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

ALISA MARIE EYVONNE G.W., ¹)	Case No. CV 19-4185-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION AND ORDER
v.)	REVERSING COMMISSIONER
)	
ANDREW SAUL, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying her applications for disability insurance benefits (“DIB”) and Social Security supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed January 14, 2020,

¹ Plaintiff’s name is partially redacted in line with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 which the Court has taken under submission without oral argument.
2 For the reasons below, the Commissioner's decision is reversed
3 and this matter is remanded for further proceedings.

4 **II. BACKGROUND**

5 Plaintiff was born in 1982. (Administrative Record ("AR")
6 271.) She graduated from high school and completed one year of
7 college. (AR 309.) She worked part time in retail from 1996 to
8 1998 and full time as a caregiver providing in-home support from
9 1998 to 2005. (Id.) She also worked part time in real estate
10 from 1999 to 2004. (Id.) On March 26, 2015, she applied for
11 benefits, alleging that she had been unable to work since June 1,
12 2006, because of posttraumatic stress disorder, chronic
13 obstructive pulmonary disease, depression, severe anxiety,
14 asthma, and lower lumbar damage. (AR 271, 308.) After her
15 applications were denied (AR 125-42, 144-48, 150-54), she
16 requested a hearing before an Administrative Law Judge (AR 158-
17 66). Hearings were held on October 12, 2017, and April 19, 2018,
18 at which Plaintiff, represented by counsel, testified, as did two
19 vocational experts.² (AR 76-113.) In a written decision issued
20 May 9, 2018, the ALJ determined that Plaintiff was not disabled.
21 (AR 60-70.) On December 11, 2018, the Appeals Council denied her
22 request for review. (AR 1-4.) This action followed.

23 **III. STANDARD OF REVIEW**

24 Under 42 U.S.C. § 405(g), a district court may review the

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26 ² At the close of the first hearing, the ALJ requested that
27 Plaintiff be sent for consulting examinations, which she
28 attended. (AR 78, 112-13.) At the supplemental hearing, the
hypotheticals to the VE were adjusted accordingly and the ALJ
acknowledged receipt of additional information. (AR 78.)

1 Commissioner's decision to deny benefits. The ALJ's findings and
2 decision should be upheld if they are free of legal error and
3 supported by substantial evidence based on the record as a whole.
4 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
5 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
6 means such evidence as a reasonable person might accept as
7 adequate to support a conclusion. Richardson, 402 U.S. at 401;
8 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
9 is "more than a mere scintilla, but less than a preponderance."
10 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
11 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). "[W]hatever the
12 meaning of 'substantial' in other contexts, the threshold for
13 such evidentiary sufficiency is not high." Biestek v. Berryhill,
14 139 S. Ct. 1148, 1154 (2019). To determine whether substantial
15 evidence supports a finding, the reviewing court "must review the
16 administrative record as a whole, weighing both the evidence that
17 supports and the evidence that detracts from the Commissioner's
18 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
19 1998). "If the evidence can reasonably support either affirming
20 or reversing," the reviewing court "may not substitute its
21 judgment" for the Commissioner's. Id. at 720-21.

22 **IV. THE EVALUATION OF DISABILITY**

23 People are "disabled" for purposes of receiving Social
24 Security benefits if they are unable to engage in any substantial
25 gainful activity owing to a physical or mental impairment that is
26 expected to result in death or has lasted, or is expected to
27 last, for a continuous period of at least 12 months. 42 U.S.C.
28 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.

1 1992).

2 A. The Five-Step Evaluation Process

3 An ALJ follows a five-step sequential evaluation process to
4 assess whether someone is disabled. 20 C.F.R. §§ 404.1520(a)(4),
5 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
6 1995) (as amended Apr. 9, 1996). In the first step, the
7 Commissioner must determine whether the claimant is currently
8 engaged in substantial gainful activity; if so, the claimant is
9 not disabled and the claim must be denied. §§ 404.1520(a)(4)(i),
10 416.920(a)(4)(i).

11 If the claimant is not engaged in substantial gainful
12 activity, the second step requires the Commissioner to determine
13 whether the claimant has a "severe" impairment or combination of
14 impairments significantly limiting her ability to do basic work
15 activities; if not, a finding of not disabled is made and the
16 claim must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 If the claimant has a "severe" impairment or combination of
18 impairments, the third step requires the Commissioner to
19 determine whether the impairment or combination of impairments
20 meets or equals an impairment in the Listing of Impairments
21 ("Listing") set forth at 20 C.F.R., part 404, subpart P, appendix
22 1; if so, disability is conclusively presumed and benefits are
23 awarded. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

24 If the claimant's impairment or combination of impairments
25 does not meet or equal one in the Listing, the fourth step
26 requires the Commissioner to determine whether the claimant has
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1 sufficient residual functional capacity ("RFC")³ to perform her
2 past work; if so, she is not disabled and the claim must be
3 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
4 has the burden of proving she is unable to perform past relevant
5 work. Drouin, 966 F.2d at 1257. If the claimant meets that
6 burden, a prima facie case of disability is established. Id.

7 If that happens or if the claimant has no past relevant
8 work, the Commissioner bears the burden of establishing that the
9 claimant is not disabled because she can perform other
10 substantial gainful work available in the national economy.
11 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That determination
12 comprises the fifth and final step in the sequential analysis.
13 §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966
14 F.2d at 1257.

15 B. The ALJ's Application of the Five-Step Process

16 At step one, the ALJ found that Plaintiff had not engaged in
17 substantial gainful activity since June 1, 2006. (AR 62.) Her
18 date last insured was December 31, 2010. (Id.) At step two, she
19 determined that Plaintiff had severe impairments of "asthma;
20 chronic obstructive pulmonary disease; lumbago; depression;
21 posttraumatic stress disorder; and a borderline personality
22 disorder." (Id.)

23 At step three, she concluded that Plaintiff's impairments
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25 ³ RFC is what a claimant can do despite existing exertional
26 and nonexertional limitations. § 416.945; see Cooper v.
27 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
28 Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 did not meet or equal any of the impairments in the Listing. (AR
2 63.) At step four, she determined that Plaintiff had the RFC to
3 perform light work

4 except for any work involving even moderate exposure to
5 environmental irritants. Additionally, the claimant can
6 perform simple, repetitive tasks with no more than
7 occasional changes in the work setting. She cannot have
8 any public contact, can have no more than occasional and
9 superficial contact with coworkers or supervisors; and
10 cannot work at a production pace (the work just has to be
11 completed by the end of the day).

12 (AR 63-64.) The ALJ found Plaintiff unable to perform her past
13 relevant work and continued to step five. (AR 68.)

14 At that step, considering Plaintiff's age, education, work
15 experience, and RFC and the VE's testimony, she concluded that
16 Plaintiff could perform several jobs existing in significant
17 numbers in the national economy. (AR 68-69.) Accordingly, she
18 found her not disabled. (Id.)

19 **V. DISCUSSION⁴**

20 Plaintiff argues that the ALJ failed to acknowledge the
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22 ⁴ In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the Supreme
23 Court held that ALJs of the Securities and Exchange Commission
24 are "Officers of the United States" and thus subject to the
25 Appointments Clause. To the extent Lucia applies to Social
26 Security ALJs, Plaintiff has forfeited the issue by failing to
27 raise it during her administrative proceedings. (See AR 76-113,
28 356-57); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (as
amended); see also Kabani & Co. v. SEC, 733 F. App'x 918, 919
(9th Cir. 2018) (rejecting Lucia challenge because plaintiff did
not raise it during administrative proceedings), cert. denied,
139 S. Ct. 2013 (2019).

1 consulting examiner's "limitation" to "simple one and two part
2 instructions" and did not explain why it was not included in her
3 RFC. (J. Stip. at 7-8.)

4 As discussed below, the ALJ rendered the record ambiguous by
5 failing to assign any particular weight to any of the mental-
6 health doctors' opinions and by not explaining why, despite
7 apparently relying on the consulting examiner's opinion, she did
8 not incorporate into Plaintiff's RFC or even address his finding
9 that "[s]he can remember and comply with simple one and two part
10 instructions." (AR 794.) The omission was not harmless because
11 none of the jobs identified by the ALJ as ones Plaintiff could
12 perform are consistent with such a limitation.

13 A. Relevant Background

14 1. *Consulting Examiner*

15 Consulting examiner Mark Pierce, a clinical psychologist,
16 performed a psychological examination on November 22, 2017. (AR
17 788-94.) After administering a variety of tests and interviewing
18 Plaintiff, he assessed her "work capacity and prognosis." (AR
19 793-94.) Among other things, Plaintiff "apparently retain[ed]
20 the mental capacity to complete simple and repetitive-to-only
21 somewhat higher-demand vocational skills and to adapt to minimal
22 changes in a work environment." (AR 794.) Her reasoning
23 capacities were "judged adequate to this lower level of
24 vocational functioning." (*Id.*) She would have "moderate-to-
25 greater difficulty working effectively with others, due to her
26 contentious approach." (*Id.*) She could "remember and comply
27 with simple one and two part instructions" and "concentrate just
28 adequately for a low-demand regular work schedule for a full

1 workweek, presuming she continue[d] with her psychological
2 treatment, while she require[d] more focused psychotherapeutic
3 addressing of her very difficult interpersonal manner." (Id.)

4 2. *ALJ's Decision*

5 After finding "severe impairments" of depression, PTSD, and
6 borderline personality disorder, among various physical ailments,
7 the ALJ determined that Plaintiff did "not have an impairment or
8 combination of impairments that me[t] or medically equal[ed] the
9 severity of one of the listed impairments" in the regulations.

10 (AR 62-63.) In so concluding, she noted that Plaintiff had
11 mild mental limitation in understanding, remembering, or
12 applying information, and in adapting or managing
13 herself. She has moderate mental limitations in social
14 interaction and in maintaining concentration,
15 persistence, or pace.

16 (AR 63.) At step four, the ALJ found that Plaintiff had the RFC
17 to perform a limited range of light work. (AR 63-64.) The ALJ
18 noted that Dr. Pierce found that Plaintiff "retained the mental
19 capacity to complete simple and repetitive tasks and adapt to
20 minimal changes in a work environment," with "moderate to greater
21 difficulty working effectively with others, but could remember
22 and comply with simple job instructions and could concentrate
23 adequately for low demand regular work." (AR 65-66.) She did
24 not assign any particular weight to Dr. Pierce's opinion – or any
25 of the mental-health physicians' opinions – and she never
26 discussed or even mentioned his statement concerning one- or two-
27 part instructions.

1 B. Analysis

2 A limitation to simple, repetitive tasks is not the same as
3 one restricting a claimant to one- or two-part or -step
4 instructions. See Rounds v. Comm’r Soc. Sec. Admin., 807 F.3d
5 996, 1003-04 (9th Cir. 2015) (as amended) (distinguishing between
6 two). Indeed, although a limitation to simple, routine tasks is
7 consistent with jobs requiring a reasoning level of two, one to
8 one- or two-part instructions is not. See id.; Banales v.
9 Berryhill, No. EDCV-16-1247-AGR, 2017 WL 651941, at *2 (C.D. Cal.
10 Feb. 16, 2017). Claimants restricted to following one- or two-
11 step instructions can perform only jobs with a reasoning level of
12 one. Apr. M. v. Saul, No. 2:18-CV-10083-GJS, 2020 WL 1062145, at
13 *3 (C.D. Cal. Mar. 5, 2020) (finding that an RFC limiting
14 claimant to two-step instructions is “inconsistent with . . .
15 jobs . . . requiring Reasoning Level 2”); see also Lara v.
16 Astrue, 305 F. App’x 324, 326 (9th Cir. 2008) (“Reasoning Level 1
17 jobs are elementary, exemplified by such tasks as counting cows
18 coming off a truck, and someone able to perform simple,
19 repetitive tasks is capable of doing work requiring more rigor
20 and sophistication – in other words, Reasoning Level 2 jobs.”).

21 In evaluating doctors’ opinions, an ALJ must state what
22 weight she has given each opinion and explain why. See SSR
23 96-2P, 1996 WL 374188, at *5 (July 2, 1996); §§ 404.1527(e),
24 416.927(e) (noting that unless treating physician’s opinion is
25 given controlling weight, ALJ must explain weight given to
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1 state-agency physicians' opinions);⁵ Martin-Quigley ex rel. A.O.
2 v. Berryhill, No. 2:17-CV-01464-RFB-VCF, 2018 WL 1802473, at *3
3 (D. Nev. Feb. 1, 2018) (finding error when ALJ cited portions of
4 doctor's opinion without discussing why other, unmentioned
5 portions were implicitly rejected, making it ambiguous what
6 weight was given to it overall), accepted by 2018 WL 1796290 (D.
7 Nev. Apr. 16, 2018).

8 As an initial matter, it is not clear that Dr. Pierce
9 intended to limit Plaintiff to one- or two-part instructions
10 simply by observing that she was capable of following them.
11 Unlike an RFC, which the regulations define as representing the
12 most a claimant can do, see §§ 404.1545(a)(1), 416.945(a)(1),
13 nothing in the Administration's instructions or guidance
14 concerning consulting opinions suggests that they are to be
15 written that way. See §§ 404.1519n, 416.919n; Soc. Sec. Admin.,
16 Program Operations Manual System (POMS) DI 22510.021 (Jan. 15,
17 2014), <https://secure.ssa.gov/apps10/poms.nsf/lrx/0422510021>
18 (stating guidelines for consulting-examination reports).
19 Plaintiff cites no authority for her assertion that Dr. Pierce's
20 statement was necessarily the "high end of [her] ability." (J.
21 Stip. at 7.) In other words, just because Dr. Pierce said she
22 could do simple one- or two-part instructions doesn't mean she
23 couldn't also do more than that. See Etter v. Astrue, No. CV-10-

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25 ⁵ For claims filed on or after March 27, 2017, the rules in
26 §§ 404.1520c and 416.920c (not §§ 404.1527 and 416.927) apply.
27 See §§ 404.1520c, 416.920c (evaluating opinion evidence for
28 claims filed on or after Mar. 27, 2017). Plaintiff's claims were
filed before March 27, 2017, however, and thus the new
regulations do not apply.

1 582-OP, 2010 WL 4314415, at *5 (C.D. Cal. Oct. 22, 2010)
2 (rejecting argument that doctor's opinion that claimant was
3 "capable of understanding, remembering and carrying out simple
4 one to two step tasks . . . necessarily limited [her] to tasks
5 involving only one and two steps"); Johnson v. Colvin, No.
6 13-CV-04862-EDL, 2014 WL 5794337, at *8 (N.D. Cal. Nov. 6, 2014)
7 (finding that doctors did not phrase statement concerning one- or
8 two-step instructions as limitation and that record as whole
9 supported RFC for "simple, repetitive tasks").

10 But in light of the ALJ's failure to specifically assign any
11 particular weight to any mental-health doctor's opinion,
12 including Dr. Pierce's, or to even mention his statement
13 concerning one- or two-part instructions, the ALJ rendered the
14 record ambiguous on this score. See Garcia v. Colvin, No. 16-
15 00652-JEM, 2016 WL 6304626, at *6 (C.D. Cal. Oct. 27, 2016)
16 (finding reversible ambiguity in record when ALJ failed to
17 acknowledge and resolve difference between "simple, routine, non-
18 stressful work" and "easy 1-2 step directions" in doctor's
19 opinion); see also Reddick v. Chater, 157 F.3d 715, 722-23 (9th
20 Cir. 1998) (ALJ erred by "not fully accounting for the context of
21 materials or all parts of the testimony and reports"); Wilson v.
22 Berryhill, No. 1:16-cv-01861-SKO, 2018 WL 1425963, at *34-35
23 (E.D. Cal. Mar. 22, 2018) (finding error when ALJ failed to
24 address or account for doctor's statement concerning one- or two-
25 part instructions). An ALJ has an affirmative duty to resolve
26 ambiguities in the record, Mayes v. Massanari, 276 F.3d 453,
27 459-60 (9th Cir. 2001) (as amended), and here she did not do so.
28 Moreover, the error was not harmless because, as Respondent does

1 not dispute (J. Stip. at 14-15), the jobs identified by the ALJ
2 that Plaintiff could perform all require at least reasoning level
3 two, which is inconsistent with a limitation to one- or two-part
4 instructions. Rounds, 807 F.3d at 1004; see also Burson v.
5 Berryhill, No. 15-CV-04991-DMR, 2017 WL 1065140, at *4 (N.D. Cal.
6 Mar. 20, 2017) (ALJ erred by limiting claimant to "simple,
7 repetitive tasks" without either including or expressly
8 discounting doctor's opinion that claimant was capable of
9 performing one- and two-step instructions).⁶

10 Accordingly, the ALJ erred, and remand is appropriate to
11 allow her to resolve the ambiguity in the record. Indeed, when
12 such ambiguities exist, "the proper course, except in rare
13 circumstances, is to remand to the agency for additional
14 investigation or explanation." Rebekah H. v. Comm'r of Soc.
15 Sec., No. 6:17-CV-01701-AA, 2019 WL 1442200, at *4 (D. Ore. Mar.
16 30, 2019) (citing Dominquez v. Colvin, 808 F.3d 403, 407 (9th
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18 ⁶ Respondent argues that in light of Dr. Pierce's
19 observation that Plaintiff was capable of some work more
20 demanding than only simple and repetitive, he necessarily found
21 that she also could do work involving more than one- or two-step
22 instructions. (J. Stip. at 12.) But Dr. Pierce also noted that
23 Plaintiff could concentrate "just adequately" for "low-demand
24 work" (AR 794), which the ALJ apparently translated into a
25 moderate limitation in concentration, persistence, and pace (see
26 AR 63). Moderate limitations in concentration often result in an
27 RFC for one- and two-step instructions. See, e.g., Rounds, 807
28 F.3d at 1004; Murray v. Colvin, No. C-13-01182 DMR, 2014 WL
1396408, at *4 (N.D. Cal. Apr. 10, 2014) ("Consistent with the
medical evidence in the record, the ALJ properly translated
Plaintiff's moderate limitations with respect to concentration,
persistence or pace into a limitation to 'one-to-two step
instructions.'" (citation omitted)). Thus, there remain
ambiguities in Dr. Pierce's opinion and the ALJ's consideration
of it.

1 Cir. 2015)).

2 **VI. CONCLUSION**

3 Consistent with the foregoing and under sentence four of 42
4 U.S.C. § 405(g),⁷ IT IS ORDERED that judgment be entered
5 REVERSING the Commissioner's decision, GRANTING Plaintiff's
6 request for remand, and REMANDING this action for further
7 proceedings consistent with this Memorandum Decision.

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9 DATED: July 16, 2020


10 JEAN ROSENBLUTH
11 U.S. Magistrate Judge
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26 ⁷ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."