IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

ASHLEY NICOLE SIMINGTON,

Plaintiff,

vs.

COMMISSIONER,
Social Security Administration,

Defendant.

Case No. 6:16-cv-01381-AA
**OPINION AND ORDER**

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AIKEN, District Judge:

Plaintiff, Ashley Nicole Simington, brings this action pursuant to the Social Security Act ("Act"), 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner of Social Security ("Commissioner"). The Commissioner denied plaintiff's application for a Period of Disability and Disability Insurance Benefits ("DIB"). For the reasons set forth below, the Commissioner's decision is reversed and remanded for an immediate award of benefits.

## BACKGROUND

On January 7, 2013, plaintiff first filed for Social Security DIB. Plaintiff alleged disability beginning February 16, 2010. Tr. 17. Plaintiff's application was initially denied, and

denied again upon reconsideration. *Id.* Plaintiff then filed a request for a hearing before an Adminstrative Law Judge ("ALJ") on October 16, 2013. *Id.* The hearing was held on September 26, 2014. *Id.* At the hearing, plaintiff amended the alleged onset date of her disability to June 22, 2010. *Id.* On December 8, 2014, the Commissioner denied plaintiff's application. Tr. 27. Plaintiff sought review of the ALJ's decision, which was denied by the Appeal Council on May 5, 2016. Tr. 1–3. Plaintiff filed the present complaint against the Commissioner in this Court on July 7, 2016.

Plaintiff has a history of cervical neuralgia, recurring migraine headaches, depression, anxiety, insomnia, bulimia nervosa, and post-traumatic stress disorder ("PTSD"). Tr. 19–20, 258, 261, 263, 266. On February 16, 2010, plaintiff was in a car crash, which resulted in neck and back pain. Tr. 285–87. On March 1, 2010, plaintiff was diagnosed with cervical strain. Tr. 544–45. Her pain became more significant by March 11, 2010. Tr. 543. Plaintiff reported "lots of pain" sitting at a desk, and an inability to drive without pain. *Id.* Plaintiff's primary care doctor, Dr. Diana Bolduc, reported a limited range of motion and tenderness in the afflicted areas. Tr. 543–44. By the end of the month, the pain improved. Tr. 541. But in April, upon returning to work, the intense pain returned. Plaintiff began to miss work on account of the pain. Tr. 539–40. On August 4, 2010, Dr. Bolduc spoke via telephone with Eugene neurosurgeon Dr. Carmina Angeles, who acknowledged the possibility of a cervical spine fracture. Tr. 538.

Dr. Angeles recommended plaintiff wear a hard neck collar, and undergo an x-ray. Plaintiff was pregnant at this point in time and unable to undergo an x-ray at such an early stage in the pregnancy. Dr. Angeles also recommended an MRI as soon as her obstetrician felt comfortable with the procedure. *Id.*

Plaintiff underwent the MRI in September of 2010. Dr. Angeles determined she did not have a fracture. Tr. 689. However, plaintiff continued to report pain, and even difficulty "laying down on the pillow." Tr. 679. Dr. Angeles diagnosed plaintiff with a C2 radiculopathy. Tr. 680. She recommended that plaintiff do an occipital nerve block, but noted that plaintiff would have to wait until after she had given birth. Dr. Angeles also identified occipital nerve ligation as a last resort option. *Id.* Plaintiff was referred to Dr. Gregory Moore. Tr. 673.

In October, Dr. Moore noted that plaintiff reported her pain levels at 10/10, and she scored a Pain Disability Index score of 66. *Id.* Dr. Moore recorded "[t]enderness to palpation over the suboccipital region with referred pain and paresthesia across the occipital nerve", as well as limited cervical range of motion. Tr. 674. Dr. Moore reviewed plaintiff's September MRI, and noted small ossifications "in the midbody of the dens." *Id.* Dr. Moore ultimately diagnosed plaintiff with: (1) possible remote history of dens fracture; (2) occipital neuralgia; (3) mysfascial pain; and (4) cervical spondylosis, possible DRG-mediated pain. Tr. 675. Dr. Moore performed an occipital nerve block on plaintiff. Tr. 672.

Dr. Angeles saw plaintiff again in January, 2011. Dr. Angeles reported that plaintiff had not felt any relief from the occipital nerve block procedure. Tr. 670. Plaintiff gave birth to her child in mid-February, 2011. Tr. 273. As she was no longer pregnant, more treatment options became available, and, on March 1, 2011, plaintiff sought more aggressive treatment to address her pain. Tr. 670. The next week, plaintiff again visited Dr. Angeles. Dr. Angeles reported plaintiff had head pain, which radiated to her shoulders when she lay on the back of her head. Tr. 669. She also reported a continued limited range of cervical motion. *Id.* Dr. Angeles recommended a suboccipital pain stimulator for pain relief. *Id.* On March 25, 2011, plaintiff underwent an occipital nerve ligation and a cranioplasty procedure. Tr. 667. At the end of April,

2011, Dr. Angeles reported that plaintiff's migraine headaches and pain had improved. Tr. 666. But by June 1, 2011, plaintiff was again suffering from persistent headaches and neck pain. Tr. 665. Dr. Angeles directed plaintiff to take Tylenol with codeine to address the pain. *Id.*

In mid-July 2012, plaintiff began seeing a new primary care provider, Paul Leppert, ANP. Plaintiff reported to Mr. Leppert that she still had recurring headaches, as well as increased feelings of depression. Tr. 360. On July 18, 2012, plaintiff began counseling sessions with Gladys Shade, LCSW, per a referral by Mr. Leppert. Tr. 347. Ms. Shade noted plaintiff had symptoms of PTSD "related to ongoing childhood...sexual abuse". Ms. Shade further described plaintiff's symptoms as: "[d]epressed/sad mood, anhedonia, poor functioning level, extreme lack of energy, intrusive memories, nightmares, poor sleep, extreme hypervigilance (dead bolts her bedroom door at night), paranoid feelings/thoughts, angry outbursts, extreme fear for her 2 year old daughter . . . " Tr. 347–48. Additionally, plaintiff felt "panic symptoms often," a fear of people and leaving her home, and feelings of anger upon physical contact with her husband. Tr. 348. Plaintiff had few people to talk with about her problems and was no longer employed. *Id.* Ms. Shade diagnosed plaintiff with depressive disorder, PTSD, panic disorder with agoraphobia, and bereavement. Tr. 349. Ms. Shade ordered further counseling and psychiatric medication. *Id.*

On December 13, 2012, plaintiff visited her original primary care provider, Dr. Bolduc. Plaintiff complained of continued pain from chronic headaches, mood disorder, and neck pain. The neck pain was reported to be not as severe as it once was, but still present. Her headaches had worsened. Tr. 531–32. Plaintiff reported that taking Imitrex alleviated her headaches for a day, but that her nine pills per month prescription was insufficient. Dr. Bolduc declined to

increase her prescription. *Id.* Plaintiff continued to take Topamax, but asserted that it did little to alleviate her headaches. Tr. 532.

In early January 2013, plaintiff again met with Dr. Bolduc regarding her chronic headaches and mood disorder. Tr. 530. Plaintiff reported frustration that she had not been able to keep any employment since 2010 on account of her symptoms. Plaintiff said she had headaches three days per week. *Id.* She also reported severe insomnia and anxiety while using Topamax. Dr. Bolduc prescribed Cymbalta instead. *Id.* Following up with plaintiff at the end of the month, Dr. Bolduc noted plaintiff had an adverse reaction to Cymbalta. After this, plaintiff only used Imitrex to treat her headaches. Tr. 529. Plaintiff also began to take Zoloft to regulate her mood. She had taken Zoloft in the past, but stopped because of its negative side effects. Plaintiff stated that she was "rather tired of not having her mood control". *Id.*

On January 30, 2013, plaintiff again visited Dr. Angeles regarding her pain. Plaintiff reported to Dr. Angeles "tremendous" pain when combing her hair on the left side of her head, and upon turning her head 45 degrees to the side. Tr. 663. She claimed to be "unable to tolerate steroid injections of pain medications. She is feeling desperate and . . . can no longer live with her pain." *Id.* Dr. Angeles recommended an x-ray and an MRI. Plaintiff indicated interest in pursing surgical treatment. Tr. 664. Dr. Angeles performed a bilateral C2 nerve ligation on plaintiff on March 3, 2013. Tr. 652. By mid-May, plaintiff reported abatement of sharp cervical pain. Tr. 708. However, she complained her neck was "tight" and "heavy" and that she had trouble sleeping as a result. *Id.* In June 2013, plaintiff reported she had "hand and feet numbness since her last neck surgery." Tr. 706.

In mid-June 2013, plaintiff returned to Dr. Bolduc for exasperated mental health issues. Tr. 705. Dr. Bolduc increased plaintiff's Zoloft prescription, prescribed clonidine, and

recommended further therapy. *Id.* The next week, Plaintiff saw Dr. Mark Ramirez, a neurologist. Tr. 701. Based on her headache symptoms, Dr. Ramirez prescribed Gabapentin, Fioricet, and permitted her to continue taking Sumatriptan, which she had been prescribed previously. Tr. 704. That same day, Plaintiff followed through with Dr. Bolduc's recommendation to seek therapy, and saw Janis Petrie, CNS. Plaintiff reported panic attacks twice a week and suicidal thoughts. Tr. 692. Ms. Petrie took plaintiff off Zoloft, and in place, prescribed Lexapro, Trazadone, Prazosin, and Buspar. Tr. 693.

On June 27, 2013, plaintiff returned to Dr. Angeles. She reported diminished sharp cervical pain, but instead a burning pain. Tr. 647. Dr. Angeles increased her Gabapentin dosage, and noted that the burning "can be explained by retrograde denigration of the C2 nerve." Tr. 648. Over the next couple of months, plaintiff was unable to attend multiple therapy appointments because of the status of her mental health. Tr. 941–63. Plaintiff was able to make an August 2, 2013, follow-up visit with Dr. Ramirez. Tr. 697–701. Dr. Ramirez took note that her ongoing headaches, which occur at least once per week, typically last two to three days each. The headaches carried symptoms of nausea, vomiting, photophobia, and phonophobia. Tr. 697. Additionally, plaintiff had "tension type headaches" about three times per week which last the whole day. Tr. 697–98. Dr. Ramirez prescribed plaintiff Maxalt to alleviate headache pain.

On August 9, 2013 plaintiff reported to a therapist that she attempted suicide two weeks prior by overdosing on prescription medications. Tr. 839. Plaintiff also reported manic episodes, lasting up to two days, in which her husband had to take off work, her child had to go to her grandparents' house, and ultimately her husband and father had to physically restrain her. Tr. 839. Plaintiff also stated that she could not work due to her severe neck pain. *Id.*

In September 2013, plaintiff began seeing Mary Frodermann, FNP. Ms. Frodermann saw plaintiff on a regular basis, and she reiterated the presence of plaintiff's ongoing symptoms. Tr. 876–892. In October 2013, plaintiff reported to psychiatric nurse practitioner Toni Damewood that she had hallucinations for two weeks. Tr. 858. In December 2013, Ms. Frodermann recorded that plaintiff is still depressed, and stopped taking most of her medications. Tr. 883. Ms. Frodermann "encouraged her to continue counseling." *Id.* In January, 2014, plaintiff reported to Ms. Frodermann that she was going to see a neurosurgeon at UC Davis. In anticipation of the trip, some of her medications were restarted, and some dosages were increased. Tr. 881. Additionally, plaintiff was prescribed Rizatriptan and Mataxalone. Tr. 882.

In March 2014, plaintiff again saw Dr. Angeles. Plaintiff complained that her pain was the same as it was prior to the nerve ligation surgery. Tr. 867. Dr. Angeles noted that there was nothing surgical she could do to alleviate the symptoms at this point. Tr. 869. In April 2014, plaintiff visited Toni Damewood, a psychiatric nurse practitioner. Ms. Damewood noted that plaintiff suffered from ongoing depression, anxiety, panic attacks 3-4 times per week, chronic pain, forgetfulness, an inability to drive, an inability to sleep, an inability to cook and do laundry, and a preference to stay in bed all day. Tr. 852. By this point, Ms. Damewood had diagnosed plaintiff with Bipolar Disorder. Tr. 853. Ms. Damewood prescribed Divalproex, in addition to plaintiff's other medications. *Id.* On May 7, plaintiff reported to psychiatric nurse practitioner Janus Maybee that she had again attempted suicide the previous week by overdosing on some of her medications. Tr. 850. Three days after her suicide attempt, plaintiff checked into the ER and told doctors she was sick, but did not report that it was due to a suicide attempt. *Id.*

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On May 21, 2014, Ms. Frodermann described plaintiff as "profoundly dysthymic and suicidal." Tr. 876. In a September letter, Ms. Frodermann stated:

> [Plaintiff's] current medication allow her to function at home. She has no stamina and long drivers are not possible with her changing daily mental and physical status. Her every day functioning is made possible with great assistance from her husband and mother. Both of these individuals work full time. I do not believe this lady is mentally capable of working outside the home.

Tr. 964.

## STANDARD OF REVIEW

The district court must affirm the Commissioner's decision if it is based upon proper legal standards and the findings are supported by substantial evidence in the record. 42 U.S.C. § 405(g); *Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). "Substantial evidence is more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 522 (9th Cir. 2014) (quotation marks omitted). The court must weigh "both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001). If the evidence is subject to more than one interpretation but the Commissioner's decision is rational, the Commissioner must be affirmed, because "the court may not substitute its judgment for that of the Commissioner." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

## ALJ'S DECISION

The initial burden of proof rests upon plaintiff to establish disability. *Howard v. Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable

physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

The Commissioner has established a five-step sequential process for determining whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R. § 404.1520(a)(4); *id.* § 416.920(a)(4). At step one, the ALJ determines if the claimant is performing substantial gainful activity. If so, the claimant is not disabled. 20 CFR §§ 404.1520(a)(4)(i), (b). Here, the ALJ found plaintiff had not engaged in "substantial gainful activity" since the alleged disability onset date. Tr. 19; 20 C.F.R. §§ 404.1520(a)(4)(i), (b); *id.* §§ 416.920(a)(4)(i), (b).

At step two, the ALJ determines if the claimant has "a severe medically determinable physical or mental impairment" that meets the 12-month durational requirement. 20 CFR §§ 404.1520(a)(4)(ii), (c). Absent a severe impairment, the claimant is not disabled. *Id.* Here, the ALJ found plaintiff had the following severe impairments: "cervical neuralgia with recurring headaches; depressive disorder; and ...PTSD..." Tr. 28; *see* 20 C.F.R. §§ 404.1520(a)(4)(ii), (c); *id.* §§ 416.920(a)(4)(ii), (c). The ALJ acknowledged medical evidence of: (1) intermittent headaches since plaintiff was 12 years old; (2) a skull fracture arising from a car accident in February 2010; (3) traumatic nerve neuralgia leading to an occipital nerve ligation and cranioplasty (these procedures did not alleviate claimant's symptoms of headache pain), and a bilateral C2 nerve ligation in 2013 (which partially alleviated symptoms of headache pain); (4) persistent, severe pain and allodynia; (5) migraine headaches with nausea, vomiting, photophobia, and phonophobia at least once per week since 2010; and (6) mental impairment symptoms of depression and PTSD, including an attempted suicide. Tr. 19-20.

At step three, the ALJ determines whether the severe impairment meets or equals an impairment "listed" in the regulations. 20 CFR §§ 404.1520(a)(4)(iii), (d); 20 CFR Pt. 404,

Subpt. P, App. 1 (Listing of Impairments). If the impairment is determined to meet or equal a listed impairment, then the claimant is disabled.

In this case, the ALJ determined plaintiff's impairments, whether considered singly or in combination, did not meet or equal "one of the listed impairments" that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. Tr. 20–21; 20 C.F.R. §§ 404.1520(a)(4)(iii), (d); *id.* §§ 416.920(a)(4)(iii), (d).

If adjudication proceeds beyond step three, the ALJ must first evaluate medical and other relevant evidence in assessing the claimant's residual functional capacity ("RFC"). The claimant's RFC is an assessment of work-related activities the claimant may still perform on a regular and continuing basis, despite the limitations imposed by his or her impairments. 20 CFR §§ 404.1520(e), 416.920(e); Social Security Ruling ("SSR") 96-8p, 1996 WL 374184 (July 2, 1996). Here, the ALJ found plaintiff retained the residual functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b),

> except that the claimant is limited to no more than frequent overhead reaching. The claimant would need to avoid concentrated exposure to vibrations, moving machinery, unprotected heights, and similar hazards. The claimant is further limited to simple, repetitive, and routine tasks that require no exposure to the general public.

Tr. 22.

At step four, the ALJ uses the RFC to determine if the claimant can perform past relevant work. 20 CFR § 404.1520(a)(4)(iv) & (e). If the claimant cannot perform past relevant work, then at step five, the ALJ must determine if the claimant can perform other work in the national

economy. 20 CFR § 404.1520(a)(4)(v) & (g); *Bowen*, 482 US at 142. Here, the ALJ concluded plaintiff would be unable to perform any past relevant work.[1] Tr. 25; 20 C.F.R. § 404.1565.

If the process reaches step five, the burden shifts to the Commissioner to show that jobs exist in the national economy within the claimant's RFC. *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). If the Commissioner meets this burden, then the claimant is not disabled. 20 CFR §§ 404.1520(a)(4)(v), (g). At step five, the ALJ found, based on plaintiff's residual functional capacity, plaintiff could perform several jobs existing in significant numbers in the national economy. These jobs include: photocopy machine operator, mail clerk, and office helper. Tr. 25–26; 20 C.F.R. §§ 404.1520, (a). Accordingly, the ALJ found plaintiff not disabled and denied her application for benefits. Tr. 26.

**DISCUSSION**

Plaintiff asserts that this case should be reversed and remanded for an immediate calculation and payment of benefits. Plaintiff claims the ALJ erred by: (1) rejecting the opinion of Ms. Frodermann, a treating nurse practitioner; and (2) not awarding benefits despite plaintiff's prima facie case of disability. Defendant concedes that the ALJ erred, but asserts that because the ALJ's factual findings were inconsistent, the case should be remanded for further proceedings instead of an immediate calculation and payment of benefits. Thus, the only question before me is whether this case should be remanded to the ALJ for further proceedings or for immediate payment of benefits.

When the only legal question is whether to remand for further proceedings or an immediate award of benefits, the Ninth Circuit provides a four-step analysis called the "credit as true" doctrine. *See Garrison v. Colvin*, 759 F.3d 995, 1020–21 (9th Cir. 2014); *Dominguez v.*

[1] Plaintiff's past relevant work included employment as an emergency medical technician, hospital admitting clerk, and file clerk. Tr. 25.

*Colvin*, 808 F.3d 403, 407 (2015). Each step of the analysis must be answered in the affirmative for a court to remand to an ALJ with instructions to calculate and award benefits. *Garrison*, 759 F.3d at 1020. The first step asks whether the ALJ erred by failing to provide legally sufficient reasons for rejecting evidence—whether claimant testimony or medical opinion. *Dominguez*, 808 F.3d at 407. Second, if the ALJ committed a legal error, whether the record has been fully developed and further administrative proceedings would serve no useful purpose. *Id.* Third, if the improperly discredited evidence were credited as true, would the ALJ be required to find the claimant disabled on remand. *Id.* Last, the record as a whole must create no serious doubt as to whether the claimant is disabled within the meaning of the Act—even if the other three elements of the credit as true analysis are met. *Id.* at 408. Defendant correctly notes that the Ninth Circuit has cautioned that a plaintiff "is not entitled to benefits under the statute unless [she] is, in fact, disabled, no matter how egregious the ALJ's errors may be." *Straus v. Comm'r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (2011).

First, I examine whether the ALJ made a legal error such as failing to provide legally sufficient reasons for rejecting evidence—whether the evidence is claimant testimony or medical opinion. *Dominguez*, 808 F.3d at 407. Here, both the plaintiff and defendant agree that the ALJ committed legal error. Defendant concedes that the ALJ relied on "problematic reasoning" in rejecting Ms. Frodermann's testimony. Comm'r Mot. for Remand at 4. Defendant also acknowledges that the ALJ's credibility finding regarding plaintiff's testimony was internally inconsistent. *Id.* at 6.

Specifically, regarding plaintiff's testimony, the ALJ erred because he stated that plaintiff "provided credible reports" about her limitations, yet he also stated that her reports "are not considered disabling from all work activity." Tr. 23. However, according to the Vocational

Expert ("VE"), plaintiff's reports of her migraine headache symptoms indicate a disability barring competitive employment. Tr. 68–69. The VE testified that plaintiff's ongoing need for 30 (or more) minute breaks once per week to deal with migraine symptoms would preclude her from competitive employment. Tr. 68. Plaintiff averred, with support from the medical record, that she suffers from migraine headaches at least once per week that last two to three days each, and additional "tension" headaches at least three times per week that last all day. Tr. 697–98.

The ALJ also erred by failing to provide legally sufficient reasons for rejecting Ms. Frodermann's testimony. In support of finding Ms. Frodermann's testimony unpersuasive, the ALJ stated that there was no evidence of plaintiff's mental impairments worsening since the alleged onset of disability in 2010. Tr. 25. The record, however, demonstrates the opposite to be true. For example, plaintiff twice attempted suicide by overdosing on her prescription medications, first in late July 2013, and again in late April or early May 2014. Tr. 839, 850. In October 2013, plaintiff for the first time began suffering from hallucinations. Tr. 858. Thus, there was clear evidence of plaintiff's mental impairments worsening.

Second, I examine whether the record has been fully developed and further administrative proceedings would serve no useful purpose.

> 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.

*Dominguez*, 808 F.3d at 407 (quoting *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014)). Defendant asserts that because the ALJ's credibility finding regarding plaintiff's testimony is internally inconsistent, the record requires further development. Defendant also argues that the record

requires further development because Ms. Frodermann's opinion: (1) is internally inconsistent; (2) is inconsistent with the opinions of medical sources; and (3) expresses an opinion on an issue that is reserved for the commissioner. Neither of defendant's arguments is persuasive.

I first address the inconsistent finding regarding plaintiff's credible testimony. The ALJ found that plaintiff's testimony was credible yet inconsistent with disabling functional limitations. Tr. 23. The commissioner argues that finding plaintiff's statements on her limitations were credible but not disabling is supported in the medical record. Defendant selectively cites to findings of plaintiff's normal and cooperative behavior at certain exams. The fact that plaintiff was able to communicate normally with medical professionals does not necessarily belie her consistent diagnoses and treatment for cervical neuralgia, recurring migraine headaches, depression, anxiety, insomnia, bulimia nervosa, and PTSD. Tr. 19–20, 258, 261, 263, 266. The healthcare professionals also noted the severity of plaintiff's symptoms, prescribing medications and making surgical and counseling referrals to treat those symptoms. The medical record shows that plaintiff has suffered "migraine headaches with nausea, vomiting, photophobia, and phonophobia at least once per week since 2010." Tr. 20. Each migraine headache typically lasts two to three days each. Tr. 697. Additionally, plaintiff has "tension type headaches" about three times per week that last the whole day. Tr. 697–98.

Also critically for this step in my analysis, the VE has already testified that an individual, such as plaintiff, who must recline in a dark area once a week for a period of 30 minutes or more would not be eligible for competitive employment in the work places identified as appropriate for plaintiff. Tr. 66–69. Therefore, plaintiff's testimony is consistent with a disabling functional limitation precluding her from competitive employment. As the medical record is fully established and consistent, further proceedings are not required on this issue.

Defendant also argues that the ALJ made an adverse credibility finding due to the plaintiffs' ability to act as the primary care giver for her child. Defendant avers that this inconsistency requires remand to resolve. The ALJ stated that plaintiff's "ability to be the primary caregiver for a child requires significant energy and stamina" which would be "consistent with the ability to sustain regular and continuous work activities." Tr. 23. However, courts have been clear that "disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations." *Reddick v Chater*, 157 F.3d 715, 722 (9th Cir. 1998). A disability claimant need not "vegetate in a dark room excluded from all forms of human and social activity" in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987) (quotation and citation omitted).

Importantly, plaintiff's testimony indicated that she lacked the energy and stamina to be the child's primary care giver. *Id.* She testified that her stepson attends an online high school program so that he can help care for her daughter. Tr. 53. Plaintiff also testified that her stepson and her husband take care of household chores and errands, and her husband attends to her stepson's academic needs. Tr. 53–55. In fact, plaintiff spends most of her days lying down, and does not read. *Id.* She only occasionally uses the internet because it gives her headaches. Tr. 55–56. Plaintiff further testified that her mother and sister often watch her daughter, and "take her to do things that are fun that I can't take her to do." *Id.* Once, plaintiff's parents claimed her daughter as a dependent on their tax return because the daughter had spent the majority of the year with them. Tr. 57.

Plaintiff's above testimony, which the ALJ credited as true, is developed to the extent that it is clear plaintiff lacks the ability to be her child's primary caregiver. Her current daily activities do not utilize significant energy or stamina. Indeed, plaintiff spends most of every day

lying down in bed. Tr. 56–57. This testimony is consistent with her objective medical record. *See, e.g.*, Tr. 270, 844, 852.

Turning to the issue of Ms. Frodermann's testimony, though it may be somewhat conclusory, further administrative proceedings to clarify her statements would not be useful. Her testimony is consistent with plaintiff's medical record.[2] Importantly, the ALJ specifically discounted Ms. Froderman's letter on the basis that there was "no real evidence of any worsening mental impairments since the alleged the onset of disability date." Tr. 25. This was clear error as discussed above. However, even if Ms. Frodermann's letter was properly discredited, plaintiff's credible testimony and the medical record are sufficient to establish a disabling functional limitation based on the VE's testimony. Therefore, Ms. Frodermann's letter need not be further evaluated on remand.

I find that the record is fully developed. There are no inconsistencies between plaintiff's testimony and the medical evidence which require further proceedings. Remanding for further administrative proceedings would serve no useful purpose.

Third, I ask if improperly discredited evidence were credited as true, would the ALJ be required to find the claimant disabled on remand. *Dominguez*, 808 F.3d at 407. The answer to this question is yes. The ALJ stated, "overall, the undersigned finds that the claimant provided credible reports regarding her activities of daily living, and social interactions with others,

[2] Ms. Froderman's letter concluded, "I do not believe this lady is mentally capable of working outside the home." Tr. 964. Ms. Frodermann based her testimony on plaintiff's "multiple physical problems" and "changing daily mental and physical status." *Id.* The record shows that Ms. Frodermann encouraged plaintiff to continue pursuing mental health counseling. Tr. 883. Plaintiff's objective medical record, her own credible testimony, and the VE's testimony indicate worsening mental and physical impairments that are a total bar from competitive employment. Tr. 68–69, 839, 850, 858. Therefore, Ms. Frodermann's testimony aligns with the objective medical record, plaintiff's credited testimony, and the VE's testimony.

however, the limitations on those activities are not disabling." Tr. 23. But, as has been noted previously, the VE stated that an ongoing weekly practice of needing at least 30 minute breaks in a dark area, at work, outside of ordinary breaks, would "not work in terms of competitive employment." Tr. 66–69. During the hearing, plaintiff did not directly answer the ALJ's question about how frequently she gets migraine headaches. Tr. 60. However, she testified that she takes two Maxalt pills per 24 hour period when she has migraine symptoms. Tr. 59–60. She receives 32 Maxalt pills per month, and typically uses all 32 pills in a three week period, finishing them before the month is over. *Id.* This indicates plaintiff is afflicted with migraine headaches at least 16 days per month. Further, the medical record shows that plaintiff has migraine headaches at least once per week that last two to three days each, and additional "tension" headaches at least three times per week that last all day. Tr. 697–98. Thus, crediting plaintiff's testimony as true and considering the VE's improperly disregarded testimony that plaintiff is unable to perform a significant number of jobs in the national economy, the ALJ would be required to find the claimant disabled on remand.[3]

Last, I must ensure that the record as a whole creates no serious doubt as to whether plaintiff is disabled within the meaning of the Act—even if the other three elements of the credit as true analysis are met. *Dominguez*, 808 F.3d at 408. Here, there is no serious doubt that plaintiff is disabled. The ALJ found plaintiff's statements and reports to be credible, and I agree. Yet the ALJ ignored the VE's opinion that a plaintiff who needs to lie down and rest and on a weekly basis would not be fit for competitive employment. Plaintiff's testimony regarding the intensity and frequency of her migraines is consistent with the extensive medical record which is

[3] Additionally, crediting Ms. Frodermann's testimony as true further bolsters a finding of disability.

outlined above. When plaintiff's testimony is credited as true, and there is no reason why the VE's opinion should be ignored, there remains no serious doubt that the plaintiff is disabled.

In sum, the plaintiff has established that she is disabled. Her testimony was credible and consistent with the medical evidence. The VE testimony shows that she is ineligible for competitive employment. Remanding this case for further proceedings would serve no useful purpose and is neither fair or expedient. It is not proper for me to give defendant a mulligan due to the ALJ's legal errors despite a presentation of disability. Such a disposition would come too close to the "unfair 'heads we win; tails, let's play again' system of disability benefits adjudication" which the Ninth Circuit has cautioned against. *See Garrision,* 759 F.3d at 1021 (quoting *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)). An unresolved question of fact would warrant further proceedings, but no such question remains here.

**CONCLUSION**

The Commissioner's decision is REVERSED and REMANDED for an immediate calculation and award of benefits.

IT IS SO ORDERED.

Dated this 25th day of July 2017.

Ann Aiken
United States District Judge