

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

Feb 23, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER C.,¹

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner
of Social Security,

Defendant.

No. 4:20-CV-5047-EFS

**ORDER GRANTING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND DENYING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.²

Plaintiff Jennifer C. appeals the denial of benefits by the Administrative Law Judge (ALJ). She alleges the ALJ erred by 1) improperly determining that the impairments did not meet or equal Listing 11.02, 2) discounting Plaintiff's symptom reports, 3) failing to properly consider Plaintiff's functional capabilities in

¹ To protect the privacy of the social-security Plaintiff, the Court refers to her by first name and last initial or by "Plaintiff." See LCivR 5.2(c).

² ECF Nos. 13 & 14.

1 the absence of alcohol use, 4) failing to properly consider lay statements, and 5)
2 improperly assessing Plaintiff's residual functional capacity and therefore relying
3 on an incomplete hypothetical at step five. In contrast, Defendant Commissioner of
4 Social Security asks the Court to affirm the ALJ's decision finding Plaintiff not
5 disabled. After reviewing the record and relevant authority, the Court grants
6 Plaintiff's Motion for Summary Judgment, ECF No. 13, and denies the
7 Commissioner's Motion for Summary Judgment, ECF No. 14.

8 I. Five-Step Disability Determination

9 A five-step sequential evaluation process is used to determine whether an
10 adult claimant is disabled.³ Step one assesses whether the claimant is currently
11 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
12 gainful activity, benefits are denied.⁵ If not, the disability-evaluation proceeds to
13 step two.⁶

14 Step two assesses whether the claimant has a medically severe impairment,
15 or combination of impairments, which significantly limits the claimant's physical
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19 ³ 20 C.F.R. § 416.920(a).

20 ⁴ *Id.* § 416.920(a)(4)(i).

21 ⁵ *Id.* § 416.920(b).

22 ⁶ *Id.*
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1 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
2 denied.⁸ If the claimant does, the disability-evaluation proceeds to step three.⁹

3 Step three compares the claimant's impairment(s) to several recognized by
4 the Commissioner to be so severe as to preclude substantial gainful activity.¹⁰ If an
5 impairment meets or equals one of the listed impairments, the claimant is
6 conclusively presumed to be disabled.¹¹ If an impairment does not, the disability-
7 evaluation proceeds to step four.

8 Step four assesses whether an impairment prevents the claimant from
9 performing work she performed in the past by determining the claimant's residual
10 functional capacity (RFC).¹² If the claimant is able to perform prior work, benefits
11 are denied.¹³ If the claimant cannot perform prior work, the disability-evaluation
12 proceeds to step five.

13 Step five assesses whether the claimant can perform other substantial
14 gainful work—work that exists in significant numbers in the national economy—

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16 ⁷ 20 C.F.R. § 416.920(a)(4)(ii).

17 ⁸ *Id.* § 416.920(c).

18 ⁹ *Id.*

19 ¹⁰ *Id.* § 416.920(a)(4)(iii).

20 ¹¹ *Id.* § 416.920(d).

21 ¹² *Id.* § 416.920(a)(4)(iv).

22 ¹³ *Id.*

1 considering the claimant's RFC, age, education, and work experience.¹⁴ If so,
2 benefits are denied. If not, benefits are granted.¹⁵

3 The claimant has the initial burden of establishing entitlement to disability
4 benefits under steps one through four.¹⁶ At step five, the burden shifts to the
5 Commissioner to show that the claimant is not entitled to benefits.¹⁷

6 If there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
7 then determine whether DAA is a material factor contributing to the disability.¹⁸
8 To determine whether DAA is a material factor contributing to the disability, the
9 ALJ evaluates which of the current physical and mental limitations would remain
10 if the claimant stopped using drugs or alcohol and then determines whether any or
11 all of the remaining limitations would be disabling.¹⁹ Social Security claimants
12 may not receive benefits if the remaining limitations without DAA would *not* be
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16 ¹⁴ 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
17 1497-98 (9th Cir. 1984).

18 ¹⁵ 20 C.F.R. § 416.920(g).

19 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

20 ¹⁷ *Id.*

21 ¹⁸ 20 C.F.R. § 416.935(a).

22 ¹⁹ 20 C.F.R. § 416.935(b)(2).
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1 disabling.²⁰ The claimant has the burden of showing that DAA is not a material
2 contributing factor to disability.²¹

3 **II. Factual and Procedural Summary**

4 Plaintiff filed a Title XVI application, alleging a disability onset date of
5 January 1, 2018.²² Her claim was denied initially and upon reconsideration.²³ A
6 video administrative hearing was held before Administrative Law Judge Marie
7 Palachuk.²⁴

8 In denying Plaintiff's disability claim, the ALJ made the following findings:

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- 10 • Step one: Plaintiff had not engaged in substantial gainful activity
11 since January 1, 2018, the alleged onset date;
 - 12 • Step two: Plaintiff had the following medically determinable severe
13 impairments: chronic urinary tract infections, endometriosis, episodic
14 migraines, depressive disorder with anxiety, alcohol abuse disorder,
15 and alcohol induced mood disorder;
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17 ²⁰ 42 U.S.C. §§ 423(d)(2)(C); 20 C.F.R. §§ 404.1535, 416.935(b); *Sousa v. Callahan*,
18 143 F.3d 1240, 1245 (9th Cir. 1998).

19 ²¹ *Parra*, 481 F.3d at 748.

20 ²² AR 93.

21 ²³ AR 106 & 123.

22 ²⁴ AR 40-77.

1 • Step three: without alcohol use, Plaintiff did not have an impairment
2 or combination of impairments that met or medically equaled the
3 severity of one of the listed impairments;

4 • RFC: Plaintiff had the RFC to perform medium work, if Plaintiff
5 stopped alcohol use, with the following limitations:

6 [Plaintiff] is unable to understand, remember, and comprehend at
7 least simple, repetitive tasks; she is able to maintain concentration,
8 persistence, and pace for two hour intervals between regularly
9 scheduled breaks; she can adapt to occasional and routine changes;
 she can make only simple routine judgments; she cannot perform at a
 fast-paced production rate of pace.

10 • Step four: Plaintiff was not capable of performing past relevant work;
11 and

12 • Step five: considering Plaintiff's RFC, age, education, and work
13 history, Plaintiff could perform work that existed in significant
14 numbers in the national economy, such as laundry worker II, order
15 filler, and lab equipment cleaner.²⁵

16 When assessing the medical-opinion evidence, the ALJ did not defer or give
17 any specific evidentiary weight, including controlling weight, to any prior
18 administrative medical finding or medical opinion.²⁶ The ALJ found the opinion of
19 testifying expert Jay Toews, Ed.D. persuasive, the opinions of state agency

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21 ²⁵ AR 19-26.

22 ²⁶ AR 21 & 24-25.

1 consultants Norman Staley, M.D. and J.D. Fitter, M.D. somewhat persuasive, and
2 the opinions of state agency psychological consultants Michael Regets, Ph.D. and
3 Shawn Horn, Psy.D. unpersuasive.²⁷

4 The ALJ also found that Plaintiff's medically determinable impairments
5 could reasonably be expected to cause some of the alleged symptoms, but that her
6 statements concerning the intensity, persistence, and limiting effects of those
7 symptoms were not entirely consistent with the medical evidence and other
8 evidence in the record.²⁸

9 Plaintiff requested review of the ALJ's decision by the Appeals Council,
10 which denied review.²⁹ Plaintiff timely appealed to this Court.

11 III. Standard of Review

12 A district court's review of the Commissioner's final decision is limited.³⁰ The
13 Commissioner's decision is set aside "only if it is not supported by substantial
14 evidence or is based on legal error."³¹ Substantial evidence is "more than a mere
15 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
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18 ²⁷ AR 21 & 25.

19 ²⁸ AR 23-25.

20 ²⁹ AR 1.

21 ³⁰ 42 U.S.C. § 405(g).

22 ³¹ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).
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1 mind might accept as adequate to support a conclusion.”³² Moreover, because it is
2 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
3 upholds the ALJ’s findings “if they are supported by inferences reasonably drawn
4 from the record.”³³ The Court considers the entire record as a whole.³⁴

5 Further, the Court may not reverse an ALJ decision due to a harmless
6 error.³⁵ An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
7 nondisability determination.”³⁶ The party appealing the ALJ’s decision generally
8 bears the burden of establishing harm.³⁷

12 ³² *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

13 ³³ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

14 ³⁴ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must
15 consider the entire record as whole, weighing both the evidence that supports and
16 the evidence that detracts from the Commissioner’s conclusion,” not simply the
17 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th
18 Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such
19 evidence was not considered[.]”).

20 ³⁵ *Molina*, 674 F.3d at 1111.

21 ³⁶ *Id.* at 1115 (quotation and citation omitted).

22 ³⁷ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

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IV. Analysis

A. Step Three (Listings): Plaintiff establishes consequential error.

Plaintiff contends the ALJ erred by finding that Plaintiff's impairments did not meet or medically equal Listing 11.02, singly or in combination.

While Listing 11.02 addresses seizures, it is the most closely analogous listing for migraines.³⁸ Listing 11.02 requires that a migraine headache be "documented by detailed description of a typical [migraine headache], including all associated phenomena."³⁹ To be of equal severity and duration, Listing 11.02B requires the migraines occur at least once a week for at least three consecutive months, despite compliance with treatment. Listing 11.02D requires the migraines occur at least once every two weeks for at least three consecutive months, despite adherence to prescribed treatment, and the claimant must have a marked limitation in physical functioning or one of the four areas of mental functioning.

A claimant bears the burden of producing medical evidence that establishes all of the requisite medical findings that her impairments meet or equal a particular Listing.⁴⁰ If the claimant is alleging equivalency to a Listing, the claimant must proffer a theory, plausible or otherwise, as to how her combined

³⁸ HALLEX DI 24505.015(B)(7)(B) (example 2).

³⁹ 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 11.02.

⁴⁰ See *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

1 impairments equal a Listing.⁴¹ Though a claimant’s burden to establish, “[a]n ALJ
2 must evaluate the relevant evidence before concluding that a claimant’s
3 impairments do not meet or equal a listed impairment. A boilerplate finding is
4 insufficient to support a conclusion that a claimant’s impairment does not do so.”⁴²
5 However the ALJ is not required to state why a claimant fails to satisfy every
6 criteria of the Listing if the ALJ adequately summarize and evaluates the
7 evidence.⁴³

8 Here, the ALJ found that Plaintiff’s migraines were a severe impairment at
9 step two of the sequential process (with and without alcohol use), but nonetheless
10 concluded that they neither met or equaled a listed impairment, stating only:
11 “There is no listing for endometriosis, migraines or urinary tract infections, and
12 [Plaintiff’s] impairments do not medically equal any other impairment. In making
13 this finding, the [ALJ] considered listing 11.02.”⁴⁴ This is the only time the ALJ
14 discussed Plaintiff’s migraines and related symptoms.

15 Plaintiff submits that the medical record demonstrates that her migraines
16 meet or equal Listing 11.02, “as she suffers from migraines occurring at least once
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19 ⁴¹ See *Lewis*, 236 F.3d at 514.

20 ⁴² *Id.* at 512.

21 ⁴³ See *Gonzalezi*, 914 F.2d at 1200-01; *Lewis*, 236 F.3d at 512.

22 ⁴⁴ AR 21.
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1 a week for at least three consecutive months, despite compliance with treatment.”⁴⁵

2 The Commissioner argues Plaintiff “proffers no plausible theory as to how her
3 impairments satisfied the specific criteria for any given Listing” but rather “simply
4 points to records which outlined her subjective report of headaches.”⁴⁶ The
5 Commissioner also argues the ALJ found Plaintiff’s subjective report to be
6 inconsistent with the evidence of record.⁴⁷

7 Here, the ALJ does not discuss Plaintiff’s reported complaints or objective
8 medical evidence associated with her migraines. Rather, when finding Plaintiff’s
9 symptoms inconsistent with the objective medical evidence, Plaintiff’s statements,
10 noncompliance with treatment, her weak work history, and activities of daily
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14 ⁴⁵ ECF No. 13 at 12 (referencing AR 602-605 (2/20/18: Plaintiff seen for worsening
15 headaches, almost daily headaches, occurring 20 out of 30 days over the last
16 month, with no relief from medication); AR 574 (4/11/18: Plaintiff reported
17 headaches occurring more than 50% of the days, nausea, photophobia, rare
18 vomiting, and occasionally seeing spots or halos of colors when most severe); AR
19 492 (8/21/18: Plaintiff reported frequent migraine headaches, occurring almost
20 daily); AR 457 (9/27/18: Plaintiff received Botox for refractory headaches)).

21 ⁴⁶ ECF No. 14 at 15.

22 ⁴⁷ *Id.* (citing AR 23).

1 living, the ALJ only discussed evidence related to Plaintiff's vomiting in relation to
2 inconsistency with her weight gain, and Plaintiff's mental impairments.⁴⁸

3 On this record, the Court is unable to meaningfully review the ALJ's Listing
4 denial. The record shows Plaintiff sought treatment for her migraines on multiple
5 occasions with reports of severe pain, proceeded by aurora consisting of blurry
6 vision and lights flashing, dizziness, vision problems, and photophobia, occurring at
7 least once a week.⁴⁹ The record also shows Plaintiff tried multiple medications to
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9 ⁴⁸ AR 23-25.

10 ⁴⁹ AR 391(1/30/18: visited clinic for headache, most severe pain is 9 out of 10,
11 reports interfering with work, headaches are usually preceded by an aurora
12 consisting of blurry vision and lights flashing; neurologic symptoms include
13 dizziness, vision problems and worsening school/work performance, prescribed
14 Toradol at clinic because pain 9/10 and interfering with work and Naproxen for
15 patient to take along with Imitrex to help with acute migraine symptoms); AR 395
16 & 1935 (2/2/18: positive for activity change, photophobia, pain and itching with
17 eyes, positive for nausea and vomiting, referral for Botox); AR 602 (2/20/18:
18 Plaintiff being seen at request of Marja Adair, M.D. for evaluation and
19 management of migraines); AR 574 (4/11/18: visit neurology with complaints of
20 headaches); AR 541 (6/28/18: emergency room visit for dysuria and headache); &
21 AR 492 (8/21/18: reports migraines 20/30 days over the last month, symptoms
22 include nausea, rare vomiting, photophobia, seeing spots and colors when migraine
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1 help with migraine pain (Gabapentin, Sumatriptan, Prophylaxis, etc.), before
2 trying Botox injections.⁵⁰

3 Because the record shows complaints of migraine headaches occurring at
4 least once a week for multiple months, the ALJ should have discussed Plaintiff's
5 migraine headaches, in any part of her decision, in determining Plaintiff's
6 impairments did not meet Listing 11.02.⁵¹ Remand is needed to properly consider
7 Plaintiff's migraines.

8 **B. Plaintiff's Symptom Reports: The ALJ is to reconsider on remand.**

9 Plaintiff argues the ALJ failed to provide valid reasons for rejecting her
10 symptom reports. Here, the ALJ found Plaintiff's statements concerning the
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12 most severe); *see also* AR 363 & 391 (physical exam: tenderness of palpation of
13 bilateral forehead, head (left side) tonsillar adenopathy present).

14 ⁵⁰ *See e.g.*, AR 385, 394 (prescribed/taking Gabapentin); AR 390,400
15 (prescribed/taking Sumatriptan); AR 391 (prescribed/taking Prophylaxis); AR 462,
16 484, 491, 512, & 540 (taking Rizatriptan for migraines); & AR 457 (received Botox
17 injection for refractory headaches).

18 ⁵¹ *See Lewis v. Apfel*, 236 F.3d 503, 512, 514 (9th Cir. 2001) (upholding a step-three
19 finding when the ALJ stated that the claimant did not meet a listing and found
20 that the claimant's epilepsy was controlled with treatment when the ALJ did not
21 recite the evidence supporting his conclusion under the "Findings" section of his
22 decision but discussed it elsewhere).

1 intensity, persistence, and limiting effects of her symptoms inconsistent with the
2 objective medical evidence, Plaintiff's own statements, noncompliance with
3 treatment, weak work history, and activities of daily living.⁵²

4 The ALJ's evaluation of Plaintiff's symptom claims and the resulting
5 limitations fails to address many of Plaintiff's limitations. Having determined a
6 remand is necessary to readdress Plaintiff's migraines under Listing 11.02, any
7 reevaluation must necessarily reassess Plaintiff's subjective symptom claims. As to
8 Plaintiff's reports of "binge drinking," the ALJ must more meaningfully explain
9 how Plaintiff's "binge drinking" is inconsistent with Plaintiff's reported back pain,
10 abdominal pain, vomiting, nausea, and migraine headaches when Plaintiff reported
11 not drinking. On remand, the ALJ must carefully reevaluate Plaintiff's symptom
12 claims in the context of the entire record.⁵³

13 **C. Other Steps: The ALJ must reevaluate.**

14 Plaintiff also argues the ALJ inadequately evaluated Plaintiff's functional
15 capabilities in the absence of alcohol use, improperly rejected lay witness
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19 ⁵² AR 23-25.

20 ⁵³ See *Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because we remand the
21 case to the ALJ for the reasons stated, we decline to reach [plaintiff's] alternative
22 ground for remand.").

1 testimony,⁵⁴ and erred at step five. Because the ALJ's evaluation of Plaintiff's
2 functional activities in the absence of alcohol use and RFC were based on an
3 erroneous weighing of Plaintiff's reported physical limitations, the ALJ on remand
4 is to reevaluate if the limitations remaining after Plaintiff stopped using alcohol
5 are disabling, reassess Plaintiff's symptom reports and lay witness testimony, and
6 proceed with a new step-five analysis.

7 **D. Remand for Further Proceedings**

8 Plaintiff submits a remand for payment of benefits is warranted. The
9 decision whether to remand a case for additional evidence, or simply to award
10 benefits, is within the discretion of the court.”⁵⁵ When the court reverses an ALJ's
11 decision for error, the court “ordinarily must remand to the agency for further
12 proceedings.”⁵⁶

15 ⁵⁴ The ALJ did not discuss the third-party function report provided by Plaintiff's
16 friend.

17 ⁵⁵ *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,
18 761 F.2d 530 (9th Cir. 1985)).

19 ⁵⁶ *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379
20 F.3d 587, 595 (9th Cir. 2004) (“[T]he proper course, except in rare circumstances, is
21 to remand to the agency for additional investigation or explanation”); *Treichler v.*
22 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

1 The Court finds that further development is necessary for a proper disability
2 determination. Here, it is not clear what, if any, additional limitations are to be
3 added to the RFC, if Plaintiff does not satisfy a listing. Therefore, the ALJ should
4 consider whether testimony should be received from a medical expert pertaining to
5 Plaintiff's impairments, and then consider any additional evidence presented, and
6 make findings at each of the five steps of the sequential evaluation process.

7 **V. Conclusion**

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

- 9 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
10 **GRANTED.**
- 11 2. The Commissioner's Motion for Summary Judgment, **ECF No. 14**, is
12 **DENIED.**
- 13 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
14 **REVERSING** and **REMANDING** the matter to the Commissioner of
15 Social Security for further proceedings consistent with this
16 recommendation pursuant to sentence four of 42 U.S.C. § 405(g).
- 17 4. The case shall be **CLOSED.**

18 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and
19 provide copies to all counsel.

20 **DATED** this 23rd day of February 2021.

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23 EDWARD F. SHEA
Senior United States District Judge