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

Apr 05, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

LINDA B.,¹
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 1:18-cv-03089-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them only by their first names and the initial of their last names.

1 grants Plaintiff's Motion, ECF No. 15, and denies Defendant's Motion, ECF No.
2 16.

3 **JURISDICTION**

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

5 **STANDARD OF REVIEW**

6 A district court's review of a final decision of the Commissioner of Social
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
8 limited; the Commissioner's decision will be disturbed "only if it is not supported
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
12 (quotation and citation omitted). Stated differently, substantial evidence equates to
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
14 citation omitted). In determining whether the standard has been satisfied, a
15 reviewing court must consider the entire record as a whole rather than searching
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its
18 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
19 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
20 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
3 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
4 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
5 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
6 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
7 *Sanders*, 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
15 “of such severity that he is not only unable to do his previous work[,] but cannot,
16 considering his age, education, and work experience, engage in any other kind of
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §
18 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §

1 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
2 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial
3 gainful activity," the Commissioner must find that the claimant is not disabled. 20
4 C.F.R. § 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
8 "any impairment or combination of impairments which significantly limits [his or
9 her] physical or mental ability to do basic work activities," the analysis proceeds to
10 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
11 this severity threshold, however, the Commissioner must find that the claimant is
12 not disabled. 20 C.F.R. § 416.920(c).

13 At step three, the Commissioner compares the claimant's impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §
16 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
17 enumerated impairments, the Commissioner must find the claimant disabled and
18 award benefits. 20 C.F.R. § 416.920(d).

19 If the severity of the claimant's impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
2 defined generally as the claimant’s ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
4 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant’s
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
8 capable of performing past relevant work, the Commissioner must find that the
9 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
10 performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant’s
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
14 must also consider vocational factors such as the claimant’s age, education and
15 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
16 adjusting to other work, the Commissioner must find that the claimant is not
17 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
18 other work, analysis concludes with a finding that the claimant is disabled and is
19 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant
5 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); Beltran v. Astrue,
6 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 On August 26, 2014, Plaintiff protectively filed an application for
9 supplemental security income benefits, alleging an amended onset date of August
10 26, 2014. Tr. 44, 176-83. The application was denied initially, Tr. 105-08, and on
11 reconsideration, Tr. 118-24. Plaintiff appeared at a hearing before an
12 administrative law judge (ALJ) on January 10, 2017. Tr. 40-76. On April 24,
13 2017, the ALJ denied Plaintiff’s claim. Tr. 14-39.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since August 26, 2014. Tr. 19. At step two, the ALJ found Plaintiff had
16 the following severe impairments: degenerative disc disease, status-post total knee
17 replacement; obesity; affective disorder; and anxiety disorder. Tr. 20. At step
18 three, the ALJ found Plaintiff did not have an impairment or combination of
19 impairments that meets or medically equals the severity of a listed impairment. Tr.

1 23. The ALJ then concluded Plaintiff had the RFC to perform light work with the
2 following limitations:

3 [Plaintiff] can lift and carry 20 pounds occasionally and 10 pounds
4 frequently. She can sit for six hours in an eight-hour workday and stand
5 and/or walk for six hours in an eight-hour workday, with normal breaks. She
6 can occasionally climb ramps and stairs, balance, stoop, bend, squat, kneel,
7 and crouch. [Plaintiff] can never crawl or climb ladders, ropes, and scaffolds.
8 She cannot have exposure to extremes of heat, cold, and humidity. [Plaintiff]
9 cannot have exposure to gases, dust, or other pulmonary irritants. [Plaintiff]
10 is able to perform the basic mental demands of competitive, remunerative,
11 unskilled work, including the ability to understand, carry out, and remember
12 simple instructions. She can respond appropriately to supervision,
13 coworkers, and usual work situations. [Plaintiff] can deal with changes in a
14 routine work setting. She can have occasional contact with the general
15 public.

16 Tr. 26.

17 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 32. At
18 step five, the ALJ found that, considering Plaintiff's age, education, work
19 experience, RFC, and testimony from a vocational expert, there were other jobs
20 that existed in significant numbers in the national economy that Plaintiff could
perform, such as plumbing hardware assembler, mechanical assembler, electronic
worker, addresser, machine stuffer, or printer circuit taper. Tr. 33-34. The ALJ
concluded Plaintiff was not under a disability from August 26, 2014 through April
24, 2017, the date of the ALJ's decision. Tr. 34.

1 On April 3, 2018, the Appeals Council denied review, Tr. 1-6, making the
2 ALJ's decision the Commissioner's final decision for purposes of judicial review.
3 See 42 U.S.C. § 1383(c)(3).

4 **ISSUES**

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her supplemental security income benefits under Title XVI of the Social Security
7 Act. ECF No. 15. Plaintiff raises the following issues for this Court's review:

- 8 1. Whether the ALJ properly weighed Plaintiff's symptom claims;
- 9 2. Whether the ALJ properly weighed the medical opinion evidence; and
- 10 3. Whether the ALJ properly weighed the lay opinion evidence.

11 ECF No. 15 at 1.

12 **DISCUSSION**

13 **A. Plaintiff's Symptom Testimony**

14 Plaintiff contends the ALJ failed to rely on clear and convincing reasons to
15 discredit her symptom testimony. ECF No. 15 at 15-20.

16 An ALJ engages in a two-step analysis to determine whether to discount a
17 claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL
18 1119029, at *2. "First, the ALJ must determine whether there is objective medical
19 evidence of an underlying impairment which could reasonably be expected to
20 produce the pain or other symptoms alleged." Molina, 674 F.3d at 1112 (quotation

1 marks omitted). “The claimant is not required to show that [the claimant’s]
2 impairment could reasonably be expected to cause the severity of the symptom [the
3 claimant] has alleged; [the claimant] need only show that it could reasonably have
4 caused some degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th
5 Cir. 2009).

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
10 omitted). General findings are insufficient; rather, the ALJ must identify what
11 symptom claims are being discounted and what evidence undermines these claims.
12 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
13 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
14 explain why it discounted claimant’s symptom claims)). “The clear and
15 convincing [evidence] standard is the most demanding required in Social Security
16 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
17 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

18 Factors to be considered in evaluating the intensity, persistence, and limiting
19 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
20 duration, frequency, and intensity of pain or other symptoms; 3) factors that

1 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
2 side effects of any medication an individual takes or has taken to alleviate pain or
3 other symptoms; 5) treatment, other than medication, an individual receives or has
4 received for relief of pain or other symptoms; 6) any measures other than treatment
5 an individual uses or has used to relieve pain or other symptoms; and 7) any other
6 factors concerning an individual's functional limitations and restrictions due to
7 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R.
8 § 416.929(c). The ALJ is instructed to "consider all of the evidence in an
9 individual's record," "to determine how symptoms limit ability to perform work-
10 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

11 The ALJ found that Plaintiff's impairments could reasonably be expected to
12 cause the alleged symptoms; however, Plaintiff's statements concerning the
13 intensity, persistence, and limiting effects of those symptoms were not entirely
14 consistent with the evidence. Tr. 27.

15 1. Lack of Supporting Medical Evidence

16 The ALJ found Plaintiff's symptom reports were inconsistent with the
17 medical evidence. Tr. 27-28. An ALJ may not discredit a claimant's symptom
18 testimony and deny benefits solely because the degree of the symptoms alleged is
19 not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853,
20 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991);

1 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989); Burch v. Barnhart, 400 F.3d
2 676, 680 (9th Cir. 2005). However, the medical evidence is a relevant factor in
3 determining the severity of a claimant's symptoms and their disabling effects.
4 Rollins, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

5 a. Physical Impairments

6 The ALJ observed that despite Plaintiff's allegations of limiting back pain,
7 objective imaging and examinations of Plaintiff's back revealed mild to moderate
8 findings. Tr. 21, 27; see Tr. 385 (July 2, 2014: imaging showed moderate
9 degenerative changes at C6-7, slight spinal curvature, and no acute osseous
10 abnormality of the lumbar spine); Tr. 341 (October 14, 2014: imaging showed six
11 degree dextroscoliosis of lumbar spine and minimal to mild multilevel
12 degenerative changes in lumbar spine); Tr. 884 (January 14, 2015: imaging showed
13 mild degenerative disc change and facet arthrosis at L4-5 resulting in mild
14 narrowing of the central canal encroachment on the lateral recesses); see also Tr.
15 483-84 (July 10, 2014: physical examination showed normal gait, normal heel-toe
16 walk, and decreased range of motion); Tr. 829 (November 17, 2015: subjective
17 spinal tenderness reported but physical examination otherwise normal).

18 The ALJ also observed that despite Plaintiff's allegations of disabling knee
19 pain, the objective imaging and examinations of Plaintiff's knee showed normal
20 findings following her knee surgeries. Tr. 21, 27; see Tr. 601 (December 4, 2014:

1 imaging of right knee showed mild tricompartmental arthritic change); Tr. 643
2 (December 16, 2014: physical examination showed mild swelling in knee, active
3 painful range of motion, and decreased strength); Tr. 754 (January 14, 2015:
4 imaging of right knee suggested large bucket handle/parrot break type tear
5 involving lateral meniscus); Tr. 756 (April 23, 2015: Plaintiff underwent
6 arthroscopic subtotal partial lateral menisectomy and debridement); Tr. 758 (May
7 6, 2015: very small effusion present, active range of motion of right knee with 0 to
8 115 degrees of flexion, knee ligamentously stable, and distal sensation, circulation,
9 and movement intact); Tr. 749-50 (February 2, 2016: Plaintiff underwent right
10 knee total replacement); Tr. 734 (April 14, 2016: mild swelling and pain, antalgic
11 gait, normal alignment, reduced range of motion, full strength, and no atrophy in
12 right knee); Tr. 728, 778 (May 24, 2016: imaging showed satisfactory position of
13 knee prosthesis and no acute osseous abnormality or periprosthetic lucency); Tr.
14 726 (July 6, 2016: Plaintiff walked without a limp. Physical examination of knee
15 showed right knee was diffusely larger than left knee, but no effusion suspected,
16 range of motion 5-110, collaterals stable and balanced, and demonstrated normal
17 play in her left knee compared to right); Tr. 724 (September 15, 2016: walking
18 without limp, right knee has range of motion from 5-110, collaterals balanced plus
19 laxity); Tr. 720 (October 26, 2016: walking without limp, range of motion 5-110,
20 collaterals stable and balanced plus laxity). The ALJ further observed that despite

1 Plaintiff's testimony that she required a walker to ambulate, possibly indefinitely,
2 Plaintiff's treatment records did not support this finding. Tr. 27; compare Tr. 58
3 (Plaintiff testified that she has used a walker since 2015 and may have to use it for
4 the rest of her life) with Tr. 782 (September 7, 2016: Plaintiff was full weight
5 bearing and did not require an assistive device).

6 Plaintiff challenges the ALJ's conclusion by identifying evidence, largely
7 treatment notes preceding Plaintiff's surgeries, that Plaintiff contends supports
8 Plaintiff's symptom complaints. ECF No. 15 at 16-17; see, e.g., Tr. 766 (March
9 12, 2015: severe swelling and tenderness in knee and limited range of motion); Tr.
10 760 (April 15, 2015: ambulation with walker, antalgic gait, audible and palpable
11 crepitus); Tr. 824 (December 30, 2015: unsteady gait and using walker). However,
12 the Court may not reverse the ALJ's decision based on Plaintiff's disagreement
13 with the ALJ's interpretation of the record. See *Tommasetti v. Astrue*, 533 F.3d
14 1035, 1038 (9th Cir. 2008) (“[W]hen the evidence is susceptible to more than one
15 rational interpretation” the court will not reverse the ALJ's decision). The
16 evidence Plaintiff identifies does not undermine the substantial evidence
17 supporting the ALJ's conclusion that the evidence of normal findings following
18 Plaintiff's surgeries was inconsistent with her symptom testimony. Nevertheless,
19 because this case is remanded for reconsideration of other evidence, the ALJ is

1 instructed to reconsider this finding on remand in light of any relevant testimony
2 from a medical expert.

3 b. Illiteracy

4 The ALJ observed that Plaintiff testified at the hearing that she was illiterate.
5 Tr. 28; see Tr. 49. However, the ALJ noted that the record contained evidence of
6 Plaintiff reading and completing worksheets and filling out her own disability
7 forms. Tr. 28; see Tr. 220-27, 228-39, 283-859, 929, 944, 947, 950. The ALJ
8 reasonably concluded that Plaintiff's self-reported illiteracy was inconsistent with
9 documentation in the medical evidence.

10 c. Mental Impairments

11 The ALJ found that the mental status examinations in the record did not
12 support Plaintiff's allegations of disabling mental health impairments. Tr. 28; see
13 Tr. 441 (October 20, 2014: oriented to time, place, person, and situation,
14 appropriate mood and affect); Tr. 689-91 (March 25, 2015: alert and oriented to
15 person, place, time, date, and situation; negative general behavior; able to
16 concentrate and good attention span; affect labile and moves between being
17 depressed to crying and being overly expressive; good impulse control; no illusions
18 or hallucinations; memory intact; fair judgment; very poor insight; below average
19 intelligence); Tr. 829 (November 17, 2015: oriented to time, place, person, and
20 situation; appropriate mood and affect); Tr. 824 (December 30, 2015: oriented to

1 time, place, person, and situation; no suicidal ideation); Tr. 747 (January 18, 2016:
2 oriented to time, place, person, and situation); Tr. 744-45 (January 21, 2016:
3 oriented to time, place, person, and situation; appropriate mood and affect); Tr. 740
4 (February 17, 2016: same); Tr. 737 (March 17, 2016: same); Tr. 792, 795 (June 27,
5 2016: same; Plaintiff reported her depression was stable); Tr. 925 (August 18,
6 2016: restricted mood and flat affect, oriented to all spheres, normal thought
7 process with intact associations, no suicidal or homicidal ideations, appropriate eye
8 contact); Tr. 782 (September 7, 2016: oriented to time, place, person, and situation;
9 appropriate mood and affect). However, the ALJ's discussion of the mental health
10 medical evidence largely omits Plaintiff's therapy records, which consistently
11 document abnormal mood and affect. Tr. 909-77. The ALJ must consider all of
12 the relevant evidence in the record and may not point to only those portions of the
13 records that bolster his findings. See, e.g., *Holohan v. Massanari*, 246 F.3d 1195,
14 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on some
15 entries in plaintiff's records while ignoring others). In citing portions of the record
16 that show milder examination findings while the longitudinal record shows more
17 mixed results, the ALJ's characterization of the record is not supported by
18 substantial evidence.

19 The Commissioner asserts that any error the ALJ made in evaluating
20 Plaintiff's symptom testimony is harmless. ECF No. 16 at 11. The Court "may

1 not reverse an ALJ's decision on account of an error that is harmless." Molina,
2 674 F.3d at 111. An error is harmless "where it is inconsequential to the [ALJ's]
3 ultimate nondisability determination." Id. at 1115 (quotation and citation omitted).
4 Here, although the ALJ erred in evaluating the evidence surrounding Plaintiff's
5 mental impairments, the ALJ made other findings about Plaintiff's testimony being
6 inconsistent with the medical evidence that are supported by substantial evidence.
7 However, the Court cannot conclude that the ALJ's error is inconsequential to the
8 ultimately nondisability determination because the ALJ's selective discussion of
9 the mental impairment evidence also informed the ALJ's evaluation of several
10 medical opinions. Tr. 29-31. Furthermore, inconsistency with the medical
11 evidence cannot stand alone as a reason to discredit a claimant's symptom
12 testimony. See Rollins, 261 F.3d at 857. As discussed *infra*, the other reasons the
13 ALJ provided to discredit Plaintiff's symptom testimony are not supported by
14 substantial evidence. The ALJ's error is not harmless. The ALJ is instructed to
15 reconsider the evidence of Plaintiff's mental impairments on remand and to take
16 testimony from a medical expert.

17 2. Daily Activities

18 The ALJ found Plaintiff's symptom reports were inconsistent with her daily
19 activities. Tr. 27. The ALJ may consider a claimant's activities that undermine
20 reported symptoms. Rollins, 261 F.3d at 857. If a claimant can spend a substantial

1 part of the day engaged in pursuits involving the performance of exertional or non-
2 exertional functions, the ALJ may find these activities inconsistent with the
3 reported disabling symptoms. Fair, 885 F.2d at 603; Molina, 674 F.3d at 1113.
4 “While a claimant need not vegetate in a dark room in order to be eligible for
5 benefits, the ALJ may discount a claimant’s symptom claims when the claimant
6 reports participation in everyday activities indicating capacities that are
7 transferable to a work setting” or when activities “contradict claims of a totally
8 debilitating impairment.” Molina, 674 F.3d at 1112-13.

9 Here, the ALJ found Plaintiff’s daily activities were inconsistent with her
10 alleged limitations. Tr. 27. The ALJ observed Plaintiff completed a function
11 report indicating she was independent in personal care except for shaving, that she
12 could do laundry and vacuuming but needed assistance with heavier chores, that
13 she could drive and grocery shop, that she could not balance a checkbook but could
14 otherwise manage money, that she spoke with a friend on a daily basis and visited
15 her friend once per week, that she did not have problems getting along with others,
16 that she could pay attention for an hour at a time, and that she had trouble
17 following instructions. Tr. 25; see Tr. 220-25. The ALJ also observed that
18 Plaintiff reported performing personal care independently to a consultative
19 examiner, but that she needed some help getting in and out of the bathtub. Tr. 25;
20 see Tr. 688. However, the ALJ failed to explain with any specificity how these

1 modest activities were either inconsistent with Plaintiff's symptom testimony or
2 transferrable to a work setting. *Molina*, 674 F.3d at 1112-13. Without further
3 explanation of the ALJ's reasoning, this finding is not supported by substantial
4 evidence.

5 3. Work History

6 The ALJ considered Plaintiff's sporadic work history in assessing the
7 reasons for her current absence from the workforce. Tr. 32. Evidence of a poor
8 work history that suggests a claimant is not motivated to work is a permissible
9 reason to discredit a claimant's testimony that she is unable to work. *Thomas*, 278
10 F.3d at 959; *SSR 96-7* (factors to consider in evaluating credibility include "prior
11 work record and efforts to work"); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
12 1996); 20 C.F.R. § 416.929(c)(3) (work record can be considered in assessing
13 credibility). *Thomas* specifically approved of an ALJ rejecting a claimant's
14 credibility when the claimant's "extremely poor work history" reflecting "little
15 propensity to work in her lifetime" – i.e., where a claimant's "work history was
16 spotty, at best, with years of unemployment between jobs, even before she claimed
17 disability." *Thomas*, 278 F.3d at 959.

18 Here, the ALJ observed that Plaintiff had never engaged in substantial
19 gainful activity (SGA) and had "only a sporadic history of attachment to the
20 workforce." Tr. 32. The ALJ continued, "I consider this circumstance as I assess

1 the reasons for her current absence from the workforce.” Tr. 32. Here, the record
2 reflects Plaintiff received disability benefits from approximately 1993 through
3 2006 or 2008, and her benefits were discontinued in 2006 or 2008 because her
4 husband’s income was too high for her to receive benefits. Tr. 47-48, 686. The
5 ALJ noted that he considered Plaintiff’s minimal work history in assessing her
6 claim but did not explain how he considered this information. Tr. 32. To the
7 extent the ALJ considered this history as evidence that Plaintiff was not motivated
8 to work, therefore making her symptom testimony less credible, this finding was
9 error. Plaintiff’s extended receipt of disability benefits suggests she was unable to
10 work, not that she was not motivated to work.

11 Because the ALJ failed to provide clear and convincing reason supported by
12 substantial evidence to discredit Plaintiff’s symptom testimony, the ALJ is
13 instructed to reconsider Plaintiff’s symptom testimony on remand.

14 **B. Medical Opinion Evidence**

15 Plaintiff challenges the ALJ’s consideration of the medical opinions of Greg
16 Sawyer, Ph.D., M.D.; P. David Wood, PA-C; Jose Diaz, PA-C; Dave Hulslander,
17 M.S.; and Rebecca Palmer Overmiller, M.S.W. ECF No. 15 at 4-15.

18 There are three types of physicians: “(1) those who treat the claimant
19 (treating physicians); (2) those who examine but do not treat the claimant
20 (examining physicians); and (3) those who neither examine nor treat the claimant

1 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
2 Holohan, 246 F.3d at 1201-02 (citations omitted). Generally, a treating
3 physician’s opinion carries more weight than an examining physician’s, and an
4 examining physician’s opinion carries more weight than a reviewing physician’s.
5 Id. at 1202. “In addition, the regulations give more weight to opinions that are
6 explained than to those that are not, and to the opinions of specialists concerning
7 matters relating to their specialty over that of nonspecialists.” Id. (citations
8 omitted).

9 If a treating or examining physician’s opinion is uncontradicted, the ALJ
10 may reject it only by offering “clear and convincing reasons that are supported by
11 substantial evidence.” Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005).
12 “However, the ALJ need not accept the opinion of any physician, including a
13 treating physician, if that opinion is brief, conclusory and inadequately supported
14 by clinical findings.” Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228
15 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
16 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
17 may only reject it by providing specific and legitimate reasons that are supported
18 by substantial evidence.” Bayliss, 427 F.3d at 1216 (citing Lester, 81 F.3d at 830-
19 831).

1 1. Mr. Hulslander

2 Mr. Hulslander, a treating therapist, opined on October 6, 2016, that Plaintiff
3 had mild limitation in her ability to remember locations and work-like procedures;
4 moderate limitation in her ability to understand and remember detailed
5 instructions; moderate limitation in her ability to maintain attention and
6 concentration for extended periods; moderate limitation in her ability to perform
7 activities within a schedule, maintain regular attendance, and be punctual within
8 customary tolerances; that Plaintiff would be off-task during 21-30% of a 40-hour
9 workweek; and that Plaintiff would miss one day of work per month if she were
10 attempting to work a 40-hour schedule. Tr. 701-03. The ALJ gave this opinion
11 little weight. Tr. 29. As a therapist, Mr. Hulslander is a non-acceptable medical
12 source. 20 C.F.R. § 416.902 (2017) (acceptable medical sources are licensed
13 physicians, licensed or certified psychologists, licensed optometrists, licensed
14 podiatrists, qualified speech-language pathologists, licensed audiologists, licensed
15 advanced practice registered nurses, and licensed physician assistants). However,
16 an ALJ is required to consider evidence from non-acceptable medical sources, such
17 as therapists. 20 C.F.R. § 416.927(f). An ALJ may reject the opinion of a non-

1 acceptable medical source by giving reasons germane to the opinion. Ghanim, 763
2 F.3d at 1161.

3 First, the ALJ found Mr. Hulslander's opinion was entitled to less weight
4 because it was inconsistent with the objective medical evidence. Tr. 29.

5 Inconsistency with the medical evidence is a germane reason for rejecting lay
6 witness testimony. See Bayliss, 427 F.3d at 1218; Lewis v. Apfel, 236 F.3d 503,
7 511-12 (9th Cir. 2001) (germane reasons include inconsistency with medical
8 evidence, activities, and reports). The ALJ found that the mental status

9 examinations in the record were inconsistent with Mr. Hulslander's opined

10 limitations. Tr. 29; see Tr. 441 (October 20, 2014: oriented to time, place, person,

11 and situation, appropriate mood and affect); Tr. 689-91 (March 25, 2015: alert and

12 oriented to person, place, time, date, and situation; negative general behavior; able

13 to concentrate and good attention span; affect labile and moves between being

14 depressed to crying and being overly expressive; good impulse control; no illusions

15 or hallucinations; memory intact; fair judgment; very poor insight; below average

16 intelligence); Tr. 829 (November 17, 2015: oriented to time, place, person, and

17 situation; appropriate mood and affect); Tr. 824 (December 30, 2015: oriented to

18 time, place, person, and situation; no suicidal ideation); Tr. 747 (January 18, 2016:

19 oriented to time, place, person, and situation); Tr. 744-45 (January 21, 2016:

20 oriented to time, place, person, and situation; appropriate mood and affect); Tr. 740

1 (February 17, 2016: same); Tr. 737 (March 17, 2016: same); Tr. 792, 795 (June 27,
2 2016: same; Plaintiff reported her depression was stable); Tr. 925 (August 18,
3 2016: restricted mood and flat affect, oriented to all spheres, normal thought
4 process with intact associations, no suicidal or homicidal ideations, appropriate eye
5 contact); Tr. 782 (September 7, 2016: oriented to time, place, person, and situation;
6 appropriate mood and affect). However, as discussed supra, the ALJ's discussion
7 of the mental health evidence largely omits Plaintiff's therapy records, including
8 Mr. Hulslander's treatment notes, which consistently document abnormal mood
9 and affect. Tr. 909-77. The ALJ must consider all of the relevant evidence in the
10 record and may not point to only those portions of the records that bolster his
11 findings. See, e.g., *Holohan*, 246 F.3d at 1207-08 (holding that an ALJ cannot
12 selectively rely on some entries in plaintiff's records while ignoring others). In
13 citing portions of the record that show milder examination findings while the
14 longitudinal record shows more mixed results, the ALJ's characterization of the
15 record is not supported by substantial evidence. This was not a germane reason to
16 reject Mr. Hulslander's opinion.

17 Second, the ALJ found Mr. Hulslander's opinion was entitled to less weight
18 because Mr. Hulslander did not appear to have a treating relationship with
19 Plaintiff. Tr. 29. An ALJ is permitted to consider the length and nature of a
20 treatment relationship in evaluating the opinions of "other sources." SSR 06-03P,

1 available at 2006 WL 2329939 at *4 (Aug. 9, 2006), see also Koenig v. Colvin,
2 No. CV-13-0412-FVS, 2014 WL 5781764, at *11 (E.D. Wash. Nov. 6, 2014).

3 However, here the ALJ omitted Mr. Hulslander's treatment notes from the
4 discussion of the medical evidence. The record shows Mr. Hulslander provided
5 therapy to Plaintiff from June 29, 2015 through September 15, 2016. Tr. 924-74.
6 Thus, the ALJ's conclusion that Mr. Hulslander did not have a treating relationship
7 with Plaintiff is not supported by substantial evidence.

8 Third, the ALJ found Mr. Hulslander's opinion was entitled to less weight
9 because Mr. Hulslander was not an acceptable medical source. Tr. 29. Although
10 an individual's status as a medically acceptable source may impact the amount of
11 deference the ALJ gives to an opinion, the ALJ may not reject an opinion as to a
12 claimant's limitations because the opinion comes from a non-acceptable medical
13 source. 20 C.F.R. § 416.927. Even if the ALJ correctly observed that Mr.
14 Hulslander is not an acceptable medical source, this finding alone does not provide
15 substantial evidence in light of this record to give less weight to his opinion.

16 Overall, the ALJ failed to provide germane reasons, supported by substantial
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1 evidence, to discredit Mr. Hulslander's opinion.² This case is remanded for the
2 ALJ to reconsider Mr. Hulslander's opinion.

3 2. Mr. Wood

4 Mr. Wood, a treating physician's assistant, rendered three opinions. On June
5 4, 2014, Mr. Wood opined Plaintiff's shoulder pain rendered her unable to
6 participate in work, that Plaintiff was unable to lift at least two pounds or unable to
7 stand or walk, that Plaintiff had no use of her left arm, and that Plaintiff's treatment
8 plan was to recover from surgery. Tr. 1018-20. On December 17, 2014, Mr.
9 Wood opined Plaintiff's chronic lumbago, knee pain, and shoulder pain rendered
10 her unable to work at all and that Plaintiff was unable to lift at least two pounds or
11 unable to stand or walk. Tr. 1034-36. On May 20, 2015, Mr. Wood opined
12 Plaintiff's impairments would cause her to need to lie down for one to two hours

14 ² The Commissioner repeatedly asserts the ALJ rejected several medical opinions,
15 including Mr. Hulslander's, for being rendered on a check-box form. ECF No. 16
16 at 14-17. However, the ALJ made no findings regarding the check-box format of
17 the reports. Tr. 29-32. The Court is constrained to affirming the ALJ's decision
18 on a ground that the ALJ invoked in making his decision. See *Orn v. Astrue*, 495
19 F.3d 625, 630 (9th Cir. 2007); *Stout v. Comm'r, Soc. Sec. Admin*, 454 F.3d 1050,
20 1054 (9th Cir. 2006).

1 per day, that Plaintiff's prognosis was poor, that regular and continuous work
2 would cause Plaintiff's condition to deteriorate, and that Plaintiff would miss four
3 or more days of work per month due to needing multiple medical appointments and
4 recovery time. Tr. 270-71. The ALJ gave these opinions little weight. Tr. 30. As
5 a physician's assistant, Mr. Wood is not an acceptable medical source. 20 C.F.R. §
6 416.902(a)(8) (2017) (including licensed physician's assistants as acceptable
7 medical sources for impairments within their licensed scope of practice "only with
8 respect to claims filed . . . on or after March 27, 2017"). Therefore, the ALJ was
9 required to provide germane reason to reject Mr. Wood's opinion. *Ghanim*, 763
10 F.3d at 1161.

11 First, the ALJ concluded that Mr. Wood's opinion was entitled to less
12 weight because the ALJ found it was based on Plaintiff's exaggerated claim. Tr.
13 30. The ALJ may reject lay testimony that essentially reproduces the claimant's
14 discredited testimony. *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694
15 (9th Cir. 2009). Here, the ALJ concluded that Mr. Wood had no basis to opine that
16 Plaintiff's limitations began in 2009, and therefore found that Mr. Wood either
17 improperly tailored his opinion to correspond to Plaintiff's alleged onset date or

1 was based on an exaggerated report by Plaintiff.³ Tr. 30. The ALJ's conclusion is
2 faulty for several reasons. First, Mr. Wood's own report indicates that he began
3 treating Plaintiff in 2009, thus providing the basis for an opinion on impairments
4 dating back to 2009. Tr. 270. Second, Plaintiff's original alleged onset date was
5 1993, which was amended to 2014 at the hearing in January 2017. Tr. 44. There is
6 therefore no reason in the record to assume that an opinion dating back to 2009
7 was "inappropriately tailored" to meet Plaintiff's onset date. See Tr. 30. Third, as
8 discussed supra, the ALJ failed to provide clear and convincing reason to discredit
9 Plaintiff's symptom testimony. Therefore, reliance on Plaintiff's self-report does
10 not provide basis to reject Mr. Wood's opinion. This was not a germane reason to
11 discredit Mr. Wood's opinion.

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14 ³ The ALJ's language here is unclear. From the context, it appears as though the
15 use of the word "her" could be a typographical error, which was meant to refer to
16 Mr. Wood. If the ALJ intended to express a conclusion that Mr. Wood
17 exaggerated the nature of his treatment relationship with Plaintiff by inaccurately
18 claiming Mr. Wood had treated Plaintiff since 2009, such a conclusion is similarly
19 not supported. There is no basis in the record to assume Mr. Wood misrepresented
20 the length of his treatment relationship with Plaintiff.

1 Second, the ALJ concluded that Mr. Wood's opinion was entitled to less
2 weight because Mr. Wood is not an acceptable medical source. Tr. 30. Although
3 an individual's status as a medically acceptable source may impact the amount of
4 deference the ALJ gives to an opinion, the ALJ may not reject an opinion as to a
5 claimant's limitations because the opinion comes from a non-acceptable medical
6 source. 20 C.F.R. § 416.927. Even if the ALJ correctly observed that Mr. Wood is
7 not an acceptable medical source, this finding alone does not provide substantial
8 evidence in light of this record to give less weight to his opinion.

9 Third, the ALJ concluded that Mr. Wood's opinion was entitled to less
10 weight because it was an opinion on an issue reserved to the Commissioner. Tr.
11 30. Opinions on the ultimate issue of disability are an issue reserved to the
12 Commissioner. 20 C.F.R. § 416.927(d); see also *Wickramasekera v. Astrue*, No.
13 CV 09-449-TUC-HCE, 2010 WL 3883241, at *34 (D. Ariz. Sept. 29, 2010)
14 (applying regulation to lay witness testimony). Here, although Mr. Wood rendered
15 opinions that Plaintiff was unable to work, Mr. Wood also rendered opinions on
16 certain specific functional limitations Plaintiff experienced. Tr. 270-71, 1018-20,
17 1034-36. While this may have been a germane reason to decline to give weight to
18 Mr. Wood's opinion on the ultimate issue of disability, this was not a germane
19 reason to reject the specific functional limitations Mr. Wood opined.

1 Finally, the ALJ concluded that Mr. Wood's opinion was entitled to less
2 weight because it was not supported by the record. Tr. 30. Inconsistency with the
3 medical evidence is a germane reason for rejecting lay witness testimony. See
4 Bayliss, 427 F.3d at 1218; Lewis, 236 F.3d at 511-12. Here, the ALJ found Mr.
5 Wood's opinion was inconsistent with the longitudinal medical evidence. Tr. 30.
6 However, as discussed supra, the ALJ is instructed to reconsider the medical
7 evidence on remand. Additionally, the ALJ concluded that there was no basis in
8 the record for Mr. Wood to opined Plaintiff would miss four days of work per
9 month for medical appointments, since Plaintiff could schedule appointments
10 around work hours or schedule multiple appointments in one day. Id. The ALJ's
11 reasoning here is speculative. Mr. Wood opined Plaintiff would miss four days of
12 work per month due to a combination of multiple medical appointments and
13 recovery time. Tr. 271. There is no basis in the record to assume that Plaintiff's
14 need to schedule appointments and recovery time could be pre-planned to occur
15 around work hours or on the same day. This was not a germane reason to reject
16 Mr. Wood's opinions.

17 Overall, the ALJ failed to provide germane reason, supported by substantial
18 evidence, to discredit Mr. Wood's opinion. The ALJ is instructed to reconsider
19 this evidence on remand.

1 3. Other Assignments of Error

2 Plaintiff challenges the ALJ’s evaluation of several other medical opinions.
3 ECF No. 15 at 6-15. Because this case is remanded for the ALJ to reconsider the
4 medical opinion evidence, the Court declines to address Plaintiff’s other specific
5 assignments of error. The Court notes that several of the errors identified supra,
6 including an incomplete consideration of the medical evidence and rejection of
7 opinions for being rendered by non-acceptable medical sources, were applied to
8 other medical opinions in the record. Tr. 29-32. The ALJ is instructed to
9 reconsider the medical evidence, take testimony from a medical expert, and
10 reevaluate all of the medical opinion evidence on remand.

11 **C. Lay Opinion Evidence**

12 Plaintiff challenges the ALJ’s evaluation of lay opinion evidence from
13 Plaintiff’s husband, Michael B.⁴ ECF No. 15 at 20.

14 An ALJ must consider the statement of lay witnesses in determining whether
15 a claimant is disabled. Stout, 454 F.3d at 1053. Lay witness evidence cannot
16 establish the existence of medically determinable impairments, but lay witness
17 evidence is “competent evidence” as to “how an impairment affects [a claimant’s]
18 ability to work.” Id.; 20 C.F.R. § 416.913(a)(4); see also *Dodrill v. Shalala*, 12

19 _____
20 ⁴ Plaintiff’s husband’s last name is omitted to protect Plaintiff’s privacy.

1 F.3d 915, 918-19 (9th Cir. 1993) (“[F]riends and family members in a position to
2 observe a claimant’s symptoms and daily activities are competent to testify as to
3 her condition.”). If a lay witness statement is rejected, the ALJ ““must give
4 reasons that are germane to each witness.”” *Nguyen v. Chater*, 100 F.3d 1462,
5 1467 (9th Cir. 1996) (citing *Dodrill*, 12 F.3d at 919).

6 Mr. B. submitted a third party function report describing Plaintiff’s back,
7 should, neck, and headache pain; and describing Plaintiff’s daily activities to
8 include talking with friends and family, watching television, reading romance
9 novels, helping with some housework, driving her daughter to and from school and
10 activities, sometimes feeding the dogs, sleeping restlessly, having no limitations in
11 personal care, preparing simple meals three to four times per month, doing laundry
12 with reminders, needing reminders daily, shopping daily, and being unable to sit
13 for extended periods due to pain. Tr. 240-46. The ALJ gave this opinion little
14 weight. Tr. 31. Because Mr. B. is a lay source, the ALJ was required to provide
15 germane reason to reject this opinion. *Nguyen*, 100 F.3d at 1467.

16 First, the ALJ found Mr. B.’s opinion was entitled to less weight because it
17 was based on casual observation. Tr. 31. “[M]edical diagnoses are beyond the
18 competence of lay witnesses and therefore do not constitute competent evidence.”
19 *Nguyen*, 100 F.3d at 1467. However, lay testimony “as to a claimant’s symptoms
20 or how an impairment affects ability to work is competent evidence.” *Id.*

1 (emphasis in original). Here, Mr. B.'s opinion does not give a medical diagnosis,
2 but rather describes Plaintiff's daily functioning and her activities at home. Tr.
3 240-46. This is exactly the kind of lay observation that makes for competent
4 evidence. Nguyen, 100 F.3d at 1467. That Mr. B.'s opinion was based on casual
5 observation, not medical training, is not a germane reason to discredit his opinion.

6 Second, the ALJ found Mr. B.'s opinion was entitled to less weight because it
7 was inconsistent with the medical evidence. Tr. 31. Inconsistency with the
8 medical evidence is a germane reason for rejecting lay witness testimony. See
9 Bayliss, 427 F.3d at 1218; Lewis, 236 F.3d at 511-12 (germane reasons include
10 inconsistency with medical evidence, activities, and reports). However, as
11 discussed throughout this opinion, the ALJ's interpretation of the medical evidence
12 is not supported by substantial evidence. Therefore, the ALJ's finding that Mr.
13 B.'s opinion was inconsistent with that evidence is similarly not supported by
14 substantial evidence.

15 The ALJ failed to provide germane reason to discredit Mr. B.'s lay opinion.
16 The ALJ is instructed to reconsider this evidence on remand.

17 **D. Remedy**

18 Plaintiff urges this Court to fully credit the challenged evidence in this case.
19 ECF No. 15 at 4-20.

1 “The decision whether to remand a case for additional evidence, or simply to
2 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
3 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
4 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
5 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
6 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the
7 proper course, except in rare circumstances, is to remand to the agency for
8 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
9 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
10 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
11 discretion for a district court not to remand for an award of benefits” when three
12 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
13 credit-as-true rule, where (1) the record has been fully developed and further
14 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
15 to provide legally sufficient reasons for rejecting evidence, whether claimant
16 testimony or medical opinion; and (3) if the improperly discredited evidence were
17 credited as true, the ALJ would be required to find the claimant disabled on
18 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
19 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
20 the Court will not remand for immediate payment of benefits if “the record as a

1 whole creates serious doubt that a claimant is, in fact, disabled.” Garrison, 759
2 F.3d at 1021.

3 Here, further proceedings are necessary. Even if the Court were to fully
4 credit the challenged opinion evidence, as Plaintiff requests, the record would still
5 present outstanding conflicts to resolve. Even if the Court were to fully credit
6 every opinion in the record stating Plaintiff is incapable of work, the record
7 contains other opinions from Dr. Arcega, Tr. 84-85, Dr. Hale, Tr. 97-98, and Dr.
8 Bailey, Tr. 98-100, who opined Plaintiff had functional limitations consistent with
9 light work. Therefore, the ALJ must resolve conflicts in the medical evidence on
10 remand. The ALJ is instructed to take testimony from a medical expert, reconsider
11 the medical evidence, reweigh Plaintiff’s symptom allegations, reweigh the
12 medical opinion evidence, reweigh the lay opinion evidence, and conduct a new
13 sequential analysis.

14 CONCLUSION

15 Having reviewed the record and the ALJ’s findings, this court concludes the
16 ALJ’s decision is not supported by substantial evidence and free of harmful legal
17 error. Accordingly, **IT IS HEREBY ORDERED:**

- 18 1. Plaintiff’s Motion for Summary Judgment, ECF No. 15, is **GRANTED**.
- 19 2. Defendant’s Motion for Summary Judgment, ECF No. 16, is **DENIED**.

