

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Heather Angel Hiduchick,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-19-08179-PCT-SMB

ORDER

15 At issue is the denial of Plaintiff Heather Hiduchick’s Applications for Social
16 Security Disability Insurance (“SSDI”) and Supplemental Security Income (“SSI”)
17 benefits by the Social Security Administration (“SSA”) under the Social Security Act (“the
18 Act”). Plaintiff filed a Complaint (Doc. 1) seeking judicial review of that denial and an
19 Opening Brief (Doc. 16). Defendant SSA filed an Answering Brief (Doc. 19), and Plaintiff
20 filed a Reply (Doc. 22). The Court has reviewed the briefs and Administrative Record
21 (“AR”) (Doc. 11) and reverses the Administrative Law Judge’s (“ALJ”) decision (AR at
22 14-26) and remands this matter for a new hearing for the reasons addressed herein.

23 **I. Background**

24 Plaintiff filed an Application for SSDI and SSI benefits on May 22, 2015, alleging
25 a disability beginning on November 10, 2013. (AR 14). Plaintiff’s claims were initially
26 denied on October 21, 2015, and upon reconsideration on March 25, 2016. (*Id.*) A hearing
27 was held before ALJ Tin Chen on February 1, 2018. (*Id.* at 32-76). Plaintiff was 45 years
28 old at the time of the hearing and held previous employment as a bookkeeper and assistant

1 retail store manager. (*Id.*) Plaintiff’s Applications were denied by the ALJ on July 5, 2018.
2 (*Id.* at 26). Thereafter, the Appeals Council denied Plaintiff’s Request for Review of the
3 ALJ’s decision and this appeal followed. (Doc. 1).

4 After considering the medical evidence and opinions, the ALJ evaluated Plaintiff’s
5 disability claim based on the severe impairments of bipolar disorder, agoraphobia, anxiety
6 disorder, and depressive disorder. (AR 17). While the ALJ noted that Plaintiff’s severe
7 impairments limited her ability to perform basic work activities, the ALJ determined that
8 Plaintiff had the residual functional capacity (“RFC”) to perform a full range of work at all
9 exertional levels, and thus was not disabled. (*Id.* at 29).

10 Plaintiff argues that the ALJ committed harmful error in rejecting the assessment of
11 Licensed Associate Counselor (“LAC”) Karen Marzullo without giving germane reasons
12 for doing so, in improperly considering the opinions of Dr. Celia A. Drake, and in
13 discounting her subjective symptom testimony without providing clear and specific reasons
14 for doing so. (Doc. 16 at 2). Plaintiff argues this matter should be remanded for an award
15 of benefits. (*Id.* at 28-29). The Commissioner argues that the ALJ did not err in the
16 consideration of Marzullo’s opinions or in addressing Plaintiff’s symptom testimony.
17 (Doc. 19). However, the Commissioner concedes that the ALJ erred in the consideration
18 of Dr. Drake’s opinions, arguing that remand of this matter is necessary for a new hearing
19 and decision. (*Id.*) The Court has reviewed the medical record and will discuss the
20 pertinent evidence in addressing the issues raised by the parties.

21 **II. Legal Standards**

22 An ALJ’s factual findings “shall be conclusive if supported by substantial
23 evidence.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). The Court may set aside
24 the Commissioner’s disability determination only if it is not supported by substantial
25 evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
26 Substantial evidence is relevant evidence that a reasonable person might accept as adequate
27 to support a conclusion considering the record as a whole. *Id.* Generally, “[w]here the
28 evidence is susceptible to more than one rational interpretation, one of which supports the

1 ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947,
2 954 (9th Cir. 2002) (citations omitted). In determining whether to reverse an ALJ's
3 decision, the district court reviews only those issues raised by the party challenging the
4 decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001).

5 To determine whether a claimant is disabled for purposes of the Act, the ALJ
6 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of
7 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*
8 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ determines whether
9 the claimant is presently engaging in substantial gainful activity. 20 C.F.R.
10 §404.1520(a)(4)(i). At step two, the ALJ determines whether the claimant has a "severe"
11 medically determinable physical or mental impairment. 20 C.F.R. § 404.1520(a)(4)(ii). At
12 step three, the ALJ considers whether the claimant's impairment or combination of
13 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P
14 of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is automatically
15 found to be disabled. *Id.* At step four, the ALJ assesses the claimant's RFC and determines
16 whether the claimant is still capable of performing past relevant work. 20 C.F.R.
17 § 404.1520(a)(4)(iv). If not, the ALJ proceeds to the fifth and final step, where she
18 determines whether the claimant can perform any other work in the national economy
19 based on the claimant's RFC, age, education, and work experience. 20 C.F.R.
20 § 404.1520(a)(4)(v). If not, the claimant is disabled. *Id.*

21 **III. Analysis**

22 Plaintiff argues that the ALJ committed harmful error in rejecting the assessment of
23 LAC Marzullo without giving germane reasons for doing so, in improperly considering the
24 opinions of consultive examiner Dr. Celia A. Drake, and in discounting Plaintiff's
25 subjective symptom testimony without providing clear and specific reasons for doing so.
26 (Doc. 16 at 2). The Court will address these issues in turn.

27 **A. The ALJ erred in considering the opinion of consultive examiner, Dr.** 28 **Celia A. Drake.**

1 Here, both parties agree that the ALJ improperly considered the opinion of
2 consultive examiner, Dr. Celia A. Drake. (Doc. 16 at 22-24; Doc 19 at 23-24). In
3 particular, the Commissioner concedes that while the ALJ accorded both “great” and
4 “significant” weight to Dr. Drake’s opinion, the ALJ did not account for Dr. Drake’s
5 opinions as to the effect of Plaintiff’s impairments in the RFC assessment, or explain how
6 Dr. Drake’s opinion impacted the RFC finding. (Doc. 19 at 23-24). Therefore, the Court
7 finds harmful error here.

8 **B. The ALJ gave germane reasons to give little weight to the opinion of**
9 **Karen Marzullo.**

10 Plaintiff argues that the ALJ failed to give germane reasons to reject the opinion of
11 her counselor, Ms. Marzullo. (Doc. 16 at 16). Plaintiff argues that the Court should credit
12 Marzullo’s opinion as true and remand this matter for an award of benefits.

13 At the time Plaintiff filed her Application, Ms. Marzullo, a counselor, was not
14 considered an “acceptable” medical source, but rather was an “other source” opinion. *Popa*
15 *v. Berryhill*, 872 F.3d 901, 907 (9th Cir. 2017). Thus, to reject her opinion, the ALJ only
16 needed to provide “germane” reasons for doing so. *Id.* at 906; *see also* 20 C.F.R. §
17 406.913(a) (defining acceptable medical sources as licensed physicians and psychologists),
18 416.913(d) (defining other sources as medical professionals not listed in subsection (a));
19 *Britton v. Colvin*, 787 F.3d 1011, 1013 (9th Cir. 2015) (per curiam) (ALJ need only give
20 germane reasons to reject an “other source” opinion). Thus, while merely stating that
21 Marzullo’s status as an unacceptable medical source would not be a germane reason to
22 reject her opinion, the ALJ cited multiple reasons to give this opinion little weight. *See*
23 *Camilli v. Berryhill*, No. 18-CV-06322-JSC, 2019 WL 3412921, at *8 (N.D. Cal. July 29,
24 2019) (citing *Popa*, 872 F.3d at 907).

25 Marzullo completed a two-page check-box questionnaire where she opined that
26 Plaintiff had moderate limitations in her ability to understand, remember, and carry out
27 instructions, and had marked to extreme limitations in her ability to maintain attention and
28 concentration. (AR 985-86). Marzullo also opined to extreme limitation in Plaintiff’s

1 ability to interact with others. (*Id.*) Marzullo concluded by checking a box that Plaintiff
2 could perform a job for eight hours per day for five days per week on a sustained basis less
3 than 50% of the time. (*Id.*)

4 The ALJ first noted that this opinion was not supported by the objective medical
5 evidence. *See* 20 C.F.R. § 404.1527(c)(4) (the ALJ is charged with evaluating the
6 “consistency of [an] opinion with the record as a whole”). The ALJ specifically discussed
7 clinical findings and examination notes describing Plaintiff’s cooperative demeanor,
8 logical thought process, attention, and stable moods. (AR 23).

9 The ALJ also stated that the two-page form contained only checks, and that
10 Marzullo did not provide additional support or comments for any of her opined limitations.
11 (*Id.* at 22). While Plaintiff contends that this is not a germane reason to reject this opinion,
12 Plaintiff’s arguments are misplaced. First, the cases cited by Plaintiff in this section relate
13 to treating physicians, not “other source” opinions. (Doc. 16 at 21). Moreover, the
14 regulations instruct the ALJ to give weight to the source opinion evidence based on the
15 explanation provided by the source to support the opinion. *See* 20 C.F.R. § 404.1527(c)(3)
16 (“The better an explanation a source provides for a medical opinion, the more weight we
17 will give that medical opinion.”). The ALJ did not err in noting that there was no
18 explanation accompanying the checked boxes.

19 Lastly, the ALJ considered the length of the treatment relationship, noting that it
20 appeared that Marzullo completed the check-box form after meeting Plaintiff only once.
21 (AR 22). Plaintiff acknowledged that she met with Marzullo for the specific purpose of
22 obtaining an evaluation for her Application. (*Id.* at 65). As the regulations instruct the
23 ALJ to consider the length and nature of the treatment relationship when weighing source
24 opinions, the ALJ did not err by noting the short period of the treatment relationship. *See*
25 20 C.F.R. § 404.1527(c)(2) (“Generally, the longer a treating source has treated you and
26 the more times you have been seen by a treating source, the more weight we will give to
27 the source’s medical opinion.”).

28 Based on all these reasons, the ALJ determined that Marzullo’s opinions would be

1 given little weight. The Court finds that the ALJ provided germane reasons for giving little
2 weight to this opinion. The ALJ did not err here.

3 **C. The ALJ provided specific, clear, and convincing reasons supported by**
4 **substantial evidence for rejecting Plaintiff’s symptom testimony.**

5 Plaintiff argues that the ALJ did not give legitimate and convincing reasons
6 supported by substantial evidence for discounting her subjective symptom testimony.
7 (Doc. 16 at 24-28). The Commissioner argues that the ALJ properly examined the medical
8 evidence to determine that the record did not support Plaintiff’s testimony as to the severity
9 of her symptoms. (Doc. 19 at 14-19).

10 An ALJ must evaluate whether the claimant has presented objective medical
11 evidence of an impairment “which could reasonably be expected to produce the pain or
12 symptoms alleged.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007)
13 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (*en banc*) (internal citations
14 omitted)). In evaluating a claimant’s pain testimony after a claimant produces objective
15 medical evidence of an underlying impairment, “an ALJ may not reject a claimant’s
16 subjective complaints based solely on a lack of medical evidence to fully corroborate the
17 alleged severity of pain.” *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). However,
18 the ALJ may “reject the claimant’s testimony about the severity of [the] symptoms”
19 provided that the ALJ also explains his decision “by providing specific, clear, and
20 convincing reasons for doing so.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 488–89 (9th Cir.
21 2015). The ALJ may also consider “whether the claimant engages in daily activities
22 inconsistent with the alleged symptoms.” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d
23 1028, 1040 (9th Cir. 2007)). “Even where those activities suggest some difficulty
24 functioning, they may be grounds for discrediting the claimant’s testimony to the extent
25 that they contradict claims of a totally debilitating impairment,” *Id.* at 1113, or where they
26 suggest that “later claims about the severity of [the] limitations were exaggerated,”
27 *Valentine v. Astrue*, 574 F.3d 685, 694 (9th Cir. 2009).

28 Plaintiff alleged that she suffered from medical conditions that cause fatigue,

1 depression, anxiety, self-isolation, night terrors, difficulty hearing and remembering, and
2 difficulty concentrating and getting along with others. (AR 39-77). Plaintiff testified that
3 she often feared leaving her home and that she had profound agoraphobia. (*Id.*) Despite
4 these symptoms, Plaintiff testified that she cares for her cats, manages personal care and
5 hygiene, prepares meals, drives, goes shopping, and likes to read, do crossword puzzles,
6 and messages with friends and family. (*Id.*)

7 The ALJ found that Plaintiff’s medically determinable impairments could
8 reasonably be expected to produce the symptoms alleged, but that her statements
9 concerning the intensity, persistence, and limiting effects of those symptoms were not
10 consistent with the medical evidence, including her own statements and testimony
11 regarding activities of daily living. (*Id.* at 22).

12 To support this finding, the ALJ discussed treatment records showing that Plaintiff’s
13 symptoms generally improved with medications, including medical marijuana, when
14 Plaintiff was compliant with taking her medications. (AR 329-33). The ALJ also noted
15 that at that time, Plaintiff reported that functioning was not difficult at all, and that she had
16 a generally normal mental status examination. (*Id.*)

17 The ALJ also discussed Plaintiff’s testimony about her daily activities and found
18 these to be inconsistent with her allegations of disabling symptoms. The ALJ noted that
19 Plaintiff took a trip to Boston in 2015, and later gave widely varying accounts of her
20 symptoms on this vacation. (AR 22). To medical providers, Plaintiff reported that she
21 spent the trip socializing, reconnecting with friends, had a positive experience, had no
22 desire to come home, and had an “amazing” time attending an NFL football game. (*Id.* at
23 459). At the hearing, Plaintiff testified that this trip was stressful, required her to be
24 tranquilized for the flights, and that when she got to Boston, all she wanted to do was come
25 home. (*Id.* at 53). The ALJ found that her ability to travel to Boston and attend a
26 professional football game at a full NFL stadium runs counter to her claims of profound
27 agoraphobia. (*Id.* at 22). Indeed, the ALJ is responsible for addressing such
28 inconsistencies. *See* 20 C.F.R. § 404.1529 (c)(4) (“We will consider whether there are any

1 inconsistencies in the evidence and the extent to which there are any conflicts between your
2 statements and the rest of the evidence, including your history, the signs and laboratory
3 findings, and statements by your medical sources or other persons about how your
4 symptoms affect you.”). And while Plaintiff argues that it was harmful error for the ALJ
5 to use her travel to question the severity of her symptoms, numerous decisions from the
6 Ninth Circuit hold otherwise. *See Romanelli v. Astrue*, 267 Fed. Appx. 722, 724 (9th Cir.
7 2008) (“ALJ reasonably concluded that Ms. Romanelli’s claimed limitation of being
8 unable to stand for more than fifteen minutes at a time was inconsistent with her testimony
9 about her physical activities such as traveling around the United Kingdom for two weeks”);
10 *Wennet v. Saul*, 777 Fed. Appx. 875, 877 (9th Cir. 2018) (discounting symptom testimony
11 where claimant travelled to New York and Italy); *Sadeeq v. Colvin*, 607 Fed. Appx. 629,
12 631 (9th Cir. 2015) (“ALJ did not err by concluding that Sadeeq’s trip to Mecca for a
13 pilgrimage suggested that the alleged symptoms and limitations may have been
14 overstated.”).

15 Lastly, the Court does not agree that the ALJ relied only on her “perceived medical
16 expertise” in discounting Plaintiff’s symptom testimony. (Doc. 16 at 26). The ALJ
17 properly concluded that the examinations in the medical record did not support Plaintiff’s
18 claims of disabling limitations, and therefore, properly found that her subjective symptom
19 testimony was not persuasive. While Plaintiff may see this evidence in a different light,
20 the Court cannot second-guess the findings of the ALJ when there is no error in the
21 discussion of the symptom testimony. *See Thomas*, 278 F.3d at 954 (“[w]here the evidence
22 is susceptible to more than one rational interpretation, one of which supports the ALJ’s
23 decision, the ALJ’s conclusion must be upheld.”). The Court finds that the ALJ provided
24 specific, clear, and convincing reasons for discounting Plaintiff’s symptom testimony. *See*
25 *Brown-Hunter*, 806 F.3d at 488–89.

26 **IV. Remand for Further Proceedings**

27 Here, the Court has found error in the ALJ’s consideration of Dr. Drake’s opinion.
28 Once a court has determined an ALJ’s decision contains harmful error, the decision

1 whether to remand a case for additional evidence or for an award of benefits is within the
2 discretion of the court. *Reddick*, 157 F.3d at 728; *Swenson v. Sullivan*, 876 F.2d 683, 689
3 (9th Cir. 1989). However, the latter is “a rare and prophylactic exception to the well-
4 established ordinary remand rule.” *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir. 2017).
5 For the Court to remand for award of benefits, three conditions must be satisfied: “(1) the
6 record has been fully developed and further administrative proceedings would serve no
7 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
8 evidence, whether claimant testimony or medical opinion; and (3) if the improperly
9 discredited evidence were credited as true, the ALJ would be required to find the claimant
10 disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). However,
11 even where each condition is satisfied, the Court may still remand for further administrative
12 proceedings if “an evaluation of the record as a whole creates serious doubt that a claimant
13 is, in fact, disabled.” *Id.* at 1021. “If additional proceedings can remedy defects in the
14 original administrative proceedings, a social security case should be remanded. “Remand
15 for further proceedings is appropriate where there are outstanding issues that must be
16 resolved before a determination can be made, and it is not clear from the record that the
17 ALJ would be required to find claimant disabled if all the evidence were properly
18 evaluated.” *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) (*citing Vasquez v. Astrue*,
19 572 F.3d 586, 593 (9th Cir. 2009)).

20 Here, it is not clear from the record that the ALJ would be required to find Plaintiff
21 disabled if all the evidence were properly evaluated using the proper standards. Of note,
22 Plaintiff’s Opening Brief appears to argue for an award of benefits if the Court were to find
23 error on either the ALJ’s findings as to Plaintiff’s symptom testimony or to Ms. Marzallo’s
24 opinions, but not as to Dr. Drake’s opinion. (Doc. 16 at 28-29). The Court has determined
25 that the ALJ properly addressed the inconsistencies in Plaintiff’s symptom testimony in
26 arriving at the determination to reject that testimony. The Court has also determined that
27 the ALJ gave germane reasons for giving little weight to Ms. Marzullo’s opinion. Here,
28 further proceedings would be useful given that Dr. Drake’s opinion was not meaningfully

1 addressed. The Court is reluctant to credit this opinion as true and remand for immediate
2 payment of benefits where there was no meaningful analysis of Dr. Drake's opinion and
3 credibility. The issue is thus best left to the ALJ, as the designated finder of fact, to
4 determine whether this medical opinion evidence, when properly evaluated according to
5 applicable regulatory standards, establishes disability. Therefore, the Court, in its
6 discretion, finds that a remand for further proceedings is appropriate, to hold a new hearing,
7 reconsider the medical opinion evidence of record, and issue a new decision.

8 Accordingly,

9 **IT IS HEREBY ORDERED** that the decision of the Commissioner is
10 **REVERSED** and this case is **REMANDED** pursuant to sentence four of 42 U.S.C. §
11 405(g) for further administrative proceedings, including a new administrative hearing, to
12 allow the Commissioner to further evaluate the medical opinion evidence, reevaluate
13 Plaintiff's residual functional capacity in light of the reevaluation of the medical opinions,
14 and issue a new decision.

15 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter judgment
16 accordingly.

17 Dated this 16th day of November, 2021.

18
19
20
21
22
23
24
25
26
27
28



Honorable Susan M. Brnovich
United States District Judge