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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 AMANDA FUSELIER,

8 Plaintiff,

9 v.

10 CAROLYN COLVIN, Commissioner of
11 Social Security Administration,

12 Defendant.

No. 4:16-CV-5053-EFS

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

13
14 Before the Court are cross motions for summary judgment. ECF
15 Nos. 16 & 17. Plaintiff Amanda Fuselier appeals the denial of benefits
16 by the Administrative Law Judge (ALJ). ECF No. 16. Ms. Fuselier contends
17 the ALJ erred because she (1) improperly weighed the medical testimony;
18 (2) failed to consider lay testimony; and (3) improperly discredited Ms.
19 Fuselier. ECF No. 16. The Commissioner of the Social Security
20 Administration ("Commissioner") asks the Court to affirm the ALJ's
21 decision that Ms. Fuselier is not disabled under the Social Security
22 Act. ECF No. 17. After reviewing the record and relevant authority, the
23 Court is fully informed. For the reasons set forth below, the Court
24 remands for further proceedings.

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ORDER - 1

1 **A. Statement of Facts¹**

2 Ms. Fuselier was born in 1980. Administrative Record (AR) at 250.
3 She dropped out of school after eighth grade, but subsequently obtained
4 her GED. AR at 69. She has three biological children and one stepchild.
5 AR at 56. Ms. Fuselier has been diagnosed with a number of physical and
6 mental conditions including diabetes mellitus with peripheral
7 neuropathy; lumbago; major depressive disorder; generalized anxiety
8 disorder; posttraumatic stress disorder; borderline personality disorder
9 traits; and cannabis dependence with history of polysubstance
10 dependence. AR at 21. Ms. Fuselier's depression and anxiety seem to be
11 related, at least in part, to sexual abuse that she experienced as a
12 child. AR at 21. She has engaged in multiple suicide attempts, with the
13 most recent apparent attempt occurring in December 2013. AR at 62. Ms.
14 Fuselier manages her conditions using a variety of medications including
15 insulin, Gabapentin, Mirapex, Lamictal, Lexapro, and Risperidone. AR at
16 1160.
17

18 Ms. Fuselier has limited employment history. AR at 416-23. She has
19 worked primarily as a home caregiver, but it appears that these
20 positions primarily involved working for family members – Ms. Fuselier's
21 mother (Linda Bates) and aunt (Brenda Armijo). See, e.g., AR at 265,
22 274. Ms. Fuselier reports that she has not worked since approximately
23 April 2013, AR at 50, although the ALJ found that Ms. Fuselier's
24 reported income for 2013 casts some doubt on when she stopped working
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26 _____
27 ¹ The facts are only briefly summarized. Detailed facts are contained in
28 the administrative hearing transcript, the ALJ's decision, the
parties' briefs, and the underlying records.

1 and whether she was working at a substantial gainful activity level
2 during the reported period of disability.²

3 **B. Procedural History**

4 On March 19, 2012, Ms. Fuselier protectively filed for Disability
5 Insurance Benefits, AR at 250-57, and on March 21, 2012, she
6 protectively filed for Supplemental Insurance Benefits, AR at 258-64.
7 Her alleged onset date is April 1, 2010. AR at 250, 258. On July 12,
8 2012, Ms. Fuselier's claims were denied. AR at 203-06. On November 9,
9 2012, her claims were again denied on reconsideration. AR at 210-14.
10

11 On June 26, 2014, a hearing was held before ALJ Lori L. Freund. AR
12 at 39. Ms. Fuselier and Diane Kramer, an independent vocational expert,
13 testified. AR at 39. The ALJ determined that Ms. Fuselier has the severe
14 impairments of diabetes mellitus with peripheral neuropathy; lumbago;
15 major depressive disorder; generalized anxiety disorder; posttraumatic
16 stress disorder; borderline personality disorder traits; and cannabis
17 dependence with history of polysubstance dependence. AR at 21. The ALJ
18 determined, however, that Ms. Fuselier's impairments do not meet or
19 medically equal the severity of any listed impairments. AR at 25.
20 Despite her impairments, the ALJ also ultimately found that Ms. Fuselier
21 has the residual functional capacity to perform light work; lift and
22 carry up to 20 pounds occasionally and up to 10 pounds frequently; stand
23

24 ² Ms. Fuselier's mother, Linda Bates, filed a declaration indicating that
25 a large part of Ms. Fuselier's income for 2013, \$13,890, represented
26 gifts of money from Ms. Bates. AR at 323. On Ms. Fuselier's tax
27 returns, this money was reported as business income. AR at 327, 330. As
28 the issue of whether Ms. Fuselier participated in substantial gainful
activity was not clearly decided by the ALJ, see AR at 21, and is
therefore not properly before this Court, the Court declines to address
the issue. Nevertheless, as the Court is remanding this case to the
ALJ, the Court notes that the ALJ may need to resolve this issue should
it be determined that an award of benefits is otherwise appropriate.

1 and walk for a total of up to six hours in an eight-hour workday, and
2 sit up to six hours in an eight-hour workday; occasionally climb ramps
3 or stairs, but should avoid climbing ladders, ropes, or scaffolds; can
4 frequently balance but only occasionally stoop, kneel, crouch, or
5 crawl; should avoid concentrated exposure to extreme cold or heat, or
6 hazards such as unprotected heights or moving machinery; is limited to
7 simple, routine, and repetitive tasks; would need to work away from the
8 general public but is capable of superficial contact with a small number
9 of coworkers; can perform no tandem tasks; and is capable of occasional
10 changes in work duties, but should avoid production rate or pace work.
11
12 AR at 27. Based on this assessment, the testimony of the vocational
13 expert, and Ms. Fuselier's age, education, and work experience, the ALJ
14 concluded Ms. Fuselier could perform work that exists in sufficient
15 quantity in the national economy, such as office cleaner or mail clerk.
16 AR 30-31.

17
18 On May 30, 2016, the Appeals Council denied review of the ALJ's
19 decision. AR at 1-3. Ms. Fuselier then filed this lawsuit, appealing the
20 ALJ's decision. ECF No. 5. Subsequently, the parties filed the instant
21 summary judgment motions. ECF Nos. 16 & 17.

22 **C. Disability Determination**

23 A "disability" is defined as the "inability to engage in any
24 substantial gainful activity by reason of any medically determinable
25 physical or mental impairment which can be expected to result in death
26 or which has lasted or can be expected to last for a continuous period
27 of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A),
28 1382c(a)(3)(A). The decision maker uses a five-step sequential

1 evaluation process to determine whether a claimant is disabled. 20
2 C.F.R. §§ 404.1520, 416.920.

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

7 Step two assesses whether the claimant has a medically severe
8 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),
9 416.920(c). If the claimant does not have a severe impairment or
10 combination of impairments, the disability claim is denied. If the
11 impairment is severe, the evaluation proceeds to the third step.

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

19 Step four assesses whether the impairment prevents the claimant
20 from performing work he has performed in the past. This includes
21 determining the claimant's residual functional capacity. 20 C.F.R.
22 §§ 404.1520(e), 416.920(e). If the claimant is able to perform his
23 previous work, she is not disabled. If the claimant cannot perform this
24 work, the evaluation proceeds to the fifth step.

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

3 The burden of proof shifts during this sequential disability
4 analysis. The claimant has the initial burden of establishing a prima
5 facie case of entitlement to disability benefits. *Rhinehart v. Finch*,
6 438 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if she
7 establishes that a physical or mental impairment prevents her from
8 engaging in her previous occupation. The burden then shifts to the
9 Commissioner to show (1) the claimant can perform other substantial
10 gainful activity, and (2) a "significant number of jobs exist in the
11 national economy" that the claimant can perform. *Kail v. Heckler*, 722
12 F.2d 1496, 1498 (9th Cir. 1984). A claimant is disabled only if her
13 impairments are of such severity that she is not only unable to do her
14 previous work, but cannot – considering her age, education, and work
15 experience – engage in any other substantial gainful work that exists in
16 the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17
18 Here, the ALJ denied Ms. Fuselier's claims at step five after
19 finding that Ms. Fuselier could perform work that existed in sufficient
20 quantity in the national economy. AR at 30-31.

21 **D. Standard of Review**

22
23 On review, a court considers the record as a whole, not just the
24 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d
25 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526
26 (9th Cir. 1980)). A court must uphold the ALJ's determination that the
27 claimant is not disabled if the ALJ applied the proper legal standards
28 and there is substantial evidence in the record as a whole to support

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

18 **E. Analysis**

19
20 The Court addresses each of Ms. Fuselier's challenges to the ALJ's
21 decision.
22

23 **1. Medical Testimony**

24 Ms. Fuselier first argues that the ALJ improperly weighed the
25 medical testimony regarding mental illness. Specifically, the ALJ
26 discounted the opinions of examining mental health professionals Dr.
27 Kouzes, Dr. Genthe, and Dr. Orr, and gave the greatest weight to an
28 opinion by non-examining mental health professional Dr. Martin. In

1 disability benefits cases, there are three types of physicians: treating
2 physicians, examining physicians, and non-examining physicians. *Lester*
3 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ must provide "clear
4 and convincing" reasons for rejecting an examining physician's opinions
5 and may not reject such opinions without providing "specific and
6 legitimate reasons" supported by "substantial evidence" in the record.
7 *Id.* "An ALJ can satisfy the substantial evidence requirement by setting
8 out a detailed and thorough summary of the facts and conflicting
9 clinical evidence, stating his interpretation thereof, and making
10 findings." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)
11 (internal quotation marks omitted).
12

13 a. Dr. Genthe

14 Ms. Fuselier argues that the ALJ erred in weighing Dr. Genthe's
15 opinion based on a misreading of his findings. The ALJ gave "great
16 weight" to Dr. Genthe's opinion and cited the significant limitations
17 found by Dr. Genthe, but noted that "Dr. Genthe also reported these
18 limits were only expected to last three months." AR at 29; *see also* AR
19 at 22 ("Dr. Genthe opined prognosis was guarded as he thought it
20 unlikely she would be able to function adequately until her symptoms
21 were managed more effectively, at least three months."). The ALJ found
22 that this opinion as to a short duration for severe impairment aligned
23 with evidence in the record that Ms. Fuselier "has had short periods of
24 time when her symptomatology is more severe, followed by periods of
25 doing relative well." AR at 29.
26

27 The three-month durational language, however, appears nowhere in
28 Dr. Genthe's opinion. As noted by Ms. Fuselier, Dr. Genthe found that "a

1 period of *no less than months* might be sufficient to address her
2 treatment needs at least moderately well." AR at 525 (emphasis added).
3 The Commissioner did not address this issue in its motion for summary
4 judgment, and instead repeated the error by continuing to inject a
5 three-month durational limit into Dr. Genthe's opinion.

6 Given the fact that impairment must last at least 12 months in
7 order for a claimant to qualify for security income and disability
8 benefits, 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A), the ALJ's reading
9 of a three-month limitation into Dr. Genthe's opinion plainly would have
10 affected the ALJ's interpretation of Ms. Fuselier's disability. This is
11 especially true given the fact that the ALJ attributed Dr. Genthe's
12 opinion "great weight," and Dr. Genthe opined that Ms. Fuselier would
13 not be able to work until her conditions were better managed. It is also
14 possible that the ALJ may have assigned a different weight to Dr.
15 Genthe's opinion had the misreading not occurred. The Court therefore
16 remands for the ALJ to reassess Dr. Genthe's opinion without the
17 erroneous insertion of the three-month durational limitation.
18
19

20 *b. Dr. Kouzes*

21 Ms. Fuselier argues that the ALJ improperly gave only "some
22 weight" to Dr. Kouzes's opinion based on the ALJ's findings that the
23 opinion was not consistent with Ms. Fuselier's mental status exam and
24 was primarily based on Ms. Fuselier's subjective complaints. Ms.
25 Fuselier argues that the ALJ failed to cite any inconsistencies between
26 Dr. Kouzes's findings and the mental status exam, and that no
27 inconsistencies actually exist. In addition, Ms. Fuselier claims that
28

1 the ALJ provided no basis for her finding that Dr. Kouzes's opinion was
2 primarily based on Ms. Fuselier's subjective complaints.

3 The Court first notes that the ALJ's explanation for discounting
4 Dr. Kouzes's opinion is abbreviated and consists of only one sentence
5 spanning four lines in her opinion, making it difficult to evaluate on
6 review. AR at 30. Ms. Fuselier correctly argues that the ALJ could only
7 disregard Dr. Kouzes's opinion for clear and convincing reasons. ECF
8 No. 16 at 7-8. In this case, however, the ALJ did not disregard Dr.
9 Kouzes's opinion, but rather gave it "some weight," and, in fact,
10 referenced it in other sections of the opinion, AR 24-25. The ALJ's
11 explanation for discounting the opinion - inconsistency with other
12 evidence in the report and that the opinion "appears to be based on the
13 subjective complaints of an individual who is not fully credible," AR at
14 30 - are both appropriate considerations. See *Tommasetti v. Astrue*, 533
15 F.3d 1035, 1041 (9th Cir. 2008) ("An ALJ may reject a treating
16 physician's opinion if it based 'to a large extent' on a claimant's
17 self-reports that have been properly discounted as incredible."); *id.*
18 ("The incongruity between [the treating physician's] Questionnaire
19 responses and her medical records provides an additional specific and
20 legitimate reason for rejecting [the treating physician's] opinion of
21 [the claimant's] limitations.").

24 The Court holds that the ALJ's finding that the report contained
25 inconsistencies and was likely based on subjective complaints were
26 reasonable. The Court notes, however, that the ALJ's analysis of Ms.
27 Fuselier's credibility contained errors, as addressed below.
28 Accordingly, on remand the ALJ should reassess whether Ms. Fuselier's

1 subjective complaints are credible and how that affects the weight of
2 Dr. Kouzes's opinion.

3 c. Dr. Orr

4 As to Dr. Orr, Ms. Fuselier argues that the ALJ improperly
5 rejected portions of Dr. Orr's opinion. The ALJ indicated that she
6 rejected the findings because Dr. Orr labeled those findings as
7 tentative due to questionable results for the Wechsler Memory Scale-
8 Fourth Edition (WMS-IV) exam, which may have indicated malingering. Ms.
9 Fuselier argues that the findings rejected by the ALJ - that Ms.
10 Fuselier would have difficulty with emotional stability and carrying out
11 tasks in a work-like setting - were not based on the results of the
12 WMS-IV test. The ALJ gave "great weight" to Dr. Orr's opinion, apart
13 from the portions indicated. AR at 29.

14
15 In his report, Dr. Orr did note that his diagnosis was
16 "tentative." AR at 900. This qualification is included above a section
17 labeled "Diagnosis." AR at 900. Subsequently, Dr. Orr includes three
18 additional sections: "Prognosis," "Capability of Managing Funds," and
19 "Medical Source Statement." AR at 901. It is under the "Medical Source
20 Statement" section that Dr. Orr addresses Ms. Fuselier's ability to
21 function at work. He explained:

22
23 Results from the Wechsler Memory testing indicates [sic]
24 significantly impaired memory function. There are significant
25 questions regarding the validity of responses on this test.
26 She currently suffers from marked depression and anxiety. She
27 continues to have psychotic symptoms. She experiences a number
28 of PTSD symptoms related to the emotional and sexual abuse.
Currently Amanda would have difficulty maintaining emotional
stability or being consistent in carrying out tasks in a work-
like setting.

1 AR at 901. Based on a plain reading of the report, Dr. Orr's indication
2 that his diagnosis was tentative does not extend to his finding under
3 "Medical Source Statement." Dr. Orr again noted the questionable
4 findings of the memory test under this subheading, but proceeded to make
5 separate findings as to Ms. Fuselier's ability to function in a work
6 environment. There is no indication in the report that these later
7 findings were tentative. In addition, it is not clear that the results
8 of the WMS-IV, a memory exam, would influence a practitioner's findings
9 as to emotional stability or being able to carry out tasks in a work-
10 like setting.³ Accordingly, without any additional explanation as to the
11 ALJ's rejection of Dr. Orr's findings, the Court holds that the
12 rejection was unreasonable.
13

14 *d. Dr. Martin*

15 Ms. Fuselier also contends that the ALJ improperly credited Dr.
16 Martin, a non-examining expert, over the examining mental health
17 practitioners, and that Dr. Martin failed to provide sufficient support
18 for her findings. In general, the opinions of examining sources are
19 entitled to greater weight than are the opinions of non-examining
20 sources. *Garrison*, 759 F.3d at 1012 (citing *Ryan v. Comm'r of Soc. Sec.*,
21

22 ³ See the following explanation from Pearson, the publisher of the WMS-IV:

23 The Wechsler Memory Scale-Fourth Edition is an individually
24 administered battery designed to assess various memory and working
25 memory abilities of individuals ages 16-90 years. The WMS-IV offers
26 a brief evaluation of cognitive status and provides a detailed
assessment of clinically-relevant aspects of memory functions
commonly reported in individuals with suspected memory deficits or
diagnosed with a wide range of neurological, psychiatric, and
developmental disorders.

27 *Wechsler Memory Scale-Fourth Edition (WMS-IV)*, Pearson, *Training-Overview of*
28 *the Wechsler Memory Scales-Fourth Edition (WMS-IV)*(Sept. 9, 2011), available
at <http://www.pearsonclinical.com/psychology/products/100000281/wechsler-memory-scale--fourth-edition-wms-iv.html#tab-training>.

1 528 F.3d 1194, 1198 (9th Cir. 2008)). "The weight afforded a non-
2 examining physician's testimony depends 'on the degree to which they
3 provide supporting explanations for their opinions.'" *Id.* (quoting
4 § 404.1527(d)(3)).

5 The ALJ gave "significant weight" to Dr. Martin's opinion. AR at
6 29. She explained that Dr. Martin has "specialized expertise" in
7 psychology and had the opportunity to review all of the evidence in the
8 record. AR at 29. The ALJ concluded that "Dr. Martin's overall opinion
9 is consistent with the longitudinal medical history, objective medical
10 findings, and the opinion of the non-examining state agency
11 psychological consultant" AR at 29.

12 For most questions, Dr. Martin did not include an explanation for
13 her findings and only generally referenced other portions of her
14 submission,⁴ and the written portion of question 1 of the Medical Source
15 Statement was left blank, despite the form's clear directives that
16 specific sources and reasoning be included for each question. See AR at
17 1180-85. Even in the more complete responses provided by Dr. Martin to
18 interrogatories #7 and #8, she did not consistently provide citations to
19 the record to support her findings. See AR at 1175-77, 1179. The ALJ did
20 not mention Dr. Martin's lack of support.
21

22 As noted above, the weight of a non-examining source's opinion
23 hinges on the support provided. Accordingly, the Court holds that Dr.
24 Martin's lack of support for many of her findings should have been
25 considered by the ALJ. On remand, the ALJ should both weigh this lack of
26 support and
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28 ⁴ Dr. Martin included notes such as "See Attached Responses to Interrogatory
Items 7 and 8" and "See Responses to Interrogatory." AR at 1180-85.

1 support and reevaluate Dr. Martin's opinion as compared with the
2 opinions of the examining mental health professionals, given the Court's
3 other holdings.

4 **2. Lay Testimony**

5 Ms. Fuselier next argues that the ALJ committed reversible error
6 by failing to consider the lay testimony submitted by Ms. Fuselier's
7 aunt, Brenda Armijo, who was also her employer at times. The
8 Commissioner concedes that "the ALJ did not specifically mention the
9 statement from Plaintiff's aunt," but argues that the omission was
10 harmless because the ALJ considered similar evidence and the aunt's
11 statement was inconsistent with evidence in the record. ECF No. 17 at
12 11-12.
13

14 "Lay testimony as to a claimant's symptoms or how an impairment
15 affects the claimant's ability to work is competent evidence that the
16 ALJ must take into account." *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th
17 Cir. 2012). The ALJ may not disregard competent lay witness testimony
18 without comment and therefore must give specific, germane reasons for
19 disregarding the testimony. *Id.*; *Bruce v. Astrue*, 557 F.3d 1113, 1115
20 (9th Cir. 2009). The Court therefore holds that it was error for the ALJ
21 to fail to address the declaration made by Ms. Armijo.
22

23 The Court also holds that this error was not harmless. The
24 Commissioner argues that that Ms. Armijo's statement was duplicative of
25 statements made by Ms. Fuselier and was inconsistent with other evidence
26 in the record. ECF No. 17 at 11-12. This argument, however, only
27 amplifies the importance of considering the declaration and weighing it
28 appropriately, as the statement could have bolstered Ms. Fuselier's

1 credibility. As both a family member of Ms. Fuselier and an employer who
2 made modifications in an attempt to accommodate Ms. Fuselier, but
3 eventually fired her despite those accommodations, Ms. Armijo's
4 declaration is highly relevant to Ms. Fuselier's disability claim. The
5 Court cannot say with certainty that the ALJ would have reached the same
6 conclusion had she evaluated Ms. Armijo's declaration. In addition, the
7 post hoc reasoning provided by the Commissioner on appeal is
8 insufficient to justify the ALJ's decision when no explanation was given
9 by the ALJ herself. See *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir.
10 2001) ("[W]e cannot affirm the decision of an agency on a ground that
11 the agency did not invoke in making its decision." (citing *Sec. Exch.*
12 *Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947))). The Court makes no
13 finding as to the weight that the ALJ should give to Ms. Armijo's
14 declaration, but only directs that the statement be expressly considered
15 on remand.
16

17 **3. Claimant Credibility**

18 Finally, Ms. Fuselier argues that the ALJ erred in finding Ms.
19 Fuselier not credible because the ALJ did not provide "a specific,
20 clear, and convincing reason to do so." ECF No. 16 at 17. Ms. Fuselier
21 claims that the ALJ erred by basing her negative credibility
22 determination on (1) Ms. Fuselier's inconsistent symptom reports
23 regarding hallucinations; (2) Ms. Fuselier's inconsistent reports as to
24 her suicide attempts; (3) Ms. Fuselier's noncompliance with medications;
25 (4) Ms. Fuselier's account of when she stopped working, as compared with
26 her reported income; (5) Ms. Fuselier's failure to disclose substance
27 abuse and legal history to Dr. Orr; and (6) a finding that Ms.
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1 Fuselier's daily activities were inconsistent with her claims of
2 disability. Ms. Fuselier seems to concede that Dr. Orr's finding of
3 potential malingering was an appropriate consideration for the ALJ's
4 negative credibility finding, but argues that the other errors in the
5 credibility analysis justify remand.

6 A two-step analysis is used by the ALJ to assess whether a
7 claimant's testimony regarding subjective pain or symptoms is credible.
8 *Garrison*, 759 F.3d at 1014. Step one requires the ALJ to determine
9 whether the claimant presented objective medical evidence of an
10 impairment that could reasonably be expected to produce some degree of
11 the pain or other symptoms alleged. *Lingenfelter v. Astrue*, 504 F.3d
12 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th
13 Cir. 1996). Objective medical evidence of pain or fatigue, or the
14 severity thereof, need not be provided by the claimant. *Garrison*, 759
15 F.3d at 1014.

16
17 If the claimant satisfies the first step of this analysis, and
18 there is no evidence of malingering, the ALJ must accept the claimant's
19 testimony about the severity of his symptoms unless the ALJ provides
20 specific, clear, and convincing reasons for rejecting the claimant's
21 testimony. *Id.* An ALJ is not "required to believe every allegation of
22 disabling pain" or other non-exertional impairment. *Orn v. Astrue*, 495
23 F.3d 625, 635 (9th Cir. 2007). To discredit a claimant's testimony when
24 a medical impairment has been established, however, the ALJ must provide
25 specific, cogent reasons for the disbelief. *See id.* at 636 ("Factors
26 that an ALJ may consider in weighing a claimant's credibility include
27 reputation for truthfulness, inconsistencies in testimony or between
28

1 testimony and conduct, daily activities, and unexplained, or
2 inadequately explained, failure to seek treatment or follow a prescribed
3 course of treatment." (internal quotation marks omitted)).

4 At step one of the credibility determination, the ALJ found that
5 Ms. Fuselier's medically determinable impairments could reasonably be
6 expected to cause the alleged symptoms AR at 28. At step two, however,
7 the ALJ found that Ms. Fuselier's "assertion of total disability under
8 the Social Security Act is not supported by the weight of the evidence"
9 and noted that the "record documents evidence of inconsistency and
10 exaggeration suggestive of motivation for secondary gain in the form of
11 establishing entitlement to Social Security disability payments." AR at
12 28.
13

14 The Court holds that many of the explanations given by the ALJ for
15 finding Ms. Fuselier not credible are reasonable and appropriate. The
16 ALJ appropriately considered Ms. Fuselier's reports of occasionally
17 working full time during her period of disability and engaging in
18 household tasks apparently inconsistent with the reported level of
19 disability. *See Orn*, 495 F.3d at 636. The ALJ was also correct to
20 consider Ms. Fuselier's noncompliance with medication for both her
21 medical and psychological impairments. *See Fair v. Bowen*, 885 F.2d 597,
22 603 (9th Cir. 1989) (A claimant's failure to assert "good reasons" for
23 failure to seek treatment or follow a proposed course of treatment "can
24 cast doubt on the sincerity of the claimant's pain testimony."); *see*
25 *also Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012) ("[T]here was
26 no medical evidence that [the claimant's] resistance [to treatment] was
27 attributable to her mental impairment rather than her own personal
28

1 preference, and it was reasonable for the ALJ to conclude that the level
2 or frequency of treatment [was] inconsistent with the level of
3 complaints." (internal quotation marks omitted)). Consideration of Ms.
4 Fuselier's inconsistent statements was also appropriate. See *Thomas v.*
5 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). To the extent that the
6 ALJ considered Ms. Fuselier's criminal history, continued use of
7 marijuana despite the recommendations of multiple medical professionals,
8 and concern expressed by medical professionals regarding Ms. Fuselier's
9 numerous trips to the emergency room with reports of pain that could not
10 be objectively verified, those considerations are also permissible. See
11 *id.*

12
13 Nevertheless, the Court also notes that apparently "inconsistent"
14 reports as to mental health symptoms and the fact that treatment is
15 effective for mental health conditions must be evaluated within the
16 context of the disorder. *Attmore v. Colvin*, 827 F.3d 872, 877 (9th Cir.
17 2016). Here, the ALJ noted that "[t]reatment records suggest that the
18 claimant has experienced some waxing and waning of symptoms, but that
19 she has had a generally positive response to treatment. . . . In view of
20 this evidence, caution must be exercised when evaluating allegations
21 pertaining to symptoms and limitations set forth by the claimant in any
22 setting involving the potential for secondary gain." AR at 28-29. The
23 fact that a social security claimant has a positive response to
24 treatment is not, however, a proper consideration for discrediting the
25 claimant unless that positive response is consistent over time. *Attmore*,
26 827 F.3d at 878 ("Although the ALJ pointed to isolated signs of
27 improvement, the ALJ could not find medical improvement on that basis
28

1 unless the ups and the downs of [the claimant's] development showed
2 *sustained* improvement.").

3 In this case, the ALJ noted that Ms. Fuselier showed improvement
4 in July 2012, AR at 28-29, but the ALJ does not include the fact that
5 Ms. Fuselier intentionally overdosed on medication in December 2013, AR
6 at 1034-42. It is the nature of some mental disorders that "symptoms wax
7 and wane over time," *Attmore*, 827 F.3d at 878, and the Ninth Circuit has
8 held that "it is error to reject a claimant's testimony merely because
9 symptoms wax and wane in the course of treatment." *Garrison*, 759 F.3d at
10 1017. In addition, "[t]hat a person who suffers from severe panic
11 attacks, anxiety, and depression makes some improvement does not mean
12 that the person's impairments no longer seriously affect her ability to
13 function in a workplace." *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th
14 Cir. 2001). In *Garrison*, the Ninth Circuit explained:

16 Here, the record reveals a tortuous path: some symptoms came
17 and went (e.g., paranoia, hallucinations, pseudo-seizures),
18 some symptoms persisted nearly the whole period
19 (e.g., insomnia, bouts of depression and mania), and still
20 other symptoms appear to have remained a constant source of
21 impairment (e.g., intense anxiety). Garrison's diagnoses of
22 PTSD and bipolar disorder remained constant across all
23 treatment records, and her GAF score consistently hovered
24 around 50 to 55. She remained in this condition even while
25 going to great lengths to minimize stressors in her life – to
26 the point that she could not go to the grocery store alone –
27 and, when she did try to work for a brief period, was fired
28 because of her mental impairments. The ALJ erred in concluding
that a few short-lived periods of temporary improvement in
Garrison's mental health symptoms undermined Garrison's
testimony.

26 *Garrison*, 759 F.3d at 1018.

27 Accordingly, although there are legitimate factors weighing
28 against Ms. Fuselier's credibility, to the extent that the ALJ relied on

1 isolated instances of improvement in symptoms and inconsistency in
2 reporting mental health symptoms such as hallucinations to discredit Ms.
3 Fuselier, the Court holds that those findings were made in error. On
4 remand, the ALJ should consider whether Ms. Fuselier's improvement has
5 been sustained over time and whether inconsistent statements regarding
6 hallucinations indicate untruthfulness or variation in symptomology over
7 time. The Court makes no finding as to whether Ms. Fuselier should
8 ultimately be found credible or not credible following an appropriate
9 evaluation of the evidence in the record.
10

11 **C. Conclusion**

12 For the above-given reasons, the Court remands the case for
13 further proceedings. Although the Court holds that the ALJ erred in some
14 respects, it is not clear from the record, as it currently stands,
15 whether Ms. Fuselier is disabled or whether she could perform work that
16 exists in sufficient quantity in the national economy.
17

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

- 19 1. Ms. Fuselier's Motion for Summary Judgment, **ECF No. 16**, is
20 **GRANTED**.
- 21 2. The Commissioner's Motion for Summary Judgment, **ECF No. 17**,
22 is **DENIED**.
- 23 3. This matter is **REMANDED** to the Commissioner for additional
24 proceedings consistent with this Order.
- 25 4. The Clerk's Office is to enter **Judgment** in favor of Ms.
26 Fuselier.
- 27 5. An application for attorney fees may be filed by separate
28 motion by Ms. Fuselier.

