

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

Aug 06, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERESA H.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.

No. 2:20-CV-00225-JTR

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 19, 21. Attorney Chad Hatfield represents Teresa H. (Plaintiff); Special Assistant United States Attorney Diana Andsager represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. 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).

¹ 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).

1 **JURISDICTION**

2 Plaintiff filed an application for Disability Insurance Benefits on August 25,
3 2017 alleging disability since July 12, 2017, due to anxiety, social anxiety, panic
4 attacks, fibromyalgia, insomnia, arthritis, headaches, paranoia, thyroid issues, and
5 osteoporosis. Tr. 78-79. The application was denied initially and upon
6 reconsideration. Tr. 114-16, 118-20. Administrative Law Judge (ALJ) Jesse
7 Shumway held a hearing on February 26, 2019, Tr. 37-77, and issued an
8 unfavorable decision on March 22, 2019, Tr. 15-28. Plaintiff requested review of
9 the ALJ's decision by the Appeals Council and the Appeals Council denied the
10 request for review on April 19, 2020. Tr. 1-5. The ALJ's March 2019 decision is
11 the final decision of the Commissioner, which is appealable to the district court
12 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
13 June 17, 2020. ECF No. 1.

14 **STATEMENT OF FACTS**

15 Plaintiff was born in 1965 and was 51 years old as of her alleged onset date.
16 Tr. 26. She has some college education and received a certificate in dental
17 assisting. Tr. 444. She has worked in the medical field, including being a unit
18 coordinator in an emergency room for 13 years. Tr. 71-73, 223. She last worked in
19 2017 and testified that she left work due to her mental impairments, which were
20 causing her to make mistakes, miss work, and have panic attacks while working.
21 Tr. 56-59, 326. She has also struggled with symptoms from fibromyalgia,
22 including wide-spread body pain and fatigue, which further exacerbate her mental
23 health. Tr. 66-67.

24 **STANDARD OF REVIEW**

25 The ALJ is responsible for determining credibility, resolving conflicts in
26 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
27 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
28 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,

1 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
2 only if it is not supported by substantial evidence or if it is based on legal error.
3 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
4 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
5 1098. Put another way, substantial evidence is such relevant evidence as a
6 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
7 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
8 rational interpretation, the Court may not substitute its judgment for that of the
9 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
10 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
11 administrative findings, or if conflicting evidence supports a finding of either
12 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
13 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
14 supported by substantial evidence will be set aside if the proper legal standards
15 were not applied in weighing the evidence and making the decision. *Brawner v.*
16 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*
20 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant
21 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
22 at 1098-1099. This burden is met once a claimant establishes that a physical or
23 mental impairment prevents the claimant from engaging in past relevant work. 20
24 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ
25 proceeds to step five, and the burden shifts to the Commissioner to show (1) the
26 claimant can make an adjustment to other work; and (2) the claimant can perform
27 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*
28 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an

1 adjustment to other work in the national economy, the claimant will be found
2 disabled. 20 C.F.R. § 404.1520(a)(4)(v).

3 **ADMINISTRATIVE FINDINGS**

4 On March 22, 2019, the ALJ issued a decision finding Plaintiff was not
5 disabled as defined in the Social Security Act. Tr. 15-28.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since the alleged onset date. Tr. 18.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: fibromyalgia, lumbar and cervical degenerative disc disease, major
10 depressive disorder, and panic disorder. *Id.*

11 At step three, the ALJ found Plaintiff did not have an impairment or
12 combination of impairments that met or medically equaled the severity of one of
13 the listed impairments. Tr. 17, 19-20.

14 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
15 she could perform a range of light work, with the following limitations:

16 she can frequently reach in all directions and frequently push and pull
17 with the upper extremities; she can never climb ladders, ropes, or
18 scaffolds; she can frequently balance; she can occasionally stoop,
19 kneel, crouch, crawl, and climb ramps and stairs; she cannot be
20 exposed to hazards (e.g., unprotected heights, moving mechanical
21 parts); she is limited to simple routine work with a reasoning level of
22 2 or less; she can have only occasional, superficial contact with the
23 public and coworkers; she needs a routine, predictable work
24 environment with no more than occasional changes; and she cannot
25 perform fast-paced work.

26 Tr. 20.

27 At step four, the ALJ found Plaintiff was unable to perform her past relevant
28 work as a unit clerk. Tr. 26.

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1 At step five the ALJ found that, considering Plaintiff’s age, education, work
2 experience and residual functional capacity, Plaintiff could perform jobs that
3 existed in significant numbers in the national economy, specifically identifying the
4 representative occupations of laundry worker, price marker, and mail clerk. Tr. 27.

5 The ALJ thus concluded Plaintiff was not under a disability within the
6 meaning of the Social Security Act at any time from the alleged onset date through
7 the date of the decision. Tr. 27-28.

8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ’s
10 decision denying benefits and, if so, whether that decision is based on proper legal
11 standards.

12 Plaintiff contends the Commissioner erred by (1) improperly rejecting the
13 opinion from Plaintiff’s treating counselor Rebecca McManus; (2) improperly
14 rejecting Plaintiff’s subjective complaints; and (3) making inadequate step five
15 findings.

16 DISCUSSION

17 1. Plaintiff’s subjective allegations

18 Plaintiff contends the ALJ erred by improperly rejecting her subjective
19 complaints. ECF No. 19 at 15-20.

20 It is the province of the ALJ to assess the claimant’s allegations. *Andrews v.*
21 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
22 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
23 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
24 medical impairment, the ALJ may not discredit testimony as to the severity of an
25 impairment merely because it is unsupported by medical evidence. *Reddick v.*
26 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
27 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be
28 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.

1 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are
2 insufficient: rather the ALJ must identify what testimony is not credible and what
3 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v.*
4 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

5 The ALJ concluded Plaintiff’s medically determinable impairments could
6 reasonably be expected to cause some of the alleged symptoms; however,
7 Plaintiff’s statements concerning the intensity, persistence and limiting effects of
8 those symptoms were not entirely consistent with the medical evidence and other
9 evidence in the record. Tr. 22. The ALJ found Plaintiff’s allegations were not
10 supported by the objective exam findings and test results, the course of treatment,
11 or Plaintiff’s activities, and found inconsistencies between Plaintiff’s allegations
12 and her own past reports to treatment providers. Tr. 22-24.

13 Plaintiff argues the ALJ took facts out of context, failed to identify any
14 activities that clearly contradicted Plaintiff’s testimony, and erred in requiring
15 objective evidence of a disease (fibromyalgia) that eludes such measurements. ECF
16 No. 19 at 15-20. Defendant argues the ALJ reasonably interpreted the objective
17 findings as unresponsive of Plaintiff’s complaints and legitimately considered the
18 course and type of treatment, along with Plaintiff’s activities and inconsistent
19 symptom reports. ECF No. 21 at 3-12.

20 The Court finds the ALJ’s rationale is not supported by substantial evidence.

21 **Activities**

22 A claimant’s activities may support an adverse credibility finding if the
23 claimant’s activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,
24 639 (9th Cir. 2007). However, the Court finds the ALJ did not identify any
25 activities that were inconsistent with Plaintiff’s reports. The ALJ found Plaintiff’s
26 attendance of aqua therapy at the YMCA was inconsistent with her reports of
27 extreme difficulty being in public and experiencing panic attacks when she leaves
28 the home or thinks about leaving. Tr. 24. The Court finds no inconsistency.

1 Plaintiff testified that she has difficulty leaving home, and has panic attacks
2 roughly three times per week, but she has never alleged a complete inability to
3 leave home. Tr. 60. She has consistently acknowledged being able to leave home
4 occasionally for errands or to go to the pool two or three times per week, but also
5 indicated she will sometimes leave if the parking lot is too crowded. Tr. 66, 215,
6 394, 447, 506. To the extent the ALJ indicated that this activity is physically
7 incompatible with Plaintiff's pain reports, the record indicates that Plaintiff was
8 encouraged to engage in gentle, low-impact exercise for treatment of her
9 fibromyalgia (Tr. 329, 465-66, 489), and she testified that her pool activity is not
10 vigorous and primarily involves floating with a bit of arm and leg movement. Tr.
11 65.

12 Defendant notes other activities that are arguably inconsistent with
13 Plaintiff's reports, such as being able to cook, pay bills, remember medications,
14 read the news, shop, and spend time with friends and family. ECF No. 21 at 5-6.
15 However, the ALJ did not identify any of these activities as the basis for his
16 finding; this therefore constitutes post hoc rationale that the Court will not
17 consider. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will
18 "review only the reasons provided by the ALJ in the disability determination and
19 may not affirm the ALJ on a ground upon which he did not rely.").

20 **Course of treatment**

21 The ALJ found the course of treatment (including not trying fibromyalgia
22 medications until September 2017) and the treating doctor's impression that
23 Plaintiff was doing very well with respect to her fibromyalgia were inconsistent
24 with Plaintiff's allegations regarding her fibromyalgia symptoms and limitations.
25 Tr. 24. An ALJ may consider the type and effectiveness of treatment and whether a
26 claimant complies with treatment in assessing the reliability of their reports. Social
27 Security Ruling 16-3p; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

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1 However, the Court finds the facts identified by the ALJ do not constitute
2 substantial evidence.

3 The ALJ's implication that Plaintiff's conditions were not as severe as
4 alleged because she "had not even tried gabapentin or Lyrica until September
5 2017" is not substantial evidence. Plaintiff's alleged onset date was July 2017, a
6 mere two months earlier. The conversation about trying new medications for
7 fibromyalgia was in the context of Plaintiff's present treatment with Duloxetine not
8 being sufficient and Plaintiff having done some research about her condition. Tr.
9 412. Her efforts to better treat her symptoms would seem to support, rather than
10 detract from her allegations of pain and other symptoms.

11 The notation cited by the ALJ that Plaintiff's treating physician stated she
12 had been doing very well regarding her fibromyalgia was also taken out of context.
13 Doctor Kenny stated Plaintiff's fibromyalgia had been doing very well in the
14 context of no longer working. Tr. 462. His assessment was: "Now that she is
15 retired, I suspect that she will continue to improve." Tr. 465. Because the ALJ did
16 not acknowledge the circumstances of the comment, this does not constitute
17 substantial evidence.

18 To the extent the ALJ implied in his summary of the medical evidence that
19 Plaintiff's inconsistent compliance with her medication and declination of a
20 referral to physical therapy indicated her conditions were not as serious as alleged
21 (Tr. 22), the Court finds these factors to constitute no more than a scintilla of
22 evidence. It was only on one occasion that Plaintiff was noted to not be taking her
23 Lyrica as prescribed, due to sedation. Tr. 397. Though she declined a referral to
24 physical therapy at the end of October 2017 (Tr. 397), by mid-November she
25 reconsidered and had started physical therapy. Tr. 402, 470.

26 **Inconsistent statements**

27 The ALJ found the record contained inconsistent statements, such as
28 Plaintiff's testimony that she did not want to take opioids conflicting with her

1 request for hydrocodone, and her testimony regarding the frequency of her
2 headaches not being reported to her treating providers. Tr. 23, 24. The Court finds
3 no inconsistencies. The record regarding hydrocodone simply reflects Plaintiff's
4 query to her provider in 2017 as to whether that would be something she could take
5 as her present medications were causing drowsiness. Tr. 399. She was informed
6 that narcotics are generally not recommended in the treatment of fibromyalgia and
7 was encouraged to follow up with her rheumatologist to discuss other treatment
8 options. Tr. 402. This is not inconsistent with her testimony in 2019 that she did
9 not want to be on strong medications that affected her. Tr. 68.

10 Regarding headaches, the ALJ found that Plaintiff's testimony regarding
11 headaches and migraines was not consistent with her pattern of reports to her
12 providers, noting "nowhere in the record has she reported weekly migraines to a
13 treating provider." Tr. 24. However, the record does contain Plaintiff's reports of
14 daily or weekly migraines or headaches at different times. Tr. 442, 464, 470, 488.
15 The ALJ is incorrect that the record does not contain reports consistent with her
16 testimony. Therefore, this does not constitute a clear and convincing basis for
17 disregarding her reports.

18 **Objective evidence**

19 The only other reason offered by the ALJ for discounting Plaintiff's
20 subjective reports was the lack of support from the objective medical evidence. Tr.
21 22-24. This alone is an insufficient reason to reject her statements. *Reddick v.*
22 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Because none of the ALJ's other
23 reasons for questioning Plaintiff's allegations meet the clear and convincing
24 standard, unsupportive objective evidence is not a sufficient rationale.

25 Furthermore, the Court takes note that fibromyalgia is not a condition that
26 generally lends itself to extensive objective findings. *See generally*, Social Security
27 Ruling 12-2p; *Revels v. Berryhill*, 874 F.3d 648, 656-57 (9th Cir. 2017). It is not
28 clear that the normal or unremarkable exam findings identified by the ALJ, such as

1 normal gait, intact strength and sensation, or mild imaging, have any bearing on
2 the severity of Plaintiff's fibromyalgia, and the ALJ cited to no medical source that
3 indicated as much.

4 Upon remand, the ALJ shall re-evaluate Plaintiff's statements and testimony.

5 **2. Counselor Rebecca McManus, LMCHA**

6 Plaintiff argues the ALJ improperly rejected the opinion from her treating
7 counselor, Ms. McManus. ECF No. 19 at 11-15.²

8 For claims filed on or after March 27, 2017, new regulations apply that
9 change the framework for how an ALJ must weigh medical opinion evidence.
10 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
11 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The new
12 regulations provide the ALJ will no longer give any specific evidentiary weight to
13 medical opinions or prior administrative medical findings, including those from
14 treating medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ will consider
15 the persuasiveness of each medical opinion and prior administrative medical
16 finding, regardless of whether the medical source is an Acceptable Medical Source.
17 20 C.F.R. § 404.1520c(c). The ALJ is required to consider multiple factors,
18 including supportability, consistency, the source's relationship with the claimant,
19 any specialization of the source, and other factors (such as the source's familiarity
20 with other evidence in the file or an understanding of Social Security's disability
21 program). *Id.* The regulations make clear that the supportability and consistency of
22 the opinion are the most important factors, and the ALJ must articulate how they
23 considered those factors in determining the persuasiveness of each medical opinion

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25 ² Plaintiff includes examining source Patrick Metoyer in the heading of her
26 argument and indicates that Dr. Metoyer's opinion supports Ms. McManus's
27 opinion, but does not specifically assign any error to the ALJ's treatment of Dr.
28 Metoyer's opinion. ECF No. 19 at 11-15.

1 or prior administrative medical finding. 20 C.F.R. § 404.1520a(b). The ALJ may
2 explain how they considered the other factors, but is not required to do so, except
3 in cases where two or more opinions are equally well-supported and consistent
4 with the record. *Id.*

5 Supportability and consistency are further explained in the regulations:

6 (1) *Supportability*. The more relevant the objective medical evidence
7 and supporting explanations presented by a medical source are to
8 support his or her medical opinion(s) or prior administrative medical
9 finding(s), the more persuasive the medical opinions or prior
10 administrative medical finding(s) will be.

11 (2) *Consistency*. The more consistent a medical opinion(s) or prior
12 administrative medical finding(s) is with the evidence from other
13 medical sources and nonmedical sources in the claim, the more
14 persuasive the medical opinion(s) or prior administrative medical
15 finding(s) will be.

16 20 C.F.R. § 404.1520c(c).

17 Plaintiff's treating counselor, Ms. McManus, completed a summary of her
18 care of Plaintiff in February 2019. Tr. 512-14. In the summary, she recounted
19 Plaintiff's reported symptoms and self-assessed functional limitations, then stated:
20 "in my opinion, based on my observation and communication with Teresa, her
21 self-assessment is accurate." Tr. 514.

22 The ALJ stated: "I do not find this statement persuasive as a medical opinion
23 given that it merely parrots the claimant's own report and brings no apparent
24 professional judgment to bear." Tr. 26.

25 Plaintiff argues this discussion was insufficient, noting the ALJ may not
26 merely assume that a provider's opinion was based solely on self-reports and
27 arguing that the opinion is supported by Ms. McManus's treatment records and
28 other evidence in the file. ECF No. 19 at 12-15. Defendant argues the ALJ
reasonably found the opinion was not supported by clinical findings or professional

1 judgments and was inconsistent with other opinion evidence in the record. ECF
2 No. 21 at 15-19.

3 As this claim is being remanded for reconsideration of Plaintiff's subjective
4 reports, the ALJ shall also reconsider the opinion evidence, discussing the factors
5 of supportability and consistency in assessing the persuasiveness of the opinions.

6 **3. Step five findings**

7 Plaintiff argues that the ALJ erred in his step five determination because the
8 testimony of the vocational expert was premised on an incomplete hypothetical
9 stemming from an inaccurate residual functional capacity determination. ECF No.
10 19 at 21. Considering the case is being remanded for the ALJ to properly address
11 Plaintiff's subjective symptom testimony, the ALJ will be required to make
12 findings on all of the steps of the sequential evaluation process, and consult a
13 vocational expert as needed.

14 **CONCLUSION**

15 Plaintiff argues the decision should be reversed and remanded for the
16 payment of benefits. The Court has the discretion to remand the case for additional
17 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
18 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
19 further administrative proceedings would serve no useful purpose. *Id.* Remand is
20 appropriate when additional administrative proceedings could remedy defects.
21 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
22 finds that further development is necessary for a proper determination to be made.

23 The ALJ's decision with respect to Plaintiff's subjective complaints is not
24 supported by substantial evidence. On remand, the ALJ shall reevaluate Plaintiff's
25 subjective complaints and the record as a whole and complete the five-step
26 process.

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Accordingly, **IT IS ORDERED:**

- 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 19**, is **GRANTED IN PART.**
 - 2. Defendant’s Motion for Summary Judgment, **ECF No. 21**, is **DENIED.**
 - 3. The matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.
 - 4. An application for attorney fees may be filed by separate motion.
- The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED.**

IT IS SO ORDERED.

DATED August 6, 2021.



JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE