

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

**Mar 20, 2023**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLLEEN S.,

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,

Defendant.

No. 4:20-CV-05189-JAG

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

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 23, 32. Attorney Chad Hatfield represents Colleen S. (Plaintiff); Special Assistant United States Attorney Lars Nelson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**I. JURISDICTION**

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on June 17, 2013, alleging disability since June 1,

1 2008<sup>1</sup>, due to bronchitis, fibromyalgia, PTSD, depression, anxiety, hearing  
2 problems, ADD, stomach pain, high cholesterol, insomnia, and headaches.  
3 Tr. 134-35. The applications were denied initially and upon reconsideration.  
4 Tr. 190-204, 207-17. Administrative Law Judge (ALJ) Cheri Filion held a hearing  
5 on January 28, 2016, Tr. 57-104, and issued an unfavorable decision on April 27,  
6 2016. Tr. 20-37. Plaintiff requested review of the ALJ's decision by the Appeals  
7 Council and the Appeals Council denied the request for review on August 11,  
8 2020. Tr. 1-6. The ALJ's April 2016 decision is the final decision of the  
9 Commissioner, which is appealable to the district court pursuant to 42 U.S.C.  
10 § 405(g). Plaintiff filed this action for judicial review on October 21, 2020. ECF  
11 No. 1.

## 12 **II. STATEMENT OF FACTS**

13 Plaintiff was born in 1955 and was 56 years old as of her alleged onset date.  
14 Tr. 35. She has a high school education and an Associate's degree in fire science.  
15 Tr. 66-67. She had a traumatic childhood and was the victim of a violent sexual  
16 assault in the 80s. Tr. 590. In 2003 she was attacked by a patient she was  
17 caretaking for, resulting in injuries that she testified led her to begin drinking.  
18 Tr. 69, 557. For the next several years she held a series of short-term jobs in food  
19 services, ticket taking, cashiering, and caregiving, and testified that these jobs all  
20 ended due to her ADD and her alcoholism. Tr. 49, 67-69. She eventually achieved  
21 sobriety and became active in her local AA community. Tr. 438, 591. At her  
22 hearing, she testified that alcohol had masked many of her physical and  
23 psychological problems, and since achieving sobriety, her symptoms had become  
24 progressively more noticeable. Tr. 74.

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28 <sup>1</sup> Plaintiff later amended her alleged onset to January 2012. Tr. 64.

### III. STANDARD OF REVIEW

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2 The ALJ is responsible for determining the reliability of a claimant's  
3 allegations, resolving conflicts in medical testimony, and resolving ambiguities.  
4 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's  
5 determinations of law are reviewed *de novo*, with deference to a reasonable  
6 interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th  
7 Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by  
8 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d  
9 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a  
10 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,  
11 substantial evidence is such relevant evidence as a reasonable mind might accept  
12 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401  
13 (1971).

14 If the evidence is susceptible to more than one rational interpretation, the  
15 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at  
16 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.  
17 1999). If substantial evidence supports the administrative findings, or if  
18 conflicting evidence supports a finding of either disability or non-disability, the  
19 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230  
20 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be  
21 set aside if the proper legal standards were not applied in weighing the evidence  
22 and making the decision. *Browner v. Secretary of Health and Human Services*,  
23 839 F.2d 432, 433 (9th Cir. 1988).

### IV. SEQUENTIAL EVALUATION PROCESS

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26 The Commissioner has established a five-step sequential evaluation process  
27 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*  
28 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant

1 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d  
2 at 1098-1099. This burden is met once a claimant establishes that a physical or  
3 mental impairment prevents the claimant from engaging in past relevant work. 20  
4 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ  
5 proceeds to step five, and the burden shifts to the Commissioner to show: (1) the  
6 claimant can make an adjustment to other work; and (2) the claimant can perform  
7 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*  
8 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make  
9 an adjustment to other work in the national economy, the claimant will be found  
10 disabled. 20 C.F.R. § 404.1520(a)(4)(v).

#### 11 V. ADMINISTRATIVE FINDINGS

12 On April 27, 2016, the ALJ issued a decision finding Plaintiff was not  
13 disabled as defined in the Social Security Act. Tr. 20-37.

14 At *step one*, the ALJ found Plaintiff had not engaged in substantial gainful  
15 activity since the alleged onset date. Tr. 23.

16 At *step two*, the ALJ determined Plaintiff had the following severe  
17 impairments: posttraumatic stress disorder, depressive disorder, attention deficit  
18 hyperactivity disorder, lumbar degenerative disc disease, fibromyalgia, and hearing  
19 loss. *Id.*

20 At *step three*, the ALJ found Plaintiff did not have an impairment or  
21 combination of impairments that met or medically equaled the severity of one of  
22 the listed impairments. Tr. 25-27.

23 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
24 she could perform medium level work with the following limitations:

25 She can lift and/or carry 50 pounds occasionally and 25 pounds  
26 frequently. The claimant can stand, walk and sit for six hours in  
27 an eight-hour workday, respectively. She should avoid work  
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1 environments with loud noises. The claimant should avoid  
2 concentrated exposure to extreme cold, heat, noise, vibration,  
3 fumes, odors, dusts, gases, hazardous machinery and heights.  
4 She can perform simple tasks. The claimant requires a work  
5 environment free of fast paced or precision requirements. She  
6 can tolerate superficial contact with the public, coworkers and  
7 supervisors. 27.

8 Tr. 27.

9 At *step four*, the ALJ found Plaintiff could perform her past relevant work  
10 as a cashier, ticket seller, and fast-food worker. Tr. 35.

11 Alternatively, at *step five* the ALJ found that, considering Plaintiff's age,  
12 education, work experience and residual functional capacity, Plaintiff could  
13 perform jobs that existed in significant numbers in the national economy,  
14 specifically identifying the representative occupations of industrial cleaner, laundry  
15 worker, and cook helper. Tr. 35-36.

16 The ALJ thus concluded Plaintiff was not under a disability within the  
17 meaning of the Social Security Act at any time from the alleged onset date through  
18 the date of the decision. Tr. 36-37.

## 19 VI. ISSUES

20 The question presented is whether substantial evidence supports the ALJ's  
21 decision denying benefits and, if so, whether that decision is based on proper legal  
22 standards.

23 Plaintiff contends: (1) the decision is not supported by substantial evidence  
24 when considering additional evidence that was submitted to the Appeals Council;  
25 (2) the ALJ improperly evaluated the medical opinion evidence; (3) the ALJ  
26 conducted an improper step three analysis; (4) the ALJ erred in rejecting Plaintiff's  
27 subjective complaints; and (5) the ALJ conducted an inadequate analysis at step  
28 five.

## VII. DISCUSSION

### A. New Evidence Submitted to the Appeals Council.

In connection with her request for review by the Appeals Council, Plaintiff submitted additional opinion evidence, including opinions from Dr. Hornell, Dr. Selah, and Dr. Torres. Tr. 43-55. The Appeals Council declined to exhibit this evidence, finding it did not show a reasonable probability that it would change the outcome of the decision. Tr. 2. Plaintiff now argues that, with the addition of this evidence, the ALJ's decision is not supported by substantial evidence. ECF No. 23 at 8-9.

When, as here, "the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence." *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012).

The new evidence included a January 2012 opinion from Dr. Noda Torres, Plaintiff's treating physician. Tr. 52-54. Dr. Torres opined Plaintiff could lift a maximum of two pounds, and did not check boxes indicating Plaintiff could stand or sit for most of a workday. Tr. 52. The report was accompanied by a treatment record from a January 24, 2012, visit documenting decreased flexion and extension in Plaintiff's lumbar spine and tenderpoints in her hips, shoulders, thighs, lower back, and knee. Tr. 54.<sup>2</sup>

Plaintiff argues this evidence is supported by the records and indicates Plaintiff is disabled, and therefore shows a reasonable probability that it would change the outcome of the case. ECF No. 23 at 8-9. Defendant argues the new evidence is redundant, as the ALJ already reviewed the accompanying treatment

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<sup>2</sup> This treatment record was included in the original file before the ALJ. Tr. 408-09.

1 record, which was one of the few references to fibromyalgia. ECF No. 32 at 18.  
2 Defendant further argues that this opinion and treatment record together further  
3 support the ALJ's conclusion that Plaintiff only sought treatment for fibromyalgia  
4 when she was seeking disability opinions. *Id.*

5 The Court finds claim must be remanded for consideration of this additional  
6 opinion. The record contains no other treating source opinions commenting on  
7 Plaintiff's physical capabilities. The only doctors who offered physical residual  
8 functional capacities were the state agency reviewing doctors, who did not review  
9 Dr. Torres' opinion, and found initially that Plaintiff's physical impairments were  
10 non-severe and on reconsideration opined she could perform medium work.  
11 Tr. 147-48, 182-83.

12 Defendant argues this case is similar to *Jacaway v. Kijakazi*, No. 20-36075,  
13 2022 WL 728795 (9th Cir. Mar. 10, 2022). In that case, the court found the  
14 additional evidence from a particular doctor was similar to an earlier opinion  
15 offered by the same doctor, so "the same reasons for which the ALJ discounted Dr.  
16 Wheeler's first opinion apply to her similar second opinion." *Id.* Here, the record  
17 before the ALJ did not contain any opinions from Dr. Torres, a treating source with  
18 at least a year of a treatment relationship with Plaintiff. Tr. 394, 398, 401, 407.  
19 While Defendant asserts the ALJ's rationale regarding fibromyalgia applies to this  
20 opinion, this is *post hoc* rationale that the Court cannot consider. *See Orn v.*  
21 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (the Court will "review only the reasons  
22 provided by the ALJ in the disability determination and may not affirm the ALJ on  
23 a ground upon which she did not rely.").  
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1 On remand the ALJ shall reconsider the record in light of Dr. Torres’  
 2 opinion, along with any other evidence Plaintiff may submit.<sup>3</sup>

3 **B. Additional Arguments.**

4 Plaintiff further argues the ALJ erred in rejecting other opinions from Drs.  
 5 Hornell, Saleh, and Barnard; improperly assessed fibromyalgia at step three;  
 6 improperly discounted Plaintiff’s subjective complaints; and made step four and  
 7 step five findings that were based on a flawed RFC. ECF No. 23 at 10-21. The  
 8 Court does not find any of these arguments to present a basis for remand.  
 9 However, as the case must be remanded for consideration of the additional  
 10 evidence, the ALJ shall reconsider each of the steps of the five-step analysis in  
 11 assessing the record as a whole.

12 **VIII. CONCLUSION**

13 Plaintiff argues the decision should be reversed and remanded for the  
 14 payment of benefits under the credit-as-true rule. The decision whether to remand  
 15 for further proceedings or reverse and award benefits is within the discretion of the  
 16 district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An  
 17 immediate award of benefits is appropriate where “no useful purpose would be  
 18 served by further administrative proceedings, or where the record has been  
 19 thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d  
 20 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly  
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22 \_\_\_\_\_  
 23 <sup>3</sup> Plaintiff also submitted additional evidence from Dr. Hornell and Dr. Saleh to the  
 24 Appeals Council. Tr. 43-51. However, this evidence is similar to evidence from  
 25 these sources that was already considered by the ALJ, similar to the circumstances  
 26 of *Jacaway*. Therefore, the Court does not find these reports create an independent  
 27 basis for remand. However, on remand the ALJ shall consider the record as a  
 28 whole in making a new decision.



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

10 In this case, it is not at all clear from the record that the ALJ would be  
11 required to find Plaintiff disabled if all the evidence were properly evaluated.  
12 Further proceedings are necessary for the ALJ to properly address all medical  
13 opinions in the record. On remand, the ALJ shall reevaluate the evidence of  
14 record, making findings on each of the five steps of the sequential evaluation  
15 process, and taking into consideration any other evidence or testimony relevant to  
16 Plaintiff’s disability claim.

17 Accordingly, **IT IS ORDERED:**

- 18 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 23**, is  
19 **GRANTED IN PART.**  
20 2. Defendant’s Motion for Summary Judgment, **ECF No. 32**, is  
21 **DENIED.**  
22 3. The matter is **REMANDED** to the Commissioner for additional  
23 proceedings consistent with this Order.  
24 4. An application for attorney fees may be filed by separate motion.

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1           5.       The District Court Executive is directed to file this Order and provide  
2 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for  
3 Plaintiff and the file shall be **CLOSED**.

4           **IT IS SO ORDERED.**

5           DATED March 20, 2023.



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JAMES A. GOEKE  
UNITED STATES MAGISTRATE JUDGE