

Administrative Law Judge (ALJ) issued an unfavorable decision. (TR. 10-21). The Appeals Council denied Plaintiff's request for review. (TR. 1-3). Thus, the decision of the ALJ became the final decision of the Commissioner.

II. THE ADMINISTRATIVE DECISION

In evaluating Plaintiff's claims of disability, the ALJ followed the five-step sequential evaluation process required by agency regulations. *See Fischer-Ross v. Barnhart*, 431 F.3d 729, 731 (10th Cir. 2005); 20 C.F.R. §§ 404.1520 & 416.920. At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since December 23, 2012, the alleged onset date. (TR. 12). At step two, the ALJ determined that Ms. Flores had the following severe impairments: Sjogren's Syndrome and inflammatory arthritis. (TR. 12). At step three, the ALJ found that Plaintiff's impairments did not meet or medically equal any of the presumptively disabling impairments listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. (TR. 13).

At step four, the ALJ found that Plaintiff could not perform her past relevant work. (TR. 19). The ALJ further concluded that Plaintiff had the residual functional capacity (RFC) to:

[P]erform light work as defined in 20 CFR 404.1567(b) and 416.967(b) limited to occasional reaching, crouching, handling, crawling, and stooping. The claimant should avoid even mild exposure to marked temperature and humidity changes; avoid concentrated exposure to pulmonary irritants; and avoid concentrated vibrations.

(TR. 13).

Based on the finding that Ms. Flores could not perform her past relevant work, the ALJ proceeded to step five. There, the ALJ presented several limitations to a vocational expert (VE) to determine whether there were other jobs in the national economy that

Plaintiff could perform. (TR. 56-57). Given the limitations, the VE identified three jobs from the Dictionary of Occupational Titles (DOT). (TR. 57). The ALJ adopted the testimony of the VE and concluded that Ms. Flores was not disabled based on her ability to perform the identified jobs. (TR. 20-21).

III. ISSUES PRESENTED

On appeal, Plaintiff alleges error: (1) at step three, (2) in the RFC determination, and (3) at step five.²

IV. STANDARD OF REVIEW

This Court reviews the Commissioner's final "decision to determin[e] whether the factual findings are supported by substantial evidence in the record and whether the correct legal standards were applied." *Wilson v. Astrue*, 602 F.3d 1136, 1140 (10th Cir. 2010). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation omitted).

While the court considers whether the ALJ followed the applicable rules of law in weighing particular types of evidence in disability cases, the court will "neither reweigh the evidence nor substitute [its] judgment for that of the agency." *Vigil v. Colvin*, 805 F.3d 1199, 1201 (10th Cir. 2015) (internal quotation marks omitted).

V. STEP THREE

At step three, the ALJ found that Plaintiff's impairments did not meet or medically equal any of the presumptively disabling impairments listed at 20 C.F.R. Part 404, Subpart

² In her opening brief, Ms. Flores alleges an additional error in the ALJ's credibility analysis. (ECF No. 14:3). But the Court need not consider this as a separate point of error as she does not develop the argument elsewhere in her brief. *See Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1161 (10th Cir. 2012) ("We will consider and discuss only those contentions that have been adequately briefed for review.").

P, Appendix 1. (TR. 13). Ms. Flores argues: (1) the ALJ failed to perform a proper step-three analysis and (2) she meets or equals Listing 14.10. (ECF No. 14:3-5; 19:1-4). The undersigned agrees with Plaintiff's first point of error and concludes that whether a Listing had been met shall be determined on remand, following a proper step-three analysis.

The record contains evidence documenting Dr. Fahed Hamadeh as Plaintiff's treating rheumatologist from June 1, 2012 through January 5, 2015. (TR. 427, 429-458, 490-553, 607-634). Dr. Hamadeh diagnosed and treated Plaintiff for Sjogren's Syndrome, an autoimmune disease which the physician explained as "causing undifferentiated inflammatory arthritis" characterized by chronic pain which affected Plaintiff's activities of daily living and her job duties. (TR. 427, 436, 451, 492, 515, 519, 525, 526, 542, 545-547, 552, 608, 612, 621, 627, 630).

At step two, the ALJ recognized the Sjogren's Syndrome as a severe impairment. (TR. 12). At step three, the ALJ noted Listing 14.10 for Sjogren's Syndrome, recited the Listing verbatim, and then stated: "The medical evidence of record does not document the symptoms and limitations described in Listing 14.10 A or B." (TR. 13). Plaintiff alleges that the ALJ's step three findings "[were] conclusory, leaving the Court with nothing to review." (ECF No. 14:5). Ms. Flores is correct.

In *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996), the Tenth Circuit Court of Appeals held that "a summary conclusion that appellant's impairments did not meet or equal any Listed Impairment. . . [is] a bare conclusion[,] beyond meaningful judicial review." (internal citation omitted). In *Clifton*, the Court held that under 42 U.S.C. §

405(b)(1),³ “the ALJ was required to discuss the evidence and explain why he found that appellant was not disabled at step three.” *Id.* The Court explained:

In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ’s conclusion that appellant’s impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects.

Id. at 1009-1010. Here, the ALJ merely outlined Listing 14.10 and concluded that the listing had not been met. (TR. 13). Under *Clifton*, the ALJ’s summary conclusion was insufficient.

The Commissioner fails to address the legal deficiency—i.e. whether the ALJ had properly explained his step-three findings—and instead argues that Plaintiff did not meet or equal Listing 14.10 because: (1) the medical evidence supported the step three finding, (2) “Plaintiff’s subjective complaints cannot substitute for the necessary clinical findings [to support the Listing]” and (3) state agency reviewing physicians concluded that Plaintiff did not meet or equal a listed impairment. (ECF No. 18:7-10). But the ALJ did not base

³ 42 U.S.C. § 405(b)(1) states:

The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner’s determination and the reason or reasons upon which it is based.

his step-three findings on any of the reasons cited by the Commissioner. As stated, the ALJ failed to provide *any* explanation as to why he had rejected the Listing.

In reviewing Plaintiff's subjective complaints, the ALJ recognized the proper standard, summarized the medical evidence, and ultimately found that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision." (TR. 16). In considering Plaintiff's subjective statements at step three, the ALJ stated:

Because a claimant's symptoms can sometimes suggest a greater level of severity of an impairment that can be shown by the objective medical evidence alone, additional factors are considered in addition to the objective medical evidence when assessing the credibility of the claimant's allegations. The claimant's impairments do not meet or equal the requirements of any impairment set forth in Appendix 1, Subpart P, Regulations No. 4; therefore, consideration has been given to the claimant's subjective complaints.

(TR. 16). Although the ALJ stated that he considered Plaintiff's subjective complaints at step three, and he summarized the medical evidence, he never:

- stated why he deemed the Plaintiff incredible or otherwise linked his credibility findings to specific evidence of record,
- cited specific evidence of record in support of his step-three findings, or
- cited the agency reviewing physicians' findings in support of his step three findings.

(TR. 10-21). Thus, the Court should reject the Commissioner's argument because the Court is not permitted to supply *post-hoc* rationales to uphold the Commissioner's decision. *See Haga v. Astrue*, 482 F.3d 1205, 1207 (10th Cir. 2007) ("[T]his court may not create or adopt post-hoc rationalizations to support the ALJ's decision that are not apparent from the ALJ's decision itself."); *Hackett v. Barnhart*, 395 F.3d 1168, 1173 (10th

Cir. 2005) (the Court should not “engage in an impermissible reweighing of the evidence” or “substitute [its] judgment for that of the Commissioner.”).

In *Fischer-Ross v. Barnhart*, 431 F.3d 729, 734 (10th Cir. 2005), the Tenth Circuit Court of Appeals held that an error at step three is harmless if “confirmed or unchallenged findings made elsewhere in the ALJ’s decision confirm the step three determination under review.” But in the instant case, the ALJ did not make other findings which would confirm his step three decision. In fact, the ALJ’s own recitation of the evidence raises a question as to whether the criteria for 14.10 had been met. *See* TR. 16-17. And, as discussed below, the ALJ erred in the consideration of the opinion of the rheumatologist who had treated Ms. Flores for Sjogren’s Syndrome. *See infra*. Accordingly, the Court should conclude that the ALJ’s step-three error was not harmless.

Ms. Flores also argues that the evidence supports a finding that she had met or equaled Listing 14.10. This determination will be left to the ALJ on remand who will re-evaluate the evidence and properly explain the step-three findings.

VI. THE ALJ’S EVALUATION OF THE MEDICAL EVIDENCE

Ms. Flores argues that the ALJ erred in his evaluation of an opinion from Plaintiff’s treating rheumatologist, Dr. Hamadeh. (ECF No. 14:8-10). The Court should agree.

On January 5, 2015, Dr. Hamadeh completed a “Physical Medical Source Statement” where the physician documented Ms. Flores’ various work-related abilities and limitations. (TR. 632-634). There, the physician stated that Ms. Flores could:

- sit for 3 hours total during an 8-hour workday,
- stand for 2 hours total during an 8-hour workday,
- walk for 3-4 hours during an 8-hour workday,

- occasionally lift and/or carry between 11-20 pounds, and
- occasionally bend, squat, crawl, climb, reach, and stoop.

(TR. 632-633). Dr. Hamadeh also stated that Ms. Flores had limitations in her ability to use her hands and feet for repetitive movements, such as pushing and pulling leg controls, grasping, and fingering. (TR. 633). Finally, Dr. Hamadeh found that Plaintiff had mild limitations involving: (1) exposure to marked changes in temperature and humidity; (2) exposure to dust, fumes, and gas; and (3) exposure to vibrations. (TR. 633). Dr. Hamadeh explained all of his findings by citing pain in Plaintiff's hands, elbows, shoulders, hips, knees and ankles, which was worse with activity and better with rest and pain medication. (TR. 633-634). Finally, the physician stated that due to her condition, she would likely miss work 3-5 days per month and would need to lie down or recline at least 1 hour during the 8-hour workday. (TR. 634).

The ALJ recognized Dr. Hamadeh's opinion and ultimately afforded it "great weight." (TR. 18-19). However, as alleged by Plaintiff, the ALJ:

- mischaracterized the medical evidence from Dr. Hamadeh and
- engaged in an improper and selective review of Dr. Hamadeh's opinion.

(ECF No. 14:10).

A. Mischaracterization of Dr. Hamadeh's Opinion

As discussed, the ALJ found an RFC for Ms. Flores to engage in light work, as defined in the regulations. (TR. 13). The ALJ explained that "light work:"

[I]nvolves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of

performing a full range of light work, you must have the ability to do substantially all these activities.

(TR. 13) (citing 20 C.F.R. §§ 404.1567(b) & 416.967(b)). Social Security Ruling 83-10 further explains that “the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday.” Titles II And XVI: Determining Capability to do Other Work--The Medical-Vocational Rules of Appendix 2, 1983 WL 31251, at *6 (1983). The ALJ also concluded that Ms. Flores could occasionally reach, crouch, handle, crawl, and stoop; and that she should avoid: even a mild exposure to marked temperature and humidity changes; concentrated exposure to pulmonary irritants; and concentrated vibrations. (TR. 13).

The ALJ’s RFC *is consistent* with Dr. Hamadeh’s findings regarding Plaintiff’s abilities to:

- occasionally lift and/or carry, reach, crouch, crawl, stoop, and
- avoid exposure to pulmonary irritants, temperature changes, and vibrations.

Compare TR. 632-633 *with* TR. 13. However, the RFC is *not consistent* with Dr. Hamadeh’s findings regarding Plaintiff’s:

- abilities to walk and stand,
- ability to frequently lift and/or carry objects,
- ability to handle,
- ability to use her feet for repetitive movements, such as pushing and pulling leg controls, and
- likelihood of missing between 3-5 days of work per month, owing to her condition.

Compare TR. 632-633 *with* TR. 13. The ALJ concluded that Dr. Hamadeh's opinion regarding the possibility of Plaintiff missing work was not supported by the physician's treatment records. Plaintiff does not challenge this finding by pointing to records which would contradict the ALJ's findings. However, other findings by the ALJ indicate that his RFC determination regarding the remaining abilities were based on a misreading and/or mischaracterization of Dr. Hamadeh's opinion. The ALJ stated:

Dr. Hamadeh opined the claimant can . . . use her left and right foot for pushing and pulling leg controls[.] Dr. Hamadeh's opinion suggest [sic] the claimant can perform a combination of walking, standing, and sitting during an 8 hour day. Dr. Hamadeh[] . . . reported the claimant can grasp and finger with both hands. A great portion of Dr. Hamadeh's opinion is incorporated into the residual functional capacity assessment herein. A treating source opinion can be used to establish the existence of medically determinable impairments; the nature and severity of the impairments; and the impact of the impairments on the claimant's functional abilities. Thus, great weight is given to Dr. Hamadeh's opinion.

(TR. 18, 19).

If Dr. Hamadeh had actually made the findings credited to him by the ALJ regarding Plaintiff's ability to: grasp and finger with both hands, use both feet to pushing and pull leg controls, and perform the standing and walking requirements of light work, the physician's opinion would provide substantial evidence in support of the RFC determination. But the rheumatologist did not make these findings. Instead, Dr. Hamadeh specifically found that Plaintiff had limitations in both hands in her ability to finger and grasp, that she was limited in both feet for pushing and pulling leg controls and that she could only stand for 2 hours during and 8-hour workday and walk for 3-4 hours during an hour workday. *See* TR. 632-633.

Because the ALJ had clearly relied on Dr. Hamadeh's opinion in formulating the RFC, the Court should conclude that the RFC lacks substantial evidence due to the ALJ's mischaracterization of the evidence.⁴ The Tenth Circuit Court of Appeals reached this conclusion under similar circumstances in *Talbot v. Heckler*, 814 F.2d 1456 (10th Cir. 1987). In *Talbot*, the ALJ supported his RFC determination by relying on the opinion of one of the claimant's treating physicians, Dr. Byrd. *Talbot v. Heckler*, 814 F.3d at 1463. The ALJ stated that Dr. Byrd's evaluation "was generally consistent with light work which allowed alternate sitting, standing, and walking," findings which were consistent with the ALJ's RFC determination. *Id.* But, as noted by the Circuit Court,

[The ALJ's] statement both mischaracterizes the evaluation and assumes that alternately sitting, standing, and walking allows one to perform a full range of light work. What Dr. Byrd's evaluation [actually] concluded was that . . . the claimant could neither sit, walk, nor stand for longer than two hours at a time for a maximum of a six-hour work day . . . [which] precludes the kind of extensive sitting, standing and walking contemplated by the definition of light activity.

Id. In sum, the Court concluded that the mischaracterization of the treating physician's opinion rendered the RFC lacking in substantial evidence. The Court should conclude that *Talbot* is persuasive and reach the same conclusion. The ALJ afforded Dr. Hamadeh's opinion "great weight" and clearly relied on that opinion for the RFC findings regarding Plaintiff's abilities to walk, stand, frequently lift and/or carry objects, and operate foot controls. But because that determination was based on a mischaracterization of the evidence, it cannot stand.

⁴ The RFC was also supported by opinions from state agency reviewing physicians, Dr. Charles Clayton and Dr. James Metcalf. *See* TR. 63-74, 79-96. But the ALJ does not adopt those opinions over Dr. Hamadeh's opinion. *See* TR. 19 (the ALJ afforded the reviewing physician's opinions only "moderate weight" while affording Dr. Hamadeh's opinion "great weight.>").

B. Selective Review of Dr. Hamadeh's Opinion

Dr. Hamadeh also stated that Plaintiff would need to lie down or recline for at least one hour during an 8-hour workday. (TR. 634). The ALJ never mentioned this portion of the physician's opinion in the RFC⁵ and the omission was improper. *See Chapo v. Astrue*, 682 F.3d 1285, 1292 (10th Cir. 2012) (noting that it "is error under this circuit's case law . . . for [a]n ALJ . . . to pick and choose through an uncontradicted medical opinion, taking only the parts that are favorable to a finding of nondisability.") (brackets in original). As stated, the ALJ adopted the VE's testimony that Plaintiff could perform the jobs of counter clerk, information clerk, and record clerk. (TR. 20-21). But at the hearing, the VE testified that these jobs would be precluded if the hypothetical individual needed to recline for at least one hour per day, aside from regular breaks. (TR. 59). Thus, the Court should conclude that the ALJ's error in failing to discuss this portion of Dr. Hamadeh's opinion was not harmless.

VII. STEP FIVE

Plaintiff also alleges that the step five findings lacked substantial evidence because they were based on a hypothetical which was, in turn, based on an improper RFC. (ECF No. 14:5-8). But the Court need not address this allegation, as the RFC will be affected on remand following further review of Dr. Hamadeh's opinion. *See Robinson v. Barnhart*, 366 F.3d 1078, 1085 (10th Cir. 2004) ("We will not reach the remaining issues raised by claimant because they may be affected by the ALJ's resolution of this case on remand.").

⁵ See TR. 10-21.

VIII. RECOMMENDATION

Having reviewed the medical evidence of record, the transcript of the administrative hearing, the decision of the ALJ, and the pleadings and briefs of the parties, the undersigned magistrate judge finds that the decision of the Commissioner should be **REVERSED** and **REMANDED** for further administrative findings.

IX. NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to file specific written objections to this Report and Recommendation. *See* 28 U.S.C. §636 and Fed. R. Civ. P. 72. Any such objections should be filed with the Clerk of the District Court by **June 27, 2017**. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

X. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on June 13, 2017.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE