

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

Mar 20, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHRYN K.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00067-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 18. Attorney Jeffrey Schwab represents Kathryn K. (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits (DIB) on May

1 13, 2014, Tr. 104, 189, alleging disability since June 1, 2008,¹ Tr. 191, due to
2 epilepsy, congenital hip dysplasia, labral tear, back problems, fibromyalgia, lupus,
3 stomach problems, cholesterol, arthritis, seizures, thyroid, anxiety, high blood
4 pressure, and chronic pain. Tr. 251. The application was denied initially and upon
5 reconsideration. Tr. 130-32, 139-42. Administrative Law Judge (ALJ) Jesse K.
6 Shumway held a hearing on June 14, 2016 and heard testimony from Plaintiff,
7 medical expert Judy Panek, M.D., and vocational expert Rebecca Hill. Tr. 40-90.
8 The ALJ issued an unfavorable decision on August 16, 2016.² Tr. 18-28. The
9 Appeals Council denied review on January 3, 2018. Tr. 1-6. The ALJ's August

11 ¹Despite alleging an onset of June 1, 2008, Social Security consistently lists
12 her date of onset as November 15, 2011. Tr. 105, 112, 204. The ALJ's decision
13 lists Plaintiff's date of onset as October 30, 2011. Tr. 18. At the hearing, the date
14 of October 30, 2011 was pulled from Exhibits 2A and 4A, which are from a
15 previous application. Tr. 46. Plaintiff did not challenge the onset date in her
16 briefing before this Court. ECF Nos. 14, 19. However, considering the case is
17 being remanded because the ALJ too narrowly scrutinized the evidence based on
18 the onset date, the ALJ will make a new finding of Plaintiff's Established Onset
19 Date in accord with S.S.R. 18-1p and request records from the school district to
20 accurately determine the date Plaintiff stopped working.

21 ²Plaintiff had a prior application for benefits filed on July 30, 2012 that
22 addressed the same period currently before the Court. Tr. 92. That application
23 was denied at the initial application and at reconsideration. Tr. 124, 128. The ALJ
24 addressed the application in his decision, stating "I do not find a basis for
25 reopening the claimant's prior Title II application." Tr. 18. However, by making a
26 determination of disability covering the same time period as the July 2012
27 application, the ALJ de facto reopened the July 2012 application. See *Lewis v.*
28 *Apfe*, 236 F.3d 503, 510 (9th Cir. 2001).

1 16, 2016 decision became the final decision of the Commissioner, which is
2 appealable to the district court pursuant to 42 U.S.C. §§ 405(g). Plaintiff filed this
3 action for judicial review on February 23, 2018. ECF Nos. 1, 3.

4 **STATEMENT OF FACTS**

5 The facts of the case are set forth in the administrative hearing transcript, the
6 ALJ's decision, and the briefs of the parties. They are only briefly summarized
7 here.

8 Plaintiff was 52 years old at the date of onset identified by the ALJ. Tr. 191.
9 She had completed three years of college. Tr. 252. Her reported work history
10 includes being a director, teacher, and owner at a private daycare/preschool, a loan
11 officer, and a director and teacher at a public preschool. Id. When applying for
12 benefits in July of 2012 Plaintiff reported that she stopped working on September
13 28, 2011 because she was fired, but that her conditions stopped her from working
14 as of October 30, 2011. Tr. 219. In her current application, Plaintiff reported that
15 she stopped working on November 15, 2011 because of her conditions. Tr. 252.
16 At the hearing, Plaintiff reported that she could not recall the exact date that she
17 stopped work, but the job ended just a couple weeks after school began, "I got
18 called in and said that - - they said that it just wasn't working out," and referred to
19 physical difficulties of helping the children climb two flights of stairs to use the
20 restroom. Tr. 55.

21 **STANDARD OF REVIEW**

22 The ALJ is responsible for determining credibility, resolving conflicts in
23 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
24 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
25 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
26 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
27 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
28 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as

1 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
2 another way, substantial evidence is such relevant evidence as a reasonable mind
3 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
4 389, 401 (1971). If the evidence is susceptible to more than one rational
5 interpretation, the court may not substitute its judgment for that of the ALJ.
6 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
7 findings, or if conflicting evidence supports a finding of either disability or non-
8 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
9 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
10 evidence will be set aside if the proper legal standards were not applied in
11 weighing the evidence and making the decision. *Browner v. Secretary of Health*
12 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); see *Bowen*
16 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
17 proof rests upon the claimant to establish a prima facie case of entitlement to
18 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
19 claimant establishes that physical or mental impairments prevent her from
20 engaging in her previous occupations. 20 C.F.R. § 404.1520(a). If the claimant
21 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
22 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
23 other work, and (2) the claimant can perform specific jobs which exist in the
24 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
25 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
26 national economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

27 **ADMINISTRATIVE DECISION**

28 On August 16, 2016, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act from October 30, 2011 through
2 Plaintiff's date last insured, December 31, 2011.

3 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
4 activity in this period. Tr. 20.

5 At step two, the ALJ determined that Plaintiff had the following severe
6 impairments during this period: fibromyalgia; irritable bowel syndrome; lumbar
7 degenerative disc disease; obesity; and partial tear gluteus minimus. Tr. 20.

8 At step three, the ALJ found that Plaintiff did not have an impairment or
9 combination of impairments that met or medically equaled the severity of one of
10 the listed impairments during this period. Tr. 22.

11 At step four, the ALJ assessed Plaintiff's residual function capacity for this
12 period and determined she could perform a range of light work with the following
13 limitations:

14 she cannot climb ladders, ropes, or scaffolds; she can frequently
15 balance and stoop; she can only occasionally climb ramps and stairs,
16 kneel, crouch, and crawl; she requires ready access to a restroom; she
17 can have only occasional exposure to extreme cold, and no exposure to
18 hazards, including unprotected heights and moving mechanical parts;
and she can have exposure to only moderate noise levels.

19 Tr. 23. The ALJ identified Plaintiff's past relevant work as a director at a daycare
20 center, loan officer, and mail clerk. Tr. 27. He found that Plaintiff could perform
21 this past relevant work as generally performed. *Id.* He then made two alternative
22 step four determinations: (1) that if Plaintiff were limited to sedentary work with
23 one absence per month, she would still be capable of performing the director at a
24 daycare and the loan officer jobs as generally performed; and (2) if Plaintiff were
25 absent up to three times per month, she would still be able to perform the loan
26 officer job as actually performed. Tr. 28.

27 The ALJ concluded Plaintiff was not under a disability within the meaning
28 of the Social Security Act from October 30, 2011, through the date Plaintiff was

1 last insured, December 31, 2011. Id.

2 ISSUES

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) failing to properly address
6 Plaintiff's symptom statements and (2) failing to make a proper step four
7 determination.

8 DISCUSSION³

9 1. Plaintiff's Symptom Statements

10 Plaintiff contests the ALJ's determination that Plaintiff's symptom
11 statements were unreliable. ECF No. 14 at 10-14.

12 It is generally the province of the ALJ to make determinations regarding the
13 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
14 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
15 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
16 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
17 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
18 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
19 rather the ALJ must identify what testimony is not credible and what evidence
20 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

21 _____
22 ³In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 The ALJ found Plaintiff's statements concerning the intensity, persistence,
2 and limiting effects of her symptoms to be "not entirely consistent with the medical
3 evidence and other evidence in the record." Tr. 24. In doing so, he repeatedly
4 limited his consideration of the evidence from October 30, 2011 to December 31,
5 2011. Tr. 24-26. This rigid approach to limiting evidence for consideration
6 resulted in an illogical rejection of Plaintiff's statements of her symptoms and their
7 reported severity. Therefore, the ALJ's determination cannot be supported by
8 substantial evidence and a remand is required to properly address Plaintiff's
9 symptom statements.

10 Specifically, the ALJ rejected Plaintiff's statements because (1) they were
11 not supported by her reported activities, (2) they were inconsistent with her ability
12 to perform work at the light to medium level just prior to onset, (3) they were
13 inconsistent with her twenty year history of working with these same impairments,
14 and (4) they were inconsistent with the medical evidence. Tr. 24-26.

15 **A. Reported Activities**

16 The ALJ's first reason for rejecting Plaintiff's symptom statements, that
17 they were inconsistent with her reported activities, is not supported by substantial
18 evidence.

19 A claimant's daily activities may support an adverse credibility finding if (1)
20 the claimant's activities contradict her other testimony, or (2) "the claimant is able
21 to spend a substantial part of his day engaged in pursuits involving performance of
22 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d
23 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).
24 A claimant need not be "utterly incapacitated" to be eligible for benefits. *Fair*, 885
25 F.2d at 603. Furthermore, that Ninth Circuit has "repeatedly warned that ALJs
26 must be especially cautious in concluding that daily activities are inconsistent with
27 testimony about pain, because impairments that would unquestionably preclude
28 work and all the pressures of a workplace environment will often be consistent

1 with doing more than merely resting in bed all day.” *Garrison v. Colvin*, 759 F.3d
2 995, 1016 (9th Cir. 2014).

3 The ALJ found that Plaintiff’s ability to provide for her personal care,
4 prepare meals, grocery shop once a week and spend time with others were
5 inconsistent with Plaintiff’s “general allegation of disability from fatigue and pain,
6 and that the claimant’s specific allegation that she could walk only 20 yards.” Tr.
7 24. In August of 2014, Plaintiff completed a function report in which she stated
8 she could walk “20 yards, depending on day [sic.]” before needing to stop and rest.
9 Tr. 284. Here, the ALJ failed to state how the ability to walk 20 yards before
10 needing to stop and rest was inconsistent with her activities of personal care,
11 preparing meals, grocery shopping once a week, and spending time with others.
12 The ALJ failed to account for Plaintiff’s statements that while she can complete
13 these activities, she did so with help and several rests. Plaintiff stated that her
14 husband helped her bathe and depending on the difficulty of the day, her husband
15 helped her cook. Tr. 280. She stated she prepared her own meals, but clarified
16 “Sometimes, such as a bowl of cereal or sandwich, generally husband cooks,” and
17 indicated that her conditions caused problems standing and preparing meals. Tr.
18 281. She stated that she shopped for groceries in stores “usually once a week and
19 as short of a time as possible, but with my husband[’]s help.” Tr. 282. By the June
20 2016 hearing, she stated that her husband did most of the shopping back in 2011
21 and at the present. Tr. 79. As such, the ALJ’s determination that Plaintiff’s reports
22 of limited activities were inconsistent with her symptom statements is not
23 supported by substantial evidence.

24 **B. Work Prior to Onset**

25 The ALJ’s second reason for rejecting Plaintiff’s symptom statements, that
26 they were inconsistent with her ability to perform work at the light to medium level
27 just prior to onset, is not supported by substantial evidence.

28 The ALJ found that there was “no evidence suggesting she declined

1 substantially between the end of her employment in October of 2011 and the end
2 of her insured period in December 2011, reducing her work capacity from
3 light/medium to less than sedentary such that she would be unable to perform her
4 sedentary past work.” Tr. 24. The ALJ assumes that Plaintiff was physically
5 capable of performing her job on a sustained basis up until her employment ended.
6 However, this is not how the Social Security Administration evaluates the onset of
7 disabilities with a nontraumatic origin. As a claimant works, her condition
8 deteriorates to the point she can no longer work, then she files an application for
9 benefits. Social Security accounts for this natural disease progression in S.S.R. 83-
10 20 which requires the ALJ to consider the applicant’s allegations, the work history,
11 and the medical evidence when coming to an onset date in impairments with
12 nontraumatic origins. In October of 2018, this S.S.R. was rescinded and replaced
13 with S.S.R. 18-1p, which recognizes that the date of onset is the date an applicant
14 meets both the non-medical and the medical requirements of disability. Therefore,
15 the Agency has consistently found that while the date of onset is a single date on
16 the calendar that must be determined for procedural reasons, the onset of an
17 impairment can involve disease progression and failed attempts at work. Here,
18 Plaintiff stated that she was fired two weeks into the school year following an
19 inability to take the stairs. Tr. 55. Therefore, the ALJ’s conclusion that Plaintiff
20 was fully capable of her medium/light job until the day she was fired and then had
21 to produce evidence of a sudden reduction in her functional ability between
22 October 2011 and December 2011 is not supported by the record and is not
23 supported by agency rulings.

24 The ALJ further notes that when Plaintiff was asked why she could not
25 perform her loan officer job, the only reason she was able to identify was epilepsy,
26 which was not a medically determinable impairment prior to the December 31,
27 2011 date last insured. Tr. 24. However, the ALJ failed to address her later
28 testimony in which she stated that while self-employed at the loan officer position,

1 she missed an average of three days per month due to pain, headaches, and
2 gastroparesis, Tr. 75-77, and that the fibromyalgia and irritable bowel syndrome
3 were severe impairments prior to the date last insured, Tr. 20. As such, the ALJ
4 again mischaracterized Plaintiff's testimony.

5 The ALJ also pointed to Plaintiff's testimony that "she was advised that she
6 could continue working sitting down after experiencing the tear in her gluteus
7 minimus. Thus, the claimant's own testimony does not support a finding of
8 disability as of the date last insured." Tr. 24. However, the ALJ failed to include
9 her testimony that this limitation to "teaching in a sitting down position," made
10 completing her work "very hard," because she was teaching three and four-year-
11 olds which required her to be on her knees. Tr. 54. The vocational expert testified
12 that this position was performed at the medium exertional level. Tr. 73. Plaintiff
13 was fired from her position two weeks after the school year began. Tr. 55.
14 Therefore, the ALJ's conclusion that her limitation to sitting to teach demonstrated
15 that she could still perform her job, is not supported by substantial evidence.

16 **C. Work History**

17 The ALJ's third reason for rejecting Plaintiff's symptom statements, that she
18 was capable of working for twenty years with these impairments, is not specific
19 and legitimate.

20 The ALJ made the following finding:

21 the claimant had the same if not worse symptoms before her alleged
22 onset date. For example, records for June of 2011 show that the
23 claimant had loose stool, diarrhea, and nausea, but that she had had
24 these symptoms for a while. Ex. B10F/10. In fact, her treatment
25 provider noted that the claimant's symptoms of fibromyalgia had been
26 present for at least 20 years. Ex. B11F/4. Her ability to work with these
symptoms proves they are not disabling.

27 Tr. 25. Once again, the ALJ failed to recognize disease progression represented
28 throughout the record and treated the onset date as a traumatic onset. It is illogical

1 to discredit Plaintiff's symptom statements because a few months prior to being
2 fired she had an increase of symptoms.

3 The ALJ's second conclusion, that the presence of her fibromyalgia
4 symptoms while working in the past demonstrated that they were not disabling
5 later on, fails to consider the impairments and their severity in combination, and
6 fails to recognize disease progression. As such, this reason fails to support the
7 ALJ's determination.

8 **D. Medical Evidence**

9 The ALJ's third reason for rejecting Plaintiff's symptom statements, that
10 they were not supported by the objective medical evidence, is not specific, clear
11 and convincing.

12 An ALJ may cite inconsistencies between a claimant's testimony and the
13 objective medical evidence in discounting the claimant's testimony. *Bray v.*
14 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). However, this
15 reason alone is not sufficient to support a rejection of Plaintiff's symptom
16 statements. See *Lester*, 81 F.3d at 834 (ALJ may not discredit the claimant's
17 testimony as to subjective symptoms merely because they are unsupported by
18 objective evidence); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)
19 (Although it cannot serve as the sole ground for rejecting a claimant's credibility,
20 objective medical evidence is a "relevant factor in determining the severity of the
21 claimant's pain and its disabling effects.")

22 Here the ALJ found that Plaintiff's allegations were not supported because
23 the examination findings from October of 2011 through December of 2011 showed
24 normal to mild findings. Tr. 25. This alone is insufficient to support a rejection of
25 Plaintiff's symptom statements.

26 Furthermore, by limiting the evidence considered to after the onset date, the
27 ALJ failed to account for the longitudinal history and treatment course of
28 Plaintiff's impairments. See S.S.R. 18-1p (requiring the adjudicator to consider all

1 the evidence in the claimant's case record and, in the case of non-traumatic
2 impairments, the longitudinal history, treatment course, and length of the
3 impairment's exacerbations and remissions). Defendant argues that Plaintiff's
4 reliance on medical evidence from May, July, and August of 2011 are of limited
5 weight because they predate her October 2011 onset date. ECF No. 18 at 7. As
6 discussed above, an onset date of a nontraumatic origin impairment is the first date
7 a claimant meets both the medical and nonmedical requirements of eligibility.
8 S.S.R. 18-1p. A claimant does not stop working and suddenly develop a severe
9 disabling impairment. Instead a person develops a severe disabling impairment,
10 which then results in her work performance suffering until she is no longer capable
11 of work. Therefore, the ALJ erred in limiting his analysis of medical evidence to
12 only the two months between the onset date and the date last insured.

13 In conclusion, the ALJ failed to properly address Plaintiff's symptom
14 statements. Therefore, the case is remanded for additional proceedings consistent
15 with this order. Upon remand, the ALJ will gather the evidence from the school
16 district that employed Plaintiff to determine when she stopped working. The ALJ
17 will then use this information to determine the onset date in accord with S.S.R. 18-
18 1p. The ALJ will then consider all the medical evidence leading up to the end of
19 Plaintiff's employment and through the date last insured.

20 **2. Step Four**

21 Plaintiff challenges the ALJ's step four determination alleging (1) the ALJ
22 failed to make the required finding of facts under S.S.R. 82-62, (2) the hypothetical
23 presented to the vocational expert was incomplete because the ALJ failed to
24 properly address Plaintiff's symptom statements, and (3) the vocational expert's
25 testimony regarding missed work and the loan officer job was inconsistent, and (4)
26 Plaintiff's past work as a loan officer was an odd lot job and the ALJ refused to
27 allow Plaintiff's attorney to develop testimony in support of an odd lot job. ECF
28 No. 14 at 14-18.

1 **CONCLUSION**

2 Accordingly, **IT IS ORDERED:**

3 1. Defendant’s Motion for Summary Judgment, **ECF No. 18**, is
4 **DENIED.**

5 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is
6 **GRANTED, in part**, and the case is remanded for additional proceedings
7 consistent with this Order.

8 3. Application for attorney fees may be filed by separate motion.

9 The District Court Executive is directed to file this Order and provide a copy
10 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
11 **and the file shall be CLOSED.**

12 DATED March 20, 2019.

A handwritten signature in black ink, appearing to read "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE