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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CINDY WILTON,
Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

Case No. CV 09-5706 JCG

**MEMORANDUM OPINION AND
ORDER**

I.

INTRODUCTION AND SUMMARY

On August 14, 2009, plaintiff Cindy Wilton (“Plaintiff”) filed a complaint against defendant Michael J. Astrue, the Commissioner of the Social Security Administration (“Defendant” or “Commissioner”), seeking review of the denial of an application for supplemental security income (“SSI”). [Docket No. 4.]

On March 11, 2010, Defendant filed his answer, along with a certified copy of the administrative record. [Docket Nos. 15, 16, 18.]

On April 14, 2010, this matter was transferred to the calendar of the undersigned Magistrate Judge. [Docket No. 19.] Both Plaintiff and Defendant

1 subsequently consented to proceed for all purposes before the Magistrate Judge
2 pursuant to 28 U.S.C. § 636(c). [Docket Nos. 20, 23.]

3 On May 14, 2010, the parties submitted a detailed, 57-page joint stipulation
4 for the resolution of issues presented in this case. [Docket No. 22.] The Court
5 deems the matter suitable for adjudication without oral argument.

6 In sum, having studied, *inter alia*, the parties' joint stipulation and the
7 administrative record, the Court concludes that the Administrative Law Judge
8 ("ALJ") inappropriately discounted Plaintiff's subjective complaints with respect to
9 her mental impairments and thus remands this matter to the Commissioner in
10 accordance with the principles and instructions enunciated in this Memorandum
11 Opinion and Order.

12 II.

13 FACTUAL AND PROCEDURAL BACKGROUND

14 Plaintiff, who was 42 years of age on the date of her administrative hearing,
15 has a high school education. (Administrative Record ("AR") at 25, 93, 111.)
16 Plaintiff has no past relevant work. (*Id.* at 22.)

17 Plaintiff protectively filed for SSI on January 3, 2007, alleging that she has
18 been disabled since December 31, 2004 due to bipolar disorder, obsessive
19 compulsive disorder, attention deficit disorder, and carpal tunnel syndrome. (*See*
20 AR at 60, 66, 93, 100.) Plaintiff subsequently amended her alleged onset date to
21 January 3, 2007, the protective filing date of her SSI application. (*Id.* at 16, 27.)
22 Plaintiff's application was denied initially and on reconsideration. (*Id.* at 57, 58, 59-
23 64, 66-70.)

24 On April 15, 2009, Plaintiff, represented by counsel, appeared and testified at
25 a hearing before an ALJ. (AR at 25, 28-46.) The ALJ also heard testimony from
26 Sharon Spaventa, a vocational expert ("VE"), and Leanna Kennedy, Plaintiff's aunt
27 ("Ms. Kennedy"). (*Id.* at 46-52, 52-56.)

28 On May 4, 2009, the ALJ denied Plaintiff's request for benefits. (AR at 16-

1 23.) Applying the five-step sequential evaluation process – which is discussed
2 below – the ALJ found, at step one, that Plaintiff has not engaged in substantial
3 gainful activity since her alleged onset date of disability. (*Id.* at 18.) At step two,
4 the ALJ found that Plaintiff suffers from severe impairments consisting of substance
5 induced mood disorder, depressive disorder, not otherwise specified, polysubstance
6 dependence in remission, and personality disorder, not otherwise specified. (*Id.*)

7 At step three, the ALJ determined that the evidence does not demonstrate that
8 Plaintiff’s impairment, either individually or in combination, meet or medically
9 equal the severity of any listing set forth in the Social Security regulations.^{1/} (AR at
10 18.)

11 The ALJ then assessed Plaintiff’s residual functional capacity^{2/} (“RFC”) and
12 determined that she can perform “a full range of work at all exertional levels but
13 with the following nonexertional limitations: restriction to simple, repetitive tasks
14 not requiring a fast paced high production quota and not requiring interaction with
15 the general public.” (AR at 19 (emphasis omitted).)

16 The ALJ found, at step four, that Plaintiff has no past relevant work. (AR at
17 22.)

18 At step five, based on Plaintiff’s vocational factors and the VE’s testimony,
19 the ALJ found that “there are jobs that exist in significant numbers in the national
20 economy that [Plaintiff] can perform,” including “agricultural packer” and “laundry
21 worker.” (AR at 22 (emphasis omitted).) Thus, the ALJ concluded that Plaintiff
22

23 ^{1/} See 20 C.F.R. pt. 404, subpt. P, app. 1.

24 ^{2/} Residual functional capacity is what a claimant can still do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
26 n. 5 (9th Cir. 1989). “Between steps three and four of the five-step evaluation, the
27 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant’s
28 residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

1 was not suffering from a disability as defined by the Act. (*Id.* at 16, 23.)

2 Plaintiff filed a timely request for review of the ALJ’s decision, which was
3 denied by the Appeals Council. (AR at 1-3, 9.) The ALJ’s decision stands as the
4 final decision of the Commissioner.

5 **III.**

6 **APPLICABLE LEGAL STANDARDS**

7 A. **Five-Step Inquiry to Ascertain a Cognizable Disability**

8 A claimant must satisfy three fundamental elements to be eligible for
9 disability benefits: (1) a medically-determinable impairment; (2) the impairment
10 prevents the claimant from engaging in substantial gainful activity; and (3) the
11 impairment is expected to result in death or to last for a continuous period of at least
12 12 months. 42 U.S.C. § 423(d)(1)(A); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th
13 Cir. 1999). A well-established five-step sequential inquiry is utilized to assess
14 whether a particular claimant satisfies these three elements. The inquiry proceeds as
15 follows:

16 First, is the claimant engaging in substantial gainful activity? If so, the
17 claimant cannot be considered disabled.

18 Second, does the claimant suffer from a “severe” impairment, *to wit*, one
19 continuously lasting at least 12 months? If not, the claimant is not disabled.

20 Third, does the claimant’s impairment or combination of impairments meet or
21 equal an impairment specifically identified as a disability by the Commissioner
22 under 20 C.F.R. part 404, subpart P, appendix 1? If so, the claimant is automatically
23 determined to be disabled.

24 Fourth, is the claimant capable of performing his past work? If so, the
25 claimant is not disabled.

26 Fifth, does the claimant have the so-called “residual functional capacity” to
27 perform some other type of work? The critical question posed here is whether the
28 claimant can, in light of the impairment and his or her age, education and work

1 experience, adjust to another form of gainful employment?

2 If a claimant is found “disabled” or “not disabled” along any of these steps,
3 there is no need to complete the remaining inquiry. 20 C.F.R. §§ 404.1520(a)(4) &
4 416.920(a)(4); *Tackett*, 180 F.3d at 1098-99.

5 B. Standard of Review on Appeal

6 This Court is empowered to review decisions by the Commissioner to deny
7 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
8 Administration must be upheld if they are free of legal error and supported by
9 substantial evidence. *Mayer v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001, *as*
10 *amended* Dec. 21, 2001). If the court, however, determines that the ALJ’s findings
11 are based on legal error or are not supported by substantial evidence in the record,
12 the court may reject the findings and set aside the decision to deny benefits.
13 *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*,
14 242 F.3d 1144, 1147 (9th Cir. 2001).

15 “Substantial evidence is more than a mere scintilla, but less than a
16 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant
17 evidence which a reasonable person might accept as adequate to support a
18 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayer*, 276 F.3d
19 at 459. To determine whether substantial evidence supports the ALJ’s finding, the
20 reviewing court must review the administrative record as a whole, “weighing both
21 the evidence that supports and the evidence that detracts from the ALJ’s
22 conclusion.” *Mayer*, 276 F.3d at 459. The ALJ’s decision “cannot be affirmed
23 simply by isolating a specific quantum of supporting evidence.” *Aukland*, 257 F.3d
24 at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the
25 evidence can reasonably support either affirming or reversing the ALJ’s decision,
26 the reviewing court “may not substitute its judgment for that of the ALJ.” *Id.*
27 (quoting *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

28

1 IV.

2 **ISSUES PRESENTED**

3 Three disputed issues are presented for decision here:

- 4 1. whether the ALJ’s finding on Plaintiff’s RFC is supported by
5 substantial evidence and whether the hypothetical question presented to the VE was
6 incomplete, (*see* Joint Stip. at 4-15, 24-27);
7 2. whether the ALJ improperly rejected the opinions of Plaintiff’s treating
8 physicians, (*id.* at 27-33, 33-35); and
9 3. whether the ALJ improperly discredited Plaintiff’s credibility and
10 improperly discounted the statements of three lay witnesses. (*Id.* at 35-45, 52-56.)

11 Under the circumstances here, the Court finds the issue of the ALJ’s
12 assessment of Plaintiff’s credibility to be dispositive of this matter, and declines to
13 substantively address the remaining issues.

14 V.

15 **DISCUSSION AND ANALYSIS**

16 As identified above, Plaintiff contends that the ALJ improperly discounted her
17 testimony regarding an “inability to concentrate which results in her not staying on
18 task, causing difficulty with employment, her habitual tardiness, her becoming
19 overwhelmed and crying on the job or responding with anger.” (*See* Joint Stip. at 37
20 (internal citations omitted); *see also id.* at 35-40, 52-54.) Plaintiff maintains that the
21 “ALJ made no specific finding that [she] was a malingerer.” (*Id.* at 37-38.)

22 Plaintiff also alleges that the “only true credibility analysis provided by the
23 ALJ in the decision is [that Plaintiff’s] daily activities[] . . . are inconsistent with
24 inability to perform any work” and that Plaintiff’s statements “are not credible to the
25 extent that they are inconsistent” with the ALJ’s RFC assessment. (Joint Stip. at 38
26 (internal quotation marks and citation omitted).)

27 Defendant counters that the ALJ appropriately discounted Plaintiff’s
28 credibility because: (1) “the objective medical evidence did not support the degree

1 of disability alleged by Plaintiff”; (2) “the ALJ observed that the intensity of
2 Plaintiff’s treatment was not consistent with the level of disability she alleged”; and
3 (3) “the ALJ noted that Plaintiff’s reported daily activities are far out of line with the
4 level of disability she alleged.” (Joint Stip. at 46-47.)

5 A. The ALJ Must Provide “Clear and Convincing” Reasons For
6 Discounting Plaintiff’s Credibility

7 Plaintiff, of course, carries the burden of producing objective medical
8 evidence of his or her impairments and showing that the impairments could
9 reasonably be expected to produce some degree of the alleged symptoms. *Benton ex*
10 *rel. Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). But once a plaintiff
11 meets that burden, medical findings are not required to support the alleged severity
12 of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (*en banc*); *see also*
13 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997, *as amended* Sept. 17,
14 1997) (“[A] claimant need not present clinical or diagnostic evidence to support the
15 severity of his pain.”) (internal citation omitted).

16 Under these circumstances, an ALJ can then reject a plaintiff’s subjective
17 complaint “only upon (1) finding evidence of malingering, or (2) expressing clear
18 and convincing reasons for doing so.” *Benton*, 331 F.3d at 1040. The ALJ may
19 consider the following factors in weighing a plaintiff’s credibility: (1) his or her
20 reputation for truthfulness; (2) inconsistencies either in the plaintiff’s testimony or
21 between the plaintiff’s testimony and his or her conduct; (3) his or her daily
22 activities; (4) his or her work record; and (5) testimony from physicians and third
23 parties concerning the nature, severity, and effect of the symptoms of which she
24 complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

25 Here, the ALJ did not find evidence of malingering. (*See generally* AR at 16-
26 23.) Thus, the ALJ’s reasons for rejecting Plaintiff’s credibility must be *clear and*
27 *convincing*. *See Benton*, 331 F.3d at 1040. “General findings are insufficient;
28 rather, the ALJ must identify what testimony is not credible and what evidence

1 undermines the claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
2 1995, *as amended* April 9, 1996); *Reddick*, 157 F.3d at 722.

3 B. Plaintiff’s Subjective Complaints

4 At the administrative hearing, Plaintiff testified that she was on medication for
5 schizophrenia in high school and was diagnosed as bipolar when she was sixteen
6 years old. (AR at 34.) Plaintiff also explained that she was diagnosed with
7 obsessive compulsive disorder in 1999 and with attention deficit disorder in high
8 school. (*Id.* at 38.) Plaintiff stated that she “was in a group home in Santa Barbara
9 . . . for people with mental illness” and completed high school at the home as a
10 “special ed” student. (*Id.* at 34)

11 Plaintiff testified that she previously worked part-time at Kmart, a position her
12 ex-husband helped her obtain. (AR at 35.) Plaintiff stated that she has a “problem
13 with tardiness” and was late roughly “75% of the time” when she was working
14 despite having reminders and assistance from her parents. (*Id.* at 32, 37-38.)
15 Plaintiff explained that a “[l]ack of concentration” inhibits her ability to work and
16 that her supervisor “would give [her] reminders” to “stay on task.” (*Id.* at 29-30.)
17 Plaintiff reported that she was eventually fired after her supervisor left and a “new
18 supervisor came in,” who “wasn’t so understanding.” (*Id.* at 36.)

19 Plaintiff also testified that she has “crying spells” and has difficulty with
20 “anger.” (AR at 36, 39-40.) Plaintiff indicated that she has been treated at “County
21 Mental Health” since she was approximately eleven years old, but more recently
22 since 2006. (*Id.* at 43.) Plaintiff stated that she sees a therapist individually and
23 attends group therapy. (*Id.* at 33.) Plaintiff reported that she receives treatment from
24 a psychiatrist every six weeks and is “taking Zoloft” after experiencing negative side
25 effects from other medication. (*Id.* at 44.)

26 Plaintiff stated that with she was “jailed in 2006 because of [a] probation
27 violation with [a] meth charge,” but has been sober since she was released. (AR at
28 31.)

1 Plaintiff indicated that her daily activities include “an exercise class” for
2 “physically disabled” individuals at Ventura College, doing dishes, laundry, and
3 grocery shopping. (AR at 31-32, 40-41.) However, Plaintiff described “doing the
4 dishes” as “overwhelming” and grocery shopping as “mak[ing her] nervous”
5 because she does not “like to be around a lot of group of people.” (*Id.* at 40-41.)

6 C. The ALJ’s Purported Reasons For Finding Plaintiff’s Testimony Non-
7 Credible

8 In rejecting Plaintiff’s credibility, the ALJ found that Plaintiff’s “medically
9 determinable impairments could reasonably be expected to cause the alleged
10 symptoms; however, [Plaintiff’s] statements concerning the intensity, persistence
11 and limiting effects of these symptoms are not credible to the extent they are
12 inconsistent with the [RFC] assessment[.]” (AR at 21.) The ALJ explained:

13 [Plaintiff] testified that although she graduated high
14 school, she attended special education classes at least partially
15 due to the side effects of Lithium which she took for bipolar
16 disorder. She testified that she has not abused drugs for 3 years
17 following participation in a court ordered program, but says she
18 is easily overwhelmed, and has crying spells at least two times a
19 month. She has seen Dr. Woods[, her treating psychiatrist,]
20 approximately every 6 weeks since July 2008 and is prescribed
21 Zoloft, with some improvement in symptoms.

22 [Plaintiff] testified that when she was working, her
23 manager would have to remind her to stay on task as she could
24 not concentrate for more than a maximum of 15 minutes. She
25 stated that she was chronically tardy (at least 75% of the time)
26 and does not believe she could attend work on a reliable basis,
27 noting that she is sometimes late for her weekly therapy and
28 group therapy sessions. The record references a community

1 college class that [Plaintiff] stated is an exercise class she attends
2 twice a week. . . .

3 [Plaintiff's] daily activities, including caring for her
4 children, doing housework, grocery shopping, caring for her
5 grandparents, and attending community college are inconsistent
6 with inability to perform any work.

7 (*Id.* at 21-22.)

8 D. Plaintiff's Testimony Merits Consideration

9 Having examined the AR, the Court is persuaded that the ALJ failed to
10 provide clear and convincing reasons and/or substantial evidence for discounting
11 Plaintiff's credibility. The Court's conclusion rests on at least two reasons.

12 First, because Plaintiff produced sufficient medical evidence of her mental
13 impairments that are likely to cause the subjective symptoms, the ALJ erred to the
14 extent she rejected Plaintiff's credibility based upon a lack of objective findings to
15 support her allegations. There are numerous indicia in the medical record supporting
16 Plaintiff's mental impairments, including the following six instances:

17 1. Treatment note from Ventura County Behavioral Health Mental Health
18 Services ("Ventura County Mental Health Services"), dated January 4, 2006,
19 diagnosed Plaintiff with substance induced mood disorder, depressive disorder, and
20 borderline personality and reported Plaintiff's extensive mental impairment history,
21 which includes two suicide attempts and suicidal thoughts as a child. (AR at 200-
22 07.)

23 2. Nursing Assessment of Psychiatric and Suicidal Inmate from California
24 Forensic Medical Group, dated September 4, 2006, diagnosed Plaintiff with
25 depression and reported prior hospitalization for attempted suicide in 1987. (*Id.* at
26 238.)

27 3. Treatment note from Ventura County Mental Health Services, dated
28 January 29, 2007, indicated Plaintiff suffered from "mood swings" and depression,

1 but “mood is more even [and] stable now on Depakote [and] Zoloft.” (*Id.* at 305.)

2 4. Case analysis, completed by non-examining physician and dated May
3 16, 2007, indicated Plaintiff “was very cooperative during interview” and reported
4 that Plaintiff indicated she has “trouble focusing, learning and concentration.” (*Id.*
5 at 285-88.)

6 5. Treatment note from Ventura County Mental Health Services, dated
7 January 12, 2009, diagnosed depression, not otherwise specified, borderline
8 personality, and polysubstance dependence “remitted” and prescribed Zoloft. (*Id.* at
9 340.)

10 6. Mental Impairment Questionnaire, dated March 23, 2009 and
11 completed by treating physician, indicated “patient’s mood is fair, she is emotionally
12 labile” and “is quick to anger and quick to tears.” (*Id.* at 363-70.)

13 Defendant contends that “[a]ll of the independent physicians who . . .
14 reviewed the medical record opined that Plaintiff could work with some limitations
15 so long as she refrained from taking methamphetamines.”^{3/} (Joint Stip. at 46.)

17 ^{3/} Although the Court declines to address Plaintiff’s claim regarding the ALJ’s
18 evaluation of the medical evidence, the Court notes that the ALJ’s rejection of
19 Plaintiff’s treating physician Celia Woods, M.D. (“Dr. Woods”) does not appear to
20 be supported by substantial evidence.

21 First, the ALJ’s rejection of Dr. Woods’s opinion based on her reliance on
22 “information received from treating social worker Ms. Miller” is unpersuasive. (AR
23 at 20.) Where the treating physician is “transmitting both his own knowledge and
24 opinion of [the claimant] *and* those of the medical treatment team under his
25 supervision[,]” the treating physician is entitled to complete a RFC assessment on
26 behalf of his treatment team. *Benton*, 331 F.3d at 1039 (italics in original). While
27 the ALJ may assign less weight to a treating physician by considering whether the
28 physician “saw [claimant] with a frequency consistent with accepted medical
practice for this type of treatment, . . . [the] ongoing prescription and medication
management of [claimant’s] evaluations” and “how well the treatment team operated
in informing [the treating physician,]” *Benton*, 331 F.3d at 1039, the ALJ did not
make any findings taking into account such considerations. (*See generally* AR at

1 However, the “independent physicians” referred to by Defendant are non-examining
2 and non-treating physicians, whose opinions standing alone, do not constitute
3 “substantial” evidence. (AR at 20-21 (ALJ adopting the opinions of three non-
4 examining and non-treating physicians with respect to Plaintiff’s mental
5 impairments), 285-88 (case analysis report completed by G.A. Jansen, M.D. (“Dr.
6 Jansen”) on May 16, 2007), 289-99 (psychiatric review technique form completed
7 by Donald Williams, M.D. (“Dr. Williams”) on June 6, 2007), 304 (one-page case
8 analysis completed by Calmeze H. Dudley, M.D. (“Dr. Dudley”) on November 8,
9 2007)); *see Lester*, 81 F.3d at 832 (“In the absence of record evidence to support it,
10 the nonexamining medical advisor’s testimony does not by itself constitute
11 substantial evidence that warrants a rejection of . . . the examining [physician]’s
12 opinion.”); *Erickson v. Shalala*, 9 F.3d 813, 818 n. 7 (9th Cir. 1993) (“the non-
13 examining physicians’ conclusion, *with nothing more*, does not constitute substantial
14 evidence[.]”) (internal quotation marks, brackets and citation omitted) (italics in
15 original); *Gallant v. Heckler*, 753 F.2d 1450, 1454 (9th Cir. 1984) (when the non-
16 treating, non-examining physician’s opinion conflicts with the conclusions of
17 examining physicians, that conclusion does not constitute substantial evidence).

18 Additionally, the opinions of the “independent physicians” Dr. Jansen, Dr.
19 Williams, and Dr. Dudley are undermined because they formed their conclusions
20 without reviewing Plaintiff’s subsequent treatment records which are dated through
21

22 16-23.)

23 Second, the ALJ’s rejection of Dr. Woods’s opinion because Dr. Woods’s
24 “assessment was internally inconsistent” is belied by the record. In a letter dated
25 April 2, 2009, Dr. Woods explained that she “conferred with therapist Ms. Marcia
26 Miller” and “[b]ased on Ms. Miller’s observations of [Ms. Miller’s more extensive]
27 interactions, [she has] *amended* [her] assessment of [Plaintiff’s] impairments and
28 limitations.” (*Id.* at 362 (emphasis added).) Accordingly, Dr. Woods’s assessment
is not internally inconsistent; instead, she amended her assessment after consulting
with a member of her treatment team.

1 2009. (*See, e.g.*, AR at 339-71.)

2 Second, the ALJ’s rejection of Plaintiff’s credibility based on her daily
3 activities fails to meet the clear and convincing standard. Although the ALJ
4 summarized Plaintiff’s testimony accurately, in discounting Plaintiff’s credibility,
5 the ALJ erred by only citing to the portions of Plaintiff’s testimony that supported
6 her conclusion. (AR at 22.) For example, the ALJ stated that Plaintiff’s activities
7 included “caring for her children, doing housework, grocery shopping, caring for her
8 grandparents, and attending community college.” (*Id.*) The ALJ, however, failed to
9 account for Plaintiff’s testimony that doing the dishes is “overwhelming” and
10 grocery shopping makes her “nervous.” (*Id.* at 40-41.) The ALJ failed to explain
11 that the “community college” class Plaintiff attends is merely an exercise class for
12 physically disabled individuals, and that Plaintiff testified she does not “get to
13 school on time.” (*Id.* at 31-33.)

14 Further, while Plaintiff’s aunt Ms. Kennedy testified that Plaintiff “helps [her]
15 with grandma,” she also explained that Plaintiff has difficulty being on time and
16 “gets really flustered,” and “has a lot of trouble staying calm.” (AR at 46-49.) Thus,
17 the ALJ erred in selectively relying on the record to support her rejection of
18 Plaintiff’s testimony. *See Reddick*, 157 F.3d at 722-23 (“In essence, the ALJ
19 developed his evidentiary basis by not fully accounting for the context of materials
20 or all parts of the testimony and reports. His paraphrasing of record material is not
21 entirely accurate regarding the content or tone of the record.”); *Gallant*, 753 F.2d at
22 1456 (9th Cir. 1984) (“Although it is within the power of the [Commissioner] to
23 make findings . . . and to weigh conflicting evidence, he cannot reach a conclusion
24 first, and then attempt to justify it by ignoring competent evidence in the record that
25 suggests an opposite result.”) (internal citation omitted).

26 Moreover, the ALJ fails to demonstrate how Plaintiff’s ability to perform
27 certain daily activities translates into an ability to work. *See Gonzalez v. Sullivan*,
28 914 F.2d 1197, 1201 (9th Cir. 1990) (ALJ errs in failing to make a finding to the

1 effect that ability to perform daily activities translated into the ability to perform
2 appropriate work); *Reddick*, 157 F.3d at 722 (only if a plaintiff’s level of activity is
3 inconsistent with her alleged limitations will these activities have any bearing on
4 claimant’s credibility); *see also Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
5 2001) (“This court has repeatedly asserted that the mere fact that a plaintiff has
6 carried on certain daily activities, such as grocery shopping, driving a car, or limited
7 walking for exercise, does not in any way detract from her credibility as to her
8 overall disability.”).

9 Defendant argues that “the ALJ observed that the intensity of Plaintiff’s
10 treatment was not consistent with the level of disability she alleged.” (Joint Stip. at
11 47.) However, the ALJ did not rely on this reason in rejecting Plaintiff’s credibility.
12 The Court’s review is limited to the reasons *actually* provided by the ALJ in her
13 decision. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (“We review only the
14 reasons provided by the ALJ in the disability determination and may not affirm the
15 ALJ on a ground upon which he did not rely.”); *Connett v. Barnhart*, 340 F.3d 871,
16 874 (9th Cir. 2003) (“We are constrained to review the reasons the ALJ asserts[and
17 i]t was error for the district court to affirm the ALJ’s . . . decision based on evidence
18 that the ALJ did not discuss.”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196
19 (1947)).

20 In any event, a review of the record reveals that Plaintiff’s treating physician
21 saw Plaintiff every six weeks and prescribed anti-depressants to treat her symptoms.
22 (*See, e.g.*, AR at 339-60.) Plaintiff’s treating physicians increased her dosage of
23 Zoloft from 50 milligrams in 2006 to 150 milligrams in 2009. (*See id.* at 45, 233.)
24 Plaintiff also attends individual therapy sessions every other week and group therapy
25 once a week. (*Id.* at 363.) The ALJ’s disagreement with Plaintiff’s treating
26 physician’s prescribed course of treatment improperly substitutes her judgment for
27 the judgment of Plaintiff’s treating physician. *See Tackett*, 180 F.3d at 1102-03
28 (ALJ may not substitute his own interpretation of the medical evidence for the

1 opinion of medical professionals); *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir.
2 1975) (ALJ erred by relying upon “his own exploration and assessment” of
3 plaintiff’s medical condition rather than medical evidence in the record); *Clifford v.*
4 *Apfel*, 227 F.3d 863, 870 (7th Cir. 2000, *as amended* Dec. 13, 2000) (“[A]n ALJ
5 must not substitute his own judgment for a physician’s opinion without relying on
6 other medical evidence or authority in the record.”); *Banks v. Barnhart*, 434 F. Supp.
7 2d 800, 805 (C.D. Cal. 2006) (“An ALJ cannot arbitrarily substitute his own
8 judgment for competent medical opinion, and he must not succumb to the temptation
9 to play doctor and make his own independent medical findings.”) (internal quotation
10 marks, alterations and citations omitted).

11 VI.

12 REMAND IS APPROPRIATE

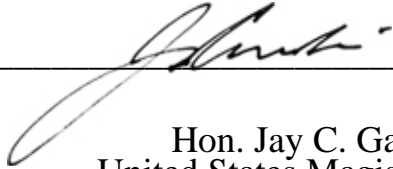
13 This Court has discretion to remand or reverse and award benefits. *McAllister*
14 *v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989, *as amended* Oct. 19, 1989). Where no
15 useful purpose would be served by further proceedings, or where the record has been
16 fully developed, it is appropriate to exercise this discretion to direct an immediate
17 award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004);
18 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000, *as amended* May 4, 2000),
19 *cert. denied*, 531 U.S. 1038 (2000). Where there are outstanding issues that must be
20 resolved before a determination can be made, and it is not clear from the record that
21 the ALJ would be required to find plaintiff disabled if all the evidence were properly
22 evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211
23 F.3d at 1179-80.

24 Here, there are outstanding issues which must be resolved before a final
25 determination can be made. On remand, the ALJ shall reconsider Plaintiff’s
26 subjective complaints with respect to her mental impairments and the resulting
27 limitations, and either credit Plaintiff’s testimony or provide clear and convincing
28 reasons supported by substantial evidence for rejecting them. The ALJ shall reassess

1 the medical opinions in the record and provide sufficient reasons under the
2 applicable legal standard for rejecting any portion of the medical opinions. The ALJ
3 shall then proceed through steps four and five to determine what work, if any,
4 Plaintiff is capable of performing.^{4/}

5 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
6 **REVERSING** the decision of the Commissioner denying benefits and
7 **REMANDING** the matter for further administrative action consistent with this
8 decision.

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10 Dated: November 22, 2010

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13 Hon. Jay C. Gandhi
14 United States Magistrate Judge

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27 ^{4/} In light of the Court's remand instructions, it is unnecessary for the Court to
28 address Plaintiff's remaining contentions. (See Joint Stip. at 4-15, 24-27, 27-33, 33-
35, 40-45, 54-56.)