

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

DENA M.,<sup>1</sup>

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner  
of Social Security,

Defendant.

No. 4:20-CV-05057-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.<sup>2</sup>

Plaintiff Dena M. appeals the denial of benefits by the Administrative Law Judge (ALJ). She alleges the ALJ erred by 1) improperly weighing the medical opinions, 2) discounting Plaintiff's symptom reports, and 3) improperly determining there were significant number of jobs Plaintiff could perform, erring at step five. In

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<sup>1</sup> 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).

<sup>2</sup> ECF Nos. 9 & 13.

1 contrast, Defendant Commissioner of Social Security asks the Court to affirm the  
2 ALJ's decision finding Plaintiff not disabled. After reviewing the record and  
3 relevant authority, the Court grants Plaintiff's Motion for Summary Judgment,  
4 ECF No. 9, and denies the Commissioner's Motion for Summary Judgment, ECF  
5 No. 13.

### 6 I. Five-Step Disability Determination

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

12 Step two assesses whether the claimant has a medically severe impairment,  
13 or combination of impairments, which significantly limits the claimant's physical  
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19 <sup>3</sup> 20 C.F.R. §§ 404.1520(a), 416.920(a).

20 <sup>4</sup> *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

21 <sup>5</sup> *Id.* §§ 404.1520(b), 416.920(b).

22 <sup>6</sup> *Id.* §§ 404.1520(b), 416.920(b).

1 or mental ability to do basic work activities.<sup>7</sup> If the claimant does not, benefits are  
2 denied. <sup>8</sup> If the claimant does, the disability-evaluation proceeds to step three.<sup>9</sup>

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.<sup>10</sup> If an  
5 impairment meets or equals one of the listed impairments, the claimant is  
6 conclusively presumed to be disabled.<sup>11</sup> 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).<sup>12</sup> If the claimant is able to perform prior work, benefits  
11 are denied.<sup>13</sup> If the claimant cannot perform prior work, the disability-evaluation  
12 proceeds to step five.

13 Step five, the final step, assesses whether the claimant can perform other  
14 substantial gainful work—work that exists in significant numbers in the national  
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16 <sup>7</sup> 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 <sup>8</sup> *Id.* §§ 404.1520(c), 416.920(c).

18 <sup>9</sup> *Id.* §§ 404.1520(c), 416.920(c).

19 <sup>10</sup> *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

20 <sup>11</sup> *Id.* §§ 404.1520(d), 416.920(d).

21 <sup>12</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

22 <sup>13</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

1 economy—considering the claimant’s RFC, age, education, and work experience.<sup>14</sup>

2 If so, benefits are denied. If not, benefits are granted.<sup>15</sup>

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

## 6 II. Factual and Procedural Summary

7 Plaintiff filed Title II and XVI applications, alleging a disability onset date of  
8 January 28, 2014.<sup>18</sup> Her claims were denied initially and upon reconsideration.<sup>19</sup>  
9 Plaintiff appealed, and the Eastern District of Washington reversed and remanded  
10 for a new hearing. A second administrative hearing was held before Administrative  
11 Law Judge Caroline Siderius.<sup>20</sup>

12 In denying Plaintiff’s disability claims, the ALJ made the following findings:  
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15 <sup>14</sup> 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
16 1497-98 (9th Cir. 1984).

17 <sup>15</sup> 20 C.F.R. §§ 404.1520(g), 416.920(g).

18 <sup>16</sup> *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

19 <sup>17</sup> *Id.*

20 <sup>18</sup> AR 287 & 289.

21 <sup>19</sup> AR 114, 120, 137, & 153.

22 <sup>20</sup> AR 1167-230.  
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- 1           • Plaintiff met the insured status requirements through December 31,  
2           2019;
- 3           • Step one: Plaintiff had not engaged in substantial gainful activity  
4           since January 28, 2014, the alleged onset date;
- 5           • Step two: Plaintiff had the following medically determinable severe  
6           impairments: obesity, fibromyalgia, asthma, tendinitis of the bilateral  
7           shoulders, cervical degenerative joint disease, and diabetes;
- 8           • Step three: Plaintiff did not have an impairment or combination of  
9           impairments that met or medically equaled the severity of one of the  
10          listed impairments;
- 11          • RFC: Plaintiff had the RFC to perform sedentary work with the  
12          following limitations:  
13          [Plaintiff] can sit up to six hours, and stand or walk up to six  
14          hours, of an eight-hour workday. [Plaintiff] requires a sit/stand  
15          option. [Plaintiff] can occasionally climb ramps and stairs, but  
16          never ladders, ropes, or scaffolds. [Plaintiff] can never balance,  
17          and can occasionally stoop, crawl, crouch, and kneel. [Plaintiff]  
18          can occasionally reach and lift overhead with either arm.  
19          [Plaintiff] must avoid exposure to odors, dusts, fumes, gasses,  
20          and environment irritants. [Plaintiff] cannot work at heights,  
21          and cannot operate heavy machinery/equipment. [Plaintiff] is  
22          limited to no more than ordinary office-level lighting or noise.  
23          She can perform simple, routine tasks with no detailed work.
- Step four: Plaintiff was not capable of performing past relevant work;  
          and
- Step five: considering Plaintiff's RFC, age, education, and work  
          history, Plaintiff could perform work that existed in significant

1 numbers in the national economy, such as touch-up screener, table  
2 worker, and gauger.<sup>21</sup>

3 When assessing the medical-opinion evidence, the ALJ gave:

- 4 • great weight to the opinions of testifying experts Robert Kidder, M.D.  
5 and Jay Toews, Ed.D;
- 6 • partial weight to the examining opinion of William Drenguis, M.D.;
- 7 • some weight to the opinion of State agency psychological consultant  
8 Renee Eisenhower, Ph.D.;
- 9 • little weight to the examining opinion of Patrick Reilly, Ph.D. and  
10 treating opinions of Jung Lim, M.D. and Paval Gaba, M.D.; and
- 11 • no weight to the opinions that predated Plaintiff's filing date.<sup>22</sup>

12 The ALJ also found that Plaintiff's medically determinable impairments  
13 could reasonably be expected to cause some of the alleged symptoms, but that her  
14 statements concerning the intensity, persistence, and limiting effects of those  
15 symptoms were not entirely consistent with the medical evidence and other  
16 evidence in the record.<sup>23</sup>

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20 <sup>21</sup> AR 1091-105.

21 <sup>22</sup> AR 1099-102.

22 <sup>23</sup> AR 1097-99.

1 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
2 which denied review.<sup>24</sup> Plaintiff timely appealed to this Court.<sup>25</sup>

### 3 III. Standard of Review

4 A district court's review of the Commissioner's final decision is limited.<sup>26</sup> The  
5 Commissioner's decision is set aside "only if it is not supported by substantial  
6 evidence or is based on legal error."<sup>27</sup> Substantial evidence is "more than a mere  
7 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
8 mind might accept as adequate to support a conclusion."<sup>28</sup> Moreover, because it is  
9 the role of the ALJ and not the Court to weigh conflicting evidence, the Court  
10 upholds the ALJ's findings "if they are supported by inferences reasonably drawn  
11 from the record."<sup>29</sup> The Court considers the entire record as a whole.<sup>30</sup>

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13 <sup>24</sup> AR 1.

14 <sup>25</sup> See 20 C.F.R. §§ 404.981 & 422.201.

15 <sup>26</sup> 42 U.S.C. § 405(g).

16 <sup>27</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

17 <sup>28</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

18 <sup>29</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

19 <sup>30</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must  
20 consider the entire record as whole, weighing both the evidence that supports and  
21 the evidence that detracts from the Commissioner's conclusion," not simply the  
22 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th  
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1 Further, the Court may not reverse an ALJ decision due to a harmless  
2 error.<sup>31</sup> An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.”<sup>32</sup> The party appealing the ALJ’s decision generally  
4 bears the burden of establishing harm.<sup>33</sup>

#### 5 IV. Analysis

##### 6 A. Medical Opinions: Plaintiff establishes consequential error.

7 Plaintiff challenges the ALJ’s assignment of little weight to Dr. Drenguis’,  
8 Dr. Gaba’s, and Dr. Lim’s opinions. The Court agrees the ALJ erred in her  
9 weighing of Dr. Drenguis’ medical opinion because it was not meaningfully  
10 explained and therefore the Court is unable to assess whether the ALJ’s findings  
11 are supported by substantial evidence. However, Plaintiff fails to establish that the  
12 ALJ’s weighing of the Dr. Gaba’s and Dr. Lim’s medical opinions were erroneous.

##### 13 1. Standard

14 The weighing of medical opinions is dependent upon the nature of the  
15 medical relationship, i.e., 1) a treating physician, 2) an examining physician who  
16 examines but did not treat the claimant, and 3) a reviewing physician who neither

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Cir. 1998) (“An ALJ's failure to cite specific evidence does not indicate that such  
evidence was not considered[.]”).

<sup>31</sup> *Molina*, 674 F.3d at 1111.

<sup>32</sup> *Id.* at 1115 (quotation and citation omitted).

<sup>33</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).



1 treated nor examined the claimant.<sup>34</sup> Generally, more weight is given to the  
2 opinion of a treating physician than to an examining physician’s opinion and both  
3 treating and examining opinions are to be given more weight than the opinion of a  
4 reviewing physician.<sup>35</sup>

5 When a treating physician’s or evaluating physician’s opinion is not  
6 contradicted by another physician, it may be rejected only for “clear and  
7 convincing” reasons, and when it is contradicted, it may be rejected for “specific  
8 and legitimate reasons” supported by substantial evidence.<sup>36</sup> A reviewing  
9 physician’s opinion may be rejected for specific and legitimate reasons supported by  
10 substantial evidence, and the opinion of an “other” medical source<sup>37</sup> may be  
11 rejected for specific and germane reasons supported by substantial evidence.<sup>38</sup> The  
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13 <sup>34</sup> *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

14 <sup>35</sup> *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

15 <sup>36</sup> *Lester*, 81 F.3d at 830.

16 <sup>37</sup> *See* 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable  
17 medical sources are licensed physicians, licensed or certified psychologists, licensed  
18 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed  
19 audiologists, licensed advanced practice registered nurses, and licensed physician  
20 assistants within their scope of practice—all other medical providers are “other”  
21 medical sources.).

22 <sup>38</sup> *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

1 opinion of a reviewing physician serves as substantial evidence if it is supported by  
2 other independent evidence in the record.<sup>39</sup>

3           2.     Dr. Drenguis

4           On May 5, 2015, Dr. Drenguis performed a physical evaluation of Plaintiff.<sup>40</sup>  
5 Dr. Drenguis diagnosed Plaintiff with fibromyalgia, left shoulder internal  
6 derangement, diabetes mellitus, and a history of dizzy spells, and opined that  
7 Plaintiff was limited in the following activities: standing, walking, and sitting up to  
8 4 hours, with normal breaks; lifting and carrying up to 20 pounds occasionally and  
9 10 pounds frequently; occasionally climb, balance, stoop, kneel, crouch, and crawl,  
10 and frequently reach, handle, finger, and feel with her upper right extremity; and  
11 occasionally reach and frequently handle, finger, and feel with her left upper  
12 extremity; and limited in working around heights and heavy machinery.<sup>41</sup>

13           The ALJ gave partial weight to Dr. Drenguis’ opinion and did “not see any  
14 basis in his objective findings to support manipulation limitations other than on  
15 the [Plaintiff’s] ability to reach on the left.” Plaintiff argues the ALJ gave full  
16 weight to Dr. Drenguis opinion that Plaintiff “could only ‘occasionally reach’ with  
17 ‘her left upper extremity’” and thus the ALJ found that the objective medical  
18 evidence supported a left reaching limitation, reaching above the shoulder and in  
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20 <sup>39</sup> *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

21 <sup>40</sup> AR 715-19.

22 <sup>41</sup> AR 719.

1 front and to the side of the body.<sup>42</sup> The Commissioner argued that the ALJ gave the  
2 opinion only partial weight and was not required to adopt any limitations she  
3 found unsupported in the record, and that even though the ALJ's discussion was  
4 not entirely clear regarding reaching, the ALJ's reasoning can be inferred from the  
5 four corners of the ALJ's decision, which is that the ALJ only found Dr. Drenguis'  
6 opinion supported to the extent that Plaintiff was limited to occasional reaching  
7 *above* her left shoulder.<sup>43</sup>

8 On this record, it is unclear what limitations the ALJ intended regarding  
9 Plaintiff's upper extremity left reaching limitations. The RFC allows Plaintiff to  
10 "occasionally reach and lift overhead with either arm."<sup>44</sup> Yet, the ALJ did not  
11 explain why the RFC limited only overhead reaching (as compared to reaching to  
12 the side and front) when Dr. Drenguis seemingly restricted Plaintiff to occasional  
13 reaching *in toto* (overhead, to the front, and to the side). As the testifying medical  
14 expert Dr. Wayne Kidder<sup>45</sup> testified, upper extremity lifting limitations are often

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16 <sup>42</sup> ECF No. 9 at 6 (citing AR 719).

17 <sup>43</sup> ECF No. 13 at 3-4.

18 <sup>44</sup> AR 1096.

19 <sup>45</sup> Dr. Kidder opined Plaintiff could occasionally lift above her shoulder bilaterally  
20 with limited weight. AR 1178. When asked why, Dr. Kidder limited Plaintiff to  
21 occasionally reaching overhead and not in all directions, he explained that often,  
22 people with tendonitis and degenerative disease have the most problems with  
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1 noted as abduction limitations or as 90 degree limitations.<sup>46</sup> Dr. Drenguis' physical  
2 examination of Plaintiff's shoulder revealed abduction right 180, left 190;  
3 adduction right 20, left 10; flexion right 180, left 90; and extension right 20, left  
4 10.<sup>47</sup> Thus, considering this testimony by Dr. Kidder and Dr. Drenguis' physical  
5 examination findings, it seems that Dr. Drenguis' limited Plaintiff to not only  
6 occasional overhead reaching but *all* reaching. Yet, while the ALJ gave great  
7 weight to Dr. Drenguis' reaching opinion, the RFC only restricted overhead  
8 reaching.

9           This discrepancy is consequential because the vocational expert testified  
10 that there were no sedentary jobs available if Plaintiff could only reach  
11 occasionally.<sup>48</sup> Without more explanation by the ALJ, it is unclear whether the  
12 RFC that "Plaintiff can occasionally reach and lift overhead with either arm"

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14 lifting above their shoulders and often are not symptomatic when lifting an object  
15 in front of them. AR 1183. However, Dr. Kidder did not base this opinion on any  
16 particular examination of Plaintiff that showed only problems reaching overhead,  
17 but rather a general understanding of tendonitis and degenerative disease. *Id.*

18 <sup>46</sup> AR 1184.

19 <sup>47</sup> AR 718. Dr. Drenguis' physical examination also revealed that Plaintiff's "[l]eft  
20 shoulder is diffusely tender with marked tenderness over the supraspinatus and  
21 biceps tendons."

22 <sup>48</sup> AR 1211.  
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1 included Dr. Drenguis' opinion about Plaintiff's restricted ability to reach on the  
2 left.<sup>49</sup>

3 3. Dr. Lim

4 On May 15, 2014, Dr. Lim completed a WorkFirst Form for Plaintiff.<sup>50</sup> Dr.  
5 Lim diagnosed Plaintiff with cognitive impairment with memory loss, dizziness,  
6 and gait instability and opined Plaintiff would have difficulty remembering and  
7 multi-tasking, frequent confusion/disorientation, difficulty walking and  
8 maintaining balance and severely limited in lifting and carrying. Dr. Lim opined  
9 these limitations would last for six months.

10 The ALJ discounted Dr. Lim's opinion because 1) it was check-box form with  
11 little meaningful explanation and 2) inconsistent with the longitudinal medical  
12 record.<sup>51</sup>

13 As to the ALJ's findings that Dr. Lim's check-box opinion was not explained,  
14 an ALJ may permissibly reject opinions that do not offer any explanation for their  
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20 <sup>49</sup> AR 1096 & 1100.

21 <sup>50</sup> AR 503-05.

22 <sup>51</sup> AR 1101.

1 limitations.<sup>52</sup> Individual medical opinions are preferred over check-box reports.<sup>53</sup>  
2 An ALJ may permissibly reject opinions that do not offer any explanation for their  
3 limitations.<sup>54</sup> However, if treatment notes are consistent with the opinion, a check-  
4 box opinion may not automatically be rejected. Here, the ALJ rationally found that  
5 Dr. Lim's limitations were not explained. Dr. Lim provided no explanation for his  
6 opined limitations nor was his diagnosis supported by testing or lab reports.<sup>55</sup> The  
7 ALJ acknowledged that Dr. Lim appeared to treat Plaintiff as a neurologist in the  
8 past but noted none of Dr. Lim's treatment notes appeared in the record. This was  
9 a specific and legitimate reason supported by substantial evidence to discount Dr.  
10 Lim's opinion.

11 The ALJ's finding that Dr. Lim's gait instability opinion was inconsistent  
12 with the longitudinal medical record is rational and supported by substantial  
13 evidence. Whether a medical opinion is consistent with the longitudinal record is a  
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17 <sup>52</sup> *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)  
18 (recognizing that a medical opinion may be rejected if it is conclusory or  
19 inadequately supported); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).

20 <sup>53</sup> *Bray*, 554 F.3d at 1228; *Crane*, 76 F.3d at 253.

21 <sup>54</sup> *Bray* 554 F.3d at 1228(; *Crane*, 76 F.3d at 253.

22 <sup>55</sup> AR 503.  
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1 factor for the ALJ to consider.<sup>56</sup> The ALJ cited to multiple medical records  
2 throughout her opinion showing Plaintiff often presented with a normal gait.<sup>57</sup>  
3 That the longitudinal medical record was inconsistent with Dr. Lim’s opinion was a  
4 specific and legitimate reason to discount the opinion.

5 Lastly, temporary limitations are not enough to meet the durational  
6 requirement for a finding of disability.<sup>58</sup> The ALJ noted that Dr. Lim’s assessed  
7 limitations were limited to six months. Thus, any error in the ALJ discounting Dr.  
8 Lim’s opinion was harmless.

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13 <sup>56</sup> See *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007) (recognizing that  
14 the ALJ is to consider the consistency of the medical opinion with the record as a  
15 whole).

16 <sup>57</sup> See e.g., AR 530, 550, 554, 557, 561, 565, 572, 581, 592, 612, 632, 711, 717, 761,  
17 797, 820, 859, 1423, 1433, 1440, 1443, 1451, 1502, & 1507.

18 <sup>58</sup> 20 C.F.R. § 416.905(a) (requiring a claimant’s impairment to be expected to last  
19 for a continuous period of not less than twelve months); 42 U.S.C. § 423(d)(1)(A)  
20 (same); *Carmickle*, 533 F.3d at 1165 (affirming the ALJ’s finding that treating  
21 physicians’ short-term excuse from work was not indicative of “claimant’s long-  
22 term functioning”).

1           4.     Dr. Gaba

2           Dr. Gaba began treating Plaintiff in 2013. On July 31, 2014, Dr. Gaba  
3 completed a WorkFirst Form for Plaintiff.<sup>59</sup> Dr. Gaba diagnosed Plaintiff with  
4 dizziness, cognitive impairment, memory issues, visual floaters/blurry vision,  
5 numbing and tingling intermittent, and optic neuritis diagnosed by an  
6 ophthalmologist. Dr. Gaba opined Plaintiff would be unable to lift, stand, sit,  
7 concentrate, or bend over. Dr. Gaba opined these limitations would exist for three  
8 months, pending an evaluation diagnosis.

9           The ALJ discounted Dr. Gaba's opinion because it was inconsistent with his  
10 treatment notes from the day of the evaluation and was check-box form with little  
11 meaningful explanation.

12           As to the ALJ's findings that Dr. Gaba's check-box opinion was not explained  
13 and not supported by treatment notes, an ALJ may permissibly reject opinions that  
14 do not offer any explanation for their limitations.<sup>60</sup> Dr. Gaba provided no  
15 explanation as to his opined limitations and was "unsure about the exact cause" of  
16 Plaintiff's symptoms.<sup>61</sup> However, Dr. Gaba was Plaintiff's primary care physician.

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18 <sup>59</sup> AR 507-09.

19 <sup>60</sup> *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)  
20 (recognizing that a medical opinion may be rejected if it is conclusory or  
21 inadequately supported); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).

22 <sup>61</sup> AR 508.  
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1 The extent to which a medical source is “familiar with the other information in [the  
2 claimant’s] case record” is relevant in assessing the weight of that source’s medical  
3 opinion.<sup>62</sup> The record contains many of Dr. Gaba’s treatment notes discussing  
4 Plaintiff’s symptoms and physical assessments.<sup>63</sup> Dr. Gaba also reviewed multiple  
5 treatment notes from specialist he referred Plaintiff to, including a  
6 gastroenterologist and rheumatologist.<sup>64</sup> Outside of Dr. Gaba’s treatment notes  
7 from the day he filled out the WorkFirst form, the ALJ does not discuss Dr. Gaba’s  
8 other numerous treatment notes when discounting his opinion. This is not a  
9 specific and legitimate reason to dismiss Dr. Gaba’s opinion.

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11 <sup>62</sup> 20 C.F.R. §§ 404.1527(c), 416.927(c).

12 <sup>63</sup> See e.g., AR 496 (The brain is remarkable for bihemipheric subcortical and deep  
13 white matter foci . . . These white matter foci are abnormal, but nonspecific. These  
14 can be seen in the setting of migraine.”); AR 557 (“discussed referral to  
15 rheumatology if labs concerning”); AR 569 (“anxiety uncontrolled, increase  
16 Wellbutrin to 300 mg”), AR 736 (“Positive for myalgias, arthralgias, stiffness and  
17 neck pain. Negative for back pain, joint swelling, gout, and neck stiffness. Left  
18 shoulder pain.”); & AR 740 (“Left shoulder: [Plaintiff] exhibits crepitus . . . normal  
19 range of motion (with extension and abduction more than 30 degrees. Empty can  
20 test positive), no tenderness and no bony tenderness (tenderness noted in anterior  
21 and lateral aspect of left shoulder.”)).

22 <sup>64</sup> AR 525-37.

1           However, temporary limitations are not enough to meet the durational  
2 requirement for a finding of disability.<sup>65</sup> The ALJ noted that Dr. Gaba’s assessed  
3 limitations were limited to three months. Thus, any error in the ALJ discounting  
4 Dr. Gaba’s opinion was harmless.

5 **B. Plaintiff’s Symptom Reports: Plaintiff establishes consequential**  
6 **error.**

7           Plaintiff argues the ALJ failed to provide valid reasons for rejecting her  
8 symptom reports. When examining a claimant’s symptom reports, the ALJ must  
9 make a two-step inquiry. “First, the ALJ must determine whether there is objective  
10 medical evidence of an underlying impairment which could reasonably be expected  
11 to produce the pain or other symptoms alleged.”<sup>66</sup> Second, “[i]f the claimant meets  
12 the first test and there is no evidence of malingering, the ALJ can only reject the  
13 claimant’s testimony about the severity of the symptoms if [the ALJ] gives ‘specific,  
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17 <sup>65</sup> 20 C.F.R. § 416.905(a) (requiring a claimant’s impairment to be expected to last  
18 for a continuous period of not less than twelve months); 42 U.S.C. § 423(d)(1)(A)  
19 (same); *Carmickle*, 533 F.3d at 1165 (affirming the ALJ’s finding that treating  
20 physicians’ short-term excuse from work was not indicative of “claimant’s long-  
21 term functioning”).

22 <sup>66</sup> *Molina*, 674 F.3d at 1112.  
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1 clear and convincing reasons' for the rejection."<sup>67</sup> Here, the ALJ found Plaintiff's  
2 statements concerning the intensity, persistence, and limiting effects of her  
3 symptoms inconsistent with Plaintiff's conservative treatment, Plaintiff's work  
4 history, Plaintiff's activities of daily living, and the objective medical evidence.<sup>68</sup>

5 First, the ALJ erred in rejecting Plaintiff's testimony on account that it was  
6 inconsistent with her record of "conservative treatment."<sup>69</sup> Specifically, that  
7 Plaintiff did not receive "regular rheumatologist treatment" when her primary  
8 problem is fibromyalgia.<sup>70</sup> "Any evaluation of the aggressiveness of a treatment  
9 regime must take into account the condition being treated."<sup>71</sup> "Fibromyalgia's cause  
10 is unknown, there is no cure, and it is poorly-understood within much of the  
11 medical community."<sup>72</sup> Because the ALJ did not specify what "more aggressive  
12 treatment options [were] appropriate or available," it would be unreasonable to  
13 discredit Plaintiff "for failing to pursue non-conservative treatment options where  
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16 <sup>67</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504  
17 F.3d at 1036).

18 <sup>68</sup> AR 1097-98.

19 <sup>69</sup> AR 1098.

20 <sup>70</sup> AR 1098.

21 <sup>71</sup> *Revels v. Berryhill*, 874 F.3d 648, 667 (9th Cir. 2017).

22 <sup>72</sup> *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004).  
23

1 none exist.”<sup>73</sup> Furthermore, Dr. Gaba referred Plaintiff to a rheumatology specialist  
2 Dr. Flavin.<sup>74</sup> Dr. Flavin diagnosed Plaintiff with fibromyalgia and prescribed an  
3 anticonvulsant, Gabapentin, to help with her symptoms. Dr. Flavin determined  
4 Plaintiff could follow up with her primary care physician for ongoing treatment.<sup>75</sup>  
5 Fibromyalgia is diagnosed “entirely on the basis of patients’ reports of pain and  
6 other symptoms,” and “there are no laboratory tests to confirm the diagnosis.”<sup>76</sup>  
7 Without more, the ALJ’s characterization of Plaintiff’s fibromyalgia care as  
8 “conservative” is not supported by substantial evidence and does not suffice as  
9 clear and convincing reason to reject her symptom testimony.

10 Second, evidence of a poor work history that suggests a claimant is not  
11 motivated to work is a permissible reason to discredit a claimant’s claim that she is  
12 unable to work.<sup>77</sup> Plaintiff argues the ALJ failed to offer any explanation as to why  
13 her unemployment is inconsistent with her symptom reports and that the record  
14 contains “numerous medical opinions supporting disability” during Plaintiff’s gap  
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16 <sup>73</sup> *Lapeirre-Gutt v. Astrue*, 382 F.App’x 662, 664 (9th Cir. 2010).

17 <sup>74</sup> AR 700-07.

18 <sup>75</sup> AR 701-02.

19 <sup>76</sup> *Barnhart*, 379 F.3d at 590.

20 <sup>77</sup> *See Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002); 20 C.F.R. § 404.1529  
21 (work record can be considered in assessing reported symptoms); 20 C.F.R. §  
22 416.929 (same).  
23

1 in earnings from 2006 through 2009.<sup>78</sup> The Commissioner does not address this  
2 issue. The ALJ cites to no records nor discusses how Plaintiff's "inconsistent work  
3 history" "suggest[s] the best explanation of [Plaintiff's] current unemployment  
4 likely involves factors other than her current medical conditions."<sup>79</sup> Without more,  
5 the ALJ's characterization of Plaintiff's work history is not supported by  
6 substantial evidence and does not suffice as clear and convincing reason to reject  
7 her symptom testimony.

8 The ALJ also discounted Plaintiff's symptom reports because they were  
9 inconsistent with her activities of daily living."<sup>80</sup> An ALJ may discount a medical  
10 opinion that is inconsistent with the claimant's level of activity.<sup>81</sup> However, many  
11 "activities are not easily transferable to what may be the more grueling  
12 environment of the workplace."<sup>82</sup> The ability to care for young children without  
13 help has been considered an activity that may undermine claims of totally  
14 disabling pain.<sup>83</sup> However, an ALJ must make specific findings before relying on  
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17 <sup>78</sup> ECF No. 9 at 16-17.

18 <sup>79</sup> AR 1098.

19 <sup>80</sup> AR 24.

20 <sup>81</sup> *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

21 <sup>82</sup> *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

22 <sup>83</sup> *Massanari*, 261 F.3d at 857.  
23

1 childcare as an activity inconsistent with disabling limitations.<sup>84</sup> The ability to care  
2 for others without help has been considered an activity that may undermine claims  
3 of totally disabling pain.<sup>85</sup> However, if the care activities are to serve as a basis for  
4 the ALJ to discredit the Plaintiff's symptom claims, the record must identify the  
5 nature, scope, and duration of the care involved and this care must be "hands on"  
6 rather than a "one-off" care activity.<sup>86</sup> If a claimant can spend a substantial part of  
7 the day engaged in pursuits involving the performance of exertional or non-  
8 exertional functions, the ALJ may also find these activities inconsistent with the  
9 reported disabling symptoms.<sup>87</sup> Here, the ALJ highlighted Plaintiff cared for her  
10 four children (ages 20 (twins), 16, and 11),<sup>88</sup> three of whom had special needs,<sup>89</sup>  
11 could make simple meals, wash dishes and laundry, grocery shop, and manage her  
12 finances.<sup>90</sup> Plaintiff consistently testified that her older children and mother helped  
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14 <sup>84</sup> *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

15 <sup>85</sup> *Rollins*, 261 F.3d at 857.

16 <sup>86</sup> *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

17 <sup>87</sup> *Molina*, 674 F.3d at 1113.

18 <sup>88</sup> At the time of the alleged onset date, Plaintiff's oldest children were 14 and the  
19 youngest was 5. AR 1196.

20 <sup>89</sup> The Court notes outside of one progress note, nothing in the record discusses  
21 Plaintiff's children having special needs.

22 <sup>90</sup> AR 1098.

1 Plaintiff with caring for her younger children and household chores.<sup>91</sup> In order for  
2 Plaintiff's cited activities to be deemed "high-functioning activities of daily living"  
3 constituting a clear and convincing reason to discount Plaintiff's symptoms, the  
4 ALJ needed to have more meaningfully articulated this finding. These cited  
5 activities, which can be achieved in relatively short periods of time and not on an  
6 everyday basis, do not "contradict claims of a totally debilitating impairment."<sup>92</sup>

7         Lastly, the ALJ discounted Plaintiff's symptom reports because they were  
8 inconsistent with the objective medical evidence that the ALJ deemed to be quite  
9 unremarkable, as she ambulated normally, demonstrated no signs of chronic  
10 illness, and her mental status exams showed only intermittent anxiety and flat  
11 affect, with the majority normal.<sup>93</sup> On remand, the ALJ is to explain why Plaintiff's  
12 observed normal gait served as a basis to discount her symptoms related to the  
13 pain she experiences when reaching with her upper extremities and bending her  
14 back and neck. Plaintiff's treating and examining physicians agreed Plaintiff  
15 consistently showed symptoms consistent with headaches, fatigue, nausea, pain,  
16 dizziness, anxiety, depression, and lapses in concentration and persistence.<sup>94</sup> The

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18 <sup>91</sup> AR 70-72, 356-57, 379-80, & 1196.

19 <sup>92</sup> *Molina*, 674 F.3d at 1112-13.

20 <sup>93</sup> AR 1097-98.

21 <sup>94</sup> *See e.g.*, AR 439 (positive for headache and dizziness); AR 533 (light headed or  
22 dizzy, numbness or tingling sensations, frequent or recurrent headaches, memory  
23

1 ALJ found Plaintiff demonstrated some of these symptoms.<sup>95</sup> Additionally on  
2 remand, the ALJ is to explain how Plaintiff's demonstrated symptoms, including  
3 but not limited to anxiety, depression, lapses in concentration and persistence,  
4

5 \_\_\_\_\_  
6 loss); AR 569 (anxiety uncontrolled, increase Wellbutrin to 300 mg daily); AR 525  
7 (fatigue, sweats, back pain, weakness of muscles/joints, muscle pains or cramps,  
8 difficulty waling, numbness or tingling sensations, tremors, frequent or recurrent  
9 headaches, memory loss); AR 530 (normal gain and station, crepitation, defects,  
10 tenderness, masses, effusion, decreased rate of motion, instability, atrophy or  
11 abnormal strength or tone in head neck spine, ribs, pelvis or extremities); 572  
12 (Plaintiff envaulted by neurology, cardiology, ENT, endocrinology); AR 696 (affect:  
13 depressed, anxious, shallow intensity; mood: depressed and nervous, congruent  
14 affect); AR 701 ("positive tender points in the classic fibromyalgia distribution");  
15 AR 732 (referral to chronic fatigue clinic); & AR 736, 739, 744, 747, 749 752, & 758  
16 (positive for fatigue).

17 <sup>95</sup> AR 1092 ("Notably, [Plaintiff's] fibromyalgia causes pain severe enough to  
18 damage her ability to persist in tasks.") ("[Plaintiff] has demonstrated longstanding  
19 weakness and some positive impingement signs bilaterally, always worse on the  
20 left." "[Plaintiff] has had problems with range of motion in the left shoulder."); &  
21 AR 1095 ("[Plaintiff] has reported pain and other fibromyalgia symptoms cause  
22 lapses in concentration and persistence. I find evidence supporting this claim . . .  
23 but this limitation is not due to mental impairments.").



1 migraines, and limited range of motion in the left shoulder, are inconsistent with  
2 the debilitating symptoms of fibromyalgia.

3 Finally, assuming that the ALJ's description of Plaintiff's "psychological  
4 observations being within normal limits" is a reasonable finding supported by  
5 substantial evidence, this sole reason, which is based on the ALJ's interpretation of  
6 the objective medical evidence, cannot serve as the sole basis on which to discount  
7 Plaintiff's symptom report.

8 In summary, Plaintiff establishes the ALJ erred by discounting Plaintiff's  
9 symptom reports.

10 **C. RFC: The ALJ must reevaluate.**

11 Because the ALJ's RFC was based on an erroneous weighing of the medical  
12 evidence and Plaintiff's symptom reports, remand is required. If the ALJ does not  
13 fully credit Dr. Drenguis' reaching limitation, the ALJ on remand must more  
14 meaningfully explain how Plaintiff's reported symptoms, including pain in upper  
15 left extremity, headaches, fatigue, dizziness, anxiety, depression, and lapses in  
16 concentration and persistence, are inconsistent with the medical record and then  
17 reassess Plaintiff's RFC and proceed with a new step-five analysis. In evaluating  
18 whether a claimant's RFC renders them disabled because of fibromyalgia, the  
19 medical evidence must be construed in light of fibromyalgia's unique symptoms  
20 and diagnostic methods.<sup>96</sup> The failure to do so is error.

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22 <sup>96</sup> *Revels*, 874 F.3d at 662.

1 **D. Remand for Further Proceedings**

2 Plaintiff submits a remand for payment of benefits is warranted.

3 The decision whether to remand a case for additional evidence, or simply to  
4 award benefits, is within the discretion of the court.”<sup>97</sup> When the court reverses an  
5 ALJ’s decision for error, the court “ordinarily must remand to the agency for  
6 further proceedings.”<sup>98</sup>

7 The Court finds that further development is necessary for a proper disability  
8 determination. On remand, the ALJ is to reevaluate Dr. Drenguis’ medical opinion  
9 related to Plaintiff’s upper left extremity reach, consider any additional evidence  
10 presented, meaningfully explain how Plaintiff’s reported symptoms are  
11 inconsistent with the medical record and then reassess Plaintiff’s RFC and proceed  
12 with a new step-five analysis.

13 **V. Conclusion**

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

- 15 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 9**, is **GRANTED**.

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17 <sup>97</sup> *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,  
18 761 F.2d 530 (9th Cir. 1985)).

19 <sup>98</sup> *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).

