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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 AFTON DANIELLE SWALLS,

8 Plaintiff,

9 v.

10 CAROLYN COLVIN, Acting  
11 Commissioner of Social Security,

12 Defendant.

No.: 4:15-CV-5064-EFS

**ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT, AND REMANDING FOR  
ADDITIONAL PROCEEDINGS**

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14 Both parties in this social-security appeal seek summary judgment in  
15 their favor. ECF Nos. 12 & 22. Plaintiff Afton Danielle Swalls appeals  
16 the Administrative Law Judge's (ALJ) denial of benefits. ECF No. 12. Ms.  
17 Swalls contends the ALJ erred because he 1) failed to fully accept the  
18 opinions of her medical providers, Dr. Sergio Flores, Dr. Jan Kouzes, Dr.  
19 Laurie Zimmerman, and Ms. T. Tanninen, 2) improperly rejected Ms. Swalls'  
20 testimony regarding the severity and limiting effects of her impairments,  
21 and 3) the ALJ failed to include all of Ms. Swalls' limitations into the  
22 hypothetical posed to the vocational expert. The Commissioner of Social  
23 Security ("Commissioner") asks the Court to affirm the ALJ's decision that  
24 Mr. Swalls is capable of performing substantial gainful activity in a  
25 field for which a significant number of jobs exist in the national economy.  
26 For the reasons set forth below, the Court remands this matter to require  
27 the ALJ to fully consider Dr. Zimmerman's, Dr. Kouzes', and Ms. Tanninen's  
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1 opinions regarding mental-health conditions and Ms. Swalls' testimony  
2 regarding the severity and limiting effects of her mental-health  
3 conditions. Therefore, the Court grants in part Ms. Swalls' motion and  
4 denies the Commissioner's motion.

5 **A. Statement of Facts<sup>1</sup>**

6 At the age of 19, Ms. Swalls suffered serious physical injuries in  
7 a car accident. Transcript of admin. hrg. ("Tr.") at 255 & 443-466. Ms.  
8 Swalls had a pelvic rod inserted into her right iliac/pelvic bone, screws  
9 placed in the medial compartment of her left foot, and her left orbit and  
10 jaw reconstructed. Tr. at 450-53. She also suffered rib fractures, facial  
11 swelling, ankle injuries, and loss of consciousness. *Id.* As a result of  
12 these injuries, Ms. Swalls continues to have lower back, tailbone, pelvis,  
13 and ankle pain. Tr. at 94. Ms. Swalls reports that her pain is most  
14 relieved by lying down. Tr. at 95.

15  
16 Prior to the accident, Ms. Swalls, who has a GED, worked as a child-  
17 care provider. Tr. at 91 & 245. Since the accident, Ms. Swalls has not  
18 been employed. She cares for her daughter, whom was born in May 2013.

19  
20 When she has had health insurance, Ms. Swalls has sought pain  
21 management through medication to relieve the pain experienced because of  
22 the injuries suffered in the car accident. However, Ms. Swalls has not  
23 done physical therapy since 2003. Pain management has been provided by  
24 providers in Yakima, Spokane, and Tri-Cities. Michael Urakawa, PA-C, who  
25

26  
27 <sup>1</sup> The facts are only briefly summarized. Detailed facts are  
28 contained in the administrative hearing transcript, the ALJ's decision,  
the parties' briefs, and the underlying records.

1 is based in Yakima, treated Ms. Swalls in the winter and spring of 2010  
2 for back and ankle pain; Mr. Urakawa's notes indicate that Ms. Swalls  
3 reported she was riding, grooming, and exercising her race horses. Tr. at  
4 419.

5 Then in June 2010, Dr. Sergio Flores evaluated Ms. Swalls and  
6 determined based on her reported activity and pain that she was unable to  
7 work and that she needed medical assistance with her pain and psychiatric  
8 assistance; Dr. Flores recommended that she be re-evaluated in six to  
9 twelve months. Tr. at 412-14.

10 Ms. Swalls also sought medication to treat anxiety and depression.  
11 Since at least 2010, Dr. Zimmerman treated Ms. Swalls' mental-health  
12 conditions. Dr. Zimmerman diagnosed Ms. Swalls with:  
13

- 14 • major depressive disorder, recurrent,
- 15 • anxiety disorder (not otherwise specified),
- 16 • posttraumatic stress disorder,
- 17 • panic and social phobia,
- 18 • methamphetamine dependence in early remission,
- 19 • cognitive disorder (not otherwise specified),
- 20 • status post-traumatic brain injury,
- 21 • possible attention deficit hyperactivity disorder (not  
22 otherwise specified),
- 23 • chronic pain, and
- 24 • Hepatitis C.

25 Tr. 288 & 291. In July 2010, Dr. Zimmerman noted that Ms. Swalls was  
26 depressed and anxious although she was taking her anti-depressant  
27 medication on a regular basis. Tr. at 289-90.

28 Two months later, Ms. Swalls had a MRI of her lumbar that revealed  
mild disc bulging at the L3/L4 without nerve root impingement or stenosis,  
and a posterior annular fissure near the midline at L5/S1, with no stenosis

1 observed. Tr. at 312. Then in November 2010, Ms. Swalls was treated at  
2 Tri-Cities Community Health for low back and ankle pain. Tr. at 305.

3 In January 2011, Dr. Zimmerman prescribed Ms. Swalls a trial of  
4 Pristiq and Valium to assist with her mental-health conditions. Tr. at  
5 288. That same month, Ms. Swalls visited PA-C Urakawa, who noted that Ms.  
6 Swalls reported that the medication was controlling her pain. Tr. at 328.

7  
8 The next month, Dr. Jan Kouzes, Ed.D. completed a psychological  
9 evaluation for the Department of Social and Health Services. Tr. at 294.  
10 Dr. Kouzes marked that Ms. Swalls suffers from moderate to marked  
11 depression. Tr. at 295. Dr. Kouzes opined that Ms. Swalls was "depressed  
12 and unlikely to be able to work until she is more stable with her mental  
13 health. She notes anxiety and depression sx that appear to be severe."  
14 Tr. at 297. That same month Ms. Swalls visited PA-C Urakawa, who noted  
15 that Ms. Swalls was tearful because of a panic attack she experienced that  
16 day and that her pain was a 4 out of 10. Two months later, PA-C Urakawa  
17 noted that Ms. Swalls' reported pain was 3 out of 10 and that she was  
18 upbeat. Tr. at 322

19  
20 A May 2011 medical record indicated that Ms. Swalls was anxious and  
21 depressed and that counseling would be of benefit. Tr. at 304. The next  
22 month, PA-C Urakawa noted that Ms. Swalls had been exercising, she  
23 registered for dental-assistant schooling, and her pain was under control.  
24 Tr. at 319.

25 In August 2011, Ms. Swalls was evaluated by Dr. Mary Murphy, who  
26 diagnosed her with lumbalgia, chronic pain syndrome, and posttraumatic  
27 stress disorder. Tr. at 316-17. And the next month, Ms. Swalls sought  
28 treatment for her pain. Tr. at 301. The following month, Dr. Daniel Kwon

1 assessed Ms. Swalls with low-back and bilateral-ankle pain and  
2 posttraumatic stress disorder. Tr. at 314-15.

3 In December 2011, Ms. Swalls' mother completed a third-party function  
4 report, indicating that she assists Ms. Swalls with cleaning her apartment  
5 and meals because Ms. Swalls suffers from lack of energy, ankle and back  
6 pain, and double vision in her right eye. Tr. at 253-61.

7 Medical records in 2012 indicate that Ms. Swalls began self-  
8 mutilating herself; this conduct purportedly began because Ms. Swalls was  
9 no longer taking mental-health medication as her health insurance had  
10 lapsed. Tr. at 336-43 & 354. In April 2012, Dr. Penny Stringer treated  
11 Ms. Swalls for anxiety and chronic pain; she prescribed Celexa and  
12 clonidine and recommended that Ms. Swalls see a mental-health counselor.  
13 Tr. at 357. Later that month, Ms. Swalls was treated for MRSA. Tr. at 361  
14 & 394.

15 Also in April, Ms. Swalls began traveling to Spokane to be treated  
16 at Inland Neurosurgery and Spine (IN&S) for her back, pelvis, and ankle  
17 pain. Tr. at 535 & 540-42. A mental-health evaluation the next month  
18 indicates that Ms. Swalls reported that she stopped receiving mental-  
19 health treatment in December 2010 as she lost her medical coverage and  
20 she was currently experiencing no energy or motivation and that she was  
21 depressed; the evaluator recommended that Ms. Swalls begin mental-health  
22 counseling and prescribed medication to treat the diagnosed mental-health  
23 conditions. Tr. at 395-97. There is no indication in the record that Ms.  
24 Swalls participated in mental-health counseling. Tr. at 400.

25 An MRI in July 2012 revealed that Ms. Swalls had a mild disc bulge  
26 at the L3-4 disc and mild facet arthrosis. Tr. at 526. That month she also  
27  
28

1 visited IN&S for pain in her tailbone, buttock, and ankle due to increased  
2 walking and lifting. Tr. at 527.

3 Ms. Swalls returned to Dr. Zimmerman in August 2012, reporting that  
4 she was doing better mentally but that she experienced anxiety and panic  
5 attacks if she went out in public. Tr. 405. Dr. Zimmerman prescribed  
6 Valium. Tr. at 405.

7  
8 In August and September 2012, Ms. Swalls received a sacral coccygeal  
9 joint injection at IN&S, and reported that the methadone and the injection  
10 improved her ability to function and lowered her pain. Tr. at 518.

11 Ms. Swalls learned she was pregnant in the fall of 2012. During the  
12 last trimester of her pregnancy, Ms. Swalls reported increased pain. Tr.  
13 at 490, 493-510.

14 In mid-April 2013, Dr. Zimmerman evaluated Ms. Swalls. Tr. at 404.  
15 Ms. Swalls reported that she was not taking her mental-health medication  
16 as she was pregnant and was having trouble with focus, fatigue, depression,  
17 and anxiety. Dr. Zimmerman reported, "Mood is mildly depressed and  
18 anxious. Speech is normal in rate and pattern and goal directed. Her  
19 affect was appropriate. There is no evidence of psychosis. There is no  
20 suicidal or homicidal ideation. Insight and judgment are fair." *Id.*

21  
22 Four days following this appointment. Dr. Zimmerman completed a  
23 Mental Medical Source Statement. Tr. at 366-68. Dr. Zimmerman noted that  
24 Ms. Swalls was markedly limited in the areas of: ability to understand  
25 and remember detailed instructions, the ability to carry out detailed  
26 instructions, the ability to perform activities within a schedule,  
27 maintain regular attendance and be punctual within customary tolerances,  
28 the ability to complete a normal work-day and workweek without

1 interruptions from psychologically based symptoms and to perform at a  
2 consistent pace without an unreasonable number and length of rest periods,  
3 and the ability to accept instructions and respond appropriately to  
4 criticism from supervisors. *Id.*

5 Ms. Swalls had her daughter by C-section on May 1, 2013. Two weeks  
6 later she visited IN&S in Spokane, seeking to increase the amount of  
7 methadone to help with pain. Tr. at 487. Also later in May 2013, Dr.  
8 Zimmerman noted that Ms. Swalls reported the Valium was helping with her  
9 panic attacks and her focus, and Dr. Zimmerman also prescribed Adderall  
10 XR to help Ms. Swalls' ability to focus. Tr. at 403.

12 Ms. Swalls had her methadone refilled in June, commenting that she  
13 had more pain in her pelvis due to carrying and lifting her 6-week old  
14 baby and that her mother helps her out with some household chores. Tr. at  
15 483.

16 In July, Ms. Swalls was treated for pain management, Tr. at 371, and  
17 for her depression and anxiety, Tr. at 402. She also began attending  
18 chemical-dependency classes. In August 2013, Ms. Swalls requested more  
19 methadone to relieve her back pain due to carrying her baby. Tr. at 479.

21 In September 2013, Dr. Zimmerman evaluated Ms. Swalls and noted that  
22 Ms. Swalls, who appeared somewhat anxious and discouraged, indicated that  
23 she was doing well and attending chemical-dependency classes. Tr. at 401.  
24 Dr. Zimmerman continued Ms. Swalls on Valium and Pristiq. *Id.* Ms. Swalls  
25 also had her pain management checked at IN&S; the doctor noted that Ms.  
26 Swalls did not exhibit any aberrant behavior. Tr. at 472-74.

27 In October 2013, a doctor at IN&S evaluated Ms. Swalls for pain.  
28 Ms. Swalls reported more pain in her tailbone region but that she is able

1 to care for her baby. Tr. at 468-69. She was continued on methadone. Tr.  
2 at 469.

3 The next month, T.K. Tanninen, LMHC, completed a psychological  
4 evaluation, concluding that Ms. Swalls is unable to "adapt outside her  
5 home. We have her on a 3 yr rehabilitation plan but then after that we'll  
6 have [indecipherable] due to brain trauma." Tr. at 546. Ms. Tanninen  
7 opined that Ms. Swalls would miss on average three days of work per month  
8 and that it was more probable than not that Ms. Swalls would miss work  
9 due to mental impairments. *Id.*

10  
11 At the November 2013 administrative hearing, Ms. Swalls testified.  
12 She stated that was living in a ground-floor apartment with her six-month  
13 daughter. Tr. at 90-91.

14 **B. Procedural History**

15 Ms. Swalls, through counsel, applied for supplemental security  
16 income on October 26, 2011.<sup>2</sup> Tr. 13, 151, & 179-80. She initially alleged  
17 an onset date of March 2, 2002; at the administrative hearing, the onset  
18 date of disability was changed to October 26, 2011. Tr. at 13 & 88.

19  
20 Ms. Swalls' application was denied initially and upon  
21 reconsideration. Tr. at 162, 178, 181, & 186. At the November 2013  
22 administrative hearing before ALJ James Sherry, Ms. Swalls and vocational  
23 expert Daniel McKinney, Sr. testified. Tr. at 82-118. In a February 2014  
24 written decision, the ALJ determined that Ms. Swalls had not engaged in  
25 substantial gainful activity and she had severe impairments that prevented  
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27 <sup>2</sup> Ms. Swalls had previously filed applications for supplemental security  
28 income, which had also been denied. Tr. at 39-40.



1 her from performing past relevant work: status post-accident injuries,  
2 including left ankle, left sacral, and pelvic fractures; coccydynia;  
3 sacroiliac joint dysfunction; lumbalgia; hepatitis C; traumatic brain  
4 injury with resultant cognitive disorder; depression; panic/anxiety  
5 disorder; personality disorder; and substance abuse. Tr. at 16. The ALJ  
6 proceeded to find that Mr. Swalls' impairments do not meet or medically  
7 equal the severity of any listed impairments. Tr. at 18. The ALJ determined  
8 that Mr. Swalls has the residual functional capacity to perform a limited  
9 range of light work: work that does not involve lifting or carrying more  
10 than 10 pounds frequently or more than 20 pounds occasionally; standing  
11 and/or walking for more than a total of 2 hours during an 8-hour workday  
12 with normal breaks, more than occasional balancing, stooping, kneeling,  
13 crouching, or crawling, more than occasional climbing of ramps or stairs,  
14 any climbing of ladders, ropes, or scaffolds; any exposure to hazards; or  
15 the performance of more than lower-level-semi-skilled tasks that do not  
16 require more than casual, superficial contact with the general public.  
17 Tr. at 19. Based on this assessment, which was presented to the vocational  
18 expert, the ALJ concluded Ms. Swalls can perform other work existing in  
19 significant numbers in the national economy, such as small products  
20 assembler, grader/sorter, and hand packager or packing inspector, and thus  
21 she is not considered disabled. Tr. at 25-26.

24 The Appeals Council denied review of the ALJ's decision. Tr. at 9.  
25 Thereafter, Ms. Swalls filed this lawsuit, appealing the ALJ's decision.  
26 ECF No. 3. The parties then filed the instant summary-judgment motions.  
27 ECF Nos. 12 & 14.

1 **C. Disability Determination**

2 A "disability" is defined as the "inability to engage in any  
3 substantial gainful activity by reason of any medically determinable  
4 physical or mental impairment which can be expected to result in death or  
5 which has lasted or can be expected to last for a continuous period of  
6 not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

7 The decision-maker uses a five-step sequential evaluation process to  
8 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

9 Step one assesses whether the claimant is engaged in substantial  
10 gainful activities during the relevant period. If she is, benefits are  
11 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision-  
12 maker proceeds to step two.

13 Step two assesses whether the claimant has a medically severe  
14 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),  
15 416.920(c). If the claimant does not have a severe impairment or  
16 combination of impairments, the disability claim is denied. If the  
17 impairment is severe, the evaluation proceeds to the third step.

18 Step three compares the claimant's impairment with a number of listed  
19 impairments acknowledged by the Commissioner to be so severe as to preclude  
20 substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App.  
21 1, 416.920(d). If the impairment meets or equals one of the listed  
22 impairments, the claimant is conclusively presumed to be disabled. If the  
23 impairment does not meet or equal one of the listed impairments, the  
24 evaluation proceeds to the fourth step.

25 Step four assesses whether the impairment prevents the claimant from  
26 performing work she has performed in the past. This includes determining  
27

1 the claimant's residual functional capacity. 20 C.F.R. §§ 404.1520(e),  
2 416.920(e). If the claimant is able to perform her previous work, she is  
3 not disabled. If the claimant cannot perform this work, the evaluation  
4 proceeds to the fifth step.

5 Step five, the final step, assesses whether the claimant can perform  
6 other work in the national economy in view of her age, education, and work  
7 experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); see *Bowen v. Yuckert*,  
8 482 U.S. 137 (1987).

9 The burden of proof shifts during this sequential disability  
10 analysis. The claimant has the initial burden of establishing a prima  
11 facie case of entitlement to disability benefits. *Rhinehart v. Finch*, 438  
12 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if she  
13 establishes that a physical or mental impairment prevents her from  
14 engaging in her previous occupation. The burden then shifts to the  
15 Commissioner to show 1) the claimant can perform other substantial gainful  
16 activity, and 2) that a "significant number of jobs exist in the national  
17 economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
18 1498 (9th Cir. 1984). A claimant is disabled only if her impairments are  
19 of such severity that she is not only unable to do her previous work but  
20 cannot, considering her age, education, and work experiences, engage in  
21 any other substantial gainful work which exists in the national economy.  
22 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

23  
24  
25 **D. Standard of Review**

26 On review, the court considers the record as a whole, not just the  
27 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d 20,  
28 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.

1 1980)). The court upholds the ALJ's determination that the claimant is  
2 not disabled if the ALJ applied the proper legal standards and there is  
3 substantial evidence in the record as a whole to support the decision.  
4 *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. §  
5 405(g)); *Browner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th  
6 Cir. 1987) (recognizing that a decision supported by substantial evidence  
7 will be set aside if the proper legal standards were not applied in  
8 weighing the evidence and making the decision). Substantial evidence is  
9 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119  
10 n.10 (9th Cir. 1975), but less than a preponderance, *McAllister v.*  
11 *Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989); *Desrosiers v. Sec'y of*  
12 *Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such  
13 relevant evidence as a reasonable mind might accept as adequate to support  
14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations  
15 omitted). "[S]uch inferences and conclusions as the [ALJ] may reasonably  
16 draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d  
17 289, 293 (9th Cir. 1965). If the evidence supports more than one rational  
18 interpretation, the court must uphold the ALJ's decision. *Allen v.*  
19 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

## 22 **E. Analysis**

23 The Court addresses each of Ms. Swalls' challenges to the ALJ's  
24 decision.

### 25 **1. Medical Providers**

26 Ms. Swalls contends the ALJ erred by rejecting the opinions of  
27 medical providers Dr. Zimmerman (treating provider), Dr. Flores (examining  
28 provider), Dr. Kouzes (non-examining provider), and Ms. Tanninen

1 (examining provider), in regard to her mental-health and physical  
2 conditions.

3 As to Dr. Zimmerman, Ms. Swalls contends the ALJ improperly rejected  
4 her opinions without explanation. The Court agrees in part. Because Dr.  
5 Zimmerman is a treating physician, the ALJ was to give more weight to her  
6 opinion than to the opinion of doctors who do not treat Ms. Swalls unless  
7 the ALJ provided "clear and convincing" specific and legitimate reasons  
8 supported by substantial evidence for rejecting Dr. Zimmerman's opinions.  
9 See *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ detailed  
10 much information regarding Ms. Swalls' mental-health conditions and her  
11 appearances and presentation at appointments—information that, at least  
12 in part, conflicts with Dr. Zimmerman's conclusions in her April 2013  
13 Mental Medical Source Statement, wherein Dr. Zimmerman concludes that Ms.  
14 Swalls was markedly limited in the areas of: ability to understand and  
15 remember detailed instructions, the ability to carry out detailed  
16 instructions, the ability to perform activities within a schedule,  
17 maintain regular attendance and be punctual within customary tolerances,  
18 the ability to complete a normal work-day and workweek without  
19 interruptions from psychologically based symptoms and to perform at a  
20 consistent pace without an unreasonable number and length of rest periods,  
21 and the ability to accept instructions and respond appropriately to  
22 criticism from supervisors. Tr. at 366-68. Because Dr. Zimmerman was a  
23 treating physician, the ALJ was required to not only provide legitimate  
24 reasons supported by substantial evidence in the record for rejecting Dr.  
25 Zimmerman's ultimate conclusions but also *specific* reasons for rejecting  
26 Dr. Zimmerman's ultimate conclusions. The ALJ failed to mention Dr.  
27  
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1 Zimmerman in his opinion, let alone provide specific reasons supported by  
2 substantial evidence for rejecting Dr. Zimmerman's conclusions that Ms.  
3 Swalls was markedly limited in the listed abilities because of her mental-  
4 health conditions.

5         Although the ALJ provided specific reasons for giving little weight  
6 to the mental-health opinions of Dr. Kouzes and Ms. Tanninen (as to  
7 severity of conditions), the Court finds the ALJ must reconsider these  
8 reasons after fully considering Dr. Zimmerman's opinions. The Court  
9 declines to enter an award of benefits as requested by Ms. Swalls at this  
10 time. Instead, the Court defers to the ALJ to consider, based on the  
11 entire medical record, whether Ms. Swalls' mental-health conditions, when  
12 treated (albeit recognizing that Ms. Swalls may experience fluctuations  
13 in her mental-health conditions even when treated), affect her work  
14 activities to the extent opined by Dr. Zimmerman, Dr. Kouzes, and Ms.  
15 Tanninen. *See Scott v. Astrue*, 647 F.3d 734 (9th Cir. 2011) (addressing  
16 the fluctuating nature of some mental-health impairments).

17  
18         As to Dr. Flores, the ALJ discounted his opinion that Ms. Swalls is  
19 severely physically limited, i.e., unable to lift at least 2 pounds or  
20 unable to stand and/or walk, because he only evaluated Ms. Swalls once  
21 and this limited exposure was insufficient to provide a detailed,  
22 longitudinal picture of Ms. Swalls' physical impairments. Tr. at 23. The  
23 Court finds these explanations to be clear and convincing reasons for  
24 rejecting Dr. Flores' opinions. The ALJ's conclusion's regarding Ms.  
25 Swalls' physical limitations are consistent with the substantial evidence  
26 in the record, including Ms. Swalls' physical activities, lack of physical  
27 therapy since 2003, and MRI results.  
28

1           Accordingly, after a review of the medical records and the hearing  
2 testimony, the Court remands this matter to ALJ to fully consider the  
3 evidence pertaining to Ms. Swalls' mental-health conditions. In this  
4 regard, the Court grants Ms. Swalls' motion and denies the Commissioner's  
5 motion. But as to Ms. Swalls' physical conditions, the Court denies Ms.  
6 Swalls' motion and grants the Commissioner's motion.

## 7           **2. Ms. Swalls' Credibility**

8           A two-step analysis is used by the ALJ to assess whether a claimant's  
9 testimony regarding subjective pain or symptoms is credible. *Garrison v.*  
10 *Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). Step one requires the ALJ to  
11 determine whether the claimant presented objective medical evidence of an  
12 impairment, which could reasonably be expected to produce some degree of  
13 the pain or other symptoms alleged. *Lingenfelter v. Astrue*, 504 F.3d 1028,  
14 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.  
15 1996). Objective medical evidence of the pain or fatigue, or the severity  
16 thereof, need not be provided by the claimant. *Garrison*, 759 F.3d at 1014.  
17 If the claimant satisfies the first step of this analysis, and there is  
18 no evidence of malingering, the ALJ must accept the claimant's testimony  
19 about the severity of his symptoms unless the ALJ provides specific,  
20 clear, and convincing reasons for rejecting the claimant's symptom-  
21 severity testimony. *Id.* (recognizing that the clear-and-convincing  
22 standard is a demanding standard).

23           Ms. Swalls argues the ALJ failed to provide specific, clear, and  
24 convincing reasons for discrediting her testimony regarding the severity  
25 and limiting effects of her impairments. The Court finds, at step two of  
26 the analysis, the ALJ provided specific, clear, and convincing reasons  
27  
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1 for discrediting Ms. Swalls' testimony regarding the severity and limiting  
2 effects of her physical impairments, i.e., her hearing testimony on this  
3 point was "contradicted by statements she made to treating medical  
4 providers about her pain," Tr. at 20, inconsistent with her lifestyle and  
5 course of treatment, Tr. at 21, and the opinions of the State agency  
6 medical consultants, Tr. at 24.

7  
8 However, the ALJ must consider Ms. Swalls' reports concerning the  
9 limiting effects of her mental-health conditions in light of Dr.  
10 Zimmerman's conclusions and the remaining record. *See, e.g., Nguyen v.*  
11 *Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (recognizing the ALJ must  
12 consider the claimant's mental-health impairment in regard to his ability  
13 to seek and follow-through with rehabilitation). In these regards, the  
14 Court grants in part and denies in part both summary-judgment motions.

15 **C. Conclusion**

16 For the above-given reasons, the Court remands this matter for  
17 additional proceedings. Although the Court finds the ALJ erred, it is not  
18 clear from the record, as it currently stands, whether Ms. Swalls' mental-  
19 health conditions prevent her from performing substantial gainful  
20 employment. Further development is necessary for a proper determination.

21 The ALJ shall consider Dr. Zimmerman's opinions in light of the  
22 entire record, including Dr. Kouzes' and Ms. Tanninen's opinions and Ms.  
23 Swalls' self-reports, to determine Ms. Swalls' residual functional  
24 capacity. The ALJ shall direct Ms. Swalls to undergo a new consultative  
25 psychological examination, and can determine whether presentation of  
26 further evidence would be helpful in light of the passage of time since  
27 the November 2013 administrative hearing. If warranted, the ALJ shall  
28



1 elicit the testimony of a medical expert to assist the ALJ in formulating  
2 a new RFC determination. The ALJ shall present the new RFC assessment to  
3 a vocational expert to help determine whether Mr. Swalls is capable of  
4 performing any work existing in sufficient numbers in the national  
5 economy.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7
- 8 1. Ms. Swalls' Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**  
9 **IN PART** (remand) **and DENIED IN PART** (no immediate award of  
10 benefits).
  - 11 2. The Commissioner's Motion for Summary Judgment, **ECF No. 14**, is  
12 **DENIED**.
  - 13 3. This matter is **REMANDED** to the Commissioner for additional  
14 proceedings consistent with this Order.
  - 15 4. The Clerk's Office is to enter **Judgment** in favor of Ms. Swalls.
  - 16 5. An application for attorney fees may be filed by separate  
17 motion by Ms. Swalls.
  - 18 6. The case shall be **CLOSED**.

19 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order  
20 and provide copies to counsel and ALJ James Sherry.  
21

22 **DATED** this 19<sup>th</sup> day of February 2016.  
23

24 s/Edward F. Shea  
25 EDWARD F. SHEA  
26 Senior United States District Judge  
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