IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SANDRA LORRAINE HARRIS, Plaintiff, v. **NANCY A. BERRYHILL**, Commissioner of Social Security, Defendant.	Case No. 3:16-cv-0977-SI **OPINION AND ORDER**

Merrill Schneider, SCHNEIDER, KERR, AND ROBICHAUX, P.O. Box 14490, Portland, OR 97293. Of Attorneys for Plaintiff.

Billy J. Williams, United States Attorney, and Janice E. Hébert, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, 1000 S.W. Third Avenue, Suite 600, Portland, OR 97204; Kathy Reif, Special Assistant United States Attorney, OFFICE OF GENERAL COUNSEL, Social Security Administration, 701 Fifth Avenue, Suite 2900 M/S 221A, Seattle, WA 98104. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

Ms. Sandra Lorraine Harris seeks judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying her application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") pursuant to

the Social Security Act. For the following reasons, the Commissioner's decision is reversed and remanded for further proceedings.

STANDARD OF REVIEW

The district court must affirm the Commissioner's decision if it is based on the proper legal standards and the findings are supported by substantial evidence. 42 U.S.C. § 405(g); see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). "Substantial evidence" means "more than a mere scintilla but less than a preponderance." Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (quoting Andrews, 53 F.3d at 1039).

Where the evidence is susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Variable interpretations of the evidence are insignificant if the Commissioner's interpretation is a rational reading of the record, and this Court may not substitute its judgment for that of the Commissioner. See Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1193, 1196 (9th Cir. 2004). "[A] reviewing court must consider the entire record as a whole and may not affirm simply by isolating a specific quantum of supporting evidence." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007) (quoting Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (quotation marks omitted)). A reviewing court, however, may not affirm the Commissioner on a ground upon which the Commissioner did not rely. Id.; see also Bray, 554 F.3d at 1226.

BACKGROUND

A. Plaintiff's Application

Plaintiff filed an application for DIB and SSI on August 1, 2011, alleging disability beginning on March 3, 2009. Administrative Record ("AR") 199, 206. In her application, reconsideration, and appeal council petition, Plaintiff specifically alleged disability due to back pain, osteoarthritis, chronic obstructive pulmonary disease, acid reflux, depression, and anxiety. AR 75-76, 89-90, 104-05, 120-22, 226, 382, 402. The Commissioner denied Plaintiff's applications initially on March 7, 2012, and upon reconsideration on February, 4, 2013. AR 134-39, 140-43, 150-52, 153-54. Thereafter, she requested a hearing before Administrative Law Judge ("ALJ") Rudolph Murgo. AR 155-57. An administrative hearing was held on July 3, 2014. AR 33. After leaving the record open for additional evidence, on July 22, 2014, the ALJ found Plaintiff was not disabled from March 3, 2009, to July 22, 2014. AR 19. The Appeals Council denied Plaintiff's review, making the ALJ's decision the final decision of the Commissioner. AR 1. "[A] civil action may be brought only after . . . [the Commissioner] has made a final decision on the claim." Bass v. Soc. Sec. Admin., 872 F.2d 832, 833 (9th Cir. 2012). Plaintiff now seeks judicial review of that decision.

B. The Sequential Analysis

A claimant is disabled if he or she is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A). "Social Security Regulations set out a five-step sequential process for determining whether an applicant is disabled within the meaning of the Social Security Act." Keyser v. Comm'r Soc. Sec. Admin., 648 F.3d 721, 724 (9th Cir. 2011); see also 20 C.F.R. §§ 404.1520 (DIB), 416.920 (SSI); Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Each step is

potentially dispositive. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). The five-step sequential process asks the following series of questions:

1. Is the claimant performing "substantial gainful activity?" 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). This activity is work involving significant mental or physical duties done or intended to be done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910. If the claimant is performing such work, she is not disabled within the meaning of the Act. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is not performing substantial gainful activity, the analysis proceeds to step two.

2. Is the claimant's impairment "severe" under the Commissioner's regulations? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). An impairment or combination of impairments is "severe" if it significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Unless expected to result in death, this impairment must have lasted or be expected to last for a continuous period of at least 12 months. 20 C.F.R. §§ 404.1509, 416.909. If the claimant does not have a severe impairment, the analysis ends. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant has a severe impairment, the analysis proceeds to step three.

3. Does the claimant's severe impairment "meet or equal" one or more of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, then the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment does not meet or equal one or more of the listed impairments, the analysis continues. At that point, the ALJ must evaluate medical and other relevant evidence to assess and determine the claimant's "residual functional capacity" ("RFC"). This is an assessment of work-related activities that the claimant may still perform on a regular and continuing basis, despite any limitations imposed by his or her impairments. 20 C.F.R. §§ 404.1520(e), 404.1545(b)-(c), 416.920(e), 416.945(b)-(c). After the ALJ determines the claimant's RFC, the analysis proceeds to step four.

4. Can the claimant perform his or her "past relevant work" with this RFC assessment? If so, then the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the claimant cannot perform his or her past relevant work, the analysis proceeds to step five.

5. Considering the claimant's RFC and age, education, and work experience, is the claimant able to make an adjustment to other work that exists in significant numbers in the national economy? If so, then the claimant is not disabled. 20

> C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v), 404.1560(c), 416.960(c). If the claimant cannot perform such work, he or she is disabled. Id.

See also Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001).

The claimant bears the burden of proof at steps one through four. Id. at 953; see also Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); Yuckert, 482 U.S. at 140-41. The Commissioner bears the burden of proof at step five. Tackett, 180 F.3d at 1100. At step five, the Commissioner must show that the claimant can perform other work that exists in significant numbers in the national economy, "taking into consideration the claimant's residual functional capacity, age, education, and work experience." Id.; see also 20 C.F.R. §§ 404.1566, 416.966 (describing "work which exists in the national economy"). If the Commissioner fails to meet this burden, the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If, however, the Commissioner proves that the claimant is able to perform other work existing in significant numbers in the national economy, the claimant is not disabled. Bustamante, 262 F.3d at 953-54; Tackett, 180 F.3d at 1099.

C. The ALJ's Decision

The ALJ found that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2013 based on her previous quarters of employment. AR 19-21. To receive DIB, Plaintiff needs to establish disability on or before that date. AR 19. SSI benefits are not dependent on insured status. The ALJ then applied the sequential process. AR 21-26.

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since her alleged disability onset date of March 3, 2009. AR 21. At step two, the ALJ found that the record established that Plaintiff suffered from osteoarthritis, obesity, and an anxiety disorder at the level of a severe impairment resulting in significant work-related functional limitations. AR 21. The ALJ further found that the record contained information on prescription drug abuse

and marijuana use, but that this substance abuse did not result in work-related functional limitations and did not qualify as severe. AR 22.

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or equaled the severity of one of the specific impairments listed in the regulations. Id. The ALJ also found that Plaintiff's osteoarthritis and obesity, separately and in combination, did not meet any criteria of § 1.04 (disorders of the spine) or any other listing, and that no physician had concluded that Plaintiff met any listing criteria. AR 22; see 20 C.F.R. § 404, Subpt. P, App'x 1, § 1.04 (2014). The ALJ found further that Plaintiff's mental impairments and symptoms did not meet the listings for § 12.06 (anxiety and obsessive-compulsive disorders) or § 12.09 (substance abuse disorders).[1] AR 22; see 20 C.F.R. § 404, Subpt. P, App'x 1, §§ 12.06, 12.09 (2014). While Plaintiff has mild restrictions in activities of daily living and moderate difficulties in social functioning according to the ALJ's findings, paragraph B of § 12.06 requires two findings of "marked" difficulties in order to meet the listed criteria. AR 22; see 20 C.F.R. § 404, Subpt. P, App'x 1, § 12.06, ¶ B (2014). The ALJ found that Plaintiff did not meet the requirements of paragraph C of the same section due to indications on the record that Plaintiff is able to function outside of her home. AR 22; see 20 C.F.R. § 404, Subpt. P, App'x 1, § 12.06, ¶ C (2014).

At step four, the ALJ found:

> [Plaintiff] has the residual functional capacity to perform less than the full range of medium work as defined in 20 CFR 404.1567(c) and 416.967(c). She can lift 50 pounds occasionally and 25 pounds frequently. She can stand and walk 6 hours out of an 8-hour day and sit 8 hours out of an 8 hour day. She is limited to frequent climbing, balancing, stooping, kneeling, crouching and crawling.

[1] After the ALJ's decision, the listing for substance abuse disorders, which previously directed the reader to other listings describing symptoms caused by substance abuse, was removed.

> She is limited to simple, routine tasks with SVP of 1 or 2. She is limited to occasional public contact and frequent contact with coworkers.

AR 23. The ALJ placed great weight on the opinion of Joshua Knight, M.D., who conducted a comprehensive examination on February 11, 2012, and gave substantial weight to the state agency's mental assessment. AR 25, 26; see also AR 76-81, AR 111-16.

Although the ALJ found a medical basis for some of the symptoms reported by Plaintiff, he did not fully credit her statements on the intensity, persistence, and limiting effects of those symptoms. AR 23. The ALJ concluded that Plaintiff's RFC indicated that she was capable of performing past relevant work ("PRW") as a warehouse laborer. AR 27. Plaintiff last previously worked in a warehouse at IKEA, where she alleges she was terminated due to memory problems. AR 23. The ALJ did not make a finding as to Plaintiff's ability to perform other substantial gainful activity at step five. Based on the finding at step four, the ALJ found that Plaintiff was not disabled from her alleged onset date of March 3, 2009, through the date of the hearing. AR 27.

DISCUSSION

Plaintiff seeks review of the determination by the ALJ that Plaintiff was not disabled from March 9, 2009, to the present. She argues that the ALJ erred in making that determination by: (a) improperly assessing Plaintiff's RFC by failing to include the mental limitations given by state agency consultants regarding Plaintiff's ability to carry out simple, one- or two-step instructions; (b) failing properly to consider functional limitations resulting from Plaintiff's impairment of uterine fibroids as part of the RFC; and (c) failing to give specific and legitimate reasons to reject the opinion of the doctor who conducted the comprehensive examination and found manipulative limitations. Each argument is addressed in turn.

A. Assessment of Limited Ability to Follow Simple One- or Two-Step Instructions

Plaintiff argues that the ALJ erred by finding Plaintiff limited to simple, one- or two-step instructions while her PRW requires a reasoning level of two, exceeding that limitation. The Commissioner responds that any error is harmless because the vocational expert ("VE") identified other substantial gainful activity in the national economy Plaintiff could perform with the RFC identified by the ALJ.

1. Whether the ALJ erred at step four

At step four of the sequential analysis, the ALJ found Plaintiff capable of her PRW as a warehouse laborer. AR 27. The Social Security Administration relies on the Dictionary of Occupational Titles ("DOT") to determine whether claimants are capable of PRW or other substantial gainful activity given their RFC after taking into account their impairments. A VE may be called to testify at the hearing in order to present expert opinion evidence identifying occupations listed in the DOT that a claimant retains the capacity to perform given her RFC. Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir. 2009).

At the hearing, the VE classified Plaintiff's prior work from 2007 to 2009 as warehouse laborer/stores. AR 27; see also DOT 922.687-058 available at 1991 WL 688132. Job descriptions in the DOT include a "definition trailer" that identifies the abilities needed to perform the given job. See DOT App'x C available at 1991 WL 688702. The definition trailer for each job includes a "Scale of General Education Development (GED) Reasoning Development," including six levels identifying the degree of reasoning ability required for a particular job. Id. According to the listing's definition trailer, warehouse laborer has a reasoning level of two, requiring workers to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and "[d]eal with problems involving a few concrete variables in or from standardized situations." Id.

Plaintiff argues that this reasoning level is inconsistent with the record and findings of the ALJ, and as a result Plaintiff is not able to perform her PRW. The ALJ gave "significant weight" to the mental limitations described by state agency consultants and specifically found Plaintiff "can understand and remember simple, one or two step instructions." AR 26. This finding is supported by substantial evidence: Megan D. Nicoloff, Psy.D., and Joshua J. Boyd, Psy.D., mirror that exact language in their reports. AR 84-85, 99-100, 115-16, 132-33. The findings of the state agency consultants and the ALJ also closely track the definition of GED reasoning level one: "Apply commonsense understanding to carry out simple one- or two-step instructions. Deal with standardized situations with occasional or no variables in or from these situations encountered on the job." DOT App'x C, available at 1991 WL 688702; see also Chase v. Colvin, 2013 WL 5567082, *5 (D. Or. Oct. 9, 2013) ("Additionally, the correlation here could not be more exact: Level One Reasoning requires the ability to 'carry out simple one- or two-step instructions' and the ALJ's limitation in this case precisely tracks this language by stating that Plaintiff could 'carry out only simple 1-to-2 step instructions.'").

The ALJ, however, did not include the limitation to simple, one- or two-step instructions or a reasoning level of one when he asked the VE whether Plaintiff was capable of her PRW or other substantial gainful activity. As a result, the VE did not indicate that Plaintiff's PRW was inconsistent with her RFC. AR 63-70. There is a clear conflict between the RFC found by the ALJ limiting Plaintiff's performance to one- or two-step tasks and the demands of level two reasoning. See Rounds v. Comm'r Soc. Sec. Admin., 807 F.3d 996, 1003 (9th Cir. 2015); see also Trujillo v. Colvin, 2014 WL 2213218 (D. Or. May 27, 2014) ("The weight of authority . . . finds that the addition of the specific wording relating to 'one- or two-step instructions' is more restrictive and correlates precisely with the phrasing used in the DOT's definition of Reasoning

Level 1, thereby rendering an RFC using this specific language compatible only with Reasoning Level 1 jobs."). The ALJ's finding at step four that Plaintiff was capable of her PRW is not supported by substantial evidence and is in error. The Commissioner does not dispute this error.

2. Whether the error was harmless

Although the Commissioner does not dispute that the ALJ erred by finding that Plaintiff could perform her PRW, the Commissioner argues that this error was harmless because the record contains information sufficient to make a step five finding that Plaintiff is capable of other substantial gainful activity. In response to a hypothetical question including limitations that otherwise meet or exceed Plaintiff's RFC at the hearing, the VE identified the job of room cleaner, requiring reasoning level one. AR 70; see also DOT 323.687-014 available at 1991 WL 672783. The Commissioner contends that this position fits Plaintiff's RFC and demonstrates that she is capable of substantial gainful activity, thereby satisfying step five.

The problem with the Commissioner's argument is that the ALJ did not make an alternative step five finding. Courts may not affirm an ALJ's decision on grounds other than those relied on by the ALJ. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014). When an ALJ makes a specific alternative finding at step five, an error at step four may be harmless. See, e.g., Tommasetti v. Astrue, 533 F.3d 1035, 1044 (9th Cir. 2008). The parties did not cite, nor could the Court find, any Ninth Circuit opinion addressing the circumstances here, when the ALJ did not make an alternative step five finding but the VE testified sufficiently for the record to support a step five finding.

District courts in this circuit, however, are divided on whether a court must remand in such circumstances, because to do otherwise would be affirming on a ground not relied on by the ALJ, or whether a court may affirm because the record is sufficient to show that the ALJ's error is inconsequential to the ultimate non-disability determination. Compare Sheehan v. Colvin,

2014 WL 3828396, at *7 (D. Ariz. Aug. 4, 2014) ("An ALJ's step four determination is harmless error if 'the ALJ properly concluded as an alternative at step five that [the claimant] could perform work in the national and regional economies.' Tommasetti, 533 F.3d at 1044. Here, the ALJ did not make any alternative step five findings. Thus, the ALJ's step four error was not harmless." (footnote omitted)); Glover v. Astrue, 2011 WL 1230045, at *9 (D. Or. Mar. 10, 2011), report and recommendation adopted, 2011 WL 1212233 (D. Or. Mar. 30, 2011) ("Because the ALJ made no alternative step five findings, this court cannot review such findings."); with Summers v. Astrue, 2011 WL 1211860, at *3 (C.D. Cal. Mar. 30, 2011) (finding that the ALJ's step four error was harmless, even though the ALJ did not make a step five determination, because "[b]ased on the vocational expert's testimony cited by the Commissioner, the Court has no doubt that a remand for further proceedings here would be pointless"); Hadnot v. Astrue, 2008 WL 5048428, at *11-12 (N.D. Cal. Nov. 25, 2008), *aff*'d on other grounds, 371 F. App'x 875 (9th Cir. 2010) (holding that although the ALJ erred at step four in relying on the VE's response to an improper hypothetical, because the VE also testified in response to a proper hypothetical, there was sufficient evidence in the record to determine at step five that the plaintiff was not disabled, despite the fact that the ALJ did not reach step five); Cowan v. Astrue, 2008 WL 2761684, *10 (N.D. Cal. July 14, 2008) (holding that, even if the ALJ erred in his step four determination, the error would be harmless because the "[p]laintiff could not pass the fifth step of the disability determination because he is capable, according to the testimony of the VE, of performing many other kinds of work outside his past work experience that exist in significant numbers in the national economy").

Because the Court finds, as discussed below, that the ALJ made another error in his opinion that requires remand, the Court does not reach the issue of whether a court may affirm

the Commissioner's finding of non-disability when the record contains evidence that the plaintiff is capable of performing other work in the national economy, even when the ALJ stopped his or her analysis at step four. Upon remand, the Commissioner properly must apply Plaintiff's restrictions to simple one- or two- step instructions and perform a step five analysis.

B. Limitations Caused by Plaintiff's Uterine Fibroids

The ALJ acknowledged Plaintiff's reports of pain from uterine fibroids but found this condition to be non-severe at step two. See AR 21 (finding only osteoarthritis, obesity, and anxiety disorder to be Plaintiff's severe impairments). The ALJ concluded that the evidence in record did not support any work-related functional limitations caused by Plaintiff's uterine fibroids. AR 25. The ALJ noted that Plaintiff had not alleged uterine fibroids as an impairment at the time she filed her application, her request for reconsideration, or her request for a hearing, and that she did not testify at the hearing to any limitations related to this condition. Id.

Plaintiff argues that the ALJ erred by failing to find any limitations from or include any accommodation in Plaintiff's RFC due to uterine fibroids given the evidence in the record. The Commissioner responds that the RFC includes limitations sufficient to address Plaintiff's non-severe uterine fibroid condition in that it limits Plaintiff to no more than six hours of standing or walking in an eight-hour day with an ability to sit for an unlimited amount of time and limits Plaintiff's lifting to no more than 50 pounds occasionally and 25 pounds frequently. The Commissioner argues that the medical evidence regarding Plaintiff's uterine fibroids supports no greater accommodations and that, even if it did, the ALJ's interpretation of the evidence is a reasonable one and may not be second guessed. The Commissioner also argues that the ALJ appropriately discounted Plaintiff's allegations of pain relating to her fibroids as part of her drug-seeking behavior, repeatedly identified in the record by her treatment providers. Finally, the ALJ

discounted the alleged severity of any limitations from Plaintiff's fibroids because Plaintiff declined to have a hysterectomy to treat the condition.

As an initial matter, the Court does not find that Plaintiff's refusal to have a major surgery such as a hysterectomy, which has significant side effects and has the significant risks inherent in all surgery requiring general anesthesia, is a clear and convincing reason to discount Plaintiff's complaints in the record of pain due to uterine fibroids. Moreover, some of Plaintiff's treatment providers also advised Plaintiff not to have a hysterectomy. See AR 392 (May 7, 2012, Plaintiff agrees with Dr. Dyson's recommendation that Plaintiff not pursue a hysterectomy and instead alter her diet and await menopause[2]); AR 405 (January 29, 2013, Dr. Nathaniel Crumet confirms that Dr. Dyson's recommendation to await menopause is the preferred course of action).

Reviewing the record as a whole, however, the ALJ's conclusion that Plaintiff's uterine fibroids did not result in significant work limitations was a rational interpretation of the record, and thus must be upheld even if there is another rational interpretation of the record. Burch, 400 F.3d at 679. First, the fact that Plaintiff did not claim any limitations from this condition is evidence the ALJ reasonably considered. Second, Plaintiff's only complaint related to this condition was pain, and both the record and Plaintiff's testimony reflect a pattern of behavior that could be reasonably categorized as drug-seeking.

On September 17, 2010, Dr. Crumet reported that Plaintiff admitted that she used prescription pain medicine that she received from friends, stating "I know it ain't right." AR 334. On October 6, 2010, Plaintiff said she had tried Vicodin, oxycodone, morphine, and Percocet for pain relief; except for Vicodin, no prescription is indicated in the record for these pain

[2] No direct medical report or opinion from Dr. Dyson has been included in the record; only second-hand summaries of his diagnosis by Plaintiff's other physicians appear.

medicines. AR 474. On January 24, 2012, Dr. Crumet reported that Plaintiff gave a friend some of her Vicodin in exchange for "paying for them architina"; she also admitted to overusing Vicodin.[3] AR 356-57. On August 3, 2012, Plaintiff admitted to eating a marijuana brownie, leading to the cancellation of her prescription for narcotics. AR 387. In November 2012, Plaintiff had a urine drug screen test positive for methadone and marijuana. AR 417. On December 17, 2012, Plaintiff denied any possibility of a positive marijuana screening for her urinalysis and admitted to drinking a neighbor's liquid methadone; she repeatedly but unconvincingly attempted to explain her positive urinalysis test. AR 389.

On April 22, 2013, Plaintiff confirmed that she receives liquid methadone from a neighbor about once per week. AR 410. On May 22, 2013, Plaintiff again reported taking methadone from a neighbor. AR 413. On June 17, 2013, Plaintiff reported that she took methadone for her pain symptoms but did not have any relief. AR 415. On June 19, 2013, Plaintiff told Dr. Crumet "I need my pain medicine." AR 406. On July 1, 2013, Plaintiff asked Dr. Meera Jain, M.D., for opiates and was described as "very focused on Vicodin"; at the same consultation she admitted to taking Vicodin and did not have a current prescription. AR 417-19. On April 22, 2014, Plaintiff stated she wanted pain medicine and that ibuprofen did not work. AR 426. At the hearing, Plaintiff told the ALJ that she frequently asked for pain medication and

[3] Dr. Crumet's note reads, "Friend takes some of her Vicodin in exchange for paying for them architina." AR 356. The ALJ appears to have interpreted this statement to mean that Plaintiff was selling her Vicodin to buy "Architina." It is unclear what "architina" means in the original note, and the Court could find no definition of the term or examples of its use. Given Plaintiff's confusion at the hearing, the ALJ's reading may have been mistaken. AR 57-58. ("I don't know nothing about that. Yes. No. I don't know about that at all. I never even heard it before.") Excluding the unknown term, a plausible reading of Dr. Crumet's note is that Plaintiff had a friend pay for her prescription, and in return she gave some of her prescription medicine to the purchaser.

explained that she did not feel she was abusing drugs by having others supply occasional pain pills without a prescription. AR 58.

Discounting a plaintiff's disability allegations due to extensive evidence of drug-seeking behavior is a reasonable interpretation of the medical evidence; the Court appropriately defers to the ALJ's interpretation of the evidence on this issue. See Edlund v. Massanari, 253 F.3d 1152, 1157 (9th Cir. 2001), *as amended on reh'g* (Aug. 9, 2001) (upholding an ALJ's finding that a claimant's reported limitations were not credible when he was found to be "exaggerating his complaints of physical pain in order to receive prescription pain medication to feed his Valium addiction"); *Massey v. Comm'r Soc. Sec. Admin.*, 400 F. App'x 192, 194 (9th Cir. 2010) ("[T]he ALJ's interpretation that [plaintiff] is engaged in drug-seeking behavior is a clear and convincing reason for disregarding his testimony."); see also Wilcox v. Colvin, 2014 WL 6650181 (D. Or. 2014) ("The ALJ's discounting of Plaintiff's disability allegations due to 'extensive evidence of drug-seeking behavior' . . . is a reasonable interpretation of the medical record. Accordingly, the Court defers to the ALJ's interpretation of the evidence on this issue.") (citing Burch v. Barnhart, 400 F.3d at 679).

Finally, the RFC includes some limitations on standing and walking, requires the ability to sit at will, and includes some lifting limitations. These are limitations that rationally relate to Plaintiff's uterine fibroid condition. The ALJ did not err in his consideration of Plaintiff's fibroids.

C. The ALJ's Rejection of Dr. Joshua Knight's Finding of Manipulative Limitations

The ALJ specifically found that the record evidence did not support manipulative limitations. AR 25. Plaintiff argues that the ALJ improperly discounted the diagnosis of temporary manipulative limitations made by Dr. Knight while giving the rest of his opinion great weight. The Commissioner responds that the ALJ correctly credited Dr. Knight's finding of

temporary manipulative limitations lasting less than one year, but that such temporary limitations do not give rise to a finding of disability. To qualify for SSI or DIB, an impairment must last or be expected to last for a continuous period of twelve months. 20 C.F.R. § 404.1509.

In his opinion, the ALJ noted:

> Evidence does not suggest any manipulative limitations lasting a 12-month period. The claimant was evaluated for hand pain in July 2011. On examination, there was no swelling or tenderness. Grip strength and sensation were intact. (Exhibit lF-1-2). In December 2012, the claimant's physician noted that she was supposed to be using the wrist splints only at night, not as needed for pain, and was to use them nightly for 6 weeks (Exhibit 5F-6). No diagnosis has been established for her hand complaints. I do not find evidence to support manipulative limitations.

AR 25. The ALJ gave great weight to the opinion of Dr. Knight. Id.

On September 1, 2010, Dr. Kathryn Moreland found that Plaintiff's tendons were tender in the lateral epicondylar area and that Plaintiff could grip and lift a full saline bottle despite a weaker grip in her right hand. AR 340; 480. On September 17, 2010, Dr. Crumet, Plaintiff's primary care physician, found "4+/5" finger spread on the right hand and full 5/5 finger spread in the left hand and that Plaintiff's hand strength was 5/5 bilaterally. AR 336. On July 19, 2011, Dr. Crumet examined Plaintiff's hands and found:

> [N]o clubbing, cyanosis, or edema. Bilateral hands without swelling, redness. or tenderness. Grip strength and intrinsic mm strength 5/5 bilaterally. Sensation to light touch intact throughout. Negative tinels and phalen's signs. No crepitance with passive or active flexion or extension.

AR 309.

During the comprehensive exam on February 11, 2012, Dr. Knight reported "tenderness diffusely throughout the hands with a soft tissue lesion on the left hand overlying her radiocarpal joint region." AR 379. Dr. Knight diagnosed Plaintiff with generalized pain throughout both

hands, noting her history of manual labor, and suspected "mild multifocal hand arthritis" or "a component of tenosynovitis." AR 380. For motor skills, Dr. Knight reported:

> The claimant states she has difficulty gripping and holding objects securely to the palm by the last three digits as well as involving the first three digits. The claimant's thumb functions with normal opposition. There is no evidence of myotonia or grip release. There is generalized tenderness without erythema or effusions. There is no evidence of diminution of function with repetition. There is no evidence of spasticity or ataxia. Sensation to touch and pin in all five fingers is normal. Joint position and vibration sense are normal. Subjective and objective findings are consistent. Functional limitations are based on both subjective and objective findings.

AR 379. He cautioned that symptoms were difficult to characterize based on his 45 minute examination and recommended further imaging. AR 376, 380.

Dr. Knight ultimately recommended "temporarily limiting handling and fingering to occasionally" and that "reaching and feeling are without limitations." AR 380. On May 7, 2012, Dr. Crumet found normal sensation throughout Plaintiff's hands. AR 393. On December 17, 2012, Dr. Crumet found Plaintiff exhibited a "5/5" score on grip, extension, and finger spread in her hands. AR 389. On February 7, 2014, Dr. Jessica Chan, D.O., also found Plaintiff exhibited a grip score of 5/5. AR 422. Reviewing doctors listed Plaintiff's manipulative limitations as frequent, rather than constant. AR 114, 131.

Plaintiff has shown objective medical evidence of the underlying impairment, including reduced grip strength, capacity for finger spread, and an abnormality in the form of a soft tissue lesion on the left hand, that "could reasonably be expected to produce the pain or other symptoms alleged." Lingenfelter, 504 F.3d at 1036 (quotation marks omitted). Contrary to the ALJ's finding that her hand complaints had no diagnosis, Dr. Knight, whose opinion the ALJ accorded great weight, listed "generalized hand pain" under the heading "Diagnoses" in his opinion. AR 380. "[T]he claimant need not show that her impairment could reasonably be

expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis added). Plaintiff has made that showing.

Furthermore, the record shows substantial objective medical evidence that Plaintiff's symptoms lasted for at least twelve months. She complained of hand pain on September 1, 2010, and Dr. Moreland reported that her grip strength was weaker in her right hand. AR 340, 480. More than a year later, on February 11, 2012, Dr. Knight examined Plaintiff and found functional limitations based in part on objective findings. AR 380. Finally, Dr. Knight's functional assessment recommended Plaintiff should have a "maximum lifting and carrying capacity" of 50 pounds occasionally and 25 pounds frequently, but "[l]ess if her hands predominantly support the load." Id. These recommendations were not included in the ALJ's recommendations, and the ALJ provided no explanation for discounting this portion of an opinion to which he otherwise gave great weight. "Where an ALJ does not explicitly reject a medical opinion . . . he errs." Garrison v. Colvin, 759 F.3d 995, 1012 (9th Cir. 2014). In sum, the ALJ erred by not providing specific and legitimate reasons to discount Dr. Knight's limitations on handling and by not finding that Plaintiff's manipulative limitations lasting greater than one year.

D. Remand

Within the Court's discretion under 42 U.S.C. § 405(g) is the "decision whether to remand for further proceedings or for an award of benefits." Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001) (citation omitted). Although a court should generally remand to the agency for additional investigation or explanation, a court has discretion to remand for immediate payment of benefits. *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099-1100 (9th Cir. 2014). The issue turns on the utility of further proceedings. A remand for an

award of benefits is appropriate when no useful purpose would be served by further administrative proceedings or when the record has been fully developed and the evidence is insufficient to support the Commissioner's decision. Id. at 1100. A court may not award benefits punitively and must conduct a "credit-as-true" analysis on evidence that has been improperly rejected by the ALJ to determine if a claimant is disabled under the Act. Strauss v. Comm'r of Soc. Sec. Admin., 635 F.3d 1135, 1138 (9th Cir. 2011).

In the Ninth Circuit, the "credit-as-true" doctrine is "settled" and binding on this Court. Garrison v. Colvin, 759 F.3d 995, 999 (9th Cir. 2014). The United States Court of Appeals for the Ninth Circuit articulates the rule as follows:

> The district court must first determine that the ALJ made a legal error, such as failing to provide legally sufficient reasons for rejecting evidence. If the court finds such an error, it must next review the record as a whole and determine whether it is fully developed, is free from conflicts and ambiguities, and all essential factual matters have been resolved. In conducting this review, the district court must consider whether there are inconsistencies between the claimant's testimony and the medical evidence in the record, or whether the government has pointed to evidence in the record that the ALJ overlooked and explained how that evidence casts into serious doubt the claimant's claim to be disabled. Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits.
>
> If the district court does determine that the record has been fully developed and there are no outstanding issues left to be resolved, the district court must next consider whether the ALJ would be required to find the claimant disabled on remand if the improperly discredited evidence were credited as true. Said otherwise, the district court must consider the testimony or opinion that the ALJ improperly rejected, in the context of the otherwise undisputed record, and determine whether the ALJ would necessarily have to conclude that the claimant were disabled if that testimony or opinion were deemed true. If so, the district court may exercise its discretion to remand the case for an award of benefits. A district court is generally not required to exercise such discretion, however. District courts retain flexibility in determining the

> appropriate remedy and a reviewing court is not required to credit claimants' allegations regarding the extent of their impairments as true merely because the ALJ made a legal error in discrediting their testimony.

Dominguez v. Colvin, 808 F.3d 403, 407-08 (9th Cir. 2015) (internal citations and quotation marks omitted).

The ALJ erred by concluding his analysis at step four and by improperly rejecting Plaintiff's handling and manipulative limitations. The record, however, is not free from material conflict and ambiguity. Thus, this action is remanded for further proceedings so that the Commissioner properly can consider Plaintiff's handling and manipulative limitations and perform a step five analysis.

CONCLUSION

The Commissioner's decision that Plaintiff is not disabled is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED this 18th day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge