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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DENISE MICHELE F.,

Plaintiff,

v.

ANDREW M. SAUL, Social Security  
Administration Commissioner,

Defendant.

Case No.: 19cv2082-MDD

**ORDER DENYING PLAINTIFF'S  
MERITS BRIEF**

[ECF No. 13]

Plaintiff Denise Michele F. (“Plaintiff”) filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final administrative decision of the Commissioner of the Social Security Administration (“Commissioner”) denying Plaintiff’s application for Social Security Disability Insurance and benefits under Title XVI of the Social Security Act (“Act”). (ECF No. 1). On September 28, 2020, Plaintiff filed a Merits Brief. (ECF No. 13 (“Mtn.”)). The Commissioner filed a response in opposition [ECF No. 16 (“Oppo.”)], to which Plaintiff replied [ECF No. 17 (“Reply”)]. For the reasons expressed herein, the Court **DENIES** Plaintiff’s Merits Brief and **AFFIRMS** the ALJ’s decision.

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1 **I. BACKGROUND**

2 Plaintiff was born on September 29, 1966. (AR 187)<sup>1</sup>. At the time the  
3 instant application was filed on March 16, 2016, Plaintiff was 49 years old  
4 which categorized her as a younger person. 20 C.F.R. § 404.1563, 416.963.

5 **A. Procedural History**

6 On March 16, 2015, Plaintiff protectively filed an application for a  
7 period of disability and disability insurance benefits under Title II of the Act,  
8 alleging a disability beginning March 1, 2016. (AR 27, 189). Plaintiff  
9 amended the alleged disability onset date to correspond with her 50th  
10 birthday, which categorized her as a person closely approaching advanced  
11 age. 20 C.F.R. § 404.1563, 416.963. After her application was denied  
12 initially and upon reconsideration, Plaintiff requested an administrative  
13 hearing before an administrative law judge (“ALJ”). (AR at 27, 133). An  
14 administrative hearing was held on July 19, 2018. (AR 45-87). Plaintiff  
15 appeared and was represented by attorney Holly McMahon. (*Id.*). Testimony  
16 was taken from Plaintiff and John P. Kilcher, an impartial vocational expert  
17 (“VE”). (*Id.*). On December 3, 2018, The ALJ issued a decision denying  
18 Plaintiff’s claim for disability insurance benefits. (AR 27-40).

19 On January 15, 2019, Plaintiff sought review with the Appeals Council.  
20 (AR 177). On September 16, 2019, the Appeals Council denied Plaintiff’s  
21 request for review and declared the ALJ’s decision to be the final decision of  
22 the Commissioner in Plaintiff’s case. (AR 1). This timely civil action  
23 followed.

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27 <sup>1</sup> “AR” refers to the Certified Administrative Record filed on March 13, 2020. (ECF No. 8).

## II. DISCUSSION

### A. Legal Standard

Sections 405(g) and 1383(c)(3) of the Social Security Act allow unsuccessful applicants to seek judicial review of a final agency decision of the Commissioner. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of judicial review is limited in that a denial of benefits will not be disturbed if it is supported by substantial evidence and contains no legal error. *Id.*; *see also Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1993 (9th Cir. 2004).

Substantial evidence means “more than a mere scintilla” but less than a preponderance. *Sandqathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). “[I]t is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). The court must consider the record as a whole, weighing both the evidence that supports and detracts from the Commissioner’s conclusions. *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). If the evidence supports more than one rational interpretation, the court must uphold the ALJ’s decision. *Batson*, 359 F.3d at 1193. When the evidence is inconclusive, “questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

Even if a reviewing court finds that substantial evidence supports the ALJ’s conclusions, the court must set aside the decision if the ALJ failed to apply the proper legal standards in weighing the evidence and reaching his or her decision. *Batson*, 359 F.3d at 1193. Section 405(g) permits a court to enter a judgment affirming, modifying or reversing the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may also remand the matter to the Social Security Administration for further proceedings. *Id.*

## 1 **B. Summary of ALJ's Findings**

2 In rendering his decision, the ALJ followed the Commissioner's five-step  
3 sequential evaluation process. *See* C.F.R. § 404.1520. At step one, the ALJ  
4 reserved making a finding as to whether Plaintiff had engaged in substantial  
5 gainful activity since September 28, 2016. (AR 29-30). He noted that  
6 Plaintiff worked after the alleged disability onset date and it is possible that  
7 some of this work rose to the level of substantial gainful activity for at least a  
8 portion of the period in question. (AR 29). However, Plaintiff did not provide  
9 further information regarding her work activity after the hearing, despite the  
10 ALJ holding the record open to allow her to do so. (*Id.*).

11 At step two, the ALJ found that Plaintiff had the following severe  
12 impairments: reported history of fibromyalgia; chronic fatigue syndrome;  
13 irritable bowel syndrome; major depressive disorder, and generalized anxiety  
14 disorder. (AR 30).

15 At step three, the ALJ found that Plaintiff did not have an impairment  
16 or combination of impairments that met or medically equaled one of the  
17 impairments listed in the Commissioner's Listing of Impairments. (AR 30)  
18 (citing 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d),  
19 44.1525, 404.1526)).

20 Next, after considering the entire record, the ALJ determined that  
21 Plaintiff had the residual functional capacity ("RFC") to perform medium  
22 work with the following limitations:

23 She could frequently perform all postural activities. She can carry  
24 out unskilled tasks at all appropriate reasoning levels per the DOT,  
25 and can perform those tasks at an adequate pace with normal  
26 breaks over an eight-hour day. She can occasionally interact with  
27 coworkers and supervisors but should have no contact with the  
the work setting.

1 (AR 32). The ALJ said that his RFC assessment was based on all the  
2 evidence and the extent to which Plaintiff's symptoms are consistent with the  
3 objective medical evidence and other evidence. (*Id.*). The ALJ also stated  
4 that he considered the opinion evidence in accordance with the requirements  
5 of 20 C.F.R. 404.1527. (*Id.*).

6 The ALJ then proceeded to step four of the sequential evaluation  
7 process. He found Plaintiff was unable to perform her past relevant work.  
8 (AR 37). For the purposes of his step five determination, the ALJ accepted  
9 the testimony of VE John P. Kilcher. The VE determined that Plaintiff could  
10 perform jobs identified by the VE which exist in significant numbers in the  
11 national economy. For example, lumbar sorter (DOT 922.687-074); hand  
12 packager (DOT 920.587-018); and package sealer (DOT 920.685-074).

### 13 **C. Issues in Dispute**

14 The issues in dispute in this case are: (1) whether the ALJ erred in  
15 finding her not disabled due to her fibromyalgia; (2) whether the ALJ's step  
16 five decision is supported by substantial evidence; and (3) whether the ALJ  
17 failed to fully and fairly develop the record. (*See generally*, Mtn.; Reply). The  
18 Court notes that Plaintiff raised the third issue for the first time in reply.  
19 The Court addresses this argument even though arguments raised for the  
20 first time in a reply brief are inappropriate. *See United States v. Boyce*, 148  
21 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001), *amended* (Apr. 27, 2001), *aff'd*, 36 F.  
22 App'x 612 (9th Cir. 2002) (stating courts generally decline to consider  
23 arguments raised for the first time in reply briefs because in such cases,  
24 opposing parties are deprived of adequate opportunity to respond).

#### 25 **1. Disability due to Fibromyalgia**

26 Plaintiff argues the ALJ erred by finding that her fibromyalgia,  
27 separately or in combination with other impairments, did not medically equal

1 a listing. (Mtn. at 9, 17-22, 24-28). At step two, the ALJ found Plaintiff's  
2 fibromyalgia was a severe impairment. (AR 30). The ALJ addressed the  
3 relevant listing for Plaintiff's mental and physical impairments and found  
4 that the required criteria was not satisfied by Plaintiff's condition. (AR 30).  
5 The ALJ noted that there is no listing for fibromyalgia. (*Id.*). Nevertheless,  
6 the ALJ explained that he considered similar listings and found Plaintiff did  
7 not meet or equal any listings regarding musculoskeletal disorders or  
8 immune system disorders.<sup>2</sup> (*Id.*); 20 C.F.R. Part 404, Subpart P, Appendix 1.

9 At step three, the claimant is conclusively presumed disabled if she  
10 meets or medically equals a listed impairment. 20 C.F.R. § 404.1520(d)-(e),  
11 416.920(d)-(e); *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987). Because  
12 fibromyalgia is not a listed impairment, the ALJ must "determine whether  
13 [it] medically equals a listing (for example, listing 14.09(d) in the listing for  
14 inflammatory arthritis), or whether it medically equals a listing in  
15 combination with at least one other medically determinable impairment."  
16 SSR 12-2p, 2012 SSR LEXIS 1, at \*17. The claimant bears the burden of  
17 proof at step three. *Bowen*, 482 U.S. at 146 n.5 (9th Cir. 1985). A mere  
18 diagnosis is insufficient to establish a disability.<sup>3</sup> *Key v. Heckler*, 754 F.2d  
19 1545, 1549-50 (9th Cir. 1985). To meet a listing, an impairment "must meet  
20 *all* of the specified medical criteria." *Sullivan v. Zebley*, 493 U.S. 521, 530  
21 (1990). "To equal a listed impairment, a claimant must establish symptoms,  
22 signs and laboratory findings 'at least equal in severity and duration' to the  
23 characteristics of a relevant listed impairment." *Tackett v. Apfel*, 180 F.3d

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26 <sup>2</sup> The ALJ also considered digestive system disorders with respect to Plaintiff's irritable  
27 bowel syndrome. (AR 30).

<sup>3</sup> Accordingly, the fibromyalgia diagnosis assessed by Dr. Adrian M. Jaffer on January 3,  
2019 does not warrant remand. (*See* Mtn. at 10); (*see* AR 21-22).

1 1094, 1099 (9th Cir. 1999).

2 Plaintiff does not identify which listing she believes her impairment  
3 satisfied or how her condition is of medical equivalency. Additionally,  
4 Plaintiff fails to offer any analysis that purports to compare her condition to  
5 that described in a particular listing. Rather, Plaintiff merely argues she has  
6 a medically determinable impairment of fibromyalgia.<sup>4</sup> Accordingly, Plaintiff  
7 has failed to meet her burden of showing error because she does not point to  
8 any listing, address the standards for meeting that listing, or cite to any  
9 evidence in the record to support a finding that she satisfied that listing.

## 10 **2. New Medical Evidence**

11 Plaintiff argues the Appeals Council failed to consider new medical  
12 evidence provided to it which contradicts the ALJ's findings of no disability.  
13 (Mtn. at 14-15). After the ALJ found Plaintiff not disabled, she submitted  
14 records from Hall Mortimer Associates dated February 8, 2019 and March 7,  
15 2019, and Allergy and Rheumatology Medical Clinic dated January 3, 2019.  
16 (See AR 2). Even though the Appeals Council "did not exhibit this evidence,"<sup>5</sup>  
17 it did in fact consider the records in concluding that they "do[] not show a  
18 reasonable probability that it would change the outcome of the decision."  
19 (*Id.*).

20 "[W]hen the Appeals Council considers new evidence in deciding  
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23 <sup>4</sup> Plaintiff conflates steps two and three of the five-step sequential evaluation analysis.  
24 Plaintiff relies on SSR 12-2p, 2012 SSR LEXIS 1, to argue the ALJ errantly found Plaintiff  
25 did not have a medically determinable impairment of fibromyalgia. However, the ALJ  
26 concluded that Plaintiff has a medically determinable impairment of fibromyalgia. (AR  
27 30). Thus, the ALJ was not prejudiced about fibromyalgia as a medically determinable  
impairment because he found Plaintiff's fibromyalgia to be one. (See Mtn. at 20-22).

<sup>5</sup> Plaintiff contends the fact the evidence was submitted into the record but was not  
indexed "leav[es] questions, which remained unanswered," but fails to explain what  
questions. (Reply at 9).

1 whether to review a decision of the ALJ, that evidence becomes part of the  
2 administrative record, which the district court must consider when reviewing  
3 the Commissioner's final decision for substantial evidence." *Brewes v.*  
4 *Comm'r of SSA*, 682 F.3d 1157, 1163 (9th Cir. 2012). However, courts "do not  
5 have jurisdiction to review a decision of the Appeals Council denying a  
6 request for review of an ALJ's decision, because the Appeals Council decision  
7 is a non-final agency action." *Id.* at 1161. As a result, the Court cannot  
8 determine whether the Appeals Council erred. (*See Mtn.* at 13-14). Rather,  
9 the issue before the Court is whether the ALJ's decision that Plaintiff is not  
10 disabled is supported by substantial evidence in light of the new evidence.

11 Plaintiff contends the new evidence she submitted to the Appeals  
12 Council is "substantial evidence" in support of a finding of disability and her  
13 inability to perform the requirements of 'Lumbar sorter', 'Hand packager' or  
14 'Package sealer'" at step five of the sequential evaluation process. (Reply at  
15 11). In doing so, Plaintiff also challenges the RFC assessed by the ALJ.  
16 (*Mtn.* at 10-11; Reply at 10)

17 The new evidence consists of a Vocational Rehabilitation Evaluation  
18 report completed by Behnush Mortimer, PhD, CRC, CVE, a work capacity  
19 evaluation form completed by Dr. Rodrigo Naranjo, M.D., and treatment  
20 notes diagnosing Plaintiff with fibromyalgia from Dr. Jaffer. (AR 8-16). Ms.  
21 Mortimer reviewed the ALJ decision along with Dr. Jaffer's treatment notes  
22 and Dr. Naranjo's work capacity evaluation form. (AR 8-23). Additionally,  
23 Ms. Mortimer conducted an independent vocational rehabilitation evaluation.  
24 (AR 8). She opined that Plaintiff "does not have the residual functional  
25 capacity to work in unskilled, sedentary, light or medium competitive  
26 employment within the open labor market. Her residual functional capacity  
27 does not allow for her to work the complete range of duties required in these



1 types of positions.” (AR 16). Specifically, Ms. Mortimer opined that  
2 Plaintiff’s vocational test results preclude her from any work requiring  
3 frequent to constant upper extremity use. (AR 16).

4 As noted by the Commissioner, Ms. Mortimer’s opinion is based on Dr.  
5 Naranjo’s more restrictive RFC assessment. As a result, the Court must first  
6 determine whether the ALJ’s RFC determination is supported by substantial  
7 evidence considering Dr. Jaffer and Dr. Naranjo’s post-hearing opinions.

8 First, Dr. Naranjo’s work capacity evaluation form provides no basis or  
9 underlying objective findings to substantiate the limitations opined in the  
10 form. (AR 18-19). While Dr. Naranjo opined that Plaintiff could only work  
11 for two to three hours a day due to fibromyalgia and chronic fatigue, the  
12 statement is inconsistent with his own treatment notes from April of 2018,  
13 the only other time he saw Plaintiff. (AR 18-19, 440). Dr. Naranjo’s findings  
14 in 2018 were generally normal and he noted that Plaintiff did not appear to  
15 be in acute distress. (AR 440). Moreover, Dr. Naranjo’s work capacity  
16 evaluation form provides no explanation for his restrictions. (AR 18-19).  
17 Accordingly, the form completed by Dr. Naranjo is unsupported and  
18 inconsistent with his own treatment records. *Ford v. Saul*, 950 F.3d 1141,  
19 1154 (9th Cir. 2020) (noting that an ALJ “need not accept the opinion of any  
20 physician, including a treating physician, if that opinion is brief, conclusory,  
21 and inadequately supported by clinical findings”).

22 Next, Dr. Jaffer’s treatment notes from January 3, 2019 do not assess  
23 Plaintiff with any limitations. (AR 21-22). Rather, Dr. Jaffer’s treatment  
24 notes support Plaintiff’s claim that she has a fibromyalgia diagnosis. (*Id.*).  
25 However, this does not impact the ALJ’s decision because the ALJ found  
26 Plaintiff’s fibromyalgia to be a severe medically determinable impairment.  
27 (AR 30).

1           Additionally, both Dr. Naranjo’s opinion and Dr. Jaffer’s treatment  
2 notes were issued after the ALJ issued his ruling. Medical opinions issued  
3 after an adverse ruling are “less persuasive.” *Macri v. Chater*, 93 F.3d 540,  
4 544 (9th Cir. 1996).

5           For these reasons, the Court cannot find that, in light of these new  
6 medical records, the ALJ’s RFC determination is supported by insufficient  
7 evidence. Ms. Mortimer’s vocational rehabilitation report is, in part, based  
8 upon Dr. Naranjo’s opinion and Dr. Jaffer’s treatment notes. (AR 8-16). Her  
9 opinion is unsupported by substantial evidence to the extent it is based on  
10 those records.

11           Ms. Mortimer also independently evaluated Plaintiff based on Plaintiff’s  
12 reported physical and cognitive limitations and based upon vocational reports  
13 assessing Plaintiff’s fingertip dexterity, upper extremity range of motion, and  
14 typing speed. (AR 13-15). Ms. Mortimer noted that Plaintiff “performed in  
15 very low percentiles for assembly, dexterity and use of small tools” and that  
16 her “typing speed was far below her prior competitive speed.” (AR 15).  
17 Ultimately, Ms. Mortimer concluded that Plaintiff’s RFC is more restrictive  
18 than the RFC assessed by the ALJ and that the more restrictive RFC  
19 precluded her from competitive employment. (AR 8-16).

20           A vocational expert’s testimony “is valuable only to the extent that it is  
21 supported by medical evidence.” *Sample v. Schweiker*, 694 F.2d 639, 644 (9th  
22 Cir. 1982). “The vocational expert’s opinion about a claimant’s residual  
23 functional capacity has no evidentiary value if the assumptions in the  
24 hypothetical are not supported by the record.” *Magallanes v. Bowen*, 881  
25 F.2d 747, 756 (9th Cir. 1989). The vocational rehabilitation report is not  
26 provided by a medical source. The regulations require that the  
27 Commissioner only use acceptable medical sources such as licensed

1 physicians, licensed osteopaths, licensed or certified psychologists, and  
2 licensed optometrists in determining a claimant's RFC. 20 C.F.R. §§  
3 404.1513, 416.913. Regarding medical matters such as RFC assessments,  
4 vocational experts, such as Ms. Mortimer, who prepared this report, are only  
5 entitled to the weight given to any other lay witness.

6 Plaintiff does not contest that the ALJ's decision was supported by  
7 substantial evidence given the material in the record at the time he made his  
8 decision. (*See generally*, Mtn.). Given that the Plaintiff does not dispute that  
9 the ALJ's previous assessment was based on ample medical evidence at the  
10 time of the hearing, there is no reasonable possibility that this non-medical  
11 vocational report could cause the ALJ to change his decision. Accordingly,  
12 the ALJ's finding at step-five of the sequential evaluation process is  
13 supported by substantial evidence.

### 14 **3. Duty to Fully and Fairly Develop the Record**

15 In her reply brief, Plaintiff for the first time contends the ALJ failed to  
16 fully and fairly develop the record. (Reply at 12). Plaintiff contends she is  
17 entitled to an ALJ decision "based on the entire record," which includes the  
18 new evidence submitted to the Appeals Council. (*Id.* at 17).

19 It is well established in the Ninth Circuit that the ALJ has a special  
20 duty to fully and fairly develop the record and to assure that the claimant's  
21 interests are considered, and that this special duty exists. *Garcia v. Comm'r*  
22 *of Soc. Sec.*, 768 F.3d 925, 930 (9th Cir. 2014). However, it remains the  
23 claimant's duty to prove that he/she is disabled. *See Mayes v. Massanari*, 276  
24 F.3d 453, 459 (9th Cir. 2001). An ALJ's duty to develop the record further is  
25 triggered only when there is ambiguous evidence or when the record is  
26 inadequate to allow for proper evaluation of the evidence. *Id.*

27 Plaintiff has failed to articulate her argument that the ALJ failed to

1 develop the record. Plaintiff does not point to ambiguous evidence or argue  
2 there was an inadequate record for proper evaluation of the evidence. (*See*  
3 *Reply*). The evidence submitted consists of post-hearing records which, as  
4 discussed above, are not supported by substantial evidence in the record. As  
5 a result, the Court finds that the ALJ did not fail to develop the record.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court **DENIES** Plaintiff's motion and  
8 **AFFIRMS** the ALJ's decision. The Clerk of Court is instructed to enter  
9 judgment accordingly.

10 **IT IS SO ORDERED.**

11 Dated: November 24, 2020



12 Hon. Mitchell D. Dembin  
13 United States Magistrate Judge  
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