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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LESLEY R. SPENCER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 2:15-cv-00020 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 6; Consent to Proceed Before a United States Magistrate Judge, Dkt. 7). This matter has been fully briefed (*see* Dkts. 12, 21, 22).

After considering and reviewing the record, the Court concludes that this matter should be reversed and remanded for further administrative proceedings. Although the parties agree that the ALJ erred when reviewing plaintiff's fibromyalgia, further

1 administrative proceedings would be useful as there are credibility issues and conflicts in
2 the medical evidence that the ALJ should resolve following remand.

3 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
4 U.S.C. § 405(g) to the Acting Commissioner for further administrative proceedings
5 consistent with this order.

6 BACKGROUND

7 Plaintiff, LESLY R. SPENCER, was born in 1956 and was 50 years old on the
8 alleged date of disability onset of February 14, 2007 (*see* AR. 344-46, 347-53). Plaintiff
9 graduated from high school, attended college for one year and took some classes years
10 later (AR. 48). Plaintiff has past work experience as a department manager,
11 cashier/checker and sales clerk (AR. 132-33). She left her last employment when she felt
12 she just could not do it anymore (AR. 53).

14 According to the ALJ, plaintiff has at least the severe impairment of “fibromyalgia
15 (20 CFR 404.1520(c) and 416.920(c))” (AR. 20).

16 At the time of the last hearing, plaintiff was living in an apartment with her two
17 sons, ages 22 and 26 (AR. 49, 59-60).

18 PROCEDURAL HISTORY

19 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
20 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
21 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
22 following reconsideration (*see* AR. 144-45, 146-47, 148, 149, 150, 151). Plaintiff’s
23 requested hearing was held before Administrative Law Judge Verrell Dethloff (“the
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1 ALJ”) on January 23, 2013 (*see* AR. 44-75). On March 15, 2013, the ALJ issued a
2 written decision in which the ALJ concluded that plaintiff was not disabled pursuant to
3 the Social Security Act (*see* AR. 14-43). Plaintiff had an earlier hearing (*see* AR. 100-43)
4 in which a different Administrative Law Judge had determined plaintiff was not disabled
5 (*see* AR. 152-77), but the Appeals Council ordered the case remanded for further
6 proceedings and vacated that decision (*see* AR. 173-77). Some of that decision is
7 incorporated by the ALJ into his decision being considered herein.

8
9 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Did the ALJ
10 properly evaluate the fibromyalgia of plaintiff; (2) Did the ALJ erroneously reject
11 overwhelming treating-physician opinions; (3) Did the ALJ erroneously rely on overruled
12 out-of-Circuit law; (4) Does substantial evidence support the ALJ’s credibility finding;
13 (5) Does substantial evidence support the ALJ’s evaluation of third-party-statements; (6)
14 Does substantial evidence support the ALJ’s alternative step-five decision; and (7) Does
15 substantial evidence support the ALJ’s step-four decision (*see* Dkt. 12, p. 1).

16 Defendant has requested remand for further proceedings (*see* Dkt. 21, p. 1).
17 Therefore, the parties agree that the ALJ erred in his written decision, which must be
18 reversed (*see id.*). However, plaintiff requests that the matter be reversed and remanded
19 with a direction to award benefits (*see* Dkt. 22).

20 STANDARD OF REVIEW

21 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
22 denial of social security benefits if the ALJ's findings are based on legal error or not
23 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
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1 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 Defendant concedes that “the hearing decision did not appropriately evaluate the
5 impact of plaintiff’s fibromyalgia or her drug and alcohol abuse,” however contends that
6 “remand is necessary so the Commissioner may order the ALJ to determine the effect of
7 the medical evidence” (Dkt. 21, p. 2). Plaintiff argues that defendant did not address all
8 of her allegations of error and that this matter should be remanded with a direction to
9 award benefits, or alternatively, for a new hearing and a new decision in which the ALJ
10 corrects the errors identified by plaintiff (*see* Dkt. 22).

12 Even if the Court agrees with plaintiff regarding all of the alleged errors, such a
13 conclusion is not necessarily dispositive on the issue of whether this matter should be
14 reversed and remanded with a direction to award benefits, or reversed and remanded for
15 further administrative proceedings. Generally, when the Social Security Administration
16 does not determine a claimant’s application properly, “the proper course, except in rare
17 circumstances, is to remand to the agency for additional investigation or explanation.”
18 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the
19 Ninth Circuit has put forth a “test for determining when [improperly rejected] evidence
20 should be credited and an immediate award of benefits directed.” *Harman v. Apfel*, 211
21 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir.
22 1996)). It is appropriate when:
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1 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such
2 evidence, (2) there are no outstanding issues that must be resolved before a
3 determination of disability can be made, and (3) it is clear from the record
4 that the ALJ would be required to find the claimant disabled were such
5 evidence credited.

6 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

7 Here, defendant concedes point one, however contends that outstanding issues
8 must be resolved before a determination of disability can be made (*see* Dkt. 21, pp. 2-5).

9 As stated recently by the Ninth Circuit:

10 Second, we turn to the question whether [or not] further administrative
11 proceedings would be useful. In evaluating this issue, we consider [if]
12 the record as a whole is free from conflicts, ambiguities, or gaps, [if] all
13 factual issues have been resolved, and [if] the claimant's entitlement to
14 benefits is clear under the applicable legal rules.

15 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)

16 (citations omitted). Here, the Court concludes that the record as a whole is not free from
17 conflicts, ambiguities or gaps. Plaintiff's entitlement to benefits is not clear. *See id.*

18 For example, regarding plaintiff's credibility, although the ALJ relied on activities
19 of daily living that are not likely transferable to a work setting and do not contradict
20 necessarily her claim of inability to work full time, the ALJ also noted inconsistencies in
21 plaintiff's allegations and noted other credibility concerns. As noted by the ALJ, plaintiff
22 alleged difficulty with memory recall, but the record demonstrates that she was in the
23 honors program with a grade point average of 3.8/4.0 at college (AR. 23, 25, 32, 468,
24 727-28). The Court notes the adoption by the ALJ of the note in the prior written decision
that Dr. Diana Cook, Ph.D. "reported that the claimant informed her that going to school
was a farce, and the only reason she went was to get financial aid" (AR. 32 (*citing* AR.

1 468)). The ALJ also noted that Dr. Cook included a rule-out diagnosis of malingering,
2 indicating a need to rule out malingering, and noted that “Dr. Cook notated that the
3 claimant might not be responding in a straightforward manner, and presented ‘several
4 minor contradictions’”(AR. 20-21 (*citing* AR. 468)). Finally, as noted by the ALJ, when
5 plaintiff was “just wanting pain medication,” from PA-C Taddele S. Ambachew after
6 being denied more medication from a doctor, PA-C Ambachew observed that plaintiff
7 “has secondary gain behavior” (*see* AR. 30, 911).

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9 Similarly, although the ALJ erred in his review of the medical evidence and noted
10 findings not inconsistent with fibromyalgia in order to discredit medical opinions based
11 on fibromyalgia, the ALJ also offered some valid reasons for discounting some of the
12 medical opinions. *See Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (footnote
13 omitted) (noting that an ALJ erred in discounting medical opinions based in part on a
14 fibromyalgia diagnosis, and found that the ALJ instead had been “relying on his disbelief
15 of [the claimant’s] symptom testimony as well as his misunderstanding of
16 fibromyalgia”); *cf. Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (award of
17 benefits not appropriate if plaintiff “is not in fact disabled”). For example, the ALJ
18 rejected the opinions of Dr. Adam Balkany, D.O, for many reasons, including that his
19 opinions were “inconsistent with the claimant’s creditable reported activities” (AR. 27-28
20 (footnote omitted)). While Dr. Balkany opined that plaintiff could not handle dealing
21 with other people, this is inconsistent with plaintiff’s report to Dr. Cook that “she
22 normally gets along with others,” a comment noted by the ALJ (AR. 27; *see also* AR.
23 468 (plaintiff “states ‘yeah’ when asked if she normally gets along with others”)).
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1 Based on a review of the record as a whole, the Court concludes that further
2 administrative proceedings would serve a useful purpose. The ALJ raised valid credibility
3 concerns, there are conflicts in the medical evidence and it is not clear that plaintiff "is []
4 in fact disabled." See *Garrison*, 759 F.3d at 1021.

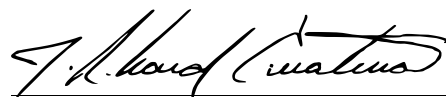
5 The ALJ is responsible for determining credibility and resolving ambiguities and
6 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
7 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). If the medical evidence
8 in the record is not conclusive, sole responsibility for resolving conflicting testimony and
9 questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
10 Cir. 1982) (quoting *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (citing
11 *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980))).

12 CONCLUSION

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14 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
15 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
16 405(g) to the Acting Commissioner for further consideration consistent with this order.

17 **JUDGMENT** should be for plaintiff and the case should be closed.

18 Dated this 21st day of July, 2015.

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21 J. Richard Creatura
22 United States Magistrate Judge
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