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

Oct 22, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHAWNA W.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,²

Defendant.

No. 4:20-cv-5150-EFS

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

Plaintiff Shawna W. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the record reflects that Plaintiff is clearly unable to sustain fulltime work, this matter is remanded for immediate payment of benefits. Accordingly, the Court grants Plaintiff's Motion for Summary Judgment, ECF

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

² On July 9, 2021, Ms. Kijakazi became the Acting Commissioner of Social Security. She is therefore substituted for Andrew Saul as Defendant. Fed. R. Civ. P. 25(d); 42 U.S.C. § 405(g).

1 No. 21, and denies the Commissioner's Motion for Summary Judgment, ECF
2 No. 25.

3 **I. Five-Step Disability Determination**

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

8 Step two assesses whether the claimant has a medically severe impairment
9 or combination of impairments that significantly limit the claimant's physical or
10 mental ability to do basic work activities.⁷ If the claimant does not, benefits are
11 denied.⁸ If the claimant does, the disability evaluation proceeds to step three.⁹

12 Step three compares the claimant's impairment or combination of
13 impairments to several recognized by the Commissioner as so severe as to preclude
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17 ³ 20 C.F.R. § 416.920(a).

18 ⁴ *Id.* § 416.920(a)(4)(i).

19 ⁵ *Id.* § 416.920(b).

20 ⁶ *Id.*

21 ⁷ *Id.* § 416.920(a)(4)(ii).

22 ⁸ *Id.* § 416.920(c).

23 ⁹ *Id.*

1 substantial gainful activity.¹⁰ If an impairment or combination of impairments
2 meets or equals one of the listed impairments, the claimant is conclusively
3 presumed to be disabled.¹¹ If not, the disability evaluation proceeds to step four.

4 Step four assesses whether an impairment prevents the claimant from
5 performing work she performed in the past by determining the claimant's residual
6 functional capacity (RFC).¹² If the claimant can perform past work, benefits are
7 denied.¹³ If not, the disability evaluation proceeds to step five.

8 Step five, the final step, assesses whether the claimant can perform other
9 substantial gainful work—work that exists in significant numbers in the national
10 economy—considering the claimant's RFC, age, education, and work experience.¹⁴
11 If so, benefits are denied. If not, benefits are granted.¹⁵

12 The claimant has the initial burden of establishing she is entitled to
13 disability benefits under steps one through four.¹⁶ At step five, the burden shifts to
14 the Commissioner to show the claimant is not entitled to benefits.

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17 ¹⁰ *Id.* § 416.920(a)(4)(iii).

18 ¹¹ *Id.* § 416.920(d).

19 ¹² *Id.* § 416.920(a)(4)(iv).

20 ¹³ *Id.*

21 ¹⁴ *Id.* § 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497–98 (9th Cir. 1984).

22 ¹⁵ 20 C.F.R. § 416.920(g).

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

1 not entirely consistent with the medical evidence and other evidence.²² Likewise,
2 the ALJ discounted the lay statements from Plaintiff's friends.²³

3 Plaintiff requested review of the ALJ's decision by the Appeals Council,
4 which denied review.²⁴ Plaintiff timely appealed to this Court.

5 III. Standard of Review

6 A district court's review of the Commissioner's final decision is limited.²⁵ The
7 Commissioner's decision is set aside "only if it is not supported by substantial
8 evidence or is based on legal error."²⁶ Substantial evidence is "more than a mere
9 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
10 mind might accept as adequate to support a conclusion."²⁷ Moreover, because it is
11 the role of the ALJ and not the Court to weigh conflicting evidence, the Court

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18 ²² AR 21–23.

19 ²³ AR 23.

20 ²⁴ AR 1–11.

21 ²⁵ 42 U.S.C. § 405(g).

22 ²⁶ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

23 ²⁷ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

1 upholds the ALJ’s findings “if they are supported by inferences reasonably drawn
2 from the record.”²⁸ The Court considers the entire record.²⁹

3 Further, the Court may not reverse an ALJ decision due to a harmless
4 error.³⁰ An error is harmless “where it is inconsequential to the ultimate
5 nondisability determination.”³¹ The party appealing the ALJ’s decision generally
6 bears the burden of establishing harm.³²

7 IV. Analysis

8 A. Step Two (Severe Impairment): Plaintiff establishes consequential 9 error.

10 Plaintiff contends the ALJ erred at step two by failing to consider
11 fibromyalgia as a severe impairment. The Commissioner concedes the ALJ did not
12 discuss Plaintiff’s fibromyalgia but argues any error was harmless because
13 Plaintiff fails to show that her fibromyalgia caused any limitations that were not
14 already accounted for by the RFC.

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17 ²⁸ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

18 ²⁹ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (requiring the court to
19 consider the entire record, not simply the evidence cited by the ALJ or the parties);
20 *see also Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998).

21 ³⁰ *Molina*, 674 F.3d at 1111.

22 ³¹ *Id.* at 1115 (cleaned up).

23 ³² *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

1 At step two of the sequential process, the ALJ must determine whether the
2 claimant suffers from a “severe” impairment, i.e., one that significantly limits her
3 physical or mental ability to do basic work activities.³³ This involves a two-step
4 process: 1) determining whether the claimant has a medically determinable
5 impairment and 2), if so, determining whether the impairment is severe.³⁴

6 Neither a claimant’s statement of symptoms, a diagnosis, nor a medical
7 opinion sufficiently establishes the existence of an impairment.³⁵ Rather, “a
8 physical or mental impairment must be established by objective medical evidence
9 from an acceptable medical source.” If the objective medical signs and laboratory
10 findings demonstrate the claimant has a medically determinable impairment, the
11 ALJ must then determine whether that impairment is severe.³⁶ “The Social
12 Security Regulations and Rulings, as well as case law applying them, discuss the
13 step two severity determination in terms of what is ‘not severe.’”³⁷ A medically
14 determinable impairment is *not* severe if, and only if, the “medical evidence
15 establishes only a slight abnormality or a combination of slight abnormalities
16 which would have no more than a minimal effect on an individual’s ability to

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19 ³³ 20 C.F.R. § 416.920(c).

20 ³⁴ *Id.* § 416.920(a)(4)(ii).

21 ³⁵ *Id.* § 416.921.

22 ³⁶ *See* Social Security Ruling (SSR) 85-28 at *3 (1985).

23 ³⁷ *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

1 work.”³⁸ Therefore, an impairment is not severe if it has no more than a minimal
2 effect on a claimant’s physical or mental ability to do basic work activities, which
3 include the following: walking, standing, sitting, lifting, pushing, pulling, reaching,
4 carrying, and handling.³⁹

5 Because step two is simply a “screening device [used] to dispose of
6 groundless claims,”⁴⁰ “[g]reat care should be exercised in applying the not severe
7 impairment concept.”⁴¹ Step two “is not meant to identify the impairments that
8 should be taken into account when determining the RFC,” as step two is meant
9 *only* to screen out weak claims, whereas the crafted RFC must take into account all
10 impairments, both severe and non-severe.⁴²

11 Here, the ALJ found Plaintiff has the severe impairments of status-post left
12 ankle fracture, osteoarthritis of the right knee, degenerative disc disease, obesity,
13 panic disorder, and depression.⁴³ The ALJ also found that Plaintiff’s injury to her
14 left shoulder, right hip, and right foot are non-severe impairments. Yet, the ALJ
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18 ³⁸ *Id.*

19 ³⁹ 20 C.F.R. § 404.921(a) (2010); *see* SSR 85-28 at *3.

20 ⁴⁰ *Smolen*, 80 F.3d at 1290.

21 ⁴¹ SSR 85-28 at *4.

22 ⁴² *Buck v. Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir. 2017).

23 ⁴³ AR 18.

1 did not discuss whether fibromyalgia is a severe impairment, nor did the ALJ
2 mention fibromyalgia in the entire opinion.

3 This was error. Medical records reflect that based on objective signs Plaintiff
4 was diagnosed and treated for fibromyalgia.⁴⁴ For instance, in June 2017, Stephen
5 Dechter, D.O., noted, “fibromyalgia tender points grossly positive in various soft
6 tissue locations with diffuse muscle aches present.”⁴⁵ He noted that at her last
7 appointment he provided Plaintiff with a prescription for EMLA cream,
8 cyclobenzaprine, and Cymbalta for her fibromyalgia and lumbar and knee
9 conditions.⁴⁶ The record reflects that her fibromyalgia history began in 2006.⁴⁷ And
10 it likely continued through at least November 2018, as a treatment note that
11 month states, “Unfortunately, [patient] is difficult to examine with her [history] of
12 fibromyalgia and chronic pain. She has tenderness wherever palpation occurs.”⁴⁸
13 The objective medical evidence reflects more than a diagnosis of fibromyalgia:

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16 ⁴⁴ SSR 12-2p, Evaluation of Fibromyalgia (2012); *Revels v. Berryhill*, 874 F.3d 648,
17 656 (9th Cir. 2017).

18 ⁴⁵ AR 385.

19 ⁴⁶ AR 385, 381–32. *See also* AR 420 (April 2017: “It is very likely the patient will
20 have chronic pain given the history of this [foot] fracture as well as her history of
21 fibromyalgia.”).

22 ⁴⁷ AR 509, 575.

23 ⁴⁸ AR 554.

1 Plaintiff's providers conducted physical examinations and found widespread
2 tenderness in both June 2017 and November 2018.⁴⁹ Moreover, both the
3 consultative examiner, Dr. Opara, and the reviewing physician, Dr. Platter, found
4 fibromyalgia to be a severe impairment.⁵⁰ On this record, the ALJ erred by not
5 finding fibromyalgia as a severe impairment.⁵¹

6 The Commissioner submits any such error was harmless because the ALJ's
7 sequential evaluation—and the RFC—considered the impact of Plaintiff's
8 fibromyalgia. When an ALJ resolves step two in a claimant's favor by finding a
9 medically determinable severe impairment, any error in failing to find other severe
10 impairments is harmless at step two; however, step-two error can be harmful at a
11 later step in the sequential disability analysis.⁵² Here, the ALJ did not articulate
12 how the sequential evaluation considered the impact of Plaintiff's fibromyalgia—
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15 ⁴⁹ See 20 C.F.R. § 404.1521 (“We will not use your statement of symptoms, a
16 diagnosis, or a medical opinion to establish the existence of an impairment(s).”).

17 ⁵⁰ AR 87–105, 508–13.

18 ⁵¹ 20 C.F.R. § 404.1521.

19 ⁵² See *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006);
20 *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (“Assuming without deciding
21 that this omission constituted legal error [at step two], it could only have
22 prejudiced Burch in step three (listing impairment determination) or step five
23 (RFC) because the other steps, including this one, were resolved in her favor.”).

1 the decision did not even mention fibromyalgia. Moreover, when crafting the RFC,
2 the ALJ “considered all symptoms” of “underlying medically determinable physical
3 or mental impairment(s).”⁵³ Because the ALJ did not identify fibromyalgia as an
4 impairment, the ALJ did not consider Plaintiff’s fibromyalgia when assessing the
5 RFC or when weighing Plaintiff’s statements about the intensity, persistence, and
6 limiting effects of her fibromyalgia symptoms, which she testified were separate
7 from her knee and hip pain.⁵⁴ Because the ALJ did not consider Plaintiff’s
8 fibromyalgia during the later sequential steps, the step-two error was not
9 harmless.⁵⁵

10 Finally, the Commissioner argues Plaintiff waived any argument that the
11 ALJ erroneously rejected her fibromyalgia-related limitations from the RFC
12 because Plaintiff raised no challenge to the ALJ’s evaluation of the medical
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15 ⁵³ AR 20–21.

16 ⁵⁴ AR 52.

17 ⁵⁵ See *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
18 review is constrained to the reasons the ALJ asserts); *Embrey v. Bowen*, 849 F.2d
19 418, 421–22 (9th Cir. 1988) (requiring the ALJ to identify the evidence supporting
20 the found conflict to permit the court to meaningfully review the ALJ’s finding);
21 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) (“We require the ALJ to build
22 an accurate and logical bridge from the evidence to her conclusions so that we may
23 afford the claimant meaningful review of the SSA’s ultimate findings.”).

1 evidence.⁵⁶ The Court finds otherwise. Even though Plaintiff did not challenge the
2 ALJ's weighing of a medical opinion, Plaintiff's step-two, step-three, symptom-
3 complaint, and RFC arguments inherently challenge the ALJ's failure to consider
4 the medical evidence and other evidence related to her fibromyalgia.

5 **B. Remand for an Award of Benefits.**

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

7 The decision whether to remand a case for additional evidence, or to simply
8 award benefits, is within the Court's discretion.⁵⁷ Remand for further proceedings
9 is the usual course, absent clear evidence from the record that a claimant is
10 entitled to benefits.⁵⁸ For instance, where "there are outstanding issues that must
11 be resolved before a determination can be made, or if further administrative
12 proceedings would be useful, a remand is necessary."⁵⁹

13 Here, the fully developed record clearly establishes disability. By not
14 considering the impacts of fibromyalgia, which are distinct from those caused by
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17 ⁵⁶ ECF No. 25 at 5–6.

18 ⁵⁷ See *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v.*
19 *Heckler*, 761 F.2d 530 (9th Cir. 1985)).

20 ⁵⁸ *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379
21 F.3d 587, 595 (9th Cir. 2004) ("[T]he proper course, except in rare circumstances, is
22 to remand to the agency for additional investigation or explanation.").

23 ⁵⁹ *Leon*, 880 F.3d at 1047.

1 Plaintiff's other severe impairments, the ALJ failed to adequately consider the
2 medical evidence and erred by discounting the distinct fibromyalgia-related
3 symptoms that both Plaintiff and her friend reported, and which were reflected on
4 Dr. Ello's evaluation and in the medical record.

5 When Plaintiff's testimony and that of her friend are credited as true, the
6 record reflects that Plaintiff is unable to sustain work due to pain and other
7 functional limitations, which result in a need to take excessive breaks or
8 absences.⁶⁰ The vocational expert testified that if Plaintiff has to elevate her legs
9 on average 4–6 times per day for 15–45 minutes each time or be absent more than
10 one day per month, competitive employment is precluded.⁶¹ Moreover, four years
11 have passed since Plaintiff applied for benefits. This case merits remand for an
12 immediate calculation of benefits.⁶²

13 **C. Conclusion**

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

- 15 1. The case caption is to be **AMENDED** consistent with footnote 2.
- 16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is **GRANTED**.

19 ⁶⁰ See, e.g., AR 508–13, 517–21, 535–38, 547–56, 567–68.

21 ⁶¹ AR 58–59.

22 ⁶² See 42 U.S.C. § 405(g) (permitting the court to reverse the Commissioner's decision
23 without remanding for a rehearing).

