

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

Tammy A. v. Frank Bisignano

Tammy A. v. Bisignano, No. 24cv1452-CAB (MSB) (S.D. Cal. June 13, 2025) (report and recommendation) ·
No. 24cv1452-CAB (MSB) · Decided June 13, 2025

OPINION

Alvidres v. O'Malley

PER CURIAM.

2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 TAMMY A.,¹ Case No.: 24cv1452-CAB (MSB) 12 Plaintiff,

REPORT AND RECOMMENDATION

13 v. 14 FRANK BISIGNANO, Commissioner of Social Security,² 15 Defendant. 16 17 18 This
Report and Recommendation is submitted to the Honorable Cathy Ann 19 Bencivengo, United
States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Civil 20 Local Rule 72.1(c) of the
United States District Court for the Southern District of 21 California. On August 15, 2024,
Plaintiff Tammy A. (“Plaintiff”) filed a complaint 22 pursuant to 42 U.S.C. § 405(g), seeking
judicial review of the Commissioner of Social 23 Security’s (“Commissioner”) final adverse
decision. (ECF No. 1.) Now pending before 24 25 1 Under Civil Local Rule 7.1(e)(6)(b),
“[o]pinions by the Court in [Social Security cases under 42 U.S.C. § 405(g)] will refer to any non-
government parties by using only their first name and last initial.” 26 2 Frank Bisignano became
the Commissioner of Social Security in on May 6, 2025. Accordingly, he should be substituted as
the defendant in this lawsuit. See Fed. R. Civ. P. 25(d) (“An action does not 27 abate when a
public officer who is a party in an official capacity dies, resigns, or otherwise ceases to 2 when he
denied Plaintiff’s application for disability insurance benefits. (ECF No. 12 3 (“Mot.”).) On
February 18, 2025, the Commissioner filed an opposition. (ECF No. 17 4 (“Opp’n”).) Plaintiff
then filed a reply on March 10, 2025. (ECF No. 20 (“Reply”).)

5 I. PROCEDURAL BACKGROUND

6 On July 18, 2018, Plaintiff filed an application for social security benefits under 7 Title II and
Title XVIII of the Social Security Act, alleging an inability to work beginning
8 August 30, 2017. (AR 304-305.) Plaintiff also filed an application for supplemental
9 security income under Title XVI of the Social Security Act on July 17, 2018. (AR 299-303.) 10
The Commissioner initially denied both applications on August 21, 2018, and again upon 11
reconsideration on July 21, 2020. (AR 123-26, AR 130-34.) On September 25, 2020, 12 Plaintiff
requested an administrative hearing. (AR 135-36.) On September 9, 2021, ALJ 13 James Delphey

held an initial telephonic hearing where he directed Plaintiff to attend 14 additional internal medical and psychological examinations. (AR 50–70.) The ALJ held a 15 subsequent telephonic hearing on October 4, 2022, during which Plaintiff, appearing 16 with counsel, and vocational expert, Jeff Beeman, testified. (AR 13-49.) 17 The ALJ issued an unfavorable written decision on April 4, 2023, finding Plaintiff 18 had not been under disability from August 30, 2017, through the date of the decision. 19 (AR 99-115.) On May 8, 2023, Plaintiff requested review of the ALJ’s decision. (AR 297- 20 98.) The Appeals Council denied Plaintiff’s request for review on December 22, 2023, 21 finalizing the ALJ’s decision. (AR 5-10.) This timely civil action followed.

22 II. SUMMARY OF THE ALJ’S FINDINGS

23 In rendering his decision, the ALJ followed the Commissioner’s five-step 24 sequential evaluation process. See 20 C.F.R. § 404.1520. At step one, the ALJ found 25 Plaintiff had not engaged in substantial gainful activity since the alleged disability onset 26 date, August 30, 2017. (AR 105.) At step two, the ALJ found Plaintiff has the following 27 severe impairments that significantly limit her ability to perform basic work activities: 2 medically determinable impairments of intermittent tinnitus, hypertension, and sleep 3 apnea were non-severe impairments that did not significantly limit Plaintiff’s ability to 4 work. (Id.) Further, the ALJ determined Plaintiff’s medically determinable mental 5 impairment—adjustment disorder with depression and anxiety—was non-severe 6 because it minimally limited Plaintiff’s ability to perform basic mental work activities.³ 7 (AR 106.) 8 At step three, the ALJ found Plaintiff did not have an impairment, or combination 9 of impairments, that met or medically equaled the severity of one of the listed 10 impairments in the Commissioner’s Listing of Impairments. (AR 108.) See also 20 C.F.R.

11 Pt. 404, Subpt. P, App. 1. After consideration of the entire record, the ALJ found:

12 [Plaintiff] has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except she has these non- 13 exertional limitations: she can occasionally climb ramps and stairs; never 14 climb ladders, ropes or scaffolds; and [can] occasionally balance, stoop, kneel, crouch, and crawl. She needs to avoid concentrated exposure to 15 extreme temperatures, loud noise, vibration, or strobe or flashing lights. 16 She needs to avoid work at unprotected heights or around dangerous moving machinery. She can occasionally drive a motor vehicle. 17 18 (AR 108.) The ALJ found Plaintiff’s symptoms were consistent with the objective medical 19 requirements. (Id.) At step four, the ALJ determined Plaintiff was “capable of 20 performing past relevant work as a personal attendant, user support analyst, order 21 clerk, policy information clerk, and solicitor/call center attendant.” (AR 113.) The ALJ 22 also noted Plaintiff’s residual functional capacity (“RFC”) permitted her to pursue other 23 readily available unskilled work. (Id.) The ALJ concluded Plaintiff was not under 24 disability as defined by the Social Security Act from August 30, 2017, through the date of 25 his decision. (AR 115.) 26 27 2 Plaintiff raises two issues as grounds for reversal: 3 1. Whether the ALJ failed to

adequately evaluate Plaintiff's vestibular migraines 4 as medically equivalent to listing 11.02B and failed to account for all 5 limitations resulting from migraines in the RFC. 6 2. Whether the ALJ failed to find that Plaintiff's depression and anxiety were 7 severe impairments and failed to account for any mental limitations in the 8 RFC. 9 (Mot. at 9.)

10 IV. STANDARD OF REVIEW

11 Section 405(g) of the Social Security Act allows unsuccessful applicants to seek
12 judicial review of the Commissioner's final decision. See 42 U.S.C. § 405(g). The 13 reviewing court may enter a "judgment affirming, modifying, or reversing" the 14 Commissioner's decision. *Id.* The reviewing court may also remand the case to the 15 Social Security Administration for further proceedings. *Id.* 16 The scope of judicial review is limited, and the denial of benefits will not be 17 disturbed if it is supported by substantial evidence in the record and contains no legal 18 error. *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Molina v. Astrue*, 674 19 F.3d 1104, 1110 (9th Cir. 2012)). The Supreme Court has said substantial evidence 20 means "more than a mere scintilla," but only "such relevant evidence as a reasonable 21 mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 22 1148, 1154 (2019) (quoting *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 23 (1938)). Where the evidence is susceptible to more than one rational interpretation, 24 the ALJ's decision must be upheld. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th 25 Cir. 2008) (citing *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). This includes 26 deferring to the ALJ's credibility determinations and resolutions of evidentiary conflicts. 27 See *Lewis v. Apfel*, 236 F.3d 503, 509 (9th Cir. 2001). 28 the reviewing court "may not reverse an ALJ's decision on account of an error that is 3 harmless." *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015) 4 (quoting *Molina*, 674 F.3d at 1111).

5 V. DISCUSSION

6 A. Whether the ALJ Failed to Adequately Evaluate Plaintiff's Vestibular Migraines 7 as Medically Equivalent to Listing 11.02B and Failed to Account for All 8 Limitations Resulting from Migraines in the RFC 9 1. Summary of Parties' Arguments 10 Plaintiff's argument essentially has four parts. First, Plaintiff argues that the ALJ 11 should have evaluated her migraines at step three even though she did not originally 12 argue that any of her impairments met or medically equaled a listed impairment. (Mot. 13 at 10-11.) Second, she argues that the ALJ mischaracterized evidence related to her 14 vestibular disturbance syndrome with migraines and the effectiveness of migraine 15 treatment. (*Id.* at 11.) Third, the ALJ failed to consider elements relevant to establishing 16 the medical equivalence of Listing 11.02B. (*Id.* at 13.) Fourth, the RFC was deficient 17 because it did not adequately account for her experiences with vestibular migraine. (*Id.* 18 at 19.) 19 The Commissioner disagrees because Plaintiff has the burden to show that her 20 migraines were medically equivalent to a listed impairment, but she failed to do so. 21 (Opp'n at 6-7.) For a headache to medically equal a listing, evidence from a medical 22 consultant, psychological consultant, medical expert, or Appeals Council medical 23 support staff

is required. (Id.) The Commissioner also purports that the ALJ ultimately found Plaintiff's severe impairment of vestibular disturbance syndrome was inconsistent with objective medical evidence and, thus, not disabling. (Id. at 8.) The inconsistencies thus rendered any possible error at step three to be harmless. (Id.) Consequently, the RFC adequately accounts for all credible symptoms. (Id. at 11.)

2 At step three, the ALJ considers whether a claimant has an impairment or 3 combination of impairments that meet or medically equal the severity of one of the 4 impairments listed in the Commissioner's Listing of Impairments. See 20 C.F.R. § 5 404.1520(a)(4)(iii). The mere diagnosis of a listed condition does not establish that a 6 claimant "meets" a listed impairment. See 20 C.F.R. § 416.925(d); *Young v. Sullivan*, 911 F.2d 180, 183–84 (9th Cir. 1990). "For a claimant to show that his impairment matches 8 a listing, it must meet all of the specified medical criteria. An impairment that manifests 9 only some of those criteria, no matter how severely, does not qualify." *Sullivan v. 10 Zebley*, 493 U.S. 521, 530 (1990); see also 20 C.F.R. § 416.925(d). If a claimant has an 11 impairment that meets or equals a listed impairment and meets the duration 12 requirement, disability is presumed, and benefits are awarded. 20 C.F.R. § 416.920(d). 13 Although a claimant bears the burden of proving that she has an impairment that 14 meets or equals the criteria of a listed impairment, the ALJ is required to adequately 15 evaluate and discuss the evidence that supports his conclusion before concluding that 16 the claimant's impairments fail to meet or equal a listing. See *Lewis*, 236 F.3d at 513; 17 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The ALJ satisfies this requirement 18 by adequately discussing the evidence supporting the step three determination 19 anywhere in his decision. *Kennedy v. Colvin*, 738 F.3d 1172, 1178 (9th Cir. 2013). 20 Additionally, "[a]n ALJ is not required to discuss the combined effects of a claimant's 21 impairments or compare them to any listing in an equivalency determination, unless the 22 claimant presents evidence in an effort to establish equivalence." *Id.* (citing *Burch*, 400 F.3d at 683). The ALJ is also not required "to state why a claimant failed to satisfy every 24 different section of the listing of impairments." *Gonzalez v. Sullivan*, 914 F.2d 1197, 25 1201 (9th Cir. 1990). 26

3. Analysis 27 The ALJ's step three analysis contained a two-sentence summary: 2 meet or medically equal a listed impairment. The undersigned has reviewed the medical record and find[s] that the claimant's impairments do not meet or 3 medically equal listings 1.18, 9.00, 11.05 or any other listing. 4 (AR 108.) Plaintiff claims that the ALJ was required to analyze whether her 5 vestibular disturbance syndrome with migraine was medically equivalent to a listed 6 impairment, specifically Listing 11.02B. 7 Plaintiff does not dispute that she never explicitly argued before the ALJ that her 8 migraines were medically equivalent to Listing 11.02B, and she does not provide legal 9 authority that requires that the ALJ must analyze medical equivalency to every possible 10 listing. According to *Kennedy*, the ALJ was not required to compare Plaintiff's 11 impairments to any listing that Plaintiff failed to present herself. See 738 F.3d at 1178. 12 "The regulations merely require the Secretary to 'review the symptoms,' 20 C.F.R. § 13 404.1526, and make specific findings essential to the conclusion." *Abreu v. Astrue*, 303 F. App'x 556, 557 (9th Cir. 2008) (quoting *Gonzalez*,

914 F.2d at 1200). 15 Although Plaintiff did not present any medical equivalence argument to the ALJ 16 and no medical examiners or consultants appeared to find any of her impairments could 17 have met a listing,⁴ the ALJ still compared Plaintiff's impairments to Listings 1.18, 9.00, 18 and 11.05. Listing 1.18 pertains to an abnormality of a major joint(s) in any extremity; 19 Listing 9.00 refers to endocrine disorders; and Listing 11.05 addresses benign brain 20 tumors. In *Abreu*, the Ninth Circuit found that the ALJ was under no obligation to 21 compare the claimant's impairments to a listing that claimant never argued before him. 22 303 F. App'x at 557. The ALJ in that case noted that no treating or examining physicians 23 mentioned findings for equivalency and only focused on claimant's argument regarding 24 listing 1.04A. *Id.* The claimant appealed the decision and argued the ALJ should have 25 also compared his impairments to 1.04B and 1.04C, but the Ninth Circuit disagreed. *Id.* 26 27 2 presented to him, he certainly is not obligated to assess an entirely different listing that 3 was never brought to his attention. 4 Despite Plaintiff's best efforts, she cannot avoid the fact that the ALJ was not 5 required to specifically compare her impairments to Listing 11.02B without first 6 presenting her argument. Plaintiff spends a sizable portion of her Reply explaining how 7 an opinion from an acceptable medical source confirming medical equivalence should 8 "not eliminate the ALJ's duty to consider medical equivalence of a listing at Step 3." 9 (Reply at 5-8.) She argues that it would be against public policy if "the ALJ would not 10 need to consider the medical equivalency of Listing 11.02(B) even if the SSA doctors did 11 not consider it and even if they did not have an opportunity to review the complete 12 record." (*Id.* at 7.) If such a practice was accepted, she insists that the ALJ would not be 13 obligated to perform an equivalency evaluation even if "Plaintiff submitted medical 14 records sufficient for [a] *prima facie* showing that the severity of her symptoms could 15 have satisfied the medical equivalence of Listing 11.02(B)" (*Id.*) However, Plaintiff's 16 hypothetical is missing a crucial initial step; it is not enough for Plaintiff to merely submit 17 medical records that would show medical equivalence, she must also present the case 18 to the ALJ. See *Kennedy*, 738 F.3d at 1178 ("[a]n ALJ is not required to . . . compare 19 [claimant's impairments] to any listing in an equivalency determination, unless the 20 claimant presents evidence in an effort to establish equivalence") (emphasis added). As 21 Plaintiff points out, the ALJ cannot "play doctor" [Reply at 8], so he cannot be expected 22 to know of every possible listing that may be equivalent to her impairments and no legal 23 authorities require him to do so. Although Plaintiff was represented by different 24 counsel at the time [see AR 102], Plaintiff is not excused from her obligation to present 25 her case to the ALJ at the appropriate time. Indeed, the ALJ held two hearings to allow 26 Plaintiff to supplement the record with an internal medical exam and psychological 27 exam. (AR 75-76.) Furthermore, the ALJ provided much leeway in keeping the record 2 record" (AR 25.) 3 Of course, Plaintiff and her counsel are not necessarily medical experts either, but 4 that is why the ALJ must rely on "objective medical evidence from an acceptable 5 medical source." SSR 19-4p. The ALJ is not allowed to only "use a person's statement of 6 symptoms, a diagnosis, or a medical opinion to establish the

existence of a medically 7 determinable impairment.” Id. 8 Plaintiff’s reading of HALLEX §I-2-5-34(A)5 is flawed. (Reply at 7-8.) The court in 9 *DuBois v. Berryhill* dealt with a similar issue where the plaintiff similarly argued that 10 HALLEX §I-2-5-34(A) required the ALJ to order a medical expert opinion to test medical 11 equivalence. No. 1:17-CV-00076-JDL, 2017 WL 6000340, at *3 (D. Me. Dec. 3, 2017). 12 However, the court in *DuBois* rejected that interpretation and found “that an ALJ must 13 consult with a medical expert only when considering finding that a claimant’s 14 impairments medically equal a listing, not when he or she is considering finding that 15 they do not.” Id. This Court agrees. The ALJ only needs to order a medical expert 16 opinion to establish that Plaintiff’s impairments were equivalent to Listing 11.02B 17 because his findings must be supported by evidence from an acceptable medical source. 18 See SSR 19-4p. However, ALJs are not required to consult with a medical expert to 19 determine whether the claimant’s impairments equal listing. *DuBois*, 2017 WL 6000340, 20 at *3. Accordingly, the ALJ’s conduct was not erroneous, and the Court may end its 21 analysis there. 22 Even if the Court were to entertain Plaintiff’s equivalency argument, Plaintiff has 23 not met her burden in establishing that her migraines were medically equivalent to

24 Listing 11.02B. For Plaintiff’s second argument, she claims that the ALJ mischaracterized 25 evidence related to her vestibular disturbance syndrome with migraines and the 26 27 5 The Program Operations Manual System has since renumbered HALLEX §I-2-5-34 to HA 01250.034. 2 statements, such as “the record [regarding her vestibular disturbance syndrome with 3 migraine] reveals relatively stable findings” and the “claimant reported improved 4 headaches with less frequency” (Id. (quoting AR 109-10).) Plaintiff argues that 5 these statements were misleading because, while “some of the medical records noted 6 that her migraines were improving in frequency and severity with treatment, they did 7 not improve to such a degree as to no longer be disabling.” (Id.) She presented 8 evidence from the medical record that showed the severity of her migraines decreased 9 from “severe to moderate” after taking prescribed medication but that she was still 10 experiencing headaches at least one to two times a week, and sometimes daily. (Id. at 11 12.) 12 The Court finds that the ALJ did not mischaracterize the medical record. An ALJ is 13 responsible for interpreting the evidence, and the ALJ considered Plaintiff’s self-reports 14 of ongoing headaches but found it did not amount to disability because other records 15 indicated normal findings. See *Tommasetti*, 533 F.3d at 1038 (the ALJ’s rational 16 interpretation must be upheld even when evidence is susceptible to more than one 17 interpretation). Plaintiff’s cherry-picked record does not negate the ALJ’s ultimate 18 finding that her vestibular migraines were relatively stable. 19 For Plaintiff’s third argument, to show the ALJ erred at step three, Plaintiff must 20 identify the listings she believes she meets or equals and set forth evidence that would 21 support “the diagnosis and findings of a listed impairment.” *Burch*, 400 F.3d at 683. 22 The impairment must meet all the specified medical criteria in the listing. *Zelby*, 493 23 U.S. at 530. Listing 11.02B requires Plaintiff to establish that she experiences 24 “[d]yscognitive seizures (see 11.00H1b), occurring at least once a week for at least 3 25

consecutive months (see 11.00H4) despite adherence to prescribed treatment (see 26 11.00C).” 20 C.F.R. pt. 404, Subpt. P, App. 1, § 11.02B. Dyscognitive seizures are 27 characterized by an “alteration of consciousness without convulsions or loss of muscle 2 gestures or verbal utterances) may occur.” Id., 11.00H1b. 3 SSR 19-4p provides further guidance in assessing medical equivalency to 11.02B: 4 To evaluate whether a primary headache disorder is equal in severity and duration to the criteria in 11.02B, we consider: a detailed description from an 5 AMS [acceptable medical source] of a typical headache event, including all 6 associated phenomena (for example, premonitory symptoms, aura, duration, intensity, and accompanying symptoms); the frequency of headache events; 7 adherence to prescribed treatment; side effects of treatment (for example, many 8 medications used for treating a primary headache disorder can produce drowsiness, confusion, or inattention); and limitations in functioning that may be 9 associated with the primary headache disorder or effects of its treatment, such as 10 interference with activity during the day (for example, the need for a darkened and quiet room, having to lie down without moving, a sleep disturbance that 11 affects daytime activities, or other related needs and limitations). 12 SSR 19-4p at ¶ 8. 13 As an initial matter, Plaintiff does not present any evidence similar to what is 14 described above. That alone is reason enough to find the ALJ did not err. Burch, 400 15 F.3d at 683. However, Plaintiff argues that she experiences migraines that are 16 equivalent to dyscognitive seizures. She claims her migraines cause pain that “feels like 17 a knife.” (Mot. at 13-14 (citing AR 787).) Her headaches are in the “mid-occipital region, 18 central region, and bilateral periorbital region.” (Id. at 14 (citing AR 787).) She also 19 reported vestibular migraines, fatigue, and poor memory. (Id. (citing AR 1106).) She 20 was evaluated for persistent ongoing chronic dizziness and disequilibrium. (Id. (citing AR 21 1134).) 22 The Court is unconvinced that Plaintiff’s theory would have made a difference in 23 the ALJ’s decision. None of the evidence presented by Plaintiff shows that she 24 experiences “an alteration of consciousness” or anything equal to blank stares, changes 25 of facial expression, and automatisms. “A claimant cannot qualify for benefits under the 26 ‘equivalence’ step by showing that the overall functional impact of his unlisted 27 impairment or combination of impairments is as severe as that of a listed impairment.” 2 components for Listing 12.05C, the combined severity of his impairments compensated 3 for the one-point difference in IQ score. Id. However, the Court found that the claimant 4 had to show his impairments “medically” equaled the requisite IQ score. Id at 1174. 5 Plaintiff argues that the pain, sensitivity to light, and being knocked out from her 6 migraines “could be equivalent” to an alteration of consciousness or blank staring. 7 (Mot. at 14.) But, Plaintiff’s belief that her impairments “could be” equivalent to a 8 listing is purely conjectural and insufficient; she must show it is medically equivalent. 9 The Court finds that Plaintiff does not meet her burden here. 10 Although the Commissioner puts Plaintiff’s subjective symptom testimony at 11 issue, the Court finds such analysis unnecessary. The ALJ found that “claimant’s 12 statements concerning the intensity, persistence and limiting effects of these symptoms 13 are not entirely consistent with the medical evidence and other evidence in the record” 14 [AR 109],

but even if he took Plaintiff's testimony at face value, it still would not have proven her symptoms were medically equivalent. See SSR 19-4p ("We also will not make a finding of disability based on a person's statement of symptoms alone.") Because Plaintiff has not shown that she experiences dyscognitive seizures or anything medically equivalent to that, she has not met her burden in showing that her impairments are equal to Listing 11.02B. The ALJ did not err here. Finally, Plaintiff believes that the RFC should include greater limitations to account for her severe migraines. (Mot. at 18-20.) Although Plaintiff makes the bold statement that "courts have consistently held that when time off task or absenteeism is supported by the evidence of record, it should be included in the RFC" [id.], Plaintiff again has not provided any legal authority to support her contention, and the Court has not found any. Instead, "the ALJ is responsible for translating and incorporating clinical findings into a succinct RFC." *Rounds*, 807 F.3d at 1006 (citing *Stubbs–Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir.2008)). Here, the ALJ thoroughly discusses Plaintiff's vestibular dizziness. (AR 109-11.) The ALJ then specifically concludes: [T]he claimant's vestibular disturbance syndrome with migraine limits the claimant to work at light exertional level, and renders it unsuitable for her to climb ladders, ropes, or scaffolds. She is able to occasionally climb ramps and stairs. She is able to occasionally balance, stoop, kneel, crouch, and crawl. She needs to avoid work at unprotected heights or around dangerous moving machinery. She is able to occasionally drive a motor vehicle. (AR 111.) Substantial evidence supports the current RFC as it pertains to Plaintiff's migraines, and the Court has not found any legal error here. Based on the foregoing, the Court finds that the ALJ's step three assessment and RFC of Plaintiff's vestibular disturbance syndrome with migraine was supported by substantial evidence and contains no legal error.

B. Whether the ALJ Failed to Find that Plaintiff's Depression and Anxiety were Severe Impairments and Failed to Account for Any Mental Limitations in the

15 RFC

Plaintiff's second issue contains two discrete parts. First, Plaintiff argues that the ALJ's finding that Plaintiff's "medically determinable mental impairments of adjustment disorder with depression and anxiety" were non-severe was not supported by substantial evidence. (Mot. at 21-27.) Second, the ALJ failed to consider those mental impairments—or explain why such consideration was excluded—in the RFC assessment. (Id. at 26.) Plaintiff further contends the erroneous RFC resulted in incomplete hypothetical questions to the vocational expert ("VE"). (Id. at 27.) In response, the Commissioner argues substantial evidence supports the ALJ's finding that Plaintiff's mental impairments were non-severe. (Opp'n at 13.) The Commissioner contends that the ALJ is not required to include an express finding for non-severe mental impairments in the RFC determination. (Id. at 19.) The Commissioner further maintains the ALJ captured Plaintiff's mental impairments in the exertional limits. (Id. at 20-21.)

2. Applicable Law To determine if an individual qualifies as disabled, the ALJ applies a five-step sequential process. 20 C.F.R. § 404.1520(a)(4); see also *Garrison v. Colvin*, 759 F.3d 995, 6

1010 (9th Cir. 2014). 7 At step two, the ALJ determines the severity of a claimant’s physical or
mental 8 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii). The ALJ must apply a “special psychiatric
9 review technique” when evaluating a mental impairment’s severity. *Id.* § 404.1520a(a); 10
Chaudhry v. Astrue, 688 F.3d 661, 670 (9th Cir. 2012). Using this technique, the ALJ 11
determines if a claimant has a medically determinable mental impairment. 20 C.F.R. § 12
404.1520a(b). The ALJ then categorizes and rates the impairment in the following 13 functional
areas: (1) understand, remember, or apply information; (2) interact with 14 others; (3) concentrate,
persist, or maintain pace; and (4) adapt or manage oneself. See 15 *Chaudhry*, 688 F.3d at 670; 20
C.F.R. § 404.1520a(c)(3). The ALJ’s decision must 16 “‘Incorporate the pertinent findings and
conclusions based on the technique’ and 17 ‘include a specific finding as to the degree of
limitation in each of the functional areas.’” 18 *Id.* § 404.1520a(c)(4); see also *Chaudhry*, 688 F.3d
at 670. 19 Steps four and five consider a claimant’s RFC assessment to determine if they can 20
perform relevant past or other available work. 20 C.F.R. § 404.1520(a)(4); see also 21 *Garrison*,
759 F.3d at 1011. A claimant’s RFC represents the most work a claimant can 22 perform given
their limitations. 20 C.F.R. § 404.1545(a)(1). The ALJ will consider “all 23 medically
determinable impairments of which we are aware, including . . . medically 24 determinable
impairments that are not ‘severe’.” 20 C.F.R. § 404.1545(a)(2). “The RFC 25 therefore should be
exactly the same regardless of whether certain impairments are 26 considered ‘severe’ or not.”
Buck, 869 F.3d at 1040. The Ninth Circuit has held that “an 27 RFC that fails to take into account
a claimant’s limitations is defective.” *Valentine v.* 2 In step two, the ALJ acknowledged Plaintiff
had medically determinable mental 3 impairments of adjustment disorder with depression and
anxiety. (AR 106). He found 4 Plaintiff had “mild limitation[s]” in the four broad functional areas,
and concluded the 5 impairments were non-severe because they “do not cause more than minimal
limitation 6 in the claimant.” (*Id.*) The ALJ supported his conclusion with evaluations from 7
Neighborhood Healthcare, which noted Plaintiff “had coherent and linear thought 8 process,”
“intact attention span and concentration” with “fair insight and judgement.” 9 (*Id.*) Treatment
notes from other providers “noted her depression was mild.” (*Id.*) The 10 ALJ also cited the
February 2022 examination by Jessica Durr Ph.D. who found Plaintiff’s 11 mental impairments
were non-severe and mild in nature. (AR 106–07.) Lastly, the ALJ 12 cited the August 2018
opinion of Dr. Aroon Suansilppongse and July 2020 opinion of Dr. 13 Kevin Gregg who both
found Plaintiff’s limitations did not exceed “mild” in any of the 14 four functional areas. (AR
107.) 15 The ALJ found the Plaintiff had the RFC to: 16 [P]erform light work as defined in 20
CFR 404.1567(b) and 416.967(b) except she has these non-exertional limitations: She can
occasionally climb 17 ramps and stairs; never climb ladders, ropes or scaffolds; and occasionally
18 balance, stoop, kneel, crouch, and crawl. She needs to avoid concentrated exposure to extreme
temperatures, loud noise, vibration, or strobe or 19 flashing lights. She needs to avoid work at
unprotected heights or around 20 dangerous moving machinery. She can occasionally drive a
motor vehicle. 21 (AR 108.) The ALJ explained he considered all of Plaintiff’s symptoms to the

22 extent they could reasonably be accepted as consistent with the objective medical 23 evidence and other evidence. (Id.) During his RFC assessment, the ALJ discussed 24 Plaintiff's medical impairments of benign pituitary adenoma, vestibular disturbance 25 syndrome with migraines, status post remote right ankle injury and surgery, and 26 obesity. (AR 109–12.) The ALJ omitted discussion of Plaintiff's medically determinable 27 mental impairments from the RFC assessment, instead stating the "[RFC] assessment 2 function analysis." (AR 108.) 3 4. Analysis 4 a. Substantial evidence supports the ALJ's conclusion that Plaintiffs 5 mental impairments were non-severe 6 Plaintiff argues the ALJ erred by not considering Plaintiff's mental impairments 7 severe and the ALJ's finding was unsupported by substantial evidence. (Mot. at 21.) 8 First, Plaintiff asserts that the ALJ erroneously relied on Dr. Durr's opinion because 9 it was "internally inconsistent." (Mot. at 22.) Plaintiff argues Dr. Durr's opinion that 10 Plaintiff can make "simplistic work-related decisions" means Plaintiff cannot make 11 complex decisions. (Id.) She claims that Dr. Durr's written statement is inconsistent 12 with the checkbox form, which indicated Plaintiff is capable of following "complex 13 instructions and making complex decisions." (Id.) The Commissioner contends the 14 additional checkbox form provides clarification to the written opinion rather than 15 creating an inconsistency. (Opp'n at 18.) 16 The Ninth Circuit has held that "an ALJ is responsible for resolving conflicts in 17 medical testimony, and resolving ambiguity" and that "determining whether 18 inconsistencies are material (or are in fact inconsistencies at all) . . . fall within this 19 responsibility." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595 (9th Cir. 1999). An 20 inconsistency on the record requires "conflicting contemporaneous medical tests, 21 diagnoses, and testimony." *Christopherson v. Comm'r of Soc. Sec. Admin.*, 460 F. App'x 22 631, 633 (9th Cir. 2011). Here, Dr. Durr's written opinion states that Plaintiff can 23 understand, remember, and carry out both simplistic and detailed instructions. (AR 24 1123.) Later on in her report, Dr. Durr checks "No" to the checkbox question that asks if 25 Plaintiff's "ability to understand, remember, and carry out instructions [are] affected by 26 the impairment[.]" (AR 1125.) Although Plaintiff contends the checkbox form is 27 inconsistent with Dr. Durr's written opinion, the two are facially consistent. Dr. Durr's 2 fact, she stated Plaintiff was able to follow detailed instructions. (Compare AR 1125 3 with AR 1123.) Therefore, the ALJ's reliance on Dr. Durr's opinion must be upheld 4 because his interpretation of the evidence was rational. See *Tommasetti*, 533 F.3d at 5 1038. 6 Second, Plaintiff asserts that her records from Neighborhood Healthcare establish 7 the presence of severe mental impairments. (Mot. at 24.) Although convoluted, 8 Plaintiff appears to argue that the ALJ improperly analyzed medical records from 9 Neighborhood Healthcare. (Id. at 24-25.) Plaintiff relies on her own reported symptoms 10 and her PHQ-9 and GAD-7 scores to demonstrate her impairment was severe.6 (Id. at 11 24-26.) The ALJ's assessment indicates he relied on the medical examiner's "BHC 12 Mental Status Exams" and "Psychiatric Exams" from the same medical reports. (AR 106, 13 1227, 1407–1408, 1462–1463.) Here, a conflict seems to exist between the results of 14 Plaintiff's self-reported symptoms and other medical exams. For example, Plaintiff's 15 GAD-7

score in one report indicates that her anxiety is “severe,” meanwhile the 16 psychiatric exam describes Plaintiff as depressed and anxious but relatively stable. 17 (Compare AR 1465-66 with AR 1467.) This underscores a conflict in the evidence, but 18 “[r]esolving conflicts is the ALJ’s responsibility and prerogative.” *Owen v. Saul*, 808 F. 19 App’x 421, 423 (9th Cir. 2020). Indeed, an ALJ may reject a treating physician’s opinion 20 where (1) the opinion is based “to a large extent” on an applicant’s self-reports and (2) 21 the ALJ properly disbelieved those complaints. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 22 (9th Cir. 2014). Here, the Plaintiff’s reported symptoms, PHQ-9, and GAD-7 scores are 23 based on Plaintiff’s own reports. (AR 1245, 1479.) The ALJ had proper grounds to 24 discredit Plaintiff’s reports based on the mental status examinations at Neighborhood 25 26 27 6 The GAD-7 and PHQ-9 scores are determined by asking the patient a series of questions regarding 2 (AR 106.) 3 Lastly, Plaintiff argues the ALJ improperly relied on Dr. Aroon Suansilppongse’s 4 findings because they were outdated and did not reflect Plaintiff’s most recent medical 5 records. (Mot. at 23.) The Ninth Circuit’s finding in *Owen* is particularly germane here; 6 the circuit court found that an ALJ did not err in giving a non-examining state agency 7 physician’s opinion great weight even though the physician had not reviewed the most 8 recent evidence. *Owen*, 808 F. App’x at 423. The court explained that “there is always 9 some time lapse between a consultant’s report and the ALJ[’s] hearing and decision, and 10 the Social Security regulations impose no limit on such a gap in time.” (Id.) Contrary to 11 Plaintiff’s assertion, ALJ did not err when he relied on Dr. Suansilppongse’s opinion, 12 despite it not including her most recent medical records. Moreover, the ALJ properly 13 found the opinion was persuasive because it was supported by objective examinations 14 and was consistent with other medical evidence. See 20 C.F.R. § 404.1520c(a) 15 (explaining the most important factors in evaluating persuasiveness are supportability 16 and consistency). The ALJ committed no error in relying on Dr. Suansilppongse’s 17 opinion. 18 Accordingly, the Court finds that the ALJ’s decision to characterize Plaintiff’s 19 medical impairments as non-severe is supported by substantial evidence and contains 20 no legal error. 21 a. The ALJ’s failure to include Plaintiff’s mental impairment in the RFC 22 assessment was reversible error. 23 Although the Court affirms the ALJ’s finding that Plaintiff’s impairment was non- 24 severe, the ALJ neglected to discuss it at all during his RFC assessment, nor explained its 25 exclusion. (AR 108–13.) The Ninth Circuit has held that the ALJ’s assessment must 26 include some discussion on how non-severe mental impairments affect the final RFC. 27 *Hutton v. Astrue*, 491 F. App’x 850, 850 (9th Cir. 2012); see also 20 C.F.R. § 2 ‘severe’.”). 3 Many courts within the circuit have reversed cases where the ALJ has failed to 4 analyze mental impairments in a claimant’s RFC determination. See *Mercado v. 5 O’Malley*, No. 2:22-CV-02155 AC, 2024 WL 967619, at *4 (E.D. Cal. Mar. 6, 2024) 6 (following *Hutton* and reversing an ALJ decision that did not consider mental limitations 7 in the RFC assessment); *Jane B. for Judith F. v. O’Malley*, No. 22-CV-1183-MMP, 2024 WL 8 1318858 at *9 (S.D. Cal. Mar. 27, 2024) (holding a claimant’s mental impairments are 9 not inconsequential to an RFC determination and reversing.); *Victor R. v. O’Malley*, No. 10 23-CV-00501-GPC-BGS,

2024 WL 1257277 *9 (S.D. Cal. Mar. 25, 2024) (“the ALJ must 11 explicitly consider limitations caused by mild mental impairments in the RFC or explain 12 why such impairments are not limiting.”). 13 Without this analysis, the court is unable to evaluate whether the ALJ properly 14 considered the Plaintiff’s mental impairments in the RFC assessment. *Curtis v. Comm’r 15 of Soc. Sec. Admin.*, 584 F. App’x 390, 391 (9th Cir. 2014) (“we are unable to determine 16 on the record before us whether the ALJ adequately considered Curtis’[s] mental health 17 limitations.”). Plaintiff’s non-severe mental impairments alone may not have 18 significantly limited her ability to work, but when combined with other limitations, her 19 ability to perform work may have been further restricted. *Titles II & XVI: Assessing 20 Residual Functional Capacity in Initial Claims*, SSR 96-8P *4 (S.S.A. July 2, 1996). 21 At the end of step two, the ALJ states “the following [RFC] assessment reflects the 22 degree of limitation the undersigned has found in the ‘paragraph B’ mental function 23 analysis.” (AR 108.) This is insufficient because it does not satisfy the “more detailed 24 assessment” required in steps 4 and 5 during the RFC assessment, nor does it assist this 25 Court in determining how the Plaintiff’s mental impairment was considered. *Titles II & 26 XVI: Assessing Residual Functional Capacity in Initial Claims*, SSR 96-8P *4 (S.S.A. July 2, 27 1996); see also *Jane B.*, 2024 WL 1318858 at *9 (“boilerplate language that the RFC 2 insufficient”). 3 The Commissioner asserts that *Woods* confirms “non-severe mental impairments 4 do not require express findings in the RFC finding” and that the ALJ was not required to 5 explain why those limitations were included in the RFC. (Opp’n at 19-20 (citing *Woods 6 v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022).) That is not the Court’s reading of *Woods*. 7 While *Woods* does not require the RFC itself to expressly reflect mental limitations, it 8 does not absolve the ALJ from discussing non-severe mental limitations in the RFC 9 assessment. 32 F.4th at 794 (“The ALJ’s assessment of her residual functional capacity 10 expressly reflected these limitations.”). And though the ALJ’s ultimate RFC does not 11 need to account for Plaintiff’s mental impairments, the ALJ must specify “‘reasons 12 supported by substantial evidence’ for not including any mental functional limitations 13 stemming from Plaintiff’s non-severe mental impairments.” *Darren Jeffrey C. v. Kijakazi*, 14 No. 3:21-CV-01012-AHG, 2022 WL 4474261 at *10 (S.D. Cal. Sept. 26, 2022) (quoting 15 *Medlock v. Colvin*, No. CV 15-9609-KK, 2016 WL 6137399, at *5 (C.D. Cal. Oct. 20, 16 2016)). 7 The ALJ’s failure to include a discussion of Plaintiff’s mild impairments in the 17 RFC assessment precludes this Court from properly determining whether the RFC was 18 supported by substantial evidence, which is evidenced in the VE’s hearing testimony, as 19 explained below. 20 The Commissioner also argues that the ALJ adequately considered Plaintiff’s 21 mental limitations when he asked the VE other hypotheticals related to mental health. 22 (Opp’n at 21.) This issue is a close call. Although the ALJ proposed a hypothetical that 23 limited “work involving simple routine tasks and only occasional interactions with the 24 public, supervisors, and coworkers,” [AR 44], the Court is uncertain whether that 25 26 7 Although the Commissioner cites two cases to support its interpretation that *Woods* does not require the ALJ to explain why he

did not include a non-severe impairment, this Court respectfully disagrees 27 with those decisions. (Opp’n at 20) (citing *Hilda V. A. v. Kijakazi*, 2023 WL 1107867, at *4 n.3 (C.D. Cal. 2 further in asking whether any jobs would exist for someone who developed a pattern of 3 calling in sick and missing work two full days a month. (AR 46.) The VE opined that 4 hypothetical would eliminate all competitive employment. (Id.) As the ALJ notes in his 5 decision, Dr. Durr reported that Plaintiff “is at risk for calling in sick, not showing up, or 6 needing to leave early.” (AR 107.) The ALJ also found Dr. Durr’s opinion persuasive. 7 (Id.) Nonetheless, the ALJ did not include any mental impairment in Plaintiff’s RFC nor 8 explained why it was excluded, which leads the Court to wonder if the ALJ purposefully 9 left out Plaintiff’s mental impairment or simply forgot to include it. Ultimately, the 10 Court cannot conclude that the ALJ’s failure to discuss Plaintiff’s mental impairments 11 was harmless because it could have resulted in a disability finding. See *Marsh v. Colvin*, 12 792 F.3d 1170, 1173 (9th Cir. 2015) (“ALJ errors in social security cases are harmless if 13 they are ‘inconsequential to the ultimate nondisability determination’”) (quoting 14 *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir.2006)). Because the 15 ALJ’s error was not harmless, the Court recommends that this issue be reversed and 16 remanded.

17 VI. CONCLUSION

18 For the foregoing reasons, the Court RECOMMENDS that judgment be entered 19 REVERSING the decision of the Commissioner and REMANDING this matter for further 20 administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). On remand, 21 the Court specifically directs the ALJ to address Plaintiff’s mental impairments in the RFC 22 analysis. Because a new RFC determination could necessarily impact other findings, 23 upon remand the ALJ should also conduct a new five-step sequential evaluation process.

24 See 20 C.F.R. § 404.1520.

25 IT IS ORDERED that no later than July 11, 2025, any party to this action may file 26 written objections with the Court and serve a copy on all parties. The document should 27 be captioned “Objections to Report and Recommendation.” 1 IT IS FURTHER ORDERED that any response to the objections shall be filed with 2 Court and served on all parties no later than July 25, 2025. The parties are advised 3 || that failure to file objections within the specified time may waive the right to raise those 4 || objections on appeal of the Court’s order. See *Turner v. Duncan*, 158 F.3d 449, 455 (9th 5 || Cir. 1998); *Martinez v. Yist*, 951 F.2d 1153, 1157 (9th Cir. 1991). 6 IT IS SO ORDERED. 7 8 ||Dated: June 13, 2025 _ = _ 2 SF — 10 Honorable Michael S. Berg United States Magistrate Judge 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28