

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 BRIDGET K. COLLERAN,)
4)
5 Plaintiff,)
6 vs.)
7 NANCY A. BERRYHILL,)
8 Defendant.)
9)

Case No.: 2:14-cv-01736-GMN-GWF

ORDER

10 Pending before the Court for consideration is a Motion to Remand, (ECF No. 16), filed
11 by Plaintiff Briget K. Colleran (“Plaintiff”) and the Cross–Motion to Affirm, (ECF No. 19),
12 filed by Defendant Nancy A. Berryhill¹ (“Defendant” or “the Commissioner”). These motions
13 were referred to the Honorable George Foley, United States Magistrate Judge, for a report of
14 findings and recommendations pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C).

15 On September 14, 2016, Judge Foley entered the Report and Recommendation (“R. &
16 R.”), (ECF No. 24), recommending Plaintiff’s Motion to Remand be granted and the
17 Commissioner’s Cross–Motion to Affirm be denied. The Commissioner filed an Objection to
18 the Report and Recommendation, (ECF No. 26), on October 17, 2016. Plaintiff filed her
19 Response to the Objection, (ECF No. 28), on March 2, 2017.²

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23 ¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to Rule 25(d) of the Federal
24 Rules of Civil Procedure, Nancy A. Berryhill is substituted for Acting Commissioner Carolyn W. Colvin as the
defendant in this suit.

25 ² Also pending before the Court is the Commissioner’s unopposed Motion, (ECF No. 25), to extend time to file
her objection. For good cause appearing, the Court GRANTS this Motion.

1 **I. BACKGROUND**

2 Plaintiff brings this action against Defendant in her capacity as the Commissioner of the
3 Social Security Administration, pursuant the Social Security Act, 42 U.S.C. § 405(g). (Compl.,
4 ECF No. 3). Plaintiff seeks judicial review of a final decision of the Commissioner of the
5 Social Security Administration denying her claims for Social Security Disability (“SSD”)
6 benefits and Supplemental Security Income (“SSI”) benefits under Titles II and XVI of the
7 Social Security Act, 42 U.S.C. § 416(i), 23, 1381–1382c. (Id. ¶ 3).

8 Plaintiff applied for SSD benefits on October 27, 2010, and SSI benefits on September
9 19, 2012, which were denied initially and upon reconsideration. (Id. ¶ 6); (Admin. R. (“A.R.”)
10 at 42, ECF No. 14-1). Plaintiff requested a hearing before an Administrative Law Judge
11 (“ALJ”), who ultimately issued an unfavorable decision denying Plaintiff’s benefits claim.
12 (Compl. ¶ 7); (A.R. at 39–49). Plaintiff timely requested Appeals Council review of the ALJ’s
13 decision, which was denied on August 22, 2014. (Compl. ¶ 8).

14 **II. LEGAL STANDARD**

15 A party may file specific written objections to the findings and recommendations of a
16 United States Magistrate Judge made pursuant to Local Rule IB 1–4. 28 U.S.C. § 636(b)(1)(B);
17 D. Nev. Local R. IB 3-2. Upon the filing of such objections, the Court must make a de novo
18 determination of those portions of the Report to which objections are made. Id. The Court may
19 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
20 Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. Local R. IB 3-2(b).

21 **III. DISCUSSION**

22 The Commissioner presents two objections to the Report and Recommendation. First,
23 the Commissioner challenges Judge Foley’s finding that “the ALJ erred in rejecting the
24 opinions of the treating physicians . . . because they were based on his finding that those
25 opinions were inconsistent with the medical evidence.” (Obj. 4:16–18, ECF No. 26). This

1 argument misunderstands Judge Foley’s findings, however. Judge Foley did not find error with
2 regard to the medical evidence supporting the opinions of Plaintiff’s treating physicians but
3 rather faulted the ALJ for appearing to require “objective clinical findings” to support
4 Plaintiff’s complaints of pain. (R. & R. 22:11–12); (see also id. 21:16–18). The Ninth Circuit
5 has held that an ALJ commits error “by effectively requiring objective evidence for a disease
6 that eludes such measurement.” *Benecke v. Barnhart*, 379 F.3d 587, 593–94 (9th Cir. 2004).
7 Here, the ALJ repeatedly emphasized the lack of objective medical evidence to support
8 Plaintiff’s claims of subjective pain. (A.R. at 46–47, ECF No. 14-1). As Judge Foley stated,
9 “the ALJ ignored the nature of fibromyalgia.” (Id. 22:12).

10 Next, the Commissioner challenges Judge Foley’s conclusion that “the ALJ did not
11 adequately address Plaintiff’s fibromyalgia diagnosis and this oversight undermines the
12 legitimacy of his reasons for rejecting Plaintiff’s credibility.” (Obj. 5:9–11). On this point, the
13 Commissioner argues that “[t]he ALJ evaluated Plaintiff’s pain complaints allegedly caused by
14 degenerative disc disease and fibromyalgia and concluded that Plaintiff’s statements
15 concerning the intensity, persistence, and limiting effects of her subjective pain complaints
16 were not credible.” (Id. 5:12–15). Again, the Commissioner misunderstands Judge Foley’s
17 reasoning.

18 The ALJ considered several factors in reaching his determination with respect to
19 Plaintiff’s credibility including that Plaintiff “has undergone only conservative treatment” and
20 that Plaintiff “made no mention that her lay-off was the result of her an [sic] inability to engage
21 in her work duties.” (A.R. at 47). As Judge Foley noted, “[t]here is no evidence that she failed
22 to follow a recommended course of treatment.” (R. & R. 22:19–20). Moreover, Judge Foley
23 pointed out that contrary to the ALJ’s report, Plaintiff testified regarding her belief that missing
24 work due to pain “had a lot to do” with why she was laid off from her previous employment.
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1 (Id. 22:28–23:1). The Court agrees that “the ALJ’s reason for rejecting Plaintiff’s credibility
2 on this ground was erroneous.” (Id. 23:1–2).

3 Having reviewed the Commissioner’s objections de novo, the Court finds no basis on
4 which to reject Judge Foley’s findings and recommendations. The Court therefore remands this
5 case for further proceedings consistent with Judge Foley’s Report and Recommendation.
6 Among other things, the ALJ must determine whether Plaintiff’s fibromyalgia symptoms are so
7 severe as to disable her from performing sedentary work.

8 **IV. CONCLUSION**

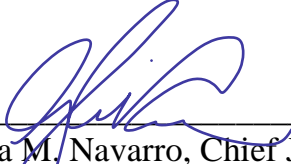
9 **IT IS HEREBY ORDERED** that the Report and Recommendation, (ECF No. 24), be
10 **ACCEPTED** and **ADOPTED** in full, to the extent that it is not inconsistent with this Order.

11 **IS FURTHER ORDERED** that Plaintiff’s Motion to Remand, (ECF No. 16), is
12 **GRANTED** and this case is hereby **REMANDED** to the Administrative Law Judge. The
13 Clerk of Court shall remand this case back to the Administrative Law Judge and thereafter
14 close this Court’s case.

15 **IT IS FURTHER ORDERED** that the Commissioner’s Motion to Extend Time, (ECF
16 No. 25), is **GRANTED**.

17 **IT IS FURTHER ORDERED** that the Commissioner’s Cross-Motion to Affirm, (ECF
18 No. 19), is **DENIED**.

19 **DATED** this 13 day of April, 2017.

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23 Gloria M. Navarro, Chief Judge
24 United States District Judge
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