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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ELLEN M. BRONSON,
Plaintiff,
vs.
NANCY A. BERRYHILL,
Acting Commissioner of
Social Security Administration,
Defendant.

) 3:16-cv-00319-LRH-WGC

) **REPORT & RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Plaintiff’s Motion for Reversal and Remand. (ECF No. 13.) The Commissioner filed a Cross-Motion to Affirm and Response to Plaintiff’s Motion for Reversal and/or Remand. (ECF Nos. 14, 15.)¹ Plaintiff filed a response to the cross-motion and reply in support of her motion. (ECF No. 17.)

After a thorough review, the court recommends that Plaintiff’s motion be granted in part; the Commissioner’s cross-motion be denied; and, that the action be remanded for further proceedings consistent with this Report and Recommendation.

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These documents are identical.

1 **I. BACKGROUND**

2 On January 7 and 11, 2013, Plaintiff completed applications for disability insurance benefits
3 (DIB) under Title II of the Social Security Act and for supplemental security income (SSI) under Title
4 XVI of the Social Security Act, alleging disability beginning September 30, 2012. (Administrative
5 Record (AR) 202-212.) The applications were denied initially and on reconsideration. (AR 119-121,
6 126-131.)

7 Plaintiff requested a hearing before an administrative law judge (ALJ). (AR 133-34.) ALJ Eileen
8 Burlison held a hearing on October 21, 2014. (AR 42-72.) Plaintiff, who was represented by counsel,
9 appeared and testified on her own behalf at the hearing. Testimony was also taken from a vocational
10 expert (VE). On January 30, 2015, the ALJ issued a decision finding Plaintiff not disabled. (AR 21-41.)
11 Plaintiff requested review, and the Appeals Council denied the request, making the ALJ's decision the
12 final decision of the Commissioner. (AR 1-6.)

13 Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C. § 405(g). Plaintiff
14 argues: (1) the ALJ failed to properly account for Plaintiff's limitations resulting from her severe
15 impairment of gastritis; (2) the ALJ did not properly explain the great weight given to the non-examining
16 stage agency consultants over Plaintiff's treating physician; and (3) the hypothetical posed to the VE did
17 not account for the limitations associated with Plaintiff's gastritis.

18 **II. STANDARD OF REVIEW**

19 **A. Substantial Evidence**

20 The court must affirm the ALJ's determination if it is based on proper legal standards and the
21 findings are supported by substantial evidence in the record. *Gutierrez v. Comm'r Soc. Sec. Admin.*,
22 740 F.3d 519, 522 (9th Cir. 2014) (citing 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere
23 scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept
24 as adequate to support a conclusion.'" *Gutierrez*, 740 F.3d at 523-24 (quoting *Hill v. Astrue*, 698 F.3d
25 1153, 1159 (9th Cir. 2012)).

26 To determine whether substantial evidence exists, the court must look at the record as a whole,
27 considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*, 740 F.3d at 524
28 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may not affirm simply by

1 isolating a specific quantum of supporting evidence." *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir.
2 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). "The ALJ is responsible
3 for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Id.*
4 (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably
5 support either affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the
6 Commissioner." *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir.
7 1996)). That being said, "a decision supported by substantial evidence will still be set aside if the ALJ
8 did not apply proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
9 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court
10 will "review only the reasons provided by the ALJ in the disability determination and may not affirm the
11 ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v. Barnhart*,
12 340 F.3d 871, 874 (9th Cir. 2003)).

13 **B. Five-Step Evaluation of Disability**

14 Under the Social Security Act, "disability" is the inability to engage "in any substantial gainful
15 activity by reason of any medically determinable physical or mental impairment which can be expected
16 to result in death or which has lasted or can be expected to last for a continuous period of not less than
17 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant "shall be determined to be under a disability only
18 if his physical or mental impairment or impairments are of such severity that he is not only unable to do
19 his previous work but cannot, considering his age, education, and work experience, engage in any other
20 kind of substantial gainful work which exists in the national economy, regardless of whether such work
21 exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or
22 whether he would be hired if he applied for work." 42 U.S.C. § 1382c(a)(3)(b).

23 The Commissioner has established a five-step sequential process for determining whether a
24 person is disabled. 20 C.F.R. § 404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S. 137, 140-
25 41 (1987). In the first step, the Commissioner determines whether the claimant is engaged in "substantial
26 gainful activity"; if so, a finding of nondisability is made and the claim is denied. 20 C.F.R. §
27 404.1520(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the claimant is not engaged in
28 substantial gainful activity, the Commissioner proceeds to step two.

1 The second step requires the Commissioner to determine whether the claimant's impairment or
2 combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and § 416.920(a)(4)(ii);
3 *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly limits the claimant's physical or
4 mental ability to do basic work activities. *Id.*

5 In the third step, the Commissioner looks at a number of specific impairments listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the impairment meets
7 or is the equivalent of one of the Listed Impairments. 20 C.F.R. § 404.1520(a)(4)(iii), (d) and
8 § 416.920(a)(4)(iii), (c). The Commissioner presumes the Listed Impairments are severe enough to
9 preclude any gainful activity, regardless of age, education, or work experience. 20 C.F.R. § 404.1525(a).
10 If the claimant's impairment meets or equals one of the Listed Impairments, and is of sufficient duration,
11 the claimant is conclusively presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(d). If the
12 claimant's impairment is severe, but does not meet or equal one of the Listed Impairments, the
13 Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

14 At step four, the Commissioner determines whether the claimant can still perform "past relevant
15 work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past relevant work is that
16 which a claimant performed in the last fifteen years, which lasted long enough for him or her to learn
17 to do it, and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and § 416.920(b)(1).

18 In making this determination, the Commissioner assesses the claimant's residual functional
19 capacity (RFC) and the physical and mental demands of the work previously performed. *See id.*;
20 20 C.F.R. § 404.1520(a)(4); *see also Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). RFC is what
21 the claimant can still do despite his or her limitations. 20 C.F.R. § 1545 and § 416.945. In determining
22 RFC, the Commissioner must assess all evidence, including the claimant's and others' descriptions of
23 limitation, and medical reports, to determine what capacity the claimant has for work despite the
24 impairments. 20 C.F.R. § 404.1545(a) and § 416.945(a)(3).

25 A claimant can return to previous work if he or she can perform the "actual functional demands
26 and job duties of a particular past relevant job" or "[t]he functional demands and job duties of the [past]
27 occupation as generally required by employers throughout the national economy." *Pinto v. Massanari*,
28 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and citation omitted).

1 If the claimant can still do past relevant work, then he or she is not disabled for purposes of the
2 Act. 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131 ("Generally, a claimant
3 who is physically and mentally capable of performing past relevant work is not disabled, whether or not
4 he could actually obtain employment.").

5 If, however, the claimant cannot perform past relevant work, the burden shifts to the
6 Commissioner to establish at step five that the claimant can perform work available in the national
7 economy. 20 C.F.R. § 404.1520(e) and § 416.290(e); *see also Yuckert*, 482 U.S. at 141-42, 144. This
8 means "work which exists in significant numbers either in the region where such individual lives or in
9 several regions of the country." *Gutierrez*, 740 F.3d at 528. If the claimant cannot do the work he or she
10 did in the past, the Commissioner must consider the claimant's RFC, age, education, and past work
11 experience to determine whether the claimant can do other work. *Yuckert*, 482 U.S. at 141-42. The
12 Commissioner may meet this burden either through the testimony of a vocational expert or by reference
13 to the Grids. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999).

14 "The grids are matrices of the four factors identified by Congress—physical ability, age,
15 education, and work experience—and set forth rules that identify whether jobs requiring specific
16 combinations of these factors exist in significant numbers in the national economy." *Lockwood v.*
17 *Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation marks and citation
18 omitted). The Grids place jobs into categories by their physical-exertional requirements, and there are
19 three separate tables, one for each category: sedentary work, light work, and medium work. 20 C.F.R.
20 Part 404, Subpart P, Appx. 2, § 200.00. The Grids take administrative notice of the numbers of unskilled
21 jobs that exist throughout the national economy at the various functional levels. *Id.* Each grid has various
22 combinations of factors relevant to a claimant's ability to find work, including the claimant's age,
23 education and work experience. *Id.* For each combination of factors, the Grids direct a finding of
24 disabled or not disabled based on the number of jobs in the national economy in that category. *Id.*

25 If at step five the Commissioner establishes that the claimant can do other work which exists in
26 the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566. Conversely, if the
27 Commissioner determines the claimant unable to adjust to any other work, the claimant will be found
28 disabled. 20 C.F.R. § 404.1520(g); *see also Lockwood*, 616 F.3d at 1071; *Valentine v. Comm'r of Soc.*

1 *Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

2 **III. DISCUSSION**

3 **A. ALJ's Findings in this Case**

4 At step one, the ALJ found Plaintiff met the insured status requirements through December 31,
5 2016, and had not engaged in substantial gainful activity since the alleged onset date of September 30,
6 2012. (AR 23.)

7 At step two, the ALJ concluded Plaintiff had the following severe impairments: steroid
8 responsive arthropathy, seronegative rheumatoid arthritis, osteoarthritis, gastro-intestinal reflux disease,
9 and gastritis. (AR 23.)

10 At step three, the ALJ determined Plaintiff did not have an impairment or combination of
11 impairments that met or medically equaled the severity of one of the Listed Impairments. (AR 28.)

12 At step four, the ALJ assessed Plaintiff as having the RFC to perform light work as defined in
13 20 C.F.R. § 404.1567(b) and 416.967(b), except she was limited to lifting/carrying ten pounds frequently
14 and twenty pounds occasionally; she could sit, stand, and walk for six hours each in an eight-hour
15 workday; she could frequently balance, stoop, kneel, crouch, and crawl; she could frequently climb
16 stairs, ladders, ropes and scaffolds; she should avoid hazards involving working at heights or operating
17 dangerous moving machinery; she would need proximity to a restroom on occasion; she should not
18 perform work that requires persistent visual acuity; she could understand and remember simple, detailed
19 and complex instructions and could relate to the public, supervisors and coworkers. (AR 29.)

20 At step five, the ALJ relied on testimony from the VE to conclude that Plaintiff could perform
21 past relevant work as a retail sales clerk. (AR 34-35.) The ALJ also determined that Plaintiff could
22 perform other jobs that existed in the national economy in significant numbers including a storage
23 facility rental clerk and cashier. (AR 35-36.) Therefore, the ALJ concluded that Plaintiff was not
24 disabled from September 30, 2012 through the date of the decision. (AR 36.)

25 **B. RFC & Gastritis Limitations**

26 **1. Summary of Argument**

27 Plaintiff argues that the ALJ's RFC determination was incomplete because it did not adequately
28 account for her functional limitations related to her gastritis. While the ALJ's RFC acknowledged the

1 need for additional bathroom breaks through the requirement of proximity to a bathroom, Plaintiff
2 contends that it failed to fully consider the impact of her symptoms to the extent she would be absent
3 from her workstation and off-task while in the restroom. (ECF No. 13-1 at 13.) In other words, Plaintiff
4 asserts that by not incorporating the time she would need for the additional restroom breaks into the
5 RFC, the ALJ failed to properly determine the maximum RFC. (*Id.* at 14.) As a result, Plaintiff contends
6 the matter should be remanded for further consideration of Plaintiff’s RFC, including the impact of these
7 symptoms, pursuant to Social Security Ruling (SSR) 96-8p. (*Id.*) Plaintiff points out that the VE testified
8 that if the restroom breaks added up to more than ten percent of time off-task, she would be precluded
9 from working any jobs in the national economy. In support of her argument, Plaintiff relies on a 2012
10 District of Oregon case, *Allen v. Astrue*, No. 6:11-cv-06322-KI, 2012 WL 4792412 (D. Or. Oct. 9, 2012),
11 and a 2013 Western District of Washington Case, *Taylor v. Astrue*, No. C12-1069-MJP-MAT, 2013 WL
12 607436 (W.D. Wash. Jan. 28, 2013).

13 The Commissioner argues that Plaintiff mistakenly claims the RFC is incomplete because it does
14 not address the time she needs for restroom breaks. (ECF Nos. 14/15 at 5.) The Commissioner asserts
15 that Plaintiff cites no evidence in the record showing she needs unscheduled breaks due to her gastritis,
16 much less breaks that would result in her being off task ten percent or more of the workday. (*Id.*) Instead,
17 the Commissioner contends that the ALJ considered the entire record and assessed an RFC that
18 adequately accommodated Plaintiff’s gastritis by calling for proximity to the bathroom. (*Id.*) The
19 Commissioner points out that the medical records show no comments regarding her bathroom usage or
20 indicate that she required unscheduled breaks. (*Id.*)

21 In her reply, Plaintiff asserts that the record demonstrates that she consistently complained of
22 frequent and urgent need to use the restroom. (ECF No. 17 at 3.) She argues it is not typical practice for
23 a physician to observe a person’s typical bathroom usage, and her medical records confirm consistent
24 reports of abdominal pain and frequent, painful bathroom usage along with diagnostic testing consistent
25 with irritable bowel disease. (*Id.* at 2.)

26 **2. Medical Evidence Re: Plaintiff’s Intestinal Issues**

27 On March 30, 2011, she saw Dr. Paul Pilgram for stomach issues which included nausea, “major
28 GI upset” and “normal to diarrhea.” (AR 531.) She reported developing “epigastric abdominal pain”

1 while preparing to go to work the morning before, and could not go to work. (AR 531.) She was assessed
2 with epigastric abdominal pain and diarrhea. (AR 532.) An abdominal ultrasound was recommended.
3 (AR 532.)

4 On August 3, 2011, her lab test for inflammatory bowel disease was normal. (AR 522.) The tests
5 showed that helicobacter pylori, celiac sprue and pancreatitis were also not responsible for her abdominal
6 pain and diarrhea. (AR 523.) She was assessed with unspecified abdominal pain. (AR 523.)

7 On September 17, 2012, Plaintiff reported intestinal cramping. (AR 362.) She was advised to
8 take probiotics for intestinal problems. (AR 363.) On September 24 and 28, 2012, she reported that her
9 intestinal problems were improving with probiotics. (AR 364, 366.) On October 9, 2012, she reported
10 bowel problems including feeling as if she had diarrhea and stomach cramps but then getting to the
11 restroom and not having to go. (AR 413.) Tests for her abdominal issues were ordered. (AR 414.)

12 On November 6, 2012, she reported trouble eating and abdominal pain after eating. (AR 411.)
13 She had lost twelve pounds since May 2012. (AR 411.) She was diagnosed with abdominal pain. (AR
14 412.) It was noted that she had a steroid responsive intestinal problem that might be a “Crohn’s
15 equivalent,” though testing showed she was not consistent with inflammatory bowel disease. (AR 412-
16 413.) A report from Dr. Pilgram on November 6, 2012, noted Plaintiff’s abdominal pain and indicated
17 that lab tests were ordered for Crohn’s Disease and Ulcerative Colitis. (AR 517.) She was given a steroid
18 pack to try to help with the pain after eating. (AR 517.) Records from Dr. Pilgram on December 3 and
19 19, 2012, noted possible Crohn’s disease. (AR 407, 408.)

20 On March 11, 2013, Dr. Pilgram noted Plaintiff was at risk for Crohn’s disease. (AR 402.) On
21 May 13, 2013, Dr. Pilgram assessed her with diarrhea. (AR 435.) He noted that a colonoscopy to further
22 investigate the possibility of Crohn’s would be scheduled when she had insurance. (AR 435.) On the
23 same date, Dr. Pilgram noted that her abdominal symptoms, which began in October 2012, were
24 undiagnosed, though she showed markers that made her a high risk for Crohn’s Disease. (AR 501.) He
25 indicated that prednisone gave her only temporary relief from her symptoms. (AR 501.) Another report
26 on that date stated that Plaintiff struggled to eat as she had severe periumbilical central abdominal pain,
27 and prednisone was helpful. (AR 512.) At that point, Dr. Pilgram did not know the cause of her issues,
28 and as such, did not expect the condition to improve in the foreseeable future. (AR 512.)

1 On April 9, 2013, she reported that peppermint oil in her coffee or hot chocolate seemed to help
2 with her intestinal problems. (AR 508.)

3 On July 9, 2013, she reported intestinal problems improving with probiotics. (AR 496.) A
4 colonoscopy was prescribed, and she was to continue probiotics. (AR 497.)

5 Dr. Pilgram filled out an RFC questionnaire on February 26, 2014. (AR 501-502.) His diagnoses
6 for Plaintiff included possible Crohn’s disease. (AR 501.) He stated that Plaintiff would need to take
7 unscheduled breaks every hour for ten to thirty minutes during an eight-hour workday. (AR 501.)

8 On April 29, 2014, it was reported that she had symptoms of alternating diarrhea and
9 constipation. (AR 563.) She was referred for a colonoscopy. (AR 564.)

10 She saw Dr. Paul Sheykhzadeh of Digestive Health Associates on September 8, 2014, regarding
11 abdominal pain, irregular bowel pattern, rectal bleeding. (AR 571-72.) She described a two-year history
12 of irregular bowel pattern with no bowel movements for several days followed by a day of diarrhea. (AR
13 571.) She admitted to frequent urgency, and frequent abdominal pain. (AR 571.) She underwent a
14 colonoscopy and endoscopy as a result of chronic diarrhea and abdominal pain on October 6, 2014, and
15 revealed hemorrhoids, a small hiatus hernia, and inflammation in the gastric antrum. (AR 565-567.)
16 Biopsies were taken for evaluation of celiac disease. (AR 567.)

17 **3. Plaintiff’s Hearing Testimony**

18 Plaintiff testified that her gastro-intestinal issues caused her to “either run[] to the bathroom all
19 the time or ... not ... at all.” (AR 61.) She said that week, for instance, she had “been in the bathroom
20 more than [she had] been out.” (AR 62.) She testified that her last job, which was a “phone job” ended
21 in part because of her intestinal issues as she “could not get off the phone to use the bathroom or [she]
22 would be penalized, it would affect [her] time. And it would actually affect [her] performance, and that
23 would affect [her] pay.” (AR 63.)

24 **4. VE Testimony**

25 The ALJ then took testimony from the VE, where the VE identified Plaintiff’s past relevant
26 work. (AR 67-68.) The ALJ posed a vocational profile with an individual of Plaintiff’s age at the onset
27 of disability, education and past work history, and asked whether a person with limitations including “on
28 occasion [requiring] some proximity to a restroom” could perform the past relevant work. (AR 68-69.)

1 The VE testified that such individual could perform the tour guide and retail sales clerk past relevant
2 work. (AR 69.) The VE also stated that such an individual could perform other work including storage
3 facility rental clerk, parking attendant, and cashier in a self-service facility or kiosk. (AR 70.) Plaintiff's
4 counsel then questioned the VE, and asked whether the jobs identified provided reasonable proximity
5 to a restroom. (AR 71.) The VE testified that the tour guide and retail sales clerk positions would have
6 reasonable proximity to a restroom. (AR 71.) Plaintiff's attorney then asked the VE, "regardless of how
7 close the bathroom is..., how many unscheduled breaks is an employer going to tolerate no matter how
8 close the bathroom is?" (AR 70.) The attorney and VE then engaged in the following discussion:

9 VE: You know, if I understand your question would be how many breaks would be
10 tolerated in -- how many breaks would be tolerated equated to time off-task, not
performing work?"

11 Attorney: Right.

12 VE: And I would say not to exceed--10 percent or more would be excessive and would
not be tolerated.

13 Attorney: Okay.

14 VE: 10 percent of the work -- maximum 10 percent of the workday.

15 Attorney: Okay, so if someone was missing that much time, does the employer care how
close the bathroom is?

16 VE: No, no, we discussed it in terms of time off-task.

17 Attorney: Right.

18 VE: Off work.

19 Attorney: Okay.

20 (AR 71-72.) The hearing then concluded. (AR 72.)

21 **5. ALJ's Decision**

22 The ALJ assessed Plaintiff as capable of performing light work with some additional limitations,
23 including the need for "proximity to a restroom on occasion." (AR 30.) The ALJ pointed out that
24 Plaintiff reported in April 2013 that gastro-intestinal issues caused her to never know when she would
25 need to be in the bathroom and made it difficult for her to eat. (AR 30.) The ALJ again acknowledged
26 Plaintiff's testimony that her gastrointestinal issues caused her to run to the bathroom. (AR 31.) The ALJ
27 went on to describe Plaintiff's treatment concerning her intestinal issues. (AR 31-33.)

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1 After recounting this treatment, the ALJ stated: “To account for the claimant’s irregular bowel
2 patterns and abdominal pain due to her gastritis and gastro-intestinal reflux disease, the undersigned
3 incorporates the limitation that the claimant must have proximity to a restroom in her residual functional
4 capacity.” (AR 33.)

5 **6. Analysis**

6 RFC is what the claimant can still do despite his or her limitations. 20 C.F.R. § 1545 and
7 § 416.945. In determining RFC, the Commissioner must assess all evidence, including the claimant's
8 and others' descriptions of limitation, and medical reports, to determine what capacity the claimant has
9 for work despite the impairments. 20 C.F.R. § 404.1545(a) and § 416.945(a)(3).

10 “In assessing RFC, the adjudicator must discuss the individual’s ability to perform sustained
11 work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5
12 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related
13 activity the individual can perform based on the evidence available in the case record.” Social Security
14 Ruling (SSR) 96-8P, 1996 WL 374184 (July 2, 1996).

15 In the first case Plaintiff relies on, *Allen v. Astrue*, the ALJ accepted the testimony of the
16 claimant’s ex-boyfriend that the claimant needed immediate access to the restroom, but the ALJ did not
17 discuss how many bathroom breaks would be needed in a workday. *See Allen*, 2012 WL 4792412, at *
18 10. There, the VE testified the claimant would not be able to work if she needed to use the restroom
19 every thirty-minutes for five minutes at a time, on a daily basis. *Id.* The court found that “a functional
20 limitation requiring continuous access to a restroom [was] insufficient to address Allen’s need to *use* the
21 restroom and the amount of time carved out from her workday to accommodate her need.” *Id.* As such,
22 the court remanded for the ALJ to consider this issue in the first instance.

23 In the second case cited by Plaintiff, the court acknowledged it was reasonable for the claimant
24 to argue that a person with Crohn’s disease does not decide when to go to the bathroom and that the
25 decision should be remanded for the ALJ to consider the claimant’s need for ready access to a bathroom
26 and unscheduled breaks. *See Taylor*, 2013 WL 607436 at * 4. Ultimately, the court found that the
27 claimant had failed to provide sufficient support for a functional limitation associated with his Crohn’s
28 disease, and did not remand on this basis.

1 Here, the ALJ acknowledged (and did not specifically discredit or reject) Plaintiff's testimony
2 that her gastro-intestinal issues caused her to never know when she would need to be in the bathroom.
3 Therefore, unlike *Taylor*, the ALJ here specifically noted there is support for a functional limitation of
4 unscheduled bathroom breaks. The ALJ accounted for this by incorporating into the RFC a limitation
5 that she be in close proximity to a restroom. Plaintiff's attorney asked the VE about what amount of time
6 being off task due to taking unscheduled restroom breaks would be tolerated by an employer. The VE
7 specifically testified that unscheduled breaks that equated to ten percent of the time being off task or not
8 working would not be tolerated by an employer. The ALJ, however, did not address how much time
9 Plaintiff would be off task as a result of taking unscheduled breaks due to her gastrointestinal issues.

10 The ALJ did not address this topic despite the VE's testimony that regardless of how close the
11 restroom was, unscheduled breaks that equated to ten percent of the time being off-task or not working
12 would not be tolerated by an employer, and Plaintiff's own testimony concerning her bowel problems,
13 their unpredictability, and that her condition had required her to be in the bathroom more than she was
14 out of it. The court agrees with the District of Oregon in *Allen* that the functional limitation assessed by
15 the ALJ—close proximity to the restroom—does not adequately address this limitation. In other words,
16 the ALJ did not sufficiently address how much time of a workday would be taken up by Plaintiff using
17 the restroom during unscheduled breaks, and whether or not this would preclude employment. The court
18 therefore recommends remand for further development of the record in this regard.

19 **C. Medical Opinion Evidence**

20 **1. Summary of Argument**

21 Plaintiff notes that the ALJ accorded “partial weight” to the opinion of Plaintiff's primary care
22 physician, Dr. Pilgram, but gave great weight to the opinions of non-examining state agency consultants
23 Dr. Susan Thobe and Dr. Kim Heaton. (ECF No. 13-1 at 14.)

24 Plaintiff argues that the opinions of Dr. Thobe and Dr. Heaton are “materially divergent on the
25 issue of [RFC.]” (*Id.* at 15.) She asserts that Dr. Thobe opined that a consultative examination was
26 required to establish the current severity of the impairments, and did not issue a RFC assessment. (*Id.*)
27 There was no consultative examination before Dr. Heaton filed her report, which claimed that Plaintiff
28 had the RFC for light work. (*Id.*) Plaintiff claims that these opinions cannot be reconciled, and therefore,

1 the ALJ's decision to afford them great weight is unsupported. (*Id.*)

2 Plaintiff further contends that the ALJ did not discuss that these opinions were based on an
3 incomplete record that did not contain the subsequently submitted treating source opinion from
4 Dr. Pilgram, and it is unclear whether a review of the full records would have altered their opinions,
5 particularly Dr. Thobe, who said that a RFC assessment was needed for proper evaluation. (*Id.*)

6 The Commissioner argues that the ALJ properly afforded partial weight to Dr. Pilgram's
7 opinions, and great weight to the opinions of Dr. Thobe and Dr. Heaton. (ECF Nos. 14/15 at 9-15.) The
8 Commissioner points out that the ALJ explained that Dr. Pilgram's extreme limitations were at odds
9 with evidence showing the pain responded to medication, were inconsistent with the normal physical
10 examination findings in the treatment records, and were inconsistent with evidence that Plaintiff could
11 engage in a variety of daily activities. (*Id.* at 11-12.)

12 The Commissioner contends that Dr. Thobe did not author the "consultative examination"
13 section of the record that Plaintiff cites, and instead, Dr. Thobe's opinion is set forth in the "Case
14 Analysis" section of the report and in that portion she did not state that any further examinations were
15 required.

16 **2. Dr. Pilgram's Opinions**

17 On March 11, 2013, Dr. Pilgram completed a form indicating that Plaintiff had generalized
18 muscle and joint pain, diarrhea, fatigue, migraines, with a history of steroid responsive arthropathy,
19 serologic markers suggesting increased risk of Crohn's disease. (AR 399.) He opined that the condition
20 was static and improvement could not be expected. (AR 405.) He further opined that she was limited
21 to sitting and standing for thirty minutes, and could lift less than twenty pounds frequently. (AR 406.)

22 In an RFC questionnaire dated February 26, 2014, Dr. Pilgram indicated that he first started
23 seeing Plaintiff in September of 2009 and then saw her for visits every one to three months. (AR 501.)
24 His diagnoses included: steroid responsive arthropathy, possible Crohn's disease and fibromyalgia. (AR
25 501.) Her symptoms involved: generalized pain, joint pain, abdominal pain and diarrhea, migraines and
26 sciatica. (AR 501.) He opined: she would need to recline or lie down in excess of typical breaks; she
27 could walk zero blocks without pain; she could sit and stand for fifteen minutes at a time; she could sit
28 and stand/walk for three hours in an eight-hour work day; she needs a job which permits shifting

1 positions at will from sitting, standing or walking; she would need a ten to thirty minute break every hour
2 during an eight-hour workday; she could frequently lift/carry up to ten pounds, and occasionally lift/carry
3 twenty pounds; she had limitations with respect to repetitive reaching and handling; she was likely to
4 be absent from work more than four times a month; and, she was not capable of working an eight-hour
5 day, five days a week on a sustained basis. (AR 501-502.)

6 **3. Dr. Thobe's Opinion**

7 Dr. Thobe's disability report is dated May 31, 2013. (AR 73-80, 81-88.)

8 She stated:

9 Reviewed MER and agree with examiner's FOFAE. Clmnt has objective evidence to
10 support MDI of migraine successfully treated with Topamax and symptoms suspicious
11 for Crohn's per treating physician including arthropathy that is responsive to steroid
12 treatment and chronic fatigue and diarrhea (no objective studies have been done to
13 establish diagnosis per available MER) and there is no evidence of synovitis or deformity
14 on exams of all extremities. Clmnt is awaiting insurance coverage before undergoing
15 colonoscopy and resuming tx with Topamax but recent exams are normal and ADLs are
16 active. TSO stating no lift greater than 20 pounds and sit/stand 30 minutes is not
17 consistent with his completely normal PE and plan at visit in 3/13 so is not given
18 controlling weight. Overall, findings consistent with NS.

19 (AR 77, 85.) As Plaintiff indicates, Dr. Thobe did not issue a functional assessment.

20 **4. Dr. Heaton's Opinion**

21 Dr. Heaton evaluated Plaintiff's records on reconsideration, and her report is dated October 8,
22 2013. (AR 91-102, 103-114.)

23 After reviewing the records (including subsequent follow up with primary care provider on July
24 9, 2013), Dr. Heaton found no evidence to support alteration of Dr. Thobe's assessment. (AR 95.) She
25 stated:

26 Review of previous MER and new MER still shows recurrent migraine headaches
27 successfully treated with medications when she has health insurance coverage to cover
28 the cost of the medications. Does not meet/equal any listing and is non-severe. Has
steroid responsive arthropathy (possible seronegative rheumatoid arthritis with negative
inflammatory markers) with subtle evidence of mild right lumbosacral radiculopathy on
EMG with multiple visits for low back pain. TSO (Pilgram, 3/11/13) stating severe
limitations of lifting and sitting/standing is not consistent with his own objective findings
and isn't given controlling weight. This is severe. See assigned RFC. Has possible
inflammatory bowel disease (Crohn's with genetic predisposition) without colonoscopy
secondary to cost due to no insurance coverage. This is non-severe. Reviewed with Dr.
Taggart.

1 (AR 96.) Dr. Heaton limited Plaintiff as follows: lift/carry twenty pounds occasionally and ten pounds
2 frequently; stand/walk and sit six hours in an eight-hour workday; climb ramps/stairs frequently; climb
3 ladders/ropes/scaffolds occasionally; frequently balance; frequent stooping, kneeling, crouching and
4 crawling. (AR 99-100.) Dr. Heaton opined Plaintiff could perform work at the light level. (AR 101.)

5 **6. The ALJ's Findings**

6 After providing a thorough summary of the medical records, the ALJ stated the following with
7 respect to the medical opinions:

8 The undersigned gives great weight to the opinions of state agency consultants Susanne
9 Thobe, M.D. and Kim Heaton, M.D. limiting the claimant to light work with frequent
10 balancing, stooping, kneeling, crouching, and crawling as well as frequent climbing of
11 ramps and stairs. In addition, the undersigned finds that the claimant can frequently climb
12 ladders, ropes and scaffolds. Drs. Thobe and Heaton are accepted medical sources who
13 reviewed the claimant's medical records, and their opinions are consistent with the
14 claimant's reports of a wide range of activities of daily living as well as with the limited
15 examination findings of the claimant of the claimant's treating physicians and the
16 effectiveness of medication in treating her symptoms.

17 The undersigned gives partial weight to Dr. Pilgram's opinions. Dr. Pilgram's opinion
18 that the claimant must lift less than 20 pounds frequently and can lift 10 pounds
19 frequently and 20 pounds occasionally (Exhibits 6F at 10, 10F at 2) is consistent with
20 Dr. Pilgram's treatment records, limited examination findings, and the responsiveness
21 of the claimant's pain to steroid medications. In addition, the undersigned accounts for
22 the claimant's allegations of continued pain in her joints and lower back by limiting her
23 to light work in her residual functional capacity. However, Dr. Pilgram's opinions stating
24 that the claimant was unable to meet the demands of competitive employment and would
25 need to recline during a typical workday, can walk zero blocks without pain, needs to
26 take unscheduled breaks every hour for ten to 30 minutes, requires the ability to shift
27 positions at will, can stand and walk a total of three hours in a day, has limitations in
28 using her hands, fingers, and arms, can sit and stand no more than 30 minutes each in a
day, and would be absent more than four times each month are not supported by the
preponderance of the medical and opinion evidence (Exhibits 6F at 10, 10F at 1-2, 11F
at 12). These opinions are inconsistent with Dr. Pilgram's treatment records indicating
that the claimant's arthritic pain responded to steroid medications and are inconsistent
with Drs. Pilgram, Jenkins, and Narag's limited examination findings. These opinions
are also inconsistent with the claimant's previously discussed reports of her activities of
daily living, including her testimony that she drives to visit her relatives out of state in
Utah and California.

(AR 33-34.)

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1 **7. Analysis**

2 First, the court will address Plaintiff’s argument that the ALJ erred in assigning great weight to
3 the consulting physicians’ opinion because Dr. Thobe stated that a consultative examination was
4 required but did not occur. As indicated above, the Commissioner argues that Dr. Thobe did not author
5 this portion of the report. It is not entirely clear who stated in the form that a consultative examination
6 was required (AR 84), but the Commissioner is correct that the case analyses section of the form, which
7 is signed by Dr. Thobe, does not state that any further examination was required. Nor did Dr. Heaton
8 state that a further consultative examination should be required in providing her assessment.

9 Second, Plaintiff argues that the ALJ erred in assigning great weight to these opinions because
10 they did not consider Dr. Pilgram’s February 2014 opinion and records from Plaintiff’s April 2013 and
11 April 2014 visits. The records post-date Dr. Thobe’s report, and except for the April 2013 records, also
12 post-date Dr. Heaton’s report. In any event, the documents were made a part of the record and considered
13 by the ALJ. The court finds that the ALJ accurately summarized Plaintiff’s medical history and provided
14 specific and legitimate reasons for assigning great weight to Dr. Thobe’s and Dr. Heaton’s opinions
15 while assigning partial weight to Dr. Pilgram’s opinions. *See Garrison v. Colvin*, 759 F.3d 995, 1012
16 (9th Cir. 2014). The ALJ found that the extreme limitations opined by Dr. Pilgram were unsupported
17 by his own treatment records which indicated that the arthritic pain responded to steroid medications.
18 The court has reviewed the medical records and finds that this conclusion is supported by substantial
19 evidence in the record. Plaintiff complained of joint pain and intestinal issues, and Dr. Pilgram’s records
20 indicate that she received relief with both steroid treatment and the use of probiotics. (*See* AR 364, 407,
21 437, 438, 440, 448, 458, 461, 462, 465.)

22 In sum, the court does not conclude the ALJ erred in this regard.

23 **D. Step Four Determination**

24 Finally, Plaintiff argues that the ALJ erred because the hypothetical question posed to the VE was
25 incomplete, as the RFC failed to account for Plaintiff’s limitations associated with gastritis and the need
26 for unscheduled bathroom breaks. (ECF No. 13-1 at 16.)

27 To the extent the court found that the ALJ erred in failing to sufficiently address how much time
28 of a workday would be taken up by Plaintiff using the restroom during unscheduled breaks, and whether

1 or not this would preclude employment, the court finds the ALJ erred in determining Plaintiff could
2 perform past relevant work and other work at steps four and five. On remand, the court should develop
3 the record and pose a hypothetical that completely takes into account Plaintiff's limitations in this regard.

4 **E. Conclusion**

5 The court finds that the ALJ erred in failing to sufficiently address how much time of a workday
6 would be taken up by Plaintiff using the restroom during unscheduled breaks, and whether or not this
7 would preclude employment. Therefore, the matter should be remanded.

8 **IV. RECOMMENDATION**

9 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING IN**
10 **PART** Plaintiff's motion (ECF No. 13) and **REMANDING** this matter for further development
11 consistent with this Report and Recommendation; and, **DENYING** the Commissioner's cross-motion
12 (ECF No. 14).

13 The parties should be aware of the following:

14 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local
15 Rules of Practice, specific written objections to this Report and Recommendation within fourteen days
16 of receipt. These objections should be titled "Objections to Magistrate Judge's Report and
17 Recommendation" and should be accompanied by points and authorities for consideration by the District
18 Court.

19 2. That this Report and Recommendation is not an appealable order and that any notice of
20 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until
21 entry of the District Court's judgment.

22 DATED: July 12, 2017.

23 *William G. Cobb*

24 _____
25 WILLIAM G. COBB
26 UNITED STATES MAGISTRATE JUDGE
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