

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PATTI BUTLER,

Plaintiff,

vs.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,

Defendant.

) No. 1:14-CV-3121-LRS
)
) **ORDER GRANTING**
) **PLAINTIFF'S MOTION FOR**
) **JUDGMENT, *INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 13) and the Defendant's Motion For Summary Judgment (ECF No. 17).

JURISDICTION

Patti Butler, Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on July 29, 2010. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing and a video hearing was held on September 6, 2012, with Administrative Law Judge (ALJ) Gene Duncan sitting in Spokane, while Plaintiff, represented by an attorney, testified from Yakima. Robert Sklaroff, M.D., testified telephonically as a Medical Expert (ME). On December 18, 2012, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review and the

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 1**

1 ALJ's decision became the final decision of the Commissioner. This decision is
2 appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

4 **STATEMENT OF FACTS**

5 The facts have been presented in the administrative transcript, the ALJ's
6 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At
7 the time of the administrative hearing, Plaintiff was 44 years old. She has a high
8 school education and no past relevant work experience. Plaintiff alleges disability
9 since June 1, 2010.

11 **STANDARD OF REVIEW**

12 "The [Commissioner's] determination that a claimant is not disabled will be
13 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
14 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
15 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
16 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
18 1988). "It means such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
20 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
21 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
22 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
23 On review, the court considers the record as a whole, not just the evidence supporting
24 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
25 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

26 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
27 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational

28 **ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 2**

1 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
2 F.2d 577, 579 (9th Cir. 1984).

3 A decision supported by substantial evidence will still be set aside if the proper
4 legal standards were not applied in weighing the evidence and making the decision.
5 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
6 1987).

7 **ISSUES**

8 Plaintiff argues the ALJ erred in: 1) not finding the Plaintiff's mental
9 impairments to be "severe;" 2) failing to take all of Plaintiff's non-exertional
10 limitations into account in his residual functional capacity (RFC) determination; 3)
11 discounting the Plaintiff's credibility; 4) finding the Plaintiff had past relevant work
12 as a cashier; and 5) denying Plaintiff's counsel the opportunity to question Plaintiff
13 at the administrative hearing and then denying Plaintiff's claim without a
14 supplemental hearing and without allowing Plaintiff an opportunity to testify at the
15 same.

16 **DISCUSSION**

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Social Security Act defines "disability" as the "inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or can
21 be expected to last for a continuous period of not less than twelve months." 42
22 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). The Act also provides that a claimant
23 shall be determined to be under a disability only if her impairments are of such
24 severity that the claimant is not only unable to do her previous work but cannot,
25 considering her age, education and work experiences, engage in any other substantial
26 gainful work which exists in the national economy. *Id.*

27 **ORDER GRANTING PLAINTIFF'S**

28 **MOTION FOR SUMMARY JUDGMENT- 3**

1 The Commissioner has established a five-step sequential evaluation process for
2 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
3 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
4 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20
5 C.F.R. §§ 404.1520(a)(4)(I) and 416.920(a)(4)(I). If she is not, the decision-maker
6 proceeds to step two, which determines whether the claimant has a medically severe
7 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
8 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
9 of impairments, the disability claim is denied. If the impairment is severe, the
10 evaluation proceeds to the third step, which compares the claimant's impairment with
11 a number of listed impairments acknowledged by the Commissioner to be so severe
12 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
13 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
14 equals one of the listed impairments, the claimant is conclusively presumed to be
15 disabled. If the impairment is not one conclusively presumed to be disabling, the
16 evaluation proceeds to the fourth step which determines whether the impairment
17 prevents the claimant from performing work she has performed in the past. If the
18 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
19 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
20 the fifth and final step in the process determines whether she is able to perform other
21 work in the national economy in view of her age, education and work experience. 20
22 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

23 The initial burden of proof rests upon the claimant to establish a prima facie
24 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
25 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
26 mental impairment prevents her from engaging in her previous occupation. The
27 burden then shifts to the Commissioner to show (1) that the claimant can perform

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 4**

1 other substantial gainful activity and (2) that a "significant number of jobs exist in the
2 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
3 1498 (9th Cir. 1984).

4 5 **ALJ'S FINDINGS**

6 The ALJ found the following: 1) Plaintiff's fibromyalgia constitutes a "severe"
7 impairment, but her mental impairments "do not cause more than minimal limitation
8 in [her] ability to perform basic work mental work activities" and therefore, are not
9 "severe;" 2) Plaintiff does not have an impairment or combination of impairments that
10 meets or equals any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1;
11 3) Plaintiff has the residual functional capacity (RFC) to perform the full range of
12 light work as defined in 20 C.F.R. §404.1567(b) and §416.967(b) (lifting no more
13 than 20 pounds at a time with frequent lifting or carrying of objects weighing up to
14 10 pounds; requires a good deal of walking or standing, or involves sitting most of
15 the time with some pushing and pulling of arm or leg controls); and 4) Plaintiff's
16 RFC allows her to perform past relevant work as a cashier and alternatively, Medical-
17 Vocational Rule 202.21, 20 C.F.R. Part 404, Subpart P, Appendix 2, would direct a
18 finding of "not disabled." Accordingly, the ALJ concluded the Plaintiff is not
19 disabled.

20 21 **"SEVERE" MENTAL IMPAIRMENTS**

22 A "severe" impairment is one which significantly limits physical or mental
23 ability to do basic work-related activities. 20 C.F.R. §§ 404.1520(c) and
24 416.920(c). It must result from anatomical, physiological, or psychological
25 abnormalities which can be shown by medically acceptable clinical and laboratory
26 diagnostic techniques. It must be established by medical evidence consisting of
27 signs, symptoms, and laboratory findings, not just the claimant's statement of
28

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 5

1 symptoms. 20 C.F.R. §§ 404.1508 and 416.908. An ALJ may find that a claimant
2 lacks a medically severe impairment or combination of impairments only when his
3 conclusion is “clearly established by medical evidence.” *Webb v. Barnhart*, 433 F.3d
4 683, 687 (9th Cir. 2005), citing S.S.R. No. 85-28 (1985).

5 Step two is a *de minimis* inquiry designed to weed out nonmeritorious claims
6 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d
7 1273, 1290 (9th Cir. 1996), citing *Bowen*, 482 U.S. at 153-54 (“[S]tep two inquiry is
8 a *de minimis* screening device to dispose of groundless claims”). “[O]nly those
9 claimants with slight abnormalities that do not significantly limit any basic work
10 activity can be denied benefits” at step two. *Bowen*, 482 U.S. at 158 (concurring
11 opinion). “Basic work activities” are the abilities and aptitudes to do most jobs,
12 including: 1) physical functions such as walking, standing, sitting, lifting, pushing,
13 pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing, and
14 speaking; 3) understanding, carrying out, and remembering simple instructions; 4) use
15 of judgment; 5) responding appropriately to supervision, co-workers and usual work
16 situations; and 6) dealing with changes in a routine work setting. 20 C.F.R. §§
17 404.1521(b) and 416.921(b).

18 Plaintiff was seen by Roland Dougherty, Ph.D., for a consultative
19 psychological evaluation on October 27, 2010. Dr. Dougherty diagnosed the Plaintiff
20 on Axis I with “ADHD [Attention Deficit Hyperactivity Disorder],” “PTSD [Post-
21 Traumatic Stress Disorder] in partial remission,” “Depressive Disorder, NOS (not
22 otherwise specified), moderate,” and “Anxiety disorder, NOS, with infrequent panic
23 attacks.” He diagnosed her on Axis II with “Personality Disorder, NOS, with
24 borderline personality traits and dependent personality features.” He assigned her a
25 GAF (Global Assessment of Functioning) score of 55. (Tr. at p. 425). A GAF score
26 between 51 and 60 indicates “moderate symptoms” or “moderate” difficulty in social,
27 occupational, or school functioning. *American Psychiatric Ass’n, Diagnostic &*

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 6**

1 *Statistical Manual of Mental Disorders*, (4th ed. Text Revision 2000)(DSM-IV-TR at
2 p. 34). According to Dr. Dougherty:

3 I have made the above diagnoses based on her report but I
4 cannot be sure that she has been entirely accurate in her
5 reports given the past evaluation findings and reports.
6 She appears to function fairly well at home and is employed
7 part-time taking care of a developmentally delayed client.
8 She reports doing well at this work. She has had multiple
9 marriages and a work history marked by holding many jobs
10 for a few months.

11 (Tr. at p. 426). He added that:

12 Her prognosis appears to be guarded and dependent upon
13 her use of appropriate mental health and medication
14 services. Motivational factors may be important in her
15 case.

16 Mrs. Butler was pleasant and cooperative with me. Her
17 thinking was rational and goal-directed though her
18 responses often tangential. Her social skills appear to
19 be good. She reports being able to function effectively
20 as a care-provider, helping to manage her client's
21 money and helping with his daily activities. She reports
22 being able to concentrate well when not distracted. She
23 should be able to understand, remember and follow both
24 simple and complex directions. She reported having done
25 well in college classes in the past.

26 (Tr. at pp. 426-27).

27 The ALJ gave "great weight" to Dr. Dougherty's assessment "because it is
28 supported by his findings and generally consistent with the overall record." (Tr. at
p. 24). According to the ALJ, "[t]he claimant's examination results and reported
activities of daily living, including her volunteer work in the community, indicate no
more than mild limitations." (*Id.*). The latter statement presumably was a reference
to the "Functional Information" that Plaintiff reported to Dr. Dougherty. (Tr. at pp.
424-25).

Interestingly, although the ALJ thought Dr. Dougherty's examination results
"indicated no more than mild limitations," the GAF score he assigned to Plaintiff

///

///

ORDER GRANTING PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT- 7

1 indicated “moderate” limitations.¹ And notwithstanding his statements that Plaintiff’s
2 “thinking was rational and goal-directed,” that [h]er social skills appear to be good,”
3 that “[s]he should be able to understand, remember and follow both simple and
4 complex directions,” he also stressed that her prognosis was “guarded and dependent
5 upon her use of appropriate mental health and medication services.” Dr. Dougherty’s
6 assessment was the only mental health provider assessment to which the ALJ gave
7 any significant weight. His assessment, however, cannot be viewed in isolation and
8 is colored by the subsequent assessments of the other treating, examining and non-
9 examining mental health professionals, all of which the ALJ gave “little weight.”

10 In November 2010, a state agency consultant psychologist, Mary Gentile,
11 Ph.D., completed a “Findings Of Fact And Analysis Of Evidence.” Based on her
12 review of the record, including Dr. Dougherty’s assessment, Dr. Gentile concluded
13 that Plaintiff had a severe medically determinable organic brain syndrome, anxiety
14 disorder, affective disorder, and personality disorder. (Tr. at pp. 94-95). “Severity”
15 is measured according to the functional limitations imposed by the medically
16 determinable impairments., and functional limitations are assessed using the four
17 criteria in paragraph B of the listings. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Section
18 12.00(C.). While Dr. Gentile concluded the restriction on Plaintiff’s daily living
19 activities was “mild,” and there were no repeated episodes of decompensation of
20 extended duration, she also concluded that Plaintiff had “moderate” difficulties in
21 maintaining social functioning and in maintaining concentration, persistence or pace.
22 (Tr. at p. 95). In April 2011, Sean Mee, Ph.D., another state agency consultant,
23

24 ¹ A GAF score between 61 and 70 indicates “mild symptoms” or “some”
25 difficulty in social, occupational, or school functioning. *American Psychiatric*
26 *Ass’n, Diagnostic & Statistical Manual of Mental Disorders*, (4th ed. Text
27 Revision 2000)(DSM-IV-TR at p. 34).
28

1 conducted a record review and reiterated everything Dr. Gentile concluded in
2 November 2010 regarding the severity of Plaintiff's mental impairments and the
3 functional limitations arising therefrom. (Tr. at pp. 126-27; 130-32).

4 Plaintiff saw Mark Deramo, M.D., on January 11, 2011 complaining about
5 depression. Plaintiff noted she was on Effexor, an antidepressant medication. Dr.
6 Deramo indicated he intended to increase the Effexor and he referred Plaintiff to
7 Kirk Strosahl, Ph.D., for "psychologic disability" and "behavioral therapies." (Tr. at
8 p. 484). Plaintiff saw Dr. Strosahl on January 11, 2011. He advised Dr. Deramo that
9 "this patient is probably suffering from primary posttraumatic stress disorder and this
10 is producing her mixed anxiety and depression symptoms." (Tr. at p. 485). Plaintiff
11 saw Dr. Deramo again on January 24, 2011, who noted that Plaintiff had "significant
12 psychologic/psychiatric symptoms" and that he would continue the Plaintiff on
13 "current medications for depression/anxiety." (Tr. at p. 483). Plaintiff also saw Dr.
14 Strosahl on January 24, 2011. This time, Dr. Strosahl advised Dr. Deramo that "this
15 patient seems to be responding very positively to the combination of increased
16 antidepressant medication and working on some acceptance and mindfulness
17 principals (sic)." He added that it was important "to continue encouraging [Plaintiff]
18 to work on allowing her emotions, memories and thoughts to simply be present
19 without struggling to evaluate them or to change them in any way," and that "she
20 needs to integrate her history in a way that it does not cause her to ruminate and think
21 about what has already happened in her life for excessive periods of time." (Tr. at p.
22 482).

23 Apparently, it was not until December 16, 2011, that Plaintiff saw Dr. Deramo
24 again. Plaintiff noted continuing problems with depression/anxiety and that she had
25 been off her medications for "quite some time" due to lack of insurance. (Tr. at p.
26 585). Dr. Deramo discussed with Plaintiff "behavioral strategies to help with
27 depression/anxiety and also supplemental medication." He also noted that he would
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 9**

1 restart the Plaintiff on Effexor and that she would follow-up with Dr. Strosahl. (*Id.*)
2 Plaintiff saw Dr. Strosahl too on December 16. He informed Dr. Deramo as follows:

3 This patient is struggling with chronic depression which is
4 being produced by her incessant rumination over her life story.
5 As she goes through the story today, it is very confusing and a
6 patchwork quilt of contradictory themes and premises. I pointed
7 out to her that her story is simply that; it is not Truth. I encouraged
8 her to begin to step back when she notices that she is engaging in
9 this rumination and to try to get into the present moment. This
10 type of mindfulness intervention has been shown to work with
11 depressive rumination in clinical studies. Please reinforce this
12 important principle, when you have medical contact with her.

13 (Tr. at p. 586).

14 The ALJ's reasons for giving little weight to Dr. Strosahl's opinion are neither
15 "clear and convincing," or "specific and legitimate."² It is apparent that Dr.
16 Strosahl's comment that Plaintiff's story was not the "truth," was not intended as a
17 comment on her credibility, but rather as an observation regarding her "depressive
18 rumination" and how it adversely impacted her mental health. Furthermore, the
19 record reasonably suggests that Plaintiff did not follow up with Dr. Strosahl between
20 January and December 2011, not necessarily because her condition had improved, but
21 rather because she lacked health insurance. It is apparent from the comments of Drs.
22 Deramo and Strosahl in December 2011, that Plaintiff continued to struggle with
23 depression requiring medical treatment and behavioral therapy.

24 In October 2012, Plaintiff saw CeCilia Cooper, Ph.D., for a consultative
25 psychological evaluation. She diagnosed Plaintiff with "Bipolar II Disorder, Atypical
26 Features," "Anxiety Disorder NOS with occasional panic attacks," and "Borderline
27

28 ² If a treating or examining physician's or psychologist's opinion is not
contradicted, it can be rejected only for clear and convincing reasons. If
contradicted, the ALJ may reject the opinion if specific, legitimate reasons that are
supported by substantial evidence are given. *Lester v. Chater*, 81 F.3d 821, 830
(9th Cir. 1995).

1 Personality Disorder (some avoidant, dependent, oppositional traits.” (Tr. at p. 632).
2 She assigned the Plaintiff a GAF score of 63, but qualified this by indicating it
3 depended on the Plaintiff being in a “supportive environment,” as discussed below.
4 (*Id.*). As noted at footnote 2, *supra*, a GAF score between 61-70 indicates “mild
5 symptoms,” or “some difficulty in social, occupational or school functioning . . . but
6 generally functioning pretty well, has some meaningful interpersonal relationships.”
7 -Dr. Cooper, like Dr. Dougherty, considered Plaintiff’s prognosis to be “guarded.”
8 (Tr. at p. 632). Although Dr. Cooper thought the Plaintiff was “inclined to magnify
9 symptoms,” she did not think the Plaintiff was malingering. (*Id.*). Dr. Cooper
10 thought Plaintiff “would have some problems with change and with maintaining
11 attention and concentration for extended periods of time because of anxiety and
12 depression” and that “[t]hose problems would be more evident in busy settings in
13 which she has to frequently interact with the general public and to multi-task.” (*Id.*).
14 Dr. Cooper thought Plaintiff “would not require close supervision if she has a
15 comfortable routine to follow in a setting she enjoys.” (*Id.*). Dr. Cooper added that:

16 Ms. Butler would have some problems with supervisors
17 because of her personality traits. She would not have
18 significant problems with coworkers provided that she and
19 they could complete work independently of one another.
20 She would not do well on a close knit team.

21 Ms. Butler would do best in settings in which she is given
22 some say in determining how best to complete her assigned
23 tasks within the time period designated. She would benefit
24 from concrete feedback about specific things she does well.
25 She would benefit from reassurance that mistakes are not
26 indications of personal failure. Specific suggestions for
27 performance improvement supported by recognition of
28 improvement would be helpful.

(Tr. at p. 633).

The ALJ gave “little weight” to Dr. Cooper’s opinions because they were
“based upon the claimant’s subjective complaints, and the claimant is not fully
credible.” It is apparent, however, that Dr. Cooper’s opinions are not significantly
different from those of Dr. Dougherty to which the ALJ assigned “great weight.” Dr.

ORDER GRANTING PLAINTIFF’S

MOTION FOR SUMMARY JUDGMENT- 11

1 Dougherty assigned the Plaintiff a GAF score of 55, lower than the GAF score of 63
2 assigned by Dr. Cooper, although as noted, Dr. Cooper stressed that a “supportive
3 environment” was necessary for Plaintiff to function at a level 63.

4 In giving “great weight” to Dr. Dougherty’s opinions, and little weight to the
5 opinions of Drs. Strosahl and Cooper, the ALJ focused on what the Plaintiff reported
6 to those doctors regarding her activities of daily living and her part-time
7 “employment” taking care of a developmentally delayed person. (Tr. at pp. 23-25).
8 It is clear, however, that notwithstanding those activities, each of these mental health
9 providers was of the opinion that Plaintiff had some moderate difficulties.

10 In *Webb*, the ALJ found the claimant’s “subjective complaints” and “assertions
11 regarding the disabling extent of his functional limitations . . . [we]re exaggerated and
12 not credible because he was capable of performing household tasks and had sought
13 employment during the relevant period.” 433 F.3d at 687-88. The Ninth Circuit
14 found those were not “clear and convincing” reasons for rejecting the claimant’s
15 subjective complaints and assertions³:

16 That Webb sought employment suggests no more than
17 that he was doing his utmost, in spite of his health, to
18 support himself. “The mere fact that a plaintiff has
19 carried on certain daily activities such as grocery shopping,
20 driving a car, or limited walking for exercise, does not in
21 any way detract from [his] credibility as to [his] overall
22 disability. One does not need to be ‘utterly incapacitated’
23 in order to be disabled.” *Vertigan v. Halter*, 260 F.3d 1044,
24 1050 (9th Cir. 2001) (internal citation omitted).

21 *Id.* at 688.

22 In *Webb*, the Ninth Circuit pointed out that the ALJ viewed Webb’s objective
23

24 ³ “Unless there is affirmative evidence to show that the claimant is
25 malingering, the Commissioner’s reasons for rejecting the claimant’s testimony
26 must be clear and convincing.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
27 1998).

28 **ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 12**

1 medical evidence simply as part of his subjective complaints in finding his assertions
2 to be “exaggerated, and not credible.” 433 F.3d at 688. The same is true in the case
3 at bar. In *Webb*, the circuit agreed that “[c]redibility determinations do bear on
4 evaluations of medical evidence when an ALJ is presented with conflicting medical
5 opinions or inconsistency between a claimant’s subjective complaints and his
6 diagnosed conditions,” but found there was “no inconsistency between Webb’s
7 complaints and his doctor’s diagnoses sufficient to doom his claim as groundless
8 under the de minimis standard of step two,” and “Webb’s clinical records did not
9 merely record the complaints he made to his physicians, nor did his physicians
10 dismiss Webb’s complaints as altogether unfounded.” *Id.* In the case at bar, it is not
11 apparent there are any conflicting opinions about Plaintiff’s mental condition and the
12 resulting functional limitations, nor is there inconsistency between the Plaintiff’s
13 subjective complaints and her diagnosed conditions sufficient to conclude her
14 disability claim is groundless under the step two standard. Plaintiff’s mental health
15 records do not merely record her complaints, and none of her mental health providers
16 dismissed her complaints as unfounded. In concluding that Plaintiff did not have a
17 severe mental impairment, the ALJ relied on his own interpretation of the medical
18 evidence, and in doing so, rejected even the interpretations and conclusions of the
19 state agency medical consultants (Drs. Gentile and Mee).

20 Here, there is not a total absence of objective evidence of “severe” mental
21 impairment. See *Ukolov v. Barnhart*, 420 F.3d 1002 [1006] (9th Cir. 2005) (affirming
22 a finding of no disability at step two when even the claimant’s doctor was hesitant to
23 conclude that any of the claimant’s symptoms and complaints were medically
24 legitimate). Accordingly, there is not substantial evidence supporting the ALJ’s
25 determination that Plaintiff does not suffer from any “severe” mental health
26 impairments.

27 ///

28 **ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 13**

1 **PHYSICAL RFC/CREDIBILITY**

2 The ALJ concluded that “[i]n terms of the claimant’s physical limitations, the
3 overall record indicates that she retains sufficient strength, range of motion, and pain
4 tolerance for the full range of light work.” (Tr. at p. 26).

5 Marie Ho, M.D., examined the Plaintiff on November 21, 2010. In the
6 “History Of Present Illness” section of her report, Dr. Ho wrote that Plaintiff has 12
7 of the standard 18 tender points of fibromyalgia on distraction with one control
8 point.” (Tr. at p. 428). It is not clear whether Dr. Ho herself did the tender points
9 testing, or whether it had been done previously by a different examiner.
10 Nevertheless, Dr. Ho diagnosed the Plaintiff with fibromyalgia “with 12 of the
11 standard 18 tender points of fibromyalgia and associated disorders, including
12 migraine headaches.” (Tr. at p. 432). And her diagnosis, along with the diagnosis of
13 Wing C. Chau, M.D., and the hearing testimony of the medical expert, led the ALJ
14 to conclude that fibromyalgia was a “severe” impairment for the Plaintiff which
15 causes her significant limitations. Nonetheless, the ALJ was unwilling to accept the
16 non-exertional limitations and all of the exertional limitations opined by Drs. Ho and
17 Chau as stemming from Plaintiff’s fibromyalgia.

18 According to Dr. Ho:

19 [Plaintiff] is limited to standing and walking a total time of
20 at least two hours, but less than six hours in an eight [hour]
workday, due to fibromyalgia.

21 [Plaintiff] is limited to sitting at least two hours, but less
22 than six hours at one time in an eight-hour workday.

23 [Plaintiff] would be capable of sitting six hours in an
eight-hour workday.

24

25 Restrictions of postural activities include kneeling, crouching,
26 and stooping occasionally, due to limitations of fibromyalgia.

27 (Tr. at p. 433).

28 **ORDER GRANTING PLAINTIFF’S**

MOTION FOR SUMMARY JUDGMENT- 14

1 The ALJ gave “some weight” to Dr. Ho’s opinion “because it is based in part
2 on Dr. Ho’s objective findings, which suggest a full range of light work,” but found
3 “the limitation on standing and walking along with the postural limitations are based
4 upon the claimant’s subjective complaints, and the claimant is not fully credible.”
5 (Tr. at pp. 27-28).

6 The ALJ treated Dr. Chau’s opinion in a similar fashion. Dr. Chau examined
7 the Plaintiff on November 7, 2012. He too diagnosed the Plaintiff with fibromyalgia,
8 even though his “impression” was as follows:

9 [Plaintiff] has been diagnosed for fibromyalgia in the past,
10 though her exam was not typical for such a patient (lack of
11 tender points). Patient did show[] some malingering
12 behaviors during the evaluation. From a musculoskeletal
13 point of view, she is without focal neurological deficit.
14 Patient should be capable of working full time. Patient has
15 good strength and there should not be any lifting/carrying
16 restrictions

17 (Tr. at p. 637). In an accompanying “Medical Source Statement Of Ability To Do
18 Work-Related Activities,” Dr. Chau indicated Plaintiff could sit, stand, and walk for
19 one hour without interruption; could sit for a total of three hours in an eight hour
20 workday, stand for a total of three hours in an eight hour workday, and walk for a
21 total of two hours in an eight hour workday; that she was limited to occasional
22 reaching overhead with both her left and right hands; that she could occasionally
23 climb stairs and ramps, climb ladders and scaffolds, balance, stoop and kneel; and
24 that she could never crouch or crawl. (Tr. at pp. 639-41).⁴ The ALJ found the non-
25 exertional limitations opined by Dr. Chau were not supported by his examination and
26 “appears” to have been based on the Plaintiff’s “subjective reports.” (Tr. at p. 28).

27 ⁴ In his decision, the ALJ says Dr. Chau opined that Plaintiff was restricted
28 regarding use of foot controls and exposure to humidity and noise, but it is not
apparent that Dr. Chau opined any such restrictions in his “Medical Source
Statement Of Ability To Do Work-Related Activities.”

1 In *Benecke v. Barnhart*, 379 F.3d 587, 589-90 (9th Cir. 2004), the Ninth Circuit
2 described fibromyalgia as follows:

3 Benecke suffers from fibromyalgia, previously called fibrositis,
4 a rheumatic disease that causes inflammation of the fibrous
5 connective tissue components of muscles, tendons, ligaments,
6 and other tissue. Common symptoms . . . include chronic
7 pain throughout the body, multiple tender points, fatigue,
8 stiffness, and a pattern of sleep disturbance that can exacerbate
9 the cycle of pain and fatigue associated with this disease.
10 Fibromyalgia's cause is unknown, there is no cure, and it is
11 poorly understood within much of the medical community.
12 **The disease is diagnosed entirely on the basis of patients'**
13 **reports of pain and other symptoms.** The American College
14 of Rheumatology issued a set of agreed-upon diagnostic
15 criteria in 1990, but to date there are no laboratory tests to
16 confirm the diagnosis.

17 (Emphasis added). It is no surprise then that the ALJ found the non-exertional
18 limitations opined by Dr. Chau were not supported by his examination. And it is true
19 that Dr. Ho's "limitation on standing and walking along with the postural limitations
20 are based upon the claimant's subjective complaints." "A patient's report of
21 complaints, or history, is an essential diagnostic tool" in fibromyalgia cases, and a
22 physician's reliance on such complaints "hardly undermines his opinion as to
23 functional limitations." *Green-Younger v. Barnhart*, 335 F.3d 99, 107 (2nd Cir. 2003).
24 The lack of objective findings is insufficient to support the ALJ's rejection of the
25 exertional and non-exertional limitations opined by Drs. Ho and Chau. It is not a
26 "clear and convincing" or a "specific and legitimate" reason to discount the opinions
27 of these doctors.

28 Clearly, Dr. Ho and Dr. Chau believed plaintiffs' reports of pain and other
symptoms to the extent that they were willing to opine the exertional and non-
exertional limitations they opined. It is noted that they were fairly consistent
regarding those limitations and Dr. Chau, like Dr. Ho, opined limitations regarding
sitting, standing and walking that do not comport with capacity to perform a full
range of light work which requires "a good deal of walking or standing, or involves

1 sitting most of the time with some pushing and pulling of arm or leg controls.”⁵

2 Drs. Ho was not duped regarding Plaintiff’s daily living activities.

3 In her report, Dr. Ho noted:

4 The claimant has mainly worked in sheltered types of jobs.
5 She is still working for the State of Washington. She works
6 about 40 hours per month and earns about \$400.00 per month.
7 She is only working part-time.

8 The claimant is able to drive locally. She shops with her
9 husband. She is able to do her own personal care, but she has
10 problems with fine motor skills, as she has had poor coordination
11 for the past 10 years. She does some light cooking and light
12 housework. She is no longer able to do her hobbies.

13 On average day (sic) she does her activities of daily living.

14 (Tr. at p. 429).

15 Bolstering the integrity of Dr. Chau’s report is the fact that notwithstanding the
16 limitations opined by him, he also opined that Plaintiff “should be capable of working
17 full time . . . has good strength and there should not be any lifting/carrying
18 restrictions.” (Tr. at p. 637). Furthermore, as noted above, Dr. Chau rendered the
19 opinions he did regarding Plaintiff’s limitations, even though he pointed out that
20 Plaintiff “did show[] some malingering behaviors during the evaluation.”

21 In his decision, the ALJ found that Plaintiff “reported several activities of daily
22 living and volunteer work that is inconsistent with her alleged pain and inability to

23 ⁵ Non-examining state agency consultant, Charles Wolfe, M.D., also
24 indicated, based on his review of the record, that Plaintiff had certain postural
25 limitations which were inconsistent with an ability to perform the full range of
26 light work. (Tr. at pp. 143-45).

27 Although Dr. Deramo indicated in January 2011 that he did “not find
28 anything that I believe is physically limiting in terms of the work that [Plaintiff] is
able to do” (Tr. at p. 483), there is no indication that he was aware of Dr. Ho’s
previous diagnosis of fibromyalgia.

1 work” including dancing at a bar with her husband every six weeks, helping her
2 eight-year-old step-son get ready for school, cooking, vacuuming, washing laundry,
3 grocery shopping, reading up to two hours at a time, taking care of the family goat,
4 attending her step-son’s school functions, helping her step-son with homework,
5 volunteering for 4H, and calling Bingo three times a week at a local senior center.
6 (Tr. at p. 27).

7 “The Social Security Act does not require that claimants be utterly
8 incapacitated to be eligible for benefits . . . and many home activities are not easily
9 transferable to what may be the more grueling environment of the workplace where
10 it might be impossible to periodically rest or take medication.” *Fair v. Bowen*, 885
11 F.2d 597, 603 (9th Cir. 1989). “[T]he mere fact that a plaintiff has carried on certain
12 daily activities, such as grocery shopping, driving a car, or limited walking for
13 exercise, does not in any way detract from credibility as to her overall disability.”
14 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001). Rather, “[i]t is only where
15 the level of activity is inconsistent with a claimed limitation that the activity has any
16 bearing on credibility.” *Id.* Daily activities therefore “may be grounds for an adverse
17 credibility finding if a claimant is able to spend a substantial part of h[er] day
18 engaged in pursuits involving physical functions that are transferable to a work
19 setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). To conclude that a
20 claimant’s daily activities warrant an adverse credibility determination, the ALJ must
21 make specific findings relating to the daily activities and the transferability of the
22 activities to the workplace. *Id.*

23 Here, the ALJ did not make specific findings how Plaintiff’s daily activities
24 manifested her ability to perform the full range of light work in the work place (a
25 good deal of walking or standing, or involves sitting most of the time with some
26 pushing and pulling of arm or leg controls). Accordingly, Plaintiff’s daily activities
27 do not constitute a “clear and convincing” reason for discounting her credibility
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 18**

1 regarding her physical exertional and non-exertional capacity. An ALJ can only
2 reject a plaintiff's statement about limitations based upon a finding of "affirmative
3 evidence" of malingering or "expressing clear and convincing reasons" for doing so.
4 *Smolen*, 80 F.3d at 1283-84.⁶

5 Nor is Plaintiff's reporting of lower leg, left ankle pain at a level of 5 out of 10
6 in September 2010 (Tr. at p. 389), and right shoulder pain at a level of 4 out of 10 in
7 January 2012, after a minor vehicle accident (Tr. at p. 566), a "clear and convincing"
8 reason for discounting her credibility regarding her physical RFC. This is particularly
9 so because of the limitations opined by Drs. Ho and Chau. Furthermore, the
10 limitations opined by Drs. Ho and Chau are contrary to the assertion of the ALJ that
11 Plaintiff's pain is "controlled with medication when needed." It was inconsequential
12 to Dr. Ho that Plaintiff reported she was only taking over-the-counter medication to
13 help with pain (Tylenol Arthritis). (Tr. at p. 429). It was inconsequential to Dr. Chau
14 that Plaintiff reported the only thing she was taking was Vitamin B. (Tr. at p. 635).
15 There is no evidence in the record that prescription medication, as opposed to over-
16 the-counter pain medication, would have more effectively controlled Plaintiff's
17 fibromyalgia symptoms.

18 ///

19 ///

20 ///

22 ⁶ In his written decision, the ALJ did not find there was "affirmative
23 evidence" of malingering. Indeed, he gave no weight to the opinion of Jay Toews,
24 Ph.D., a psychologist who in February 2010, diagnosed Plaintiff on Axis I with
25 "Malingering, probable." (Tr. at p. 360). The ALJ gave the opinion no weight
26 because the diagnosis was made prior to Plaintiff's alleged disability onset date.
27 (Tr. at p. 25).

1 **REMAND**

2 Social Security cases are subject to the ordinary remand rule which is that when
3 “the record before the agency does not support the agency action, . . . the agency has
4 not considered all the relevant factors, or . . . the reviewing court simply cannot
5 evaluate the challenged agency action on the basis of the record before it, the proper
6 course, except in rare circumstances, is to remand to the agency for additional
7 investigation or explanation.” *Treichler v. Commissioner of Social Security*
8 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
9 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

10 In “rare circumstances,” the court may reverse and remand for an immediate
11 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).
12 Three elements must be satisfied in order to justify such a remand. The first element
13 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
14 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
15 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
16 second element is whether there are “outstanding issues that must be resolved before
17 a determination of disability can be made,” and whether further administrative
18 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,
19 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
20 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
21 Finally, if it is concluded that no outstanding issues remain and further proceedings
22 would not be useful, the court may find the relevant testimony credible as a matter of
23 law and then determine whether the record, taken as a whole, leaves “not the slightest
24 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
25 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
26 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
27 no outstanding issues that must be resolved, and there is no question the claimant is

28 **ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 20**

1 disabled- the court has discretion to depart from the ordinary remand rule and remand
2 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
3 exist, “[t]he decision whether to remand a case for additional evidence or simply to
4 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
5 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

6 Here, there are “outstanding issues that must be resolved before a
7 determination of disability can be made,” and further administrative proceedings
8 would be useful. Not all essential factual issues have been resolved. Although the
9 ALJ erred in finding that Plaintiff does not have “severe” mental impairments, there
10 must still be a determination as to Plaintiff’s mental RFC. In making the mental RFC
11 determination, the ALJ will have to accept as true that Plaintiff’s mental impairments
12 significantly limit her ability to perform basic work-related activities at least to the
13 extent indicated by the mental health professionals who have examined her (Drs.
14 Strosahl, Cooper and Dougherty). Plaintiff’s mental RFC, along with her physical
15 RFC for less than the full range of light work as opined by Drs. Ho and Chau, will
16 have to be presented to a vocational expert who will testify whether Plaintiff’s
17 combined mental and physical RFC allows her to perform jobs existing in significant
18 numbers in the national economy.⁷ *Tackett v. Apfel*, 180 F.3d 1094, 1103-04 (9th Cir.
19 1999). Because it is assumed the Plaintiff will testify during the additional
20 proceedings, and that her counsel will have an opportunity to ask her questions, the
21 court deems moot Plaintiff’s assertion that the ALJ erred in not convening a
22 supplemental hearing before he rendered his decision. And during the additional
23 proceedings, Plaintiff has can request the ALJ include her 2004 file in the record.

24
25
26
27 ⁷ The Commissioner concedes that Plaintiff has no past relevant work and
28 that the ALJ erred in finding otherwise at Step Four. (ECF No. 17 at pp. 25-26).

1 **CONCLUSION**

2 Plaintiff's Motion For Summary Judgment (ECF No. 13) is **GRANTED** and
3 Defendant's Motion For Summary Judgment (ECF No. 17) is **DENIED**. The
4 Commissioner's decision is **REVERSED** and pursuant to sentence four of 42
5 U.S.C. §405(g) and § 1383(c)(3), this matter is **REMANDED** to the
6 Commissioner for additional proceedings and/or findings consistent with this
7 order. An application for attorney fees may be filed by separate motion.

8 **IT IS SO ORDERED.** The District Executive shall enter judgment
9 accordingly and forward copies of the judgment and this order to counsel of
10 record.

11 **DATED** this 22nd day of May, 2015.

12
13 *s/Lonny R. Suko*

14 _____
15 LONNY R. SUKO
16 Senior United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28