 1, 2011, through her date last insured, September 30,
4 2014. AR 15. At step two, the ALJ found that Plaintiff had the following severe impairments
5 through her date last insured: “history of recurrent strokes; possible ischemic neurological deficits
6 or paralysis associated with migraine headaches; piriformis syndrome; myofascial pain syndrome;
7 and asthma.” *Id.* However, the ALJ found that Plaintiff’s claimed fibromyalgia syndrome was
8 not medically determinable based on the evidence in the record. AR 17-18. The ALJ also found
9 that Plaintiff’s medically determinable depressive disorder was non-severe. AR 15. At step three,
10 the ALJ concluded that Plaintiff’s impairments did not meet or medically equal the severity of one
11 of the listed impairments in the regulations. AR 18-19.

12 Prior to making a step four determination, the ALJ found that Plaintiff had the RFC to
13 perform a reduced range of light work. AR 19. Light work is defined in the regulations as
14 follows:

15 Light work. Light work involves lifting no more than 20 pounds at a time with
16 frequent lifting or carrying of objects weighing up to 10 pounds. Even though the
17 weight lifted may be very little, a job is in this category when it requires a good
18 deal of walking or standing, or when it involves sitting most of the time with some
19 pushing and pulling of arm or leg controls. To be considered capable of
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 20 C.F.R. § 404.1567(b).

21 The ALJ found that Plaintiff can perform these activities with the following limitations:
22 she can sit for 6 to 8 hours per day but she needs breaks every 2 hours for 1 to 3 minutes; she can
23 stand or walk up to 4 hours per 8-hour workday, but only for 1 hour at a time; she can perform
24 manipulative activities (reaching, handling, fingering, pushing, pulling) only occasionally; she can
25 use foot controls only occasionally; she can climb stairs or ramps, stoop, kneel, crouch, or crawl
26 only occasionally; she cannot climb ladders or scaffolds; she should not be around unprotected
27 heights or moving mechanical parts; she can drive a motor vehicle only occasionally; and she
28 should be exposed only occasionally to humidity, wetness, extreme cold or heat, vibrations, or

1 respiratory irritants. AR 19-22. In determining this RFC, the ALJ discounted Plaintiff’s claims
2 that she suffers from fibromyalgia syndrome and that her depression constitutes a severe mental
3 impairment. AR 23-24.

4 Based on the above RFC and the testimony of the VE, the ALJ found at step four that
5 Plaintiff was capable of performing her past relevant work as a Case Aide and ESL Teacher. AR
6 25-26. The ALJ made an alternative step five determination that Plaintiff could perform other jobs
7 that exist in the national economy. *Id.* The ALJ therefore found that Plaintiff was not disabled
8 from her alleged onset date through her date last insured. AR 26-27.

9 Plaintiff asserts that the ALJ’s decision is legally insufficient because: (a) the ALJ’s
10 determination that Plaintiff is limited to walking and standing for 4 hours a day is inconsistent
11 with the determination that Plaintiff can perform light work activity; (b) all of the relevant medical
12 opinions support Plaintiff’s claim of severe mental impairment and the ALJ’s rejection of those
13 opinions is not supported by substantial evidence in the record; (c) the ALJ erred in failing to
14 consider the effect of Plaintiff’s mental impairment on her ability to work; (d) the ALJ erred in
15 finding that Plaintiff’s claimed fibromyalgia syndrome was not medically determinable; and
16 (e) the ALJ failed to develop the record fully as to Plaintiff’s claim that she suffers from
17 fibromyalgia syndrome. The Court addresses those arguments in turn.

18 **A. RFC Determination**

19 As discussed above, the ALJ determined that Plaintiff retains the RFC to perform a
20 reduced range of light work, imposing among others a limitation that Plaintiff can stand or walk
21 up to 4 hours per 8-hour workday for at most 1 hour at a time. AR 19. Plaintiff asserts that the 4-
22 hour stand/walk limitation is incompatible with an RFC of light work, because “the full range of
23 light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-
24 hour workday.” Social Security Ruling (“SSR”) 83-10, 1983 WL 31251, at *6. “Consequently,”
25 Plaintiff argues, “the ALJ made an error of law by finding an RFC of light work when she
26 concurrently limited Claimant to walking and standing for 4 hours in an 8-hour day.” Pl.’s MSJ at
27 5, ECF 12.

28 In response, Defendant cites numerous cases affirming decisions in which the ALJ found

1 the claimant capable of a reduced range of light work. *See* Def.’s XMSJ at 5, ECF 14 (collecting
2 cases). For example, in *Avilez v. Colvin*, No. EDCV 14-0732-JPR, 2015 WL 1966916, at *6 (C.D.
3 Cal. Apr. 30, 2015), the ALJ determined that Avilez had the RFC to perform a limited range of
4 light work, those limitations including a restriction that Avilez could stand or walk only 2 hours in
5 an 8-hour workday. Relying on SSR 83-10, Avilez argued to the district court that “because light
6 work in most cases requires approximately six hours of standing or walking,” the ALJ had
7 violated “agency policy” by assigning an RFC of light work while simultaneously restricting
8 standing and walking to 2 hours per day. *Id.* The district court rejected that argument, noting that
9 “[a]lthough most light work requires more standing and walking than the ALJ found Plaintiff able
10 to perform, some light-work positions require no more than two hours of standing and walking.”
11 *Id.* Similarly, in *Jones v. Colvin*, No. ED CV 13-722-SP, 2014 WL 657914, at *7 (C.D. Cal. Feb.
12 19, 2014), the district court concluded that a light work RFC with a 4-hour stand/walk limitation
13 did not conflict with SSR 83-10. The court observed that “the ALJ did not determine that plaintiff
14 could perform the full range of light work, but simply ‘a range of light work.’” *Id.*

15 Based on the cases cited by Defendant, and absent citation to contrary authority by
16 Plaintiff, this Court concludes that it is not per se legal error to determine that a claimant has the
17 RFC to perform a reduced range of light work which includes a 4 hour stand/walk limitation.

18 **B. Determination that Mental Impairment is Non-Severe**

19 At step two, the ALJ concluded that Plaintiff’s claimed mental impairment of depressive
20 disorder was non-severe. AR 15. Plaintiff argues that all of the relevant medical opinions support
21 her claim of severe mental impairment and the ALJ’s rejection of those opinions is not supported
22 by substantial evidence in the record.

23 The ALJ noted in her written decision that the file contained opinions from three mental
24 health professionals: Plaintiff’s treating psychiatrist, Frank Read, M.D., and two agency
25 consulting psychiatrists, Jay Flocks, M.D., and G.R. Ibarra, M.D. AR 16-17. Dr. Read completed
26 a Medical Source Statement Regarding A Mental Impairment on March 7, 2014, stating that he
27 began treating Plaintiff in August 2007 and last had treated her on February 28, 2014. AR 1015.
28 Dr. Read opined that Plaintiff had a substantial loss of the following abilities: “ability to make

1 judgments that are commensurate with the functions of unskilled work, i.e., simple work-related
2 decisions”; “ability to respond appropriately to supervision, co-workers and usual work
3 situations”; and “ability to deal with changes in a routine work setting.” *Id.* He also found that
4 Plaintiff was “Markedly Limited” in 12 of 20 activities, including: “ability to understand and
5 remember detailed instructions”; “ability to maintain attention and concentration for extended
6 periods”; “ability to perform activities within a schedule, maintain regular attendance and be
7 punctual within customary tolerances”; and “ability to get along with co-workers or peers without
8 unduly distracting them or exhibiting behavioral extremes.” AR 1016-17. Dr. Read estimated that
9 Plaintiff would miss 4 or more days of work per month as a result of her mental impairment. AR
10 1015. Finally, Dr. Read opined that Plaintiff’s global assessment of functioning (“GAF”) score
11 was 41-50, AR 1015, which the ALJ recognized indicated “Serious symptoms,” AR 17.

12 Dr. Flocks and Dr. Ibarra found Plaintiff to suffer from “a moderate mood disorder with
13 depressive symptoms predominating,” and opined that she was limited to performing “simple
14 repetitive task[s] with adequate pace and persistence.” AR 85, 102. The ALJ summarized the
15 agency psychiatrists’ opinions as stating that Plaintiff suffered “from a severe depressive
16 disorder.” AR 17.

17 The ALJ acknowledged that all three mental health professionals had found Plaintiff to
18 suffer from severe mental impairments. AR 17. However, the ALJ gave each of the three medical
19 opinions “little weight,” and instead concluded that “[t]he claimant’s medically determinable
20 mental impairment of depressive disorder did not cause more than minimal limitation in the
21 claimant’s ability to perform basic mental work activities and was therefore non-severe.” AR 15-
22 17. *Id.*

23 “To reject an uncontradicted opinion of a treating physician, the ALJ must provide clear
24 and convincing reasons that are supported by substantial evidence.” *Ghanim*, 763 F.3d at 1160-61
25 (internal quotation marks and citation omitted). With respect to Dr. Read’s opinion, the ALJ
26 stated that “[t]he problem with this opinion is that the GAF score given and the markedly limited
27 ratings are not supported by the treatment given by Dr. Read.” AR 17. The ALJ characterized Dr.
28 Read’s treatment as “limited to infrequent follow-up visits with Dr. Read and minimal use of anti-

1 depressant medications.” *Id.* The ALJ also stated that “objective evidence or even his own
2 treatment notes and treatment recommendations do not support the opinions of Dr. Read.” *Id.*
3 Finally, the ALJ stated her own opinion that “[i]f the claimant had truly had serious symptoms or
4 serious impairment in social, occupational, or school functioning, she would be institutionalized or
5 in some sort of intensive outpatient program to help her cope with these serious symptoms.” *Id.*

6 “A conflict between treatment notes and a treating provider’s opinions may constitute an
7 adequate reason to discredit the opinions of a treating physician or another treating provider.”
8 *Ghanim*, 763 F.3d at 1161. However, the ALJ failed to identify substantial evidence of such a
9 conflict here. While the record includes treatment notes from Dr. Read only through November
10 2012, AR 271-322, Dr. Read’s medical source statement dated March 7, 2014 indicated that he
11 last had treated Plaintiff on February 28, 2014, AR 1015. Plaintiff testified at the administrative
12 hearing on December 9, 2014 that she was continuing to see Dr. Read in person every 3-5 months,
13 she spoke with him by telephone at least 1 time a month, and she emailed him for prescription
14 refills. AR 58-59. Plaintiff testified specifically that she had spoken with Dr. Read the week prior
15 to the administrative hearing. AR 59. The ALJ apparently disregarded both Dr. Read’s
16 representation of treatment through 2014 and Plaintiff’s testimony re same in concluding that Dr.
17 Read’s treatment was “limited to infrequent follow-up visits.” The ALJ’s reason for disregarding
18 this evidence is unclear, since the ALJ cited only to Dr. Read’s treatment notes when
19 characterizing the nature and frequency of Dr. Read’s treatment. Defendant has not cited, and this
20 Court has not discovered, any authority for the proposition that a “conflict” is created with respect
21 to otherwise consistent medical evidence simply because not all treatment notes are included in the
22 administrative record.

23 Moreover, although the ALJ cited Dr. Read’s minimal use of antidepressant medication as
24 a reason to disregard Dr. Read’s opinion regarding the severity of Plaintiff’s mental impairment,
25 the ALJ provided no basis for her underlying assumption that more antidepressant medication
26 would have been prescribed if Plaintiff indeed had a serious mental impairment. The ALJ
27 likewise provided no basis for her statement that if Plaintiff had a serious mental impairment, “she
28 would be institutionalized or in some sort of intensive outpatient program.” AR 17. “An ALJ

1 cannot substitute his own opinion for that of the medical experts by disregarding evidence in the
2 record.” *Winkowitsch-Smith v. Barnhart*, 113 F. App’x 765, 767 (9th Cir. 2004); *see also Gomez*
3 *v. Colvin*, No. 1:15-CV-00647-SKO, 2016 WL 3196770, at *17 (E.D. Cal. June 8, 2016) (ALJ
4 erred in rejecting multiple diagnoses of PTSD based on ALJ’s own opinion that an individual who
5 had never been in combat could not suffer from PTSD). “Sheer disbelief is no substitute for
6 substantial evidence.” *Winkowitsch-Smith*, 113 F. App’x at 767 (internal quotation marks and
7 citation omitted).

8 Finally, the ALJ’s general statement that Dr. Read’s opinion was unsupported by
9 “objective evidence” or Dr. Read’s “treatment notes” is not sufficiently specific to constitute
10 substantial evidence to reject Dr. Read’s medical opinion. Similarly, the ALJ’s statement that
11 “objective medical evidence of record does not support” the two state agency psychiatrists’
12 opinions does not constitute substantial evidence to reject those opinions. AR 17. Absent citation
13 to specific portions of the very lengthy administrative record, which totals more than 1200 pages,
14 the Court cannot discern what conflicts in the evidence the ALJ perceived. *See Garrison v.*
15 *Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (“[A]n ALJ errs when he rejects a medical opinion
16 or assigns it little weight while . . . criticizing it with boilerplate language that fails to offer a
17 substantive basis for his conclusion.”).

18 Accordingly, the Court concludes that the ALJ erred by failing to credit the three
19 uncontradicted mental health opinions without providing clear and convincing reasons, supported
20 by substantial evidence, for doing so. The Court notes that Defendant’s brief contains numerous
21 citations to record evidence which Defendant contends supports the ALJ’s determination that
22 Plaintiff’s mental impairment was non-severe. *See* Def.’s XMSJ at 6-7, ECF 14. That evidence
23 may have provided an adequate basis for rejection of the mental health opinions had the ALJ
24 expressly cited and relied on it. However, the ALJ did not do so. As discussed above, “[a]
25 reviewing court may not make independent findings based on the evidence before the ALJ to
26 conclude that the ALJ’s error was harmless.” *Brown-Hunter v. Colvin*, 806 F.3d at 492. The
27 court is “constrained to review the reasons the ALJ asserts.” *Id.*

28

1 **C. Failure to Consider Effect of Mental Impairment on Ability to Work**

2 Plaintiff argues that even if her mental impairment properly was found to be non-severe,
3 the ALJ erred in failing to consider the effect of the mental impairment on Plaintiff’s ability to
4 work. The step two determination whether particular impairments are “severe” or “non-severe” is
5 “not meant to identify the impairments that should be taken into account when determining the
6 RFC.” *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017). When determining a claimant’s
7 RFC, the ALJ “must consider limitations and restrictions imposed by all of an individual’s
8 impairments, even those that are not ‘severe.’” *Id.* at 1049 (internal quotation marks and citation
9 omitted). “The RFC therefore *should* be exactly the same regardless of whether certain
10 impairments are considered ‘severe’ or not.” *Id.*

11 The ALJ did not include any limitations resulting from Plaintiff’s mental impairment in the
12 RFC determination. Given the Court’s conclusion that the ALJ improperly rejected the
13 uncontradicted mental health opinions that Plaintiff suffered from a severe mental impairment, the
14 ALJ’s failure to include any mental limitation in the RFC clearly was in error.

15 **D. Determination that Fibromyalgia Syndrome not Medically Determinable**

16 At step 2, the ALJ determined that Plaintiff’s claimed fibromyalgia syndrome was not
17 medically determinable based on the evidence in the record. AR 17-18. Plaintiff asserts that the
18 ALJ erred in making that determination because the ALJ failed to comply with SSR 99-2p. SSR
19 99-2p addresses the criteria for evaluating a claim of disability based on Chronic Fatigue
20 Syndrome (“CFS”). *See* SSR 99-2p, 1999 WL 271569. As Defendant points out, SSR 12-2p,
21 which became effective on July 25, 2012, “provides guidance on how we develop evidence to
22 establish that a person has a medically determinable impairment (MDI) of fibromyalgia (FM), and
23 how we evaluate FM in disability claims and continuing disability reviews under titles II and XVI
24 of the Social Security Act (Act).” SSR 12-2p, 2012 WL 3104869, at *1. The ALJ expressly
25 applied the criteria set forth in SSR 12-2p when concluding that Plaintiff’s alleged fibromyalgia
26 syndrome is not medically determinable. AR 18. Plaintiff’s claim that the ALJ failed to comply
27 with SSR 99-2p, which is not applicable here, is insufficient to establish legal error by the ALJ.
28

1 **E. Failure to Develop the Record re Fibromyalgia Syndrome**

2 Finally, Plaintiff argues that the ALJ failed to develop the record with respect to Plaintiff's
3 claim of fibromyalgia syndrome. The ALJ noted that under SSR 12-2p, a claimant's evidence
4 must satisfy one of two alternative sets of diagnostic criteria to establish a medically determinable
5 impairment of fibromyalgia syndrome. AR 17-18. The ALJ concluded that the first set of criteria
6 was not met because it required at least 11 positive tender points on physical examination and
7 there was no notation regarding tender points on the questionnaire submitted by Plaintiff's
8 physician, Dr. Nguyen. *Id.* The ALJ concluded that the second set of criteria was not met because
9 it required that other disorders be excluded, and Plaintiff had not presented evidence excluding
10 other disorders. *Id.* Plaintiff argues that the ALJ should have developed the record as to whether
11 Plaintiff did or did not have tender points sufficient to satisfy the first set of criteria.

12 “The ALJ in a social security case has an independent duty to fully and fairly develop the
13 record and to assure that the claimant's interests are considered.” *Tonapetyan v. Halter*, 242 F.3d
14 1144, 1150 (9th Cir. 2001) (internal quotation marks and citation omitted). “This duty extends to
15 the represented as well as to the unrepresented claimant.” *Id.* However, it is the claimant's duty
16 to prove disability. *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001). “An ALJ's duty to
17 develop the record further is triggered only when there is ambiguous evidence or when the record
18 is inadequate to allow for proper evaluation of the evidence.” *Id.*

19 Dr. Nguyen clearly did not base the diagnosis of fibromyalgia syndrome on the presence of
20 tender points, as Dr. Nguyen did not check the box for that symptom on the questionnaire
21 submitted for administrative review. AR 1241. Dr. Nguyen checked the boxes for 13 other
22 symptoms in support of the fibromyalgia diagnosis. *Id.* Accordingly, this is not a case in which
23 the evidence was ambiguous or the record was inadequate to allow for evaluation of the evidence.
24 There simply was a failure of proof on Plaintiff's part with respect to the claimed impairment of
25 fibromyalgia. Plaintiff's failure of proof was not sufficient to trigger the ALJ's duty to develop
26 the record. *See Cole v. Colvin*, No. 6:15-CV-01044-PA, 2016 WL 4154934, at *7 (D. Or. Aug. 2,
27 2016) (“Plaintiff's failure to carry her burden of proof, however, does not equate with an
28 ambiguity or inadequacy in the record.”).

1 **F. Appropriate Remedy**

2 As discussed above, the ALJ erred in rejecting the mental health opinions of severe mental
3 impairment without providing clear and convincing reasons for doing so, supported by substantial
4 evidence in the record. The Court must decide whether that error was harmless and, if not, the
5 appropriate remedy. “An error is harmless only if it is inconsequential to the ultimate
6 nondisability determination, or if despite the legal error, the agency’s path may reasonably be
7 discerned.” *Brown-Hunter*, 806 F.3d at 494 (internal quotation marks and citations omitted).
8 Here, the error was not harmless, because it went to key evidence regarding Plaintiff’s claimed
9 mental impairment. Moreover, the Court cannot discern the agency’s path absent appropriate
10 consideration of all relevant evidence of record. The Court therefore must determine the
11 appropriate remedy.

12 Plaintiff requests that the case be remanded to the Commissioner for an immediate award
13 of benefits. A remand for an immediate award of benefits may be appropriate in the “rare
14 circumstances” in which the following three requirements are met: (1) “the ALJ has failed to
15 provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical
16 opinion”; (2) “the record has been fully developed and further administrative proceedings would
17 serve no useful purpose”; and (3) “if the improperly discredited evidence were credited as true, the
18 ALJ would be required to find the claimant disabled on remand.” *Id.* at 495 (internal quotation
19 marks and citation omitted). Even if all three requirements are satisfied, the Court “retain[s]
20 flexibility in determining the appropriate remedy.” *Id.* (internal quotation marks and citation
21 omitted). The Court “may remand on an open record for further proceedings when the record as a
22 whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of
23 the Social Security Act.” *Id.* (internal quotation marks and citation omitted).

24 The Court concludes that a remand for further proceedings is appropriate here. The first
25 factor clearly is met, as the ALJ failed to provide legally sufficient reasons for failing to credit the
26 mental health opinions of severe mental impairment. However, the second and third factors are
27 not met, as the record has not been fully developed and it is unclear whether crediting the mental
28 health opinions would require a finding of disability. The ALJ relied on the VE’s testimony to

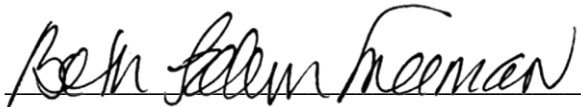
1 conclude that Plaintiff can perform her past relevant work and other work in the national economy.
2 AR 67-71. However, the VE's opinion was based on an RFC which did not include limitations
3 arising from Plaintiff's mental impairment. *Id.* Plaintiff's counsel did ask the VE whether his
4 opinion of Plaintiff's employability would be affected if, in addition to the physical limitations
5 encompassed by the RFC, there were also mental limitations. AR 71-72. Counsel gave some
6 hypothetical limitations drawn from Dr. Read's opinion, including inability to complete a normal
7 workday, inability to perform at a consistent pace without an unreasonable number or length of
8 rest periods, and absences from work of four or more days per month. *Id.* The VE stated that the
9 presence of such limitations would affect Plaintiff's employability. AR 72. However, he did not
10 state precisely *how* employability would be affected. *Id.* Consequently, it is not clear from the
11 record whether inclusion of mental limitations in Plaintiff's RFC would result in a determination
12 that Plaintiff cannot perform her past relevant work or other work in the national economy.

13 Accordingly, the Court will grant in part and deny in part Plaintiff's motion for summary
14 judgment and will deny Defendant's cross-motion for summary judgment. Pursuant to sentence
15 four of 42 U.S.C. § 405(g), the Court will reverse the denial of benefits and remand for further
16 administrative proceedings consistent with this order. 42 U.S.C. § 405(g) (sentence four) ("The
17 court shall have power to enter, upon the pleadings and transcript of the record, a judgment
18 affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or
19 without remanding the cause for a rehearing.").

20 **IV. ORDER**

- 21 (1) Plaintiff's motion for summary judgment is GRANTED IN PART AND DENIED
22 IN PART;
- 23 (2) Defendant's motion for summary judgment is DENIED;
- 24 (3) The denial of benefits is REVERSED; and
- 25 (4) The matter is REMANDED to the Commissioner for proceedings consistent with
26 this order.

27 Dated: February 12, 2018


BETH LABSON FREEMAN
United States District Judge