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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 ELIZA HAYDEN,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting  
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:13-cv-05790-KLS

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

12 Plaintiff has brought this matter for judicial review of defendant's denial of her  
13 applications for disability insurance and supplemental security income ("SSI") benefits.  
14 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the  
15 parties have consented to have this matter heard by the undersigned Magistrate Judge. After  
16 reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons  
17 set forth below, defendant's decision to deny benefits should be reversed and that this matter  
18 should be remanded for further administrative proceedings.  
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21 FACTUAL AND PROCEDURAL HISTORY

22 On September 20, 2010, plaintiff filed concurrent applications for disability insurance  
23 benefits and SSI alleging disability as of December 8, 2008, due to depression and panic attacks.  
24 See Administrative Record ("AR") 206-16, 250. Plaintiff's applications were denied upon initial  
25 administrative review and on reconsideration. See AR 139-42, 147-50. A hearing was held  
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ORDER - 1

1 before an administrative law judge (“ALJ”) on March 21, 2012, at which plaintiff, represented  
2 by counsel, appeared and testified, as did a vocational expert (“VE”) and plaintiff’s mental health  
3 counsel. See AR 41-92.

4 On April 2, 2012, the ALJ issued a decision in which plaintiff was determined to be not  
5 disabled. See AR 16-36. Plaintiff’s request for review of the ALJ’s decision was denied by the  
6 Appeals Council on July 13, 2013, making the ALJ’s decision defendant’s final decision. See  
7 AR 1-6; see also 20 C.F.R. §§ 404.981, 416.1481. On September 10, 2013, plaintiff filed a  
8 complaint in this Court seeking judicial review of the ALJ’s decision. See Dkt. No. 1. The  
9 administrative record was filed with the Court on December 13, 2013. See Dkt. No. 10. The  
10 parties have completed their briefing, and thus this matter is now ripe for judicial review and a  
11 decision by the Court.  
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13 Plaintiff argues the ALJ’s decision should be reversed and remanded to defendant for  
14 payment of benefits, or, alternately, further administrative proceedings, because the ALJ erred:  
15 (1) in evaluating the medical evidence in the record; (2) in discounting plaintiff’s credibility; (3)  
16 in assessing plaintiff’s residual functional capacity; and (4) in finding plaintiff to be capable of  
17 returning to her past relevant work. The Court agrees the ALJ erred in determining plaintiff to  
18 be not disabled, but, for the reasons set forth below, finds that while defendant’s decision should  
19 be reversed, this matter should be remanded for further administrative proceedings.  
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## 22 DISCUSSION

23 The determination of the Commissioner of Social Security (the “Commissioner”) that a  
24 claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been  
25 applied by the Commissioner, and “substantial evidence in the record as a whole supports” that  
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1 determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.  
2 Comm’r Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp.  
3 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless,  
4 be set aside if the proper legal standards were not applied in weighing the evidence and making  
5 the decision.”) (citing Brawner v. Sec’y of Health and Human Serv., 839 F.2d 432, 433 (9th Cir.  
6 1987)).

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8 Substantial evidence is “such relevant evidence as a reasonable mind might accept as  
9 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation  
10 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if  
11 supported by inferences reasonably drawn from the record.”). “The substantial evidence test  
12 requires that the reviewing court determine” whether the Commissioner’s decision is “supported  
13 by more than a scintilla of evidence, although less than a preponderance of the evidence is  
14 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence  
15 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.  
16 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence  
17 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting  
18 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).<sup>1</sup>

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23 <sup>1</sup> As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that  
25 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by  
26 substantial evidence, the courts are required to accept them. It is the function of the  
[Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may  
not try the case de novo, neither may it abdicate its traditional function of review. It must  
scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are  
rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 Plaintiff argues the ALJ erred by failing to provide specific and legitimate reasons to  
3 reject the medical opinion of consultative examining psychologist Mary Lemberg, PhD. Dkt.  
4 No. 12, pp. 3-6. Dr. Lemberg opined plaintiff would not be able to perform work activities on a  
5 consistent basis or maintain regular attendance in the workplace, due to her psychiatric  
6 symptoms. AR 490. This opinion is significant because the VE testified that if an individual  
7 was unable to complete her assigned work tasks at least one day per week or was off task 15 to  
8 20 percent of the time, that individual would not be able to perform any work that exists in the  
9 national economy. AR 88-90. The ALJ rejected Dr. Lemberg's opinion because: (1) it appeared  
10 to be based primarily on plaintiff's subjective reports, which were not credible; (2) it was not  
11 consistent with plaintiff's activity level; and (3) it was based on incomplete information  
12 regarding plaintiff's work history as a caregiver. AR 29. These are not specific and legitimate  
13 reasons supported by substantial evidence sufficient to reject the opinion of an examining  
14 psychologist. See Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1996).

17 The ALJ is responsible for determining credibility and resolving ambiguities and  
18 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).  
19 Where the medical evidence in the record is not conclusive, "questions of credibility and  
20 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,  
21 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Comm'r  
22 of the Soc. Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining whether  
23 inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and  
24 whether certain factors are relevant to discount" the opinions of medical experts "falls within this  
25 responsibility." Id. at 603.

1 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted  
2 opinion of an examining psychologist. Lester, 81 F.3d at 830. Even when an examining  
3 psychologist’s opinion is contradicted, that opinion “can only be rejected for specific and  
4 legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31.

5 Based on the results of the consultative psychological examination, which included a  
6 clinical interview, records review and mental status examination (“MSE”), Dr. Lemberg opined  
7 plaintiff was limited in her ability to perform various work related functions and could not  
8 perform work activities on a consistent basis nor maintain regular attendance in the workplace,  
9 due to her psychiatric symptoms. AR 485-90. As discussed previously, Dr. Lemberg’s opinion  
10 is significant because the VE testified that an individual with these limitations would not be able  
11 to perform any work that exists in the national economy. See AR 88-90.

12 The first reason relied on by the ALJ, that it appeared Dr. Lemberg’s opinion was based  
13 primarily on plaintiff’s subjective reports, was not a specific and legitimate reason supported by  
14 substantial evidence. See Lester, 81 F.3d at 830-31. In conjunction with the consultative  
15 examination, Dr. Lemberg conducted an MSE and made clinical observations of plaintiff’s  
16 behaviors. See AR 488-89. Dr. Lemberg noted that plaintiff “demonstrated significant  
17 impairments on the [MSE] that is mostly likely the result of a combination of anxiety, cognitive  
18 disorder from her probable brain injury, and depression.” AR 490. In addition to plaintiff’s  
19 abnormal performance on MSE, Dr. Lemberg also made several objective clinical observations  
20 regarding plaintiff’s presentation at the examination. For example, Dr. Lemberg observed  
21 plaintiff’s behavior to be “anxious, shaking at the end, tearing up at points, covering per mouth  
22 with her hands at a few points.” AR 488. Dr. Lemberg also noted plaintiff’s affect was  
23 “anxious, somewhat dysphoric.” AR 488. Contrary to the ALJ’s assertion, there is nothing in  
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1 Dr. Lemberg’s report to suggest that Dr. Lemberg relied more heavily on plaintiff’s description  
2 of her symptoms than Dr. Lemberg’s own objective clinical observations and findings. See Ryan  
3 v. Comm’r Soc. Sec. Admin., 528 F.3d 1194, 1200 (9th Cir. 2008).

4 “Like the physical examination, the [MSE] is termed the *objective* portion of the patient  
5 evaluation.” Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental Status*  
6 *Examination 4* (Oxford University Press 1993) (emphasis in original). The MSE generally is  
7 conducted by medical professionals skilled and experienced in psychology and mental health.  
8 Although “anyone can have a conversation with a patient, [] appropriate knowledge, vocabulary  
9 and skills can elevate the clinician’s ‘conversation’ to a ‘[MSE].’” Id. at 3. A mental health  
10 professional is trained to observe patients for signs of their mental health not rendered obvious  
11 by the patient’s subjective reports, in part because the patient’s self-reported history is “biased by  
12 their understanding, experiences, intellect and personality” (id. at 4), and, in part, because it is  
13 not uncommon for a person suffering from a mental illness to be unaware that her “condition  
14 reflects a potentially serious mental illness.” Van Nguyen v. Chater, 100 F.3d 1462, 1465 (9th  
15 Cir. 1996) (citation omitted).

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18 Moreover, it is clear from Dr. Lemberg’s report that Dr. Lemberg’s opinion regarding  
19 plaintiff’s functional limitations was based, at least in part, on these objective findings. For  
20 example, Dr. Lemberg specifically noted in her report that her opinion regarding plaintiff’s  
21 limitation in completing detailed and complex tasks was based on plaintiff’s performance on the  
22 MSE. See AR 490. Dr. Lemberg also noted that her opinion regarding plaintiff’s difficulty  
23 adapting to new environments was based on a combination of the clinical interview and MSE.  
24 See AR 490. For these reasons, the ALJ’s conclusion that Dr. Lemberg’s examination was based  
25 primarily on plaintiff’s subjective complaints is not supported by substantial evidence in the  
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1 record. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (finding ALJ’s rejection  
2 of doctor’s opinion supported by substantial evidence when opinion was not supported by  
3 rationale, treatment notes, objective findings, nor clinical observations).

4         The second reason relied on by the ALJ, that Dr. Lemberg’s opinion was not consistent  
5 with plaintiff’s activities, was similarly not a specific and legitimate reason supported by  
6 substantial evidence in the record. Lester, 81 F.3d at 830-31. An ALJ may properly reject the  
7 opinion of an examining psychologist “by setting out a detailed and thorough summary of the  
8 facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.”  
9 Reddick, 157 F.3d at 725 (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).  
10 Here, however, the ALJ failed to explain how plaintiff activities were inconsistent with Dr.  
11 Lemberg’s findings. See AR 29. Although the ALJ discussed plaintiff’s various reported  
12 activities—including the ability to drive her children to and from school, prepare meals, do  
13 household chores, and grocery shop—the ALJ offered no explanation of how these activities  
14 were inconsistent with Dr. Lemberg’s clinical findings or conclusions regarding plaintiff’s  
15 functional limitations in a work setting. See e.g. AR 23. Moreover, Dr. Lemberg’s report  
16 indicated that Dr. Lemberg considered many of the same daily activities—including plaintiff’s  
17 ability to drive her children to school, cook meals, complete household chores and grocery  
18 shop—in forming her opinion regarding plaintiff’s functional limitations. See AR 489. Because,  
19 the ALJ provided no explanation for why his interpretation of this evidence, rather than Dr.  
20 Lemberg’s, was correct, the ALJ’s rejection of Dr. Lemberg’s opinion was not legally sufficient.  
21 See Reddick, 157 F.3d at 725 (citing Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988))  
22 (“[t]he ALJ must do more than offer his conclusions. He must set forth his own interpretations  
23 and explain why they, rather than the doctors’, are correct”).  
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1 The final reason relied on by the ALJ, that Dr. Lemberg’s opinion was based on  
2 incomplete information regarding plaintiff’s past work as a care taker, also is not supported by  
3 substantial evidence sufficient to reject the opinion of an examining psychologist. See Lester, 81  
4 F.3d at 830-31. Here, the ALJ concluded that Dr. Lemberg based her opinion that plaintiff could  
5 not maintain employment on an inaccurate or incomplete account of plaintiff’s work history,  
6 which, according to the ALJ, “Dr. Lemberg understood to be working for a few days before  
7 interference from symptoms.” AR 29. In contrast, the ALJ concluded that plaintiff’s “caretaker  
8 job for Ms. Pascal ended because the claimant was in a car accident not because of her mental  
9 health symptoms.” AR 29. It is important to note that there is conflicting evidence in the record  
10 regarding plaintiff’s work as a caregiver for Ms. Pascal. Plaintiff testified at the hearing that the  
11 caregiver job for Ms. Pascal never started. See AR 58; but see AR 281(regarding work for Ms.  
12 Pascal, plaintiff reported: “Started this job could take job got into car accident hurt back and  
13 neck [sic]”).  
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16 Although the ALJ’s conclusion that plaintiff’s work as a caretaker for Ms. Pascal ended  
17 due to a car accident was a reasonable interpretation of conflicting evidence, as plaintiff points  
18 out, the ALJ’s use of this evidence to discredit Dr. Lemberg’s opinion was inconsistent with the  
19 ALJ’s other findings regarding plaintiff’s most recent work attempts. Based on these  
20 inconsistencies, this Court cannot find that the ALJ’s final reason for rejecting Dr. Lemberg’s  
21 opinion was supported by substantial evidence in the record as a whole. See Hoffman, 785 F.2d  
22 at 1425.  
23

24 After her alleged disability onset date, plaintiff worked at Fashion Bug, South Sound  
25 Dispatch, and Domino’s Pizza. See AR 22. The ALJ considered this work and determined it  
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1 was an unsuccessful work attempt. AR 22.<sup>2</sup> In reaching this determination, the ALJ relied on  
2 plaintiff's testimony that she was forced to leave these positions after short periods of time  
3 because she was having panic attacks. See AR 22. The ALJ also considered plaintiff's post  
4 onset date work as a caregiver for Ms. Pascal; however, the ALJ determined plaintiff did not  
5 perform this work at substantial gainful levels. See AR 22.

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7 The ALJ's rejection of Dr. Lemberg's opinion because Dr. Lemberg considered  
8 plaintiff's report that she had "only been able to work for a very short time (usually days) before  
9 her symptoms lead her to quit" was inconsistent with the ALJ's own reliance on plaintiff's  
10 reports that she was recently forced to stop work after short periods of time due to her panic  
11 attacks. Moreover, as discussed previously, there is nothing in Dr. Lemberg's report to indicate  
12 Dr. Lemberg's opinion relied more heavily on plaintiff's own accounts of her symptoms than on  
13 objective examination findings or clinical observations. For these reasons, the ALJ's rejection of  
14 Dr. Lemberg's opinion was not supported by substantial evidence in the record as a whole. See  
15 Hoffman, 785 F.2d at 1425.  
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## 17 18 II. This Matter Should Be Remanded for Further Administrative Proceedings

19 The Court may remand this case "either for additional evidence and findings or to award  
20 benefits." Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
21 reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the  
22 agency for additional investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th  
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25 <sup>2</sup> Ordinarily, an unsuccessful work attempt will not show a claimant is able to do substantial gainful activity, if after  
26 work for a period of six months or less, the claimant's impairment forces her or him to stop working or reduce the  
amount of work he or she is doing. 20 C.F.R. §§ 404.1574(c)(1), 416.974(c)(1). Additionally, there must be a  
significant break (at least 30 days) in the continuity of a claimant's prior work before the Commissioner will  
consider a claimant's work activity an unsuccessful work attempt.

1 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record  
2 that the claimant is unable to perform gainful employment in the national economy,” that  
3 “remand for an immediate award of benefits is appropriate.” Id.

4 Benefits may be awarded where “the record has been fully developed” and “further  
5 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan  
6 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded  
7 where:  
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9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
10 claimant’s] evidence, (2) there are no outstanding issues that must be resolved  
11 before a determination of disability can be made, and (3) it is clear from the  
12 record that the ALJ would be required to find the claimant disabled were such  
13 evidence credited.

14 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

15 Here, further administrative proceedings are necessary for the Commissioner to reassess the  
16 medical opinion of Dr. Lemberg.

### 17 CONCLUSION

18 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded  
19 plaintiff was not disabled. Accordingly, defendant’s decision is REVERSED and this matter is  
20 REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative  
21 proceedings in accordance with the findings contained herein.  
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23 DATED this 9th day of July, 2014.

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26 Karen L. Strombom  
United States Magistrate Judge