UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

AMBER R.,[1] Plaintiff, vs. KILOLO KIJAKAZI, ACTING COMMISSIONER OF SOCIAL SECURITY,[2] Defendant.	No. 1:20-cv-03115-MKD ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 18, 19

[1] To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

[2] Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 18, 19. 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. 18, and denies Defendant's motion, ECF No. 19.

JURISDICTION

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

STANDARD OF REVIEW

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

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue,* 674 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§ 404.1502(a), 416.920(a). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id*. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id*. at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that he is not only unable to do his previous

work[,] but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

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

At step three, the Commissioner compares the claimant's impairment to severe impairments recognized by the Commissioner to be so severe as to preclude

a person from engaging in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

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

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy.

20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

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

ALJ'S FINDINGS

On October 4, 2016, Plaintiff applied for Title II disability insurance benefits and on December 19, 2016, she applied for Title XVI supplemental security income benefits, alleging a disability onset date of August 1, 2013 in both applications. Tr. 15, 103, 208-25. The applications were denied initially and on reconsideration. Tr. 128-30, 132-45. Plaintiff appeared before an administrative

law judge (ALJ) on May 9, 2019. Tr. 40-94. On July 19, 2019, the ALJ denied Plaintiff's claim. Tr. 12-37.

At step one of the sequential evaluation process, the ALJ found Plaintiff, who met the insured status requirements through September 30, 2018, has not engaged in substantial gainful activity since August 1, 2013. Tr. 18. At step two, the ALJ found that Plaintiff has the following severe impairments: pelvic/abdominal conditions including endometriosis and status-post multiple surgeries; depressive disorder; anxiety disorder; substance use disorder; and a bladder condition (characterized as interstitial cystitis). *Id.*

At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform light work with the following limitations:

> [Plaintiff] is limited to frequent climbing of ramps and stairs; no climbing ladders, ropes, or scaffolds; occasional stooping; frequent kneeling, crouching and crawling; simple, routine tasks; in a routine work environment with simple work related decisions; and only superficial interaction with co-workers and public.

Tr. 21.

At step four, the ALJ found Plaintiff is unable to perform any of her past relevant work. Tr. 28. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, RFC, and testimony from the vocational expert,

there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, such as labeler, merchandise marker, and housekeeper/maid. Tr. 29. The ALJ further found that if the RFC were reduced to sedentary work with the same non-exertional limitations, there were jobs that existed in significant number in the national economy that Plaintiff could perform, such as table worker, toy stuffer, and rubber roller grinder. Tr. 29. Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the Social Security Act, from the alleged onset date of August 1, 2013, through the date of the decision. Tr. 30.

On June 10, 2020, the Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

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

1. Whether the ALJ conducted a proper step-three analysis;
2. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
3. Whether the ALJ properly evaluated the medical opinion evidence.

ECF No. 18 at 2.

DISCUSSION

A. Step Three

Plaintiff contends the ALJ erred in failing to find Plaintiff's impairments meet or equal Listing 5.08. ECF No. 18 at 3-5. At step three, the ALJ must determine if a claimant's impairments meet or equal a listed impairment. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

The Listing of Impairments "describes for each of the major body systems impairments [which are considered] severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education or work experience." 20 C.F.R. §§ 404.1525, 416.925. "Listed impairments are purposefully set at a high level of severity because 'the listings were designed to operate as a presumption of disability that makes further inquiry unnecessary.'" *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990)). "Listed impairments set such strict standards because they automatically end the five-step inquiry, before residual functional capacity is even considered." *Kennedy,* 738 F.3d at 1176. If a claimant meets the listed criteria for disability, she will be found to be disabled. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

"To *meet* a listed impairment, a claimant must establish that he or she meets each characteristic of a listed impairment relevant to his or her claim." *Tackett,* 180 F.3d at 1099 (emphasis in original); 20 C.F.R. §§ 404.1525(d), 416.925(d). "To *equal* a listed impairment, a claimant must establish symptoms, signs and laboratory findings 'at least equal in severity and duration' to the characteristics of a relevant listed impairment . . . ." *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting 20 C.F.R. § 404.1526(a)). "If a claimant suffers from multiple impairments and none of them individually meets or equals a listed impairment, the collective symptoms, signs and laboratory findings of all of the claimant's impairments will be evaluated to determine whether they meet or equal the characteristics of any relevant listed impairment." *Id*. However, "'[m]edical equivalence must be based on medical findings," and "[a] generalized assertion of functional problems is not enough to establish disability at step three.'" *Id*. at 1100 (quoting 20 C.F.R. § 404.1526(a)).

The claimant bears the burden of establishing her impairment (or combination of impairments) meets or equals the criteria of a listed impairment. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). "An adjudicator's articulation of the reason(s) why the individual is or is not disabled at a later step in the sequential evaluation process will provide rationale that is sufficient for a subsequent reviewer or court to determine the basis for the finding about medical

equivalence at step 3." Social Security Ruling (SSR) 17-2P, 2017 WL 3928306, at *4 (effective March 27, 2017).

Here, the ALJ found that Plaintiff's impairments and combinations of impairments did not meet or equal any listings. Tr. 19-20. The ALJ did not specifically address Listing 5.08. Listing 5.08 is met when a Plaintiff demonstrates "weight loss due to any digestive disorder despite continuing treatment as prescribed, with BMI of less than 17.50 calculated on at least two evaluations at least 60 days apart within a consecutive 6-month period." 20 C.F.R. § 404, Subpt. P, App. 1, § 5.08. Plaintiff contends she meets or equals Listing 5.08 because she had a BMI of 17.5 or lower at multiple visits during the relevant adjudicative period. ECF No. 18 at 4. Plaintiff had a BMI of 17.5 when she weighed 112 pounds. Tr. 454. Plaintiff cites to medical visits when Plaintiff weighed 112 pounds or less, and therefore had a BMI of 17.5 or lower, between January 24, 2014 through April 26, 2016. ECF No. 18 at 4. The November 14, 2014 and January 20, 2015 visits satisfy the requirement that the evaluations be at least 60 days apart within a consecutive 60-month period. Tr. 348, 482.

However, Plaintiff does not cite to any evidence that demonstrates that she had weight loss due to a digestive disorder, despite prescribed treatment. At the visits where Plaintiff had a BMI of 17.5 or lower, she was seen for depression, endometriosis, hypothyroidism, dyspareunia, migraines, back pain, and infertility.

Tr. 329, 348, 359, 397, 419, 451, 454, 482, 484, 1291, 1672, 1684, 1697. Some of the visits note Plaintiff had "no significant weight loss." Tr. 451, 454. Plaintiff argues that the evidence in May of 2016 onward demonstrates Plaintiff had a kink in the sigmoid colon, and she had symptoms including constipation, nausea, and other symptoms, and thus Plaintiff had a "manner of digestive disorder." ECF No. 18 at 3-4 (citing Tr. 416, 508, 848). There are no opinions in the record that link any digestive disorder symptoms to her weight loss, and the evidence cited to in 2016 through 2018 that shows improvement in Plaintiff's symptoms and BMI does not provide a causal explanation for her low BMI in 2014 through April 2016. Further, the evidence Plaintiff relies on that documents Plaintiff treatment in April 2016 onward demonstrates that with treatment Plaintiff consistently had a BMI above 17.5, which indicates that Plaintiff would not meet the listing. Tr. 441, 448, 451, 552, 555, 585, 659, 779, 861. Plaintiff has not met her burden in demonstrating she meets Listing 5.08.

Plaintiff argues she equals the listing, because she had a low BMI and she later had nausea, vomiting, and a sigmoid kink. ECF No. 20 at 2-3. Again, Plaintiff does not demonstrate that she had weight loss due to any of these symptoms. Plaintiff also does not demonstrate that she had weight loss despite prescribed treatment. Plaintiff argues she was seen for pain medication and underwent surgeries for her abdominal pain. *Id.* (citing Tr. 325, 341, 391, 427,

471, 473). While Plaintiff took pain medication, there is no evidence the pain medication nor surgery was treating any condition that caused her to lose weight. Tr. 325, 342, 391, 427, 471, 473. Plaintiff has not met her burden in demonstrating her impairments equaled Listing 5.08. Plaintiff is not entitled to remand on these grounds.

B. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting her symptom claims. ECF No. 18 at 5-16. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show that [the claimant's] impairment could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the

rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id*. (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's symptom claims)). "The clear and convincing [evidence] standard is the most demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin*., 278 F.3d 920, 924 (9th Cir. 2002)).

Factors to be considered in evaluating the intensity, persistence, and limiting effects of a claimant's symptoms include: 1) daily activities; 2) the location, duration, frequency, and intensity of pain or other symptoms; 3) factors that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side effects of any medication an individual takes or has taken to alleviate pain or other symptoms; 5) treatment, other than medication, an individual receives or has received for relief of pain or other symptoms; 6) any measures other than treatment an individual uses or has used to relieve pain or other symptoms; and 7) any other factors concerning an individual's functional limitations and restrictions due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§ 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in

an individual's record," to "determine how symptoms limit ability to perform work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

The ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not entirely consistent with the evidence. Tr. 22.

1. Improvement with Treatment

The ALJ found Plaintiff's symptom claims were inconsistent with her improvement with treatment. Tr. 22-26. The effectiveness of treatment is a relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions effectively controlled with medication are not disabling for purposes of determining eligibility for benefits); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response to treatment can undermine a claimant's complaints of debilitating pain or other severe limitations).

The ALJ found Plaintiff had improvement in her symptoms with surgery and medication. Tr. 22. Plaintiff reported improvement in her pain with gabapentin in 2015, though the improvement reportedly ended. *Id.* (citing Tr. 402-03). Plaintiff had a good result from a surgery for her endometriosis in 2014, and she reported in

2015 that her endometriosis was no longer causing pain. Tr. 22 (citing Tr. 348, 473-74). Plaintiff had no complications following surgery to remove her left ovary in 2016, and around the same time, Plaintiff reported her pain and urinary urgency/frequency had significantly improved with changes to her diet. Tr. 22 (citing Tr. 431). Plaintiff underwent another endometriosis excision and an appendectomy in 2017. Tr. 23 (citing Tr. 508). Despite ongoing complaints of pain, Plaintiff's provider noted her endometriosis was essentially gone and the cystoscopy and urodynamics procedures were normal. Tr. 23 (citing 562-63, 1041). Plaintiff described her pain as well-controlled in November 2017, with 70 percent pain relief with medication, and she reported good response to hydro-distention in 2018. Tr. 23 (citing Tr. 574, 593, 846-47, 1059). In 2018, Plaintiff reported improvement with treatment but stated the symptoms return before her next appointment. Tr. 611. Regarding her mental health symptoms, Plaintiff's mood was noted as managed on medication, Plaintiff reported tolerating Clonazepam, and she generally had normal mental status examinations. Tr. 26, 808, 811, 826, 1492.

Plaintiff contends the ALJ erred because although she had some improvement in individual impairments with treatment, she had multiple impairments that caused ongoing limitations despite treatment. ECF No. 18 at 5-6. However, the ALJ reasonably found Plaintiff's complaints are inconsistent with

her improvement with treatment. Medical providers noted that the diagnostic findings do not support Plaintiff's reported level of pain and distress, Tr. 323, and her endometriosis was found to be "essentially gone" after her surgery in 2017, Tr. 1035. Although Plaintiff continued to report pain symptoms, her provider noted in 2018 that there are likely underlying psychological factors that need to be treated. Tr. 1791. Despite her complaints of ongoing abdominal pain, no distinct cause was found in October 2018. Tr. 647. The reports of ongoing pain were often associated with requests for pain medication, as discussed *infra.*

On this record, the ALJ reasonably concluded that Plaintiff's impairments when treated were not as limiting as Plaintiff claimed. This finding is supported by substantial evidence and was a clear and convincing reason to discount Plaintiff's symptoms complaints.

2. Drug-Seeking Behavior

The ALJ found Plaintiff engaged in drug-seeking behavior. Tr. 24. Drug seeking behavior can be a clear and convincing reason to discount a claimant's credibility. *See Edlund*, 253 F.3d at 1157 (holding that evidence of drug seeking behavior undermines a claimant's credibility); *Gray v. Comm'r, of Soc. Sec.*, 365 F. App'x 60, 63 (9th Cir. 2010) (evidence of drug-seeking behavior is a valid reason for finding a claimant not credible); *Lewis v. Astrue*, 238 F. App'x 300, 302 (9th Cir. 2007) (inconsistency with the medical evidence and drug-seeking

behavior sufficient to discount credibility); *Morton v. Astrue*, 232 F. App'x 718, 719 (9th Cir. 2007) (drug-seeking behavior is a valid reason for questioning a claimant's credibility).

The ALJ found Plaintiff's complaints of chronic pain were overshadowed by the drug seeking behavior demonstrated in the record. Tr. 24. A medical provider in 2011 noted they were concerned about Plaintiff's narcotic use. *Id.* (citing Tr. 1052). Plaintiff was cautioned in October 2013 to use her pain medications judiciously. Tr. 24 (citing Tr. 384). In March 2014, Plaintiff was diagnosed with physiologic dependence on pain medication, and she was repeatedly advised in 2014 and 2015 that trying to conceive while using Oxycodone could put a fetus at risk. Tr. 34 (citing Tr. 348, 366, 370). Plaintiff reported withdrawal symptoms in July 2014 when she reported losing most of her medication in a toilet. Tr. 24 (citing Tr. 358). In October 2015, a provider stated Plaintiff's pain may be an addiction issue and tapering off opioids was discussed. Tr. 24 (citing Tr. 388). Plaintiff's requests for extra medication were denied on multiple occasions, and she could not get her Oxycodone refilled in August 2018 due to her ongoing marijuana use. Tr. 24-25 (citing Tr. 330, 76, 879). The ALJ also noted Plaintiff was untruthful with providers or failed to follow medication instructions, including failing to bring in a pill bottle for a pill count. Tr. 24-25 (citing Tr. 443-46). Plaintiff reported she may need to seek help for her pain pill dependence but did

not seek treatment. Tr. 25 (citing Tr. 1493). In June and July 2017, Plaintiff sought emergency care and left when she could not get narcotics. Tr. 25 (citing Tr. 1592, 1604). Plaintiff was argumentative with staff when denied opiates. Tr. 25 (citing Tr. 647-49, 1790-95). Plaintiff also declined other forms of treatment for her pain, and instead repeatedly requested opiate medication. Tr. 25 (citing Tr. 1399). Medical providers have documented their concern regarding Plaintiff's behaviors. *See* Tr. 1399.

Plaintiff argues the ALJ erred because there is not sufficient evidence of drug seeking to completely discount Plaintiff's allegations and contends some of the records cited to by the ALJ do not demonstrate drug seeking. ECF No. 18 at 10-13. Plaintiff also argues her husband has never been documented as drug-seeking, and her husband repeatedly requested pain medication for her and stated she may commit suicide without the medication, which supports Plaintiff's argument the medication was necessary. ECF No. 18 at 13 (citing Tr. 1603-04, 1794). However, the ALJ cited to multiple incidences where providers believed Plaintiff was drug-seeking. There is also evidence of Plaintiff's husband's inappropriate behavior related to his requests for medication for Plaintiff. Tr. 1523 (husband was belligerent on the phone and hung up on staff); Tr. 1636-37 (husband demanded medication and yelled at staff); Tr. 1603, 1792 (husband cursed at staff and upset at denial of medication); Tr. 1581 (husband yelled at staff

regarding pain medication). Providers have documented Plaintiff giving evasive, inconsistent answers, becoming tearful, disrespectful, and angry when she is not given pain medication, refusing non-opiate medication, leaving against medical advice when she was denied pain medication, and having tachycardia and tongue/jaw tremors that were concerning indications of opiate dependence. Tr. 649-51, 1591, 1792.

On this record, the ALJ reasonably found there is evidence of Plaintiff drug-seeking. This was a clear and convincing reason, supported by substantial evidence, to reject Plaintiff's symptom claims.

3. Lack of Treatment

The ALJ found Plaintiff's symptom claims were inconsistent with Plaintiff's lack of treatment. Tr. 25-26. An unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of treatment may be considered when evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). And evidence of a claimant's self-limitation and lack of motivation to seek treatment are appropriate considerations in determining the credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, *3 (9th Cir. 2009) (unpublished opinion) (considering why plaintiff was not seeking treatment). When there is no evidence suggesting that the failure to seek or

participate in treatment is attributable to a mental impairment rather than a personal preference, it is reasonable for the ALJ to conclude that the level or frequency of treatment is inconsistent with the alleged severity of complaints. *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental health treatment is partly due to a claimant's mental health condition, it may be inappropriate to consider a claimant's lack of mental health treatment when evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

While Plaintiff alleges disability in part due to her mental health conditions, the ALJ found Plaintiff's allegations were inconsistent with Plaintiff's lack of ongoing mental health treatment. Tr. 25-26. Plaintiff participated in mental health services prior to her alleged onset date, but the services ended prior to the relevant time period; she was repeatedly encouraged to seek mental health treatment in 2015, but Plaintiff did not re-establish mental health care until May 2017. *Id.,* Tr. 1469. Plaintiff was seen from May through July 2017, when she was told her case was going to be closed due to her lack of contact. Tr. 26 (citing Tr. 1544). Plaintiff again saw a mental health provider in 2018, but Plaintiff terminated services after five months of counseling at the clinic, when the clinic would not prescribe more pain medication. Tr. 885. Plaintiff argues she sought treatment because her mental health conditions were managed through her primary care

providers, and her mental health was primarily impacted by her chronic pain, thus pain treatment was her focus. ECF No. 18 at 9. Plaintiff does not offer any explanations for why she did not seek mental health treatment for several years despite recommendations to do so, and why she terminated services in 2017. Plaintiff does not contend her mental health symptoms interfered with her ability to seek services. The ALJ's finding that Plaintiff's allegations were inconsistent with her lack of treatment is a clear and convincing reason, supported by substantial evidence, to reject Plaintiff's claims.

4. Inconsistent Objective Medical Evidence

The ALJ found Plaintiff's symptom claims were inconsistent with the objective medical evidence. Tr. 22-26. An ALJ may not discredit a claimant's symptom testimony and deny benefits solely because the degree of the symptoms alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680. However, the objective medical evidence is a relevant factor, along with the medical source's information about the claimant's pain or other symptoms, in determining the severity of a claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

First, the ALJ found Plaintiff's pain allegations were inconsistent with the objective medical evidence. Tr. 22-26. The records demonstrate some improvement with treatment, as discussed *supra.* Tr. 22-23. A 2016 cystoscopy was normal. Tr. 23 (citing Tr. 419). In August 2017, Plaintiff reported ongoing pain, but the medical records note Plaintiff's endometriosis was essentially gone. Tr. 23 (citing Tr. 1035). Plaintiff's cystoscopy and urodynamics procedures were also normal. Tr. 23 (citing Tr. 14F, 1041). Despite her complaints of disabling pain, Plaintiff generally had normal strength, range of motion, and gait, although she reported tenderness. Tr. 24, 448, 1409, 1141, 1597, 448, 599, 605, 1062. At multiple visits where Plaintiff reported high levels of pain, there were few abnormal findings on examination. Tr. 24 (citing Tr. 800-6). While Plaintiff offers an alternative interpretation of the evidence, the Court may not reverse the ALJ's decision based on Plaintiff's disagreement with the ALJ's interpretation of the record. *See Tommasetti*, 533 F.3d at 1038 ("[W]hen the evidence is susceptible to more than one rational interpretation" the court will not reverse the ALJ's decision).

Second, the ALJ found Plaintiff's allegation that she has flare-ups that would cause absenteeism due to a need to lie down was inconsistent with the evidence. Tr. 26. The ALJ noted Plaintiff did not frequently miss, cancel, or reschedule appointments. *Id.* Plaintiff argues her ability to attend an appointment

for one to two hours every month is not inconsistent with an inability to maintain full-time attendance at work, ECF No. 18 at 9, however Plaintiff does not point to any evidence of her need to lie down.

Third, the ALJ found Plaintiff's claims of disabling limitations were inconsistent with her efforts to have a baby during the relevant period. Tr. 26. The ALJ does not set forth an analysis as to how Plaintiff's desire to have a baby is inconsistent with her allegations. Any err in finding Plaintiff's claims were inconsistent with her efforts to get pregnant is harmless as the ALJ gave other supported reasons to reject Plaintiff's allegations. *See Molina,* 674 F.3d at 1115.

On this record, the ALJ reasonably concluded that Plaintiff's symptom claims were inconsistent with the objective medical evidence. This finding is supported by substantial evidence and was a clear and convincing reason, along with the other reasons offered, to discount Plaintiff's symptom complaints.

C. Medical Opinion Evidence

Plaintiff contends the ALJ erred in rejecting the opinions of Derek Leinenbach, M.D.; Joan Harding, M.D.; Myrna Palasi, M.D.; and Jenny Rainey-Gibson, LMFT. ECF No. 18 at 16-21.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant

[but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari,* 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists." *Id*. (citations omitted).

If a treating or examining physician's opinion is uncontradicted, the ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart,* 427 F.3d 1211, 1216 (9th Cir. 2005). "However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31). The opinion of a nonexamining physician may serve as substantial evidence if

it is supported by other independent evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

"Only physicians and certain other qualified specialists are considered '[a]cceptable medical sources.'" *Ghanim*, 763 F.3d at 1161 (alteration in original); *see* 20 C.F.R. § 416.902 (2011)[3] (citing to 20 C.F.R. § 416.913(a)) (acceptable medical sources are licensed physicians, licensed or certified psychologists, licensed optometrists, licensed podiatrists, and qualified speech-language pathologists)). However, an ALJ is required to consider evidence from non-acceptable medical sources, such as therapists. 20 C.F.R. § 416.927(f). An ALJ may reject the opinion of a non-acceptable medical source by giving reasons germane to the opinion. *Ghanim*, 763 F.3d at 1161.

1. Dr. Leinenbach

On January 24, 2019, Dr. Leinenbach, a reviewing source, reviewed some of Plaintiff's medical records and rendered an opinion on Plaintiff's functioning. Tr.

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[3] This section was amended in 2017, effective March 27, 2017, and in 2018, effective October 15, 2018. *See* 20 C.F.R. § 416.902. Plaintiff filed his/her claim before March 27, 2017, and the Court applies the regulation in effect at the time Plaintiff's claim was filed. *See* 20 C.F.R. § 416.902 (noting changes apply only for claims filed on or after March 27, 2017).

796-97. Dr. Leinenbach opined Plaintiff is limited to a light RFC, but she has marked attendance limitations, and moderate postural limitations. Tr. 796. The ALJ did not address Dr. Leinenbach's opinion. As Dr. Leinenbach is a non-examining source, the ALJ must consider the opinion and whether it is consistent with other independent evidence in the record. *See* 20 C.F.R. §§ 404.1527(b),(c)(1), 416.927(b),(c)(1); *Tonapetyan v. Halter,* 242 F.3d 1144, 1149 (9th Cir. 2001); *Lester*, 81 F.3d at 830-31.

Defendant argues the ALJ did not error by failing to address Dr. Leinenbach's opinion because the opinion did not contain any probative evidence, and further any error in the rejection of Dr. Leinenbach's opinion was harmless, because the ALJ gave supported reasons to reject Dr. Palasi and Dr. Harding's opinions, and the same reasoning applies to Dr. Leinenbach's opinion. ECF No. 19 at 15-17. However, the ALJ did not offer any analysis of Dr. Leinenbach's opinion, and the ALJ did not consider the consistency of Dr. Leinenbach's opinion with the other opinions, and thus the Court cannot conclude the ALJ would have rejected Dr. Leinenbach's opinion for the same reasons she rejected the other opinions. *See Orn*, 495 F.3d at 630 (The Court will "review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely."). Further, Dr. Leinenbach's opinion includes a marked limitation, and thus cannot be found harmless.

On remand, the ALJ is instructed to consider Dr. Leinenbach's opinion and incorporate the limitation into the RFC or set forth an analysis of the consistency of the opinion with the other evidence.

2. Dr. Harding

On June 5, 2018, Dr. Harding, a treating provider, opined Plaintiff was limited to sedentary work. Tr. 567. The ALJ gave Dr. Harding's opinion little weight. Tr. 27. As Dr. Harding's opinion is contradicted by the opinion of Dr. Koukol, Tr. 109-11, the ALJ was required to give specific and legitimate reasons, supported by substantial evidence, to reject Dr. Harding's opinion. *See Bayliss*, 427 F.3d at 1216. As the case is being remanded for the ALJ to consider Dr. Leinenbach's opinion, the ALJ is also instructed to reconsider Dr. Harding's opinion.

3. Dr. Palasi

On October 30, 2016, Dr. Palasi reviewed a medical report and rendered an opinion on Plaintiff's functioning. Tr. 784. Dr. Palasi opined Plaintiff is not capable of even sedentary work due to her endometriosis. *Id.* The ALJ gave Dr. Palasi's opinion little weight. Tr. 27. As Dr. Palasi is a non-examining source, the ALJ must consider the opinion and whether it is consistent with other independent evidence in the record. *See* 20 C.F.R. §§ 404.1527(b),(c)(1), 416.927(b),(c)(1); *Tonapetyan,* 242 F.3d at 1149; *Lester*, 81 F.3d at 830-31. As the case is being

remanded for the ALJ to reconsider Dr. Leinenbach's opinion, the ALJ is also instructed to reconsider Dr. Palasi's opinion.

4. Ms. Rainey-Gibson

On May 17, 2018, Ms. Rainey-Gibson, a treating therapist, opined Plaintiff has mild limitations in her ability to carry out very short and simple instructions; moderate limitations in her ability to remember instructions and work-like procedures, sustain ordinary routines, and maintain socially appropriate behavior and adhere to basic standards of neatness; marked limitations in her ability to understand/remember very short and simple instructions, understand/remember detailed instructions, carry out detailed instructions, maintain attention/concentration for extended periods, perform activities within a schedule and maintain attendance, work in coordination or in close proximity to others without being distracted by them, make simple work-related decisions, interact appropriately with the general public, ask simple questions or request assistance, accept instructions and respond appropriately to criticism from supervisors, get along with coworkers or peers without distracting them, respond appropriately to changes in the work setting, be aware of normal hazards and take appropriate precautions, travel to unfamiliar places or take public transportation, and set realistic goals or make plans independently of others; and an extreme limitation in her ability to complete a normal workday/workweek. Tr. 564-66. The ALJ found

Ms. Rainey-Gibson's opinion was not supported. Tr. 27. As Ms. Rainey-Gibson is not an acceptable medical source, the ALJ was required to give germane reasons to reject the opinion. *See Ghanim*, 763 F.3d at 1161.

First, the ALJ found Ms. Rainey-Gibson provided no explanations for the marked and extreme ratings. *Id.* The Social Security regulations "give more weight to opinions that are explained than to those that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray*, 554 at 1228. Ms. Rainey-Gibson's opinion is a checkbox form and does not contain any explanation nor citation to records to support her opinion. Tr. 564-66. "Although the treating physician's opinions were in the form of check-box questionnaires, that is not a proper basis for rejecting an opinion supported by treatment notes." *See Garrison*, 759 F.3d at 1014 n. 17. Plaintiff does not present any argument that Ms. Rainey-Gibson's opinion is supported by her treatment notes. ECF No. 18 at 19-21. As discussed *infra,* Ms. Rainey-Gibson's opinion is inconsistent with the treatment records. This was a germane to reject Ms. Rainey-Gibson's opinion.

Second, the ALJ found Ms. Rainey-Gibson's opinion was inconsistent with the objective evidence. Tr. 27. A medical opinion may be rejected if it is unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at

1195; *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d at 1019. Moreover, an ALJ is not obliged to credit medical opinions that are unsupported by the medical source's own data and/or contradicted by the opinions of other examining medical sources. *Tommasetti*, 533 F.3d at 1041. While Ms. Rainey-Gibson opined Plaintiff had multiple marked limitations, such as a marked limitation in understanding/remembering very short and simple instructions, the ALJ found the opinion was inconsistent with the medical records that demonstrate Plaintiff repeatedly had a normal memory. Tr. 27. Ms. Rainey-Gibson's records contain generally normal mental status examinations, including normal, memory, thoughts, intelligence, and concentration, with occasional abnormalities such as an anxious or depressed mood. Tr. 27, 880, 888, 897, 971, 980, 1002, 1007. This was a germane reason to reject Ms. Rainey-Gibson's opinion.

Third, the ALJ found Ms. Rainey-Gibson's opinion was inconsistent with Plaintiff's activities of daily living. Tr. 27. An ALJ may discount a medical source opinion to the extent it conflicts with the claimant's daily activities. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). Additionally, the ability to care for young children without help has been considered an activity that may undermine claims of totally disabling pain. *Rollins,* 261 F.3d at 857. However, an ALJ must make specific findings before relying on childcare as an activity inconsistent with disabling limitations. *Trevizo*

v. Berryhill, 871 F.3d 664, 675-76 (9th Cir. 2017). The ALJ found Ms. Rainey-Gibson's opinion that Plaintiff had marked limitations in several areas of functioning, including concentration and social interaction, was inconsistent with Plaintiff's ability to provide childcare for a friend's infant, and help care for her father after he had a stroke. Tr. 27. However, the ALJ did not make any findings regarding the extent of care provided. While the ALJ erred in rejecting the opinion as inconsistent with Plaintiff's activities, the error is harmless as the ALJ gave other supported reasons to reject the opinion. *See Molina,* 674 F.3d at 1115. The ALJ did not error in rejecting Ms. Rainey-Gibson's opinion.

D. Remedy

Plaintiff urges this Court to remand for an immediate award of benefits. ECF No. 18 at 21.

"The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ's decision for error, the Court "ordinarily must remand to the agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*,

775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has "stated or implied that it would be an abuse of discretion for a district court not to remand for an award of benefits" when three conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the credit-as-true rule, where (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied, the Court will not remand for immediate payment of benefits if "the record as a whole creates serious doubt that a claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1021.

Plaintiff urges remand for immediate benefits based on the arguments that Plaintiff's impairments meet a listing, and the ALJ erred in rejecting the medical opinions and Plaintiff's symptom claims. ECF No. 18 at 21. However, the Court finds Plaintiff did not meet her burden in demonstrating her impairments meet or equal a listing, and the ALJ gave clear and convincing reasons to reject Plaintiff's symptom claims, as discussed *supra.* While the ALJ erred in rejecting Dr.

Harding's opinion, remand for further proceedings is necessary to resolve conflicts in the record, including conflicts between the medical opinions. As such, the case is remanded for further proceedings consistent with this Order.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is not supported by substantial evidence and is not free of harmful legal error. Accordingly, **IT IS HEREBY ORDERED**:

1. The District Court Executive is directed to substitute Kilolo Kijakazi as Defendant and update the docket sheet.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **GRANTED**.

3. Defendant's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff REVERSING and REMANDING the matter to the Commissioner of Social Security for further proceedings consistent with this recommendation pursuant to sentence four of 42 U.S.C. § 405(g).

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE.**

DATED December 28, 2021.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE