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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRINA THOMAS,
Plaintiff,
vs.
NANCY A. BERRYHILL,
Acting Commissioner of Social
Security,
Defendant.

No. 2:16-CV-00148-LRS

**ORDER GRANTING
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT,
INTER ALIA**

BEFORE THE COURT are the Plaintiff’s Motion For Summary Judgment (ECF No. 16) and the Defendant’s Motion For Summary Judgment (ECF No. 20).

JURISDICTION

Trina Thomas, Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on January 16, 2013. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on April 7, 2014, before Administrative Law Judge (ALJ) James W. Sherry. Plaintiff testified at the hearing, as did Vocational Expert (VE) Trevor Duncan. On June 16, 2014, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ’s decision, making that decision the Commissioner’s final decision subject to judicial review. The Commissioner’s final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING PLAINTIFF’S
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1 **STATEMENT OF FACTS**

2 The facts have been presented in the administrative transcript, the ALJ's
3 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
4 the time of her most recent application for SSI benefits, Plaintiff was 29 years old,
5 and at the time of the administrative hearing, she was 30 years old. She has a seventh
6 grade education and past relevant work experience as a server/waitress.

7
8 **STANDARD OF REVIEW**

9 "The [Commissioner's] determination that a claimant is not disabled will be
10 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
11 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
12 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
13 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
14 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
15 1988). "It means such relevant evidence as a reasonable mind might accept as
16 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
17 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
18 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
19 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
20 On review, the court considers the record as a whole, not just the evidence supporting
21 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
22 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

23 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
24 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
25 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
26 F.2d 577, 579 (9th Cir. 1984).

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28 **ORDER GRANTING PLAINTIFF'S
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1 A decision supported by substantial evidence will still be set aside if the proper
2 legal standards were not applied in weighing the evidence and making the decision.
3 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
4 1987).

6 ISSUES

7 Plaintiff argues the ALJ erred in: 1) failing to fully and fairly develop the
8 record; 2) rejecting Plaintiff's symptom testimony; and 3) rejecting the request to
9 reopen Plaintiff's prior application for SSI benefits.

11 DISCUSSION

12 SEQUENTIAL EVALUATION PROCESS

13 The Social Security Act defines "disability" as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or can
16 be expected to last for a continuous period of not less than twelve months." 42
17 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined
18 to be under a disability only if her impairments are of such severity that the claimant
19 is not only unable to do her previous work but cannot, considering her age, education
20 and work experiences, engage in any other substantial gainful work which exists in
21 the national economy. *Id.*

22 The Commissioner has established a five-step sequential evaluation process for
23 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,
24 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged
25 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §
26 416.920(a)(4)(I). If she is not, the decision-maker proceeds to step two, which
27 determines whether the claimant has a medically severe impairment or combination

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1 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe
2 impairment or combination of impairments, the disability claim is denied. If the
3 impairment is severe, the evaluation proceeds to the third step, which compares the
4 claimant's impairment with a number of listed impairments acknowledged by the
5 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
6 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
7 equals one of the listed impairments, the claimant is conclusively presumed to be
8 disabled. If the impairment is not one conclusively presumed to be disabling, the
9 evaluation proceeds to the fourth step which determines whether the impairment
10 prevents the claimant from performing work she has performed in the past. If the
11 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §
12 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
13 in the process determines whether she is able to perform other work in the national
14 economy in view of her age, education and work experience. 20 C.F.R. §
15 416.920(a)(4)(v).

16 The initial burden of proof rests upon the claimant to establish a prima facie
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
18 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
19 mental impairment prevents her from engaging in her previous occupation. The
20 burden then shifts to the Commissioner to show (1) that the claimant can perform
21 other substantial gainful activity and (2) that a "significant number of jobs exist in the
22 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
23 1498 (9th Cir. 1984).

24 25 **ALJ'S FINDINGS**

26 The ALJ found the following: 1) Plaintiff has a "severe" medical impairment,
27 that being mild lumbar degenerative disk disease; 2) Plaintiff's impairment does not

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1 meet or equal any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3)
2 Plaintiff has the residual functional capacity (RFC) to perform light work as defined
3 in 20 C.F.R. § 416.967(b), with the following additional limitations: she can sit,
4 stand, or walk for about six hours in an eight hour day; she can perform unlimited
5 pushing or pulling within these lifting restrictions; she can occasionally climb
6 ladders, ropes or scaffolds; she can occasionally stoop and crouch; and she can
7 frequently kneel; and 4) Plaintiff's RFC allows her to perform her past relevant work
8 as a server/waitress. Accordingly, the ALJ concluded the Plaintiff is not disabled.
9

10 **DUTY TO DEVELOP RECORD**

11 The ALJ has a basic duty to inform himself about facts relevant to his decision.
12 *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983). The ALJ's duty
13 to develop the record exists even when the claimant is represented by counsel.
14 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). The duty is triggered by
15 ambiguous or inadequate evidence in the record and a specific finding of ambiguity
16 or inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th
17 Cir. 2011).

18 Plaintiff contends the ALJ erred in failing to order testing to ascertain whether
19 she has a "severe" cognitive impairment, that being either an intellectual disability

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28 **ORDER GRANTING PLAINTIFF'S
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1 and/or a learning disability.¹ Plaintiff did not allege a cognitive impairment in either
2 of her applications for SSI benefits.² The current medical record contains no
3 reference to a possible cognitive impairment. Instead, at the April 7, 2014 hearing,
4 Plaintiff’s counsel requested “IQ testing” based on the fact Plaintiff had not obtained
5 her GED (General Educational Development) certificate and had attended special
6 education classes. (AR at p. 45). Plaintiff testified the highest grade she achieved in
7 school was the seventh grade and that she was working on obtaining her GED. She
8 testified she has difficulty with reading, writing and math, and took special education

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16 ¹ “Intellectual disability,” formerly known as mental retardation, is a
17 condition that causes significantly impaired cognitive functioning from birth or
18 early infancy. A “learning disability” is a neurologically-based disorder that
19 occurs when an individual has difficulty interpreting or processing what he or she
20 sees or hears. Such an individual has difficulties in specific areas of academic
21 achievement. A learning disability can occur across a range of intellectual ability.
22 [http://www.difference](http://www.differencebetween.com/difference-between-learning-disability-and-vs-intellectual-disability/)
23 [between.com/difference-between-learning-disability-and-vs-](http://www.differencebetween.com/difference-between-learning-disability-and-vs-intellectual-disability/)
24 [intellectual-disability/](http://www.differencebetween.com/difference-between-learning-disability-and-vs-intellectual-disability/)

25 ² In addition to the application she filed on January 16, 2013, alleging her
26 disability began on December 22, 2001 (AR at pp. 170-73), she filed an
27 application on June 14, 2011, alleging her disability began on January 1, 2005.
28 (AR at pp. 164-69).

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1 classes in school on those subjects. (AR at pp. 48-51).³ According to Plaintiff, she
2 has been working for the past three years on obtaining her GED. She has not actually
3 taken the test, but has been practicing for it. Plaintiff testified she does not have a
4 driver's license, although she tried to get one and failed the written test. (AR at pp.
5 51-53). Plaintiff testified she does not have any friends and that she was picked on
6 because she attended special education classes. (AR at p. 63). She testified that she
7 had some trouble with her job as a server/waitress because she got confused regarding
8 orders. (AR at p. 72).

9 In a letter dated April 22, 2014, two weeks after the hearing, Plaintiff's counsel
10 asked the ALJ to again consider ordering a consultative examination to determine if
11 Plaintiff suffers from "cognitive impairments and intellectual deficits." (AR at p.
12 223). Counsel included a written statement from Diana Toulou, Plaintiff's GED
13 instructor "off and on throughout the past 4-5 years," which detailed her observations
14 of Plaintiff's "learning difficulties" in reading, writing, and math. For example, Ms.
15 Toulou indicated Plaintiff could read at a third grade level "with support and tutoring
16 throughout the process." Ms. Toulou acknowledged she was not qualified to

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20 ³ In January 2013, it appears the Plaintiff's attorney at the time answered
21 questions on her behalf in conjunction with the filing of her application for SSI
22 benefits. The "Disability Report" indicates there was "[n]o contact with the
23 claimant" and refers to "ATTY I3368." (AR at p. 184). With regard to
24 "Education and Training Information," the report indicates Plaintiff completed a
25 GED in 2000 and she did not attend special education classes. (AR at p. 188).
26 Obviously, this is contrary to what Plaintiff testified to at the hearing, but these
27 answers were not supplied directly by the Plaintiff and it is unknown whether she
28 supplied such information to her attorney at the time.

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1 diagnose Plaintiff with a learning disability, but could only share what she had seen
2 while working with the Plaintiff in the classroom. (AR at p. 224).

3 In his decision, the ALJ indicated he had reviewed and considered the
4 statement of Ms. Toulou and found it was insufficient to establish Plaintiff had a
5 medically determinable “learning disorder” as such a diagnosis was not documented
6 by acceptable clinical or laboratory findings. (AR at p. 24). Plaintiff does not dispute
7 that Ms. Toulou’s statement does not constitute acceptable clinical or laboratory
8 findings, but notes that the very purpose of the requested cognitive testing was to
9 determine if such a diagnosis could be documented.⁴

10 This court concludes that the statement of Ms. Toulou, in addition to Plaintiff’s
11 testimony about her learning difficulties, was sufficient to trigger a duty on the part
12 of the ALJ to develop the record to ascertain whether Plaintiff suffers from a “severe”
13 medically determinable learning disability and beyond that, whether she may even
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15 ⁴ A “severe” impairment is one which significantly limits physical or mental
16 ability to do basic work-related activities. 20 C.F.R. § 416.920(c). It must result
17 from anatomical, physiological, or psychological abnormalities which can be
18 shown by medically acceptable clinical and laboratory diagnostic techniques. It
19 must be established by medical evidence consisting of signs, symptoms, and
20 laboratory findings, not just the claimant's statement of symptoms. 20 C.F.R. §
21 416.908. "Basic work activities" are the abilities and aptitudes to do most jobs,
22 including: 1) physical functions such as walking, standing, sitting, lifting, pushing,
23 pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing, and
24 speaking; 3) understanding, carrying out, and remembering simple instructions; 4)
25 use of judgment; 5) responding appropriately to supervision, co-workers and usual
26 work situations; and 6) dealing with changes in a routine work setting. 20 C.F.R.
27 § 416.921(b).

1 suffer from an intellectual disability meeting or equivalent to Section 12.05
2 (“Intellectual Disability”) of the Listing of Impairments. 20 C.F.R. § 404 Subpart P,
3 App. 1.⁵ The record was inadequate to allow for proper evaluation of the evidence.
4 (Ms. Toulou’s statement; Plaintiff’s testimony) and allow the ALJ to conclude
5 Plaintiff does not have a severe “learning disorder.” *Mayes v. Massanari*, 276 F.3d
6 453, 460 (9th Cir. 2001). The record taken as a whole was inadequate to answer that
7 question.

8 On remand, the ALJ will order a consultative psychological examination which
9 will include IQ testing to determine whether Plaintiff has a “severe” intellectual
10 disability that may meet or equal Listing 12.05, and testing to determine whether
11 Plaintiff suffers from a “severe” learning disability which significantly limits her
12 ability to perform basic work-related activities including understanding, carrying out,
13 and remembering simple instructions, use of judgment, responding appropriately to
14 supervision, co-workers and usual work situations, and dealing with changes in a

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21 ⁵ In *Reed v. Berryhill*, 2017 WL 684154 at *4 (W.D. Wash.), the court
22 found that evidence the plaintiff attended special education classes, did not
23 graduate from high school, and had been unable to obtain a GED, potentially
24 constituted evidence plaintiff had “deficits in adaptive functioning initially
25 manifested during the developmental period,” as set forth in the introductory
26 paragraph of Listing 12.05. The “developmental period” is the period before age
27 22.

1 routine work setting.⁶ If the ALJ finds there is a “severe” intellectual disability that
2 does not meet or equal Listing 12.05, and/or finds there is a “severe” learning
3 disability, he or she shall make a new RFC finding and conduct a new analysis at step
4 four and, if necessary, at step five of the sequential evaluation process.⁷

6 **REOPENING**

7 At the April 7, 2014 hearing, the ALJ himself suggested Plaintiff’s prior
8 application, dated June 14, 2011, could be reopened. (AR at p. 43). Plaintiff’s
9 counsel formally requested such reopening and the ALJ remarked he would “focus[]
10 on June 14, 2011 for disability purposes,” advising Plaintiff the reason was that
11 “benefits can only begin from the date of an application that is subject to my
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13 ⁶ Although the ALJ did not find the presence of a “severe” learning
14 disability and included no mental limitations in his RFC, it is true that he
15 presented the VE with a hypothetical that included certain mental health
16 restrictions in the work place. The VE opined that the addition of those
17 restrictions would not alter his conclusion that Plaintiff was capable of performing
18 her past relevant work or other work in the national economy, regardless of
19 whether her physical RFC was limited to “light” work or “sedentary” work. (AR
20 at pp. 73-76). Nevertheless, without further development of the record, the true
21 extent of the “severity” of any learning disability and/or intellectual disability is
22 unknown.

23 ⁷ Plaintiff’s contention that the ALJ improperly rejected her physical
24 symptoms testimony is preserved for further appeal, if necessary. The court, at
25 this time, makes no determination regarding Plaintiff’s credibility and that is an
26 issue which the ALJ, on remand, may further address in light of new evidence
27 presented regarding Plaintiff’s mental limitations.

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1 reopening, which is your prior application of 2011, so that's why we look at that date
2 forward, even though some of your issues may exist prior to that date." (AR at p.
3 44). Although seemingly having reopened Plaintiff's prior application, in his
4 subsequent written decision, the ALJ denied the Plaintiff's request to reopen "as
5 discussed more fully below" (AR at p. 21) and found Plaintiff had not been under a
6 disability since January 16, 2013, the date the second application was filed. (AR at
7 p. 28). As Plaintiff notes, however, there was in fact no discussion by the ALJ why
8 he denied reopening of the prior application.

9 In her summary judgment motion, the Commissioner appears to concede that
10 the ALJ considered "on the merits" the issue of Plaintiff's disability during the
11 already-adjudicated period (June 14, 2011 to January 16, 2013), and therefore, he *de*
12 *facto* reopened Plaintiff's prior application. (ECF No. 20 at pp. 13-14). The
13 Commissioner asserts, however, that reopening is of no practical consequence
14 because Plaintiff alleged the same basis of disability pursuant to both applications
15 (back pain), the ALJ considered an earlier onset date in her second application
16 (December 22, 2001) than in her first application (January 1, 2005), the same
17 evidence considered pursuant to the first application was considered pursuant to the
18 second application, and the ALJ did not apply a presumption of continuing non-
19 disability based upon the prior determination denying the first application.

20 Because of this court's finding that the ALJ had a duty to develop the record,
21 the ALJ's *de facto* reopening has consequences in that on remand, the ALJ will have
22 to consider mental and/or physical disability from the date of Plaintiff's initial
23 application (June 14, 2011), instead of her second application (January 16, 2013).
24 Evidence of intellectual and/or learning disability is relevant to the period from June
25 14, 2011 onward.

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28 **ORDER GRANTING PLAINTIFF'S
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1 **CONCLUSION**

2 Plaintiff's Motion For Summary Judgment (ECF No. 16) is **GRANTED** and
3 Defendant's Motion For Summary Judgment (ECF No. 20) is **DENIED**. The
4 Commissioner's decision is **REVERSED** and pursuant to sentence four of 42 U.S.C.
5 §405(g), this matter is **REMANDED** to the Commissioner for additional proceedings
6 and findings consistent with this order. An application for attorney fees may be filed
7 by separate motion.

8 **IT IS SO ORDERED.** The District Executive shall enter judgment
9 accordingly and forward copies of the judgment and this order to counsel of record.

10 **DATED** this 30th day of August, 2017.

11 *s/Lonny R. Suko*

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LONNY R. SUKO
14 Senior United States District Judge