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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SIGRID ANDREA FRENCH,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner of
Social Security,

Defendant.

Case No.: 21-cv-0092-BLM

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

[ECF NOS. 12, 15]

Plaintiff Sigrid French brought this action for judicial review of the Social Security Commissioner's ("Commissioner") denial of her application for Social Security Disability Insurance Benefits. ECF No. 1. Before the Court are Plaintiff's Motion for Summary Judgment [ECF No. 12-1 ("Mot.")], Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's motion [ECF No. 15 ("Oppo."), and Plaintiff's reply [ECF No. 16 ("Reply")]. For the reasons set forth below, Plaintiff's motion for summary judgment is **GRANTED** and Defendant's motion for summary judgment is **DENIED**.

PROCEDURAL BACKGROUND

On August 22, 2018, Plaintiff filed a Title II application for a period of disability and

1 disability insurance benefits alleging disability beginning on September 1, 2015. See
2 Administrative Record ("AR") at 16. The claims were denied initially on February 6, 2019, and
3 upon reconsideration on July 2, 2019, resulting in Plaintiff's request for an administrative hearing
4 on August 27, 2019. Id.

5 On June 23, 2020, a telephonic hearing was held before Administrative Law Judge ("ALJ")
6 Eric Benham. Id. at 16, 27. Plaintiff and an impartial vocational expert ("VE"), Marcos Molinar,
7 testified at the hearing. Id. at 16. In a written decision dated July 17, 2020, ALJ Benham
8 determined that Plaintiff had not been under a disability, as defined in the Social Security Act,
9 since September 1, 2015. Id. at 27. Plaintiff requested review by the Appeals Council. Id. at
10 1. In a letter dated November 23, 2020, the Appeals Council denied review of the ALJ's ruling,
11 and the ALJ's decision therefore became the final decision of the Commissioner. Id. at 1-3.

12 On January 15, 2021, Plaintiff filed the instant action seeking judicial review by the federal
13 district court. ECF No. 1. On April 11, 2022, Plaintiff filed a Motion for Summary Judgment
14 alleging that the ALJ "failed to properly evaluate Dr. Brazinsky's opinion" and, therefore, the
15 ALJ's RFC lacks the support of substantial evidence. Mot. at 3-13. Defendant filed a timely
16 Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment
17 asserting that the "ALJ properly weighed the evidence, including (but not limited to) the medical-
18 opinion evidence when evaluating Plaintiff's RFC." Oppo. at 5-8.

19 **ALJ's DECISION**

20 On July 17, 2020, the ALJ issued a written decision in which he determined that Plaintiff
21 was not disabled as defined in the Social Security Act. AR at 26. At step one, the ALJ determined
22 that Plaintiff had not engaged in substantial gainful activity during the relevant time period (since
23 September 1, 2015). Id. at 18. At step two, he considered all of Plaintiff's medical impairments
24 and determined that the following impairment was "severe" as defined in the Regulations:
25 "chronic refractory cough (20 CFR 404.1520(c))." Id. At step three, the ALJ found that Plaintiff's
26 medically determinable impairments or combination of impairments did not meet or medically
27 equal the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d),
28 404.1525, and 404.1526). Id. at 19. At step four, the ALJ considered Plaintiff's severe

1 impairment and determined that her residual functional capacity (“RFC”) permitted her
2 to perform a full range of work at all exertional levels but with the following
3 nonexertional limitations: the claimant can concentrate on simple work. The
4 claimant’s contact with the general public, or co-workers should be limited to
5 occasional.

6 Id. at 20. The ALJ found that while Plaintiff’s “medically determinable impairments could
7 reasonably be expected to cause the alleged symptoms;” Plaintiff’s “statements concerning the
8 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the
9 medical evidence and other evidence in the record for the reasons explained in this decision.”

10 Id. at 21. The ALJ further determined that there are jobs that exist in significant numbers in
11 the national economy that Plaintiff can perform. Id. at 25-26.

12 **STANDARD OF REVIEW**

13 Section 405(g) of the Social Security Act permits unsuccessful applicants to seek judicial
14 review of the Commissioner’s final decision. 42 U.S.C. § 405(g). The scope of judicial review is
15 limited in that a denial of benefits will not be disturbed if it is supported by substantial evidence
16 and contains no legal error. Id.; see also Miner v. Berryhill, 722 Fed. Appx. 632, 633 (9th Cir.
17 2018) (We review the district court’s decision de novo, disturbing the denial of benefits only if
18 the decision “contains legal error or is not supported by substantial evidence.”) (quoting
19 Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008)).

20 Substantial evidence is “more than a mere scintilla but may be less than a
21 preponderance.” Ahearn v. Saul, 988 F.3d 1111, 1115 (9th Cir. 2021) (quoting Molina v. Astrue,
22 674 F.3d 1104, 1110–11 (9th Cir. 2012) (quotation marks and citations omitted), *superseded by*
23 *regulation on other grounds*. It is relevant evidence that a reasonable person might accept as
24 adequate to support a conclusion after considering the entire record. Id. See also Biestek v.
25 Berryhill, 139 S. Ct. 1148, 1154 (2019). “In determining whether the Commissioner’s findings
26 are supported by substantial evidence, [the court] must review the administrative record as a
27 whole, weighing both the evidence that supports and the evidence that detracts from the [ALJ’s]
28 conclusion.” Laursen v. Barnhart, 127 Fed. Appx. 311 (9th Cir. 2005) (quoting Reddick v. Chater,

1 157 F.3d 715, 720 (9th Cir. 1998)). Where the evidence can reasonably be construed to support
2 more than one rational interpretation, the court must uphold the ALJ's decision. See Ahearn,
3 988 F.3d at 1115 (citing Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001)). This includes
4 deferring to the ALJ's credibility determinations and resolutions of evidentiary conflicts. Id.
5 ("[t]he ALJ is responsible for determining credibility, resolving conflicts in medical testimony,
6 and for resolving ambiguities," and "we reverse only if the ALJ's decision was not supported by
7 substantial evidence in the record as a whole") (quoting Andrews v. Shalala, 53 F.3d 1035, 1039
8 (9th Cir. 1995) and Molina, 674 F.3d 1110-1111).

9 Even if the reviewing court finds that substantial evidence supports the ALJ's conclusions,
10 the court must set aside the decision if the ALJ failed to apply the proper legal standards in
11 weighing the evidence and reaching his or her decision. See Miner, 722 Fed. Appx. at 633.
12 Section 405(g) permits a court to enter judgment affirming, modifying, or reversing the
13 Commissioner's decision. 42 U.S.C. § 405(g). The reviewing court also may remand the matter
14 to the Social Security Administration for further proceedings. Id.

15 **DISCUSSION**

16 Plaintiff argues that the ALJ's assessment of Plaintiff's RFC "[i]s a result of an
17 impermissible rejection of the Dr. Brazinsky's opinion" and, therefore, "lacks the support of
18 substantial evidence and is a result of legal error." Mot. at 8. Defendant contends that the ALJ
19 "properly found that Dr. Brazinsky's opinion that Plaintiff could not perform simple tasks was
20 unpersuasive because it was inconsistent with the medical evidence." Oppo. at 8.

21 A. Relevant Medical Records

22 1. Dr. Shari Brazinsky

23 According to the records in the Administrative Record, Dr. Shari Brazinsky treated Plaintiff
24 from 2014-2020 for problems related to her cough. AR at 354-389, 400-423, 454-456, 454-461,
25 484-511, 574-599, 619, 674-677. On February 27, 2020, Dr. Brazinsky wrote a letter stating
26 that Plaintiff recently enrolled in a clinical research study for her Chronic Refractory Cough and
27 was monitored for twenty-four hours. Id. at 71, 619. The results showed that Plaintiff coughed
28 2,417 times while she was awake and averaged 141.79 coughs per hour. Id.

1 Dr. Brazinsky completed a Physical Residual Functional Capacity Questionnaire for Plaintiff
2 on May 19, 2020. Id. at 61-69, 674-677. Dr. Brazinsky found that Plaintiff was not a malingerer
3 and that her symptoms could be expected to last at least twelve months. Id. at 63, 674. She
4 also concluded that Plaintiff's symptoms were severe enough to constantly interfere with her
5 attention and concentration, Plaintiff would need a job that permitted her to shift positions at
6 will from sitting, standing, or walking, and Plaintiff would sometimes need to take unscheduled
7 breaks during an eight-hour workday. Id. at 67, 675-676. Dr. Brazinsky further found that
8 Plaintiff could frequently carry fifty pounds or less, look down, turn her head right or left, look
9 up, hold her head in a static position, twist, stoop (bend), crouch/squat, climb ladders, and climb
10 stairs. Id. at 67, 676. Finally, Dr. Brazinsky concluded that Plaintiff did not have good days and
11 bad days as all of her days were bad ones and that Plaintiff was likely to never be absent from
12 work as a result of her impairment or treatment. Id. at 69, 677.

13 2. Dr. F. Kalmar

14 State Agency Consultant, Dr. F. Kalmar, reviewed Plaintiff's medical records on January
15 28, 2019 and concluded that Plaintiff could occasionally lift or carry twenty pounds and
16 frequently lift or carry ten pounds and sit, stand, or walk six hours out of an eight hour day. Id.
17 at 132-134. Dr. Kalmar also found that Plaintiff had unlimited push/pull limitations, postural
18 limitations including occasional climbing of ramps, stairs, ladders, ropes, and scaffolds and
19 occasional balancing, stooping, kneeling, crouching, and crawling. Id. Dr. Kalmar concluded
20 that Plaintiff had no manipulative, visual, or communicative limitations, but did have
21 environmental limitations requiring that she avoid concentrated exposure to extreme cold, heat,
22 or hazards (machinery, heights, etc), and vibration and avoid even moderate exposure to fumes,
23 odors, dusts, gases, poor ventilation, etc. Id. Dr. Kalmar did not find Plaintiff to be limited as to
24 wetness, noise, or vibration. Id.

25 3. Dr. Leonard H. Naiman

26 State Agency Consultant, Dr. Leonard H. Naiman, reviewed Plaintiff's medical records on
27 July 1, 2019 and concluded that Plaintiff could occasionally lift or carry twenty pounds and
28 frequently lift or carry ten pounds and sit, stand, or walk six hours out of an eight hour day. Id.

1 at 144-147. Dr. Naiman also found that Plaintiff had unlimited push/pull limitations, postural
2 limitations including occasional climbing of ramps and stairs, occasional balancing, stooping,
3 kneeling, crouching, and crawling, and no climbing ladders, ropes, or scaffolds. Id. Dr. Naiman
4 concluded that Plaintiff had no manipulative, visual, or communicative limitations, but did have
5 environmental limitations requiring that she avoid concentrated exposure to extreme cold, heat,
6 or hazards (machinery, heights, etc), wetness, and humidity, and avoid even moderate exposure
7 fumes, odors, dusts, gases, poor ventilation, etc. Id. Dr. Naiman did not find Plaintiff to be limited
8 as to noise, and vibration. Id.

9 B. Legal Standard

10 Because Plaintiff filed for disability after March 27, 2017, the Social Security
11 Administration's 2017 revised regulations governing the consideration of medical opinions apply.
12 See 20 C.F.R. § 404.1520c (2017). Pursuant to the revised regulations, ALJs no longer have to
13 give controlling weight to any medical opinions or prior administrative findings. Id. §
14 404.1520c(a) ("We will not defer or give any specific evidentiary weight, including controlling
15 weight, to any medical opinion(s) or prior administrative medical finding(s), including those from
16 your medical sources."). Now, ALJs must focus on the persuasiveness of the medical opinions
17 and prior administrative records. Id. In assessing the persuasiveness, ALJs will focus on
18 supportability and consistency. Id. For supportability, "[t]he more relevant the objective
19 medical evidence and supporting explanations presented by a medical source are to support his
20 or her medical opinion(s) or prior administrative medical finding(s), the more persuasive the
21 medical opinions or prior administrative medical finding(s) will be." Id. at § 404.1520c(c)(1).
22 Similarly, for consistency, "[t]he more consistent a medical opinion(s) or prior administrative
23 medical finding(s) is with the evidence from other medical sources and nonmedical sources in
24 the claim, the more persuasive the medical opinion(s) or prior administrative medical finding(s)
25 will be." Id. at § 404.1520c(c)(2).

26 "The Ninth Circuit has not yet interpreted the revised regulations because appeals
27 of ALJ decisions applying these regulations have just recently been considered by district courts.
28 It is clear, however, that the Commissioner's new regulations require the ALJ to explain his or

1 her reasoning and to specifically address how he or she considered the supportability and
2 consistency of the medical opinion.” Teresa G. v. Kijakazi, 2022 WL 298367, at *3 (S.D. Cal.,
3 Feb. 1, 2022) (citing 404.1520c(b)(2); P.H. v. Saul, 2021 WL 965330, at *3 (N.D. Cal. Mar. 15,
4 2021) (“Although the regulations eliminate the ‘physician hierarchy,’ deference to specific
5 medical opinions, and assigning ‘weight’ to a medical opinion, the ALJ must still ‘articulate how
6 [he/she] considered the medical opinions’ and ‘how persuasive [he/she] find[s] all of the medical
7 opinions.”) (citation omitted); and Carolyn M.D. v. Kijakazi, 2021 WL 6135322, at *5 (C.D. Cal.
8 Dec. 28, 2021) (“As always, the ALJ’s reasoning must be free of legal error and supported by
9 substantial evidence.”) (citing Ford, 950 F.3d at 115)).

10 C. Analysis

11 Dr. Brazinsky found that Plaintiff’s symptoms were severe enough to constantly interfere
12 with her attention and concentration and Plaintiff would need a job that permitted her to shift
13 positions at will from sitting, standing, or walking. She also found that Plaintiff (1) would
14 sometimes need to take unscheduled breaks during an eight-hour workday, (2) did not have
15 exertional limitations, (3) did not have good days and bad days as all of her days were bad ones,
16 and (4) was likely to never be absent from work as a result of her impairment or treatment. Id.
17 at 67-69, 675-677.

18 With respect to Dr. Brazinsky, the ALJ concluded that

19 Shari Brazinsky, M.D., the claimant’s primary care physician, provided a Physical
20 Residual Functional Capacity Questionnaire dated May 19, 2020, and opined the
21 claimant had no exertional limitations, but would require the ability to shift
22 positions from sitting, standing, or walking at will, and would need to take
23 unscheduled breaks due to her cough (Ex. 11F). Dr. Brazinsky further opined the
24 claimant’s cough would constantly interfere with her attention and concentration
25 to perform even simple work tasks (Id.). Based upon the evidence, this opinion is
26 generally persuasive. Dr. Brazinsky’s opinion that the claimant has no exertional
27 limitations is consistent with her treatment of the claimant which documented
28 generally unremarkable physical examinations except for the claimant’s cough with
deep breathing, as well as normal pulmonary function tests and normal
bronchoscopies, suggesting that the claimant is able to perform work at all

1 exertional levels (Exs. 1F/29; 2F/4, 12; 3F/6; 4F/18; 7F/14, 21). Conversely, while
2 the undersigned finds the claimant's cough would interfere with her ability to
3 perform complex and detailed tasks, the opinion that it would interfere with the
4 claimant's ability to perform simple tasks is not persuasive. This opinion is
5 inconsistent with mental status examinations that documented intact memory for
6 recent and remote events, orientation in all spheres, and no acute distress (Exs.
7 1F/6; 6F/8; 9F/11), suggesting the claimant is capable of performing simple work
8 and should have no more than occasional interaction with co-workers to avoid
9 disrupting their concentration. Turning to supportability, Dr. Brazinsky relied on
10 her treating relationship with the claimant, including a cough monitor that
11 measured 142 coughs per hour and 2,417 coughs per day, and medication side
12 effects including drowsiness. This supporting explanation partially aligns with the
13 evidence of record. Accordingly, the undersigned finds this opinion persuasive.

14 Id. at 24-25.

15 Plaintiff argues that the ALJ erred by relying on Plaintiff's mental status examinations as
16 a reason for discounting Dr. Brazinsky's conclusion that Plaintiff's condition would interfere with
17 her ability to perform simple detailed tasks. Mot. at 8-9. Plaintiff argues that the ALJ cannot
18 rely on mental status examinations to discount the symptoms from Plaintiff's physical condition.
19 Id. at 8. Plaintiff also argues that the ALJ has improperly assessed Plaintiff's RFC without the
20 support of a physician's opinion. Id. at 9-10. Finally, Plaintiff argues that the ALJ failed to
21 explain his rejection of Dr. Brazinsky's finding that Plaintiff will need unscheduled breaks and
22 the ability to shift at will. Id. at 10.

23 Defendant contends that the ALJ is not required to rely on a medical opinion when
24 assessing a plaintiff's RFC. Oppo. at 7. Defendant further argues that the ALJ properly found
25 that Dr. Brazinsky's opinion was unpersuasive where it was not consistent with the medical
26 evidence. Id. at 8. Defendant does not address Plaintiff's arguments regarding the ALJ's failure
27 to address Dr. Brazinsky's finding that Plaintiff needed unscheduled breaks and the ability to
28 shift at will. Oppo.

29 1. The ALJ's Analysis of Dr. Brazinsky's Medical Opinion

30 The ALJ assessed the persuasiveness of Dr. Brazinsky's medical opinion and while he
31 found that it was generally persuasive, he did not agree with all of her findings. Id. at 24-25.

1 The ALJ addressed the two most important factors when determining persuasiveness,
2 supportability and consistency. Id. The ALJ found that Dr. Brazinsky's conclusion that Plaintiff
3 was unable to perform even simple work tasks because coughing would interfere with her
4 attention and concentration was inconsistent with Plaintiff's unremarkable mental status
5 examinations and therefore, not persuasive. Id. The more consistent a medical opinion is with
6 the evidence from other medical sources and nonmedical sources, the more persuasive the
7 medical opinion will be. See 20 C.F.R. § 404.1520c(c)(2). In support, the ALJ cited to three
8 medical records noting that Plaintiff showed "no acute distress" and "was alert and oriented x3"
9 [id. at 25, 519, 611] and describing her mental status as "[j]udgment insight are appropriate for
10 age. Oriented to time, place, and person. Intact for recent and remote events. No depression,
11 anxiety, or agitation" [id. at 25, 347]. The ALJ concluded that Plaintiff was able to perform
12 simple work with no more than occasional interaction with co-workers to avoid disrupting their
13 concentration. Id. at 25.

14 With respect to supportability, the ALJ noted that Dr. Brazinsky relied on her treating
15 relationship with Plaintiff and found that Dr. Brazinsky's conclusion was only partially supported
16 by the cough study that measured 142 coughs per hour and 2417 coughs per day and the side
17 effects of Plaintiff's medication related to drowsiness. Id. at 25. The more objective, relevant
18 medical evidence and supporting explanations provided by a medical source to support a doctor's
19 opinions, the more persuasive the medical opinions will be. See 20 C.F.R. § 404.1520c(c)(1).
20 Here, Dr. Brazinsky's medical opinion was based on her treatment history with Plaintiff and the
21 results of Plaintiff's cough study with Dr. Bruce M. Penner. Id. at 25. The ALJ considered Dr.
22 Brazinsky's treatment history with Plaintiff and noted that the medical records showed "generally
23 unremarkable physical examinations except for the claimant's cough with deep breathing,
24 suggesting that the claimant is able to perform work at all exertional levels, as well as normal
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1 pulmonary function tests and normal bronchoscopies, (Exs. 1F/29¹; 2F/4², 12³; 3F/6⁴; 4F/18⁵;
2 7F/14⁶, 21⁷).” Id. at 24. Thus, the ALJ interpreted the medical evidence to mean that Plaintiff
3 was capable of performing a full range of work at all exertional levels.

4 a. Failure to Address Dr. Brazinsky’s Findings Regarding Unscheduled Breaks
5 and Shifting at Will

6 While acknowledging that the ALJ correctly assessed most of Dr. Brazinsky’s findings,
7 Plaintiff argues the ALJ’s opinion is improperly “bereft of any articulated rationale for rejecting
8 the findings that [Plaintiff] would need unscheduled breaks and a job that permits shifting at
9 will” which does not allow for meaningful review. Mot. at 10. Defendant fails to address this
10 argument [see Oppo.] and the Court finds Plaintiff’s argument is correct. The ALJ failed to
11 address Dr. Brazinsky’s conclusion that Plaintiff would require unscheduled breaks and the ability
12 to shift positions at will. AR. The ALJ summarized Dr. Brazinsky’s findings, including her findings

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14 ¹ April 10, 2015 chart noting that Plaintiff’s lungs were “[c]lear to auscultation and percussion,
15 without rales, rhonchi, or wheezes. [D]idn’t cough with deep breathing.” AR at 370.

16 ² May 5, 2017 chart noting that Plaintiff’s lungs were “[c]lear to auscultation and percussion,
17 without rales, rhonchi, or wheezes. [D]idn’t cough with deep breathing.” AR at 401.

18 ³ April 15, 2017 chart noting that Plaintiff’s lungs were “[c]lear to auscultation and percussion,
19 without rales, rhonchi, or wheezes. [C]ough[s] with deep breathing.” AR at 409.

20 ⁴ October 26, 2018 office visit noting that Plaintiff “has [had] two bronchoscopies. The results
21 were normal.” AR at 429.

22 ⁵ April 16, 2018 Pulmonary Function Report stating “NORMAL SPIROMETRIC VALUES indicate
23 the absence of any significant degree of obstructive pulmonary impairment and/or restrictive
ventilatory defect.” AR at 450.

24 ⁶ August 28, 2019 chart stating that Plaintiff’s lungs were “[c]lear to auscultation and percussion,
25 without rales, rhonchi, or wheezes, coughs, with deep breathing.” AR at 582.

26 ⁷ August 28 2019 Pulmonary Function Report stating “Possible EARLY OBSTRUCTIVE
27 PULMONARY IMPAIRMENT. This is suggested by the reduced FEF 25-75 with a normal FVC and
FEVI. This finding can be due to a mild degree of small airway disease and/or the earliest stages
28 of emphysema. This may be reversible in nature; therefore, REPEAT TESTING FOLLOWING
BRONCHODILATOR ADMINISTRATION IS RECOMMENDED.” AR at 589.

1 regarding shifting positions at will and taking unscheduled breaks, however, the ALJ does not
2 provide any discussion of these findings, nor does he include any such limitations in his RFC
3 determination or confirm that the jobs that exist in significant numbers in the national economy
4 that he finds Plaintiff can perform account for these limitations. Id.

5 By ignoring Dr. Brazinsky's findings of limitations regarding Plaintiff's need to shift at will
6 and take unscheduled breaks, the ALJ erred. Because there is no evidence of possible jobs, the
7 error is not harmless.⁸ The ALJ should have evaluated the persuasiveness of Dr. Brazinsky's
8 opinion regarding unscheduled breaks and shifting at will. See 20 C.F.R. § 404.1520(c). While
9 ALJ's no longer need to provide specific and legitimate reasons for discounting the opinion of a
10 treating physician⁹, they must still explain their reasoning and specifically address how they
11 analyzed the supportability and consistency of the medical opinion. Id. § 404.1520c(b)(2); see
12 also Teresa G., 2022 WL 298367, at *3 (citing P.H. v. Saul, 2021 WL 965330, at *3 (N.D. Cal.
13 Mar. 15, 2021) ("the ALJ must still 'articulate how [he/she] considered the medical opinions' and
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15 ⁸ Harmless error occurs if the error is inconsequential to the ultimate non-disability
16 determination. See Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006); see also
17 Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006). Errors that do not
18 affect the ultimate result are harmless. See Parra v. Astrue, 481 F.3d 742, 747 (9th Cir. 2007).
19 An ALJ's error may be deemed harmless if, in light of the other reasons supporting the overall
20 finding, it can be concluded that the error did not "affect[] the ALJ's conclusion." Batson v.
Comm'r, Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004).

21 ⁹ Social Security applications filed before March 27, 2021 distinguish among three types of
22 physicians: (1) treating physicians; (2) examining physicians; and (3) non-examining physicians.
23 20 C.F.R. §§ 404.1526(c),(e); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). While an ALJ
24 is not bound by the opinion of a treating physician, the opinion of a treating doctor is generally
25 given more weight than opinions of doctors who do not treat the claimant. See Turner v. Comm'r
of Soc. Sec., 613 F.3d 1217, 1222 (9th Cir. 2010) (citing Lester, 81 F.3d at 830-31 (9th Cir.
26 1995)). If a treating doctor's opinion is not contradicted by another doctor, it may be rejected
27 only for "clear and convincing" reasons supported by substantial evidence in the
28 record. Id. When the treating doctor's opinion is contradicted by the opinion of another doctor,
the ALJ may properly reject the treating doctor's opinion only by providing "specific and
legitimate reasons" supported by substantial evidence in the record for doing
so. Id.; see also Fennell v. Berryhill, 721 Fed. Appx. 652, 654 (9th Cir. 2018) (quoting Bayliss v.
Barnhart, 427 F.3d 1211, 1217 (9th Cir. 200) ("[A]n ALJ need not accept the opinion of a doctor
if that opinion is brief, conclusory, and inadequately supported by clinical findings.")).

1 'how persuasive [he/she] find[s] all of the medical opinions.") (citation omitted)). Here, the ALJ
2 failed to do so with respect to Dr. Brazinsky's findings on unscheduled breaks and shifting at will
3 and that failure warrants remand.

4 b. Mental Symptoms Stemming from Physical Condition not Mental
5 Impairment

6 Plaintiff also argues that the ALJ erred by relying on mental status examinations to
7 discount symptoms related to Plaintiff's physical condition. Mot. at 8. Defendant contends that
8 the "ALJ properly found that Dr. Brazinsky's opinion that Plaintiff could not perform simple tasks
9 was unpersuasive because it was inconsistent with the medical evidence." Oppo. at 8. Plaintiff
10 cites to Kelly Sue S. v. Kijakazi, 2021 WL 5921350, at *11 (D. Idaho, Dec. 14, 2021) in support
11 of her argument. Mot. at 8-9. In Kelly Sue S., the ALJ did not find Plaintiff's allegations of
12 impaired concentration to be credible due in part to the lack of an associated diagnosis from an
13 acceptable medical source. Kelly Sue S., 2021 WL 5921350 at *10. The plaintiff in Kelly Sue
14 S. alleged that her impaired concentration was due to back pain and not a mental impairment.
15 Id. The court ruled that the ALJ erred because he could not "rely upon the lack of a medical
16 diagnosis for any mental impairments to discredit Petitioner's testimony that her back pain
17 causes impaired concentration." Id. Defendant does not address Kelly Sue S. or provide any
18 authority opposing the case or distinguishing the current matter. Oppo. Because the Court is
19 remanding the matter and Defendant has not addressed the issue, the argument should be
20 considered on remand.

21 c. Lack of a Medical Opinion

22 Plaintiff's final argument is that the ALJ improperly assessed Plaintiff's RFC without the
23 support of a physician's opinion. Mot. at 9-10. Plaintiff argues that "the ALJ's conclusion that
24 coughing 142 times supports a limitation to simple work and occasional contact with the general
25 public, or co-workers but [is] inconsistent with greater limitations with respect to concentration
26 and attention is nothing more than the ALJ's lay medical opinion." Id. at 9. Defendant contends
27 that the RFC "does not need to be based on medical opinions." Oppo. at 7 (citing 20 C.F.R.
28 404.1546).

1 An RFC assessment is the most a plaintiff can do despite their limitations, and this
2 assessment is based upon all relevant evidence in the record including medical records, medical
3 source statements, and symptom testimony. See 20 C.F.R. § 404.1545(a)(1); SSR 96-8p. The
4 responsibility for making this assessment is within the purview of the administrative law judge.
5 See 20 C.F.R. § 404.1546(c); see also Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir. 2001)
6 (citing 20 C.F.R. § 404.1545). "SSR 96-8p provides a blueprint for what an RFC assessment
7 must contain in all cases in which symptoms are alleged: (1) a thorough discussion and analysis
8 of the objective medical and other evidence, including the individual's complaints of pain and
9 other symptoms and the adjudicator's personal observations, if appropriate; (2) a resolution of
10 any inconsistencies in the evidence as a whole; and (3) a logical explanation of the effects of
11 symptoms, including pain, on the individual's ability to work." Shafer v. Barnhart, 120 Fed.
12 Appx. 688, 698 (9th Cir. 2005). Where the "record contains conflicting medical evidence, the
13 ALJ is charged with determining credibility and resolving conflicts." Benton v. Barnhart, 331
14 F.3d 1030, 1040 (9th Cir. 2003). While an ALJ determines a plaintiff's RFC, "an ALJ is not
15 allowed to make medical judgments, but only legal judgments based on medical evidence.
16 Barring a few exceptions, an ALJ must have a doctor's opinion of a claimant's functional capacity
17 in order for there to be substantial evidence supporting the decision." Duarte v. Saul, 2020 WL
18 5257597, at *5 (E.D. Cal., Sept. 3, 2020) (citing Day v. Weinberger, 522 F.2d 1154, 1156 (9th
19 Cir. 1975) and Manso-Pizarro v. Sec'y of Health & Human Servs., 76 F.3d 15, 17 (1st Cir. 1996)
20 ("With few exceptions, ... an ALJ, as a layperson, is not qualified to interpret raw data in a
21 medical record.")).

22 Here, the ALJ rejected the medical findings of State Agency Consultants F. Kalmar and L.
23 Naiman. AR at 23-24. Both doctors found exertional and environmental limitations and no
24 mental limitations. Id. at 132-134, 144-147. The ALJ found Drs. Kalmar and Naiman's opinions
25 to be unpersuasive as they were not consistent with the findings of Plaintiff's treating doctor
26 who found that Plaintiff had no exertional limitations nor with Plaintiff's testimony and treatment
27 notes that there were no known triggers for her cough. Id. at 23-24. Because the ALJ found
28 the Agency Consultants' opinions unpersuasive, the only medical opinion regarding Plaintiff's

1 limitations came from Dr. Brazinsky. In determining Plaintiff's RFC, the ALJ found that Plaintiff
2 could perform simple work with no more than occasional interaction with co-workers and the
3 general public. Id. at 23-24. In reaching this decision, the ALJ rejected Dr. Brazinsky's opinion
4 that Plaintiff's cough interfered with her attention and concentration and prevented her from
5 performing even simple tasks. The ALJ did not identify any expert or doctor who examined
6 Plaintiff or reviewed her medical records relating to her cough and opined that Plaintiff was
7 capable of performing simple work with limited interaction with co-workers and the public.
8 Instead, the ALJ appears to interpret Plaintiff's mental status examinations himself and
9 concludes that the mental status findings establish that Plaintiff has the ability to perform simple
10 tasks.¹⁰ Id.

11 While Defendant is correct that the RFC is an administrative finding and not a medical
12 finding, an ALJ still needs medical support for his RFC finding. Here, where the ALJ rejected the
13 opinion of the only doctor who opined on a functional limitation by interpreting mental status
14 results, the ALJ improperly acted as his own medical expert which was an error. See Javier A.
15 G. v. Saul, 2020 WL 6940042, at *9 (C.D. Cal., Nov. 25, 2020) ("an ALJ may not substitute his
16 or her lay interpretation of raw medical data in making an RFC assessment in lieu of a qualified
17 expert's medical opinion").¹¹ Accordingly, the ALJ's finding constituted legal error and was not

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19 ¹⁰ As discussed above, Plaintiff provided case law indicating that mental status findings cannot
20 be used to contradict physical symptoms that impair a plaintiff's ability to work and Defendant
21 failed to rebut the argument or provide contradictory law.

22 ¹¹Citing Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993) ("Without a personal medical
23 evaluation it is almost impossible to assess the residual functional capacity of any individual.");
24 Banks v. Barnhart, 434 F. Supp. 2d 800, 805 (C.D. Cal. 2006) ("An ALJ cannot arbitrarily
25 substitute his own judgment for competent medical opinion ... and ... must not succumb to the
26 temptation to play doctor and make ... independent medical findings.") (quotations omitted);
27 Tagger v. Astrue, 536 F. Supp. 2d 1170, 1181 (C.D. Cal. 2008) ("[An] ALJ's determination or
28 finding must be supported by medical evidence, particularly the opinion of a treating or an
examining physician.") (citations and internal quotation marks omitted); Brawdors v. Astrue,
793 F. Supp. 2d 485, 493 (D. Mass. 2011) (" '[W]here an ALJ reaches conclusions about [a]
claimant's physical exertional capacity without any assessment of residual functional capacity by
a physician, the ALJ's conclusions are not supported by substantial evidence and it is necessary
to remand for the taking of further functional evidence.'") (quoting Perez v. Sec. of Health and

1 supported by substantial evidence. See De Gutierrez v. Saul, 2020 WL 5701019, at *6 (E.D.
2 Cal. Sep. 24, 2020) (“Without a medical opinion to support the conclusion that Plaintiff was able
3 to perform medium work and could lift and carry fifty pounds occasionally and twenty-five
4 pounds frequently, stand and/or work for eight hours in an eight-hour workday, sit for eight
5 hours in an eight-hour workday, and was limited to simple routine tasks, the ALJ's RFC lacks the
6 support of substantial evidence.”); and Goolsby v. Berryhill, 2017 WL 1090162, at *8 (E.D. Cal.
7 Mar. 22, 2017) (ALJ erred in including “simple routine tasks” in RFC when the medical record
8 did not contain medical opinions supporting this limitation).

9 **REMAND v. REVERSAL**

10 “The decision whether to remand for further proceedings or simply to award benefits is
11 within the discretion of [the] court.” McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
12 (internal citation omitted). “Remand for further administrative proceedings is appropriate if
13 enhancement of the record would be useful.” Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir.
14 2004). On the other hand, if the record has been fully developed such that further administrative
15 proceedings would serve no purpose, “the district court should remand for an immediate award
16 of benefits.” Id. “More specifically, the district court should credit evidence that was rejected
17 during the administrative process and remand for an immediate award of benefits if (1) the ALJ
18 failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding
19 issues that must be resolved before a determination of disability can be made; and (3) it is clear
20 from the record that the ALJ would be required to find the claimant disabled were such evidence
21 credited.” Id. (citing Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000)). The Ninth Circuit
22 has not definitely stated whether the “credit-as-true” rule is mandatory or discretionary. See
23 Vasquez v. Astrue, 572 F.3d 586, 593 (9th Cir. 2009) (acknowledging that there is a split of
24 authority in the Circuit, but declining to resolve the conflict); Luna v. Astrue, 623 F.3d 1032,
25 1035 (9th Cir. 2010) (finding rule is not mandatory where “there are ‘outstanding issues that
26 must be resolved before a proper disability determination can be made’” (internal citation
27 _____
28 Human Servs., 958 F.2d 445, 446 (1st Cir. 1999)).

1 omitted)); Shilts v. Astrue, 400 F. App'x 183, 184-85 (9th Cir. Oct. 18, 2010) (explaining that
2 "evidence should be credited as true and an action remanded for an immediate award of benefits
3 only if [the Benecke requirements are satisfied]" (internal citation omitted)).

4 Here, because the Court finds that the ALJ failed to address Dr. Brazinsky's conclusions
5 regarding Plaintiff's need for unscheduled breaks and the ability to shift at will, and failed to
6 provide an RFC supported by substantial evidence, further administrative proceedings to develop
7 the record would be useful and is appropriate. See Benecke, 379 F.3d at 593. Similarly, an
8 immediate award of benefits is not appropriate because there are outstanding issues that must
9 be resolved before a determination of disability can be made. Id. Therefore, this Court
10 **REVERSES** the ALJ's decision and **REMANDS** for further proceedings to address the errors
11 noted in this Order.

12 **IT IS SO ORDERED.**

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14 Dated: 8/15/2022


15 Hon. Barbara L. Major
16 United States Magistrate Judge
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