

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 20, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JENNIFER ALLEN,
Plaintiff,
vs.
NANCY A. BERRYHILL,
Acting Commissioner of Social
Security,
Defendant.

} No. 1:17-CV-03097-LRS
} **ORDER GRANTING**
} **PLAINTIFF'S MOTION FOR**
} **SUMMARY JUDGMENT,**
} ***INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 14) and the Defendant's Motion For Summary Judgment (ECF No. 15).

JURISDICTION

Jennifer Allen, Plaintiff, applied for Title II Social Security Disability Insurance benefits (SSDI) and Title XVI Supplemental Security Income benefits (SSI) on February 28, 2011. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on February 25, 2013, before Administrative Law Judge (ALJ) Stephanie Martz. Plaintiff testified at the hearing, as did Vocational Expert (VE) Mark Harrington, and Plaintiff's mother, Tracy LaQuay. On March 14, 2013, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review.

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

1 Plaintiff appealed to federal district court and pursuant to a stipulation by the parties,
2 the matter was remanded to the Commissioner for further proceedings. (ECF No. 23
3 in 1:14-CV-03177-RMP).

4 A second administrative hearing was held on January 23, 2017, before ALJ
5 Martz. Plaintiff testified at the hearing, as did VE Harrington, and Plaintiff's mother.
6 Also testifying at that hearing was Medical Expert (ME), John William Davis, Ph.D.,
7 a clinical psychologist. On March 27, 2017, the ALJ issued a decision finding the
8 Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's
9 decision, making that decision the Commissioner's final decision subject to judicial
10 review. The Commissioner's final decision is appealable to district court pursuant
11 to 42 U.S.C. §405(g) and §1383(c)(3).

12 13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative transcript, the ALJ's
15 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.
16 Plaintiff has a General Equivalency Diploma (GED) and past relevant work
17 experience as a home attendant and customer service representative. She alleges
18 disability since September 1, 2009, on which date she was 24 years old. Her date last
19 insured for SSDI benefits was September 30, 2013.

20 21 22 **STANDARD OF REVIEW**

23 "The [Commissioner's] determination that a claimant is not disabled will be
24 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
25 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere
26 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less
27 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);

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

1 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
2 1988). "It means such relevant evidence as a reasonable mind might accept as
3 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91
4 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may
5 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457
6 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
7 On review, the court considers the record as a whole, not just the evidence supporting
8 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
9 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

10 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
12 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
13 F.2d 577, 579 (9th Cir. 1984).

14 A decision supported by substantial evidence will still be set aside if the proper
15 legal standards were not applied in weighing the evidence and making the decision.
16 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
17 1987).

18

19 ISSUES

20 Plaintiff argues the ALJ erred in: 1) failing to find Plaintiff has severe,
21 medically determinable fibromyalgia; 2) failing to properly assess Plaintiff's obesity,
22 physical impairments and RFC (Residual Functional Capacity); 3) improperly
23 assessing the opinion of ARNP (Advanced Registered Nurse Practitioner) Liu; 4)
24 improperly assessing the medical opinion evidence from acceptable medical sources;
25 and 5) failing to provide specific, clear and convincing reasons for discounting
26 Plaintiff's testimony regarding her symptoms and limitations.

27

28

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 3

1 **DISCUSSION**

2 **SEQUENTIAL EVALUATION PROCESS**

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

12 The Commissioner has established a five-step sequential evaluation process for
13 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
14 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
15 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20
16 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker
17 proceeds to step two, which determines whether the claimant has a medically severe
18 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
19 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
20 of impairments, the disability claim is denied. If the impairment is severe, the
21 evaluation proceeds to the third step, which compares the claimant's impairment with
22 a number of listed impairments acknowledged by the Commissioner to be so severe
23 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
24 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
25 equals one of the listed impairments, the claimant is conclusively presumed to be
26 disabled. If the impairment is not one conclusively presumed to be disabling, the
27 evaluation proceeds to the fourth step which determines whether the impairment

28 **ORDER GRANTING PLAINTIFF'S**

MOTION FOR SUMMARY JUDGMENT- 4

1 prevents the claimant from performing work she has performed in the past. If the
2 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
3 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
4 the fifth and final step in the process determines whether she is able to perform other
5 work in the national economy in view of her age, education and work experience. 20
6 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

7 The initial burden of proof rests upon the claimant to establish a prima facie
8 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
9 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
10 mental impairment prevents her from engaging in her previous occupation. The
11 burden then shifts to the Commissioner to show (1) that the claimant can perform
12 other substantial gainful activity and (2) that a "significant number of jobs exist in the
13 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
14 1498 (9th Cir. 1984).

15 16 **ALJ'S FINDINGS**

17 The ALJ found the following:

18 1) Plaintiff has "severe" medically determinable impairments, those being
19 depressive disorder and anxiety disorder;

20 2) Plaintiff's impairments do not meet or equal any of the impairments listed
21 in 20 C.F.R. § 404 Subpart P, App. 1;

22 3) Plaintiff has the RFC to perform a full range of work at all exertional levels,
23 subject to the following non-exertional considerations: she needs to avoid
24 concentrated exposure to extreme cold, fumes, odors, dusts, gases, and poor
25 ventilation; she can understand, remember and carry out routine tasks in a predictable
26 work environment with few changes; she should avoid working with the public; she

27 ///

28 **ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 5**

1 can work with coworkers on superficial tasks; and she can have occasional contact
2 with supervisors.

3 4) Plaintiff's RFC precludes her from performing her past relevant work;

4 5) Plaintiff's RFC allows her to perform jobs existing in significant numbers
5 in the national economy as identified by the VE, including janitor, laundry worker,
6 electrical accessories assembler and small products assembler.

7 Accordingly, the ALJ concluded the Plaintiff is not disabled.

9 **MEDICAL OPINIONS**

10 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion
11 of a licensed treating or examining physician or psychologist is given special weight
12 because of his/her familiarity with the claimant and his/her condition. If the treating
13 or examining physician's or psychologist's opinion is not contradicted, it can be
14 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725
15 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the
16 ALJ may reject the opinion if specific, legitimate reasons that are supported by
17 substantial evidence are given. *Id.* "[W]hen evaluating conflicting medical opinions,
18 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,
19 and inadequately supported by clinical findings." *Bayliss v. Barnhart*, 427 F.3d 1211,
20 1216 (9th Cir. 2005). The opinion of a non-examining medical advisor/expert need
21 not be discounted and may serve as substantial evidence when it is supported by other
22 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,
23 53 F.3d 1035, 1041 (9th Cir. 1995).

24 Nurse practitioners, physicians' assistants, and therapists (physical and mental
25 health) are not "acceptable medical sources" for the purpose of establishing if a
26 claimant has a medically determinable impairment. 20 C.F.R. §§ 404.1513(a);
27 416.913(a). Their opinions are, however, relevant to show the severity of an

28 **ORDER GRANTING PLAINTIFF'S**

MOTION FOR SUMMARY JUDGMENT- 6

1 impairment and how it affects a claimant’s ability to work. 20 C.F.R. §§ 404.1513(d);
2 416.913(d).

3 The record reveals a lengthy history of mental health treatment for the Plaintiff.
4 From May 2010 through 2012, Plaintiff was seen by mental health therapists at
5 Yakima Neighborhood Health Services (YNHS), and starting in January 2013, she
6 started receiving mental health services at Central Washington Comprehensive
7 Mental Health (CWCMH).

8 The ME, Dr. Davis, testified the record was “full of inconsistencies, some
9 duplication, and most of the material is self-reported.” (AR at p. 807). He noted
10 there was “no in-patient psych history,” that many of the people who worked with
11 Plaintiff were social workers who are not “authoritative sources,” and that the
12 majority of mental status examinations (MSE), whether conducted by doctors or
13 therapists, were essentially within normal limits. (AR at pp. 807-08). Dr. Davis
14 asserted that one of the diagnoses of Aaron Burdge, Ph.D., from his August 2012
15 psychological examination of Plaintiff, was malingering. (AR at p. 808).

16 The ALJ gave great weight to Dr. Davis’ opinion that Plaintiff’s “depressive
17 and anxiety disorders caused mild limitations in understanding, remembering, and
18 applying information, and in social interaction;” a “moderate limitation in her ability
19 to concentrate, persist, or maintain pace, and either no limitation or a mild limitation
20 in her ability to adapt or manage oneself;” and that Plaintiff “retained the ability to
21 interact appropriately with a supervisor, sustain casual and infrequent social
22 interaction, and perform tasks involving 5 to 10 small and simple steps.” (AR at pp.
23 789-90). The ALJ found Dr. Davis’ opinion “consistent with the objective findings
24 from the record, including mental status tests, routine progress notes, observations
25 from treating medical sources, and the claimant’s report of activities.” (AR at p. 790).

26 The clinical findings from Dr. Burdge’s August 2012 examination of Plaintiff
27 included: 1) Depression (“Increased need for sleep, concentration problems”); 2)
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 7**

1 Hypomania (“Hyperactivity, flight of ideas, decreased need for sleep, impulsive
2 behavior”); and 3) Anxiety (“Autonomic hyperactivity, apprehensive expectation,
3 vigilance and scanning, recurrent panic attacks, recurrent nightmares of
4 molestation”). (AR at p. 565). Dr. Burdge diagnosed Plaintiff with Bipolar II
5 Disorder¹ and Anxiety Disorder NOS (Not Otherwise Specified). He assigned her
6 a Global Assessment Functioning (GAF) rating of 55 because of “[m]oderate
7 symptoms of difficulty in social and occupational functioning.”² (AR at p. 566). He
8 opined that Plaintiff would have “moderate”- those being “significant”- limitations
9 in performing activities within a schedule, maintaining regular attendance, and being
10 punctual within customary tolerances without special supervision, and in completing
11 ///

13 ¹ Like Bipolar I Disorder, the moods attendant to Bipolar II Disorder cycle
14 between high and low. The “up” moods, however, never reach full-blown mania,
15 but are less intense and called hypomania. Most people with Bipolar II suffer
16 more often from episodes of depression. [https://www.webmd.com/bipolar-disorder](https://www.webmd.com/bipolar-disorder/guide/bipolar-2-disorder#1)
17 /guide/bipolar-2-disorder#1. In her March 2013 decision, the ALJ found bipolar
18 disorder to be one of Plaintiff’s “severe” impairments. (AR at p. 21). In January
19 2016, Plaintiff’s bipolar disorder was deemed to be “stable on current
20 medications.” (AR at p. 1144). It appears the manic phase of the disorder was
21 successfully suppressed and therefore, in her 2017 decision, the ALJ found
22 Plaintiff to have “severe” depression instead of “severe” bipolar disorder.

23 ² GAF scores in the range of 51 to 60 indicate moderate symptoms (e.g., flat
24 affect, and circumstantial speech, occasional panic attacks), or moderate difficulty
25 in social, occupational, or school functioning (e.g. few friends, conflicts with peers
26 or co-workers). *American Psychiatric Ass’n, Diagnostic & Statistical Manual of*
27 *Mental Disorders*, (4th ed. Text Revision 2000)(DSM-IV-TR at p. 34).

28 **ORDER GRANTING PLAINTIFF’S**
MOTION FOR SUMMARY JUDGMENT- 8

1 a normal work day and work week without interruptions from psychologically based
2 symptoms. (AR at p. 566).

3 According to the ALJ, the GAF score of 55 was “indicative of moderate, rather
4 than disabling, limitations in social or occupational functioning.” (AR at p. 788).
5 The ALJ found Dr. Burdge’s opinion consistent with the “objective observations and
6 clinical findings from the evaluations” and therefore, gave it “significant weight.”
7 (AR at p. 788).

8 The ALJ discussed the PAI (Personality Assessment Inventory) that was taken
9 as part of Dr. Burdge’s evaluation, asserting that “malingering was a potential
10 diagnosis based on these results.” (AR at p. 788). This is a misstatement of the PAI
11 results. According to the PAI report:

12 The PAI clinical profile is marked by significant elevations
13 across several scales, indicating a broad range of clinical
14 features and increasing the possibility of multiple diagnoses.
15 **Given certain response tendencies previously noted, it is**
16 **possible that the clinical scales may overrepresent or exaggerate**
17 **the actual degree of psychopathology. Nonetheless, profile**
18 **patterns of this type are usually associated with marked distress**
19 **and, unless there is extensive distortion or exaggeration of**
20 **symptomatology, severe impairment in functioning is typically**
21 **present.** The configuration of the clinical scales suggests a
22 person with significant thinking and concentration problems,
23 accompanied by prominent agitation and distress. The
24 respondent is likely to be withdrawn and isolated, and she
25 may have few if any close interpersonal relationships
26 and may get quite anxious and threatened by such relationships.
27 Her social judgment is probably fairly poor and she has
28 difficulty making decisions, even about matters of little
apparent significance.

(AR at p. 574)(emphasis added).

“Malingering” was not among the “*DSM-IV* Diagnostic Possibilities” discussed
in the report. (AR at pp. 578-79). With regard to “Critical Item Endorsement,”
“potential malingering” was mentioned as to two statements made by the Plaintiff
(AR at p. 580), but with the caveat that “[e]ndorsement of these critical items is not
in itself diagnostic, but review of the content of these items with the respondent may
help to clarify the presenting clinical picture.” (AR at p. 579).

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 9

1 “Malingering” was not a diagnosis or even a potential diagnosis based on the
2 PAI results. Dr. Davis erred in concluding to the contrary. There simply is not
3 “affirmative evidence” of malingering or symptom exaggeration in the record. The
4 ALJ erred in relying on Dr. Davis’ conclusion and this led her to incorrectly assess
5 the opinions of the other examining psychiatrists, psychologists and mental health
6 therapists.

7 Dr. Davis cited lack of in-patient psychiatric care, long-term counseling or
8 therapeutic programs, as not supporting Plaintiff’s claimed inability to deal with
9 stress. (AR at p. 827). While Plaintiff apparently did not have any in-patient care,
10 the record establishes a lengthy and regular course of mental health counseling and
11 therapy with YNHS and then CWCMH. Furthermore, not all of the mental status
12 examinations were “essentially normal,” as contended by Dr. Davis. (See e.g., AR
13 at pp. 343, 346, 354, 359, 375, 382, 424, 501, 509, 514, 619, 639, and 651).

14 The opinion of Rebekah A. Cline, Psy. D., was one of the medical opinions the
15 ALJ discounted because of her incorrect assertion there was “affirmative evidence of
16 symptom exaggeration” in the record. Dr. Cline evaluated the Plaintiff in June 2014.
17 Plaintiff was administered the Rey 15-Item Memory test for malingering. She scored
18 a 15 which “indicates excellent effort and cooperation with the task and decreases the
19 likelihood that she is malingering at this time.” (AR at p. 1029). Plaintiff scored a
20 36 on the BDI-II (Beck Depressive Inventory) indicating a “moderate to marked level
21 of depression,” and scored a 31 on the BAI (Beck Anxiety Inventory) indicating a
22 “moderate level of anxiety.” (AR at p. 1029). Dr. Cline’s “Clinical Findings”
23 included: 1) moderate depressed mood/mood instability (chronically depressed with
24 no manic episode in three years); 2) marked anxiety/panic; 3) moderate to marked
25 sleep disturbance; and 4) moderate social difficulty. (AR at p. 1030). She diagnosed
26 Plaintiff with “Bipolar I disorder, most recent episode depressed, moderate, with
27 psychotic features,” panic disorder and agoraphobia. (AR at p. 1030). She assigned

1 Plaintiff a GAF score of 55 and opined that Plaintiff had numerous “moderate”
2 limitations and “marked”- very significant- limitations in her abilities to communicate
3 and perform effectively in a work setting and to complete a normal work day and
4 work week without interruptions from psychologically based symptoms. (AR at p.
5 1031). Dr. Cline’s MSE of Plaintiff was not within normal limits with regard to
6 thought process and content (recent suicidal ideation and history of attempts) and
7 perception (intermittent paranoia and auditory hallucinations). (AR at p. 1032).

8 Dr. Cline evaluated Plaintiff again in August 2015. Plaintiff again scored a 15
9 on the Rey-15 Item Memory Test and a 31 on the BAI. This time, she scored 40 on
10 the BDI-II, an increase over the 36 she had scored previously and which suggested
11 a marked level of depression. (AR at p. 1034). This time, Dr. Cline diagnosed
12 Plaintiff with “major depressive disorder, recurrent, marked,” noting it had been four
13 years since Plaintiff’s last manic episode, thereby making it the more appropriate
14 diagnosis as opposed to bipolar disorder. Dr. Cline also diagnosed Plaintiff with
15 “anxiety disorder NOS with features of panic disorder, agoraphobia, and social
16 anxiety disorder” and with Post-Traumatic Stress Disorder (PTSD). (AR at p. 1035).
17 This time, Dr. Cline opined Plaintiff had a “severe” limitation in her ability to
18 communicate and perform effectively in a work setting, and “marked” limitations in
19 asking simple questions or requesting assistance, maintaining appropriate behavior
20 in a work setting, and completing a normal work day and work week without
21 interruptions from psychologically based symptoms. (AR at p. 1036). A “severe”
22 limitation is the inability to perform the particular work activity in regular
23 competitive employment or outside of a sheltered workshop. (AR at p. 1035). Dr.
24 Cline again opined that Plaintiff’s MSE was not within normal limits with regard to
25 thought process and content, and with regard to perception. (AR at p. 1037).

26 The ALJ found that Dr. Cline’s 2014 opinion was inconsistent with YNHS
27 treatment records of Advance Registered Nurse Practitioner (ARNP) Schwarzkopf

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 11**

1 from August 2014 showing no complaints by Plaintiff of frequent panic attacks,
2 nightmares, paranoia and hallucinations; observing appropriate interaction by
3 Plaintiff; and with Plaintiff reporting her sleep and mood had improved. (AR at p.
4 789). The ALJ found Dr. Cline’s 2015 opinion was inconsistent with YNHS
5 treatment notes of ARNP Dennis from August 2015, observing that Plaintiff
6 presented with an appropriate mood and affect, with normal insight and judgment,
7 and with no indication she was suffering from paranoia, delusions, or hallucinations.
8 (AR at p. 789). It is noted that Plaintiff saw ARNP Dennis for primarily a
9 gynecological examination regarding polycystic ovaries and also to address her low
10 back pain. (AR at p. 1157). Plaintiff saw ARNP Schwarzkopf for a variety of
11 physical issues including hypothyroidism, polycystic ovaries, bronchitis, and
12 fibromyalgia. (AR at p. 1195). These nurse practitioners performed perfunctory
13 “Neuro/Psychiatric” reviews as part of their “Review of Systems,” but they are not
14 mental health specialists and Plaintiff’s mental health was not the focus of their
15 treatment.

16 The opinion of Dr. Davis, the ME, was not supported by other evidence in the
17 record and was not consistent with other evidence in the record. His opinion was not
18 a specific and legitimate reason for the ALJ to reject Dr. Cline’s opinions, nor did the
19 ALJ offer any other specific and legitimate reasons supported by substantial evidence
20 to reject Dr. Cline’s opinions.

21 The ALJ gave little weight to the opinion of Jesse McClelland, M.D., a
22 psychiatrist who evaluated Plaintiff on May 21, 2011. Based on a MSE, Dr.
23 McClelland diagnosed Plaintiff with “Bipolar II disorder, rapid cycling; most recent
24 episode hypomanic” and “Posttraumatic stress disorder, delayed onset, chronic.” (AR
25 at p. 443). He assigned the Plaintiff a GAF score of 22 “due to severe impairment in
26 multiple areas of functions[] (current).” (*Id.*). A GAF score in the 21 to 30 range
27 includes behavior considerably influenced by delusions or hallucinations, or serious

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

1 impairment in communication or judgment (e.g., sometimes incoherent, acts grossly
2 inappropriately, suicidal preoccupation), or inability to function in almost all areas
3 (e.g, stays in bed all day; no job, no home or friends).³ Dr. McClelland opined
4 Plaintiff “would likely have difficulty attending the workplace regularly due to her
5 problems with panic attacks and increasing difficulty in leaving the house” and
6 “would likely have interruptions during the workday for panic attacks and during the
7 work week from being too anxious or depressed to go in or being hypomanic and
8 having some level of impulsivity impact her going in or leaving.” (AR at p. 444).
9 The doctor also noted, however, that Plaintiff did not have access to mental health
10 services at the time and “[i]f she is able to receive appropriate care, which should
11 include both medications and psychotherapy, she has a good chance of showing
12 improvement in her symptoms.” (AR at p. 443).

13 The record indicates there was subsequent improvement in Plaintiff’s
14 symptoms, presumably due to medications and psychotherapy, such that bipolar
15 disorder was no longer one of Plaintiff’s diagnosed conditions. Furthermore, Drs.
16 Burdge and Cline assigned Plaintiff GAF scores (55) considerably higher than the 22
17 assigned by Dr. McClelland. Indeed, the GAF score of 22 is a striking outlier in the
18 numerous GAF scores assigned to Plaintiff in the medical record, suggesting that at
19 best, it captured Plaintiff’s mental condition during a very limited period of time.
20 Accordingly, the court considers Dr. McClelland’s 2011 opinion of limited relevance
21 in determining when Plaintiff became disabled for a continuous period of 12 months
22 or longer.

23
24 **SYMPTOM TESTIMONY**

25
26 _____
27 ³ *American Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental*
28 *Disorders*, (4th ed. Text Revision 2000)(DSM-IV-TR at p. 34).

1 Where, as here, the Plaintiff has produced objective medical evidence of an
2 underlying impairment that could reasonably give rise to some degree of the
3 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ’s
4 reasons for rejecting the Plaintiff’s testimony must be clear and convincing. *Burrell*
5 *v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014); *Garrison v. Colvin*, 759 F.3d 995,
6 1014 (9th Cir. 2014). If an ALJ finds a claimant’s subjective assessment unreliable,
7 “the ALJ must make a credibility determination with findings sufficiently specific to
8 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]
9 claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002).
10 Among other things, the ALJ may consider: 1) the claimant's reputation for
11 truthfulness; 2) inconsistencies in the claimant's testimony or between her testimony
12 and her conduct; 3) the claimant’s daily living activities; 4) the claimant's work
13 record; and 5) testimony from physicians or third parties concerning the nature,
14 severity, and effect of claimant's condition. *Id.* Subjective testimony cannot be
15 rejected solely because it is not corroborated by objective medical findings, but
16 medical evidence is a relevant factor in determining the severity of a claimant’s
17 impairments. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

18 The ALJ discounted Plaintiff’s testimony about her mental health symptoms
19 in large part because of the PAI results which, as discussed above, the ALJ
20 erroneously found constituted “affirmative evidence of malingering” and “affirmative
21 evidence of symptom exaggeration, negative impression management, and/or
22 malingering.” (AR at pp. 782-83). The ALJ also asserted that Plaintiff’s “candid
23 presentation to medical sources, outside of evaluations in connection [with] disability
24 benefits, is not consistent with allegations of disabling functional limitations.” (AR
25 at p. 782). Yet none of the “medical sources” to which the ALJ cites are mental
26 health therapists. They are nurse practitioners the Plaintiff saw in conjunction with
27 primarily physical problems.

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 14**

1 The ALJ also found that Plaintiff’s activities were inconsistent with allegations
2 of disabling functional limitations, noting that during a July 2013 appointment,
3 Plaintiff indicated she was engaged in aqua-therapy (water walking) three times per
4 week; in August 2016, she reported that she went swimming “almost daily” and
5 “went on an hours-long journey in the confines of a bus to attend a friend’s wedding
6 in another state;” and was able to volunteer at the Human Society to help staffers and
7 to go outside and walk dogs, an activity which she continued until she was asked to
8 interact more with the public. (AR at p. 783).

9 The Ninth Circuit has recognized there are differences between activities of
10 daily living and full-time employment. “The Social Security Act does not require that
11 claimants be utterly incapacitated to be eligible for benefits and many home activities
12 may not be easily transferable to a work environment where it might be impossible
13 to rest periodically or take medication.” *Smolen v. Chater*, 80 F.3d 1273, 1287 n. 7
14 (9th Cir. 1996). See also *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012) (“The
15 critical differences between activities of daily living and activities in a full-time job
16 are that a person has more flexibility in scheduling the former than the latter, can get
17 help from other persons . . . , and is not held to a minimum standard of performance,
18 as she would be by an employer”). Because “disability claimants should not be
19 penalized for attempting to lead normal lives in the face of their limitations,” the
20 Ninth Circuit had held that “[o]nly if [her] level of activity were inconsistent with [a
21 claimant’s] claimed limitations would these activities have any bearing on [her]
22 credibility.” *Reddick*, 157 F.3d at 725.

23 It is not apparent how the Plaintiff’s activities cited by the ALJ indicate an
24 ability to perform in a work environment. Even assuming they do, the record does
25 not reveal that Plaintiff was, as declared by the ALJ, “able to go out, commit to, and
26 sustain” these activities. (AR at p. 783). There is no indication in the record that any
27 of these activities continued for a sustained period of time. Notwithstanding that
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 15**

1 Plaintiff took a trip to Boston in 2012 and another trip to Idaho in 2016, the record
2 reflects an individual who is severely socially isolated as a result of her mental
3 impairments and essentially living an “online” existence. For example, while the
4 record indicates Plaintiff advised she had a boyfriend in New Zealand, there is no
5 indication she ever traveled to see him, but instead this was an online relationship in
6 which the two of them would “skype” each other. (AR at p. 592).

7 The ALJ stated Plaintiff “acknowledged that she socialized with others by
8 going to friends’ homes approximately 4 to 5 times per week, where she watched and
9 played video games.” (AR at p. 779). This assertion, however, is derived not from
10 a form completed by the Plaintiff, but one completed by her mother and moreover,
11 does not indicate Plaintiff “goes to friends’ homes,” but at best, suggests she stays
12 home and plays on her own computer and interacts with others via that computer.
13 (AR at p. 248).

14 Elsewhere in her decision, the ALJ asserted that Plaintiff told treating sources
15 she did not have sleep problems, but told Dr. McClelland in May 2011 she never slept
16 more than two hours at a time and had terrible nightmares that prevented her from
17 sleeping at all. (AR at p. 785). The record, however, reflects that “sleeping
18 problems” were something Plaintiff consistently reported to therapists at YNHS both
19 before and after her evaluation by Dr. McClelland. (See e.g., pp. 343, 346, 354, 359,
20 363, 367, 371, 375, 382, 413, 417, 420, 424, 501, 509, 514, 615, 619, 623, 631, 639,
21 651, 655, 659, 662 and 695).

22 The ALJ also asserted that while Dr. McClelland noted that Plaintiff presented
23 with some psychomotor retardation, such clinical observations were “notably absent”
24 from Plaintiff’s treating sources. (AR at p. 785). To the contrary, there were
25 instances of such clinical observations from treating sources. (See e.g., pp. 346, 354,
26 375, 424, 501 and 509 referring to Plaintiff exhibiting “hypoactive” psychomotor or
27 “limp” behavior).

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 16**

1 In sum, the ALJ did not offer clear and convincing reasons for discounting
2 Plaintiff’s testimony regarding her mental health limitations. Her testimony is
3 consistent with what examining medical sources opined about her limitations, in
4 particular Dr. Cline.

5
6 **REMAND AND DISABILITY ONSET DATE**

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

15 In “rare circumstances,” the court may reverse and remand for an immediate
16 award of benefits instead of for additional proceedings. *Treichler*, 775 F.3d at 1099,
17 citing 42 U.S.C. §405(g). Three elements must be satisfied in order to justify such
18 a remand. The first element is whether the “ALJ has failed to provide legally
19 sufficient reasons for rejecting evidence, whether claimant testimony or medical
20 opinion.” *Id.* at 1100, quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014).
21 If the ALJ has so erred, the second element is whether there are “outstanding issues
22 that must be resolved before a determination of disability can be made,” and whether
23 further administrative proceedings would be useful. *Id.* at 1101, quoting *Moisa v.*
24 *Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004). “Where there is conflicting evidence,
25 and not all essential factual issues have been resolved, a remand for an award of
26 benefits is inappropriate.” *Id.* Finally, if it is concluded that no outstanding issues
27 remain and further proceedings would not be useful, the court may find the relevant

28
**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 17**

1 testimony credible as a matter of law and then determine whether the record, taken
2 as a whole, leaves “not the slightest uncertainty as to the outcome of [the]
3 proceedings.” *Id.*, quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6
4 (1969). Where all three elements are satisfied- ALJ has failed to provide legally
5 sufficient reasons for rejecting evidence, there are no outstanding issues that must be
6 resolved, and there is no question the claimant is disabled- the court has discretion
7 to depart from the ordinary remand rule and remand for an immediate award of
8 benefits. *Id.* But even when those “rare circumstances” exist, “[t]he decision whether
9 to remand a case for additional evidence or simply to award benefits is in [the court’s]
10 discretion.” *Id.* at 1102, quoting *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir.
11 1989).

12 The court finds all three elements are satisfied in this case. In light of the fact
13 this case has already been remanded once to the Commissioner for what the ALJ
14 accurately described as “start[ing] over” and “reevaluat[ing] basically everything”
15 (AR at p. 802), the court exercises its discretion to award benefits to the Plaintiff.⁴

17 ⁴ Because the limitations arising from Plaintiff’s mental health impairments
18 are severe enough to find her disabled, it is not necessary to address the limitations
19 arising from any physical impairments.

20 In his July 2010 assessment, ARNP Edward Liu opined only mild physical
21 limitations which would not significantly interfere with Plaintiff’s ability to
22 perform basic work-related activities. (AR at p. 480). And while he opined that
23 Plaintiff was limited to sedentary work, he also opined that Plaintiff’s limitations
24 would continue for three months without medical treatment. (AR at p. 481).

25 Nina Flavin, M.D., did not definitively diagnose the Plaintiff with
26 fibromyalgia until July 2014 (AR at p. 1242) which is after the date the court has
27 deemed Plaintiff disabled based solely on her mental limitations.

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

1 There is a question about the appropriate disability onset date which the court
2 will resolve. Plaintiff suggests the “moderate” limitations opined by Dr. Burdge in
3 August 2012 , to which the ALJ gave “significant weight,” are sufficient to compel
4 a finding of disability as evidenced by the VE’s testimony at the administrative
5 hearing. (AR at pp. 850-52). It is not clear, however, that the VE’s testimony in fact
6 evidences this. Although the VE testified that one unscheduled or unexcused
7 absence per month would make an employee subject to termination (AR at p. 850),
8 he did not testify this was the same as the “moderate” limitations opined by Dr.
9 Burdge. In fact, the ALJ prevented Plaintiff’s counsel from asking the VE to assume
10 Plaintiff had a “very significant inability to complete a workday” unless counsel was
11 willing to define that “in functional and vocational terms.” (AR at p. 851).

12 The court finds the “marked” limitation opined by Dr. Cline in June 2014
13 regarding Plaintiff’s ability to perform effectively in a work setting and complete a
14 normal work day and work week without interruptions from psychologically based
15 symptoms clearly establishes Plaintiff’s disability and is consistent with the monthly
16 unscheduled or unexcused absence the VE testified would result in termination of
17 employment. Accordingly, Plaintiff is deemed disabled as of June 13, 2014.⁵ As
18 such, she will not be awarded Title II SSDI benefits because her date last insured for
19 ///

21 ⁵ Tae-Im Moon, Ph.D., evaluated the Plaintiff in February 2012, but he did
22 not assess specific work-related functional limitations. He indicated Plaintiff’s
23 ability to get along with co-workers and deal with the public was “fair to poor”
24 and that “[r]eliability may be an issue during [the] depressive phase of her illness
25 (sleeps 13 hrs).” (AR at p. 546). He also, indicated, however that “[w]hen she is
26 stabilized on medication for mood disorder, DVR referral may assist her [to] find
27 work” and that she may be able to work as an online researcher. (*Id.*).

1 those benefits was September 30, 2013, but she will be awarded Title XVI SSI
2 benefits.

3 **CONCLUSION**

4 Plaintiff's Motion For Summary Judgment (ECF No. 14) is **GRANTED** and
5 Defendant's Motion For Summary Judgment (ECF No. 15) is **DENIED**. The
6 Commissioner's decision is **REVERSED**. Pursuant to sentence four of 42 U.S.C. §
7 1383(c)(3), this matter is **REMANDED** to the Commissioner for an immediate award
8 of Title XVI SSI disability benefits based on Plaintiff becoming disabled as of June
9 13, 2014.⁶ An application for attorney fees may be filed by separate motion.

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

12 **DATED** this 20th day of March, 2018.

13 *s/Lonny R. Suko*

14 _____
15 LONNY R. SUKO
16 Senior United States District Judge

17
18
19
20 _____
21 ⁶ Onset in SSI cases is established as of the date of the filing provided the
22 individual was disabled as of that date. Social Security Ruling (SSR) 83-20; 1983
23 WL 31249 at *7. Here, Plaintiff was not disabled as of the date her application for
24 SSI benefits was filed (February 2011). Hence, this is an instance where an onset
25 date must be determined to ascertain when SSI benefits should commence.
26 Benefits are payable no earlier than the month after the month in which all of the
27 eligibility requirements are met. 20 C.F.R. § 416.330(a); SSR 83-20; 1983 WL
28 31249 at *1.