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

May 10, 2022

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TASHIA G.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:20-cv-03207-MKD

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

ECF Nos. 16, 24

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).*

ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 16, 24. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court grants
4 Plaintiff's motion, ECF No. 16, and denies Defendant's motion, ECF No. 24.

5 **JURISDICTION**

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1338(c)(3).

7 **STANDARD OF REVIEW**

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

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R.
5 §416.902(a). Further, a district court “may not reverse an ALJ’s decision on
6 account of an error that is harmless.” *Id.* An error is harmless “where it is
7 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
8 (quotation and citation omitted). The party appealing the ALJ’s decision generally
9 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
10 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

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

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

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

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step 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. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
2 analysis concludes with a finding that the claimant is disabled and is therefore
3 entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.

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

ALJ'S FINDINGS

11 On October 18, 2017, Plaintiff applied for Title XVI supplemental security
12 income benefits alleging a disability onset date of October 1, 2017.³ Tr. 15, 114,

¹⁵ Plaintiff previously applied for Title XVI benefits on February 3, 2014; the
¹⁶ application was denied and resulted in a September 15, 2016 unfavorable decision.
¹⁷ Tr. 92-113. At the 2020 hearing the ALJ found that although the prior unfavorable
¹⁸ ALJ decision created a presumption of continuing non-disability under *Chavez*, the
¹⁹ presumption had been rebutted because of a change in Plaintiff's medical or
²⁰ vocational status since the prior decision. Tr. 15; see *Chavez v. Bowen*, 844 F.2d

1 226-31. The application was denied initially, and on reconsideration. Tr. 146-61.

2 Plaintiff appeared before an administrative law judge (ALJ) on January 16, 2020.

3 Tr. 73-91. On March 11, 2020, the ALJ denied Plaintiff's claim. Tr. 12-38.

4 At step one of the sequential evaluation process, the ALJ found Plaintiff has
5 not engaged in substantial gainful activity since October 18, 2017. Tr. 17. At step
6 two, the ALJ found that Plaintiff has the following severe impairments: obesity,
7 anemia, hypertension, status-post iliac stent and anterior and posterior tibial artery
8 angioplasty, depression, anxiety, personality disorder, and methamphetamine
9 addiction. Tr. 18.

10 At step three, the ALJ found Plaintiff does not have an impairment or
11 combination of impairments that meets or medically equals the severity of a listed
12 impairment. Tr. 19-21. The ALJ then concluded that Plaintiff has the RFC to
13 perform sedentary work with the following limitations:

14 Her ability to stand and walk is limited to two hours in an eight-hour
15 workday with normal breaks. She can occasionally climb ladders,
ropes, and scaffolds. She must avoid concentrated exposure to
extreme heat, humidity, or hazards. She can engage in simple, routine
16 3-step tasks with no public contact but she would be able to briefly
interact with others in a work setting.
17

18 691, 693 (9th Cir. 1998); *see also* Acquiescence Ruling (AR) 97-4(9), available at
19 1997 WL 742758 at *3.

20

1 Tr. 21.

2 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 33. At
3 step five, the ALJ found that, considering Plaintiff's age, education, work
4 experience, RFC, and testimony from the vocational expert, there were jobs that
5 existed in significant numbers in the national economy that Plaintiff could perform,
6 such as, assembler (button and notion); touch-up screener (printed circuit board
7 assembly); and toy stuffer. Tr. 34. Therefore, the ALJ concluded Plaintiff was not
8 under a disability, as defined in the Social Security Act, from the date of the
9 application through the date of the decision. *Id.*

10 On September 21, 2020, the Appeals Council denied review of the ALJ's
11 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
12 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

13 ISSUES

14 Plaintiff seeks judicial review of the Commissioner's final decision denying
15 her supplemental security income benefits under Title XVI of the Social Security
16 Act. Plaintiff raises the following issues for review:
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- 1 1. Whether the ALJ conducted a proper step-three analysis⁴;
- 2 2. Whether the ALJ properly developed the record;
- 3 3. Whether the ALJ conducted a proper step-two analysis;
- 4 4. Whether the ALJ properly evaluated the medical opinion evidence; and
- 5 5. Whether the ALJ properly evaluated Plaintiff's symptom claims.

6 ECF No. 16 at 2.

7 DISCUSSION

8 A. Step Three

9 Plaintiff contends the ALJ erred at step three by failing to properly consider
10 Plaintiff's heart disorder. ECF No. 16 at 12-15. At step three, the ALJ must
11 determine if a claimant's impairments meet or equal a listed impairment. 20
12 C.F.R. § 416.920(a)(4)(iii).

13 The Listing of Impairments "describes for each of the major body systems
14 impairments [which are considered] severe enough to prevent an individual from
15 doing any gainful activity, regardless of his or her age, education, or work

16 _____

17 ⁴ Plaintiff makes arguments the ALJ erred at step two and three under the heading
18 "The ALJ erred by not properly assessing the heart disorder." ECF No. 16 at 12-
19 15. The Court acknowledges the arguments for both steps, noting the issues are
20 somewhat intertwined, but separates them here for ease of discussion.

1 experience.” 20 C.F.R. § 416.925. “Listed impairments are purposefully set at a
2 high level of severity because ‘the listings were designed to operate as a
3 presumption of disability that makes further inquiry unnecessary.’” *Kennedy v.*
4 *Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S.
5 521, 532 (1990)). “Listed impairments set such strict standards because they
6 automatically end the five-step inquiry, before residual functional capacity is even
7 considered.” *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed criteria for
8 disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

9 “To *meet* a listed impairment, a claimant must establish that he or she meets
10 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,
11 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a
12 listed impairment, a claimant must establish symptoms, signs and laboratory
13 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
14 listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
15 20 C.F.R. § 404.126(a)); 20 C.F.R. § 416.926(a). “If a claimant suffers from
16 multiple impairments and none of them individually meets or equals a listed
17 impairment, the collective symptoms, signs and laboratory findings of all of the
18 claimant’s impairments will be evaluated to determine whether they meet or equal
19 the characteristics of any relevant listed impairment.” *Id.* However, “[m]edical
20 equivalence must be based on medical findings,” and “[a] generalized assertion of

1 functional problems is not enough to establish disability at step three.” *Id.* at 1100
2 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a).

3 The claimant bears the burden of establishing her impairment (or
4 combination of impairments) meets or equals the criteria of a listed impairment.
5 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s
6 articulation of the reason(s) why the individual is or is not disabled at a later step in
7 the sequential evaluation process will provide rationale that is sufficient for a
8 subsequent reviewer or court to determine the basis for the finding about medical
9 equivalence at step 3.” SSR 17-2P, 2017 WL 3928306, at *4 (effective March 27,
10 2017).

11 The ALJ found that Plaintiff’s impairments and combinations of
12 impairments did not meet or equal any listings. Tr. 19. In terms of Plaintiff’s
13 cardiovascular impairment(s), the ALJ found “[Plaintiff’s] cardiovascular
14 condition fails to meet or medically equal listing 4.00 … [t]he medical record fails
15 to establish evidence of any cardiovascular system deficits that rise to listing
16 level.” *Id.* The ALJ lists a number of the cardiovascular listings, noting
17 “[s]pecifically, the record fails to demonstrate evidence of listing level chronic
18 heart failure (4.02) … [through] peripheral arterial disease (4.12). Therefore, I find
19 that the [Plaintiff’s] cardiovascular condition fail[s] to meet or medically equal
20 listing level severity.” *Id.* The ALJ also briefly discusses the requirements for

1 listing 4.02A and B (chronic heart failure) in regard to hypertension, finding
2 “[Plaintiff’s] hypertension does not meet or medically equal section 4.02 or 4.04”
3 because the record “does not demonstrate evidence of systolic or diastolic failure
4 4.02(A); along with persistent symptoms of heart failure limiting the ability to
5 independently initiate, sustain, or complete activities or daily living” Tr. 20.
6 The ALJ also lists some of the B and C requirements of listings 4.02 and 4.04,
7 concluding “therefore I find that the [Plaintiff’s] hypertension fails to meet or
8 medically equal listing level severity.” *Id.*

9 Plaintiff contends the ALJ failed to appropriately consider the complete
10 evidence concerning Plaintiff’s heart impairment(s), including evidence of listing
11 level chronic heart failure under listing 4.02. ECF No. 16 at 13-15. Plaintiff also
12 argues that the ALJ failed to appropriately assess the extent of her cardiovascular
13 disorder, as revealed during hospitalization for a 2019 ischemic event. *Id.*

14 While the ALJ was correct to discuss hypertension, as under the
15 cardiovascular listings it must be discussed in relation to the body system it affects,
16 *See* 20 C.F.R. § 404, Subpt. P, App. 1, § 4.00H1, this is the only discussion the
17 ALJ provides of listing 4.02 for chronic heart failure; Plaintiff points out, however,
18 that an echocardiogram during her August 2019 hospitalization showed cardiac
19 findings including moderately to severely dilated left ventricle, with left ventricular
20 end diastolic diameter (LVEDD) of 6.5 cm, which appears, in part, to meet the

1 requirements of listing 4.02A,⁵ for systolic failure, along with findings of grade II
2 diastolic dysfunction. ECF No. 16 at 13; Tr. 647. Plaintiff contends that Listing
3 4.02B1 is met due to limitations in the ability to independently initiate, sustain, or
4 complete activities of daily living, pointing out that Plaintiff alleged her known
5 heart condition left her physically and mentally exhausted to the point of being
6 bedridden and that she often slept too much. ECF No. 16 at 14. Defendant
7 acknowledges Plaintiff's contention that recent exams satisfy listing 4.02B1 but
8 argues Plaintiff cannot meet her burden of showing prejudicial error at step three
9 because Plaintiff "has made no effort to show that she met any of the other parts of
10 listing 4.02, including listing 4.02(A)." ECF No. 24 at 4-5. However, as discussed
11 *supra*, Plaintiff points out a 2019 echocardiogram showed LVEDD findings at the
12 level required by 4.02A. This imaging also shows the "symptoms and signs
13 described in 4.00D2," as required by listing 4.02, with "cardiomegaly or
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15 ⁵ Listing 4.02A requires chronic heart failure while on a regimen of prescribed
16 treatment, with symptoms and signs described in 4.00D2 ... with medically
17 documented presence of the following: 1. systolic failure ... with left ventricular
18 end diastolic dimensions greater than 6.0 cm or ejection fraction of 30 percent or
19 less during a period of stability (not during an episode of acute heart failure)"

20 See 20 C.F.R. § 404, Subpt. P, App. 1, § 4.02A1.

1 ventricular dysfunction ... present and demonstrated on appropriate medically
2 acceptable imagining" (echocardiogram) showing "[a]n LVEDD greater than 6.0
3 cm ... measured during a period of stability (that is, not during an episode of acute
4 heart failure) [which] may be associated with systolic failure." *See* 20 C.F.R. §
5 404, Subpt. P, App. 1, § 4.02D2. While Plaintiff has not shown that she was on a
6 regimen of prescribed treatment as required by listing 4.02, it appears to the Court
7 that more than one cardiovascular listing may be involved in her case, as indicated
8 by her hospitalization and treatment for arterial embolism in her leg/threatened
9 limb ischemia due to occlusive peripheral arterial disease. *See, e.g.*, Tr. 452, 518.
10 As Plaintiff contends the ALJ failed to appropriately assess the extent of her
11 cardiovascular disorder as revealed during hospitalization for a 2019 ischemic
12 event, including imaging showing listing level findings, the Court finds Plaintiff
13 has met her burden by showing there is evidence she may meet or equal a
14 cardiovascular listing, including listing 4.02.

15 Based on the August 2019 echocardiogram, which the ALJ did not discuss at
16 step three or elsewhere in the decision, the ALJ erred in finding "the record does
17 not demonstrate evidence of systolic or diastolic failure (4.02(A))." *See* Tr. 20.
18 Further, as Plaintiff points out, there has been no medical assessment of the
19 medical evidence relating to Plaintiff's cardiovascular impairments after her
20 August 2019 ischemic event, nor any medical opinion regarding Plaintiff's

1 physical functioning in light of new and/or worsened cardiovascular impairments.

2 See ECF No. 16 at 5-6.

3 While Defendant argues that the ALJ adequately and reasonably assessed
4 and interpreted the medical evidence, ECF No. 24 at 17-18, there is minimal
5 discussion of her cardiovascular impairment(s) at step three or elsewhere in the
6 decision, including findings relevant to the cardiovascular listings during and post
7 Plaintiff's August 2019 ischemic event. *See generally* Tr. 15-34. Plaintiff has
8 reported an enlarged heart, history of mild strokes/transient ischemic attacks (TIA),
9 and history of heart failure. *See* Tr. 116, 445. While the ALJ found her "enlarged
10 heart" nonsevere, and adopted the prior ALJ's findings regarding her history of
11 TIA, there is no evidence the ALJ (or Plaintiff's representative) inquired whether
12 she was followed by cardiology, despite records from her August 2019 ischemic
13 event, where she reported she did not have clotting disorder that she knew of, but
14 "she [has] been followed by the cardiologist for some type of CHF or cardiac issue
15 which she cannot clarify very well," *see* Tr. 454, and other medical records show
16 diagnosis/active problems including CHF, along with a history of
17 methamphetamine abuse including "meth induced cardiomyopathy," which the
18 ALJ did not discuss in the decision, all of which require further analysis under 4.02
19 and the cardiovascular listings. *See, e.g.*, Tr. 328, 505, 609, 649.

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1 The ALJ limits his discussion of cardiovascular imaging to an August 6,
2 2019 x-ray of her heart, explaining at step two in the decision that a chest x-ray at
3 that time showed her “heart remains mildly enlarged” but was “negative for acute
4 disease”; the ALJ found her enlarged heart was therefore nonsevere. Tr. 18-19; *see*
5 Tr. 448-49. This is the only cardiovascular imaging the ALJ discusses in the
6 decision, despite the fact this imaging occurred when she was hospitalized for the
7 ischemic event in her leg, and she also underwent CT angiogram and additional 2D
8 and 3D imaging August 5, 2019, which showed presumed embolus in the proximal
9 aspect of the right external iliac artery and possible nonocclusive small embolism
10 versus heterogeneous plaque in the distal aspect of the left common iliac artery;
11 occlusion of large portions of the anterior tibialis and posterior tibialis arteries;
12 high grade stenosis at the proximal aspect of the right external iliac artery; diffused
13 diseased anterior and posterior tibialis arteries and mildly diffusely diseased
14 peroneal artery; and left leg diffusely diseased posterior tibialis artery. Tr. 449-
15 450. An ultrasound of her right lower leg arteries on August 5, 2019 also
16 suggested aortic iliac inflow disease, along with potentially significant stenosis
17 between the superficial femoral artery and popliteal artery. Tr. 450. She was
18 transferred to Seattle with diagnoses of “embolism, arterial, leg (obstruction of
19 artery) and threatened limb ischemia due to occlusive [peripheral arterial disease].”

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1 Tr. 452. Additional abnormal findings were noted on EKG, along with the new
2 findings on echocardiogram, discussed *supra*. Tr. 442, 452; see ECF No 16 at 14.

3 Despite an ischemic event and treatment, there is no discussion by the ALJ
4 as to whether Plaintiff has ongoing arterial or vascular disease, even though at the
5 2020 hearing she testified she has continued pain, difficulty walking and standing,
6 and that she was told by her doctors that she still has blood clots in her legs; ER
7 records also show she continued experiencing foot pain due to ongoing emboli or
8 residuals from her 2019 procedures. Tr. 77, 84-86, 394, 419. While the ALJ found
9 later exams were unremarkable, records from an ER visit in late August 2019, for
10 example, show persistent foot pain due to “continue arterial occlusion from
11 embolus, postprocedural pain,” along with blistering on her toe and a healing
12 laceration, and she was instructed to follow up with a vascular surgeon within 1-2
13 days; there is no record of follow up and she was not asked about this at the
14 hearing although she reported everything was worse and that she continued
15 experiencing foot pain due to continued issues with clots. Tr. 84. At a follow up
16 with her PCP after her August 2019 surgery, her provider noted she had not
17 received hospital records yet, but she also indicated Plaintiff would need to follow
18 up with a vascular specialist. Tr. 516.

19 The Court finds that the ALJ did not properly evaluate Plaintiff’s
20 cardiovascular impairment(s) under the listings. The cardiovascular listings

1 explain not only what constitutes a cardiovascular impairment, and how to evaluate
2 issues such as her preexisting cardiomegaly, but also how these must be
3 documented and how the Agency will proceed if a person has not received ongoing
4 medical treatment or does not have sufficient longitudinal evidence, noting that “in
5 rare instances where there is no or insufficient longitudinal evidence, we may
6 purchase a consultative examination(s) to help us establish the severity and
7 duration of your impairment.” *See* 20 C.F.R. § 404, Subpt. P, App. 1, § 4.00B3.
8 The ALJ failed to provide sufficient rationale for the Court to determine the basis
9 for step three findings, and to adequately evaluate the relevant evidence of
10 cardiovascular impairments at step three or elsewhere in the decision. As
11 discussed *supra*, the ALJ did not adequately discuss evidence of Plaintiff’s
12 cardiovascular impairments, including multiple abnormal cardiovascular findings
13 and abnormal imaging which could support Plaintiff’s argument of listing level
14 impairment; her cardiovascular impairments must be evaluated under the
15 cardiovascular listings. *See* 20 C.F.R. § 404, Subpt. P, App. 1, §§ 4.00A-D;
16 4.00G-H3; 4.00I.

17 On remand, the ALJ is instructed to reconsider whether Plaintiff’s
18 impairment(s) meets or equals Listing 4.02, or any of the cardiovascular listings,
19 evaluating the relevant medical evidence with the assistance of medical expert
20

1 testimony and further developing the record, if needed, with a consultative
2 examination.

3 **B. Develop the record**

4 Plaintiff contends the ALJ failed to fully and fairly develop the record with a
5 new physical consultative examination. ECF No. 16 at 3-8. The ALJ has an
6 independent duty to fully and fairly develop a record in order to make a fair
7 determination as to disability, even where, as here, the claimant is represented by
8 counsel. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003); *see also*
9 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Crane v. Shalala*, 76
10 F.3d 251, 255 (9th Cir. 1995). “Ambiguous evidence, or the ALJ’s own finding
11 that the record is inadequate to allow for proper evaluation of the evidence, triggers
12 the ALJ’s duty to ‘conduct an appropriate inquiry.’” *See Tonapetyan*, 242 F.3d at
13 1150 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996); *Mayes v.*
14 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (“An ALJ’s duty to develop the
15 record further is triggered only when there is ambiguous evidence or when the
16 record is inadequate to allow for proper evaluation of the evidence.”) (citing
17 *Tonapetyan*, 242 F.3d at 1150).

18 Plaintiff points out that under the Regulations an ALJ may order a
19 consultative exam either to resolve an inconsistency in the evidence or when the
20 evidence as a whole is insufficient to make a determination or decision on a claim,

1 such as when “[t]here is an indication of a change in your condition that is likely
2 to affect your ability to work ... but the current severity of your impairment is not
3 established.” 20 C.F.R. § 416.919a(b)(4). Here, there are no medical opinions
4 after her ischemic event and additional/worsened cardiovascular impairment(s)
5 were discovered in 2019; and the ALJ failed to consider all of Plaintiff’s
6 cardiovascular impairments and to properly evaluate her impairments under the
7 cardiovascular listing(s), as explained in the discussion of step three, *supra*. The
8 ALJ also finds that the medical record “does not support that her physical
9 impairments significantly deteriorated since the prior administrative judge’s
10 decision,” without discussion of relevant new evidence, including objective
11 evidence of worsening cardiovascular impairments and/or new cardiovascular
12 impairments, and despite Plaintiff’s allegations that “everything is worse,”
13 including leg pain. *See* Tr. 22, 23, 26, 79-80, 83-86. Plaintiff argues, and the
14 Court agrees, that Plaintiff’s ischemic event with treatment for new cardiovascular
15 diagnoses in 2019 constituted a sudden and significant change in her physical
16 functioning that created ambiguity over her functional capacity that should have
17 prompted the ALJ to seek further information in the form of medical expert
18 testimony or a consultative examination. *Id.* at 6.

19 Defendant argues Plaintiff did not make a request for a consultative exam at
20 the hearing or once the record was updated, and “this is not a case in which a

1 medical expert described the record as ‘confusing’ or testified that the record may
2 not be complete enough for the ALJ to reach a conclusion.” ECF No. 24 at 15
3 (citing *Tonapetyan*, 242 F.3d at 1150). This case is different, however, as the ALJ
4 did not have all the evidence until after the hearing and also did not have the
5 benefit of any medical opinion evidence or testimony to support his conclusions.
6 Further, the ALJ did not discuss relevant evidence, which requires analysis under
7 the listings, as discussed *supra*.

8 The Court finds the medical evidence in this case is ambiguous as to the
9 severity of her condition after her hospitalization and treatment for new/worsened
10 cardiovascular impairments in 2019, and the ALJ failed to considerer relevant
11 evidence as to her cardiovascular impairments. Accordingly, the record was
12 inadequate as to the extent of Plaintiff’s cardiovascular problems. The ALJ
13 therefore had a duty to develop the record to determine the severity of her
14 condition(s) and functional capacity.

15 Upon remand the ALJ is instructed to reevaluate the medical evidence of
16 record with the assistance of medical expert testimony, and to further develop the
17 record with a consultative examination, if necessary.

18 **C. Step Two**

19 Plaintiff contends the ALJ erred by failing to identify Plaintiff’s other
20 cardiac impairments as severe. ECF No. 19 at 16-17. At step two of the sequential

1 process, the ALJ must determine whether the claimant suffers from a “severe”
2 impairment, i.e., one that significantly limits her physical or mental ability to do
3 basic work activities. 20 C.F.R. § 416.920(c).

4 To establish a severe impairment, the claimant must first demonstrate that
5 the impairment results from anatomical, physiological, or psychological
6 abnormalities that can be shown by medically acceptable clinical or laboratory
7 diagnostic techniques. 20 C.F.R. § 416.921. In other words, the claimant must
8 establish the existence of the physical or mental impairment through objective
9 medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable
10 medical source; the medical impairment cannot be established by the claimant’s
11 statement of symptoms, a diagnosis, or a medical opinion. *Id.*

12 An impairment may be found to be not severe when “medical evidence
13 establishes only a slight abnormality or a combination of slight abnormalities
14 which would have no more than a minimal effect on an individual’s ability to
15 work” Social Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is
16 not severe if it does not significantly limit a claimant’s physical or mental ability to
17 do basic work activities; which include walking, standing, sitting, lifting, pushing,
18 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;
19 understanding, carrying out and remembering simple instructions; responding
20 appropriately to supervision, coworkers, and usual work situations; and dealing

1 with changes in a routine work setting. 20 C.F.R. § 416.922(a); SSR 85-28.⁶

2 Step two is “a de minimis screening device [used] to dispose of groundless
3 claims.” *Smolen*, 80 F.3d at 1290. “Thus, applying our normal standard of review
4 to the requirements of step two, [the Court] must determine whether the ALJ had
5 substantial evidence to find that the medical evidence clearly established that
6 [Plaintiff] did not have a medically severe impairment or combination of
7 impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

8 As the case is being remanded for the ALJ to reconsider the medical
9 evidence at step three and to develop the record, the ALJ is also instructed to
10 reconsider the step-two analysis with the assistance of medical expert testimony.

11 **D. Medical Opinion Evidence**

12 Plaintiff contends the ALJ erred in his consideration of the opinion of Troy
13 Bruner, Ed.D. ECF No. 16 at 8-12. As this case is being remanded for the ALJ to
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20 ⁶ The Supreme Court upheld the validity of the Commissioner’s severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987).

1 reconsider the medical evidence, the ALJ is also instructed to reconsider the
2 medical opinion evidence during the period at issue.

3 **E. Plaintiff's Symptom Claims**

4 Plaintiff contends the ALJ failed to give specific, clear, and convincing
5 reasons to not fully credit Plaintiff's testimony. ECF No. 16 at 15-21. An ALJ
6 engages in a two-step analysis to determine whether to discount a claimant's
7 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
8 "First, the ALJ must determine whether there is objective medical evidence of an
9 underlying impairment which could reasonably be expected to produce the pain or
10 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
11 "The claimant is not required to show that [the claimant's] impairment could
12 reasonably be expected to cause the severity of the symptom [the claimant] has
13 alleged; [the claimant] need only show that it could reasonably have caused some
14 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

15 Second, "[i]f the claimant meets the first test and there is no evidence of
16 malingering, the ALJ can only reject the claimant's testimony about the severity of
17 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
18 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
19 omitted). General findings are insufficient; rather, the ALJ must identify what
20 symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
2 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
3 explain why it discounted claimant’s symptom claims)). “The clear and
4 convincing [evidence] standard is the most demanding required in Social Security
5 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
6 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

7 Factors to be considered in evaluating the intensity, persistence, and limiting
8 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
9 duration, frequency, and intensity of pain or other symptoms; 3) factors that
10 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
11 side effects of any medication an individual takes or has taken to alleviate pain or
12 other symptoms; 5) treatment, other than medication, an individual receives or has
13 received for relief of pain or other symptoms; 6) any measures other than treatment
14 an individual uses or has used to relieve pain or other symptoms; and 7) any other
15 factors concerning an individual’s functional limitations and restrictions due to
16 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
17 416.929(3). The ALJ is instructed to “consider all of the evidence in an
18 individual’s record,” “to determine how symptoms limit ability to perform work-
19 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

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1 The ALJ found that Plaintiff's medically determinable impairments could
2 reasonably be expected to cause the alleged symptoms but that Plaintiff's
3 statements concerning the intensity, persistence, and limiting effects of his
4 symptoms were not entirely consistent with the medical evidence and other
5 evidence in the record. Tr. 22-23.

Having determined a remand is necessary to readdress the medical evidence at step three, the ALJ is also instructed to carefully reevaluate Plaintiff's symptom claims in the context of the entire record.

9 | F. Remedy

10 The Court finds further proceedings are necessary to resolve conflicts in the
11 record, as well as to further develop the record. On remand, the ALJ is to fully
12 develop the record with the assistance of medical expert testimony, including
13 ordering a consultative examination if necessary. As such, the case is remanded
14 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 not free of harmful
legal error. Accordingly, **IT IS HEREBY ORDERED:**

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

2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**.
3. Defendant's Motion for Summary Judgment, **ECF No. 24**, is **DENIED**.
4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
ERSING and REMANDING the matter to the Commissioner of Social
ity for further proceedings consistent with this recommendation pursuant to
nce 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 May 10, 2022.

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