

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PATRICIA R.,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

Case No.: 20cv1771-RBB

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT [ECF NO. 21];
DENYING DEFENDANT’S CROSS-
MOTION FOR SUMMARY
JUDGMENT [ECF NO. 25]; AND
REMANDING CASE FOR
FURTHER PROCEEDINGS**

On September 9, 2020, Plaintiff Patricia R.¹ commenced this action against Defendant Andrew Saul, Commissioner of Social Security, for judicial review under 42 U.S.C. § 405(g) of a final adverse decision for disability insurance and supplemental

¹ The Court refers to Plaintiff using only her first name and last initial pursuant to the Court's Civil Local Rules. See S.D. Cal. Civ. R. 7.1(e)(6)(b).

1 security income benefits [ECF No. 1].² Defendant filed the Administrative Record
2 eleven months later on August 18, 2021 [ECF No. 16]. On October 22, 2021, Plaintiff
3 filed a Motion for Summary Judgment [ECF No. 21]. Defendant filed a Cross-Motion
4 for Summary Judgment and Opposition to Plaintiff’s Merits Brief on December 9, 2021
5 [ECF No. 25]. Plaintiff filed a Reply on December 28, 2021 [ECF No. 28]. Following
6 the transfer of this matter from the Honorable Linda Lopez to Magistrate Judge Ruben B.
7 Brooks, Plaintiff consented to have this Court conduct all proceedings on February 8,
8 2022 [ECF No. 30].³

9 For the following reasons, Plaintiff’s Motion for Summary Judgment is
10 **GRANTED**; Defendant’s Cross-Motion for Summary Judgment is **DENIED**; and the
11 case is **REMANDED** for further proceedings.

12 I. BACKGROUND

13 Plaintiff Patricia R. was born in 1959 and previously performed clerical work at
14 automobile dealerships. (Admin. R. 173, 351, 414, ECF No. 16.)⁴ On or about
15 December 5, 2017, Plaintiff filed applications for disability insurance benefits and
16 supplemental security income under Titles II and XVI of the Social Security Act,
17 respectively. (Id. at 16, 351-57.) She alleged that she had been disabled since February
18 28, 2013, due to asthma, arthritis in both hands, major depressive disorder, anxiety,
19 chronic sinusitis, and hyperlipidemia. (Id. at 378.) Patricia R.’s applications were denied
20 on initial review and again on reconsideration. (Id. at 273-78, 281-92.) An
21

22
23 ² Kilolo Kijakazi is now the Acting Commissioner of Social Security and is automatically substituted as
a party pursuant to Fed. R. Civ. P. 25(d).

24 ³ The United States has informed the Court of its general consent to Magistrate Judge jurisdiction in
cases of this nature.

25 ⁴ The administrative record is filed on the Court’s docket as multiple attachments. The Court will cite to
26 the administrative record using the page references contained on the original document rather than the
page numbers designated by the Court’s case management/electronic case filing system (“CM/ECF”).
27 For all other documents, the Court cites to the page numbers affixed by CM/ECF.

1 administrative hearing was conducted on November 13, 2019, by Administrative Law
2 Judge (“ALJ”) Andrew Verne. (Id. at 165.) On December 23, 2019, the ALJ issued a
3 decision and concluded that Patricia R. was not disabled. (Id. at 16-27.) Plaintiff
4 requested a review of the ALJ's decision; the Appeals Council denied the request on July
5 13, 2020. (Id. at 1-7.) Plaintiff then commenced this action pursuant to 42 U.S.C. §
6 405(g).

7 II. LEGAL STANDARDS

8 Sections 405(g) and 421(d) of the Social Security Act allow unsuccessful
9 applicants to seek judicial review of a final agency decision of the Commissioner. 42
10 U.S.C.A. § 405(g), 421(d) (West 2011). The scope of judicial review is limited,
11 however, and the denial of benefits ““will be disturbed only if it is not supported by
12 substantial evidence or is based on legal error.”” Brawner v. Sec'y of Health & Human
13 Servs., 839 F.2d 432, 433 (9th Cir. 1988) (quoting Green v. Heckler, 803 F.2d 528, 529
14 (9th Cir. 1986)); see also Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014).
15 Substantial evidence means ““more than a mere scintilla but less than a preponderance; it
16 is such relevant evidence as a reasonable mind might accept as adequate to support a
17 conclusion.”” Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997) (quoting Andrews
18 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)); see also Biestek v. Berryhill, ___ U.S.
19 ___, ___, 139 S. Ct. 1148, 1154, 203 L. Ed. 2d 504 (2019). The court must consider
20 the entire record, including the evidence that supports and detracts from the
21 Commissioner's conclusions. Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d
22 573, 576 (9th Cir. 1988). If the evidence supports more than one rational interpretation,
23 the court must uphold the ALJ's decision. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir.
24 2005); Ford v. Saul, 950 F.3d 1141, 1154 (9th Cir. 2020). The district court may affirm,
25 modify, or reverse the Commissioner's decision. 42 U.S.C.A. § 405(g). The matter may
26 also be remanded to the Social Security Administration for further proceedings. Id.

1 To qualify for disability benefits under the Social Security Act, a claimant must
2 show two things: (1) The applicant suffers from a medically determinable impairment
3 that can be expected to result in death or that has lasted or can be expected to last for a
4 continuous period of twelve months or more, and (2) the impairment renders the
5 applicant incapable of performing the work that he or she previously performed or any
6 other substantially gainful employment that exists in the national economy. See 42
7 U.S.C.A. § 423(d)(1)(A), (2)(A) (West 2011). An applicant must meet both requirements
8 to be classified as “disabled.” Id. The applicant bears the burden of proving he or she
9 was either permanently disabled or subject to a condition which became so severe as to
10 disable the applicant prior to the date upon which his or her disability insured status
11 expired. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995).

12 The Commissioner makes this assessment by employing a five-step analysis
13 outlined in 20 C.F.R. §§ 404.1520 and 416.920. See also Tackett v. Apfel, 180 F.3d
14 1094, 1098-99 (9th Cir. 1999) (describing five steps). First, the Commissioner
15 determines whether a claimant is engaged in “substantial gainful activity.” If so, the
16 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b) (2019). Second, the
17 Commissioner determines whether the claimant has a “severe impairment or combination
18 of impairments” that significantly limits the claimant's physical or mental ability to do
19 basic work activities. If not, the claimant is not disabled. Id. §§ 404.1520(c), 416.920(c).
20 Third, the medical evidence of the claimant's impairment is compared to a list of
21 impairments that are presumed severe enough to preclude work; if the claimant's
22 impairment meets or equals one of the listed impairments, benefits are awarded. Id. §§
23 404.1520(d), 416.920(d). If not, the claimant’s residual functional capacity is assessed
24 and the evaluation proceeds to step four. Id. §§ 404.1520(e), 416.920(e). Fourth, the
25 Commissioner determines whether the claimant can do his or her past relevant work. If
26 the claimant can do their past work, benefits are denied. Id. §§ 404.1520(f), 416.920(f).

1 If the claimant cannot perform his or her past relevant work, the burden shifts to the
2 Commissioner. In step five, the Commissioner must establish that the claimant can
3 perform other work. Id. §§ 404.1520(g)(1), 416.920(g)(1). If the Commissioner meets
4 this burden and proves that the claimant is able to perform other work that exists in the
5 national economy, benefits are denied. Id. §§ 404.1520(g)(1), 416.920(g)(1).

6 III. DISCUSSION

7 In his decision, ALJ Verne employed the five-step sequential analysis set forth in
8 20 C.F.R. §§ 404.1520 and 416.920. The ALJ determined that Plaintiff had not engaged
9 in substantial gainful activity since February 28, 2013, the alleged onset date (step one).
10 (Admin. R. 18, ECF No. 16.) He concluded that Patricia R. had severe
11 impairments—asthma, osteoarthritis, and depression/anxiety (step two). (Id.) The ALJ
12 stated that Plaintiff did not have an impairment or combination of impairments that met
13 or medically equaled a listed impairment (step three). (Id. at 19-20.) He then found that
14 Patricia R. retained the residual functional capacity to perform medium work subject to
15 additional specified limitations. (Id. at 20.) ALJ Verne next determined that Plaintiff
16 was unable to perform her past relevant work (step four). (Id. at 25-26.) The ALJ
17 concluded that Plaintiff was capable of performing the requirements of the representative
18 unskilled medium occupations of checker/weigher, hand packager, and stubber/general
19 office clerk as well as the unskilled light occupations of inspector, information clerk, and
20 subassembler (step five). (Id. at 26-27.) The ALJ accordingly found that Patricia R. had
21 not been under a disability from February 28, 2013, through the date of his decision. (Id.
22 at 27.)

23 Plaintiff makes three arguments: (1) the ALJ committed error in his evaluation of
24 the opinions of the state agency physicians, (see Pl.'s Mot. Attach. #1 Mem. P. & A. 4-7,
25 ECF No. 21); (2) the ALJ failed to articulate clear and convincing reasons for rejecting
26 her subjective symptom testimony, (id. at 7-11); and (3) the Commissioner's decision
27
28

1 rests on an unconstitutional delegation of authority, (id. at 12-15). Plaintiff’s second
2 argument is addressed first because as will be discussed further below, the Court find that
3 it presents a basis for remand, whereas Plaintiff’s first and third arguments do not.

4 **A. ALJ’s Evaluation of Plaintiff’s Subjective Symptom Testimony**

5 Patricia R. contends that the ALJ failed to articulate clear and convincing reasons
6 to reject her symptom testimony. (Id. at 7-11.) At the administrative hearing, Plaintiff
7 testified that her arthritis prevents her from working. (Admin. R. 174, ECF No. 16.) She
8 was hospitalized once for observation after an asthma attack. (Id. at 175.) She has been
9 prescribed a nebulizer, inhalers, and a spirometer for her asthma. (Id. at 175-76, 178.)
10 Her asthma is exacerbated by smoke, pet dander, and smog, and anytime she catches a
11 cold, “it goes into bronchitis and it goes into asthma.” (Id. at 178-79.) When she has an
12 asthma attack, her chest tightens, she coughs and sneezes, and she has difficulty breathing
13 without an inhaler. (Id. at 179.) She experienced a severe exacerbation of her asthma in
14 August 2019 when a cold progressed to pneumonia. (Id. at 179-80.) She was prescribed
15 medications, including Prednisone, and it took a month, including weeks of bed rest, to
16 fully recover. (Id. at 180.) When she experiences an attack, she typically “self-treats” at
17 home with medication and goes to the emergency room if she is still not able to breathe
18 well following her home treatments. (Id. at 181.) About two months prior to her August
19 2019 attack, she went to the emergency room for bronchitis and was prescribed rest and
20 antibiotics. (Id.) That recovery required twelve days of rest. (Id. at 181-82.) A few
21 times a month, when she feels her asthma coming on, she does a one-hour breathing
22 treatment in the morning. (Id. at 182.) Her attacks often occur at night when she starts
23 coughing and is unable to sleep. (Id.) She generally does not feel well immediately
24 following a breathing treatment; it can take a couple of days or longer before she feels
25 better. (Id. at 183.) She believes she went to the emergency room for her asthma attacks
26 four or five times in 2019, as well as in 2018. (Id. at 184.) Her asthma has gotten worse
27
28

1 over the last five years. (Id. at 184-85.) She last worked in 2013 and believes she was let
2 go from her last job because of her frequent absences due to asthma. (Id. at 185, 190.)

3 An ALJ engages in a two-step analysis to determine the extent to which a
4 claimant's report of symptoms must be credited. First, the ALJ must decide whether the
5 claimant has presented objective medical evidence of an underlying impairment which
6 could reasonably be expected to produce the pain or other symptoms alleged. Garrison,
7 759 F.3d at 1014); see also SSR 16-3P, 2017 WL 5180304, at *3 (Oct. 25, 2017); 20
8 C.F.R. §§ 404.1529(b), 416.929(b) (2019). Second, the ALJ evaluates the intensity and
9 persistence of the claimant's symptoms to determine the extent to which they limit the
10 ability to perform work-related activities. SSR 16-3P, 2017 WL 5180304, at *3; 20
11 C.F.R. §§ 404.1529(c), 416.929(c). When the ALJ finds that a claimant is not
12 malingering, "the ALJ can reject the claimant's testimony about the severity of her
13 symptoms only by offering specific, clear and convincing reasons for doing so."
14 Garrison, 759 F.3d at 1014-15; see also Lambert v. Saul, 980 F.3d 1266, 1277 (9th Cir.
15 2020).⁵ This requires the ALJ to "specifically identify the testimony [from a claimant]
16 she or he finds not to be credible and . . . explain what evidence undermines that
17 testimony." Lambert, 980 F.3d at 1277 (citing Treichler v. Comm'r Soc. Sec. Admin.,
18 775 F.3d 1090, 1102 (9th Cir. 2014)).

19 In this case, ALJ Verne determined that Patricia R. satisfied step one of the two-
20 step analysis. (Admin. R. 21, ECF No. 16.) At the second step, the ALJ stated that
21 "[Plaintiff's] statements concerning the intensity, persistence and limiting effects of these
22 symptoms are not entirely consistent with the medical evidence and other evidence in the
23 record." (Id.) This language, which is routinely included in ALJ decisions denying
24

25
26 ⁵ The Commissioner contends that the "clear and convincing" standard is inconsistent with the
27 deferential "substantial evidence" standard set forth in 42 U.S.C. § 405(g) but acknowledges that Ninth
28 Circuit precedent requires its application. (Def.'s Opp'n 5 n.2, ECF No. 16.)

1 benefits, is insufficient in and of itself to meet the requirements set forth in Ninth Circuit
2 authority to reject a plaintiff's pain testimony because it does not "identify what parts of
3 the claimant's testimony were not credible and why." See Lambert, 980 F.3d at 1277;
4 Treichler, 775 F.3d at 1103. After making this boilerplate statement, ALJs typically
5 identify the parts of the claimant's testimony that were not credible and explain the
6 reasons for their finding. Treichler, 775 F.3d at 1103. Here, the ALJ devoted eleven
7 paragraphs to detailing the clinical findings in the record that he believed did not support
8 Patricia R.'s testimony, including eight paragraphs with references to Plaintiff's asthma
9 condition. (Admin. R. 21-23, ECF No. 16.) But "providing a summary of medical
10 evidence . . . is not the same as providing clear and convincing reasons for finding the
11 claimant's symptom testimony not credible." Brown-Hunter v. Colvin, 806 F.3d 487,
12 494 (9th Cir. 2015); see also Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) ("[A]
13 reviewing court should not be forced to speculate as to the grounds for an [ALJ's]
14 rejection of a claimant's [symptom] allegations[.]" The ALJ thus committed legal error
15 by failing to specifically identify which part of Plaintiff's testimony about the severity of
16 her symptoms he found not credible and link that testimony to evidence that contradicted
17 Plaintiff's testimony.

18 Moreover, even if the clinical findings cited by the ALJ in his summary of the
19 medical evidence could be construed as his reasons for finding Plaintiff not credible, they
20 do not constitute clear and convincing reasons to reject Plaintiff's testimony regarding
21 her asthma. For example, ALJ Verne first observed that on October 22, 2014, Patricia
22 R.'s treating physician, Dr. Andrelita Barrera of Kaiser Permanente, "found normal
23 pulmonary/chest effort and normal [] breath sounds and found no wheezes, no rales in her
24 lungs[.]" (Admin. R. 22, ECF No. 16, citing id. at 502.) The ALJ ignores, however, that
25 the primary reasons for Plaintiff's doctor visit were her arthritis and triglycerides, not her
26 asthma. (Id. at 501.) While the ALJ is correct that Dr. Barrera reported during this visit
27
28

1 that Plaintiff's asthma was intermittent and "controlled," he does not provide any
2 explanation as to how this was inconsistent with Plaintiff's testimony. (Id. at 22.)
3 Similarly, the primary reasons for Patricia R.'s office visit on July 13, 2015, during which
4 the ALJ noted that Dr. Barrera found no pulmonary issues of concern, (see id.), were her
5 arthritis and a pulled muscle in her chest, not her asthma. (Id. at 495.)

6 The ALJ next refers to Plaintiff's February 9, 2016 visit to Kaiser Permanente,
7 during which she presented with an acute exacerbation of her asthma, and notes that the
8 physician "found normal respiratory effort in the claimant's lungs with no retractions,
9 wheezes end expiration[.]" (Id. at 22, citing id. at 488.) Wheezing during expiration
10 indicates narrowed airways and is a common symptom of and finding for asthma. See
11 Merck Manual, [https://www.merckmanuals.com/professional/pulmonary-](https://www.merckmanuals.com/professional/pulmonary-disorders/symptoms-of-pulmonary-disorders/wheezing)
12 [disorders/symptoms-of-pulmonary-disorders/wheezing](https://www.merckmanuals.com/professional/pulmonary-disorders/symptoms-of-pulmonary-disorders/wheezing) (last visited June 29, 2022). The
13 ALJ did not provide any explanation for why he believed this treatment note undermined
14 Plaintiff's report of symptoms, and the Court is unable to discern any logical reason. In
15 the next paragraph, ALJ Verne observes that on October 3, 2016, Plaintiff told Dr.
16 Michael Shatz of Kaiser Permanente that she did not have many symptoms between her
17 asthma episodes, and her examination showed no respiratory issues. (Admin R. 22, ECF
18 No. 16, citing id. at 479.) This visit took place following, not during, an exacerbation of
19 Patricia R.'s asthma and thus is not inconsistent with her testimony. (See id. at 479
20 ("Getting over an exacerbation now (just finished prednisone)".) Additionally, although
21 the ALJ refers to Plaintiff's November 2017 medical record as reflecting a visit to the
22 emergency department, (see id. at 22), this is not accurate. Rather, this visit was to
23 Kaiser Permanente's outpatient clinic in Otay Mesa, and Plaintiff reported that she had
24 experienced a bad asthma flare two weeks before while in Mexico. (Id. at 466.) Plaintiff
25 was provided with medical advice on how to manage her asthma with a maintenance
26 steroid inhaler, Singulair, and a "rescue" albuterol inhaler. (Id. at 467.) Again, it is not at
27
28

1 all clear how the treatment notes from this visit undermine Plaintiff’s testimony, and the
2 ALJ has offered no explanation permitting the Court to discern his path of thinking for
3 purposes of review. See Brown-Hunter, 806 F.3d at 494-95 (finding reversible error
4 “when we cannot discern the agency's path because the ALJ made only a general
5 credibility finding without providing any reviewable reasons why she found Brown–
6 Hunter's testimony to be not credible.”).

7 Furthermore, the record is replete with objective clinical findings substantiating
8 Plaintiff’s asthma condition, some of which were acknowledged by the ALJ, and some of
9 which were not. As set forth above, on February 9, 2016, Plaintiff’s doctor noted that
10 Patricia R. was wheezing on her physical exam. (Admin. R. 488, ECF No. 16 (“wheezes
11 end expiration”).) On April 6, 2016, Dr. Raymond Poliakoff observed that Plaintiff gave
12 normal effort on her pulmonary exam and demonstrated wheezing but no rales. (Id. at
13 484.) On January 11, 2017, Patricia R. saw Dr. Richard Garris because of an
14 exacerbation of her asthma and reported that she had been using her inhaler at home for
15 the past week without relief. (Id. at 476.) Dr. Garris observed “scattered wheezes” in her
16 lungs. (Id. at 477.) On February 28, 2018, Plaintiff was treated by Dr. Jorge Mata for
17 shortness of breath, wheezing, coughing, and lack of sleep due to needing to sit up to
18 breathe. (Id. at 578.) Plaintiff’s objective findings included wheezing upon inspiration
19 and crackles, or rales. (Id. at 579.) Two weeks later, on March 10, 2018, she went to
20 urgent care because although her symptoms initially got better after seeing Dr. Mata, they
21 had returned. (Id. at 601.) Upon physical exam, Plaintiff’s lungs demonstrated
22 “scattered wheeze and rhonchi bilateral.” (Id. at 602.)⁶ Wheezes were again heard in
23 Plaintiff’s lungs during an urgent care visit on April 14, 2018, and emergency room visit
24

25
26 ⁶ Rhonchi are low-pitched abnormal breath sounds heard through a stethoscope that occur when air tries
27 to pass through bronchial tubes that contain fluid or mucus. See Healthline.com,
28 <https://www.healthline.com/health/breath-sounds#types> (last visited June 29, 2022).

1 on May 12, 2018. (Id. at 627, 668.) The emergency room physician observed that
2 Plaintiff’s “peak flow was around 250[,] barely increased to 620 after 2nd treatment[,]”
3 and her “predicted value was around 430 for her age and height.” (Id. at 668.) On
4 August 28, 2019, Patricia R.’s complaint of upper respiratory symptoms at urgent care
5 was supported by physical exam findings of diffuse wheezing and left lower lobe rales.
6 (Id. at 1084-85.)

7 In sum, for the foregoing reasons, the ALJ committed legal error by failing to
8 provide specific, clear, and convincing reasons to reject the Plaintiff’s testimony about
9 the severity of her symptoms.

10 **B. ALJ’s Evaluation of Opinions of State Agency Physicians**

11 Plaintiff argues that ALJ Verne failed to properly evaluate the opinions of the state
12 agency physicians concerning her asthma restrictions. (Pl.’s Mot. Attach. #1 Mem. P. &
13 A. 4-7, ECF No. 21.) Two state agency physicians provided medical opinions regarding
14 the limitations relating to Patricia R.’s asthma. The first, R. Masters, M.D., rated
15 Plaintiff’s environmental limitations on April 12, 2018, and opined that Plaintiff should
16 “[a]void even moderate exposure” to “[f]umes, odors, dusts, gases, poor ventilation, etc.”
17 (Admin. R. at 214-15, ECF No. 16 [emphasis added].) The second, C. Eskander, M.D.,
18 provided, on August 15, 2018, the same ratings as Dr. Masters regarding Patricia R.’s
19 environmental limitations, but found that Plaintiff should “[a]void concentrated
20 exposure” to “[f]umes, odors, dusts, gases, poor ventilation, etc.” (Id. at 249-50
21 [emphasis added].) In his decision, the ALJ found these doctors’ opinions to be
22 persuasive. (Id. at 25; see also 20 C.F.R. §§ 404.1520c(a), 416.920c (requiring ALJ to
23 evaluate medical opinions and prior administrative medical findings by assessing their
24 “persuasiveness”).) Nonetheless, in his formulation of Plaintiff’s residual functional
25 capacity, the ALJ seemingly ignored Dr. Masters’s opinion that Patricia R. should avoid
26 “even moderate exposure” to pulmonary irritants and determined that Plaintiff should
27

1 “avoid concentrated exposure to extreme cold, wetness, vibration, fumes, dust, gasses,
2 odors, poor ventilation and other pulmonary irritants, including molds, pollens, smoke
3 and other lung irritants[.]” (Id. at 23-24 [emphasis added].) Similarly, the hypothetical
4 question posed by the ALJ to the vocational expert at the administrative hearing
5 described an individual who should “avoid concentrated exposure to extreme cold,
6 wetness, vibration, fumes, dust, gasses, poor ventilation and other pulmonary irritants,
7 including smoke, cat dander.” (Id. at 192-93 [emphasis added].) Nowhere in his decision
8 does the ALJ account for the discrepancy between Dr. Masters’s opinion that Plaintiff
9 avoid moderate exposure to pulmonary irritants and Dr. Eskander’s opinion that she
10 avoid concentrated exposure to such conditions.

11 Patricia R. argues that the ALJ’s misreading of Dr. Masters’s opinion resulted in a
12 failure to properly consider the opinion. (Pl.’s Mot. Attach. #1 Mem. P. & A. 5, ECF No.
13 21.) Relying on Social Security Ruling 85-15, she contends that the “difference between
14 concentrated exposure and even moderate exposure to pulmonary irritants is
15 significant[.]” (Id., citing SSR 85-15, 1985 WL 56857 (Jan. 1, 1985), at *8.) She further
16 asserts that the vocational expert’s testimony has no evidentiary value because the expert
17 did not contemplate a preclusion against even moderate exposure to pulmonary irritants.
18 (Id. at 7.) Defendant Commissioner maintains that any error in the ALJ’s evaluation of
19 the state agency physicians’ opinions was harmless because “no atmospheric conditions
20 exist” for the representative occupations identified by the ALJ at step five in his decision.
21 (Def.’s Opp’n 8-9, ECF No. 25.)

22 To ascertain the requirements of occupations as generally performed in the national
23 economy at step five, the ALJ may rely on vocational expert testimony or information
24 from the Dictionary of Occupational Titles (“DOT”). Pinto v. Massanari, 249 F.3d 840,
25 845-46 (9th Cir. 2001); see also SSR 00-4P, 2000 WL 1898704, at *2 (Dec. 4, 2000)
26 (providing that at steps four and five, the Social Security Administration relies “primarily
27
28

1 on the DOT (including its companion publication, the [Selected Characteristics of
2 Occupations Defined in the Revised Dictionary of Occupational Titles (SCO)]) for
3 information about the requirements of work in the national economy[]). Each job listed
4 in the DOT categorizes the job’s exposure to “atmospheric conditions,” defined in the
5 SCO as “[e]xposure to such conditions as fumes, noxious odors, dusts, mists, gases, and
6 poor ventilation, that affect the respiratory system, eyes, or the skin” as “not present,”
7 meaning the conditions do not exist; “occasionally,” meaning the conditions exist up to
8 one-third of the time; “frequently,” meaning the conditions exist one-third to two-thirds
9 of the time; and “constantly,” meaning the conditions exist two-thirds or more of the
10 time. SCODICOT, app. D (1993).

11 The Commissioner argues that Plaintiff’s distinction between “concentrated
12 exposure” and “moderate exposure” to pulmonary irritants is irrelevant because
13 according to the DOT, four of the six representative occupations identified by the ALJ as
14 jobs that Plaintiff could perform (checker, stubber, inspector, and subassembler) require
15 no exposure to any atmospheric conditions. (Def.’s Opp’n 10, ECF No. 25.)⁷ As
16 observed by Defendant, the DOT specifically states that “atmospheric conditions” are
17 “not present” and “condition does not exist” in the checker/weigher job, DICOT 369.687-
18 014, 1991 WL 673071; the stubber/general office clerk job, DICOT 222.687-034, 1991
19 WL 672136; the inspector job, DICOT 559.687-074, 1991 WL 683797; and the
20

21
22 ⁷ Defendant excludes the occupation of information clerk because it requires a reasoning level of 4
23 which potentially conflicts with Plaintiff’s residual functional capacity, which limits her to performing
24 “simple repetitive tasks.” (Def.’s Opp’n 10 n.2, ECF No. 25; see also Admin. R. 20, ECF No. 16.)
25 Reasoning level 4 requires the ability to “[a]pply principles of rational systems to solve practical
26 problems and deal with a variety of concrete variables in situations where only limited standardization
27 exists. Interpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form.”
28 DOT, App. C, 1991 WL 688702. The Commissioner also excludes the hand packager (also referred to
as bag loader) job because it “frequently” requires exposure to atmospheric conditions. See DICOT
737.687-104, 1991 WL 680044.

1 subassembler job, DICOT 729.684-054, 1991 WL 679729. Thus, Plaintiff's argument
2 fails because the DOT's description of the four jobs identified above are not inconsistent
3 with Dr. Masters's opinion that Plaintiff should avoid even moderate exposure to
4 pulmonary irritants.

5 Notwithstanding the lack of atmospheric conditions in four of the jobs identified
6 by the ALJ, Plaintiff contends that the DOT is not reliable because it "does not provide a
7 comprehensive classification of all work categories." (Pl.'s Reply 4, ECF No. 28.) She
8 refers to an excerpt from The Revised Handbook for Analyzing Jobs, originally published
9 by the U.S. Department of Labor in 1991, to support her argument that the DOT has a
10 "gap" in its atmospheric conditions classifications because The Revised Handbook
11 classifies degrees of exposure to pulmonary irritants in a manner that the DOT does not.
12 (Id. at 5-6.) Plaintiff refers to two occupations, air analyst and dust mixer, to persuade
13 the Court that the DOT's "atmospheric conditions" classifications are unreliable. (Id.)
14 Specifically, she contends that air analysts and dust mixers are exposed to pulmonary
15 irritants even though the atmospheric conditions classification in the DOT for each of
16 these occupations is "not present." (Id.) While this is an interesting argument, it is
17 irrelevant to the case at hand because the ALJ did not identify these occupations as jobs
18 that Plaintiff can perform. Moreover, the Court notes that at least one district court has
19 previously rejected this same argument. See Williams v. Colvin, Case No. CV 15-01743-
20 RAO, 2015 WL 7740412, at *6 (C.D. Cal. Nov. 30, 2015) (declining to find, contrary to
21 the DOT, that air analysts and dust mixers are necessarily exposed to pulmonary
22 irritants).

23 The ALJ's error in reading Dr. Masters's opinion and failure to address or
24 incorporate the doctor's finding that Plaintiff should avoid even moderate exposure to
25 pulmonary irritants was harmless because the ALJ sufficiently identified other work in
26 the national economy that Plaintiff could perform that did not require exposure to any
27
28

1 atmospheric conditions. See Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
2 (defining harmless error as such error that is “inconsequential to the ultimate
3 nondisability determination”). Accordingly, the ALJ’s evaluation of the state agency
4 physicians’ opinions does not constitute a basis for remand.

5 **C. Unconstitutional Delegation of Authority Argument**

6 Although the Court finds that remand is appropriate, the Court will briefly address
7 Plaintiff’s constitutionality argument.

8 Plaintiff contends that the appointment of Commissioner of Social Security
9 Andrew Saul was unconstitutional because he could not be removed by the President
10 without cause, therefore rendering the ALJ’s decision, which was issued during
11 Commissioner Saul’s tenure, defective. (Pl.’s Mot. Attach. #1 Mem. P. & A. 12-14, ECF
12 No. 21.) The Ninth Circuit’s recent opinion in Kaufmann v. Kijakazi, 32 F.4th 843 (9th
13 Cir. 2022), decided after the briefs in this case were filed, is dispositive of this issue. In
14 Kaufmann, the Ninth Circuit held that the removal provision in the statute governing the
15 President’s removal authority over the Commissioner of Social Security, 42 U.S.C. §
16 902(a)(3), was unconstitutional and severable. Id. at 848. In deciding the appropriate
17 remedy for the plaintiff, whose appeal to the Appeals Council was denied while former
18 Commissioner Saul was serving under the unconstitutional removal statute, the court
19 stated that “[a] party challenging an agency’s past actions must [] show how the
20 unconstitutional removal provision actually harmed the party[.]” Id. at 849. Here, as in
21 Kaufmann, Plaintiff has not presented any evidence or articulated a plausible theory to
22 show that the removal provision caused her any harm. See id. at 849-50. Therefore, “the
23 unconstitutional provision has no effect on [her] case.” See id. at 850.

24 **D. Remedy**

25 Plaintiff argues that the proper remedy in this case is remand for the payment of
26 benefits or, in the alternative, remand for further proceedings. (Pl.’s Mot. Attach. #1
27
28

1 Mem. P. & A. 15-16, ECF No. 21.) The Commissioner contends that the case should be
2 remanded for further administrative proceedings if the Court finds any grounds for
3 overturning the agency's decision. (Def.'s Opp'n 29-30, ECF No. 25.) The decision
4 whether to remand for further proceedings or for immediate payment of benefits is within
5 the discretion of the court. 42 U.S.C. § 405(g); Treichler, 775 F.3d at 1099. A remand
6 for an immediate award of benefits is appropriate only in rare circumstances. See
7 Brown-Hunter, 806 F.3d at 495. "If additional proceedings can remedy defects in the
8 original administrative proceedings, a social security case should be remanded." Lewin
9 v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Here, although the Court finds that the
10 ALJ committed legal error in his evaluation of Plaintiff's subjective symptom testimony,
11 the Court is not satisfied that further administrative proceedings would serve no useful
12 purpose. Accordingly, remand is appropriate for further consideration of this issue.


13 IV. CONCLUSION

14 For the reasons set forth above, Plaintiff's Motion for Summary Judgment is
15 **GRANTED**; Defendant's Cross-Motion for Summary Judgment is **DENIED**; and the
16 case is **REMANDED** for further proceedings.

17 This Order concludes the litigation in this matter. The Clerk shall close the file.

18 **IT IS SO ORDERED.**

19 Dated: July 12, 2022

20 
21 Hon. Ruben B. Brooks
22 United States Magistrate Judge
23
24
25
26
27
28