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4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF ARIZONA

7  
8 A. M. Holmes,

No. CV-17-03360-PHX-DGC

9 Plaintiff,

**ORDER**

10 v.

11 Nancy A. Berryhill, Acting Commissioner  
12 of Social Security,

13 Defendant.

14 Plaintiff A.M. Holmes seeks review under 42 U.S.C. § 405(g) of the final decision  
15 of the Commissioner of Social Security (“the Commissioner”), which denied her  
16 disability insurance benefits and supplemental security income under sections 216(i),  
17 223(d), and 1614(a)(3)(A) of the Social Security Act. Because the decision of the  
18 Administrative Law Judge (“ALJ”) is based on legal error, the Commissioner’s decision  
19 will be vacated and the matter remanded for further administrative proceedings.

20 **I. Background.**

21 Plaintiff is a thirty-two year-old female who previously worked as a caregiver, a  
22 cashier or checker, and a fast food worker. A.R. 28. On January 2, 2014, she applied for  
23 disability insurance benefits and supplemental security income, alleging disability  
24 beginning August 9, 2012. *Id.* On April 21, 2016, she appeared with her attorney and  
25 testified at a hearing before the ALJ. *Id.* A vocational expert also testified. *Id.* On  
26 May 23, 2016, the ALJ held that Plaintiff was not disabled within the meaning of the  
27 Social Security Act. *Id.* at 30. The Appeals Council denied Plaintiff’s request for  
28 review, making the ALJ’s decision the Commissioner’s final decision. A.R. 1-3.

1     **II.     Legal Standard.**

2             The Court reviews only those issues raised by the party challenging the ALJ's  
3 decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The Court may set  
4 aside the Commissioner's disability determination only if the determination is not  
5 supported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625,  
6 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a  
7 preponderance, and relevant evidence that a reasonable person might accept as adequate  
8 to support a conclusion. *Id.* In determining whether substantial evidence supports a  
9 decision, the Court must consider the record as a whole and may not affirm simply by  
10 isolating a "specific quantum of supporting evidence." *Id.* As a general rule, "[w]here  
11 the evidence is susceptible to more than one rational interpretation, one of which supports  
12 the ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278  
13 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

14             Harmless error principles apply in the Social Security Act context. *Molina v.*  
15 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless if there remains  
16 substantial evidence supporting the ALJ's decision and the error does not affect the  
17 ultimate nondisability determination. *Id.* The claimant usually bears the burden of  
18 showing that an error is harmful. *Id.* at 1111.

19             The ALJ is responsible for resolving conflicts in medical testimony, determining  
20 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
21 1995). In reviewing the ALJ's reasoning, the court is "not deprived of [its] faculties for  
22 drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes v.*  
23 *Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

24     **III.     The ALJ's Five-Step Evaluation Process.**

25             To determine whether a claimant is disabled for purposes of the Social Security  
26 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears  
27 the burden of proof on the first four steps, and the burden shifts to the Commissioner at  
28 step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). To establish disability,

1 the claimant must show that (1) she is not currently working, (2) she has a severe  
2 impairment, and (3) this impairment meets or equals a listed impairment or (4) her  
3 residual functional capacity (“RFC”) prevents her performance of any past relevant work.  
4 If the claimant meets her burden through step three, the Commissioner must find her  
5 disabled. If the inquiry proceeds to step four and the claimant shows that she is incapable  
6 of performing past relevant work, the Commissioner must show at step five that the  
7 claimant is capable of other work suitable for her RFC, age, education, and work  
8 experience. 20 C.F.R. § 404.1520(a)(4).

9 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
10 the Social Security Act through June 30, 2016, and that she has not engaged in substantial  
11 gainful activity since August 9, 2012. A.R. 19. At step two, the ALJ found that Plaintiff  
12 has the following severe impairments: tarsal tunnel involvement in the right lower  
13 extremity, degenerative disc disease, asthma, obesity, bipolar disorder, anxiety, and  
14 depression. *Id.* at 20. At step three, the ALJ determined that Plaintiff does not have an  
15 impairment or combination of impairments that meets or medically equals an impairment  
16 listed in Appendix 1 to Subpart P of 20 C.F.R. Pt. 404.<sup>1</sup> *Id.* At step four, the ALJ found  
17 that Plaintiff has the following RFC:

18 To perform light work as defined in 20 CFR 404.1567(b) and  
19 416.967(b) except the claimant can sit six hours out of an  
20 eight hour day. The claimant can stand for six hour[s] out of  
21 an eight-hour day. The claimant can walk for six hours out of  
22 an eight-hour day. The claimant can occasionally lift and  
23 carry twenty pounds and frequently lift and carry ten pounds.  
24 The claimant can push and pull with the right lower extremity  
25 on an occasional basis only. The claimant can only  
26 occasionally climb, balance, stoop, kneel, crouch, and crawl.  
The claimant can have only occasional exposure to heights,  
moving machinery, humidity, dust, fumes, smoke,  
temperature extremes and vibrations. The claimant can only  
understand, remember and carry out complex and detailed job

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27  
28 <sup>1</sup> The ALJ did not specifically address whether tarsal tunnel involvement in the  
right lower extremity met the severity of one of the listed impairments in 20 CFR Part  
404, Subpart P, Appendix 1. But Plaintiff does not challenge this omission.

1 instructions and can only occasionally interact with  
2 coworkers or the public.

3 *Id.* at 22. The ALJ further found that Plaintiff is unable to perform any of her past  
4 relevant work. *Id.* at 26. Considering Plaintiff's age, education, work experience, and  
5 RFC, the ALJ found at step five that jobs exist in significant numbers in the national  
6 economy that Plaintiff could perform, such as housekeeper or cleaner, delivery maker,  
7 and routing clerk. *Id.* at 28.

#### 8 **IV. Analysis.**

9 Plaintiff argues that the ALJ's decision is defective for three reasons: (1) the ALJ  
10 failed to consider the assessments of Plaintiff's treating psychiatrist, S. Patel, M.D., and  
11 treating psychiatric nurse practitioner, Linda Banziger, N.P.; (2) the ALJ rejected  
12 Plaintiff's symptom testimony without specific, clear, and convincing reasons supported  
13 by substantial evidence in the record as a whole; and (3) the ALJ ignored Plaintiff's  
14 limitations in concentration, persistence, and pace when she determined Plaintiff's RFC.

##### 15 **A. Weighing of Medical Source Evidence.**

16 Plaintiff argues that the ALJ improperly weighed the medical opinions of Dr. Patel  
17 and Nurse Practitioner Banziger.

##### 18 **1. Legal Standard.**

19 The Commissioner is responsible for determining whether a claimant meets the  
20 statutory definition of disability and need not credit a physician's conclusion that the  
21 claimant is "disabled" or "unable to work." 20 C.F.R. § 404.1527(d)(1). But the  
22 Commissioner generally must defer to a physician's medical opinion, such as statements  
23 concerning the nature or severity of the claimant's impairments, what the claimant can  
24 do, and the claimant's physical or mental restrictions. § 404.1527(a)(1), (c).

25 The Ninth Circuit distinguishes between the opinions of treating physicians,  
26 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
27 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
28 physician's opinion and more weight to the opinion of an examining physician than to

1 one of a non-examining physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R.  
2 § 404.1527(c)(2)-(6) (listing factors to be considered when evaluating opinion evidence,  
3 including length of examining or treating relationship, frequency of examination,  
4 consistency with the record, and support from objective evidence). If it is not  
5 contradicted by another doctor’s opinion, the opinion of a treating or examining  
6 physician can be rejected only for “clear and convincing” reasons. *Lester*, 81 F.3d at 830  
7 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). Under this standard, the  
8 ALJ may reject a treating or examining physician’s opinion if it is “conclusory, brief, and  
9 unsupported by the record as a whole or by objective medical findings,” *Batson v.*  
10 *Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (citation omitted), or if  
11 there are significant discrepancies between the physician’s opinion and her clinical  
12 records, *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

13 An ALJ may discount the opinion of “other sources,” such as a nurse practitioner,  
14 if she “provides reasons germane to each witness for doing so.” *Popa v. Berryhill*, 872  
15 F.3d 901, 905 (9th Cir. 2017) (citing *Molina*, 674 F.3d at 1111) (internal quotations  
16 omitted); *see also* 20 C.F.R. § 404.1513(a)(3). The same factors that are used to evaluate  
17 the opinions of medical providers should be used to evaluate other medical sources. *See*  
18 *Revels v. Berryhill*, 874 F.3d 648, 655 (9th Cir. 2017); *see also* § 404.1527(f).

19 **2. Dr. Patel.**

20 The ALJ failed to consider Plaintiff’s treating psychiatrist’s supplemental  
21 questionnaire regarding Plaintiff’s RFC. *See* A.R. 752-53. The Commissioner concedes  
22 this was reversible legal error and that remand is warranted. *See* Doc. 19 at 2. Because  
23 the vocational expert opined that Dr. Patel’s identified limitations could further restrict  
24 the jobs available to Plaintiff (A.R. 56), the Court cannot conclude that the error was  
25 harmless. The Court will remand for the ALJ to consider Dr. Patel’s medical opinion.

26 **3. Linda Banziger, N.P.**

27 On April 7, 2014, Nurse Practitioner Linda Banziger, who treated plaintiff through  
28 Corazon Behavioral Health (*see* AR 734-47), completed an agency-provided assessment

1 form as Plaintiff's psychiatric nurse practitioner. *See* A.R. 590. She indicated that  
2 Plaintiff had been diagnosed with PTSD and Bipolar Disorder, medication was not  
3 effective in controlling Plaintiff's symptoms, and Plaintiff has significant limitations in  
4 basic work abilities due to poor concentration and mood variability. *Id.* Because  
5 Banziger is considered an "other source," her opinions can be rejected if the ALJ  
6 provides germane reasons. *Popa*, 872 F.3d at 905.

7 The ALJ afforded less weight to Banziger's opinion because she did not indicate  
8 what tests and clinical findings supported her answers. A.R. 26. The ALJ also found that  
9 an independent psychological examination by Dr. Patricia Johnson "provide[d] a more  
10 complete, thorough and well supported foundation upon which to base an opinion as to  
11 the claimant's mental functioning." *Id.* Additionally, the ALJ concluded that "Ms.  
12 Banziger's opinion that the claimant seemed unable to work [wa]s not specifically  
13 directed at the claimant's mental health, but instead seem[ed] more of a commentary on  
14 the claimant's physical allegations."<sup>2</sup> *Id.*

15 The ALJ erred by discrediting Banziger's opinion because it lacked supporting  
16 clinical findings or tests. The lack of clinical findings on a standard check-the-box form  
17 provided by an "other source" is not by itself a germane reason for discrediting the  
18 opinion. *Popa*, 872 F.3d at 907. Instead, the ALJ should consider the conclusions in  
19 light of the "other source's" treatment records with the Plaintiff. *Id.* (ALJ erred by not  
20 addressing accessible treatment records that supported the nurse practitioner's  
21 conclusions); *Revels*, 874 F.3d at 665 (the fact that the nurse practitioner examined the  
22 claimant ten times over two years is a strong reason to assign weight to her opinion).  
23 Here, Banziger used a check-the-box form provided by the Arizona Department of  
24 Economic Security; the form did not require lengthy explanations. A.R. 590. Banziger's  
25 statements are consistent with her treatment records, which state that Plaintiff has mood

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27 <sup>2</sup> As noted in Plaintiff's reply brief, the ALJ confused Nurse Banziger's  
28 assessment with a letter provided by Rebecca Villa, Med, of Corazón Integrated  
Healthcare Services. In light of this error, the Court does not address the ALJ's findings  
related to Exhibit 14F. *See* A.R. 26; Doc. 18 at 13; A.R. 732.

1 swings and outbursts of anger, and suffers from PTSD and bipolar disorder. *See*  
2 A.R. 734, 738. The ALJ erred in discrediting Banziger’s opinion because of a lack of  
3 supporting clinical findings.

4 Dr. Johnson’s independent psychological evaluation is not by itself a germane  
5 reason to discredit Banziger’s opinion. An inconsistency with the medical record can be  
6 a germane reason to discount an “other source” opinion so long as the ALJ explains the  
7 inconsistency. *Popa* 872 F.3d at 907. Here, Dr. Johnson provided a medical assessment  
8 of Plaintiff to determine whether she should try a spinal simulator. Dr. Johnson did not  
9 opine as to Plaintiff’s specific limitations or work abilities; instead, Dr. Johnson’s report  
10 presents clinical findings in relation to possible treatment, as well as a possible diagnosis  
11 of an adjustment disorder. *See* AR 398-401. The ALJ failed to explain why Dr.  
12 Johnson’s evaluation contradicts Banziger’s conclusions. Indeed, Dr. Johnson reported  
13 unspecified “vocational concerns,” and that “Plaintiff appear[ed] to be suffering from an  
14 [a]djustment [d]isorder related to her industrial injury.” A.R. 406. Without some  
15 explanation, the Court cannot find that the ALJ provided a germane reason for rejecting  
16 Nurse Practitioner Banziger’s opinion.

17 Finally, the ALJ’s conclusion that Banziger’s work limitations were based on  
18 Plaintiff’s physical condition rather than her mental health issues appears to be  
19 speculation. And it is contradicted by Banziger’s references to Plaintiff’s PTSD and  
20 bipolar disorder, and her indication that “poor concentration and mood variability” are  
21 the reasons Plaintiff’s work abilities are limited. *See* A.R. 590. This is not a germane  
22 reason for discrediting Banziger’s opinion.

23 Addressing Banziger’s opinion, the vocational expert testified that an individual  
24 who had poor concentration and mood variability may have difficulty sustaining work  
25 due to off-task behavior. *See* A.R. 55. Thus, the ALJ’s error was not harmless. The  
26 Court will remand for reconsideration of Nurse Practitioner Banziger’s opinion.

1           **B.     The ALJ Did Not Err in Evaluating Plaintiff’s Credibility.**

2           In evaluating a claimant’s symptom testimony, the ALJ must engage in a two-step  
3 analysis. First, the ALJ must determine whether the claimant presented objective medical  
4 evidence of an impairment that could reasonably be expected to produce the symptoms  
5 alleged. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). The claimant is not  
6 required to show that her impairment could reasonably be expected to cause the severity  
7 of the symptoms she has alleged, only that it could reasonably have caused some degree  
8 of the symptoms. *Id.* Second, if there is no evidence of malingering, the ALJ may reject  
9 the claimant’s symptom testimony only by giving specific, clear, and convincing reasons.  
10 *Id.* at 1015.

11           Plaintiff testified that her mental health issues keep her from working because she  
12 “gets a lot of anxiety[,] and it makes [her] more depressed because [she] can see  
13 everybody else and what they can do and [she] can’t.” A.R. 46. She stated that the  
14 depression makes her feel “worthless a lot of the time.” *Id.* at 47. The anxiety makes her  
15 “feel sometimes [she] can’t go on.” *Id.* Plaintiff also testified that she does not want to  
16 be around anyone or do anything, and that her concentration is affected by the pain in her  
17 foot. *Id.*

18           The ALJ gave this description of Plaintiff’s additional symptom testimony:

19           The claimant testified that she suffered anxiety that interfered with her  
20 ability to interact with others. The claimant also testified that she  
21 experienced pain that limited her to twenty minutes of sitting at one time  
22 and difficulty lifting her young [b]aby. The claimant reported ongoing  
23 chronic pain and shortness of breath. The claimant testified that she felt  
24 worthless and had issues with her concentration and memory.

24           A.R. 23.

25           The ALJ found that “the claimant’s medically determinable impairments could  
26 reasonably be expected to cause the alleged symptoms,” but that her statements  
27 “concerning the intensity, persistence and limiting effects of these symptoms were not  
28 entirely consistent with the medical evidence and other evidence in the record for the



1 reasons explained in this decision.” *See* A.R. 23. The ALJ then proceeded to summarize  
2 and afford weight to the various medical reports and opinions. *Id.* Plaintiff argues that  
3 the ALJ failed to provide any explanation of how this medical evidence discredits  
4 Plaintiff’s mental health testimony. *See* Doc. 18 at 18. The Court disagrees.

5 When an ALJ discredits testimony, she may consider “ordinary techniques of  
6 credibility evaluation, such as claimant’s reputation for lying, prior inconsistent  
7 statements concerning the symptoms, and other testimony by the claimant that appears  
8 less than candid.” *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ  
9 may also consider observations by treating physicians regarding the frequency, nature,  
10 and severity of Plaintiff’s symptoms. *Id.* In this case, the ALJ’s summary of medical  
11 evidence identifies several inconsistencies that discredit Plaintiffs’ symptom testimony.  
12 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989) (In reviewing the ALJ’s  
13 reasoning, the court is “not deprived of [its] faculties for drawing specific and legitimate  
14 inferences from the ALJ’s opinion.”).

15 The ALJ noted several instances from Plaintiff’s medical records that demonstrate  
16 her tendency to exaggerate symptoms and behave inconsistently with reported symptoms.  
17 A.R. 23-25. The ALJ identified several records where Plaintiff’s foot appeared normal  
18 even though she reported severe pain and swelling. *See* A.R. 22-25. The ALJ noted  
19 reports that Plaintiff’s claimed sensitivities did not match her objective evaluations, MRIs  
20 and X-rays failed to show abnormal findings, and measurements failed to substantiate  
21 Plaintiff’s report of lower extremity swelling. A.R. 24. The ALJ noted documentation  
22 that the Plaintiff used her foot despite reporting immobilizing pain. A.R. at 24. One  
23 doctor reported that Plaintiff walked with a “fairly fast style of gait,” was able to  
24 ambulate normally, and could stand on her injured foot while reaching down to put a sock  
25 on the other foot. A.R. 24. Further the ALJ noted independent evaluations where the  
26 doctors did not find Plaintiff suffered complex regional pain syndrome, and a doctor felt  
27 that Plaintiff’s subjective complaints “were grossly out of line with any abnormal  
28 objective findings.” *Id.* at 23-24. With respect to mental health testimony, the ALJ noted

1 Dr. Johnson's report that suggested Plaintiff may have the tendency to exaggerate her  
2 symptoms. A.R. 25.

3 The Court finds these to be clear and convincing reasons for discounting  
4 Plaintiff's testimony, supported by substantial evidence. The ALJ may consider  
5 inconsistent statements and treatment providers' observations. The ALJ identified many  
6 instances where Plaintiff's claims did not match the relevant evidence, and did not err in  
7 finding that this undermined her credibility generally.

8 Plaintiff argues that the ALJ mischaracterized Dr. Johnson's report, which read in  
9 context does not suggest malingering, and that the ALJ relied improperly on one report of  
10 isolated improvement in Plaintiff's psychiatric treatment records. Doc. 18 at 18. But  
11 these isolated criticisms do not undermine the ALJ's broad findings that Plaintiff often  
12 overstated her symptoms. The Court finds the ALJ has provided "such relevant evidence  
13 as a reasonable mind might accept as adequate" to support her conclusion. *Orn v. Astrue*,  
14 495 F.3d 625, 630 (9th Cir. 2007) (internal citation and quotations omitted); *see also*  
15 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1. (9<sup>th</sup> Cir. 2005) ("Where evidence is  
16 susceptible to more than one rational interpretation the ALJ's decision must be upheld.").  
17 The Court will affirm the ALJ's finding on Plaintiff's symptom testimony.

### 18 **C. Plaintiff's Mental Work Capacities.**

19 Plaintiff contends that the ALJ erred by limiting the consideration of her mental  
20 work capacities to understanding, remembering, and carrying out detailed job  
21 instructions, with only occasional interaction with the public. Plaintiff argues that the  
22 ALJ did not include her moderate difficulties with concentration, persistence and pace,  
23 asserting that these difficulties preclude her from performing the tasks outlined in the  
24 RFC. Doc. 18 at 20.

25 An ALJ must consider all of Plaintiff's impairments when determining the RFC.  
26 *See* SSR 96-8P, 1996 WL 374184, at \* 5; *see also Winschel v. Comm'r of Soc. Sec.*, 631  
27 F.3d 1176, 1180 (11th Cir. 2011); *Ramirez v. Barnhart*, 372 F.3d 546, 554 (3d Cir.  
28 2004); *see also Lubin v. Comm'r of Soc. Sec. Admin.*, 507 Fed. App'x 709, 712 (9th Cir.

1 2013) (ALJ erred by not including the limitation in concentration, persistence, and pace  
2 in the residual function capacity determination). When considering the severity of  
3 Plaintiff's mental impairments, an ALJ must first assess Plaintiff's limitations and  
4 restrictions pursuant to the "Paragraph B" categories established in 20 CFR  
5 § 404.1520a(c) and 20 CFR § 416.920a(c)(3). See SSR 96-8P, 1996 WL 374184, at \* 4;  
6 20 CFR §416.920a(c)(3) (Four categories: understand, remember or apply information;  
7 interact with others; concentrate, persist or maintain pace; and adapt or manage oneself).  
8 Then, the ALJ must conduct a more detailed assessment of mental residual capacity by  
9 considering more detailed functions contained in these four broad categories. See SSR  
10 96-8P, 1996 WL 374184, at \* 4. For evaluating concentration, persistence, and pace, the  
11 mental residual functional capacity form includes questions regarding the Plaintiff's  
12 ability to follow detailed instructions. See *Andrews*, 53 F.3d at 1044; see, e.g., AR 752-  
13 53.

14 In the step three assessment of the severity of Plaintiff's impairment, the ALJ  
15 determined that Plaintiff had moderate limitations in the area of concentration,  
16 persistence, and pace. A.R. 22. At the end of step three, the ALJ noted that her "[RFC]  
17 assessment reflects the degree of limitations [she] found in the 'paragraph B' mental  
18 function analysis." *Id.*

19 The ALJ did not mention concentration, persistence, and pace when presenting a  
20 hypothetical to the vocational expert. See A.R. 54. Instead, the ALJ asked the expert  
21 about a hypothetical individual who "can only occasionally understand, remember and  
22 carry out complex and detailed job instructions with only occasional interaction with  
23 coworkers and the public." A.R. 53. In the RFC, the ALJ concluded that the "claimant  
24 can only [occasionally]<sup>3</sup> understand, remember and carry out complex and detailed job  
25 instructions, and can only occasionally interact with coworkers or the public." A.R. 23.

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27 <sup>3</sup> The RFC in the ALJ's decision omits the word "occasionally" from the  
28 description of Plaintiff's understanding, remembering, and carrying out instructions.  
A.R. 22. Considering, the hypothetical posed to the vocational expert and the context of  
this omission, it appears to be a typographical error. *Id.* Because Plaintiff agrees that the  
ALJ limited her ability to "understand, remember, and carry out complex instructions

1 The Court concludes that the ALJ sufficiently considered Plaintiff's moderate  
2 concentration and persistence limitations by asking the vocational expert about  
3 limitations in understanding, remembering, and carrying out complex and detailed  
4 instructions and then incorporating these difficulties into Plaintiff's final RFC. These are  
5 the questions on the RFC intended to address limitations in concentration, persistence,  
6 and pace. See *Andrews*, 53 F.3d at 1044. Additionally, on remand, questions to the  
7 vocational expert and the ALJ's RFC considerations may change after the ALJ properly  
8 considers the treating psychiatrist's mental RFC evaluation. See A.R. 752-53.

9 **D. Remand.**

10 The ALJ erred in failing to address Dr. Patel's opinion, and in her evaluation of  
11 Nurse Practitioner Banziger's medical opinion. Plaintiff contends that, crediting these  
12 opinions as true, the Court must remand for an award of benefits. Docs 18 at 23; 20 at 8.  
13 The Commissioner counters that the appropriate remedy is a remand for further  
14 proceedings. Doc. 19 at 6-7.

15 "When the ALJ denies benefits and the Court finds error, the Court ordinarily  
16 must remand to the agency for further proceedings before directing an award of benefits."  
17 *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Under a "rare exception" to this  
18 rule, the Court may remand for an immediate award of benefits after conducting a three-  
19 part inquiry:

20 First, the Court asks whether the ALJ failed to provide legally sufficient  
21 reasons for rejecting evidence, whether claimant testimony or medical  
22 opinion. Next, the Court determines whether there are outstanding issues  
23 that must be resolved before a disability determination can be made, and  
24 whether further administrative proceedings would be useful. When these  
25 first two conditions are satisfied, [the Court] will then credit the discredited  
26 testimony as true for the purpose of determining whether, on the record  
27 taken as a whole, there is no doubt as to disability.

28 (see Doc. 18 at 20) and the record clearly indicates an intent to limit Plaintiff's abilities in  
that context (see A.R. 53), the Court will assume the word "occasionally" for the  
purposes of Plaintiff's argument. On remand, the ALJ should address this omission.

1 *Id.* (internal quotation marks and citations omitted). *Leon* emphasized that the Court has  
2 discretion to remand for further proceedings even if it reaches the third step in the  
3 process. *Id.* “Where an ALJ makes a legal error, but the record is uncertain and  
4 ambiguous, the proper approach is to remand the case to the agency.” *Id.* (quotation  
5 marks omitted).

6 The Court concludes that further proceedings are necessary before a disability  
7 determination can be made. The ALJ erred in omitting Dr. Patel’s assessment from the  
8 summary of medical opinions and in discrediting Nurse Practitioner Banziger’s. Both  
9 professionals opined that Plaintiff’s ability to stay on task and issues with concentration  
10 affect Plaintiff’s ability to work. But the ALJ has not fully developed the record on  
11 Plaintiff’s mental impairments because she never weighed Dr. Patel’s medical opinion  
12 against the record as a whole.

13 Further, the Court is not convinced that the record, once proper weight and  
14 consideration is given to the medical opinions, would support Plaintiff’s disability. *See*  
15 *Garrison*, 759 F.3d at 1021 (courts may remand if there is still doubt that a claimant is  
16 disabled). It is not entirely clear how the evidence would affect the vocational expert’s  
17 testimony. During the hearing, the following exchange occurred:

18  
19 [Plaintiff’s Attorney]: [To vocational expert] if we took a look at that first  
20 hypothetical and we added to that the non-exertional component of pain  
21 taking a person off task, let’s say, 10, 11 percent, would that impact your  
22 answer?

23 [Vocational Expert]: Yes, that person would not be able to do those jobs at  
24 anything over ten percent I think. The norm is about eight to ten percent.

25 [Plaintiff’s Attorney]: So, there would be no work for such an individual?

26 [Vocational Expert]: Yes, or at least in unskilled.

27 [Plaintiff’s Attorney]: I don’t know if this is enough for you, but at [nurse  
28 practitioner Banziger’s report] we have an indication from the  
psychological source indicat[ing] poor concentration and [mood]  
variability.

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[Plaintiff's Attorney]: Is that sufficient enough for you to make an assessment?

[Vocational Expert]: Well, not – no, but it is kind of to me equates to the off task behavior as far as concentration.

[Plaintiff's Attorney]: So, kind of would indicate that maybe not a sustainable situation from a work standpoint?

[Vocational Expert]: Yes

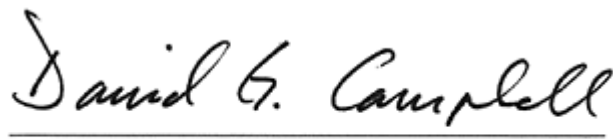
A.R. 55. The expert's response to Nurse Practitioner's Banziger's report was far from conclusive as to its effect on Plaintiff's ability to work.

Finally, the ALJ provided sufficient reasons for discounting Plaintiff's symptom testimony, which raises general questions regarding her disability.

The Court concludes that further proceedings before the ALJ would be useful.

**IT IS ORDERED** that the final decision of the Commissioner of Social Security is **vacated** and this case is **remanded** for further proceedings consistent with this opinion. The Clerk shall enter judgment accordingly and **terminate** this case.

Dated this 5th day of November, 2018.



David G. Campbell  
Senior United States District Judge