

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 10, 2018

SEAN F. MCAVOY, CLERK

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

JENIFER MAE PETER,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:16-cv-03173-MKD

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 13, 14

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 13, 14. The parties consented to proceed before a magistrate judge. ECF No. 5. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion (ECF No. 13) and denies Defendant's motion (ECF No. 14).

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
3 1383(c)(3).

4 **STANDARD OF REVIEW**

5 A district court’s review of a final decision of the Commissioner of Social  
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
7 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
8 by substantial evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153,  
9 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
10 reasonable mind might accept as adequate to support a conclusion.” Id. at 1159  
11 (quotation and citation omitted). Stated differently, substantial evidence equates to  
12 “more than a mere scintilla[,] but less than a preponderance.” Id. (quotation and  
13 citation omitted). In determining whether the standard has been satisfied, a  
14 reviewing court must consider the entire record as a whole rather than searching  
15 for supporting evidence in isolation. Id.

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. Edlund v. Massanari, 253 F.3d 1152,  
18 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
19 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
20 supported by inferences reasonably drawn from the record.” Molina v. Astrue, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
2 ALJ’s decision on account of an error that is harmless.” Id. An error is harmless  
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
4 Id. at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within  
9 the meaning of the Social Security Act. First, the claimant must be “unable to  
10 engage in any substantial gainful activity by reason of any medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of not less than twelve  
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s  
14 impairment must be “of such severity that he is not only unable to do his previous  
15 work[,] but cannot, considering his age, education, and work experience, engage in  
16 any other kind of substantial gainful work which exists in the national economy.”  
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to  
19 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§  
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis  
6 proceeds to step two. At this step, the Commissioner considers the severity of the  
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
8 claimant suffers from "any impairment or combination of impairments which  
9 significantly limits [his or her] physical or mental ability to do basic work  
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to  
15 severe impairments recognized by the Commissioner to be so severe as to preclude  
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
18 severe than one of the enumerated impairments, the Commissioner must find the  
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the  
2 severity of the enumerated impairments, the Commissioner must pause to assess  
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
4 defined generally as the claimant's ability to perform physical and mental work  
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's  
9 RFC, the claimant is capable of performing work that he or she has performed in  
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).

11 If the claimant is capable of performing past relevant work, the Commissioner  
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).

13 If the claimant is incapable of performing such work, the analysis proceeds to step  
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
18 the Commissioner must also consider vocational factors such as the claimant's age,  
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);  
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
3 work, analysis concludes with a finding that the claimant is disabled and is  
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.  
6 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
8 capable of performing other work; and (2) such work “exists in significant  
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);  
10 Beltran v. Astrue, 700 F.3d 386, 389 (9th Cir. 2012).

### 11 **ALJ’S FINDINGS**

12 Plaintiff applied for Title II disability insurance benefits and also  
13 protectively applied for Title XVI supplemental security income benefits on March  
14 19, 2013, alleging a disability onset date of February 17, 2012. Tr. 239-49. The  
15 applications were denied initially, Tr. 113-14, and on reconsideration, Tr. 135-36.  
16 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on  
17 January 13, 2015. Tr. 43-84. On March 13, 2015, the ALJ denied Plaintiff’s  
18 claim. Tr. 15-36.

19 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has  
20 not engaged in substantial gainful activity since February 17, 2012. Tr. 20. At

1 step two, the ALJ found Plaintiff has the following severe impairments:  
2 polyarthralgia, gastroesophageal reflux disease (GERD), history of dysuria,  
3 obesity, depression, anxiety disorder not otherwise specified, personality disorder,  
4 and marijuana use disorder. Tr. 20. At step three, the ALJ found Plaintiff does not  
5 have an impairment or combination of impairments that meets or medically equals  
6 the severity of a listed impairment. Tr. 23. The ALJ then concluded that Plaintiff  
7 has the RFC to perform light work with the following with the following  
8 limitations:

9 [S]he can occasionally climb ladders, ropes, and scaffolds; she can  
10 frequently stoop, kneel, crouch, and crawl; she is limited to occasional  
11 exposure to extreme cold, vibration, pulmonary irritants such as dust, fumes,  
12 odors, gases, pollens, and poor ventilation; she is limited to tasks that can be  
13 learned in 30 days or less, involving no more than simple work-related  
14 decisions in few workplace changes; she is limited to occasional public  
15 interaction; she is able to interact with coworkers on an occasional and  
16 superficial basis but would not do well as a member of a highly interactive  
17 or interdependent work group.

14 Tr. 24.

15 At step four, the ALJ found Plaintiff is unable to perform any past relevant  
16 work. Tr. 30. At step five, after considering the testimony of a vocational expert,  
17 the ALJ found there are jobs that exist in significant numbers in the national  
18 economy that Plaintiff can perform, such as assembler, cleaner/housekeeping, and  
19 packing line worker. Tr. 31. Thus, the ALJ concluded Plaintiff has not been under  
20 a disability since February 17, 2012, the alleged onset date. Tr. 31.

1 On July 28, 2016, the Appeals Council denied review of the ALJ's decision,  
2 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes  
3 of judicial review. See 42 U.S.C. § 1383(c)(3).

#### 4 **ISSUES**

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 her disability insurance benefits under Title II and supplemental security income  
7 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
8 issues for review:

- 9 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 10 2. Whether the ALJ properly identified all of Plaintiff's severe  
11 impairments at step two;
- 12 3. Whether the ALJ properly evaluated the lay opinion evidence; and
- 13 4. Whether the ALJ properly evaluated the credibility of Plaintiff's  
14 testimony.

15 ECF No. 13 at 7-20.

#### 16 **DISCUSSION**

##### 17 **A. Medical Opinion Evidence**

18 Plaintiff contends the ALJ failed to properly consider the medical opinions  
19 of Dr. Billings, Dr. Bernardez-Fu, Dr. Burdge, Dr. Crank, Dr. Dhanota, and Dr.  
20 Drenguis. ECF No. 13 at 9-15.



1           There are three types of physicians: “(1) those who treat the claimant  
2 (treating physicians); (2) those who examine but do not treat the claimant  
3 (examining physicians); and (3) those who neither examine nor treat the claimant  
4 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”  
5 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
6 Generally, a treating physician’s opinion carries more weight than an examining  
7 physician’s, and an examining physician’s opinion carries more weight than a  
8 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight  
9 to opinions that are explained than to those that are not, and to the opinions of  
10 specialists concerning matters relating to their specialty over that of  
11 nonspecialists.” *Id.* (citations omitted).

12           If a treating or examining physician’s opinion is uncontradicted, the ALJ  
13 may reject it only by offering “clear and convincing reasons that are supported by  
14 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
15 “However, the ALJ need not accept the opinion of any physician, including a  
16 treating physician, if that opinion is brief, conclusory and inadequately supported  
17 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
18 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
19 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
20 may only reject it by providing specific and legitimate reasons that are supported

1 by substantial evidence.” Bayliss, 427 F.3d at 1216 (citing Lester v. Chater, 81  
2 F.3d 821, 830-831 (9th Cir. 1995)).

3 1. Emma Billings, Ph.D.

4 Dr. Billings examined Plaintiff on May 30, 2012. Tr. 351-56. Dr. Billings  
5 opined Plaintiff functions at an overall borderline level of intellect, would likely  
6 need a patient employer that would provide long training periods and frequent  
7 repetition, faces a significant problem in her anger management, and that it would  
8 be difficult to perceive Plaintiff maintaining employment under these  
9 circumstances. Tr. 356. The ALJ assigned some weight to this opinion. Tr. 29.  
10 Dr. Billings’ assessment of Plaintiff’s psychological limitations was contradicted  
11 by Dr. Burdge. Tr. 395-97. Therefore, the ALJ needed to identify specific and  
12 legitimate reasons to discredit Dr. Billings’ opinion. Bayliss, 427 F.3d at 1216.

13 Although the ALJ discussed Dr. Billings’ findings, the ALJ failed to explain  
14 why he gave Dr. Billings’ opinion only some weight. Tr. 29. Moreover, the ALJ  
15 failed to identify which opinions and limitations to which he assigned limited  
16 weight. Tr. 29. Here, Dr. Billings’ assessment of borderline intellectual  
17 functioning and a need for a patient employer with long training periods and  
18 frequent repetition appear to be addressed by the RFC’s limitation to tasks that can  
19 be learned in 30 days or less and with no more than simple work-related decisions  
20 in few workplace changes. Tr. 24, 356. However, the ALJ failed to address Dr.

1 Billings' assessment of Plaintiff's anger issues and the ALJ did not incorporate  
2 into the RFC or explicitly reject Dr. Billings' opinion that "it is difficult to perceive  
3 [Plaintiff] would be able to maintain employment under the current  
4 circumstances." Tr. 356. A statement by a medical source that a claimant is  
5 "unable to work" is not a medical opinion and is not due any special significance.  
6 20 C.F.R. §§ 404.1527 (d), 416.927(d). Nevertheless, the ALJ is required to  
7 "carefully consider medical source opinions about any issue, including opinion  
8 about issues that are reserved to the Commissioner." Social Security Ruling (SSR)  
9 96-5p, 1996 WL 374183, at \*2 (July 2, 1996). "If the case record contains an  
10 opinion from a medical source on an issue reserved to the Commissioner, the  
11 adjudicator must evaluate all the evidence in the case record to determine the  
12 extent to which the opinion is supported by the record." Id. at \*3. Here, the ALJ  
13 merely summarized Dr. Billings' findings and failed to offer any discussion of Dr.  
14 Billings' opinion about Plaintiff's anger issues or ability to work. Tr. 29. This was  
15 error. The ALJ is instructed to readdress this medical opinion evidence on remand.

16 2. Robert Bernardez-Fu, M.D.

17 Plaintiff argues the ALJ improperly incorporated reviewing physician Dr.  
18 Bernardez-Fu's opinion into the RFC without explanation. ECF No. 13 at 12; ECF  
19 No. 15 at 8. Dr. Bernardez-Fu reviewed the record and determined Plaintiff is  
20 capable of light work with some additional limitations. Tr. 144-46.

1 The ALJ must evaluate every medical opinion received according to a list of  
2 factors set forth by the Social Security Administration. 20 C.F.R. § 416.927(c).  
3 These factors apply when evaluating the opinions of state medical consultants. 20  
4 C.F.R. § 416.913a(b). “Where an ALJ does not explicitly reject a medical opinion  
5 or set forth specific, legitimate reasons for crediting one medical opinion over  
6 another, he errs.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citing  
7 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)). Dr. Bernardez-Fu  
8 assessed a series of functional limitations, which were incorporated into the RFC.  
9 Tr. 144-46, 24.

10 The ALJ did not discuss Dr. Bernardez-Fu’s opinion or explain why Dr.  
11 Bernardez-Fu’s assessed limitations were incorporated into the RFC. Because the  
12 ALJ incorporated Dr. Bernardez-Fu’s assessed limitations into the RFC, the ALJ  
13 did not need to identify clear and convincing reasons for his treatment of Dr.  
14 Bernardez-Fu’s opinion. See *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223  
15 (9th Cir. 2010). However, since this case is being remanded on other grounds, the  
16 ALJ is instructed to readdress this medical opinion evidence on remand.

17 3. Aaron Burdge, Ph.D.

18 Dr. Burdge offered two assessments. On August 7, 2012, Dr. Burdge opined  
19 Plaintiff would have mostly mild or no limitations on her ability to perform basic  
20 work activities, with moderate restrictions in her ability to maintain a regular

1 schedule, communicate effectively, complete a work day without interruption from  
2 psychologically based symptoms, and maintain appropriate behavior in the  
3 workplace. Tr. 485-89. On January 16, 2013, Dr. Burdge opined Plaintiff would  
4 have mild to no limitations in her ability to perform basic work activities. Tr. 393-  
5 97. The ALJ assigned some weight to Dr. Burdge's opinion. Tr. 29.

6 Dr. Burdge's opinion was contradicted by Dr. Kraft and Dr. Billings, Tr.  
7 161-62, 356, 395-97, thus, the ALJ needed specific and legitimate reasons to  
8 discredit Dr. Burdge's opinion. Bayliss, 427 F.3d at 1216. Although the ALJ  
9 discussed Dr. Burdge's 2013 opinion, the ALJ failed to explain why he gave the  
10 opinion some weight. Tr. 29. The ALJ also failed to mention the 2012 opinion or  
11 discuss the limitations opined therein. Tr. 29. Here, the ALJ indicated he gave  
12 some weight the 2013 opinion that found mild to no limitations, failed to discuss  
13 the 2012 opinion finding more moderate impairments, yet formulated an RFC that  
14 seems to account for some of the moderate limitations assessed in the 2012  
15 opinion. Tr. 24. The ALJ's failure explain his treatment of Dr. Burdge's opinions  
16 was error. The ALJ is instructed to readdress this medical opinion evidence on  
17 remand.

#### 18 4. Additional Assignments of Error

19 The Court concludes that in light of the foregoing, a new sequential  
20 evaluation is necessary on remand to take into account the reconsidered medical

1 evidence. Because the ALJ's findings at step two, evaluation of the lay testimony,  
2 and assessment of Plaintiff's credibility were all based in part on the medical  
3 evidence, the ALJ should reconsider these findings on remand. As such, the Court  
4 declines to reach Plaintiff's other assignments of error.

### 5 **REMEDY**

6 Plaintiff urges the Court to remand for immediate award of benefits. ECF  
7 No. 13 at 19-20. To do so, the Court must find that the record has been fully  
8 developed and further administrative proceedings would not be useful. *Garrison*,  
9 759 F.3d at 1019-20; *Varney v. Sec. of Health and Human Servs.*, 859 F.2d 1396,  
10 1399 (9th Cir. 1988). But where there are outstanding issues that must be resolved  
11 before a determination can be made, and it is not clear from the record that the ALJ  
12 would be required to find a claimant disabled if all the evidence were properly  
13 evaluated, remand is appropriate. See *Benecke v. Barnhart*, 379 F.3d 587, 595-96  
14 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

15 Here, it is not clear from the record that the ALJ would be required to find  
16 Plaintiff disabled if all the evidence were properly evaluated. Further proceedings  
17 are necessary for the ALJ to properly consider the medical opinion evidence. On  
18  
19  
20

1 remand, the ALJ shall reconsider the medical opinion evidence and shall conduct a  
2 new sequential evaluation based on the newly considered record.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, this Court concludes the  
5 ALJ's decision is not supported by substantial evidence and free of harmful legal  
6 error.

7 **IT IS ORDERED:**

- 8 1. Plaintiff's motion for summary judgment (ECF No. 13) is **GRANTED**.  
9 2. Defendant's motion for summary judgment (ECF No. 14) is **DENIED**.  
10 3. Application for attorney fees may be filed by separate motion.

11 The District Court Executive is directed to file this Order, enter  
12 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**  
13 **THE FILE**.

14 DATED January 10, 2018.

15 s/Mary K. Dimke  
16 MARY K. DIMKE  
17 UNITED STATES MAGISTRATE JUDGE  
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20