

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

Jun 21, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHAYLA H.¹,
Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

No. 1:21-CV-03132-SAB

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 13, and Defendant's Motion for Summary Judgment, ECF No. 14. The motions were heard without oral argument. Plaintiff is represented by Cory Brandt and Defendant is represented by Jeffrey Staples and Brian Donovan.

Jurisdiction

On April 20, 2016, Plaintiff filed an application for Title II disability insurance benefits, alleging disability beginning December 5, 2015.

Plaintiff's application was denied initially and on reconsideration.² On July

¹Pursuant to the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
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JUDGMENT ~ 1**

1 7, 2021, Plaintiff testified at a telephonic hearing held before an ALJ, with the
2 assistance of Cory Brandt. Medical experts H.C. Alexander and Jay Toews
3 participated, along with Garry Jesky, vocational expert. The ALJ issued a decision
4 on August 12, 2021, finding that Plaintiff was not disabled.

5 Plaintiff filed a timely appeal with the United States District Court for the
6 Eastern District of Washington on October 14, 2021. The matter is before this
7 Court under 42 U.S.C. § 405(g).

8 **Sequential Evaluation Process**

9 The Social Security Act defines disability as the “inability to engage in any
10 substantial gainful activity by reason of any medically determinable physical or
11 mental impairment which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than twelve months.” 42
13 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
14 under a disability only if their impairments are of such severity that the claimant is
15 not only unable to do their previous work, but cannot, considering claimant’s age,
16 education, and work experiences, engage in any other substantial gainful work
17 that exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 The Commissioner has established a five-step sequential evaluation process to
19 determine whether a person is disabled in the statute. See 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v).

21 **Step One:** Is the claimant engaged in substantial gainful activities? 20
22 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work
23 done for pay and requires compensation above the statutory minimum. *Keyes v.*
24

25 ² The ALJ issued an unfavorable decision on February 23, 2018. Plaintiff sought
26 review of the denial from the United States District Court for the Eastern District
27 of Washington, which remanded the case on August 26, 2020. See 1:19-CV-
28 03357-FVS, ECF No. 18.

1 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
2 substantial activity, benefits are denied. 20 C.F.R. § 404.1520(b), 416.920(b). If
3 the claimant is not, the ALJ proceeds to step two.

4 **Step Two:** Does the claimant have a medically-severe impairment or
5 combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).
6 A severe impairment is one that lasted or must be expected to last for at least 12
7 months and must be proven through objective medical evidence. *Id.* §§ 404.1509,
8 416.909. If the claimant does not have a severe impairment or combination of
9 impairments, the disability claim is denied. *Id.* § 404.1520(a)(4)(ii),
10 416.920(a)(4)(ii). If the impairment is severe, the evaluation proceeds to the third
11 step.

12 **Step Three:** Does the claimant's impairment meet or equal one of the listed
13 impairments acknowledged by the Commissioner to be so severe as to preclude
14 substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If
15 the impairment meets or equals one of the listed impairments, the claimant is
16 conclusively presumed to be disabled. 20 C.F.R. §§ 404.1520(d), 416.920(d). If
17 the impairment is not one conclusively presumed to be disabling, the evaluation
18 proceeds to the fourth step.

19 Before considering to the fourth step, the ALJ must first determine the
20 claimant's residual functional capacity. An individual's residual functional
21 capacity is their ability to do physical and mental work activities on a sustained
22 basis despite limitations from their impairments. 20 C.F.R. §§ 404.1545(a)(1),
23 416.945(a)(1). The residual functional capacity is relevant to both the fourth and
24 fifth steps of the analysis.

25 **Step Four:** Does the impairment prevent the claimant from performing
26 work they have performed in the past? 20 C.F.R. §§ 404.1520(a)(4)(iv),
27 416.920(a)(4)(iv). If the claimant is able to perform their previous work, they are
28

1 not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant cannot perform
2 this work, the evaluation proceeds to the fifth and final step.

3 **Step Five:** Is the claimant able to perform other work in the national
4 economy in view of their age, education, and work experience? 20 C.F.R. §§
5 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
6 claimant to establish a prima facie case of entitlement to disability benefits.
7 *Tackett v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a
8 claimant establishes that a physical or mental impairment prevents him from
9 engaging in her previous occupation. *Id.* At step five, the burden shifts to the
10 Commissioner to show that the claimant can perform other substantial gainful
11 activity. *Id.*

12 **Standard of Review**

13 The Commissioner's determination will be set aside only when the ALJ's
14 findings are based on legal error or are not supported by substantial evidence in
15 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
16 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
19 evidence is "such relevant evidence as a reasonable mind might accept as
20 adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must
21 uphold the ALJ's denial of benefits if the evidence is susceptible to more than one
22 rational interpretation, one of which supports the decision of the administrative
23 law judge. *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court
24 reviews the entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If
25 the evidence can support either outcome, the court may not substitute its judgment
26 for that of the ALJ." *Matney*, 981 F.2d at 1019.

27 A decision supported by substantial evidence will be set aside if the proper
28 legal standards were not applied in weighing the evidence and making the

1 decision. *Browner v. Sec’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th
2 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
3 immaterial to the ultimate nondisability determination. *Stout v. Comm’r, Soc. Sec.*
4 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

5 **Statement of Facts**

6 The facts have been presented in the administrative transcript, the ALJ’s
7 decision, and the briefs to this Court; only the most relevant facts are summarized
8 here.

9 At the time of the hearing, Plaintiff was thirty-seven years old. She
10 graduated from high school and has come college credits. She has three children
11 and lives with her husband, who is a disabled veteran. Her first husband passed
12 away in 2007. She woke up to find him not breathing. As a result of his death, she
13 developed anxiety, panic attacks, depression and anger issues. She began cutting
14 herself to manage her stress and anxiety, but she no longer does this. Plaintiff has
15 extensive work experience in retail.

16 In 2014, Plaintiff was diagnosed with Crohn’s disease and had a section of
17 her small intestine removed. In 2016, she was diagnosed with fibromyalgia, and
18 she also experiences GERD, stiffness in her body, muscle aches, back pain,
19 insomnia, stomach cramping, muscle spasms and headaches three to four times a
20 week.

21 She reports that she has little motivation for showering and doing household
22 chores. She prefers to stay at home. She worries about things every day.

23 **The ALJ’s Findings**

24 The ALJ found that Plaintiff met the insured status requirements of the
25 Social Security Act through June 30, 2020. At step one, the ALJ found Plaintiff
26 had not engaged in substantial gainful activity from her alleged onset date of
27 December 5, 2015, through her date last insured of June 30, 2020. AR 926.

28 //

1 At step two, the ALJ found Plaintiff has the following severe impairments:
2 fibromyalgia; anemia; ileectomy, irritable bowel syndrome/Crohn's disease;
3 gastroparesis; obesity; depression; degenerative disc disease; posttraumatic stress
4 disorder; bipolar disorder; obstructive sleep apnea.³ AR 926.

5 At step three, the ALJ found that Plaintiff did not have an impairment or
6 combination of impairments that meets or medically equals the severity of one of
7 the listed impairments. AR 927. The ALJ considered Listings 5.00, 7.00, 12.04,
8 12.06, 12.15 and 14.09. AR 927-28. Ultimately, the ALJ concluded that Plaintiff
9 has a residual function capacity ("RFC") to perform:

10 light work as defined in 20 CFR 404.1567(b) except: she can stand or
11 sit each for up to six hours; she can walk for up to four hours; she can
12 occasionally climb ramps or stairs, balance, stoop, kneel, crouch or
13 crawl; she can never climb ladders, ropes or scaffolds; she must avoid
14 concentrated exposure to non-weather related extreme cold; she must
15 avoid concentrated exposure to irritants such as fumes, odors, dusts,
16 gases, and poorly ventilated areas; she must avoid all unprotected
17 heights; and she must avoid moderate exposure to hazardous
18 machinery. Work is limited to only occasional changes to the work
19 setting; she cannot perform assembly line or highly paced work; she
20 can have occasional interaction with the public; she can have
21 occasional interaction with coworkers but no tandem tasks; and she can
22 accept occasional supervision.

23 AR 929.

24 At step four, the ALJ found that Plaintiff was not capable of performing
25 past relevant work. AR 942.

26 At step five, the ALJ found Plaintiff would be able to perform the
27 _____

28 ³ The ALJ found while the record mentions nare infections, varicose veins, asthma,
mastitis, and vitamin D deficiency, these impairments occurred only sporadically
and were acute/transient or responsive to treatment, appear to have resolved, have
been responsive to treatment or do not cause more than minimal workplace
limitations so the ALJ found these impairments non-severe. AR 927.

1 requirements of representative occupations such as officer helper, plastic molder,
2 and janitor, and as such, she was not disabled. AR 943-44.

3 **Issues for Review**

- 4 1. Whether the ALJ denied Plaintiff the right to a full and fair hearing?
- 5 2. Whether the ALJ properly evaluated the medical opinion evidence?
- 6 3. Whether the ALJ properly rejected Plaintiff's symptom testimony?
- 7 4. Whether the ALJ conducted a proper step five analysis?

8 **Analysis**

9 Because Plaintiff's date last insured is through June 30, 2020, Plaintiff was
10 required to establish disability on or before June 30, 2020 to be entitled to
11 disability benefits.

12 **1. Plaintiff's Right to a Full and Fair Hearing**

13 Plaintiff argues the ALJ violated her due process rights and her right to
14 present her own testimony at the hearing when the ALJ interrupted and
15 abruptly cut off the line of questioning, speaking over Plaintiff and her
16 representative, to begin the vocational expert testimony. Even though
17 Plaintiff's representative told the ALJ he had a number of questions left to
18 ask Plaintiff in order to fully develop her testimony, the ALJ insisted that it
19 had already provided Plaintiff with a full and fair hearing and refused to
20 allow her representative to continue to question her.

21 "[A]pplicants for social security benefits are entitled to due process in the
22 determination of their claims." *Holohan v. Massanari*, 246 F.3d 1195, 1209 (9th
23 Cir. 2001). "The fundamental requirement of due process is the opportunity to be
24 heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*,
25 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Accordingly, under
26 the Social Security Act, claimants shall be given reasonable notice and
27 opportunity for a hearing with respect to a decision rendered by an ALJ, during
28 which the ALJ may examine witnesses and receive evidence. 42 U.S.C. 405(b)(1).

1 Hearing procedures may be informal, but they must be “fundamentally fair.”
2 *Richardson v. Perales*, 402 U.S. 389, 401–02 (1971); *see also Martise v. Astrue*,
3 641 F.3d 909, 921–22 (8th Cir. 2011) (“procedural due process requires disability
4 claimants to be afforded a full and fair hearing”); *Ferriell v. Comm’r of Soc. Sec.*,
5 614 F.3d 611, 620 (6th Cir. 2010) (“In the context of a social security hearing, due
6 process requires that the proceedings be full and fair.”). Moreover, the “ALJ in a
7 social security case has an independent duty to fully and fairly develop the record
8 and to assure that the claimant’s interests are considered.” *Tonapetyan v. Halter*,
9 242 F.3d 1144, 1150 (9th Cir. 2001).

10 Additionally, 20 C.F.R. § 404.950(a) provides:

11 (a) The right to appear and present evidence. Any party to a hearing
12 has a right to appear before the administrative law judge, either by
13 video teleconferencing, in person, or, when the conditions in §
14 404.936(c)(2) exist, by telephone, to present evidence and to state his
or her position.

15 Here, the ALJ denied Plaintiff the opportunity to fully present her case. In
16 reviewing the transcript, it appears that the medical experts, and Dr. Toews, in
17 particular, spent a significant amount of the allotted hearing time to review the
18 medical records. Because of this, Plaintiff was not allowed to fully present her
19 testimony. This was in clear violation of the statute, the regulations, and the case
20 law. There does not appear to be any justification for the ALJ to deny Plaintiff the
21 opportunity to fully present her case. Instead, it is clear the ALJ failed to provide
22 Plaintiff with a “fundamentally fair” hearing.

23 **2. Plaintiff’s Fibromyalgia**

24 Although the ALJ determined that Plaintiff had a severe impairment of
25 fibromyalgia and/or chronic pain syndrome, it failed to discuss the effect this
26 impairment had on Plaintiff’s ability to sustain full time work.

27 “Fibromyalgia is ‘a rheumatic disease that causes inflammation of the
28 fibrous connective tissue components of muscles, tendons, ligaments, and other

1 tissue.’ *Revels v. Berryhill*, 874 F.3d 648, 656 (9th Cir. 2017) (quoting *Benecke v.*
2 *Barnhart*, 379 F.3d 587, 589 (9th Cir. 2004)). The Ninth Circuit has recognized
3 that fibromyalgia is diagnosed primarily based on the patient’s self-reported
4 symptoms. *Id.* And there are no laboratory tests to confirm the diagnosis. *Benecke*,
5 379 F.3d at 590. Typical symptoms include “chronic pain throughout the body,
6 multiple tender points, fatigue, stiffness, and a pattern of sleep disturbance that
7 can exacerbate the cycle of pain and fatigue.” *Id.* at 590. That said, generally those
8 suffering from fibromyalgia have muscle strength, sensory functions and reflexes
9 that are normal. *Rollins v. Massanari*, 261 F.3d 853, 863 (9th Cir. 2001)
10 (Ferguson, J., dissenting)

11 When a claimant has established a fibromyalgia diagnosis the ALJ is
12 required to consider the longitudinal record. *Id.* at 657 (noting SSR 12-2p “warns
13 that after a claimant has established a diagnosis of fibromyalgia, an analysis of her
14 RFC should consider ‘a longitudinal record whenever possible’”). SSR 12-2p
15 recognizes that the symptoms of fibromyalgia “wax and wane,” and that a person
16 may have “bad days and good days.” SSR 12-2p, 2012 WL 3104869, at *6.
17 This means that while there were normal findings in some—but not all—objective
18 physical exams, these findings do not contradict Plaintiff’s statements regarding
19 the effects of her fibromyalgia.

20 **3. The ALJ’s evaluation of the medical opinions**

21 The medical opinion of a claimant’s treating physician is given “controlling
22 weight” as long as it “is well-supported by medically acceptable clinical and
23 laboratory diagnostic techniques and is not inconsistent with the other substantial
24 evidence in [the claimant’s] case record.” 20 C.F.R. § 404.1527(c)(2); *Trevizo v.*
25 *Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017). When a treating physician’s opinion
26 is not controlling, it is weighted according to factors such as the length of the
27 treatment relationship and the frequency of examination, the nature and extent of
28 the treatment relationship, supportability, consistency with the record, and

1 specialization of the physician. § 404.1527(c)(2)-(6). “If a treating or examining
2 doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only
3 reject it by providing specific and legitimate reasons that are supported by
4 substantial evidence. *Trevizo*, 871 F.3d at 675 (quoting *Ryan v. Comm’r of Soc.*
5 *Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). “[A]n ALJ errs when he rejects a
6 medical opinion or assigns it little weight while doing nothing more than ignoring
7 it, asserting without explanation that another medical opinion is more persuasive,
8 or criticizing it with boilerplate language that fails to offer a substantive basis for
9 his conclusion.” *Garrison*, 759 F.3d at 1012–13 (citing *Nguyen v. Chater*, 100
10 F.3d 1462, 1464 (9th Cir. 1996)).

11 In this case, generally the ALJ gave limited weight to Plaintiff’s treatment
12 providers, or to medical professionals who examined her and provided a report.
13 On the other hand, the ALJ gave great weight to the mental consultants who did
14 not have an opportunity to examine Plaintiff and/or to review the updated records.
15 The ALJ failed to justify assigning more weight to the opinions of non-treating,
16 non-examining state agency consultants than to the opinions of those medical
17 professionals who were either treating Plaintiff or had the opportunity to examine
18 her.

19 A. Dr. Hunte

20 The ALJ gave some weight to Dr. Hunte, who was Plaintiff’s treatment
21 provider, but concluded that her opinion as to the severity of Plaintiff’s limitations
22 was out of proportion to the longitudinal record. The ALJ specifically rejected Dr.
23 Hunte’s opinion that Plaintiff had manipulative limitations. The ALJ also rejected
24 Dr. Hunte’s opinion that Plaintiff would miss more than four days of work per
25 month or be off task more than twenty-five percent of the workday was out of
26 proportion to the longitudinal record.

27 The ALJ failed to provide specific and legitimate reasons that are supported
28 by substantial evidence to reject Dr. Hunte’s opinion. In every situation where the

1 ALJ gave little weight to the medical professional, it did so for the same reasons,
2 namely because the ALJ believed the opinions were “out of proportion to the
3 longitudinal record,” and then it cited to generally normal or unremarkable
4 findings on physical examinations that were in categories largely unrelated to the
5 specific symptoms that supported the limitations identified by the medical
6 provider. Moreover, it appears the ALJ seemingly failed to incorporate Plaintiff’s
7 fibromyalgia/chronic pain diagnosis when viewing the longitudinal record.
8 Because of this, the ALJ’s rejection of Dr. Hunte’s opinion is not supported by
9 substantial evidence. On the contrary, Plaintiff’s fibromyalgia/chronic pain
10 diagnosis supports Dr. Hunte’s limitations. Dr. Hunte had the opportunity to
11 observe Plaintiff’s difficulty with fine manipulation. Plaintiff complained of
12 stiffness and pain in her hands. The longitudinal record reveals that Plaintiff
13 consistently complained of abdominal pain, cramping and lower back pain. Dr.
14 Hunte, as a treating physician, was in the best position to opine as to the
15 anticipated number of days that Plaintiff would miss because of her symptoms.
16 Thus, the ALJ erred in giving Dr. Hunte’s opinion little weight. Rather than
17 support its conclusions with specific and legitimate reasons, it appears the ALJ
18 simply offered her own interpretation of the records to reject Dr. Hunte’s opinion.
19 This was in error.

20 **B. Dr. Drenguis**

21 The ALJ gave some weight to the opinion of Dr. Drenguis. The ALJ
22 believed Dr. Drenguis’s opinion was out of proportion to the longitudinal record.
23 This was in error because the ALJ failed to give a specific explanation with
24 supporting evidence to support her assertion. Moreover, the longitudinal record is
25 fairly consistent with Dr. Drenguis’ opinion and he had the opportunity to
26 examine Plaintiff.

27 **C. Dr. Nestler**

28 The ALJ gave little weight to Dr. Nestler’s opinion. Dr. Nestler examined

1 Plaintiff and wrote a report. The ALJ concluded that Dr. Nestler’s opinion was out
2 of proportion to the longitudinal record and out of proportion to Dr. Nestler’s own
3 findings and observations.

4 The ALJ failed to provide specific and legitimate reasons that were
5 supported by substantial evidence for giving Dr. Nestler’s opinion little weight.
6 While the ALJ may have believed Dr. Nestler’s opinions were inconsistent with
7 the examination, the ALJ was simply substituting its own interpretation of the
8 findings instead of relying on Dr. Nestler’s conclusions. Moreover, the record
9 demonstrates that Dr. Nestler’s opinions were supported by her examination and
10 findings. Consequently, the ALJ’s evaluation of Dr. Nestler’s opinions was in
11 error because it was not supported by substantial evidence in the record.

12 **D. Dr. Metoyer**

13 The ALJ gave little weight to Dr. Metoyer’s opinion because it was out of
14 proportion to the longitudinal record. The ALJ believed Dr. Metoyer’s opinion
15 that Plaintiff would have more than mild interaction limitations was out of
16 proportion to his observations and findings, particularly that Plaintiff was
17 cooperative and engaged throughout the session.

18 The ALJ erred in evaluating Dr. Metoyer’s opinion because it failed to
19 provide specific and legitimate reasons for giving Dr. Metoyer’s opinions little
20 weight. Additionally, it appears the ALJ substituted its own interpretation of the
21 findings rather than relying on Dr. Metoyer’s conclusions.

22 **2. The ALJ’s evaluation of Plaintiff’s Symptom Testimony**

23 The ALJ rejected Plaintiff’s symptom testimony because it concluded her
24 testimony was out of proportion to the objective findings in the record.

25 In determining whether a claimant’s testimony regarding subjective pain or
26 symptoms is credible, the ALJ engages in a two-step analysis. *Garrison v. Colvin*
27 759 F.3d 995, 1014 (9th Cir. 2014). “First, the ALJ must determine whether the
28 claimant has presented objective medical evidence of an underlying impairment

1 which could reasonably be expected to produce the pain or other symptoms
2 alleged.” *Id.* (citation and quotation omitted). If the claimant satisfies the first step
3 of the analysis, and there is no evidence of malingering, the ALJ can reject the
4 claimant’s testimony about the severity of their symptoms “only by offering
5 specific, clear and convincing reasons for doing so.” *Id.* (citation and quotation
6 omitted). “This is not an easy requirement to meet: The clear and convincing
7 standard is the most demanding required in Social Security cases.” *Id.* (citation
8 and quotation omitted). That said, if the ALJ’s credibility finding is supported by
9 substantial evidence in the record, the reviewing court “may not engage in second-
10 guessing.” *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

11 In recognition of the fact that an individual’s symptoms can sometimes
12 suggest a greater level of severity of impairment than can be shown by the
13 objective medical evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c)
14 describe the kinds of evidence, including the factors below, that the ALJ must
15 consider in addition to the objective medical evidence when assessing the
16 credibility of an individual’s statements:

- 17 1. Daily activities; 2. The location, duration, frequency, and intensity of
18 pain or other symptoms; 3. Factors that precipitate and aggravate the
19 symptoms; 4. The type, dosage, effectiveness, and side effects of any
20 medication an individual takes or has taken to alleviate pain or other
21 symptoms; 5. Treatment, other than medication, an individual receives
22 or has received for relief of pain or other symptoms; 6. Any measures
23 other than treatment an individual uses or has used to relieve pain or
24 other symptoms (e.g., lying flat on his or her back, standing for 15 to 20
minutes every hour, or sleeping on a board); and 7. Any other factors
concerning an individual’s functional limitations and restrictions due to
pain or other symptoms.

25 SSR 16-3P, 2017 WL 5180304. Daily activities may be grounds for an adverse
26 credibility finding if (1) Plaintiff’s activities contradict her other testimony, or (2)
27 Plaintiff “is able to spend a substantial part of his day engaged in pursuits
28 involving the performance of physical functions that are transferable to a work

1 setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*,
2 885 F.2d 597, 603 (9th Cir. 1989)).

3 Here, the ALJ failed to provide clear and convincing reasons supported by
4 substantial evidence in the record for discounting Plaintiff’s testimony. Notably,
5 the ALJ relied on many normal findings that it was able to glean from the records
6 to reject Plaintiff’s testimony. But many of these normal findings were in
7 categories largely unrelated to Plaintiff’s allegations and thus were not
8 inconsistent with her testimony regarding her fibromyalgia, Crohn’s disease and
9 her other conditions. Additionally, the ALJ’s credibility determination is not
10 supported by substantial evidence in the record because it denied Plaintiff the
11 opportunity to present a full and complete record.

12 Notably, the ALJ’s characterization of the medical treatment records as
13 relatively benign is not supported by substantial evidence in the record, and
14 therefore cannot be used to discount Plaintiff’s symptom testimony, especially
15 given that the ALJ failed to account for Plaintiff’s fibromyalgia diagnosis.

16 3. Conclusion

17 Here, the ALJ denied Plaintiff an opportunity for a full and fair hearing.
18 Additionally, the ALJ erred in failing to consider the unique characteristics of
19 fibromyalgia in evaluating Plaintiff’s testimony as well as the testimony of her
20 treatment providers. Moreover, substantial evidence does not support the ALJ’s
21 decision. Notably, the ALJ failed to provide specific and legitimate reasons to
22 give her treatment provider’s and examining consultants’ opinions little weight.
23 Most important, if the ALJ properly credited the opinion of Dr. Hunte, it would be
24 required to find that Plaintiff is disabled on remand because it is clear she would
25 miss more than 4 days a month due to her fibromyalgia/chronic pain and Crohn’s
26 disease. As such, remand for an immediate calculation and award of benefits is
27 required.

28 //

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, No. 13, is **GRANTED**.

3 2. Defendant's Motion for Summary Judgment, No. 14, is **DENIED**.

4 3. The decision of the Commissioner denying benefits is **reversed** and
5 **remanded** for an immediate calculation and award of benefits.

6 4. The District Court Executive is directed to enter judgment in favor of
7 Plaintiff and against Defendant.

8 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
9 file this Order, provide copies to counsel, and **close** the file.

10 **DATED** this 21st day of June 2022.



14
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A handwritten signature in blue ink that reads "Stanley A. Bastian".

16 Stanley A. Bastian
17 Chief United States District Judge
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