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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHERRI LASHAWN K.,

Plaintiff,

v.

KILOLO KIJAKAZI,¹ *Acting
Commissioner of Social Security*,

Defendant.

Case No.: 20cv1916-W-MDD

**REPORT AND
RECOMMENDATION ON CROSS
MOTIONS FOR SUMMARY
JUDGMENT**

[ECF Nos. 15, 16]

This Report and Recommendation is submitted to United States District Judge Thomas J. Whelan pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

Sherri Lashawn K. (“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” or

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021 and is therefore substituted for Andrew M. Saul as Defendant. See 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d).

1 “Defendant”) denying Plaintiff’s application for a period of disability and
2 disability insurance benefits under Title II of the Social Security Act (“Act”).
3 (AR at 18, 292-99).² For the reasons expressed herein, the Court
4 **RECOMMENDS** Plaintiff’s motion for summary judgment be **GRANTED**,
5 Defendant’s motion for summary judgment be **DENIED**, and the case be
6 **REMANDED** for further administrative proceedings.

7 **I. BACKGROUND**

8 Plaintiff was born on June 27, 1968. (AR at 29). At the time of
9 Plaintiff’s alleged disability onset date of May 25, 2015, Plaintiff was 46 years
10 old which categorized her as a younger person. 20 C.F.R. § 404.1563. (AR at
11 18, 29). At the time of the ALJ’s decision on March 2, 2020, Plaintiff’s age
12 category changed to a person closely approaching advanced age. (AR at 29).

13 **A. Procedural History**

14 On October 13, 2015, Plaintiff protectively filed an application for a
15 period of disability and disability insurance benefits under Title II of the Act,
16 alleging a disability beginning on May 25, 2015. (AR at 18). After her
17 application was denied initially and upon reconsideration, Plaintiff requested
18 a hearing before an administrative law judge (“ALJ”). An administrative
19 hearing was held on December 8, 2017. (AR at 42-64). Plaintiff appeared
20 and was represented by her attorney. (*Id.*). Testimony was taken from
21 Plaintiff and Gloria Lasoff, a vocational expert (“VE”). (*Id.*). On March 16,
22 2018, the administrative law judge (“ALJ”) issued an unfavorable decision.
23 (AR at 18). Plaintiff appealed that decision. (*Id.*). On June 19, 2019, the
24 Appeals Council vacated the hearing decision and remanded the case for
25 further consideration. (*Id.*).

26
27 ² “AR” refers to the Certified Administrative Record filed on April 13, 2020. (ECF No. 11).

1 A second administrative hearing was held on December 16, 2019. (AR
2 at 65-85). Plaintiff appeared and was represented by an attorney, Tim
3 Carpenter. (*Id.*). Testimony was taken from Plaintiff and VE Katie Macy-
4 Powers. (*Id.*). On March 2, 2020, the ALJ issued a decision denying
5 Plaintiff's claim for a period of disability and disability insurance benefits.
6 (AR at 18-31). On March 10, 2020, Plaintiff sought review with the Appeals
7 Council. (AR at 290). On July 3, 2020, the Appeals Council denied Plaintiff's
8 request for review and declared the ALJ's decision to be the final decision of
9 the Commissioner in Plaintiff's case. (AR at 1). This timely civil action
10 followed.

11 II. DISCUSSION

12 A. Legal Standard

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

19 Substantial evidence “is a ‘term of art’ used throughout administrative
20 law to describe how courts are to review agency factfinding.” *Biestek v.*
21 *Berryhill*, 139 S. Ct. 1148, 1154 (2019). Courts look “to an existing
22 administrative record and ask[] whether it contains ‘sufficien[t] evidence’ to
23 support the agency’s factual determinations.” *Id.* “[T]he threshold for such
24 evidentiary sufficiency is not high. Substantial evidence, [the Supreme
25 Court] has said, is ‘more than a mere scintilla.’ It means—and only means—
26 ‘such relevant evidence as a reasonable mind might accept as adequate to
27 support a conclusion.” *Id.* The Ninth Circuit explains that substantial

1 evidence is “more than a mere scintilla but may be less than a
2 preponderance.” *Molina v. Astrue*, 674 F.3d 1104, 1110-11 (9th Cir. 2012)
3 (quotation marks and citations omitted), *superseded by regulation on other*
4 *grounds*.

5 An ALJ’s decision is reversed only if it “was not supported by
6 substantial evidence in the record as a whole or if the ALJ applied the wrong
7 legal standard.” *Id.* “To determine whether substantial evidence supports
8 the ALJ’s determination, [the Court] must assess the entire record, weighing
9 the evidence both supporting and detracting from the agency’s conclusion.”
10 *Ahearn v. Saul*, 988 F.3d 1111, 1115 (9th Cir. 2021) (citing *Mayer v.*
11 *Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The Court “may not reweigh
12 the evidence or substitute [it’s] judgment for that of the ALJ.” *Id.* “The ALJ
13 is responsible for determining credibility, resolving conflicts in medical
14 testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,
15 1039 (9th Cir. 1995). “When the evidence can rationally be interpreted in
16 more than one way, the court must uphold the [ALJ’s] decision.” *Mayer*, 276
17 F.3d at 459.

18 Section 405(g) permits a court to enter a judgment affirming, modifying
19 or reversing the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing
20 court may also remand the matter to the Social Security Administration for
21 further proceedings. *Id.*

22 **B. Summary of the ALJ’s Findings**

23 In rendering his decision, the ALJ followed the Commissioner’s five-step
24 sequential evaluation process. *See* C.F.R. § 404.1520. At step one, the ALJ
25 found that Plaintiff had not engaged in substantial gainful activity since May
26 25, 2015. (AR at 20).

27 At step two, the ALJ found that Plaintiff had the following severe

1 impairments: history of coronary artery disease, chondromalacia of the left
2 knee, adhesive capsulitis of the left shoulder, and obesity. (*Id.*).

3 At step three, the ALJ found that Plaintiff did not have an impairment
4 or combination of impairments that met or medically equaled one of the
5 impairments listed in the Commissioner's Listing of Impairments. (AR at 23)
6 (citing 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d),
7 404.1525 and 404.1526)).

8 Next, after considering the entire record, the ALJ determined that
9 Plaintiff had the residual functional capacity ("RFC") to perform light work
10 with the following limitations:

11 the claimant can lift and carry no more than 20 pounds with
12 frequent lifting or carrying of objects weighing up to ten pounds.
13 The claimant can sit for six hours in an eight-hour workday and
14 stand or walk for six hours in an eight-hour workday. The claimant
15 can occasionally balance, stoop, kneel, crouch, crawl, and climb
16 ramps and stairs, but should never climb ladders, ropes or scaffolds.
17 The claimant can occasionally perform overhead reaching using her
left upper extremity (she is right hand dominant). The claimant
should also avoid concentrated exposure to extreme cold and heat,
unprotected heights, and moving and dangerous machinery.

18 (AR at 25).

19 The ALJ said that his RFC assessment was based on all the evidence
20 and the extent to which Plaintiff's symptoms can reasonably be accepted as
21 consistent with the objective medical evidence and other evidence. (*Id.*). The
22 ALJ also stated that he considered the opinion evidence in accordance with
23 the requirements of 20 C.F.R. 404.1527. (*Id.*).

24 The ALJ then proceeded to step four of the sequential evaluation
25 process. He found Plaintiff was unable to perform her past relevant work.
26 (AR at 29). For the purposes of his step five determination, the ALJ accepted
27 the testimony of VE Gloria Lasoff. The ALJ determined that Plaintiff could

1 perform jobs identified by the VE which exist in significant numbers in the
2 national economy. For example, cashier II (DOT 211.462-010), housekeeper
3 cleaner (DOT 323.687-014), and small products assembler (DOT 706.684-
4 022). (AR at 30).

5 **C. Issue in Dispute**

6 The sole issue in dispute in this case is whether the ALJ's RFC
7 determination is supported by substantial evidence. (ECF No. 15 at 18).
8 Plaintiff argues the ALJ's RFC determination is not supported by medical
9 opinion evidence and the ALJ failed to fully and fairly develop the record by
10 not obtaining such evidence. (*Id.* at 17-24). In making this argument,
11 Plaintiff also highlights two factual issues raised by the ALJ's
12 "interpretation" of the medical record. First, she contends that the ALJ
13 errantly discredited her subjective complaints because she did not have
14 surgery. (*Id.* at 22-23). Second, Plaintiff argues the ALJ misinterpreted the
15 medical record to find that she could lift her left arm overhead occasionally.
16 (*Id.* at 21). The Court addresses each sub-argument in turn.

17 **1. Medical Opinion Evidence and Duty to Fully and Fairly** 18 **Develop the Record**

19 There are only two medical source opinions from 2015 and 2016, despite
20 additional medical records detailing Plaintiff's impairments and treatments
21 up to 2019. (AR at 28). Both are non-examining state agency medical
22 consultant opinions. (*Id.*). The ALJ accorded these opinions "little weight"
23 because "the record is more consistent with limiting the claimant to
24 performing light exertional work" and because the "consultants did not
25 examine the claimant or review the record available at the hearing level
26 when they formed these opinions." (*Id.*). Plaintiff contends the ALJ should
27 have solicited a more recent medical source opinion instead of relying on his

1 own “lay interpretation of the evidence.” (ECF No. 15 at 18).

2 The ALJ has a special duty to fully and fairly develop the record and to
3 assure that the claimant’s interests are considered. *Garcia v. Comm’r of Soc.*
4 *Sec.*, 768 F.3d 925, 930 (9th Cir. 2014). However, it remains the claimant’s
5 duty to prove that she is disabled. *See Mayes v. Massanari*, 276 F.3d 453, 459
6 (9th Cir. 2001). An ALJ’s duty to develop the record further is triggered only
7 when there is ambiguous evidence or when the record is inadequate to allow
8 for proper evaluation of the evidence. *Id.* Plaintiff suggests the record is
9 ambiguous or inadequate because the only medical opinions pre-date other
10 medical evidence and the ALJ did not rely on them in formulating his RFC
11 determination. (ECF No. 15 at 17-24).

12 “The mere existence of medical records post-dating a state agency
13 physician’s review does not in and of itself trigger a duty to further develop
14 the record.” *Stivers v. Saul*, No. 1:19-cv-01110-BAM, 2021 U.S. Dist. LEXIS
15 61358, at *26 (E.D. Cal. Mar. 30, 2021). The record contains Plaintiff’s
16 complete treatment records from 2015 to 2019. The ALJ also left the record
17 open after the administrative hearing and only closed it upon receipt of a
18 letter from Plaintiff’s counsel indicating the record was complete. (AR at 17,
19 453). The ALJ was not obligated to further develop the record where
20 Plaintiff’s counsel affirmatively stated that the record was complete. *See*
21 *Stivers*, 2021 U.S. Dist. LEXIS 61358, at *26; *see also Findley v. Saul*, No.
22 1:18-cv-00341-BAM, 2019 U.S. Dist. LEXIS 147761, at *19 (E.D. Cal. Aug. 29,
23 2019) (rejecting argument that the ALJ erred by failing to obtain additional
24 medical opinions in response to new medical evidence and finding the record
25 was not ambiguous or inadequate where the plaintiff’s attorney stated the
26 record was complete).

27 Additionally, the ALJ did not err by failing to obtain additional medical

1 source opinions. It was Plaintiff's burden to supplement the record with
2 additional medical source opinions if she believed it supported her claim.
3 *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999); 20 C.F.R. § 404.1512(a)
4 ("In general, you have to prove to us that you are blind or disabled."). As
5 noted by Defendant, Plaintiff did not provide or request medical source
6 opinions before or after the administrative hearing, despite the record being
7 left open for additional evidence. (See ECF No. 16 at 5).

8 Nor did the Court err in evaluating medical evidence without the
9 benefit of new medical opinions interpreting it. Some courts have determined
10 that "an ALJ is 'simply not qualified to interpret raw medical data in
11 functional terms.'" *Padilla v. Astrue*, 541 F.Supp.2d 1102, 1106 (C.D. Cal.
12 2008) (quoting *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999)); see *Day v.*
13 *Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975) (citation omitted) (stating
14 that the ALJ, "who [was] not a qualified medical expert, should not have gone
15 outside the record to the medical textbooks for the purpose of making his own
16 exploration and assessment as to claimant's medical condition"). However,
17 the Court is unaware of any case where the Ninth Circuit has conclusively
18 held that an ALJ may not use or interpret the medical record in a disability
19 determination. "It is clear that it is the responsibility of the ALJ, not the
20 claimant's physician, to determine the [RFC]." *Vertigan v. Halter*, 260 F.3d
21 1044, 1049 (9th Cir., 2001). An ALJ must base their RFC finding "on all the
22 relevant evidence in [one's] case record," rather than a single medical opinion
23 or piece of evidence. 20 C.F.R. § 404.1545(a)(1). The ALJ is "responsible for
24 translating and incorporating clinical findings into a succinct RFC." *Rounds*
25 *v. Comm'r of Social Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015).
26 Accordingly, it was well within the ALJ's purview to evaluate medical
27 evidence without a medical source opinion interpreting it.

2. Factual Arguments

1
2 Plaintiff also argues the ALJ errantly discredited her testimony because
3 she did not have surgery on her knee or shoulder. (ECF No. 15 at 22). The
4 ALJ found that Plaintiff's "treatment history suggests she is not as limited as
5 she has alleged" because she did not receive "surgical intervention to treat
6 her knee or shoulder impairments, or her history of coronary artery disease
7 (since 2009)" and she does not "need[] any specific treatment aside from
8 managed medication." (AR at 28). Plaintiff does not challenge the ALJ's
9 finding that her impairments are managed by medication and physical
10 therapy. (See ECF No. 15 at 22). Rather, Plaintiff avers that the ALJ was
11 wrong to discredit her for failing to pursue surgery because that was not an
12 option for her. (ECF No. 15 at 23) (citing AR at 1295). As noted by
13 Defendant, the record cited by Plaintiff does not indicate that she could not
14 have surgery. (ECF No. 16 at 10). The treatment note explains that Plaintiff
15 is a "questionable surgical candidate," but that they could consider surgery.
16 (AR at 1295). Plaintiff chose to pursue physical therapy instead. (*Id.*). As
17 such, the ALJ did not errantly list lack of surgical intervention as a reason to
18 discredit Plaintiff's subjective symptoms testimony. Further, the ALJ was
19 permitted to discredit Plaintiff's subjective symptom testimony where her
20 impairments are managed by medication and physical therapy. See
21 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (finding a
22 claimant's failure to seek an aggressive treatment program a permissible
23 reason to discredit his subjective symptom testimony).

24 Finally, Plaintiff argues that the ALJ's decision to limit Plaintiff to
25 occasional overhead reaching with her left arm is not supported by
26 substantial evidence. (ECF No. 15 at 21-22). The ALJ found that Plaintiff
27 could "occasionally perform overhead reaching using her left upper

1 extremity.” (AR at 25). At the administrative hearing Plaintiff demonstrated
2 her range of motion in her left shoulder and acknowledged that she has a
3 problem with her left arm reaching overhead. (See AR at 57). As of April 25,
4 2019, Plaintiff’s left shoulder range of motion was limited to “[f]orward
5 flexion to 85,” or roughly to shoulder height. (AR at 605, 1653). This is
6 Plaintiff’s best range of motion in her left shoulder in the medical record.
7 (See AR at 599, 602, 608, 649, 701, 705, 710, 715, 720, 725, 730, 735, 740, 745,
8 752, 838, 1148, 1152, 1156, 1161, 1167, 1172, 1177, 1186, 1192, 1197, 1199,
9 1204, 1209, 1284, 1286, 1293, 1295, 1636, 1647, 1653). The ALJ
10 acknowledged Plaintiff’s restricted range of motion and cited to the record
11 indicating that Plaintiff can raise her arm to about shoulder height, but
12 concluded that Plaintiff could occasionally raise her left arm overhead. (AR
13 at 25, 605). In light of Plaintiff’s testimony and the objective medical record
14 illustrating Plaintiff’s restricted range of motion, the ALJ’s decision to limit
15 her to occasional overhead reaching with her left arm is not supported by
16 substantial evidence.

17 **3. Remand for Further Proceedings**

18 The law is well established that the decision whether to remand for
19 further proceedings or simply to award benefits is within the discretion of the
20 Court. See, e.g., *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990);
21 *McCallister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989); *Lewin v.*
22 *Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). Remand for further
23 proceedings is warranted where additional administrative proceedings could
24 remedy defects in the decision. See, e.g., *Kail v. Heckler*, 722 F.2d 1496, 1497
25 (9th Cir. 1984); *Lewin*, 654 F.2d at 635. When error exists in an
26 administrative determination, “the proper course, except in rare
27 circumstances, is to remand to the agency for additional investigation or

1 exploration.” *INS v. Ventura*, 537 U.S. 12, 16 (2002) (citations and quotation
2 marks omitted); *Moisa v. Barnhart*, 367 F.3d 882, 886 (9th Cir. 2004).
3 Accordingly, this case should be remanded for further administrative action
4 consistent with the findings presented herein.

5 **III. CONCLUSION**

6 Based on the foregoing, the Court **RECOMMENDS** that the District
7 Court **GRANT** Plaintiff’s motion for summary judgment, **DENY** Defendant’s
8 cross-motion for summary judgment, and **REMAND** this case for further
9 administrative action consistent with the findings presented herein. This
10 Report and Recommendation of the undersigned Magistrate Judge is
11 submitted to the United States District Judge assigned to this case, pursuant
12 to the provisions of 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the
13 United States District Court for the Southern District of California.

14 **IT IS HEREBY ORDERED** that any written objection to this report
15 must be filed with the court and served on all parties no later than
16 **September 24, 2021**. The document should be captioned “Objections to
17 Report and Recommendations.”

18 **IT IS FURTHER ORDERED** that any reply to the objections shall be
19 filed with the Court and served on all parties no later than **October 1, 2021**.
20 The parties are advised that failure to file objections within the specified time
21 may waive the right to raise those objections on appeal of the Court’s order.
22 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 **IT IS SO ORDERED.**

24 Dated: September 8, 2021



25 Hon. Mitchell D. Dembin
26 United States Magistrate Judge
27