NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FIONA M. B., Plaintiff, v. Kilolo KIJAKAZI, Commissioner of Social Security, Defendant.	Case No.: 20-cv-1250-AGS **ORDER ON SUMMARY-JUDGMENT MOTION (ECF 14)**

The question here is whether a Social Security judge impermissibly rejected claimant's statements and her mother's testimony regarding her fibromyalgia symptoms.

BACKGROUND

Plaintiff Fiona M. B. applied for Social Security disability benefits, alleging that she cannot work due to a multitude of ailments, including chronic joint pain and fibromyalgia. (AR 70-71.) Her symptoms allegedly include weakness, constant pain in her joints, dizziness, migraines, and brain fog. (AR 43-46, 229.) Fiona's mother offered corroborating testimony. (AR 61-62.) After a hearing, an Administrative Law Judge concluded that Fiona could perform light work with limitations and so denied her disability request. (AR 20, 25.)

DISCUSSION

After deciding a claimant has an ailment that might cause such symptoms, an ALJ must "evaluate[s] the intensity and persistence of those symptoms to determine the extent to which [they] limit [claimant's] ability to perform work-related activities." SSR 16-3p, 2017 WL 5180304, at *3 (October 25, 2017). The ALJ determined that Fiona suffered from "chronic joint pain, fibromyalgia, and major joint disfunction," (AR 20), but her impairments did not "render[] her totally disabled." (AR 21.) To reach that conclusion, the ALJ rejected Fiona's statements and her mother's testimony regarding the intensity of her symptoms. (*Id.*) Fiona challenges this decision.

A. Plaintiff's Subjective Symptom Testimony

When "consider[ing] [the claimant's] statements about the intensity, persistence, and limiting effects of symptoms, [an ALJ] evaluate[s] whether the statements are consistent with objective medical evidence and the other evidence." SSR 16-3p, 2017 WL 5180304, at *6. An ALJ may only reject a claimant's testimony regarding the severity of her symptoms by providing "specific, clear and convincing reasons." *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). The Court considers below the ALJ's grounds for discounting Fiona's testimony about the severity of her symptoms.

1. *Inconsistent with Objective Medical Evidence*

One reason the ALJ rejected Fiona's subjective testimony is because it wasn't "entirely consistent with the medical evidence." (AR 23.) The ALJ noted, for example, that Fiona's physical exams over a five-year span showed that her "range of motion was normal in her musculoskeletal, upper extremities, and neck," and that there was "no swelling in her bilateral hands, wrists or ankles." (AR 21.) The ALJ also cited a doctor who "reported there was no specific area of the musculoskeletal to examine[,] and for the extremities, there was no cyanosis, clubbing or edema." (AR 23.) And when Fiona presented to the emergency room in 2017, her "physical exam was relatively unremarkable, the lab tests were all negative and her vital signs were stable." (AR 22.)

But these results are consistent with Fiona's fibromyalgia. Fibromyalgia is "poorly-understood within much of the medical community." *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004). Its "cause is unknown," "there is no cure," and "[t]he disease is diagnosed entirely on the basis of patients' reports of pain and other symptoms." *Id.*; *see also Revels v. Berryhill*, 874 F.3d 648, 657 (9th Cir. 2017) ("[D]iagnosis of fibromyalgia does not rely on X-rays or MRIs."); *Cota v. Comm'r of Soc. Sec.*, No. 08-00842, 2009 WL 900315, at *9 (E.D. Cal. Mar. 31, 2009) ("Joints in fibromyalgia patients appear normal; musculoskeletal examinations generally indicate no objective joint swelling or abnormality in muscle strength, sensory functions, or reflexes."). Thus, Fiona's "unremarkable" tests

and exams do not contradict her reports of "constant pain" and "full body pain." (AR 43-44.)

In addition, "the symptoms of fibromyalgia 'wax and wane,'"—"a person may have 'bad days and good days.'" *Revels*, 874 F.3d at 657 (quoting SSR 12-2p, 2012 WL 3104869, at *6). So a chiropractor's observation that "Fiona's prognosis is good at this time," is compatible with his subsequent remark that "[s]ome days[,] when Fiona has a neurol[o]gical flare[,] there are zero work tasks that can be done and should be refrained from." (AR 1096.) Because the ALJ failed to consider the medical record "in light of fibromyalgia's unique [characteristics]," his recitation of Fiona's medical history is not a convincing reason to reject her testimony.[1] *Revels*, 874 F.3d at 662.

2. *Routine Conservative Treatment*

Next, the ALJ contended that Fiona's record shows "mostly [] routine conservative treatment." (AR 21.) The Ninth Circuit has "indicated that evidence of conservative treatment is sufficient to discount a claimant's testimony regarding severity of an impairment." *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) (internal quotation marks and citation omitted). But there is "no guiding authority on what exactly constitutes 'conservative' or 'routine' treatment." *Childress v. Colvin*, No. 13-CV-03252-JSC, 2014 WL 4629593, at *12 (N.D. Cal. Sept. 16, 2014). For example, the "authority considering whether use of narcotic pain medication by itself constitutes 'conservative'

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[1] The Commissioner also argues that Fiona's physical activities contradict her symptom testimony. (*See* ECF 17, at 10 ("Plaintiff sought treatment for . . . knee and wrist pain yet reported that she walked for one to three hours per day . . . .").) But the ALJ did not articulate this rationale, and the Court is "constrained to review the reasons the ALJ asserts." *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003); *see also Bray v. Comm'r of Soc. Sec.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ—not *post hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.").

treatment goes both ways." *Vuoso v. Colvin*, No. CV 15-1255-PLA, 2016 WL 1071576, at *9 (C.D. Cal. Mar. 16, 2016) (gathering cases). *Compare Aguilar v. Colvin*, No. CV 13-08307-VBK, 2014 WL 3557308, at *8 (C.D. Cal. July 18, 2014) ("It would be difficult to fault Plaintiff for overly conservative treatment when he has been prescribed strong narcotic pain medications."), *with Vuoso*, 2016 WL 1071576, at *9 (upholding ALJ's finding that claimant's treatment was "conservative and routine" when she was "prescribed two narcotic medications" but received no other pain-related treatment). Some courts go even further and consider any regimen, in "the absence of surgery or injections, to be 'conservative' treatment." *See Childress*, 2014 WL 4629593, at *12 (gathering cases). When treatment is limited to nonnarcotic medications and noninvasive therapies, the treatment is more likely to be considered "conservative." *See, e.g.*, *Edginton v. Colvin*, 625 F. App'x 334, 336 (9th Cir. 2015) (considering "medications and an electronic transcutaneous electrical nerve stimulation unit" to be "conservative treatment"); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (considering "physical therapy and the use of anti-inflammatory medication, a transcutaneous electrical nerve stimulation unit, and a lumbosacral corset" to be "conservative treatment"). This finding is especially likely when more "aggressive treatment program[s]" are available. *See Tommasetti*, 533 F.3d at 1039 & n.2 ("[The applicant] testified that his doctors suggested back surgery, but that he did not want to risk the procedure.").

Fiona has received various treatments over the years: Dilaudid, Norco, hydrocodone, and other narcotics for generalized pain (*see* AR 73, 345, 347-48, 385, 536, 797-98); Cymbalta and nortriptyline to treat fibromyalgia (AR 426); spinal manipulation and arthrostimulation (AR 1092-93); and physical therapy (AR 407, 423, 492-93, 537, 845). Fiona was also administered at least one nonsteroidal anti-inflammatory injection (AR 389) and sought emergency care for her pain multiple times (AR 22, 73, 82, 106). Given the length and breadth of Fiona's regimen, "it is not at all obvious to this Court that consistent treatment" with "increasingly strong narcotic pain medications . . . , as well as

anti-inflammatory drugs and physical therapy, is 'conservative' treatment." *See Tran v. Colvin*, No. EDCV 15-0671 AS, 2016 WL 917891, at *7 (C.D. Cal. Mar. 8, 2016).

Moreover, "the ALJ failed to describe the type of treatment [p]laintiff should have sought for . . . fibromyalgia, . . . a disease for which there is no known cause or cure." *Rose v. Berryhill*, 256 F. Supp. 3d 1079, 1089 (C.D. Cal. 2017). So, Fiona "cannot be discredited for failing to pursue non-conservative treatment options where none exist." *Lapeirre-Gutt v. Astrue*, 382 Fed. App'x 662, 664 (9th Cir. 2010). The Court concludes that "conservative treatment" was not a valid basis for discrediting Fiona's testimony.

3. *Lack of Ongoing Treatment*

Finally, the ALJ found that the "medical evidence lacks sufficient ongoing treatment," which he attributed to improvement. (AR 21; *see* AR 22 ("[Because] the claimant has not sought any medical treatment for her alleged impairments since March 2018, it may be reasonable to assume that her alleged impairments and associated pain have improved and/or been controlled.").) But the Social Security Administration "will not find an individual's symptoms inconsistent . . . without considering possible reasons he or she may not . . . seek treatment consistent with the degree of his or her complaints." SSR 16-3p, 2017 WL 5180304, at *9. Potential reasons a claimant may stop seeking medical help include that the "symptoms have reached a plateau," that "the side effects are less tolerable than the symptoms," or that the "individual may not be able to afford treatment." *Id.* at *9-10. Additionally, there may be "no further effective treatment to prescribe or recommend that would benefit the individual." *Id.* at *10.

The record shows that Fiona's medications were often ineffective. (*See, e.g.*, AR 430 ("Tried multiple meds as listed above without improvement."); AR 447 ("No improvement with [N]orco."); AR 473 ("No improvement on [M]obic or Pamelor."); AR 501 ("Norco and [A]dvil with minimal relief."); *id.* ("Prednisone from urgent care at high doses did not dramatically improve her symptoms.").) Fiona also reported that she "couldn't tolerate[] the side effects" of her medications, which included "blurred/double vision, [central nervous system] effect, and nausea," (AR 426, 428, 487), and that her fibromyalgia

medication "made her too drowsy [so she] stopped." (*See* AR 408.) She also alluded to financial constraints deterring her from recent treatment. (*See* AR 46 (visiting her chiropractor "[w]hen [she has] the money to do so").) And finally, "[t]here is no cure or known surgical treatment for fibromyalgia." *Olguin v. Astrue*, No. CV 08-6548-JEM, 2009 WL 4641728, at *11 (C.D. Cal. Dec. 2, 2009). The ALJ's failure to grapple with any of these explanations in the record renders this last rationale unconvincing.

Because the ALJ failed to consider fibromyalgia's unique characteristics, Fiona's extensive treatment history, and her legitimate reasons for not seeking more aggressive remedies (or any remedy at all), he erroneously rejected Fiona's statements regarding her subjective symptoms.

B. Harmless-Error Review

But the Court must still "affirm if the error is harmless." *Zavalin v. Colvin*, 778 F.3d 842, 845 (9th Cir. 2015). An error is harmless when it is "inconsequential to the ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006). At Fiona's hearing, the ALJ questioned the vocational expert about a hypothetical claimant based on Fiona's testimony: "Off task six hours out of eight; miss work two weeks a month; able to walk 1.5 blocks at one time; walk or stand for . . . 20 minutes; sit [for] . . . one hour; has to lay down [one hour in every] eight hours"; and other lifting and postural limitations. (AR 68.) In that scenario, the vocational expert confirmed that there would be "no jobs in the competitive economy," so claimant "wouldn't be able to maintain any employment." (*Id.*) Because fully crediting Fiona's testimony could lead to a disability finding, the Court concludes that the error here was not harmless.

C. Remedy

Fiona seeks immediate payment of benefits due to this error. (ECF 14, at 1.) When "the record has been developed fully and further administrative proceedings would serve no useful purpose, the district court should remand for an immediate award of benefits." *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011) (citation

omitted). Even so, courts have "flexibility to remand for further proceedings when the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014).

The record here casts doubt on Fiona's entitlement to benefits. Plaintiff's reported activities, which include walking one to three hours each day and "swimming and doing yoga 2-3 times/week," raise questions about her physical abilities. (AR 408.) And, although the ALJ found that fibromyalgia was one of plaintiff's medically determinable impairments, plaintiff herself reports that she "recently found out [it] could be [Ehlers-Danlos syndrome] with fibro like symptoms." (*Id.*; *see also* AR 73 ("[Fiona] does not fit the picture of [fibromyalgia].").) Finally, Fiona's mother suggests there may be jobs within plaintiff's capacity. (*See* AR 61-62 ("Jobs that she's able to do don't pay enough.").) Thus, the case should be remanded so that the ALJ may reconsider the full record and consider the unique characteristics of fibromyalgia.

CONCLUSION

The Court need not reach whether Fiona's mother's testimony was erroneously rejected. Because the ALJ's erroneous disability ruling requires remand, Fiona's summary-judgment motion is granted. The case is remanded for further proceedings consistent with this opinion. The Clerk is directed to issue a judgment and close this case.

REVERSED AND REMANDED.

Dated: March 22, 2022

Hon. Andrew G. Schopler
United States Magistrate Judge