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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Stephanie Bakarich,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.
14

No. CV-13-02620-PHX-JZB

ORDER

15 Plaintiff Stephanie Bakarich seeks review of the Social Security Administration
16 Commissioner's decision denying her social security benefits under the Social Security
17 Act. (Doc. 1; Doc. 13.) For the reasons below, the Court will reverse the
18 Commissioner's decision and remand this matter for further proceedings.

19 **I. Background**

20 On December 2, 2010, Plaintiff filed an application for supplemental security
21 income (SSI) benefits under Title XVI of the Social Security Act. (AR¹ 559-66.) In
22 April 2011, Plaintiff filed an application for disability insurance (DI) benefits under Title
23 II of the Act.² (*Id.* at 79-80.) In both Applications, Plaintiff asserts disability beginning
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26 ¹ Citations to "AR" are to the administrative record.

27 ² Plaintiff previously filed applications for SSI and DI benefits in 2005. (*Id.* at 575-86.)
28 The Social Security Administration denied Plaintiff's DI benefits application, but granted
Plaintiff SSI benefits on January 30, 2006. (*Id.* at 38.) The Social Security
Administration terminated Plaintiff's SSI benefits on May 1, 2007, because Plaintiff was
incarcerated. (*Id.*)

1 on October 14, 1998.³ (*Id.* at 79-81, 559.) Plaintiff’s applications were initially denied
2 on April 11, 2011, and her DI application was denied upon reconsideration. (*Id.* at 47-51,
3 53-55, 569-73.) On August 4, 2011, Plaintiff requested a hearing. (*Id.* at 56.)
4 Subsequently, both applications were set for a hearing. (*Id.* at 58-60.) In a decision dated
5 January 30, 2013, Administrative Law Judge (ALJ) Paula Fow denied Plaintiff’s
6 applications for benefits. (*Id.* at 20-29.) On June 7, 2013, the Appeals Council denied
7 Plaintiff’s request for review of the ALJ’s decision, making the ALJ’s decision the final
8 decision of the Commissioner of the Social Security Administration. (*Id.* at 11-14.)

9 Having exhausted the administrative review process, on December 23, 2013,
10 Plaintiff sought judicial review of the ALJ’s decision by filing a Complaint in this Court
11 pursuant to 42 U.S.C. § 405(g). (Doc. 1.) On May 9, 2014, Plaintiff filed an Opening
12 Brief, seeking remand of this case to the Social Security Administration for an award of
13 benefits. (Doc. 13.) On July 9, 2014, Defendant filed a Response Brief in support of the
14 Commissioner’s decision. (Doc. 16.) On September 4, 2014, Plaintiff filed a Reply
15 Brief. (Doc. 17.) On February 12, 2015, Defendant filed a Notice of Supplemental
16 Authority, arguing that the Ninth Circuit’s decision in *Treichler v. Comm’r of SSA*, 775
17 F.3d 1090 (9th Cir. 2014), requires the Court to remand for further proceedings, instead
18 of for an award of benefits, should the Court find reversible error. (Doc. 19.) Plaintiff
19 filed a Response on February 25, 2015, arguing that Plaintiff is disabled and an award of
20 benefits is appropriate even under the Court’s holding in *Treichler*. (Doc. 20.)

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24 ³ Plaintiff claims that prior to the administrative hearing, she amended her alleged onset
25 date to December 2, 2010 and, therefore, the ALJ should not have considered records
26 prior to that date. (Doc. 13 at 5 n.1.) However, as Plaintiff notes, there is no such motion
27 included in the record. Further, Plaintiff testified at the hearing that the onset date was
28 “about 1998” or 1999. (*Id.* at 616.) SSI benefits are not payable prior to the month
following the month in which the application was filed. *See* 20 C.F.R. § 416.335. But,
because Plaintiff filed applications for both DI and SSI benefits and alleged an onset date
in October 1998, the ALJ did not generally err in considering medical evidence in the
record prior to December 2, 2010. *See* 20 C.F.R. § 416.912(d). The Court will address
the ALJ’s treatment of the record evidence more specifically in its analysis below.

1 **II. Legal Standards**

2 **a. Standard of Review**

3 The Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of the
4 Commissioner’s disability benefits determinations. The Court may set aside the
5 Commissioner’s disability determination only if the determination is not supported by
6 substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.
7 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). “‘Substantial evidence’
8 means more than a mere scintilla, but less than a preponderance; it is such relevant
9 evidence as a reasonable person might accept as adequate to support a conclusion.”
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also Reddick v. Chater*,
11 157 F.3d 715, 720 (9th Cir. 1998).

12 In determining whether substantial evidence supports the ALJ’s decision, the
13 Court considers the record as a whole, weighing both the evidence that supports and that
14 which detracts from the ALJ’s conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*,
15 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for resolving conflicts,
16 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
17 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The Court “must
18 uphold the ALJ’s decision where the evidence is susceptible to more than one rational
19 interpretation.” *Andrews*, 53 F.3d at 1039. “However, a reviewing court must consider
20 the entire record as a whole and may not affirm simply by isolating a ‘specific quantum
21 of supporting evidence.’” *Orn*, 495 F.3d at 630 (quoting *Robbins v. Soc. Sec. Admin.*, 466
22 F.3d 880, 882 (9th Cir. 2006)). The Court reviews only those issues raised by the party
23 challenging the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.
24 2001). Similarly, the Court reviews “only the reasons provided by the ALJ in the
25 disability determination and may not affirm the ALJ on a ground upon which he did not
26 rely.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

27 **b. The ALJ’s Five-Step Evaluation Process**

28 To be eligible for Social Security benefits, a claimant must show an “inability to

1 engage in any substantial gainful activity by reason of any medically determinable
2 physical or mental impairment which can be expected to result in death or which has
3 lasted or can be expected to last for a continuous period of not less than 12 months.” 42
4 U.S.C. § 423(d)(1)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). A
5 person is under a disability only:

6 if his physical or mental impairment or impairments are of
7 such severity that he is not only unable to do his previous
8 work but cannot, considering his age, education, and work
experience, engage in any other kind of substantial gainful
work which exists in the national economy.

9 42 U.S.C. § 423(d)(2)(A).

10 The ALJ follows a five-step evaluation process to determine whether an applicant
11 is disabled under the Social Security Act:

12 The five-step process for disability determinations begins, at
13 the first and second steps, by asking whether a claimant is
engaged in “substantial gainful activity” and considering the
14 severity of the claimant’s impairments. *See* 20 C.F.R. §
416.920(a)(4)(i)-(ii). If the inquiry continues beyond the
15 second step, the third step asks whether the claimant’s
impairment or combination of impairments meets or equals a
16 listing under 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the
duration requirement. *See id.* § 416.920(a)(4)(iii). If so, the
17 claimant is considered disabled and benefits are awarded,
ending the inquiry. *See id.* If the process continues beyond
18 the third step, the fourth and fifth steps consider the
claimant’s “residual functional capacity” in determining
19 whether the claimant can still do past relevant work or make
an adjustment to other work. *See id.* § 416.920(a)(4)(iv)-(v).

20 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). “The burden of proof is on the
21 claimant at steps one through four, but shifts to the Commissioner at step five.” *Bray v.*
22 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

23 Applying the five-step evaluation process, the ALJ found that Plaintiff is not
24 disabled and is not entitled to benefits. (*Id.* at 29.) At step one, the ALJ found that
25 Plaintiff has not engaged in substantial gainful activity since the alleged onset date. (*Id.*

1 at 23.)⁴ At step two, the ALJ found that Plaintiff has the following severe impairments:
2 asthma, chronic obstructive pulmonary disease (COPD), spina bifida occulta, bipolar
3 disorder, obsessive compulsive disorder (OCD), borderline personality disorder, and
4 substance abuse, in remission. (*Id.*) At step three, the ALJ determined that Plaintiff does
5 not have an impairment or combination of impairments that meets or medically equals an
6 impairment listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404. (*Id.* at 23-24.)

7 At step four, the ALJ found the following:

8 [Plaintiff] has the [RFC] to perform light work as defined in
9 20 CFR 404.1567(b) and 416.967(b). However, [Plaintiff]
10 would be limited to occupations requiring no more than
11 simple, routine, and repetitive tasks, not performed in a fast-
paced production environment and involving relatively few
work place changes.

12 (*Id.* at 24.) The ALJ further found that Plaintiff has “no past relevant work.” (*Id.* at 28.)
13 At step five, the ALJ found that jobs exist in significant numbers in the national economy
14 that Plaintiff can perform. (*Id.*) Given that finding, the ALJ concluded that Plaintiff is
15 not disabled under sections 216(i), 223(d), or 1614(a)(3)(A) of the Social Security Act.
16 (*Id.* at 29.)

17 **III. Analysis**

18 As an initial matter, Plaintiff appears to contend that only her application for SSI
19 benefits was before the ALJ. (Doc. 13 at 2, 5.) However, as detailed above, the record
20 includes two applications, one filed on December 2, 2010 for SSI benefits, and one filed
21 on April 11, 2011 for DI benefits, and the ALJ considered and made decisions regarding
22 both applications. Plaintiff asserts that “[t]he ALJ noted the claim is for SSI benefits at
23 hearing. TR 589.” (*Id.*) But, in the record to which Plaintiff cites, the ALJ actually states
24 that the proceeding “involve[d] applications for Supplemental Security Income *and*
25 Disability Insurance Benefits.” (*Id.* at 589) (emphasis added). Regardless, in her
26 briefing, Plaintiff only addresses the ALJ’s treatment of her SSI application related to her

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28 ⁴ With regard to Plaintiff’s claim for DI benefits, the ALJ also found that Plaintiff “meets
the insured status requirements of the Social security Act through September 30, 2001.”
(*Id.* at 22.)

1 mental impairments. Therefore, the Court will only review those issues here.

2 Plaintiff argues that the ALJ's decision is defective for four reasons: (1) the ALJ
3 erroneously weighed medical source evidence; (2) the ALJ improperly evaluated
4 Plaintiff's credibility and discounted her testimony; (3) the ALJ improperly evaluated
5 third-party testimony by Plaintiff's mother; and (4) the ALJ failed to consider Plaintiff's
6 social limitations. The Court addresses these arguments below.

7 **a. Weighing of Medical Source Evidence**

8 Plaintiff argues that the ALJ erred in weighing the opinions of Dr. Sharon
9 Steingard, examining physician, and a state agency, non-examining source. (Doc. 13 at
10 4-5.) Plaintiff further argues that the ALJ erred in her treatment of Plaintiff's May 3,
11 2011 serious mental illness (SMI) benefits eligibility determination. Below, the Court
12 addresses these arguments.

13 **i. Legal Standard**

14 The Ninth Circuit distinguishes between the opinions of treating physicians,
15 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,
16 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating
17 physician's opinion and more weight to the opinion of an examining physician than to
18 one of a non-examining physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R.
19 § 404.1527(c)(2)-(6). If it is not contradicted by another doctor's opinion, the opinion of
20 a treating or examining physician can be rejected only for "clear and convincing"
21 reasons. *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.
22 1988)). "If a treating or examining doctor's opinion is contradicted by another doctor's
23 opinion, an ALJ may only reject it by providing specific and legitimate reasons that are
24 supported by substantial evidence." *Garrison*, 759 F.3d at 1012 (quoting *Ryan v.*
25 *Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)).

26 An ALJ can meet the "specific and legitimate reasons" standard "by setting out a
27 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
28 interpretation thereof, and making findings." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th

1 Cir. 1986). But “[t]he ALJ must do more than offer his conclusions. He must set forth
2 his own interpretations and explain why they, rather than the doctors’, are correct.”
3 *Embrey*, 849 F.2d at 421-22. “The opinion of a non-examining physician cannot by itself
4 constitute substantial evidence that justifies the rejection of the opinion of either an
5 examining *or* a treating physician.” *Lester*, 81 F.3d at 831 (emphasis in original)
6 (citations omitted).

7 **ii. Dr. Sharon Steingard’s Opinions**

8 Plaintiff argues that the ALJ erred in failing to give the opinions of Dr. Steingard
9 “controlling weight.” (Doc. 13 at 4-5.) Dr. Steingard examined Plaintiff on March 7,
10 2011. (AR 442.) During the exam, Dr. Steingard noted that Plaintiff had normal
11 alertness, her gait was unremarkable, facial expression was variable, eye contact was
12 good, but her attention span was poor and she was hyperactive. (*Id.* at 446.) She noted
13 that Plaintiff was rocking, her feet were almost constantly moving, and she seemed
14 agitated and anxious. (*Id.*) Her speech was unremarkable, and she did not have any
15 significant depressive thought content. (*Id.*) She could make a simple comparison and
16 her insight and judgment appeared intact. (*Id.*) Her score on the mini mental state exam
17 was 28 out of 30. She had some trouble with more complicated directions such as the
18 three step command. (*Id.*) She had poor general fund of information, and she could not
19 comment on a recent news story. (*Id.*) “She did not know in what direction the sun rose.”
20 (*Id.*) At the time of the examination, Plaintiff reported that she had been prescribed
21 Xanax, Wellbutrin, and Gabapentin, but had stopped taking those medications and was
22 not in “formal psychiatric care or treatment.” (*Id.* at 445-46.)

23 Dr. Steingard noted in her findings that Plaintiff “gives a picture of episodes of
24 mania as well as depression, panic attacks with agoraphobia. The extent of OCD
25 behaviors is vague from [Plaintiff’s] report, no repetitive behaviors were observed.” (*Id.*)
26 Dr. Steingard further noted that Plaintiff “had difficulty focusing on tasks especially
27 during the interview portion of the evaluation. She should not be managing benefits if
28 deemed eligible to receive them.” (*Id.*) Finally, Dr. Steingard noted that Plaintiff “is not

1 currently in formal psychiatric care or treatment and is currently noncompliant with
2 medication management. Prognosis could be significantly improved with formal
3 psychiatric care or treatment and consistency with medication.” (*Id.*)

4 Based on her examination, Dr. Steingard completed a Psychological/Psychiatric
5 Medical Source Statement. (*Id.* at 447-48.) In the Statement, Dr. Steingard opined that
6 Plaintiff has limitations that will last for 12 months. (*Id.* at 447.) Dr. Steingard further
7 opined that although Plaintiff’s score on the MMSE does not suggest cognitive
8 impairment, a couple of instructions had to be repeated, “[s]he had some trouble focusing
9 and would likely need a lot of extra supervision on a job and will need instructions
10 repeated for different directions especially more complicated directions.” (*Id.* at 448.)
11 Additionally, Dr. Steingard noted that Plaintiff has a “diminished ability to maintain pace
12 and persistence on task in the work place,” based on Dr. Steingard’s observations during
13 the exam that Plaintiff’s “concentration . . . was impaired,” “[s]he was distractable,”
14 “[s]he was over inclusive,” and “[s]he appeared to be hyperactive and agitated.” (*Id.*)

15 With regard to social interaction, Dr. Steingard opined that Plaintiff “would be
16 disturbing and distracting to other supervisors and especially to the general public.” (*Id.*)
17 Dr. Steingard further opined that Plaintiff’s dramatic presentation would “be a problem
18 [in] a typical work place.” (*Id.*) With regard to adaptation, Dr. Steingard found that
19 Plaintiff’s “[c]oncentration is poor for typical work place hazards especially for being in
20 dangerous or hazardous work place environment[s].” (*Id.*) Dr. Steingard again noted that
21 “prognosis could certainly be improved with medication management and return to
22 formal psychiatric treatment with consistent care.” (*Id.*)

23 Dr. Steingard’s opinions were contradicted by the opinions of agency psychologist
24 Dr. Tawnya Brode. (*Id.* at 36-41.) The ALJ could, therefore, discount Dr. Steingard’s
25 opinions for specific and legitimate reasons supported by substantial evidence. *Lester*, 81
26 F.3d at 830-31.

27 The Court finds that the ALJ failed to provide specific and legitimate reasons
28 supported by substantial evidence for rejecting Dr. Steingard’s opinions. Specifically, the

1 ALJ gave “no weight” to Dr. Steingard’s opinions because Plaintiff “was not taking her
2 medication at the time of the evaluation and was not receiving continuing mental
3 treatment.” (*Id.* at 27.) As stated above, Dr. Steingard opined that Plaintiff’s
4 “[p]rognosis could be significantly improved with formal psychiatric care or treatment
5 and consistency with medication.” (*Id.* at 446.)

6 In her decision, the ALJ failed to address with any specificity the treatment notes
7 relating to Plaintiff’s mental impairments, particularly the 2011 notes from Magellan,
8 which relate to a time period subsequent to Dr. Steingard’s opinions when Plaintiff was
9 taking medication and obtaining treatment. *Magallanes*, 881 F.2d at 751 (“The ALJ can
10 meet [the specific and legitimate] burden by setting out a detailed and thorough summary
11 of the facts and conflicting clinical evidence, stating his interpretation thereof, and
12 making findings.”) (internal citation and quotation marks omitted). Instead, in discussing
13 Plaintiff’s mental health treatment since 2004, the ALJ cited only a few examples and
14 ignored many of the more recent records regarding Plaintiff’s symptoms and limitations.
15 (*Id.* at 26.) For example, the ALJ cited to 2005 records stating that Plaintiff had “fair
16 concentration, insight, and judgment.” (*Id.*) However, the ALJ failed to address
17 Plaintiff’s 2011 treatment notes reporting that Plaintiff’s insight and judgment were either
18 “limited” or “poor.” (*Id.* at 490, 493.)

19 The ALJ also noted that Plaintiff’s GAF scores ranged from 45-60, but stated
20 without further analysis or discussion of the record evidence that “during those periods of
21 serious symptoms, the claimant was diagnosed with amphetamine abuse/dependence
22 and/or opioid/narcotic medication.” (*Id.*) The ALJ did not address in any detail the GAF
23 scores of 48 and 49 Plaintiff received in 2011. (*Id.* at 491, 495, 500, 534, 557.) Further,
24 the ALJ did not cite to any evidence that Plaintiff was using drugs during this time, and at
25 least some 2011 records state that Plaintiff has not been using since she was released
26 from prison. (*Id.* at 493, 495, 497.) While previous records are helpful in providing a
27 longitudinal picture of Plaintiff’s mental impairments and symptoms, the ALJ’s treatment
28 of Dr. Steingard’s opinions is not supported by substantial evidence because the ALJ

1 failed to address the most recent medical records regarding Plaintiff's symptoms while
2 she was in treatment and taking medications. *See* 20 C.F.R. § 416.927(c)(4) ("Generally,
3 the more consistent an opinion is with the record as a whole, the more weight we will
4 give that opinion.").

5 Defendant argues that there is support in the record for the conclusion that
6 Plaintiff improved when she took her medication and obtained treatment subsequent to
7 Dr. Steingard's opinions. (Doc. 16 at 16.) Defendant cites to examples of records that
8 could show Plaintiff improved while on medication. However, Defendant overstates
9 some of these records. For example, Defendant cites to Plaintiff's 2011 statement that
10 she was "happy," but, in the record cited by Defendant, Plaintiff stated that she is
11 "happy" when she is "feeling well." (*Id.*; AR 557.). Further, while some records note
12 that Plaintiff could complete daily activities independently, others indicate Plaintiff has
13 limitations in her ability to interact with others and struggles to leave the house due to her
14 OCD. (*Id.* at 496, 499, 553, 557, 523.) Regardless, the ALJ did not specifically address
15 or rely on any of these records. Accordingly, the ALJ failed to provide specific and
16 legitimate reasons supported by substantial evidence for rejecting Dr. Steingard's
17 opinions.

18 **iii. Dr. Brode's Opinions**

19 Plaintiff further argues that the ALJ erred in giving a non-examining source, Dr.
20 Brode, "the most weight." (Doc. 13 at 4-5.) On April 1, 2011, non-examining
21 Psychologist Dr. Brode completed a Mental Residual Functional Capacity Assessment
22 based on her review of the record. (AR 39-41.) Dr. Brode opined that Plaintiff is able to
23 understand and remember work locations and simple routines, maintain adequate
24 attention and concentration, sustain a workday/workweek schedule, interact with others,
25 respond to hazards, and make basic plans in a reasonably stable environment. (*Id.* at 41.)

26 The ALJ stated that she gave "consideration to" Dr. Brode's opinions. (*Id.* at 27.)
27 She further stated that "[w]hile these opinions differ somewhat from those of the
28 undersigned, they are supported by the evidence before the consultants at the time of the

1 reconsidered determination. Further, the opinions are consistent with the finding herein
2 that the claimant's impairments do not prevent the performance of all work related
3 activities." (*Id.*) However, it is unclear from the ALJ's decision what weight the ALJ
4 gave to Dr. Brode's opinions. Further, the ALJ failed to address Dr. Brode's findings in
5 any detail and to explain how Dr. Brode's opinions differ from the ALJ's findings.
6 Social Security Ruling (SSR) 96-6p, 1996 SSR LEXIS 3 (findings made by state agency
7 physicians must be treated as expert opinion evidence). Accordingly, the Court finds that
8 the ALJ's treatment of Dr. Brode's opinions is not supported by substantial evidence in
9 the record.

10 **iv. Plaintiff's Eligibility for SMI Benefits**

11 Plaintiff also asserts that the ALJ erroneously stated in her decision that
12 Psychologist Christine Ketchmark, "a treating medical source, opined that [Plaintiff] did
13 not meet the criteria for being severely mentally ill," and, therefore, the ALJ's decision is
14 not supported by substantial evidence. (Doc. 13 at 7; AR 27.) A review of the relevant
15 record shows that in May 2011, Dr. Ketchmark found Plaintiff did meet the SMI criteria.
16 (*Id.* at 558.) Defendant concedes that the ALJ's assertion regarding Plaintiff's SMI
17 eligibility is incorrect, but argues that the error is harmless. (Doc. 16 at 19 n.6.)

18 An ALJ's error is harmless when such error is inconsequential to the ultimate non-
19 disability determination. *See Stout v. Comm'r of Soc. Sec.*, 454 F.3d 1050, 1055 (9th Cir.
20 2006); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991) (harmless error rule applies
21 to review of administrative decisions regarding disability); *see also Burch v. Barnhart*,
22 400 F.3d 676, 679 (9th Cir. 2005) (an ALJ's error is harmless when it is "irrelevant to the
23 ALJ's ultimate disability conclusion.").

24 Here, the Court cannot find that the ALJ's misstatement regarding Plaintiff's SMI
25 eligibility was harmless. The ALJ fails to explain the extent to which she relied on her
26 mistaken belief that Plaintiff did not meet the SMI criteria. Further, the SMI
27 determination was included in more recent treatment notes than most of those notes on
28 which the ALJ relied in her decision. Therefore, the Court cannot find that this error was

1 inconsequential to the ultimate non-disability determination.

2 **b. Plaintiff's Symptom Testimony**

3 **i. Legal Standard**

4 Plaintiff also argues that the ALJ erred in evaluating Plaintiff's symptom
5 testimony. (Doc. 13 at 7-9.) An ALJ engages in a two-step analysis to determine
6 whether a claimant's testimony regarding subjective pain or symptoms is credible.
7 *Garrison*, 759 F.3d at 1014-15 (citing *Lingenfelter*, 504 F.3d at 1035-36). "First, the ALJ
8 must determine whether the claimant has presented objective medical evidence of an
9 underlying impairment 'which could reasonably be expected to produce the pain or other
10 symptoms alleged.'" *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947
11 F.2d 341, 344 (9th Cir. 1991) (en banc)). The claimant is not required to show objective
12 medical evidence of the pain itself or of a causal relationship between the impairment and
13 the symptom. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the
14 claimant must only show that an objectively verifiable impairment "could reasonably be
15 expected to produce his pain." *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d
16 at 1282); *see also Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1160-61 (9th Cir. 2008)
17 ("requiring that the medical impairment 'could reasonably be expected to produce' pain
18 or another symptom . . . requires only that the causal relationship be a reasonable
19 inference, not a medically proven phenomenon").

20 Second, if a claimant shows that she suffers from an underlying medical
21 impairment that could reasonably be expected to produce her pain or other symptoms, the
22 ALJ must "evaluate the intensity and persistence of [the] symptoms" to determine how
23 the symptoms, including pain, limit the claimant's ability to work. *See* 20 C.F.R. §
24 404.1529(c)(1). General assertions that the claimant's testimony is not credible are
25 insufficient. *See Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must
26 identify "what testimony is not credible and what evidence undermines the claimant's
27 complaints." *Id.* (quoting *Lester*, 81 F.3d at 834).

28 In weighing a claimant's credibility, the ALJ may consider many factors,

1 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s
2 reputation for lying, prior inconsistent statements concerning the symptoms, and other
3 testimony by the claimant that appears less than candid; (2) unexplained or inadequately
4 explained failure to seek treatment or to follow a prescribed course of treatment; and (3)
5 the claimant’s daily activities.” *Smolen*, 80 F.3d at 1284; *see Orn*, 495 F.3d at 637-39.
6 The ALJ also considers “the claimant’s work record and observations of treating and
7 examining physicians and other third parties regarding, among other matters, the nature,
8 onset, duration, and frequency of the claimant’s symptom; precipitating and aggravating
9 factors; [and] functional restrictions caused by the symptoms” *Smolen*, 80 F.3d at
10 1284 (citation omitted).

11 At this second step, the ALJ may reject a claimant’s testimony regarding the
12 severity of his or her symptoms only if the ALJ “makes a finding of malingering based on
13 affirmative evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins*, 466 F.3d at 883),
14 or if the ALJ offers “clear and convincing reasons” for finding the claimant not credible.
15 *Carmickle*, 533 F.3d at 1160 (quoting *Lingenfelter*, 504 F.3d at 1036). “The clear and
16 convincing standard is the most demanding required in Social Security Cases.”
17 *Garrison*, 793 F.3d at 1015 (quoting *Moore v. Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th
18 Cir. 2002)).

19 **ii. The ALJ erred in evaluating Plaintiff’s symptom testimony.**

20 At the administrative hearing, with regard to her mental impairments, Plaintiff
21 testified that she was unable to work because she could not focus, did not like leaving her
22 house, was scared of people, and had panic attacks. (AR 604-05). Plaintiff testified that
23 “on a good day” she does yard work, does the dishes, mops, vacuums, makes breakfast,
24 and helps the kids get ready for school. (*Id.* at 597.) But, on good days, Plaintiff also has
25 “OCD really bad.” (*Id.* at 598.) Plaintiff further testified that she cannot work in part due
26 to her OCD because it takes her longer to complete tasks than someone not suffering
27 from her condition, including leaving the house. (*Id.* at 607.) On a “bad day” Plaintiff
28 doesn’t “do anything. The laundry will pile up and pile up and the plants will die and the

1 floors will get filthy.” (*Id.*) On a bad day, Plaintiff asserts she is agitated, angry,
2 impatient, and irritable, and she cries a lot or yells and then usually sleeps. (*Id.* at 559.)
3 Plaintiff testified that she has about three good days and four bad days a week on
4 average. (*Id.*)

5 The ALJ found that Plaintiff’s medically determinable impairments could
6 reasonably be expected to cause the alleged symptoms, but Plaintiff’s statements
7 concerning the intensity, persistence, and limiting effects of these symptoms are not
8 credible to the extent they are inconsistent with the ALJ’s assessed RFC. (*Id.* at 25.)
9 Because the ALJ did not make an affirmative finding of malingering, the ALJ was
10 required to provide clear and convincing reasons supported by substantial evidence for
11 concluding that Plaintiff’s subjective complaints regarding symptoms related to her
12 mental impairments were not wholly credible.

13 The Court finds that the ALJ failed to give sufficient reasons for discounting
14 Plaintiff’s symptom testimony. First, the ALJ noted that Plaintiff’s activities of daily
15 living were inconsistent with her allegations of disability. (AR 27.) In support, the ALJ
16 cited to Plaintiff’s statement during a 2006 mental examination that she was able to take
17 care of her activities of daily living, and her statement in 2008 that she was taking yoga
18 classes. (*Id.*) Although on a different page of the decision, the ALJ also cited to
19 Plaintiff’s statements that she can maintain her hygiene, make her bed, do dishes, and
20 care for pets, Dr. Steingard’s observation during her examination that Plaintiff was
21 appropriately attired and clean, and testimony by Plaintiff’s mother that Plaintiff can do
22 “chores two to three time a week for one to two hours a day with reminders.” (*Id.* at 23-
23 24.)

24 The ALJ did not, however, discuss or make any finding regarding the amount of
25 time per day that plaintiff spends engaged in daily activities. *See Vertigan v. Halter*, 260
26 F.3d 1044, 1050 (9th Cir. 2001) (“physical activities did not consume a substantial part of
27 Ms. Vertigan’s day. This court has repeatedly asserted that the mere fact that a plaintiff
28 has carried on certain daily activities, such as grocery shopping, driving a car, or limited

1 walking for exercise, does not in any way detract from her credibility as to her overall
2 disability”); *see also Garrison*, 759 F.3d at 1016 (“We have repeatedly warned that ALJs
3 must be especially cautious in concluding that daily activities are inconsistent with
4 testimony about pain, because impairments that would unquestionably preclude work and
5 all the pressures of a workplace environment will often be consistent with doing more
6 than merely resting in bed all day.”). This analysis is particularly relevant here, where
7 Plaintiff asserts that the activities she is able to complete differ depending on whether it is
8 a “good” or “bad” day. The Court notes that there are other statements in Plaintiff’s 2011
9 treatment notes that could support the ALJ’s finding that Plaintiff’s daily activities are
10 inconsistent with Plaintiff’s testimony (e.g., AR 553). But, the ALJ did not address or
11 rely on any of those records in discussing Plaintiff’s testimony.

12 Second, the ALJ cited inconsistencies in Plaintiff’s testimony regarding Plaintiff’s
13 desire to work, including Plaintiff’s statements that she quit working due to having kids
14 and getting married. (*Id.* at 27.) The ALJ cited to a similar statement during a 2006
15 mental examination, where Plaintiff reported that she “was not interested in returning to
16 work at this time.” (*Id.*) The Court finds that these statements are not clear and
17 convincing reasons supported by substantial evidence. Plaintiff’s statement regarding her
18 reason for stopping work related to her decision prior to her alleged onset date. (*Id.* at
19 590-91.) Further, Plaintiff’s more recent 2011 treatment notes indicate that Plaintiff
20 reports wanting to return to work. (*Id.* at 557.) The ALJ did not address this evidence.

21 Third, the ALJ discounted Plaintiff’s symptom testimony because she made
22 inconsistent statements regarding the severity of her symptoms, citing to a statement by
23 Plaintiff that she was “doing great, feeling alert, and happy as well as no longer taking
24 her anti-depressant medication,” and a 2005 statement that Plaintiff reported no longer
25 being hostile or angry since taking Zyprexa. (*Id.* at 27.) However, the records to which
26 the ALJ cited do not contain the referenced statements or are several years’ old and
27 merely isolated examples that do not capture the record as whole, particularly given that
28 the ALJ failed to meaningfully address Plaintiff’s most recent 2011 treatment notes. The

1 Court therefore finds that these statements by Plaintiff are not clear and convincing
2 reasons supported by substantial evidence for discounting her testimony.

3 Fourth, the ALJ noted that “during several follow up exams, the claimant reported
4 having no complications with her medication,” citing to a record from 2004 and one
5 treatment note from 2011. (*Id.* at 27.) This reason is also not clear and convincing or
6 supported by substantial evidence. The ALJ failed to address how the 2004 records
7 undercut Plaintiff’s credibility. Further, some of the 2011 treatment notes indicate
8 Plaintiff indeed has experienced side effects from medication. (*Id.* at 493.)

9 Fifth, the ALJ also discounted Plaintiff’s symptom testimony because she missed
10 several mental health evaluation appointments. (*Id.*) An unexplained or inadequately
11 explained failure to follow prescribed treatment can be a basis upon which to discredit a
12 Plaintiff’s symptom testimony. *See Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9th Cir.
13 2012). However, as the Ninth Circuit Court reiterated in *Garrison*, “it is a questionable
14 practice to chastise one with a mental impairment for the exercise of poor judgment in
15 seeking rehabilitation.” *Garrison*, 759 F.3d at 1018 n.24. “In other words, we do not
16 punish the mentally ill for occasionally going off their medication when the record
17 affords a compelling reason to view such departures from prescribed treatment as part of
18 claimant’s underlying mental afflictions.” (*Id.*)

19 Here, Plaintiff testified that she missed appointments because either she or
20 someone in her family was sick. (*Id.* at 600.) However, the ALJ did not address the
21 reasons Plaintiff provided for her absences.

22 Finally, the ALJ discredited Plaintiff’s testimony because “there are
23 inconsistencies in her reported history of substance abuse with incarceration due to drug
24 use.” (*Id.* at 27.) The ALJ fails to provide any examples or discuss the inconsistencies to
25 which she refers. *Lester v. Chater*, 81 F.3d at 834 (the ALJ “must identify what
26 testimony is not credible and what evidence undermines the claimant’s complaints.”).
27 Accordingly, this reason is also an insufficient basis upon which to discredit Plaintiff’s
28

1 testimony.⁵

2 **IV. Remand for further proceedings is appropriate here.**

3 Having determined that the ALJ erred, the Court must vacate the Commissioner's
4 decision. The remaining issue for the Court is whether to remand this matter for an
5 award of benefits or for further proceedings. Such a determination is within the Court's
6 discretion. *Smolen*, 80 F.3d at 1292.

7 "When an ALJ's denial of benefits is not supported by the record, the proper
8 course, except in rare circumstances, is to remand to the agency for additional
9 investigation or explanation." *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012)
10 (quotation omitted); *see also Treichler*, 775 F.3d at 1101 (noting that a remand for further
11 administrative proceedings is generally useful where the record has not been fully
12 developed, there are outstanding conflicts and ambiguities to be resolved, or the
13 presentation of further evidence may "prove enlightening."). The Court applies the
14 credit-as-true rule to determine that a claimant is disabled and entitled to an award of
15 benefits only if there are no "outstanding issues [in the record] that must be resolved" and
16 "it is clear from the record that the ALJ would be required to find the claimant disabled
17 were [the improperly rejected] evidence credited." *Harman v. Apfel*, 211 F.3d 1172, 1178
18 (9th Cir. 2000). However, a "claimant is not entitled to benefits under the statute unless
19 the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be."
20 *Strauss v. Comm'r, Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011).

21 The Court has considered the record as a whole, weighing both the evidence that
22 supports and that which detracts from the ALJ's conclusions. Here, the record contains
23 evidentiary conflicts that require further evaluation by the ALJ. The Court will therefore
24 remand this case for further proceedings and a new decision. On remand, in addition to

25
26 ⁵ Plaintiff also argues that the ALJ erred in rejecting lay witness statements and failing to
27 consider Plaintiff's social limitations as opined by Dr. Steingard and Dr. Brode. (Doc. 13
28 at 5-6.) However, because the Court has found that the ALJ erred in her treatment of
medical opinion evidence and Plaintiff's symptom testimony, and as detailed below will
remand this matter for further proceedings and a new decision, the Court declines to
reach Plaintiff's other arguments.

1 reevaluating the evidence and taking new testimony, the ALJ should accept any
2 additional medical evidence into the record that exists for the period at issue.

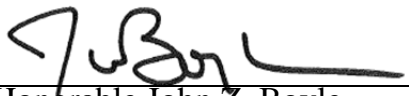
3 Accordingly,

4 **IT IS ORDERED** that the Commissioners' decision is vacated and this matter is
5 remanded to the Commissioner for further administrative proceedings consistent with this
6 Order.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
8 accordingly and terminate this case.

9 Dated this 30th day of March, 2015.

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Honorable John Z. Boyle
United States Magistrate Judge