

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

Jun 15, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SYRECEA E.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 4:19-CV-05130-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney Chad L. Hatfield represents Syrecea E. (Plaintiff); Special Assistant United States Attorney Michael S. Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **DENIES** Defendant's Motion for Summary

¹Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 Judgment; **GRANTS, in part**, Plaintiff’s Motion for Summary Judgment; and
2 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
3 42 U.S.C. §§ 405(g), 1383(c).

4 **JURISDICTION**

5 Plaintiff filed applications for Supplemental Security Income (SSI) and
6 Disability Insurance Benefits (DIB) on May 29, 2015. Tr. 100-01. She alleged
7 disability since November 1, 2013, Tr. 233, 252, due to Behcet’s disease, lupus,
8 fibromyalgia, Sjogren’s Syndrome, hypertension, sleep apnea, depression, and
9 hyperthyroidism, Tr. 275. The applications were denied initially and upon
10 reconsideration. Tr. 140-52, 155-76. Administrative Law Judge (ALJ) Jesse K.
11 Shumway held a hearing on December 13, 2017 and heard testimony from
12 Plaintiff, medical expert Lynne Jahnke, M.D., and vocational expert Anne Jones.
13 Tr. 35-69. At the hearing, Plaintiff amended her alleged date of onset to August
14 25, 2014. Tr. 39. The ALJ issued a partially favorable decision on March 7, 2018
15 finding Plaintiff was not disabled before May 20, 2016 but was disabled on May
16 20, 2016 and through the date of the decision. Tr. 17-28. The Appeals Council
17 denied review on March 12, 2019. Tr. 1-5. The ALJ’s March 7, 2018 decision
18 became the final decision of the Commissioner, which is appealable to the district
19 court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for
20 judicial review on May 16, 2019. ECF No. 1.

21 **STATEMENT OF FACTS**

22 The facts of the case are set forth in the administrative hearing transcript, the
23 ALJ’s decision, and the briefs of the parties. They are only briefly summarized
24 here.

25 Plaintiff was 52 years old at the amended date of onset. Tr. 233. Plaintiff
26 completed three years of college in 2007 and received a degree in early childhood
27 education. Tr. 276. Her reported work history includes the positions of counseling
28 assistant, customer service lead, office assistance, and purchasing manager. Tr.

1 277. When applying for benefits Plaintiff reported that she was still working, but
2 that her conditions had caused her to make changes to her work activities as early
3 as August 1, 2014. Tr. 275-76.

4 **STANDARD OF REVIEW**

5 The ALJ is responsible for determining credibility, resolving conflicts in
6 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
7 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
8 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
9 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
10 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
11 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
13 another way, substantial evidence is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
15 389, 401 (1971). If the evidence is susceptible to more than one rational
16 interpretation, the court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
21 evidence will be set aside if the proper legal standards were not applied in
22 weighing the evidence and making the decision. *Browner v. Secretary of Health*
23 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
28 through four, the burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
2 burden is met once the claimant establishes that physical or mental impairments
3 prevent her from engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a),
4 416.920(a)(4). If the claimant cannot do her past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show (1) the claimant
6 can make an adjustment to other work, and (2) the claimant can perform specific
7 jobs that exist in the national economy. *Batson v. Comm’r of Soc. Sec. Admin.*,
8 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an
9 adjustment to other work in the national economy, she is found “disabled.” 20
10 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 **ADMINISTRATIVE DECISION**

12 On March 7, 2018, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act before May 20, 2016, but she was
14 disabled from May 20, 2016 through the date of the decision.

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since August 25, 2014, the amended date of onset. Tr. 19.

17 At step two, the ALJ determined that Plaintiff had the following severe
18 impairments since August 25, 2014: osteoarthritis in the bilateral knees; Bechet’s
19 disease; fibromyalgia; extreme obesity (BMI 65+); and mild bilateral carpal tunnel
20 syndrome status post bilateral surgical releases in March and April of 2016. Tr.
21 20.

22 At step three, the ALJ found that before May 20, 2016 Plaintiff did not have
23 an impairment or combination of impairments that met or medically equaled the
24 severity of one of the listed impairments. Tr. 20.

25 At step four, the ALJ assessed Plaintiff’s residual function capacity and
26 determined that before May 20, 2016 she could perform a range of sedentary work
27 with the following limitations:
28

1 [S]he could not climb ladders, ropes, or scaffolds; could not climb stairs
2 or ramps; could not kneel or crawl; could only occasionally perform all
3 other postural activities; could frequently handle and finger; could not
4 have concentrated exposure to extreme cold or vibration; could have no
5 exposure to hazards such as unprotected heights and moving
6 mechanical parts.

6 Tr. 21. The ALJ identified Plaintiff's past relevant work as order clerk and general
7 clerk and found that before May 20, 2016 she could perform her past relevant work
8 as an order clerk. Tr. 25-26. The ALJ concluded that Plaintiff was not under a
9 disability within the meaning of the Social Security Act before May 20, 2016. Tr.
10 27.

11 Next, the ALJ found that beginning on May 20, 2016, the severity of
12 Plaintiff's impairments medically equaled the criteria of section 1.02 of 20 C.F.R.
13 Part 400, Subpart P, Appendix 1. Tr. 26. Therefore, the ALJ concluded that as of
14 May 20, 2016 Plaintiff was disabled at step three and this disability continued
15 through the date of his decision. Tr. 27.

16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's
18 decision denying benefits prior to May 20, 2016 and, if so, whether that decision is
19 based on proper legal standards. Plaintiff contends the ALJ erred by (1) failing to
20 properly weigh the medical opinions in the record; (2) failing to find Plaintiff's
21 mental health conditions severe at step two; (3) failing to properly weigh Plaintiff's
22 symptom statements; and (4) failing to make proper determinations at steps four
23 and five.

24 DISCUSSION

25 1. Medical Opinions

26 Plaintiff argues the ALJ failed to properly consider and weigh the medical
27 opinions expressed by Dev Banerjee, M.D., Lynn M. Orr, Ph.D., Lynne Jahnke,
28 M.D., and Leslie Postovoit, Ph.D. ECF No. 13 at 9-14.

1 In weighing medical source opinions, the ALJ should distinguish between
2 three different types of physicians: (1) treating physicians, who actually treat the
3 claimant; (2) examining physicians, who examine but do not treat the claimant;
4 and, (3) nonexamining physicians who neither treat nor examine the claimant.
5 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
6 weight to the opinion of a treating physician than to the opinion of an examining
7 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
8 should give more weight to the opinion of an examining physician than to the
9 opinion of a nonexamining physician. *Id.*

10 When an examining physician's opinion is not contradicted by another
11 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
12 and when an examining physician's opinion is contradicted by another physician,
13 the ALJ is only required to provide "specific and legitimate reasons" to reject the
14 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
15 met by the ALJ setting out a detailed and thorough summary of the facts and
16 conflicting clinical evidence, stating his interpretation thereof, and making
17 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
18 required to do more than offer his conclusions, he "must set forth his
19 interpretations and explain why they, rather than the doctors', are correct."
20 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

21 **A. Dev Banerjee, M.D.²**

22 _____
23 ²The Court notes that when some providers refer to Plaintiff's primary care
24 physician, the name used is Dev Banerjee, M.D. in Richland, WA. Tr. 1067, 1072,
25 1094-95, 1165. However, records from Kadlec include evidence from a Sirshendu
26 Banerjee, M.D. and a Turhin Banerjee, M.D. Sirshendu Banerjee, M.D. is
27 consistently referred to as Plaintiff's primary care physician or as the referring
28 provider demonstrating a longitudinal history of treatment. Tr. 278, 376, 790, 835,

1 On December 5, 2017, Dr. Banerjee completed a Medical Report form
2 opining that Plaintiff would have to lie down due to pain for more than four hours
3 in a day. Tr. 1232. He also opined that if Plaintiff attempted to work a 40-hour per
4 week schedule, she would probably miss four or more days per month. Tr. 1233.
5 He further opined that Plaintiff could perform sedentary work defined as “[c]an lift
6 10 pounds maximum and frequently lift and/or carry articles such as docketts,
7 ledgers, and small tools. Although a sedentary job involves sitting, a certain
8 amount of walking and standing may be necessary.” *Id.* He limited the use of her
9 upper extremities to occasional handling and reaching. Tr. 1234. He stated that
10 the opined limitations had existed since August 15, 2014. *Id.*

11 The ALJ gave the opinion little weight stating the following: “Little weight
12 is afforded to this checkbox form. Dr. Banerjee provided little explanation for his
13 findings. His opinion is not consistent with the longitudinal medical record
14 documenting effective treatment. Greater weight is afforded to the medical
15 expert’s testimony.” Tr. 24. Here the ALJ’s reasons failed to meet the specific
16 and legitimate standard because they amounted to a conclusory rejection of the
17 opinion. *See Garrison v. Colvin*, 759 F.3d 95, 1012-13 (9th Cir. 2014) (“an ALJ
18 errs when he rejects a medical opinion or assigns it little weight while doing
19 nothing more than ignoring it, asserting without explanation that another medical
20 opinion is more persuasive, or criticizing it with boilerplate language that fails to
21 offer a substantive basis for his conclusion.”).

22 _____
23 891, 918, 956, 962, 968, 977, 984, 1019. Turhin Banerjee, M.D. appears to be the
24 admitting Hospitalist who treated Plaintiff at the emergency room in October of
25 2017. Tr. 880, 885-91. The opinion at issue was signed “Banerjee, MD,” Tr.
26 1234, but states the first date of treatment was April 5, 2015, Tr. 1232. Therefore,
27 substantial evidence supports the conclusion that Sirshendu Banerjee, M.D. is also
28 Dev Banerjee and the provider penning the opinion.

1 Defendant points to several locations in the ALJ's decision that provides
2 further support and explanation for his decision to reject the opinion. ECF No. 14
3 at 7-9. However, the Court is limited to reviewing the reasons the ALJ clearly
4 provided for rejecting Dr. Banerjee's opinion. The only reasons provided by the
5 ALJ are in the four conclusory sentences set forth above. Tr. 24. These
6 conclusory statements are not sufficient under *Embrey*. The Court acknowledges
7 that the ALJ's reasons for rejecting the opinion alluded to reasons that the Ninth
8 Circuit has found to be specific and legitimate, but the ALJ failed to provide the
9 specificity required in *Embrey* to meet the specific and legitimate standard. 849
10 F.2d at 421-22 (The ALJ is required to do more than offer his conclusions, he
11 "must set forth his interpretations and explain why they, rather than the doctors',
12 are correct.").

13 First, the ALJ mentioned that the opinion was expressed on a check-the-box
14 form. Tr. 24. The Ninth Circuit has stated a preference for individualized medical
15 opinions over check-off reports. *See Murray v. Heckler*, 722 F.2d 499, 501 (9th
16 Cir. 1983). However, check-the-box forms that do not stand alone, but are
17 supported by records should be "entitled to weight that an otherwise unsupported
18 and unexplained check-box form would not merit." *Garrison*, 759 F.3d at 1013.
19 Here, Dr. Banerjee was Plaintiff's treating physician who had treated Plaintiff
20 since 2015. Tr. 649-66, 777-80, 854-68, 899-904, 908-12, 926-35, 943-49, 952-55.
21 Therefore, the check-the-box form did not stand alone and the treatment records
22 should have been considered when addressing the supportability of the opinion.
23 Therefore, this reason falls short of the specific and legitimate standard.

24 The ALJ's second reason for rejecting the opinion, that Dr. Banerjee did not
25 provide an explanation for his opinion, is not specific and legitimate. An ALJ may
26 discredit treating physicians' opinions that are conclusory, brief, and unsupported
27 by the record as a whole. *Batson*, 359 F.3d at 1195. However, the form Dr.
28 Banerjee completed requested that he explain the reasons for the limitations he

1 opined, and he provided such an explanation. Tr. 1232 (the reason for needing to
2 lie down during the day was pain, and the pain was caused by her impairments
3 including fibromyalgia); Tr. 1233 (missing four or more days a week was
4 attributed to Plaintiff's pain and dizziness). As such, the ALJ's rationale that Dr.
5 Banerjee did not provide an explanation for his opinion is not supported by
6 substantial evidence.

7 The ALJ's third reason for rejecting the opinion, that it was not supported by
8 the medical record, is not specific and legitimate. An opinion's inconsistency with
9 the majority of objective evidence is a specific and legitimate reason for rejecting
10 the opinion. *Batson*, 359 F.3d at 1195. However, the ALJ failed to provide any
11 reference to evidence that did not support Dr. Banerjee's opinion. Therefore, he
12 failed to meet the specificity required under *Embrey* to meet the specific and
13 legitimate standard. 849 F.2d at 421-22 (The ALJ is required to do more than offer
14 his conclusions, he "must set forth his interpretations and explain why they, rather
15 than the doctors', are correct.").

16 The ALJ failed to provide specific and legitimate reasons for rejecting the
17 opinion of treating provider, Dr. Banerjee. Therefore, this case is remanded for
18 additional proceedings to properly address this opinion.

19 **B. Lynn M. Orr, Ph.D.**

20 On July 29, 2015, Dr. Orr completed a psychological evaluation of Plaintiff
21 and provided a Medical Source Statement. Tr. 781-86. Dr. Orr stated that Plaintiff
22 "complains of memory problems. Results from the Wechsler Memory Scale
23 indicate significant impairment. There are, however, some questions raised
24 regarding the validity and reliability of these scores." Tr. 785. She also stated that
25 Plaintiff "would have difficulty with concentration, persistence, and pace currently.
26 This is also the case with adaptation. She did not appear to comprehend or
27 understand all information given," and "[e]motionally she would have difficulty
28 however in being consistent in carrying out tasks in a consistent way." *Id.*

1 The ALJ summarized the opinion as Dr. Orr “stated that the claimant has
2 significant memory impairment. She stated that the claimant is socially isolated
3 and has difficulty with concentration, persistence, pace, and adaptation.” Tr. 25.
4 The ALJ then assigned the opinion little weight stating “Dr. Orr observed poor
5 effect on testing, rendering the evaluation invalid. Also, this opinion is not
6 consistent with the longitudinal medical record, which reflects minimal complaints
7 and treatment for depression.” *Id.*

8 Here, the ALJ’s first finding, that an observation of poor effort on testing
9 rendered the entire evaluation invalid, is not specific and legitimate. Typically, a
10 claimant’s poor effort can provide substantial evidence to discount the *claimant’s*
11 credibility. *See Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002)
12 (discounting the claimant’s credibility for failing to give maximum effort during an
13 examination). However, absent further explanation, it is not a legitimate basis for
14 discounting a physician’s opinion. *See Ogin v. Colvin*, 608 F. App’x 519, 520 (9th
15 Cir. 2015) (finding the ALJ erred in discounting a physician’s opinion based on
16 “lackluster effort” where the physician took a lack of cooperation into account
17 when formulating a conclusion). Therefore, without more explanation
18 demonstrating that Dr. Orr failed to take Plaintiff’s poor effort into account when
19 forming her opinion, this fails to meet the specific and legitimate standard.

20 The ALJ’s conclusion that Dr. Orr’s opinion was not consistent with the
21 longitudinal medical record that reflects minimal complaints and treatment for
22 depression is also not specific and legitimate. First, this reason lacks the
23 specificity required in *Embrey* to meet the specific and legitimate standard. 849
24 F.2d at 421-22 (The ALJ is required to do more than offer his conclusions, he
25 “must set forth his interpretations and explain why they, rather than the doctors’,
26 are correct.”). Here, the ALJ only points to a lack of complaints and treatment for
27 depression without citing to evidence in the record. Furthermore, the Ninth Circuit
28 has held that a failure to seek treatment for a mental health impairment

1 demonstrates poor judgment in seeking rehabilitation and does not mean that the
2 impairment is nonexistent. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.,
3 1996). Therefore, this reason also fails to meet the specific and legitimate
4 standard.

5 **C. Lynne Jahnke, M.D.**

6 At the ALJ hearing, Dr. Jahnke provided a residual functional opinion. Tr.
7 46. Upon cross-examination by Plaintiff’s attorney, she stated that since April of
8 2015 Plaintiff was limited to occasional handling and fingering. Tr. 50. Then,
9 following additional questions by the ALJ, Dr. Jahnke stated “I’ve really never
10 vacillated like this, but I think in this, I think frequent was more appropriate choice
11 for her.” Tr. 51. In the decision, the ALJ gave Dr. Jahnke’s opinion great weight.
12 Tr. 24. Plaintiff argues that the ALJ erred by not taking Dr. Jahnke’s initial
13 limitation to occasionally handling and fingering. ECF No. 13 at 12-13. Here, the
14 case is remanded for the ALJ to further address Dr. Banerjee’s opinion, which
15 includes a limitation to occasional handling and reaching. Therefore, the ALJ will
16 readdress Dr. Jahnke’s opinion on remand.

17 **D. Leslie Postovoit, Ph.D.**

18 Dr. Postovoit reviewed the medical evidence in the record on August 24,
19 2015 as a part of the initial evaluation of the claim. Tr. 76. She opined that
20 Plaintiff was capable of completing simple tasks with episodic disruption of
21 concentration, persistence, and pace but was nonetheless capable of a production
22 rate of work activities within physical limits. Tr. 80. She also opined that Plaintiff
23 was capable of asking simple questions, requesting assistance, accepting
24 instructions, and responding appropriately. *Id.* She further opined Plaintiff would
25 do “best with superficial social contact.” *Id.*

26 The ALJ gave the opinion little weight because “mental status exams
27 showed largely benign findings, which supports a finding of non-severe
28 depression. She put forth minimal effort during the psychological consultative

1 exam, calling into question the validity of any low scores.” Tr. 24. Considering
2 Dr. Postovoit never examined Plaintiff, and her opinion is based on the treatment
3 record available to her at the time of the initial determination, the specific and
4 legitimate standard and clear and convincing standard set forth in *Lester* do not
5 apply. However, since the case is being remanded for the ALJ to properly address
6 the opinion of Dr. Orr and since Dr. Postovoit reviewed Dr. Orr’s opinion when
7 formulating her own opinion, Tr. 72, the ALJ will also readdress Dr. Postovoit’s
8 opinion on remand.

9 **2. Step Two**

10 Plaintiff challenges the ALJ’s step two determination that Plaintiff’s mental
11 health impairments were not severe. ECF No. 13 at 14-15.

12 The step-two analysis is “a de minimis screening device used to dispose of
13 groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
14 impairment is “not severe” if it does not “significantly limit” the ability to conduct
15 “basic work activities.” 20 C.F.R. §§ 404.1522(a), 416.922(a). Basic work
16 activities are “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§
17 404.1522(b), 416.922(b).

18 The ALJ found Plaintiff’s mental health impairments were not severe at step
19 two. Tr. 20. Since the case is being remanded for the ALJ to further address the
20 opinions of Dr. Orr and Dr. Postovoit, the ALJ will make a new step two
21 determination for the period prior to May 20, 2016.

22 **3. Plaintiff’s Symptom Statements**

23 Plaintiff contests the ALJ’s determination that Plaintiff’s symptom
24 statements were unreliable. ECF No. 13 at 15-18.

25 It is generally the province of the ALJ to make determinations regarding the
26 reliability of Plaintiff’s symptom statements, *Andrews*, 53 F.3d at 1039, but the
27 ALJ’s findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
28 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,

1 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
2 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81
3 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what
4 testimony is not credible and what evidence undermines the claimant's
5 complaints." *Lester*, 81 F.3d at 834.

6 The ALJ found Plaintiff's "statements concerning the intensity, persistence,
7 and limiting effects of these symptoms are not fully supported before May 20,
8 2016, for the reasons explained in this decision." Tr. 22. The evaluation of a
9 claimant's symptom statements and their resulting limitations relies, in part, on the
10 assessment of the medical evidence. See 20 C.F.R. §§ 404.1529(c), 416.929(c);
11 S.S.R. 16-3p. Therefore, in light of the case being remanded for the ALJ to
12 readdress the medical source opinions in the file, a new assessment of Plaintiff's
13 subjective symptom statements prior to May 20, 2016 will be necessary.

14 **4. Step Four**

15 Plaintiff challenges the ALJ's determination at steps four and five. ECF No.
16 13 at 18-19. Since the case is being remanded to further address medical source
17 opinions and Plaintiff's symptom statements, a new residual functional capacity
18 determination and step four determination will be required for the period prior to
19 May 20, 2016. The Court notes that the ALJ did not make a step five
20 determination as one was not required following a finding that Plaintiff was able to
21 do her past relevant work prior to May 20, 2016. Tr. 25. Upon remand, the ALJ
22 will make a step five determination if one is required.

23 **REMEDY**

24 The decision whether to remand for further proceedings or reverse and
25 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
26 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
27 where "no useful purpose would be served by further administrative proceedings,
28 or where the record has been thoroughly developed," *Varney v. Secretary of Health*

1 & *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
2 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
3 (9th Cir. 1990); *see also Garrison*, 759 F.3d at 1021 (noting that a district court
4 may abuse its discretion not to remand for benefits when all of these conditions are
5 met). This policy is based on the “need to expedite disability claims.” *Varney*,
6 859 F.2d at 1401. But where there are outstanding issues that must be resolved
7 before a determination can be made, and it is not clear from the record that the ALJ
8 would be required to find a claimant disabled if all the evidence were properly
9 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96
10 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

11 This case is remanded for additional proceedings because it is not clear from
12 the record that the ALJ would be required to find Plaintiff disabled if all the
13 evidence were properly evaluated. Additional proceedings are necessary for the
14 ALJ to further address the medical source opinions in the record, the step two
15 determination, Plaintiff’s symptom statements, and steps four and five prior to May
16 20, 2016. Additionally, the ALJ will supplement the record with any outstanding
17 medical evidence pertaining to the period in question and take testimony from a
18 vocational expert in the event that a step four or five determination is required.

19 CONCLUSION

20 Accordingly, **IT IS ORDERED:**

- 21 1. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is
22 **DENIED**.
- 23 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is
24 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
25 consistent with this order.
- 26 3. Application for attorney fees may be filed by separate motion.

27 The District Court Executive is directed to file this Order and provide a copy
28 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**

1 and the file shall be **CLOSED**.

2 DATED June 15, 2020.



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4 JOHN T. RODGERS
5 UNITED STATES MAGISTRATE JUDGE
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