

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Monica Contreras,
Plaintiff,

vs.

Michael J. Astrue, Commissioner of
Social Security,
Defendant.

No. CV 11-471-PHX-JAT

ORDER

Pending before the Court is Claimant’s appeal from the Administrative Law Judge’s (“ALJ”) denial of Claimant’s Title II application for disability insurance benefits and Title XVI application for supplemental security income based on disability (Doc. 1). The Court reverses the ALJ’s decision to deny Claimant’s applications and remands for further consideration.

I. PROCEDURAL BACKGROUND

Claimant Monica Contreras previously filed Title II and Title XVI applications on September 16, 2005. (Record Transcript (“TR”) 16.) She alleged the onset of disability was December 1, 2004. (*Id.*) Claimant’s applications were denied on November 28, 2005, and again upon reconsideration on May 30, 2006. (*Id.*) Claimant did not further appeal the denial of her applications. (*Id.*)

Claimant filed her current applications, which are the subject of this appeal, on

1 February 10, 2007. (TR 15.) She alleged in both applications that her disability began on
2 October 15, 2006. (*Id.*) After Claimant’s applications were denied initially on July 19, 2007
3 and again upon reconsideration on October 31, 2007, Claimant requested a hearing before
4 an ALJ. (*Id.*) Claimant appeared and testified at a hearing before the ALJ on October 21,
5 2008. (*Id.*) However, the ALJ continued the hearing so that updated medical evidence
6 regarding Claimant’s mental status could be presented. (*Id.*) A supplemental hearing was
7 held on February 26, 2009, and the ALJ denied Claimant’s applications on August 28, 2009.
8 (*Id.*) On January 11, 2011, the Appeals Council denied Claimant’s request for a review of
9 the ALJ’s decision. (TR 1-3.)

10 The ALJ denied Claimant’s Title II application because the ALJ found that Claimant
11 was not disabled under sections 216(i) and 223(d) of the Social Security Act. (*Id.*) The ALJ
12 denied Claimant’s Title XVI application because the ALJ found that Claimant was not
13 disabled under section 1614(a)(3)(A) of the Social Security Act. (*Id.*) Pursuant to 42 U.S.C.
14 § 405(g), Claimant filed an appeal to this Court on March 11, 2011, seeking judicial review
15 of the ALJ’s decision. (Doc. 1.)

16 **II. FACTUAL BACKGROUND**

17 Claimant alleged that she became disabled in October 2006 due to depression, anxiety,
18 arthritis, and asthma. (TR 167.) Prior to the onset of disability, Claimant was a school bus
19 driver, but quit allegedly because of her depression. (TR 29.) Claimant then worked as a
20 driver for a company that transported patients to appointments, but she quit on October 15,
21 2006 because she claims she “got in the depression again.” (TR 31.) Claimant has a general
22 equivalency education and was 42 years old at the alleged onset of disability. (Doc. 13 at 4.)
23 Although Claimant alleged in her disability applications that she suffers physical
24 impairments, she appeals only the ALJ’s decision regarding her mental impairments. (*Id.* at
25 5.) On appeal, Claimant argues the ALJ erred by rejecting the following: (1) the assessment
26 of Claimant’s treating physician; (2) the assessment of Claimant’s examining psychologist;

1 and (3) Claimant’s symptom testimony.¹ (*Id.* at 1.)

2 **III. LEGAL STANDARD**

3 **A. Definition of Disability**

4 To qualify for disability benefits under the Social Security Act, a claimant must show,
5 among other things, that he is “under a disability.” 42 U.S.C. § 423(a)(1)(E). The Social
6 Security Act defines “disability” as the “inability to engage in any substantial gainful activity
7 by reason of any medically determinable physical or mental impairment which can be
8 expected to result in death or which has lasted or can be expected to last for a continuous
9 period of not less than 12 months.” *Id.* § 423(d)(1)(A). A person is “under a disability only
10 if his physical or mental impairment or impairments are of such severity that he is not only
11 unable to do his previous work but cannot, considering his age, education, and work
12 experience, engage in any other kind of substantial gainful work which exists in the national
13 economy.” *Id.* § 423(d)(2)(A).

14 **B. Five-Step Evaluation Process**

15 The Social Security regulations set forth a five-step sequential process for evaluating
16 disability claims. 20 C.F.R. § 404.1520; *see also Reddick v. Chater*, 157 F.3d 715, 721 (9th
17 Cir. 1998) (describing the sequential process). A finding of “not disabled” at any step in the
18 sequential process will end the ALJ’s inquiry. 20 C.F.R. § 404.1520(a)(4). The claimant
19 bears the burden of proof at the first four steps, but the burden shifts to the ALJ at the final
20 step. *Reddick*, 157 F.3d at 721. The five steps are as follows:

21 1. First, the ALJ determines whether the claimant is “doing substantial gainful
22 activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.

23 2. If the claimant is not gainfully employed, the ALJ next determines whether the
24 claimant has a “severe medically determinable physical or mental impairment.” 20 C.F.R.
25 § 404.1520(a)(4)(ii). A severe impairment is one that “significantly limits [the claimant’s]
26

27 ¹ The relevant facts for each claim on appeal will be presented with the corresponding
28 portion of the analysis section of this order.

1 physical or mental ability to do basic work activities.” *Id.* § 404.1520(c). Basic work
2 activities means the “abilities and aptitudes to do most jobs.” *Id.* § 404.1521(b). Further, the
3 impairment must either be expected “to result in death” or “to last for a continuous period
4 of twelve months.” *Id.* § 404.1509 (incorporated by reference in 20 C.F.R. §
5 404.1520(a)(4)(ii)). The “step-two inquiry is a de minimis screening device to dispose of
6 groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

7 A “special technique” is provided in the regulations for determining the severity of
8 a mental impairment. *Id.* § 404.1520a(a). The first step is to evaluate the claimant’s
9 “pertinent symptoms, signs, and laboratory findings” in order to determine whether a
10 medically determinable mental impairment exists. *Id.* § 404.1520a(b)(1). If a medically
11 determinable mental impairment is found, then the ALJ must rate the degree of functional
12 limitation resulting from the impairment. *Id.* § 404.1520a(b)(2). Functional limitation is
13 assessed over the following four areas: (1) activities of daily living; (2) social functioning;
14 (3) concentration, persistence, or pace; and (4) episodes of decompensation. *Id.* §
15 404.1520a(c)(3). Areas (1) through (3) are evaluated according to the following five-point
16 scale: none, mild, moderate, marked, and extreme. *Id.* § 404.1520a(c)(4). Episodes of
17 decompensation are evaluated according to the following four-point scale: none, one or two,
18 three, and four or more. *Id.* If the ALJ determines the claimant’s functional limitations in
19 each of areas (1) through (3) is either “none” or “mild,” and episodes of decompensation are
20 “none,” the claimant presumptively does not have a severe impairment. *Id.* §
21 404.1520a(d)(1). If the claimant does not have a severe impairment, the claimant is not
22 disabled.

23 3. Having found a severe impairment, the ALJ next determines whether the
24 impairment “meets or equals” one of the impairments specifically listed in the regulations.
25 *Id.* § 404.1520(a)(4)(iii). If so, the claimant is found disabled without considering the
26 claimant’s age, education, and work experience. *Id.* § 404.1520(d). For a mental
27 impairment, the ALJ will compare the medical findings regarding the claimant’s impairment
28 and the claimant’s functional limitation rating to the criteria of the corresponding listed

1 mental impairment in the regulations. *Id.* § 404.1520a(d)(2). If the impairment or
2 impairments do not meet or equal a listed impairment, before proceeding to the next step, the
3 ALJ will make a finding regarding the claimant’s “residual functional capacity based on all
4 the relevant medical and other evidence in [the] record.” *Id.* § 404.1520(e). A claimant’s
5 “residual functional capacity” is the most he can do despite all his impairments, including
6 those that are not severe, and any related symptoms. *Id.* § 404.1545(a)(1-2).

7 4. At step four, the ALJ determines whether, despite the impairments, the
8 claimant can still perform “past relevant work.” *Id.* § 404.1520(a)(4)(iv). To make this
9 determination, the ALJ compares its “residual functional capacity assessment . . . with the
10 physical and mental demands of [the claimant’s] past relevant work.” *Id.* § 404.1520(f). If
11 the claimant can still perform the kind of work the claimant previously did, the claimant is
12 not disabled. Otherwise, the ALJ proceeds to the final step.

13 5. At the final step, the ALJ determines whether the claimant “can make an
14 adjustment to other work” that exists in the national economy. *Id.* § 404.1520(a)(4)(v). In
15 making this determination, the ALJ considers the claimant’s residual functional capacity,
16 together with vocational factors (age, education, and work experience). *Id.* § 404.1520(g)(1).
17 If the claimant can make an adjustment to other work, then he is not disabled. If the claimant
18 cannot perform other work, he will be found disabled. As previously noted, the ALJ has the
19 burden of proving the claimant can perform other substantial gainful work that exists in the
20 national economy. *Reddick*, 157 F.3d at 721.

21 **C. Credibility of Medical Testimony**

22 When evaluating the medical evidence throughout this five-step process, the ALJ must
23 give appropriate consideration based on the source of testimony. The ALJ should afford the
24 most weight to the treating physician’s opinion, a lesser amount of weight to an examining
25 physician’s opinion, and an even lesser amount to a physician who has neither treated nor
26 examined the claimant. *See Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).

27 If the treating physician’s opinion is not contradicted by another physician, it is given
28 controlling weight and may be rejected only for “clear and convincing” reasons supported

1 by substantial evidence in the record. *Id.* at 632 (quoting *Lester v. Chater*, 81 F.3d 821, 830
2 (9th Cir. 1995)). However, even if there is conflicting medical evidence, the ALJ may not
3 reject the treating physician’s opinion without providing “specific and legitimate reasons”
4 supported by substantial evidence in the record. *Id.*

5 Similarly, the ALJ may only reject the uncontradicted opinion of an examining
6 physician by presenting clear and convincing reasons supported by substantial evidence in
7 the record. *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1298 (9th Cir. 1999).
8 If the examining physician’s opinion is contradicted, the ALJ must still offer specific and
9 legitimate reasons for rejecting the opinion. *Id.* If an examining physician’s opinion differs
10 from the treating physician’s opinion, and both opinions are based on the same medical
11 findings and differ only in their ultimate conclusions, then the treating physician’s opinion
12 is still entitled to controlling weight. *Orn*, 495 F.3d at 632. However, if the examining
13 physician’s conflicting opinion is based on independent findings, e.g., a different diagnosis
14 or findings from different objective medical tests, then the treating physician’s opinion is no
15 longer given controlling weight but is still entitled to deference. *Id.* at 632-33.

16 Additionally, if a medically determinable impairment is found, the ALJ must give
17 appropriate consideration to the claimant’s personal symptom testimony. *See Orn*, 495 F.3d
18 at 635. To discredit the claimant’s testimony, the ALJ must provide “specific, cogent reasons
19 for the disbelief.” *Id.* (quoting *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599
20 (9th Cir. 1999)) (internal quotation marks omitted). If there is not affirmative evidence that
21 the claimant is a malingerer, then the reasons for discrediting a claimant’s testimony must
22 be “clear and convincing.” *Id.* at 635. “Factors that an ALJ may consider in weighing a
23 claimant’s credibility include reputation for truthfulness, inconsistencies in testimony or
24 between testimony and conduct” *Orn*, 495 F.3d at 636 (quoting *Fair v. Bowen*, 885
25 F.2d 597, 603 (9th Cir. 1989)).

26 **IV. THE ALJ’S DECISION**

27 The ALJ used the five-step process to evaluate Claimant’s claim. (TR 16.) First, the
28 ALJ found that since the alleged onset of disability, Claimant has not engaged in any

1 substantial gainful activity. (TR at 22.) Second, in addition to physical impairments that are
2 not relevant to Claimant’s appeal, the ALJ found Claimant has two severe medically
3 determinable mental impairments: major depressive disorder (“MDD”) and generalized
4 anxiety disorder (“GAD”). (TR 23.) However, under step three, the ALJ found that neither
5 mental impairment alone or in combination with each other equal an impairment listed in the
6 regulations. (*Id.*) The ALJ determined that Claimant had the residual functional capacity to
7 perform sedentary work as defined in 20 C.F.R. 404.1567(a) and 416.967(a). (*Id.*)
8 According to the ALJ, “[t]he claimant has moderate limitations in social functioning and
9 maintaining concentration, persistence or pace in a high stress environment, but has minimal
10 limitations otherwise.” (*Id.*) Finally, under steps four and five, the ALJ found that although
11 Claimant could not perform any past relevant work, Claimant’s residual functional capacity
12 allowed her to perform “jobs existing in significant numbers in the national economy.” (*Id.*)
13 These jobs include: assembler, quality control worker, parking lot attendant, and security
14 monitor. (*Id.*) The ALJ concluded that Claimant is not disabled under sections 216(i),
15 223(d) and 1614(a)(3)(A) of the Social Security Act. (*Id.*)

16 **V. STANDARD OF REVIEW**

17 A district court

18 may set aside a denial of disability benefits only if it is not supported by
19 substantial evidence or if it is based on legal error. Substantial evidence means
20 more than a mere scintilla but less than a preponderance. Substantial evidence
21 is relevant evidence which, considering the record as a whole, a reasonable
person might accept as adequate to support a conclusion. Where the evidence
is susceptible to more than one rational interpretation, one of which supports
the ALJ’s decision, the ALJ’s decision must be upheld.

22 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation marks
23 omitted). “The trier of fact and not the reviewing court must resolve conflicts in the
24 evidence, and if the evidence can support either outcome, the court may not substitute its
25 judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). The
26 Court will uphold the ALJ’s findings “if supported by inferences reasonably drawn from the
27 record.” *Batson v. Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the
28 Court must consider the entire record as a whole and “may not affirm simply by isolating a

1 ‘specific quantum of supporting evidence.’” *Orn*, 495 F.3d at 630 (quoting *Robbings v. Soc.*
2 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)).

3 **VI. ANALYSIS**

4 **A. Claimant’s Treating Physician**

5 1. Opinion of Treating Physician

6 In February 2007, Dr. V. Abhyanker at Southwest Behavioral Health Services
7 diagnosed Claimant with MDD and GAD and assessed Claimant as having a global
8 assessment of functioning (“GAF”) score of 45.² (TR 328.) The following are Dr.
9 Abhyanker’s subsequent diagnoses and GAF scores for Claimant: May 2007—MDD, GAD,
10 with a GAF score of 45; June 2007—MDD, with a GAF score of 45; August 2007—MDD,
11 GAD, with a GAF score of 50; September 2007—MDD, GAD, with a GAF score of 50; and
12 November 2007—MDD, GAD, with a GAF score of 55. (TR 321-24.)

13 During Claimant’s September 2007 visit, Dr. Abhyanker evaluated Claimant’s ability
14 to perform work-related activity “on a sustained basis in a routine work setting.” (TR 317.)
15 The assessment used by Dr. Abhyanker defined a moderate impairment as one “which affects
16 but does not preclude ability to function” and a moderately severe impairment as one “which
17 seriously affects ability to function.” (*Id.*) Dr. Abhyanker assessed Claimant as moderately
18

19 ² The GAF rating is used by clinicians to assess an individual’s overall level of
20 functioning. Am. Psychiatric Ass’n *Diagnostic and Statistical Manual of Mental Disorders*
21 32 (4th ed. text. rev. 2000). The rating scale ranges from zero to one hundred (0-100) and
22 ascribes different levels of functioning to each group of 10. *Id.* A score of below 10
23 indicates behavior that is a persistent danger of severely hurting self or others and a score of
24 above 90 indicates superior functioning in a wide range of activities. *Id.* A GAF score
25 between 41 and 50 reflects “serious symptoms (e.g., suicidal ideation, severe obsessional
26 rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school
27 functioning (e.g., no friends, unable to keep a job).” *Id.* A score between 51 and 60 indicates
28 “moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks)
OR moderate difficulty in social, occupational, or school functioning (e.g., few friends,
conflicts with peers or co-workers).” *Id.* A score between 61 and 70 indicates “some mild
symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social,
occupational, or school functioning (e.g., temporarily falling behind in schoolwork).” *Id.*

1 impaired in the following areas: ability to understand, carry out, and remember instructions;
2 responding appropriately to supervision; responding appropriately to co-workers; and
3 performing simple, varied, and repetitive tasks. (*Id.*) Dr. Abhyanker assessed Claimant to
4 have moderately severe impairments in the following areas: responding to customary work
5 pressures; performing complex tasks; and completing a normal workday/workweek without
6 interruptions from psychologically based symptoms and performing at a consistent pace
7 without an unreasonable number/length of rest periods. (*Id.*)

8 Dr. Abhyanker concluded that Claimant could not handle a full-time job. (TR 318).
9 A vocational expert, George Bluth, testified at Claimant’s hearing that a person with the
10 functional limitations assessed by Dr. Abhyanker would not be able to work on a sustained
11 basis. (TR 56-58.)

12 After Claimant’s November evaluation with Dr. Abhyanker, Nurse Practitioner Carol
13 Finney examined Claimant. In February 2008, Finney diagnosed Claimant with MDD,
14 recurrent, moderate and panic disorder without agoraphobia. (TR 673.) After the February
15 2008 evaluation, Finney continued to diagnose Claimant with panic disorder without
16 agoraphobia, but diagnosed Claimant as having MDD, recurrent, in partial remission. (TR
17 662, 664, 667.) Finney assessed Claimant with the following GAF scores: February
18 2008—55; March 2008—60; May 2008—60; and August 2008—55. (TR 662, 664, 667,
19 673.)

20 2. ALJ’s Consideration of Treating Physician’s Opinion

21 The ALJ did not provide specific and legitimate reasons supported by substantial
22 evidence in the record for rejecting Dr. Abhyanker’s opinion.³ Instead, the ALJ misstated
23 Dr. Abhyanker’s opinion and accepted the testimony of Dr. Jasinski, the non-examining
24

25
26 ³ It is arguable whether Dr. Abhyanker’s opinion is sufficiently contradicted to justify
27 using the “specific and legitimate” standard. However, the ALJ’s reasons do not meet this
28 lesser standard, so it is not necessary to determine whether the ALJ’s reasons are “clear and
convincing.”

1 psychologist.⁴ (TR 20). The ALJ failed to accord appropriate deference to Dr. Abhyanker's
2 opinion.

3 First, the ALJ stated that, according to Dr. Abhyanker on September 4, 2007,
4 Claimant wanted to "get disability benefits so she could quit working." (*Id.*) However, as
5 conceded by the Commissioner (Doc. 14 at 13 n. 5), this misconstrued Dr. Abhyanker's
6 assessment. Dr. Abhyanker instead stated that Claimant wanted benefits as she cannot work,
7 meaning *because* she cannot work. (TR 321). Dr. Abhyanker also stated on that same date
8 that Claimant could not handle a full-time job. (TR 318). Under certain circumstances, the
9 ALJ's error may be considered harmless. However, because the ALJ offered minimal
10 evidence for rejecting Dr. Abhyanker's opinion, the harm resulting from this error is
11 magnified.

12 Second, the ALJ cited the evaluation of Nurse Practitioner Carol Finney on March 11,
13 2008 as a reason for rejecting Dr. Abhyanker's opinion. (TR 20). Finney describes Claimant
14 in an improved condition with a GAF score of 60, but ultimately diagnoses Claimant with
15 MDD and panic disorder. (*Id.*) Although Finney's evaluation is evidence that Claimant may
16 have been in an improved condition at the time of the evaluation, it is not sufficient evidence
17 to completely discount Dr. Abhyanker's assessment six months earlier. The portions of
18 Finney's evaluation that the ALJ cited do not necessarily contradict Dr. Abhyanker's prior
19 conclusions, and Finney never made any conclusions regarding Claimant's ability to work.
20 (*Id.*)

21 Finally, the ALJ relied heavily on Dr. Jasinski, who neither treated nor examined
22 Claimant. (*Id.*) According to the ALJ, Dr. Jasinski's "opinions are consistent with the
23 overall evidence of record with regard to the claimant's mental impairments." (*Id.*) The ALJ
24

25
26 ⁴ The Commissioner cites state agency psychologist Eugene Campbell's opinion as
27 also contradicting Dr. Abhyanker's opinion. (Doc. 14 at 11 n.4.) Dr. Campbell reported that
28 Claimant had the functional ability to handle full-time employment in a setting with a slow
pace and low demand. (TR 279.) However, the ALJ never mentioned Dr. Campbell's
opinion and therefore, presumably did not rely on Dr. Campbell's opinion.

1 cited Dr. Jasinski's testimony that Claimant had MDD in partial remission and that
2 Claimant's mental condition gradually improved. (*Id.*) However, Dr. Jasinski, like Finney,
3 did not make any conclusions during the hearing regarding Claimant's ability to work. (TR
4 51-54.) Dr. Jasinki's opinion should be adopted by the ALJ only if there is insufficient
5 evidence to support a treating or examining physician's testimony. Instead, the overall
6 evidence of record offers sufficient support for Dr. Abhyanker's conclusions. For example,
7 the testimony of the vocational expert at the February 2009 hearing supports Dr.
8 Abhyanker's assessment of Claimant's inability to work. (TR 56-58.) Accordingly, the ALJ
9 provided insufficient support for rejecting Dr. Abhyanker's opinion.

10 **B. Claimant's Examining Physician**

11 1. Opinion of Examining Physician

12 The Social Security Administration referred Claimant to Dr. Brent B. Geary for an
13 examination in connection with Claimant's applications for benefits. (TR 266.) Dr. Geary
14 diagnosed Claimant with MDD, recurrent, moderate, and possible borderline intellectual
15 functioning. (TR 269.) Dr. Geary also noted that Claimant did not have a personality
16 disorder, but demonstrated distinct depressive and dependent features. (*Id.*) Dr. Geary
17 summarized his opinion of Claimant's functioning ability:

18 [Claimant] seems capable of remembering work-like procedures and simple
19 job instructions. She can evidently sustain an ordinary routine without special
20 supervision, work in proximity to others without being distracted by them,
21 render simple work-related decisions, and ask for assistance as needed.
22 [Claimant] also is able to respond appropriately to changes and hazards in the
23 work environment and to travel to unfamiliar places alone. There appear to be
24 **mild limitations** in her capacity to carry out short and simple job instructions,
25 respond appropriately to criticism from supervisors, get along with coworkers
26 without exhibiting behavioral extremes, adhere to basic standards of neatness
27 and cleanliness, and independently establish realistic goals for herself.
28 [Claimant] seems **moderately limited** in her ability to carry out detailed and
complex job instructions, perform activities within a schedule, maintain
regular attendance, complete a normal work week without interruption from
psychological symptoms, and persistently deal with the public. The prognosis
in this case is guarded. [Claimant] does seem capable of independently
managing benefits, though she apparently entrusts this function to her
daughter.

27 (*Id.*) (emphasis added). The vocational expert testified at Claimant's hearing that the
28 limitations assessed by Dr. Geary would prevent Claimant from working. (TR 56-58).

1 2. ALJ’s Consideration of Examining Physician’s Opinion

2 The ALJ erred by not sufficiently addressing Dr. Geary’s opinion. Dr. Geary’s
3 assessment in combination with the vocational expert’s testimony countered the ALJ’s
4 finding that Claimant can work, but the ALJ never explicitly rejected Dr. Geary’s opinion.
5 Although the ALJ acknowledged Dr. Geary’s assessment, the ALJ never stated the effect Dr.
6 Geary’s assessment had on the ALJ’s findings, nor did the ALJ mention the vocational
7 expert’s opinion of Dr. Geary’s assessment. (TR 19.)

8 The Commissioner concedes that the ALJ did not adequately address Dr. Geary’s
9 opinion, but argues that this was harmless legal error. (Doc. 14 at 15-16). The Court
10 disagrees. The ALJ may only reject the uncontradicted opinion of an examining physician
11 by presenting clear and convincing reasons. *Regennitter*, 166 F.3d at 1298. If the examining
12 physician’s opinion is contradicted, the ALJ must still offer specific and legitimate reasons
13 for rejecting the opinion. *Id.* Here, the ALJ did not state whether Dr. Geary’s opinion was
14 contradicted. Accordingly, the ALJ did not reject Dr. Geary’s testimony for sufficient
15 reasons.

16 **C. Claimant’s Personal Symptom Testimony**

17 1. Claimant’s Testimony

18 Claimant reported in an April 2007 Function Report that she primarily ate, slept, and
19 watched television but sometimes took care of her grandson on the weekends. (TR 174, 175.)
20 She wrote that she had problems sleeping and remembering things. (TR 175.) She checked
21 that her “illnesses, injuries, or conditions affect” the following: lifting, squatting, bending,
22 standing, reaching, walking, kneeling, stair climbing, seeing (sometimes), memory,
23 completing tasks, concentration, understanding, and using her hands. (TR 179.) According
24 to the function report, Claimant’s “illnesses, injuries, or conditions” do not affect her ability
25 to talk, hear, follow instructions, get along with others and authority figures. (TR 179-80.)

26 In Claimant’s September 2007 Function Report, Claimant reported that she still
27 watches television, but also crochets and cleans up around the house. (TR 202, 206.)
28 Claimant checked that her “illnesses, injuries, or conditions” still affect her ability to do the

1 same activities as she claimed in the April 2007 report with the addition of hearing and
2 following instructions. (TR 207.) She again claimed that she was not limited in the activities
3 of talking and getting along with others and authority figures. (TR 207-08.)

4 In Claimant's brief testimony at the October 2008 administrative hearing, Claimant
5 testified that she quit working in October 2006 because she "got in the depression again" and
6 "it was just getting too much for [her] to concentrate." (TR 29, 31.)

7 2. ALJ's Consideration of Claimant's Testimony

8 The ALJ did not provide sufficient reasons for discrediting claimant's testimony.
9 There is not affirmative evidence that Claimant is a malingerer, thus the ALJ must set forth
10 clear and convincing reasons for discrediting Claimant's testimony. *Orn*, 439 F.3d at 635.
11 The ALJ found that "claimant's allegations of a complete inability to work are not wholly
12 credible based on the medical history, findings made on examination, and reports of the
13 treating and examining sources." (TR 23.) However, the ALJ only specifically addressed
14 Claimant's testimony regarding her physical impairments. (TR 21.) The ALJ also cited
15 Claimant's failure to attend a physical medicine consultative examination scheduled by the
16 Arizona State agency and her failure to respond to close out letters as evidence detracting
17 from her credibility. (*Id.*) These reasons are insufficient to satisfy the ALJ's burden of
18 providing clear and convincing reasons to discredit Claimant's testimony regarding her
19 mental impairments.

20 **D. Further Enhancement of the Record is Necessary**

21 Claimant requests that the Court remand for an immediate award of benefits because
22 the ALJ failed to provide legally sufficient reasons for rejecting the evidence. However, this
23 is only one prong of the test as to whether a Court should remand for an immediate award
24 of benefits. "The district court should credit evidence that was rejected during the
25 administrative process and remand for an immediate award of benefits if (1) the ALJ failed
26 to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding
27 issues that must be resolved before a determination of disability can be made; and (3) it is
28 clear from the record that the ALJ would be required to find the claimant disabled were such

1 evidence credited.” See *Strauss v. Comm’r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th
2 Cir. 2011) (quoting *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004)).

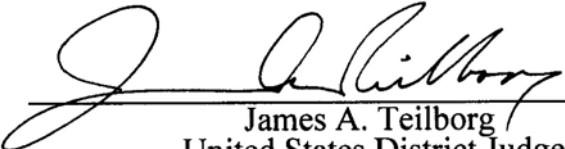
3 Here, a remand for an immediate award of benefits would be inappropriate because
4 it is unclear from the record whether Claimant is disabled as defined by the statute. As
5 discussed above, there is conflicting medical evidence about Claimant’s medical condition
6 from Claimant’s treating physician and the Nurse Practitioner that examined Claimant. For
7 instance, there is medical evidence, contained in Dr. Abhyanker’s records and Nurse
8 Practitioner Finney’s records that Claimant may have suffered a temporary, but not
9 permanent, disability entitling her to benefits. Further, the vocational expert’s testimony is
10 somewhat ambiguous.⁵ The Court recognizes that there is a significant interest in expediting
11 disability claims and does not enter into its decision to remand for further proceedings
12 lightly. However, the Court cannot, as a matter of law, decide from the record as it stands
13 that Claimant suffers from a disability that would entitle her to benefits.

14 **VII. CONCLUSION**

15 For the reasons stated above,

16 **IT IS ORDERED** that the decision of the Administrative Law Judge is **REVERSED**
17 and **REMANDED** for further proceedings consistent with this Order.

18 DATED this 18th day of November, 2011.

19
20
21 
22 _____
23 James A. Teilborg
24 United States District Judge

25 ⁵ The vocational expert both opined that Claimant was able to perform sedentary,
26 unskilled work (as discussed more fully above) and that a hypothetical individual of
27 claimant’s age, education, and work experience with similar medical records would be
28 unable to work on a sustained basis. Because this Court cannot itself further develop the
record by further examining the vocational expert on this seeming inconsistency, remanding
for further development of the record is appropriate.