

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Marina Thompson v. Commissioner of Social Security

No. 2:24-CV-0793-DMC · No. No. 2:24-CV-0793-DMC · Decided March 20, 2025

SUMMARY

The United States District Court for the Eastern District of California reviews Marina Thompson’s challenge to the Commissioner of Social Security’s denial of disability benefits. The court rejects the challenges concerning fibromyalgia and mental impairments at Step 2, but finds that the Administrative Law Judge did not adequately account for migraine headaches in the residual functional capacity analysis. The matter is remanded to the Commissioner for further proceedings.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Dennis M. Cota
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 20, 2025
DOCKET	No. 2:24-CV-0793-DMC
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff sought judicial review under 42 U.S.C. § 405(g) of the Commissioner's final decision denying Social Security disability benefits. The parties filed cross-motions for summary judgment.
STANDARD OF REVIEW	The court reviews whether the Commissioner's decision applied proper legal standards and is supported by substantial evidence in the record as a whole. Substantial evidence is more than a mere scintilla but less than a preponderance. The court must consider evidence supporting and detracting from the Commissioner's conclusion and may not affirm by isolating a specific quantum of supporting evidence.
PRECEDENTIAL VALUE	Unpublished district court memorandum opinion and order; precedential status unknown in the source metadata.
PARTIES	Marina Thompson v. Commissioner of Social Security

TOPICS

judicial review of agency action

administrative law

agency adjudication

disability definition

ada / disability

PRACTICE AREAS

Social Security disability

administrative law

judicial review of agency action

civil procedure

QUESTIONS PRESENTED

1. Whether the ALJ erred by finding that the record did not establish fibromyalgia as a medically determinable impairment at Step 2.
2. Whether the ALJ properly evaluated Thompson's mental impairments under the paragraph B criteria at Step 2.
3. Whether the ALJ's residual functional capacity assessment adequately considered the limiting effects of migraine headaches after finding migraines to be a severe impairment.
4. Whether the ALJ properly evaluated Thompson's subjective statements and testimony, including reliance on objective evidence, inconsistencies, and daily activities.

HOLDINGS

1. The ALJ did not err in finding that the evidence failed to establish fibromyalgia as a medically determinable impairment because the physician's statement merely recited diagnostic criteria and did not identify objective evidence supporting the diagnosis as required by SSR 12-2p.
2. The ALJ did not err in finding Thompson's mental impairments non-severe because the ALJ applied the paragraph B criteria, found no more than mild limitations in the relevant functional areas, and did not improperly conduct a persuasiveness analysis at Step 2.
3. The ALJ erred by failing to consider in the RFC how Thompson's migraine headaches significantly limited her ability to work, despite finding migraines to be a severe impairment at Step 2.
4. The ALJ did not err in evaluating Thompson's statements and testimony because the ALJ relied on more than a lack of objective support, including inconsistencies concerning cane use and daily activities inconsistent with an allegation of total disability.

KEY QUOTATIONS

"At Step 4, however, the ALJ does not appear to have considered how Plaintiff is significantly limited by her migraines, despite the finding at Step 2." (Opinion at migraine discussion)

"The Commissioner's final decision is reversed and this matter is remanded for further proceedings consistent with this order" (Opinion at conclusion)

FACTUAL BACKGROUND

Thompson alleged disability from lupus, migraines, an antiphospholipid blood-clotting disorder, obesity, fibromyalgia, and mental impairments. The ALJ found lupus, migraines, the clotting disorder, and obesity

severe, but found fibromyalgia not medically determinable and the mental impairments non-severe. The ALJ assessed a light-work residual functional capacity with specified postural, manipulative, environmental, and hazard limitations, but did not include limitations addressing the episodic effects of migraines. Thompson testified that she experienced migraines three to four times per month, with episodes requiring her to be out for a day or two several times per month.

PROCEDURAL HISTORY

Thompson applied for benefits on July 6, 2021, alleging disability beginning January 1, 2019. The claim was denied initially and on reconsideration. After an administrative hearing on March 31, 2023, the ALJ found her not disabled. The Appeals Council denied review on January 10, 2024. The district court granted Plaintiff's motion for summary judgment, denied the Commissioner's motion, reversed the final decision, and remanded for further proceedings under sentence four of 42 U.S.C. § 405(g).

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand under sentence four of 42 U.S.C. § 405(g) for further development of the record and/or further findings addressing the deficiencies identified in the opinion, particularly the limiting effects of Plaintiff's migraine headaches in the residual functional capacity assessment.

CASES CITED

- Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999)
- Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996)
- Richardson v. Perales, 402 U.S. 389, 402 (1971)
- Howard v. Heckler, 782 F.2d 1484, 1487-88 (9th Cir. 1986)
- Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985)
- Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)
- Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987)
- Thomas v. Barnhart, 278 F.3d 947, 954, 958-59 (9th Cir. 2002)
- Burkhart v. Bowen, 856 F.2d 1335, 1338, 1340 (9th Cir. 1988)
- Quang Van Han v. Bower, 882 F.2d 1453, 1456 (9th Cir. 1989)
- Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990)
- Gallant v. Heckler, 753 F.2d 1450, 1452-53 (9th Cir. 1984)
- Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986)
- Smolen v. Chater, 80 F.3d 1273, 1282, 1284, 1289-90 (9th Cir. 1996)
- Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)
- Walters v. Kijakazi, 2022 WL 1046208, at *1 (9th Cir. Apr. 7, 2022)

- Ford v. Saul, 950 F.3d 1141, 1155 n.7 (9th Cir. 2020)
- Few v. Commissioner of Social Security, No. 2:19-cv-1491-KJN
- Valencia v. Heckler, 751 F.2d 1082, 1085 (9th Cir. 1985)
- Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990)
- Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)
- Carmickle v. Commissioner, 533 F.3d 1155, 1160-61 (9th Cir. 2008)
- Lingenfelter v. Astrue, 504 F.3d 1028, 1936 (9th Cir. 2007)
- Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006)
- Bunnell v. Sullivan, 947 F.2d 341, 345-48 (9th Cir. 1991) (en banc)
- Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)
- Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)
- Fair v. Bowen, 885 F.2d 597, 602-03 (9th Cir. 1989)
- Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007)
- Vertigan v. Heller, 260 F.3d 1044, 1050 (9th Cir. 2001)
- Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)

OPINION

1 2 3 4 5 6 7 8 IN THE UNITED STATES DISTRICT COURT 9 FOR THE EASTERN
DISTRICT OF CALIFORNIA 10 11 MARINA THOMPSON, No. 2:24-CV-0793-DMC 12
Plaintiff, 13 v. MEMORANDUM OPINION AND ORDER 14 COMMISSIONER OF SOCIAL
SECURITY, 15 Defendant. 16 17 18 Plaintiff, who is proceeding with retained counsel, brings this
action for judicial 19 review of a final decision of the Commissioner of Social Security under 42
U.S.C. § 405(g).

20 Pursuant to the written consent of all parties, ECF Nos. 5 and 6, this case is before the 21
undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 22
U.S.C. § 636(c). Pending before the Court are the parties’ briefs on the merits, ECF Nos. 12, 18 23
and 22. 24 The Court reviews the Commissioner’s final decision to determine whether it is: 25 (1)
based on proper legal standards; and (2) supported by substantial evidence in the record as a 26
whole.

See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). “Substantial evidence” is 27 more than
a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521 28 (9th Cir.
1996). It is “... such evidence as a reasonable mind might accept as adequate to support 1 a
conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971).

The record as a whole, 2 including both the evidence that supports and detracts from the
Commissioner’s conclusion, must 3 be considered and weighed. See Howard v. Heckler, 782 F.2d
1484, 1487 (9th Cir. 1986); Jones 4 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985).

The Court may not affirm the Commissioner's 5 decision simply by isolating a specific quantum of supporting evidence. See *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative 7 findings, or if there is conflicting evidence supporting a particular finding, the finding of the 8 Commissioner is conclusive. See *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir.

1987). 9 Therefore, where the evidence is susceptible to more than one rational interpretation, one of 10 which supports the Commissioner's decision, the decision must be affirmed, see *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal 12 standard was applied in weighing the evidence, see *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th 13 Cir.

1988). 14 For the reasons discussed below, the matter will be remanded for further 15 proceedings.

16 17 I. THE DISABILITY EVALUATION PROCESS 18 To achieve uniformity of decisions, the Commissioner employs a five-step 19 sequential evaluation process to determine whether a claimant is disabled. See 20 C.F.R. §§ 20 404.1520 (a)-(f) and 416.920(a)-(f).

The sequential evaluation proceeds as follows: 21 Step 1 Determination whether the claimant is engaged in substantial gainful activity; if so, the claimant is presumed 22 not disabled and the claim is denied; 23 Step 2 If the claimant is not engaged in substantial gainful activity, determination whether the claimant has a severe 24 impairment; if not, the claimant is presumed not disabled and the claim is denied; 25 Step 3 If the claimant has one or more severe impairments, 26 determination whether any such severe impairment meets or medically equals an impairment listed in the regulations; 27 if the claimant has such an impairment, the claimant is presumed disabled and the claim is granted; 28 1 Step 4 If the claimant's impairment is not listed in the regulations, determination whether the impairment prevents the 2 claimant from performing past work in light of the claimant's residual functional capacity; if not, the claimant 3 is presumed not disabled and the claim is denied; 4 Step 5 If the impairment prevents the claimant from performing past work, determination whether, in light of the claimant's 5 residual functional capacity, the claimant can engage in other types of substantial gainful work that exist in the 6 national economy; if so, the claimant is not disabled and the claim is denied.

7 See 20 C.F.R. §§ 404.1520 (a)-(f) and 416.920(a)-(f). 8 9 To qualify for benefits, the claimant must establish the inability to engage in 10 substantial gainful activity due to a medically determinable physical or mental impairment which 11 has lasted, or can be expected to last, a continuous period of not less than 12 months. See 42 12 U.S.C. § 1382c(a)(3)(A).

The claimant must provide evidence of a physical or mental 13 impairment of such severity the claimant is unable to engage in previous work and cannot, 14 considering the claimant's age, education, and work experience, engage in any other kind of 15 substantial gainful work which exists in the national economy. See *Quang Van Han v. Bower*, 16 882 F.2d 1453, 1456 (9th Cir.

1989). The claimant has the initial burden of proving the existence 17 of a disability. See *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990). 18 The claimant establishes a prima facie case by showing that a physical or mental 19 impairment prevents the claimant from engaging in previous work. See *Gallant v. Heckler*, 753 20 F.2d 1450, 1452 (9th Cir. 1984); 20 C.F.R. §§ 404.1520(f) and 416.920(f).

If the claimant 21 establishes a prima facie case, the burden then shifts to the Commissioner to show the claimant 22 can perform other work existing in the national economy. See *Burkhart v. Bowen*, 856 F.2d 23 1335, 1340 (9th Cir. 1988); *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986); *Hammock 24 v. Bowen*, 867 F.2d 1209, 1212-1213 (9th Cir. 1989). 25 /// 26 /// 27 // / 28 /// 1 II.

THE COMMISSIONER’S FINDINGS 2 Plaintiff applied for social security benefits on July 6, 2021. See CAR 17.1 In the 3 application, Plaintiff claims disability began on January 1, 2019. See *id.* Plaintiff’s claim was 4 initially denied. Following denial of reconsideration, Plaintiff requested an administrative 5 hearing, which was held on March 31, 2023, before Administrative Law Judge (ALJ) Daniel 6 Myers.

In an April 12, 2023, decision, the ALJ concluded Plaintiff is not disabled based on the 7 following relevant findings: 8 1. The claimant has the following severe impairment(s): lupus, migraines, an antiphospholipid blood clotting disorder, and 9 obesity; 10 2.

The claimant does not have an impairment or combination of impairments that meets or medically equals an impairment listed in 11 the regulations; 12 3. The claimant has the following residual functional capacity: light work except she can perform only occasional crawling and 13 climbing of ladders; no constant stooping, kneeling, crouching, and climbing of stairs; and only frequent, not constant, handling and 14 fingering; the claimant can have no more than occasional exposure to heat and hazards, such as unprotected heights and dangerous 15 moving machinery; she can have no exposure to direct sun; 16 4.

Considering the claimant’s age, education, work experience, residual functional capacity, and vocational expert testimony, the 17 claimant is capable of performing her past relevant work as a waitress, parts salesperson, and complaint clerk; additionally, there 18 are other jobs that exist in significant numbers in the national economy that the claimant can perform.

19 See *id.* at 19-28. 20 21 After the Appeals Council declined review on January 10, 2024, this appeal followed. 22 / / / 23 / / / 24 / / / 25 / / / 26 / / / 27 1 Citations are to the Certified Administrative Record (CAR) lodged on May 9, 28 2024, ECF No. 8. 1 III. DISCUSSION 2 In her opening brief, Plaintiff argues: (1) the ALJ erred at Step 2 in failing to 3 consider fibromyalgia or mental impairments to be severe; (2) the ALJ’s residual functional 4 capacity finding at Step 4

“is self-evidently wrong and has no basis;” and (3) the ALJ erred in evaluating Plaintiff’s subjective statements and testimony at Step 4.

6 A. Step 2 7 To qualify for benefits, the plaintiff must have an impairment severe enough to 8 significantly limit the physical or mental ability to do basic work activities. See 20 C.F.R. §§ 9 404.1520(c), 416.920(c).

In determining whether a claimant’s alleged impairment is sufficiently 10 severe to limit the ability to work, the Commissioner must consider the combined effect of all 11 impairments on the ability to function, without regard to whether each impairment alone would be 12 sufficiently severe. See *Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996); see also 42 13 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523 and 416.923.

An impairment, or combination of 14 impairments, can only be found to be non-severe if the evidence establishes a slight abnormality 15 that has no more than a minimal effect on an individual’s ability to work. See Social Security 16 Ruling (SSR) 85-28; see also *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting 17 SSR 85-28).

The plaintiff has the burden of establishing the severity of the impairment by 18 providing medical evidence consisting of signs, symptoms, and laboratory findings. See 20 19 C.F.R. §§ 404.1508, 416.908. The plaintiff’s own statement of symptoms alone is insufficient. 20 See *id.* 21 At Step 2, the ALJ found that lupus, migraines, an antiphospholipid blood clotting 22 disorder, and obesity are severe impairments which “significantly limit the ability to perform 23 basic work activities.” CAR 19.

As to impairments found to be non-severe at Step 2, such as a 24 hiatal hernia, asthma, and mental impairments, the ALJ nonetheless considered such impairments 25 at Step 4 in determining Plaintiff’s residual functional capacity. See *id.* at 20; see also *id.* at 24- 26 25 (residual functional capacity analysis). Plaintiff argues the ALJ erred at Step 2 with respect to 27 fibromyalgia and mental impairments.

See ECF No. 12, pgs. 6-9. 28 / / / 1 1. Fibromyalgia 2 Regarding fibromyalgia, the ALJ stated as follows: 3 Although the medical evidence of record shows that the claimant has been assessed with fibromyalgia (see e.g. 8F/26), I find that fibromyalgia is not 4 a medically determinable impairment pursuant to Agency regulations.

Under Social Security Ruling 12-2p, there has to be, in part, evidence 5 showing that other disorders that could cause the claimant’s symptoms or signs were excluded, or that there is evidence that other disorders that 6 could cause the claimant’s repeated manifestations of symptoms, signs, or co-occurring conditions were excluded.

The medical evidence of record 7 does not document such findings. Consequently, the claimant does not have a medically determinable impairment for fibromyalgia under Agency 8 regulations. 9 CAR 23-24. 10 Plaintiff argues that the ALJ erred by not finding fibromyalgia to be a severe 11 impairment. See ECF No. 12, pgs. 6-7. According to Plaintiff: 12 That Marina Thompson's fibromyalgia should have been found severe was adequately argued above.

The decision gives no indication it 13 saw Dr. Vij's quoted statement at CAR 1008 saying why Ms. Thompson had FMS (supra, p.2), and even if one imputed to the decision, on no 14 basis, that it dismissed the statement as mere rote recitation, step-two law, following Webb and Tonapetyan, requires either further development 15 clarifying why Ms. Thompson's doctors give her this diagnosis in this fashion seemingly satisfying Social Security Ruling 12-2p or simply 16 precautionary inclusion of it at step two.

(See fn.3.) The decision gives nothing but a rote recitation that the required findings aren't in the record 17 (CAR 23-24), which is incorrect. Again, there is no reason to believe the decision knew what we know from CAR 1008, including that Dr. Vij 18 diagnosed FMS with full knowledge autoimmune complexities were present. 19 ECF No. 12, pg. 7. 20 21 At the outset, the Court rejects the suggestion that the ALJ failed to consider all of 22 the evidence of record, specifically page 1008.

This document, which consists of a progress note 23 by Dr. Priya Vij dated May 25, 2022, is part of Exhibit 8F, which the ALJ clearly references in 24 the decision. See CAR 1001; see also CAR 23 (hearing decision citing Exhibit 8F). Plaintiff has 25 presented no evidence to suggest that the ALJ did not consider Exhibit 8F in its entirety, 26 including page 1008.

27 / / / 28 / / / 1 Turning to the ALJ's analysis regarding fibromyalgia at Step 2, Social Security 2 Ruling (SSR) 12-2p provides guidance. Under the ruling, fibromyalgia is shown to be a 3 medically determinable impairment either by evidence of eleven tender points on examination or 4 evidence of repeated manifestation of six or more specific symptoms. See SSR 12-2p.

Also 5 required is evidence demonstrating that other disorders that could cause the observed symptoms 6 have been ruled out. See id. 7 Plaintiff argues that "decision gives nothing but a rote recitation that the required 8 findings aren't in the record (CAR 23-24), which is incorrect." Contrary to Plaintiff's 9 conclusion, the findings required under Social Security Ruling 12-2p are not reflected in Dr. Vij's 10 progress note at page 1008.

Dr. Vij's statement regarding fibromyalgia, upon which Plaintiff 11 relies, is as follows: 12 Marina Jean Thompson meets the American College of Rheumatology diagnostic criteria of fibromyalgia, which includes: Widespread pain 13 (typically in at least 7 of 19 body areas) and a severity of symptoms that include fatigue, waking unrefreshed, cognitive symptoms, and other 14 somatic

symptoms; Symptoms present for more than 3 months and lack of another disorder that would explain the symptoms....

15 CAR 1008. 16 17 As Defendant notes, Dr. Vij's statement is conclusory. In essence, Dr. Vij merely 18 repeats the American College of Rheumatology criteria for diagnosing fibromyalgia without 19 identifying any objective evidence to support the diagnosis, as required under SSR 12-2p. 20 Plaintiff does not point to such objective evidence in her brief. Given the conclusory nature of 21 Dr. Vij's assessment, the Court finds that SSR 12-2p has not met and that the ALJ did not err at 22 Step 2 in determining that the evidence fails to establish fibromyalgia as a medically determinable 23 impairment in this case.

See *Walters v. Kijakazi*, 2022 WL 1046208, at *1 (9th Cir. Apr. 7, 2022) 24 (concluding that the claimant "did not provide objective medical evidence of his symptoms or 25 their severity" and a physician's diagnosis of fibromyalgia alone cannot establish a medically 26 determinable impairment); see also *Ford v. Saul*, 950 F.3d 1141, 1155 at n.7 (9th Cir. 2020) 27 (affirming the ALJ's finding that a diagnosis of fibromyalgia was insufficient where the physician 28 failed to document the bases for such diagnoses, such as identifying the requisite tender points or 1 ruling out other causes).

2 2. Mental Impairments 3 The ALJ provided a detailed analysis of Plaintiff's mental impairments at Step 2, 4 ultimately concluded that they are not severe, singly or in combination. See CAR 19-22. Where 5 there is a colorable claim of mental impairment, the regulations require the ALJ to follow a 6 special procedure (known as the "paragraph B" criteria). See 20 C.F.R. §§ 404.1520a(a), 7 416.920a(a).

The ALJ is required to record pertinent findings and rate the degree of functional 8 loss. See 20 C.F.R. §§ 404.1520a(b), 416.920a(b). The ALJ did so here. As to mental 9 impairments, the ALJ stated: 10 The claimant's medically determinable mental impairments, including an anxiety and an adjustment disorder, considered singly and in combination, 11 do not cause more than minimal limitation in the claimant's ability to perform basic mental work activities and are therefore nonsevere.

In 12 making this finding, I have considered the broad functional areas of mental functioning set out in the disability regulations for evaluating 13 mental disorders and in the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1). These four broad functional areas are known as 14 the "paragraph B" criteria. 15 The first functional area is understanding, remembering or applying information.

The claimant alleges that her memory is foggy due to lupus, 16 but the medical evidence of record shows that the claimant has a relatively normal memory with digit span responses in the average

range (7F). Thus, 17 in this area, the claimant has no limitation. 18 The next functional area is interacting with others.

The claimant has revealed that she interacts with others in person and on the phone as well 19 as goes shopping on a regular basis (11E). Thus, in this area, the claimant has no limitation. 20 The third functional area is concentrating, persisting or maintaining pace. 21 The claimant has been shown to be able to spell the word “world” forward and backward (7F) and has demonstrated the ability to perform a 22 significant number of activities of daily living, including preparing meals and doing household chores (11E).

In this area, the claimant has no more 23 than a mild limitation. 24 The fourth functional area is adapting or managing oneself. The claimant has demonstrated the ability to take care of her personal hygiene and 25 perform a significant number of activities of daily living (11E, 7F).

Thus, in this area, the claimant has no more than a mild limitation. 26 * * * 27 28 / / / 1 Because the claimant’s medically determinable mental impairments cause no more than “mild” limitation in any of the functional areas and the 2 evidence does not otherwise indicate that there is more than a minimal limitation in the claimant’s ability to do basic work activities, they are 3 nonsevere (20 CFR 404.1520a(d)(1)).

4 CAR 19-22. 5 In reaching these conclusions, the ALJ relied on Plaintiff’s own function reports as 6 well as the objective findings of Drs. Stephen Simonian, M. Jakubowski, Joshua Schwartz, and 7 Preston Davis. See *id.* 8 Under the regulations governing evaluation of mental impairments, where the 9 degree of functional limitation is no more than mild the impairments are considered non-severe.

10 See 20 C.F.R. § 404.1520a. Plaintiff argues that the ALJ erred in evaluating the doctors’ records 11 under the paragraph B criteria at Step 2. According to Plaintiff, such evaluation is only part of 12 the analysis at Step 4.2 Plaintiff cites Judge Newman’s decision in *Few v. Commissioner of* 13 Social Security, 2:19-cv-1491-KJN, in support of this proposition.

In *Few*, Judge Newman 14 concluded that “the existence of contradictions between the opinions....is not a proper basis for 15 rejecting a mental impairment at step two.” Judge Newman went on to say that such analysis “is 16 meant to occur at step four... in assessing RFC [residual functional capacity].” The *Few* case, 17 however, is distinguishable in that, here, the ALJ did not comment on contradictory medical 18 opinions.

Rather, the ALJ in this case cited the doctors’ objective findings in support of 19 conclusions under the paragraph B criteria. The ALJ did not engage in any improper 20 “persuasiveness analysis” at Step 2, as Plaintiff contends. 21 B. Step 4 22 Residual functional capacity, evaluated at Step 4 of the sequential evaluation 23 process, is the most a person “can still do despite [the

individual's] limitations.” 20 C.F.R. 24 §§ 404.1545(a), 416.945(a) (2012); see also Valencia v. Heckler, 751 F.2d 1082, 1085 (9th Cir.

25 1985) (residual functional capacity reflects current “physical and mental capabilities”). Thus, 26 residual functional capacity describes a person’s exertional capabilities in light of his or her 27 2 Despite Plaintiff’s claim of error, Plaintiff concedes that the regulations do not 28 explicitly limit the paragraph B analysis to Step 4. See ECF No. 12, pg.

8. 1 limitations. An ALJ’s RFC finding must include all of the limitations the ALJ has found to be 2 supported by the evidence of record. See SSR 85-15. 3 Plaintiff first argues the ALJ erred at Step 4 by failing to consider the limiting 4 effects of migraine headaches, despite finding this impairment to be severe at Step 2. See ECF 5 No. 12, pgs. 9-12. Plaintiff also argues the ALJ erred at Step 4 with respect to analysis of her 6 subjective testimony and statements.

See id. at 12-15. 7 1. Migraine Headaches 8 As Plaintiff notes, the ALJ determined at Step 2 that Plaintiff’s migraine 9 headaches are a severe impairment. See CAR 19-20. The ALJ found that Plaintiff’s severe 10 impairments – including migraine headaches – “significantly limit the ability to perform basic 11 work activities....” Id. at 19. At Step 4, the ALJ acknowledged Plaintiff’s testimony and 12 statements that she is unable to work due to her impairments, which include migraine headaches.

13 See id. at 24. The ALJ then commented on Plaintiff’s migraine headaches as follows: “The 14 medical evidence of record shows that the claimant has a history of...migraine headaches.” Id. 15 at 25. The ALJ also noted that Plaintiff had complained of migraine headaches at a July 2021 16 rheumatological consultative evaluation performed by David Chesak, M.D.

See id. The hearing 17 decisions contains no further mention of Plaintiff’s migraine headaches. 18 Plaintiff argues: 19 Ergo, the decision failed to account for the migraine headaches it found severe. Ergo, its RFC is self-evidently wrong. 20 One expects migraines to have an episodic negative effect on ability to work. See generally Social Security Ruling 19-4p [Primary 21 headache disorders].

Nothing in this record supports finding some general, overall, sustained decrement in work-functioning attributable to migraines; 22 everything says their effect is episodic. But nothing in the decision’s RFC is episodic.

The RFC is self-evidently wrong. 23 ECF No. 12, pgs. 10 (emphasis in original). 24 25 Defendant argues that the ALJ did not err because the ALJ properly found that the 26 “alleged severity was not entirely consistent with the medical and nonmedical record such as her 27 daily activities.” ECF No 18, pg. 11.

The Court does not agree that this finding adequately 28 addresses Plaintiff's residual functional capacity as it relates to migraine headaches. As noted 1 above, at Step 2 the ALJ determined that Plaintiff's impairments, including migraine headaches, 2 "significantly limit" Plaintiff's ability to perform basic work activities. An impairment is severe 3 at Step 2 if it has more than a minimal impact on a claimant's ability to work.

See SSR 85- 4 28; Yuckert, 841 F.2d at 306. In finding that Plaintiff's migraine headaches, in combination with 5 her other impairments, "significantly limit" Plaintiff's ability to perform work activities, the ALJ 6 went far beyond this standard. At Step 4, however, the ALJ does not appear to have considered 7 how Plaintiff is significantly limited by her migraines, despite the finding at Step 2.

While the 8 ALJ determined that Plaintiff's subjective statements and testimony regarding the limiting effects 9 of her migraine headaches were not entirely consistent with the objective evidence, the ALJ does 10 not discuss any objective evidence relating to migraine headaches. Nor does the ALJ outline at 11 Step 2 the objective evidence supporting the determination that Plaintiff's migraine headaches 12 "significantly limit" her ability to work.

To the extent the ALJ found that the objective evidence 13 supported a finding at Step 2 that migraine headaches "significantly limit" her ability to work, the 14 ALJ erred at Step 4 by not considering such evidence in the context of Plaintiff's residual 15 functional capacity. 16 Defendant has not offered any explanation for the ALJ's failure to address the 17 objective evidence indicating the significant limitations caused by Plaintiff's migraine headache 18 impairment, which was found to be severe at Step 2.

The Court will direct that this matter be 19 remanded to the Commissioner for further consideration of the limiting effects of Plaintiff's 20 migraine headaches. 21 2. Plaintiff's Statements and Testimony 22 The Commissioner determines the weight to be given to a claimant's own 23 statements and testimony, and the court defers to the Commissioner's discretion if the 24 Commissioner used the proper process and provided proper reasons.

See Saelee v. Chater, 94 25 F.3d 520, 522 (9th Cir. 1996). An explicit finding must be supported by specific, cogent reasons. 26 See Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). General findings are insufficient. 27 See Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). Rather, the Commissioner must identify 28 what testimony is not afforded weight and what evidence undermines the testimony.

See id. 1 Moreover, unless there is affirmative evidence in the record of malingering, the Commissioner's 2 reasons for rejecting testimony as not credible must be "clear and convincing." See id.; see also 3 Carmickle v. Commissioner, 533 F.3d 1155, 1160 (9th Cir. 2008) (citing

Lingenfelter v Astrue, 450 F.3d 1028, 1936 (9th Cir. 2007), and Gregor v. Barnhart, 464 F.3d 968, 972 (9th Cir.

2006)). 5 If there is objective medical evidence of an underlying impairment, the 6 Commissioner may not discredit a claimant's testimony as to the severity of symptoms merely 7 because they are unsupported by objective medical evidence. See Bunnell v. Sullivan, 947 F.2d 8341, 347-48 (9th Cir. 1991) (en banc).

As the Ninth Circuit explained in Smolen v. Chater: 9 The claimant need not produce objective medical evidence of the [symptom] itself, or the severity thereof. Nor must the claimant produce 10 objective medical evidence of the causal relationship between the medically determinable impairment and the symptom. By requiring that 11 the medical impairment "could reasonably be expected to produce" pain or another symptom, the Cotton test requires only that the causal relationship 12 be a reasonable inference, not a medically proven phenomenon.

13 80 F.3d 1273, 1282 (9th Cir. 1996) (referring to the test established in Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986)). 14 15 The Commissioner may, however, consider the nature of the symptoms alleged, 16 including aggravating factors, medication, treatment, and functional restrictions. See Bunnell, 17 947 F.2d at 345-47.

In weighing a claimant's statements and testimony, the Commissioner may 18 also consider: (1) the claimant's reputation for truthfulness, prior inconsistent statements, or other 19 inconsistent testimony; (2) unexplained or inadequately explained failure to seek treatment or to 20 follow a prescribed course of treatment; (3) the claimant's daily activities; (4) work records; and 21 (5) physician and third-party testimony about the nature, severity, and effect of symptoms.

See 22 Smolen, 80 F.3d at 1284 (citations omitted). It is also appropriate to consider whether the 23 claimant cooperated during physical examinations or provided conflicting statements concerning 24 drug and/or alcohol use. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If the 25 claimant testifies as to symptoms greater than would normally be produced by a given 26 impairment, the ALJ may disbelieve that testimony provided specific findings are made.

See 27 Carmickle, 533 F.3d at 1161 (citing Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)). 28 / / / 1 Regarding reliance on a claimant's daily activities to discount testimony of 2 disabling pain, the Social Security Act does not require that disability claimants be utterly 3 incapacitated. See Fair v. Bowen, 885 F.2d 597, 602 (9th Cir. 1989).

The Ninth Circuit has 4 repeatedly held that the "... mere fact that a plaintiff has carried out certain daily activities... 5 does not...[necessarily] detract from her credibility as to her overall disability." See Orn v. 6 Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (quoting Vertigan v. Heller, 260 F.3d 1044, 1050 (9th 7 Cir. 2001)); see also Howard v. Heckler, 782 F.2d 1484, 1488 (9th Cir.

1986) (observing that a 8 claim of pain-induced disability is not necessarily gainsaid by a capacity to engage in periodic 9 restricted travel); *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984) (concluding that the 10 claimant was entitled to benefits based on constant leg and back pain despite the claimant's 11 ability to cook meals and wash dishes); *Fair*, 885 F.2d at 603 (observing that "many home 12 activities are not easily transferable to what may be the more grueling environment of the 13 workplace, where it might be impossible to periodically rest or take medication").

Daily 14 activities must be such that they show that the claimant is "...able to spend a substantial part of 15 his day engaged in pursuits involving the performance of physical functions that are transferable 16 to a work setting." *Fair*, 885 F.2d at 603.

The ALJ must make specific findings in this regard 17 before relying on daily activities to discount a claimant's pain testimony. See *Burch v. Barnhart*, 18 400 F.3d 676, 681 (9th Cir. 2005). 19 As to Plaintiff's statements and testimony, the ALJ provided the following 20 summary: 21 The claimant alleges, in essence, that she is unable to work due to lupus, multiple sclerosis, arthritis, mixed connective tissue disease, migraine 22 headaches, and an antiphospholipid clotting disorder.

She also claims that she often needs frequent or extended rest breaks throughout the 23 day and that she occasionally uses a cane to ambulate (4E, 5E, 6E, 11E). 24 On Function Reports (4E, 5E, 6E, 11E, 12E), the claimant, her husband, and her mother-in-law revealed that the claimant was able to prepare 25 meals, do laundry, wash dishes, sweep, mop, drive a car, shop in stores and by computer, and take her kids to school.

They also revealed that she 26 had limitations with exertional, postural and manipulative activities; that she used a cane, brace and splint; and that she had difficulty with 27 concentrating and completing tasks. 28 / / / 1 During the hearing, the claimant testified that she had difficulty lifting her baby and cookware; that she could do small loads of laundry and light 2 housework; and that she had migraines 3 to 4 times a month and would make her be out for a day or two about 2 to 3 times a month.

She also 3 testified that she had difficulty with her hands for a couple of days to a week during a month; that she had difficulty sitting due to back pain; that 4 she could be on her feet for 30 to 45 minutes before needing a break; that she had difficulty with ambulation due to her legs feeling like they will 5 give out; that she occasionally uses a cane that was not prescribed, but was suggested by her doctor to use; that she had extreme fatigue and muscle 6 soreness due to fibromyalgia; and that she was not currently receiving any mental treatment.

7 CAR 24-25. 8 9 After summarizing the objective medical evidence, the ALJ concluded as follows 10 regarding Plaintiff's statements and testimony: 11 Thus, after careful consideration of the evidence, I find that the claimant's medically determinable impairments could reasonably be

expected to 12 cause the alleged symptoms; however, the claimant's, her husband's, and her mother's statements concerning the intensity, persistence and limiting 13 effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this 14 decision.

As for their statements about the intensity, persistence, and limiting effects of the claimant's symptoms, they are inconsistent with the 15 medical evidence of record as a whole. To illustrate, although they allege that the claimant had difficulty with ambulation and sitting in addition to 16 occasionally using a cane, the claimant had been reported to have normal strength with a normal gait and intact sensation.

The claimant also 17 acknowledged during her hearing [that use of a cane] had been suggested by a physician but was not prescribed. In addition, despite her symptoms 18 and impairments, the claimant has demonstrated the ability to perform a significant number of activities of daily living, including preparing meals, 19 doing household chores, going shopping, and taking her kids to school.

20 CAR 26. 21 Plaintiff argues that the ALJ erred by failing to consider Plaintiff's statements and 22 testimony separately from the function reports submitted by her husband and mother-in-law. See 23 ECF No. 12, pgs. 12-15. This argument appears to have three components.

First, Plaintiff 24 contends that the ALJ erred with respect to the third-party statements because the ALJ did not 25 provide reasons germane to each witness. Second, Plaintiff asserts that the ALJ's references to 26 the objective evidence are insufficient to provide a rationale for discrediting her subjective 27 statements and testimony.

Third, Plaintiff challenges the ALJ's reliance on her limited daily 28 activities to discount her statements and testimony. 1 Plaintiff's first argument is based on case law relating to evaluation of third-party 2 statements which is no longer applicable due to revision of the regulations for cases filed, as here, 3 after March 2017.

Under the revised regulations applicable to this case, the ALJ need only 4 consider third-party statements, but is not required to explain how they were considered. See 20 5 C.F.R. § 416.920c(d). Because the hearing decision clearly reflects that third-party statements 6 were considered, the Court rejects Plaintiff's first argument. 7 As to Plaintiff's second argument – that the ALJ's references to the objective 8 medical evidence do not provide a sufficient analysis – the Court does not agree.

As explained 9 above, the ALJ may not rely solely on inconsistency with the objective evidence. The ALJ did 10 not do so here. The hearing decision reflects that, in addition to inconsistency with the objective 11 evidence, the ALJ also relied on inconsistencies between various statements made by Plaintiff 12 regarding her subjective complaints, as well as her activities of daily living.

As to 13 inconsistencies, the ALJ notes, for example, that while Plaintiff testified to debilitating symptoms 14 relating to her ability to ambulate and the need to use a cane, Plaintiff admitted during the hearing 15 that use of a cane has never been prescribed by a doctor.

The ALJ may rely on this inconsistency. 16 See *Smolen*, 80 F.3d at 1284. 17 Finally, as to Plaintiff's argument that the ALJ's reliance on her activities of daily 18 living was inappropriate because such activities are limited and do not show an ability to perform 19 work on a full-time consistent basis, the Court also does not agree. Again, even if Plaintiff's 20 activities of daily living are limited and do not show transferability to a work-setting, the ALJ 21 may nonetheless rely on inconsistencies between Plaintiff's subjective statements and testimony 22 concerning the limiting effects of her impairments and her daily activities.

See *id.* Here, Plaintiff 23 testified that she is completely disabled by her symptoms. However, Plaintiff also acknowledged 24 daily activities – such as preparing meals, completing household chores, grocery shopping, and 25 caring for her children – which are inconsistent with her allegation of total disability. 26 / / / 27 / / / 28 / / / 1 IV. CONCLUSION 2 For the foregoing reasons, this matter will be remanded under sentence four of 42 3 | U.S.C. § 405(g) for further development of the record and/or further findings addressing the 4 || deficiencies noted above.

5 Accordingly, IT IS HEREBY ORDERED that: 6 1. Plaintiff's motion for summary judgment, ECF Nos. 12 and 22, is granted; 7 2. Defendant's motion for summary judgment, ECF No. 18, is denied; 8 3. The Commissioner's final decision is reversed and this matter is remanded 9 | for further proceedings consistent with this order; and 10 4.

The Clerk of the Court is directed to enter judgment and close this file. 1] 12 | Dated: March 19, 2025 Ss..c0_, 13 DENNIS M. COTA 14 UNITED STATES MAGISTRATE JUDGE 15 16 17 18 19 20 21 22 23 24 25 26 27 28 16