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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 CINDY MUSTONEN,

8 Plaintiff,

9 v.

10 CAROLYN W. COLVIN,
11 Commissioner of Social Security,

12 Defendant.
13

No. CV-12-3127-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING
FOR AN IMMEDIATE AWARD OF
BENEFITS

14
15 BEFORE THE COURT are cross-Motions for Summary Judgment. ECF
16 No. 21, 23. Attorney D. James Tree represents Cindy Mustonen (Plaintiff);
17 Special Assistant United States Attorney John C. Lamont represents the
18 Commissioner of Social Security (Defendant). The parties have consented to
19 proceed before a magistrate judge. ECF No. 6. After reviewing the administrative
20 record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for
21 Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

22 **JURISDICTION**

23 On July 12, 2005, Plaintiff filed an application for Title II Disability
24 Insurance Benefits and Title XVI Supplemental Security Income (SSI) payments.
25 Tr. 19; 150. In both applications, Plaintiff alleged disability beginning September
26 5, 2004. Tr. 19; 150. The claim was denied initially and on reconsideration and
27 she requested a hearing before an administrative law judge (ALJ). Tr. 19; 33-85;
28 675-95. A hearing was held on May 14, 2008, in the Dalles, Oregon. Tr. 744-78.

ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT - 1

1 At the hearing, vocational expert Kathryn Heatherly, and Plaintiff, who was
2 represented by counsel, appeared and testified. Tr. 744-778. ALJ Riley J. Atkins
3 presided. Tr. 744. The ALJ denied benefits on October 1, 2008. Tr. 54-67.

4 The Appeals Council vacated the decision and remanded the case on July 15,
5 2009. Tr. 87-89. The Appeals Council ordered the ALJ to further evaluate
6 Plaintiff's subjective complaints of painful headaches and provide a proper
7 credibility analysis for evaluating her headache symptoms, and give "further
8 consideration" to Plaintiff's maximum RFC. Tr. 88. Finally, the Appeals Council
9 ordered the ALJ to "obtain supplemental evidence from a vocational expert to
10 clarify the effect of the assessed limitations on the claimant's occupational base."
11 Tr. 88.

12 The second hearing in front of ALJ Atkins was held on October 6, 2010.
13 Tr. 777-98. Plaintiff, who was represented by counsel, testified. Tr. 784- 97.
14 Vocational expert Richard Keough was present, but the ALJ did not call him to
15 testify. Tr. 782. The ALJ again denied benefits on November 10, 2010. Tr. 19-
16 32. The Appeals Council denied review. Tr. 8-10. The instant matter is before
17 this court pursuant to 42 U.S.C. § 405(g).

18 **STATEMENT OF THE CASE**

19 The facts of the case are set forth in detail in the transcript of proceedings
20 and are briefly summarized here. At the time of the second administrative hearing,
21 Plaintiff was 54 years old and living alone in a single mobile home. Tr. 790-92.
22 Plaintiff dropped out of high school, obtained a GED and took some college
23 courses. Tr. 748.

24 Plaintiff's past work included home health aide, housekeeper and fruit
25 sorter. Tr. 772. In her application, Plaintiff stated that she stopped working
26 because she must nap during the day or she is too fatigued to function. Tr. 155.
27 She reported that she is very anxious when she is around people, she has a hard
28 time hearing, she is a "nervous wreck," and she has frequent bouts of diarrhea. Tr.

1 155.

2 In 1997, a CT scan revealed a tumor in Plaintiff’s brain that was described as
3 a “small, densely calcified mass.” Tr. 24; 446-47; 485. In January, 2008, Plaintiff
4 sought treatment after a head trauma, which was causing her pain and headache.
5 Tr. 24; 446-47. A CT scan revealed that Plaintiff’s tumor had grown slightly, and
6 the neurosurgeon recommended re-testing every two years. Tr. 24.

7 At the first hearing, Plaintiff testified that she has emotional problems,
8 hearing problems, and frequent headaches. Tr. 749. Two years later, at the second
9 administrative hearing, Plaintiff testified that she had problems with irritable bowel
10 syndrome and anxiety when around other people. Tr. 787-88. She said she has
11 frequent headaches, but the prescribed Vicodin leaves her feeling “over-
12 medicated,” so she simply lies down until the headache recedes. Tr. 794-95.
13 Plaintiff testified that the headaches last between one and three hours. Tr. 795.
14 Plaintiff also testified that she has difficulty hearing, and she wears one hearing
15 aid. She explained she does not wear two, because the second one makes her ear
16 itchy and she hears about the same if she is wearing one or two hearing aids. Tr.
17 796.

18 Plaintiff also said that sometimes she “sees” her deceased parents, and she
19 testified that on occasion, “they talk to me.” Tr. 790. She described a violent
20 childhood, and said she has frequent nightmares about her past. Tr. 789-90.
21 Plaintiff testified that a couple of times per week, she feels so poorly – mentally
22 and physically – that she is unable to leave her bed. Tr. 792. She said she is
23 unable to handle many people in a store, and she sometimes leaves and returns
24 later. Tr. 793. At the second hearing, Plaintiff said she experiences thoughts of
25 suicide. Tr. 793.

26 **STANDARD OF REVIEW**

27 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set
28 out the standard of review:

1 A district court's order upholding the Commissioner's denial of
2 benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174
3 (9th Cir. 2000). The decision of the Commissioner may be reversed
4 only if it is not supported by substantial evidence or if it is based on
5 legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
6 Substantial evidence is defined as being more than a mere scintilla,
7 but less than a preponderance. *Id.* at 1098. Put another way,
8 substantial evidence is such relevant evidence as a reasonable mind
9 might accept as adequate to support a conclusion. *Richardson v.*
10 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to
11 more than one rational interpretation, the court may not substitute its
12 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
13 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
14 (9th Cir. 1999).

15 The ALJ is responsible for determining credibility, resolving conflicts in
16 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
18 although deference is owed to a reasonable construction of the applicable statutes.
19 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

20 It is the role of the trier of fact, not this court, to resolve conflicts in
21 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
22 rational interpretation, the court may not substitute its judgment for that of the
23 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
24 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
25 still be set aside if the proper legal standards were not applied in weighing the
26 evidence and making the decision. *Browner v. Secretary of Health and Human*
27 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to
28 support the administrative findings, or if conflicting evidence exists that will
support a finding of either disability or non-disability, the Commissioner's
determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
Cir. 1987).

1 **SEQUENTIAL PROCESS**

2 The Commissioner has established a five-step sequential evaluation process
3 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
4 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
5 through four, the burden of proof rests upon the claimant to establish a prima facie
6 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
7 burden is met once a claimant establishes that a physical or mental impairment
8 prevents him from engaging in his previous occupation. 20 C.F.R. §§
9 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
10 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
11 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
12 in the national economy which claimant can perform. *Batson v. Commissioner of*
13 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an
14 adjustment to other work in the national economy, a finding of “disabled” is made.
15 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

16 **ADMINISTRATIVE DECISION**

17 At step one, ALJ Atkins found that Plaintiff had not engaged in substantial
18 gainful activity since September 5, 2004. Tr. 22. At step two, he found Plaintiff
19 had the severe impairments of “depression with anxiety, also referred to as a
20 schizoaffective disorder of a depressive type, as well as a personality disorder, and
21 a hearing loss.” Tr. 22. At step three, the ALJ determined that Plaintiff does not
22 have an impairment or combination of impairments that meets or medically equal
23 one of the listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§
24 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). Tr. 25. The
25 ALJ found that Plaintiff has the residual functional capacity (“RFC”) to perform
26 light work with the following limitations:

27 The hearing deficit experienced by the claimant precludes work where
28 the whispered word or communication is required, or in an

1 environment with loud background noise, such as a factory. Also
2 excluded is work around hazards, such as working at unprotected
3 heights or around machinery with exposed moving parts. ... Finally,
4 ready availability of a restroom facility is required.

4 Tr. 28-29. At step four, the ALJ found that Plaintiff is unable to perform past
5 relevant work. Tr. 30. The ALJ found that the testimony of vocational expert
6 Kathryn Heatherly from the first hearing “may be used as there has been no change
7 in the severe impairments, all important factors, and in particular, no change in the
8 residual functional capacity.” Tr. 31. The ALJ relied upon this testimony in
9 concluding that notwithstanding Plaintiff’s nonexertional limitations, jobs exist in
10 the national economy that Plaintiff can perform. Tr. 31. At step five, the ALJ
11 concluded that considering Plaintiff’s age, education, work experience, and
12 residual functional capacity, jobs exist in significant numbers in the national
13 economy that Plaintiff can perform, such as motel cleaner housekeeper and small
14 products assembler. Tr. 31. The ALJ concluded that Plaintiff was not disabled as
15 defined by the Social Security Act. Tr. 31.

16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's
18 decision denying benefits and, if so, whether that decision is based on proper legal
19 standards. Plaintiff contends that the ALJ erred by (1) finding Plaintiff was not
20 credible; (2) failing to address and properly reject opinions from several medical
21 providers; and (3) failing to comply with the Appeals Council remand order. ECF
22 No. 21 at 3.

23 DISCUSSION

24 A. Credibility

25 Plaintiff contends that the ALJ erred by finding Plaintiff only partially
26 credible. ECF No. 21 at 17. The ALJ is responsible for determining credibility.
27 *Andrews*, 53 F.3d at 1039. Unless affirmative evidence exists indicating that the
28 claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony

1 must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
2 1996). The ALJ's findings must be supported by specific, cogent reasons. *Rashad*
3 *v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). "General findings are
4 insufficient; rather, the ALJ must identify what testimony is not credible and what
5 evidence undermines the claimant's complaints." *Reddick v. Chater*, 157 F.3d 715,
6 722 (9th Cir. 1998), quoting *Lester*, 81 F.3d at 834. If objective medical evidence
7 exists of an underlying impairment, the ALJ may not discredit a claimant's
8 testimony as to the severity of symptoms merely because they are unsupported by
9 objective medical evidence. See *Bunnell v. Sullivan*, 947 F.2d 341, 347-48 (9th
10 Cir. 1991).

11 To determine whether the claimant's testimony regarding the severity of the
12 symptoms is credible, the ALJ may consider, for example: (1) ordinary techniques
13 of credibility evaluation, such as the claimant's reputation for lying, prior
14 inconsistent statements concerning the symptoms, and other testimony by the
15 claimant that appears less than candid; (2) unexplained or inadequately explained
16 failure to seek treatment or to follow a prescribed course of treatment; and (3) the
17 claimant's daily activities. See, e.g., *Fair v. Bowen*, 885 F.2d 597, 602-04 (9th Cir.
18 1989); *Bunnell*, 947 F.2d at 346-47.

19 In this case, the ALJ's findings regarding credibility consist of the
20 boilerplate statement that Plaintiff's claims regarding the "intensity, persistence
21 and limiting effects of these symptoms are not credible to the extent they are
22 inconsistent with the above residual functional capacity assessment." Tr. 29.
23 Curiously, the ALJ follows that paragraph with a discussion of the weight he
24 afforded to medical provider Steven Woolpert, M.S. Tr. 29.

25 Following the medical evidence paragraph, the ALJ noted he considered
26 Plaintiff's inconsistent statements in determining her RFC. Tr. 30. Specifically,
27 the ALJ stated that Plaintiff's testimony at the 2010 hearing was inconsistent with
28 the medical records and her 2008 hearing testimony. Tr. 30. The ALJ provided

1 three specific examples: (1) in the 2010 hearing, the Plaintiff claimed she
2 experienced visual and auditory hallucinations, but Plaintiff “specifically denied”
3 experiencing visual and auditory hallucinations in a visit with her mental health
4 provider on July 7, 2010; (2) in the 2010 hearing, Plaintiff claimed she had suicidal
5 thoughts, but had previously denied this to “to a number of treating sources;” and
6 (3) Plaintiff’s “testimony at the first hearing that she requires medical marijuana
7 for her appetite [is] in contrast to her current testimony that medical marijuana is
8 for treating irritable bowel syndrome.” Tr. 30.

9 The ALJ’s first reason for discounting Plaintiff’s credibility is not supported
10 by the record. The chart notes from July 7, 2010, reveal Kari Heistand, M.D.,
11 examined Plaintiff, who indicated that her hallucinations were diminishing with a
12 new dosage of medication:

13 [A]uditory hallucinations of foreboding music have decreased in
14 frequency from daily to about once or twice per week and have
15 decreased in severity from frightening music to just the sensation that
16 a song she hears gets stuck in her head and is not frightening to her
17 since increasing her risperidone.

18 Tr. 610. The entry is consistent with Plaintiff’s testimony that she previously
19 experienced frequent auditory and visual hallucinations. The ALJ’s conclusion
20 that Plaintiff “specifically denied” hallucinations overlooks the facts reflected in
21 the chart note that the new medication dosage was effective in controlling
22 Plaintiff’s daily hallucinations. As such, the record does not support this reason for
23 finding Plaintiff not credible.

24 Next, the ALJ asserted that Plaintiff’s testimony changed regarding whether
25 she experienced suicidal thoughts. A change in intensity of suicidal thoughts is not
26 a legally valid reason upon which to find a mentally impaired individual not
27 credible. Waxing and waning symptoms do not preclude a finding of disability.
28 *Reddick*, 157 F.3d at 724. “[I]t is inherent in psychotic illnesses that periods of

1 remission will occur,” and such remission does not mean that the disability has
2 ceased. *Miller v. Heckler*, 756 F.2d 679, 681 n.2 (8th Cir. 1985) (quoting *Dreste v.*
3 *Heckler*, 741 F.2d 224, 226 n.2 (8th Cir. 1984). “[O]ne characteristic of mental
4 illness is the presence of occasional symptom-free periods.” *Andler v. Chater*, 100
5 F.3d 1389, 1393 (8th Cir. 1996); see *Poulin v. Bowen*, 260 U.S. App. D.C. 142,
6 817 F.2d 865, 875 (D.C. Cir. 1987). The course of mental illness can be
7 “extremely difficult to predict,” and remissions are of uncertain duration and
8 marked by the impending possibility of relapse. *Andler*, 100 F.3d at 1393. As a
9 result, given the episodic nature of a mental illness, the ALJ improperly relied
10 upon Plaintiff’s 2010 testimony that she recently had experienced thoughts of
11 suicide as a reason to diminish her credibility.

12 Finally, the ALJ found that between her testimony in 2008 and 2010,
13 Plaintiff provided inconsistent statements about why she needed medical
14 marijuana. Tr. 30. The ALJ noted that on May 14, 2008, Plaintiff testified that she
15 used medical marijuana to stimulate her appetite, and on October 6, 2010, Plaintiff
16 testified that she used marijuana to ease symptoms associated with irritable bowel
17 syndrome. Tr. 30.

18 A chart note from May 3, 2007, signed by Thomas O. Orvald, M.D., of the
19 THCF Medical Clinics, indicates Plaintiff had low back pain and leg stiffness, as
20 well as GI bleeding, pain, and urgency related to urination. Tr. 505. Dr. Orvald
21 listed Plaintiff’s “debilitating medical condition from previous physicians” as
22 “IBS” (Irritable Bowel Syndrome) and pancreatitis. Tr. 506.¹

23
24
25 ¹Plaintiff testified at each hearing about different medical conditions that
26 necessitated medical marijuana, but it was apparent the ALJ believed neither: “It
27 appears Ms. Mustonen has managed to obtain a prescription for a substance she
28 has otherwise abused her entire adult life.” Tr. 28. Significantly, the ALJ found

1 The record reveals that in each administrative hearing, Plaintiff identified a
2 different medical condition that required treatment with marijuana. Plaintiff's
3 recent testimony that she required marijuana for her irritable bowel syndrome is
4 supported by the chart notes from her prescribing doctor. Tr. 506. Moreover,
5 medical evidence exists that marijuana may alleviate a variety of symptoms,
6 including nausea, vomiting, symptoms associated with hepatitis C, severe muscle
7 spasms associated with multiple sclerosis, epilepsy, glaucoma, Crohn's disease and
8 Some forms of intractable pain. See Rev. Code Wash. (RCW) § 69.51A.005(1).²

9 Thus, because medical marijuana can be used to treat a variety of symptoms,
10 the court cannot conclude with certainty that Plaintiff's testimony about why she
11 needed it was false at one or both hearings. Considering Plaintiff's complicated
12 medical condition and the voluminous record, this single remaining circumstance
13 is not a persuasive reason to deny credibility. The analysis in the record does not

14 Plaintiff's marijuana use was not a material factor in reaching a determination of
15 disability. Tr. 27.

16 ²The Purpose and Intent section introduction to the medical marijuana statute
17 in Washington State provide:

18 The legislature finds that:

19 (a) There is medical evidence that some patients with terminal or
20 debilitating medical conditions may, under their health care
21 professional's care, benefit from the medical use of cannabis. Some of
22 the conditions for which cannabis appears to be beneficial include, but
23 are not limited to:

- 24 (i) Nausea, vomiting, and cachexia associated with cancer, HIV-
25 positive status, AIDS, hepatitis C, anorexia, and their treatments;
26 (ii) Severe muscle spasms associated with multiple sclerosis,
27 epilepsy, and other seizure and spasticity disorders;
28 (iii) Acute or chronic glaucoma;
(iv) Crohn's disease; and
(v) Some forms of intractable pain.

1 establish "clear and convincing" reasons supported by substantial evidence. See
2 *Lester*, 81 F.3d at 834. The ALJ erred by discrediting Plaintiff's allegations related
3 to the severity of her symptoms.

4 **B. Medical Opinions**

5 Plaintiff argues that the ALJ erred by failing to consider the opinions from
6 Kari Heistand, M.D., Phillip Rodenberger, M.D., Kimberly Humann, M.D., E.G.
7 Tupper, M.D., and Mark B. Whitehill, Ph.D. ECF No. 21 at 7-11. The Defendant
8 responds that the ALJ's failure to specifically address these opinions was harmless
9 error because the determination of disability is solely within the province of the
10 ALJ and because the limitations are reflected in Plaintiff's RFC. ECF No. 23 at
11 10-15. The Defendant is incorrect on both counts.

12 As a general rule, more weight should be given to the opinion of a treating
13 source than to the opinion of doctors who do not treat the claimant. *Lester*, 81 F.3d
14 at 830. Where the treating doctor's opinion is not contradicted by another doctor, it
15 may be rejected only for "clear and convincing" reasons. *Id.* Where the treating
16 doctor's opinion is contradicted by another doctor, the ALJ may not reject this
17 opinion without providing "specific and legitimate reasons" supported by
18 substantial evidence in the record. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
19 1983).

20 Moreover, in disability benefits cases, physicians may render medical,
21 clinical opinions, or they may render opinions on the ultimate issue of disability -
22 the claimant's ability to perform work. *Reddick*, 157 F.3d at 725. An ALJ is not
23 bound by the uncontroverted opinions of the claimant's physicians on the ultimate
24 issue of disability, but the ALJ cannot reject the opinions without providing clear
25 and convincing reasons. *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).
26 As such, a treating physician's opinion on disability, even if controverted, can be
27 rejected only with specific and legitimate reasons supported by substantial
28 evidence in the record. *Lester*, 81 F.3d at 830.

1 A review of the medical reports that were ignored by the ALJ reveal
2 Defendant's suggestion that the opinions were incorporated into Plaintiff's RFC is
3 wholly without merit.

4 **(1) Kari Heistand, M.D.**

5 Psychiatrist Kari Heistand, M.D., examined Plaintiff on August 24, 2010.
6 Tr. 497-502. Dr. Heistand noted while Plaintiff presented a "diagnostic
7 challenge," it was "clear" Plaintiff has signs of Post-Traumatic Stress Syndrome
8 and major depression. Tr. 501. After an hour long examination, Dr. Heistand
9 observed that Plaintiff's symptoms included, "poverty of thought, flat affect,
10 amotivation, general decline in her ability to function over the years, [along with]
11 hallucinations and paranoia that are present independent of immediate effects of
12 substance intoxication and worsening of depression" Tr. 501.

13 Dr. Heistand agreed with Dr. Rodenberger that the "most reasonable"
14 diagnoses were schizoaffective disorder and PTSD. Tr. 501. Finally, Dr. Heistand
15 opined that Plaintiff was not capable of sustaining employment. "I do feel that due
16 to the positive and negative symptoms of schizophrenia, PTSD that includes
17 difficulty being around others and due to difficult to treat depression she is unlikely
18 to be able to work enough to support herself through gainful employment." Tr.
19 501.

20 **(2) Phillip Rodenberger, M.D.**

21 Psychiatrist Phillip Rodenberger, M.D., examined Plaintiff on October 22,
22 2009. Tr. 628-30. Dr. Rodenberger noted that Plaintiff looked "much older than
23 her stated age." Tr. 628. He observed Plaintiff as "sad, constricted, but not
24 unpleasant appearance." Tr. 629. Dr. Rodenberger expressed wonder that
25 Plaintiff's previous diagnoses consisted of "major depression and anxiety state"
26 and failed to reflect a schizoaffective disorder:

27 I'm not sure why this woman has not carried the schizophrenic or
28 schizoaffective diagnosis, nor why she has not been on antipsychotic

1 medications. She has very much the look of somebody who is
2 chronically schizophrenic, and because of the mood disturbance, I
3 have chosen to call her schizoaffective, although she could be
4 regarded as chronic paranoid schizophrenia, or chronic
5 undifferentiated schizophrenia. In any case, I think an antipsychotic
6 medication is indicated.

6 Tr. 629-30. Dr. Rodenberger recommended Plaintiff begin taking risperidone, an
7 antipsychotic drug. Tr. 629.

8 **(3) Kimberly Humann, M.D.**

9 Psychiatrist Kimberly Humann, M.D., examined Plaintiff on March 31,
10 2009, for ninety minutes. Tr. 651-53. Dr. Humann observed Plaintiff's mood as
11 depressed and anxious, and her affect as congruent, "appears stressed and
12 depressed." Tr. 652. Dr. Humann diagnosed Plaintiff with PTSD, chronic, and
13 major depressive disorder, moderate, recurrent. Tr. 652. Dr. Humann concluded,
14 "Patient meets criteria for severe complicated PTSD which is quite disabling." Tr.
15 653.

16 **(4) E.G. Tupper, M.D.**

17 On August 17, 2009, E.G. Tupper, a family practice physician, completed a
18 Physical Evaluation form. Tr. 512-17. Dr. Tupper opined that Plaintiff's brain
19 tumor and memory loss would result in the inability to perform "all work
20 activities." Tr. 514. Dr. Tupper also assessed Plaintiff's overall work level as
21 limited to "one hour" and the doctor noted that Plaintiff had "difficulty following
22 orders; very limited strength." Tr. 514. Dr. Tupper also checked "sedentary" work
23 level, but wrote a note that Plaintiff was weak, and could work only 1-2 hours. Tr.
24 514.

25 **(5) Mark B. Whitehill, Ph.D.**

26 Mark B. Whitehill, Ph.D., completed a Psychological/Psychiatric Evaluation
27 of Plaintiff on October 11, 1996. Tr. 215-18. Dr. Whitehill assessed Plaintiff with
28 severe impairments of depressed mood, global illness, and in several social factors.

1 Tr. 216-17. He also found Plaintiff had several marked cognitive impairments. Tr.
2 217. He recommended hospitalization for psychiatric evaluation, medication and
3 participation in an abused women's group. Tr. 218.

4 **(6) Jay M. Toews, Ph.D.**

5 Plaintiff argues that the ALJ erred by failing to consider all the opinions
6 from Jay M. Toews, Ph.D. ECF No. 21 at 16. Plaintiff asserts that the ALJ gave
7 "great weight" to Dr. Toews' opinion. ECF No. 21 at 16. However a review of the
8 ALJ's opinion reveals several paragraphs summarizing Dr. Toews' opinion, but no
9 statement reflecting the weight the ALJ assigned to that opinion. Tr. 26-27.

10 Dr. Toews examined Plaintiff on August 30, 2008, and administered several
11 objective medical tests. Tr. 487-95. Plaintiff's MMPI-2 test results were deemed
12 "patently invalid." Tr. 490. Dr. Toews explained Plaintiff's clinical profile is most
13 consistent with individuals who respond in a random manner without regard to
14 item content. Tr. 490. "Usually these individuals are patently non-compliant, or
15 are malingering." Tr. 490. He concluded, "[i]t is not possible to develop any
16 clinical hypotheses from the MMPI-2 profile." Tr. 491. Dr. Toews observed that
17 Plaintiff "did not appear to be motivated or interested in the examination," she had
18 low average range of intelligence, and she appeared "clinically depressed." Tr.
19 490. Dr. Toews opined that Plaintiff would "not interact well with the general
20 public, [and she] would have moderate to severe difficulties interacting with
21 coworkers and supervisors." Tr. 490-91.

22 On September 22, 2008, Dr. Toews completed a check-the-box Medical
23 Source Statement of Ability to Do Work-Related Activities (Mental). Tr. 493-95.
24 In that form, Dr. Toews indicated that Plaintiff would have marked difficulty in
25 both making judgments on complex work-related decisions and in interacting
26 appropriately with the public. Tr. 493-94. Dr. Toews opined that Plaintiff would
27 have between a moderate and marked difficulty in: (1) carrying out complex
28 instructions; (2) understanding and remembering complex instructions; and (3)

1 interacting appropriately with co-workers. Tr. 493-94. Dr. Toews also assessed
2 Plaintiff with moderate impairments in the ability to interact appropriately with
3 supervisors and in the ability to respond appropriately to usual work situations and
4 to changes in a routine work setting. Tr. 494.

5 While the ALJ discussed Dr. Toews' opinion, he failed to explicitly weigh
6 the opinions, or provide reasons for rejecting the limitations assessed by Dr.
7 Toews. Defendant responds that the ALJ simply, albeit silently, resolved the
8 contradiction between the two evaluations and "appropriately relied upon the more
9 reasoned opinion." ECF No. 23 at 14. The ALJ's decision "must stand or fall
10 with the reasons set forth in the ALJ's decision, as adopted by the Appeals
11 Council." *Barbato v. Comm'r of Soc. Sec.*, 923 F. Supp. 1273, 1276 n.2 (C.D. Cal.
12 1996). Notwithstanding the Defendant's offered *post hoc* rationalization, the ALJ
13 provided no explanation for rejecting Dr. Toews' opinions related to Plaintiff's
14 multiple moderate and marked limitations.

15 The record supports the Plaintiff's assertion that the ALJ erred by failing to
16 address and properly credit several significant, probative medical opinions.

17 **C. Remedy**

18 The decision whether to remand for further proceedings or for immediate
19 payment of benefits is within the discretion of the court. *Harman*, 211 F.3d at
20 1178. The issue turns on the utility of further proceedings. A remand for an award
21 of benefits is appropriate when no useful purpose would be served by further
22 administrative proceedings or when the record has been fully developed and the
23 evidence is insufficient to support the ALJ's decision. *Strauss*, 635 F3d at 1138.

24 Plaintiff argues that her subjective testimony, as well as the improperly
25 rejected opinions discussed above, should be credited as true and the case should
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1 be remanded for an immediate award of benefits.³ ECF No. 21 at 9-14; 20.
2 Defendant asserts remanding for an award of benefits is an inappropriate remedy
3 because this “is not a case in which the evidence is so one-sided that the court can
4 conclude there are no issues better resolved by the fact finder designated by law.”
5 ECF No. 23 at 20. Defendant misunderstands the “credit as true” doctrine.

6 Under the "credit as true" doctrine, evidence should be credited and an
7 immediate award of benefits directed where "(1) the ALJ failed to provide legally
8 sufficient reasons for rejecting the evidence; (2) there are no outstanding issues
9 that must be resolved before a determination of disability can be made; and (3) it is
10 clear from the record that the ALJ would be required to find the claimant disabled
11 were such evidence credited." *Harman*, 211 F.3d at 1178, quoting *Smolen v.*
12 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The "credit as true" doctrine is not a
13 mandatory rule in the Ninth Circuit, but leaves the court flexibility in determining
14 whether to enter an award of benefits upon reversing the Commissioner's decision.
15 *Connett v. Barnhart*, 340 F3d 871, 876 (9th Cir 2003), citing *Bunnell*, 947 F.2d at
16 348.

17 Significantly, the Ninth Circuit has also considered other factors in
18 determining whether to employ the credit as true doctrine. *See Vasquez v. Astrue*,
19 572 F.3d 586, 593-594 (9th Cir. 2009). In *Vasquez*, despite outstanding issues
20 related to whether the claimant was disabled, the Ninth Circuit exercised its
21 discretion and directed the Commissioner to credit the claimant's testimony as true
22 because the claimant was of advanced age (58 years old) and she had already
23 experienced a "severe" delay (seven years) in her application. *Vasquez*, 572 F.3d
24

25 ³As Plaintiff points out, ALJ Atkins failed to comply with the remand order
26 from the Appeals Council. However, this court may not award benefits punitively
27 and, thus, performs a "credit-as-true" analysis to determine if Plaintiff is disabled.
28 *Strauss v. Comm'r of Soc. Sec. Admin.*, 635 F3d 1135, 1138 (9th Cir 2011).

1 at 593-94. The *Vasquez* court noted that “the purpose of the credit-as-true rule is
2 to discourage ALJs from reaching a conclusion about a claimant's status first, and
3 then attempting to justify it by ignoring any evidence in the record that suggests an
4 opposite result.” *Id.*, citing *Varney v. Sec’y of Health & Human Svcs*, 859 F.2d
5 1396, 1398 (9th Cir. 1988).

6 Plaintiff in this case is similarly situated to the *Vasquez* claimant: Plaintiff
7 applied for benefits in July, 2005, more than eight years ago, and at present is 57
8 years old, which is deemed an “advanced age” under the regulations. 20 CFR §
9 404.1563(e) (“We consider that at advanced age (age 55 or older), age significantly
10 affects a person's ability to adjust to other work.”)

11 The unusual circumstances presented in this case justify crediting as true the
12 Plaintiff’s subjective testimony, as well as the medical opinions from Kari
13 Heistand, M.D., Phillip Rodenberger, M.D., Kimberly Humann, M.D., and E.G.
14 Tupper, M.D.⁴ See *Harman*, 211 F3d at 1179; *Smolen*, 80 F3d at 1281-83; *Varney*
15 *v. Sec’y of Health & Human Servs.*, 859 F2d, 1396, 1398 (9th Cir 1988).

16 Moreover, this court finds that outstanding issues need not be resolved
17 before a determination of disability can be made, and that the record is clear that
18 the ALJ would be required to find Plaintiff disabled if the evidence is credited.
19 The vocational expert at the first hearing indicated that if the hypothetical
20 limitations included fatigue, discomfort, and unpredictable absences that could rise

21
22 ⁴The ALJ erred by failing to address, and thus rejecting, the medical
23 opinions listed above, save the opinion from Dr. Whitehall. The court notes that
24 Dr. Whitehall’s evaluation was conducted approximately eight years prior to
25 Plaintiff’s alleged onset date, and thus should not be considered in this application.
26 See 20 C.F.R. § 416.912(d)(2) (SSA will develop medical history for “at least the
27 12 months preceding the month in which you file your application unless there is a
28 reason to believe that development of an earlier period is necessary.”)

1 to the level of 4-8 hours per week, the Plaintiff could not sustain any substantial
2 gainful employment. Tr. 774.

3 Because the evidence establishes that Plaintiff would be unable to maintain
4 employment while managing her pain and fatigue, as well as her chronic
5 schizoaffective disorder, remand for further administrative proceedings serves no
6 useful purpose and is unwarranted. Remanding a disability claim for further
7 proceedings can delay much needed income for claimants who are unable to work
8 and are entitled to benefits, often subjecting them to "tremendous financial
9 difficulties while awaiting the outcome of their appeals and proceedings on
10 remand." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004), quoting *Varney*,
11 859 F.2d at 1398.

12 As the Ninth Circuit has pointed out, if valid grounds exist for rejecting
13 evidence, "it is both reasonable and desirable to require the ALJ to articulate them
14 in the original decision." *Harman*, 211 F.3d at 1179 (quoting *Varney v. Sec'y of*
15 *Health and Human Serv.*, 859 F.2d 1396, 1399 (9th Cir. 1988)). The ALJ has
16 reviewed this case on two separate occasions, two years apart. The ALJ failed to
17 provide valid reasons for rejecting the testimony of Plaintiff's subjective
18 complaints and the multiple medical opinions that indicate Plaintiff is disabled.

19 Considering the entire record, the court is persuaded that applying the credit
20 as true rule and remanding for benefits is the proper course in this case. *See*
21 *Varney*, 859 F.2d at 1399 (noting that it is within the Court's discretion to remand
22 for an award of benefits and finding it appropriate when further proceedings would
23 delay the receipt of benefits). To remand this matter to consider for a third time
24 the medical opinions and Plaintiff's credibility would subject Plaintiff to a
25 disability system of "heads we win; tails, let's play again." *Id.* (quoting *Moisa v.*
26 *Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004)).

27 CONCLUSION

28 Having reviewed the record and the ALJ's findings, this court concludes the

1 ALJ's decision is not supported by substantial evidence and is based on legal error.
2 Because no remaining issues exist that must be resolved and it is clear from the
3 record that Plaintiff is entitled to disability benefits, the court **REMANDS** to the
4 Commissioner of Social Security for an immediate award of benefits.
5 Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is
8 **GRANTED** and the matter is remanded to the Commissioner for an immediate
9 award of benefits;

10 2. Defendant's Motion for Summary Judgment, **ECF No. 23**, is
11 **DENIED**;

12 3. An application for attorney fees may be filed by separate motion.

13 The District Court Executive is directed to file this Order and provide a copy
14 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and
15 the file shall be CLOSED.

16 DATED November 26, 2013.

A handwritten signature in black ink, appearing to read "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE