

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

Mar 20, 2023

SEAN F. McAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALEXANDRYA R.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 4:20-CV-05231-JAG

ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 18, 24. Attorney Chad Hatfield represents Alexandrya R. (Plaintiff); Special Assistant United States Attorney Michael Mullen represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff’s Motion for Summary Judgment; **DENIES** Defendant’s Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

I. JURISDICTION

Plaintiff filed applications for Supplemental Security Income and Child Disability Benefits in February and March 2018, alleging disability since February

1 15, 2015, due to schizoaffective disorder bipolar type, major depressive disorder,
2 and gender dysphoric disorder. Tr. 86-87, 96-97. The applications were denied
3 initially and upon reconsideration. Tr. 143-50, 153-58. Administrative Law Judge
4 (ALJ) Jesse Shumway held a hearing on March 18, 2020, Tr. 38-83, and issued an
5 unfavorable decision on April 3, 2020. Tr. 16-32. Plaintiff requested review of the
6 ALJ's decision by the Appeals Council and the Appeals Council denied the request
7 for review on September 25, 2020. Tr. 1-6. The ALJ's April 2020 decision is the
8 final decision of the Commissioner, which is appealable to the district court
9 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
10 November 23, 2020. ECF No. 1.

11 **II. STATEMENT OF FACTS**

12 Plaintiff was born in 1994 and was 20 years old as of the alleged onset date.
13 Tr. 86. She stopped attending school in the 8th grade and has a minimal work
14 history, last having worked part-time in a party store when she was 16 years old.
15 Tr. 876. She had a traumatic childhood, with abusive and addicted parents, and
16 experienced numerous traumas while homeless in her 20s. Tr. 352, 759, 875-76,
17 1056-57, 1087. She has struggled with suicidal ideation and substance abuse for
18 many years. Tr. 349, 425, 572, 836, 884-86, 1127. She achieved sobriety and a
19 somewhat more stable home life in 2018 and 2019, but continued to experience
20 depression and anxiety, particularly regarding leaving her home. Tr. 75-77, 1161.

21 **III. STANDARD OF REVIEW**

22 The ALJ is responsible for determining the reliability of a claimant's
23 allegations, resolving conflicts in medical testimony, and resolving ambiguities.
24 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's
25 determinations of law are reviewed *de novo*, with deference to a reasonable
26 interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th
27 Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by
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1 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d
2 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a
3 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,
4 substantial evidence is such relevant evidence as a reasonable mind might accept
5 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
6 (1971). If the evidence is susceptible to more than one rational interpretation, the
7 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
8 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.
9 1999). If substantial evidence supports the administrative findings, or if
10 conflicting evidence supports a finding of either disability or non-disability, the
11 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
12 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
13 set aside if the proper legal standards were not applied in weighing the evidence
14 and making the decision. *Browner v. Secretary of Health and Human Services*,
15 839 F.2d 432, 433 (9th Cir. 1988).

16 **IV. SEQUENTIAL EVALUATION PROCESS**

17 The Commissioner has established a five-step sequential evaluation process
18 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
19 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
20 four, the burden of proof rests upon the claimant to establish a prima facie case of
21 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
22 met once a claimant establishes that a physical or mental impairment prevents the
23 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
24 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
25 to step five, and the burden shifts to the Commissioner to show: (1) the claimant
26 can make an adjustment to other work; and (2) the claimant can perform specific
27 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*,
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1 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment
2 to other work in the national economy, the claimant will be found disabled. 20
3 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 “A finding of ‘disabled’ under the five-step inquiry does not automatically
5 qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th
6 Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).

7 When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must
8 determine whether the drug or alcohol addiction is a material factor contributing to
9 the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). In order to determine
10 whether DAA is a material factor contributing to the disability, the ALJ must
11 evaluate which of the current physical and mental limitations would remain if the
12 claimant stopped using drugs or alcohol, then determine whether any or all of the
13 remaining limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2),
14 416.935(b)(2). If the remaining limitations would not be disabling, DAA is a
15 material contributing factor to the determination of disability. *Id.* If the remaining
16 limitations would be disabling, the claimant is disabled independent of
17 the DAA and the addiction is not a material contributing factor to
18 disability. *Id.* Plaintiff has the burden of showing that DAA is not a material
19 contributing factor to disability. *See Parra*, 481 F.3d at 748.
20

21 V. ADMINISTRATIVE FINDINGS

22 On April 3, 2020, the ALJ issued a decision finding Plaintiff was not
23 disabled as defined in the Social Security Act. Tr. 16-32.

24 At *step one*, the ALJ found Plaintiff had not engaged in substantial gainful
25 activity since the alleged onset date. Tr. 18.

26 At *step two*, the ALJ determined Plaintiff had the following severe
27 impairments: polysubstance use disorders, gender dysphoria, PTSD, major
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1 depressive disorder, generalized anxiety disorder, bipolar disorder, and unspecified
2 personality disorder. Tr. 19.

3 At *step three*, the ALJ found Plaintiff's impairments, including the
4 substance use disorder, met sections 12.04 and 12.08 of 20 C.F.R. Part 404,
5 Subpart P, Appendix 1. Tr. 19-22.

6 Because of Plaintiff's substance abuse, the ALJ further considered her
7 abilities if she were to stop using drugs and alcohol. Tr. 23. The ALJ found
8 Plaintiff's remaining impairments would continue to be severe, but would not meet
9 or medically equal a listing. Tr. 23-24.

10 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) in the
11 absence of substance abuse and found she could perform work at all exertional
12 levels, but had the following nonexertional limitations:

13 [S]imple, routine tasks; no contact with the general public; no
14 exposure to large crowds; occasional, superficial contact with
15 coworkers but no collaborative tasks; normal supervision but not
16 highly confrontational supervision; routine, predictable work
17 environment with no more than occasional changes and no
18 assembly-line pace or other fast-paced work; and no more than a
moderate noise level (based on concentration).

19 Tr. 24.

20 At *step four*, the ALJ found Plaintiff had no past relevant work. Tr. 31.

21 At *step five*, the ALJ found that, considering Plaintiff's age, education, work
22 experience and residual functional capacity were she to stop substance use,
23 Plaintiff could perform jobs that existed in significant numbers in the national
24 economy, specifically identifying the representative occupations of laundry
25 worker, janitor, and industrial cleaner. Tr. 31.

26 The ALJ thus concluded Plaintiff's substance use disorder was a
27 contributing factor material to the determination of disability, and thus Plaintiff
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1 was not under a disability within the meaning of the Social Security Act at any
2 time from the alleged onset date through the date of the decision. Tr. 31-32.

3 VI. ISSUES

4 The question presented is whether substantial evidence supports the ALJ's
5 decision denying benefits and, if so, whether that decision is based on proper legal
6 standards. Plaintiff contends the Commissioner erred by (1) failing to adequately
7 evaluate Plaintiff's RFC in the absence of substance abuse; (2) improperly
8 evaluating the medical opinion evidence; (3) failing to conduct an adequate step
9 three evaluation; (4) rejecting Plaintiff's subjective complaints; and (5) making
10 inadequate step five findings.

11 VII. DISCUSSION

12 A. Plaintiff's Subjective Statements.

13 Plaintiff contends the ALJ erred by improperly rejecting her subjective
14 complaints. ECF No. 18 at 19-20. It is the province of the ALJ to make
15 determinations regarding a claimant's allegations. *Andrews v. Shalala*, 53 F.3d
16 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by
17 specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990).
18 Once the claimant produces medical evidence of an underlying medical
19 impairment, the ALJ may not discredit testimony as to the severity of an
20 impairment merely because it is unsupported by medical evidence. *Reddick v.*
21 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
22 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
23 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
24 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
25 insufficient: rather the ALJ must identify what testimony is not credible and what
26 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
27 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).
28

1 The ALJ concluded Plaintiff's medically determinable impairments could
2 reasonably be expected to produce some of the alleged symptoms; however,
3 Plaintiff's statements concerning the intensity, persistence and limiting effects of
4 those symptoms were not entirely consistent with the medical evidence and other
5 evidence in the record. Tr. 25. The ALJ found Plaintiff's allegations to be
6 undermined by inconsistent statements about when she achieved sobriety and
7 about her suicidal ideation and self-harm behaviors, evidence of improvement with
8 treatment, unremarkable objective evidence, her weak work history and job
9 hunting, and her activities. Tr. 24-28.

10 Plaintiff argues the ALJ's analysis is insufficient, as her lack of work history
11 is explained by her life-long disability, her job search efforts were not successful,
12 and her activities were not inconsistent with her allegations. ECF No. 18 at 20.
13 She further asserts the minor discrepancies regarding her precise sobriety date are
14 irrelevant to her greater symptom allegations. *Id.* at 19. Defendant argues the ALJ
15 reasonably considered contradictions between Plaintiff's statements and the
16 medical record, specifically noting documentation of improvement in Plaintiff's
17 conditions, her conflicting reports about substance abuse, and her activities and
18 work history. ECF No. 24 at 3-8.

19 The Court finds the ALJ's assessment is insufficient. Evidence of medical
20 treatment successfully relieving symptoms can undermine a claim of disability.
21 *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017). Records documenting
22 improvement must be read in context, however. The fact that a person suffering
23 from depression makes some improvement "does not mean that the person's
24 impairments no longer seriously affect her ability to function in a workplace.
25 *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001). Throughout the
26 decision, the ALJ noted Plaintiff's improvement once she achieved sobriety and
27 began receiving counseling and medication for her mental health conditions.
28

1 While the ALJ is correct that the record contains indications of Plaintiff's
2 improvement, the longitudinal record indicates Plaintiff continued to suffer from
3 significant symptoms of anxiety and depression, including crippling agoraphobia,
4 disrupted sleep, suicidal thoughts, and relationship difficulties and dependence on
5 her partner. Tr. 1087-1169. At the hearing, Plaintiff acknowledged that she was
6 doing somewhat better since moving to Washington and beginning treatment, but
7 that she still had difficulties. Tr. 75-77. For example, at a counseling session
8 Plaintiff was able to sit in the office with her counselor while her spouse went to
9 the restroom, which the counselor noted to be progress. Tr. 1135. These ongoing
10 symptoms were improved from earlier periods, but the records do not support the
11 ALJ's implication that treatment controlled or eliminated Plaintiff's symptoms.

12 While an ALJ may consider a claimant's work history in assessing the
13 validity of their claim, the ALJ's finding that Plaintiff's weak work history
14 suggested her unemployment was related to factors other than her medical
15 condition is not supported. Plaintiff has alleged disability since age 20, with
16 trauma and suicidal ideation spanning back to her childhood. Tr. 352, 759, 875-76,
17 1056-57. Defendant's assertion that Plaintiff has virtually no work activity in the
18 last 20 years is disingenuous in light of the fact that the claimant was only 26 years
19 old. The ALJ additionally found that because Plaintiff applied for jobs, she may
20 believe herself capable of employment. Tr. 28. Applying for work and being
21 capable of working are not the same, however. The record contains no indication
22 of whether Plaintiff was applying for full-time or part-time jobs, and even the act
23 of asking for applications or dropping off her resume were fraught and something
24 that she was only able to do with the assistance of her peer counselor. Tr. 327-43,
25 364-71. Similarly, the activities the ALJ identified of Plaintiff meeting her
26 counselor in public and joining a hiking group are not inconsistent with her
27 reported symptoms of agoraphobia. These were structured activities that were a
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1 part of her treatment. Additionally, meeting in public was not notable, as Plaintiff
2 was homeless at the time, so spent all of her time out-of-doors. Tr. 368, 378, 416.
3 The ALJ's discussion does not present clear and convincing reasons for finding
4 Plaintiff's allegations to be unreliable.

5 An ALJ may consider a claimant's inconsistent statements when assessing
6 the reliability of their symptom testimony. *Tonapetyan v. Halter*, 242 F.3d 1144,
7 1148 (9th Cir. 2001). The ALJ, however, failed to identify any substantial
8 inconsistency in Plaintiff's testimony. While the records contain some minor
9 discrepancies as to Plaintiff's exact sober date, the record generally supports (and
10 the ALJ found) that Plaintiff last used hard drugs sometime in the first part of
11 2018. Tr. 20, 994, 1013, 1057, 1088. The ALJ found Plaintiff's testimony that she
12 is not able to leave home alone to be inconsistent with going to appointments
13 unaccompanied; however, Plaintiff's testimony was that she is *almost* always
14 accompanied, and the record contains only one treatment note indicating Plaintiff
15 attended therapy without her spouse. Tr. 1161.

16 Finally, the ALJ found Plaintiff's statements to be unsupported by the
17 largely unremarkable objective evidence. Tr. 27. This cannot, however, be the
18 only reason provided by the ALJ. *See Lester*, 81 F.3d at 834 (the ALJ may not
19 discredit the claimant's testimony as to subjective symptoms merely because they
20 are unsupported by objective evidence). Additionally, the record contains
21 numerous objective signs of Plaintiff's ongoing struggles, including abnormal
22 mood and affect, nervousness and hesitancy about pushing herself, hopeless and
23 helpless thoughts, and suicidal ideation. Tr. 1097, 1100, 1108, 1113-14, 1129-30,
24 1141-43, 1155, 1161, 1169. While some objective indicators were normal or
25 unremarkable, the record still contained evidence of Plaintiff's ongoing severe
26 conditions.
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1 On remand, the ALJ shall reconsider Plaintiff's subjective reports in context
2 with the entire record.

3 **B. Medical Opinion Evidence.**

4 Plaintiff contends the ALJ erred by improperly assessing the medical
5 opinion evidence. ECF No. 18 at 9-17. For claims filed on or after March 27,
6 2017, the ALJ must consider the persuasiveness of each medical opinion and prior
7 administrative medical finding, regardless of whether the medical source is an
8 Acceptable Medical Source. 20 C.F.R. § 404.1520c(c). The ALJ is required to
9 consider multiple factors, including supportability, consistency, the source's
10 relationship with the claimant, any specialization of the source, and other factors
11 (such as the source's familiarity with other evidence in the file or an understanding
12 of Social Security's disability program). *Id.* The regulations make clear that the
13 supportability and consistency of the opinion are the most important factors, and
14 the ALJ must articulate how they considered those factors in determining the
15 persuasiveness of each medical opinion or prior administrative medical finding.
16 20 C.F.R. § 404.1520c(b). The ALJ may explain how they considered the other
17 factors, but is not required to do so, except in cases where two or more opinions
18 are equally well-supported and consistent with the record. *Id.*

19 Supportability and consistency are further explained in the regulations:
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21 (1) *Supportability.* The more relevant the objective medical
22 evidence and supporting explanations presented by a medical
23 source are to support his or her medical opinion(s) or prior
24 administrative medical finding(s), the more persuasive the
25 medical opinions or prior administrative medical finding(s) will
26 be.

27 (2) *Consistency.* The more consistent a medical opinion(s) or
28 prior administrative medical finding(s) is with the evidence from
other medical sources and nonmedical sources in the claim, the

1 more persuasive the medical opinion(s) or prior administrative
2 medical finding(s) will be.

3 20 C.F.R. § 404.1520c(c). The Ninth Circuit has additionally held that the new
4 regulatory framework displaces the longstanding case law requiring an ALJ to
5 provide “specific and legitimate” or “clear and convincing” reasons for rejecting a
6 treating or examining doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir.
7 2022).

8 **1. Dr. N.K Marks.**

9 Plaintiff attended a consultative psychological exam with Dr. Marks in
10 September 2018. Tr. 1056-61. Dr. Marks reviewed a prior evaluation and
11 conducted a clinical interview and mental status exam. *Id.* She diagnosed Plaintiff
12 with major depressive disorder, unspecified personality disorder with borderline
13 features, generalized anxiety disorder, gender dysphoria, and unspecified trauma-
14 related disorder. Tr. 1058. She opined Plaintiff was markedly impaired in asking
15 simple questions or requesting assistance, communicating and performing
16 effectively in a work setting, maintaining appropriate behavior in a work setting,
17 and completing a normal workday and work week without interruptions from
18 psychologically based symptoms. Tr. 1059. She further stated that the limitations
19 were not primarily the result of a substance use disorder and would persist for 12
20 months. *Id.*

21 The ALJ found this opinion was not persuasive, noting Plaintiff was not in
22 treatment at the time and had mislead Dr. Marks as to the nature and duration of
23 her sobriety. Tr. 30. He further found the mental status exam from the report was
24 unremarkable and that the impairments were based only on Plaintiff’s self-reported
25 hallucinations with no observations of Plaintiff responding to stimuli. *Id.*

26 Plaintiff argues the ALJ erred by failing to address any of the assessed
27 functional limitations or clearly discuss the factors of supportability and
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1 consistency. ECF No. 18 at 11-13. She further argues that the ALJ improperly
2 inserted his own assessment of the mental status findings for that of Dr. Marks and
3 failed to explain the effect of any alleged ongoing substance abuse on the findings.
4 *Id.* Defendant argues the ALJ reasonably found Dr. Marks' opinion to be
5 unsupported by the largely normal mental status exam and the opinion's
6 dependence on Plaintiff's unreliable subjective reports. ECF No. 24 at 14-15.
7 With respect to consistency, Defendant argues Plaintiff was not receiving any
8 mental health treatment at the time of the exam, undermining Dr. Marks' statement
9 that Plaintiff's limitations would last for a year with available treatment. *Id.* at 15.

10 The Court finds the ALJ's discussion is insufficient. Dr. Marks conducted a
11 clinical interview and mental status exam, which contain abnormal findings.
12 Tr. 1056-61. The nature of psychological exams is such that opinions will always
13 be somewhat based on the reports of the subject, as has been noted by the Ninth
14 Circuit:

15 Moreover, as two other circuits have acknowledged, "[t]he report
16 of a psychiatrist should not be rejected simply because of the
17 relative imprecision of the psychiatric methodology ..."
18 *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989)
19 (quoting *Poulin v. Bowen*, 817 F.2d 865, 873-74 (D.C. Cir.
20 1987)). Psychiatric evaluations may appear subjective,
21 especially compared to evaluation in other medical fields.
22 Diagnoses will always depend in part on the patient's self-report,
23 as well as on the clinician's observations of the patient. But such
24 is the nature of psychiatry. *See Poulin*, 817 F.2d at 873 ("[U]nlike
a broken arm, a mind cannot be x-rayed."). Thus, the rule
allowing an ALJ to reject opinions based on self-reports does not
apply in the same manner to opinions regarding mental illness.

25 *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017). Additionally, as discussed
26 above, the ALJ improperly disregarded Plaintiff's subjective reports.

27 With respect to the role of substance use, the Court finds the ALJ's
28 discussion is not clearly relevant to the supportability of Dr. Marks' opinion. As

1 discussed above, there are some discrepancies in the record as to the exact date of
2 Plaintiff's last use of hard drugs, but the ALJ found Plaintiff had achieved sobriety
3 by the time Dr. Marks conducted her exam. Throughout the rest of the decision,
4 the ALJ did not appear to treat occasional ongoing alcohol or marijuana use as
5 material to the analysis. As discussed further below, on remand the ALJ must
6 reconsider the DAA analysis in its entirety, including being consistent about the
7 relevance of any ongoing alcohol or marijuana use.

8 The Court further finds that the ALJ failed to address the other most
9 important factor of consistency. Dr. Marks' opinion is consistent with some of the
10 other opinions, which the ALJ did not address. Particularly notable is Dr.
11 Carstens' reviewing opinion, which noted that the diagnoses and functional limits
12 contained in Dr. Marks' opinion were supported by the clinical evidence in her
13 report. Tr. 1062.¹

14 On remand, the ALJ shall reconsider Dr. Marks' opinion along with the rest
15 of the record.

16 **2. Dr. David Morgan.**

17 Plaintiff attended a psychological consultative exam with Dr. David Morgan
18 in March 2017. Tr. 1050-54. Dr. Morgan diagnosed Plaintiff with major
19 depressive disorder, generalized anxiety disorder, and borderline personality
20 disorder, and assessed marked and severe limitations in nearly all work-related
21 functional abilities. Tr. 1051-52.

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25 ¹ The ALJ found Dr. Carstens' opinion to not be persuasive for the same reasons as
26 Dr. Morgan and Dr. Marks. Tr. 30. As discussed further below, the ALJ also
27 erred in his discussion of Dr. Morgan. Therefore, the ALJ shall reconsider Dr.
28 Carstens' opinion along with Dr. Marks and Dr. Morgan.

1 The ALJ found this opinion was outside of the periods at issue and noted
2 that the assessed duration was only eight months. Tr. 23-30. The ALJ further
3 noted that the opinion was not persuasive as to an alleged period of sobriety
4 because the record indicated it was possible Plaintiff was still using substances at
5 the time or was still suffering the lingering effects, and that she was not receiving
6 treatment at the time. *Id.* The ALJ finally noted that Dr. Morgan's mental status
7 exam findings were not that remarkable. Tr. 30.

8 Plaintiff argues the ALJ's discussion was insufficient, as he failed to address
9 the consistency or supportability of the opinion, his findings regarding substance
10 abuse were purely speculative, and that the timeline of the longitudinal record
11 indicates the durational requirements were met. ECF No. 18 at 13-14. Defendant
12 argues the ALJ reasonably found the mental status exam to be unremarkable, and
13 thus unsupportive of the extreme opinion. ECF No. 24 at 11-12. Defendant
14 further argues that the opinion was not consistent with other evidence that showed
15 abstinence and treatment to be beneficial to Plaintiff's functioning, and reasonably
16 found the opinion to be outside of the relevant time period and to not meet the
17 durational requirement. *Id.* at 12-13.

18 The Court finds the ALJ's discussion is not supported by substantial
19 evidence. The ALJ's discussion of the evidence of substance abuse does not
20 support his finding that Plaintiff was possibly using substances at the time of the
21 exam or that the effects of past substance use were still lingering. This was
22 speculation on the ALJ's part. The fact that Plaintiff was not receiving treatment at
23 the time is only relevant to an assessment of whether she failed to seek or follow
24 treatment that was expected to restore her ability to work.

25 The ALJ's conclusion that the mental status exam was "not that remarkable"
26 is lacking in specificity, particularly given the findings that she was unkept,
27 inappropriately dressed, had an anxious mood, and was not within normal limits on
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1 memory testing. Tr. 1053-54. While this portion of the ALJ's discussion goes to
2 the supportability factor, the conclusion is not supported by substantial evidence.

3 With respect to the timing of the report, while the ALJ is correct that this
4 opinion post-dates the period for establishing eligibility for Child Disability
5 Benefits,² it is within the claimed period of disability, and thus would be relevant
6 to determining whether Plaintiff continued to qualify for CDB benefits, were she
7 found eligible. It is also within a year of the protected filing date for SSI, and thus
8 was relevant to the development of the record, despite SSI benefits not being
9 *payable* prior to the filing date. 20 C.F.R. §§ 416.335, 416.912(b).

10 On remand the ALJ shall reconsider Dr. Morgan's opinion, along with the
11 rest of the record.

12 **3. Other Opinions.**

13 Plaintiff additionally challenges the ALJ's treatment of treating provider
14 Christina Hodge and the medical expert who testified at the hearing, Dr. Nance.
15 ECF No. 18 at 9, 15-17. Given the other issues already identified, the ALJ shall
16 also reconsider these opinions on remand.

17 **C. Materiality of Substance Abuse.**

18 The Social Security Act bars payment of benefits when drug addiction and
19 alcoholism (DAA) is a contributing factor material to a disability claim. 42 U.S.C.
20 §§ 423(d)(2)(C) & 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir.
21 2001). If there is evidence from an acceptable medical source that a claimant has a
22 substance abuse disorder and the claimant succeeds in proving disability, the
23 Commissioner must determine whether DAA is *material* to the determination of
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25
26 ² To be eligible, a claimant must establish disability prior to attaining age 22. 20
27 C.F.R. § 404.350(a)(5). Plaintiff turned 22 in 2016, over a year before this exam
28 took place.

1 disability. 20 C.F.R. § 416.935; SSR 13-2p at ¶ 8(b)(i) (Feb. 20, 2013), *available*
2 *at* 2013 WL 621536. That is, the ALJ must perform the sequential evaluation
3 process a second time, separating out the impact of the claimant’s DAA, to
4 determine if she would still be found disabled if she stopped using drugs or
5 alcohol. *Bustamante*, 262 F.3d at 955. DAA is a materially contributing factor if
6 the claimant would not meet the SSA’s definition of disability if the claimant were
7 not using drugs or alcohol. 20 C.F.R. § 416.935(b).

8 The ALJ found that Plaintiff’s substance use was material to the finding of
9 disability. Tr. 20-24, 31-32. Specifically, he found that when Plaintiff stopped
10 using IV drugs in 2018 and began receiving treatment in 2019, she experienced
11 substantial improvement in her abilities, to the point where her conditions no
12 longer met or equaled a listing and she was capable of performing work. *Id.*

13 Plaintiff argues the ALJ’s findings regarding the listings and the RFC in the
14 absence of substance use were not supported by substantial evidence, as the record
15 shows continuing disabling symptoms even during periods of sobriety. ECF No.
16 18 at 8-9, 17-19. Defendant argues the ALJ cited ample evidence supporting the
17 listing and RFC findings and reasonably relied on the testimony of the medical
18 expert. ECF No. 24 at 18-21.

19 While the ALJ followed the directives of Social Security Ruling 13-2p in
20 evaluating Plaintiff’s limitations with and without the impact of DAA, and
21 adequately explained his reliance on the testimony of the medical expert, the Court
22 finds the ALJ must reconsider the DAA analysis on remand. As discussed above,
23 the ALJ’s findings of improvement with treatment were flawed, failing to
24 acknowledge the context of indications of improvement. Secondly, the ALJ made
25 numerous references throughout the decision to Plaintiff’s ongoing alcohol and
26 marijuana use, even after the acknowledged sobriety date. At times, the ALJ
27 implies that this ongoing use indicated medical opinions were not reliable, as
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1 Plaintiff had not actually achieved sobriety. On remand, these inconsistent
2 findings must be remedied. Finally, the ALJ appears at times to conflate substance
3 use and Plaintiff's lack of treatment. At various points in the decision the ALJ
4 notes Plaintiff was continuing to use substances or had not engaged in treatment or
5 received medication for her mental health concerns, using these factors
6 interchangeably in assessing the reliability of Plaintiff's reports and the
7 persuasiveness of the medical opinions. However, these are two separate factors.
8 On remand, the ALJ shall reconsider Plaintiff's substance use and treatment
9 history in assessing the various periods and Plaintiff's functional abilities with and
10 without substance use.

11 **D. Step Five.**

12 Plaintiff argues that the ALJ erred in his step five determination because the
13 testimony of the vocational expert was premised on an incomplete hypothetical
14 stemming from an inaccurate residual functional capacity determination. ECF
15 No. 18 at 21. Considering the case is being remanded for the ALJ to properly
16 address the medical opinion evidence and Plaintiff's subjective symptom
17 testimony, the ALJ will be required to make a new step five determination and call
18 upon a vocational expert to provide testimony.

19 **VIII. CONCLUSION**

20 Plaintiff argues the decision should be reversed and remanded for the
21 payment of benefits. The decision whether to remand for further proceedings or
22 reverse and award benefits is within the discretion of the district court. *McAllister*
23 *v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is
24 appropriate where "no useful purpose would be served by further administrative
25 proceedings, or where the record has been thoroughly developed," *Varney v.*
26 *Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or
27 when the delay caused by remand would be "unduly burdensome," *Terry v.*
28

1 *Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990); *see also Garrison*, 759 F.3d at 1021
2 (noting that a district court may abuse its discretion not to remand for benefits
3 when all of these conditions are met). This policy is based on the “need to
4 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
5 outstanding issues that must be resolved before a determination can be made, and it
6 is not clear from the record that the ALJ would be required to find a claimant
7 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
8 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
9 F.3d 1172, 1179-80 (9th Cir. 2000).

10 In this case, it is not at all clear from the record that the ALJ would be
11 required to find Plaintiff disabled if all the evidence were evaluated consistent with
12 this Order. Further proceedings are necessary for the ALJ to properly address the
13 medical opinions in the record, to properly consider Plaintiff’s symptom
14 statements, and to reevaluate the materiality of substance use. On remand, the ALJ
15 shall reevaluate the evidence of record, making findings on each of the five steps
16 of the sequential evaluation process, and taking into consideration any other
17 evidence or testimony relevant to Plaintiff’s disability claim.

18 Accordingly, **IT IS ORDERED:**

- 19 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 18**, is
20 **GRANTED IN PART.**
21
22 2. Defendant’s Motion for Summary Judgment, **ECF No. 24**, is
23 **DENIED.**
24
25 3. The matter is **REMANDED** to the Commissioner for additional
26 proceedings consistent with this Order.
27
28 4. An application for attorney fees may be filed by separate motion.

1 5. The District Court Executive is directed to file this Order and provide
2 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for
3 Plaintiff and the file shall be **CLOSED**.

4 **IT IS SO ORDERED.**

5 DATED March 20, 2023.



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JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE