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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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10 Brenda Kuchenberg,

11 Plaintiff,

12 vs.

13 Michael J. Astrue, Commissioner of  
Social Security,

14 Defendant.

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No. CIV 10-726-TUC-GEE

**ORDER**

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The plaintiff filed this action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. §405(b). The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having received the written consent of both parties. *See* FED.R.CIV.P. 73.

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The Magistrate Judge concludes the final decision of the Commissioner must be reversed. The Commissioner’s decision is not supported by substantial evidence and free from legal error. The case will be remanded for payment of benefits.

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PROCEDURAL HISTORY

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On August 28, 2007, Kuchenberg filed an application for disability insurance benefits. (Tr. 82). She alleged disability beginning on May 2, 2007, due to “[d]epression, bipolar, delayed sleep phase. . . .” (Tr. 124). Her claim was denied initially (Tr. 57) and upon

1 reconsideration. (Tr. 63). Kuchenberg requested review and appeared with counsel at a hearing  
2 before Administrative Law Judge (ALJ) Lauren R. Mathon on June 8, 2009. (Tr. 9, 67, 68-71).  
3 In her decision, dated October 23, 2009, the ALJ found Kuchenberg was not disabled. (Tr. 9-  
4 18).

5 Kuchenberg appealed, but the Appeals Council denied review making the decision of the  
6 ALJ the final decision of the Commissioner. (Tr. 1-3); *Bass v. Social Sec. Admin.*, 872 F.2d  
7 832, 833 (9<sup>th</sup> Cir. 1989). Kuchenberg subsequently filed the instant action appealing the  
8 Commissioner's final decision. *See* 20 C.F.R. § 422.210(a). She filed a motion for summary  
9 judgment on April 21, 2011. (Doc. 12).

#### 10 11 Claimant's Work History and Medical History

12 Between 2005 and 2007, Kuchenberg worked as a customer service representative and  
13 as a radio disc jockey. (Tr. 36, 112). In early 2007, Kuchenberg was working full-time and  
14 taking care of her mother. (Tr. 499; treatment note 4/23/2009, record 204 of 233). When her  
15 mother died in April of 2007, she "lost it" and quit her job because "working full-time was too  
16 much." *Id.*, (Tr. 266, 267). Kuchenberg alleged disability beginning on May 2, 2007, due to  
17 "[d]epression, bipolar, delayed sleep phase. . . ." (Tr. 124). At the time of the hearing, in June  
18 of 2009, she was working 8-12 hours per week as a radio disc jockey and a receptionist for a  
19 beauty salon. (Tr. 28).

20 Kuchenberg has suffered from mental illness off and on since childhood. (Tr. 223, 288,  
21 622). The record contains treatment notes from La Frontera Center, Inc., starting in June of  
22 2006 and extending to June of 2009. (Tr. 212-283, 474-730). At various times, Kuchenberg  
23 has been treated with Prozac, Trazodone, and Cymbalta for depression; Propranolol and Ativan  
24 for anxiety; Eskalith for mania; and Ambien for insomnia. (Tr. 368, 475). The treatment record  
25 documents an Axis I diagnosis of (1) 296.33 [major depressive disorder severe without  
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1 psychotic features<sup>1</sup>] and (2) 307.45 delayed sleep phase. (Tr. 264, 267, 269, 273, 275, 277, 278,  
2 280, 281).

3 In October of 2007, Kuchenberg was examined by a psychologist, Noelle Rohen, Ph.D.,  
4 for the disability determination service. (Tr. 288-92). Rohen reviewed the record, conducted  
5 a clinical interview, and performed a mental status exam. *Id.* Rohen offered the following  
6 diagnosis:

7 Axis I: 296.90 Mood Disorder NOS, Currently Depressed, Severe  
309.81 Posttraumatic Stress Disorder  
8 Axis II: V71.09 No Diagnosis  
9 Axis III: Defer to medical records

10 (Tr. 290). Rohen found Kuchenberg's understanding, memory, social interaction, and  
11 adaptation skills to be good. (Tr. 292). She found Kuchenberg's ability to sustain concentration  
12 and pace, however, to be poor. *Id.* She explained that "[Kuchenberg] can be expected to  
13 maintain concentration and persistence at a good to fair level until depressive severity increases,  
14 at which time she can be expected to fail to attend altogether until such impedances as  
15 hypersomnia, fatigue, and severe depressive mood subside." *Id.* Rohen made the following  
16 assessment of Kuchenberg's employment prospects: "With regard to work, it is expected that  
17 claimant will continue to struggle as she reportedly has in the past, performing fairly well at  
18 work, when she is able to go, but not managing regular attendance on a full-time sustained  
19 basis." (Tr. 291).

20 In November of 2007, Eugene Campbell, Ph.D., reviewed the medical record and  
21 completed a Psychiatric Review Technique form. (Tr. 294, 353). He documented (1) Affective  
22 Disorders and (2) Anxiety-Related Disorders. (Tr. 294, 353). He found mild limitation in  
23 "Maintaining Social Functioning" and "Maintaining Concentration, Persistence or Pace." (Tr.  
24 304). Campbell noted that Kuchenberg's symptoms were exacerbated when her mother died,  
25 but with treatment she was making improvements. (Tr. 306). He opined that her mental  
26 impairments would be non-severe by May of 2008. *Id.*

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27 <sup>1</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 319  
28 (4th ed., 1999).

1 In May of 2008, Alan Goldberg, Psy.D., reviewed the medical record and completed a  
2 Psychiatric Review Technique form. (Tr. 381). He documented (1) Affective Disorders and  
3 (2) Anxiety-Related Disorders. (Tr. 381). He found moderate limitation in “Maintaining Social  
4 Functioning” and “Maintaining Concentration, Persistence or Pace.” (Tr. 391).

5 Goldberg completed a Mental Residual Functional Capacity Assessment. (Tr. 377). He  
6 found moderate limitation in Kuchenberg’s “ability to understand and remember detailed  
7 instructions,” “ability to carry out detailed instructions,” “ability to maintain attention and  
8 concentration for extended periods,” “ability to complete a normal workday and workweek .  
9 . . . and to perform at a consistent pace,” “ability to interact appropriately with the general  
10 public,” “ability to get along with co-workers,” and “ability to respond appropriately to changes  
11 in the work setting.” (Tr. 377-78).

12 The record contains a Medical Source Statement received from La Frontera and dated  
13 May 20, 2008. (Tr. 374). It is signed, but the signature is illegible. *Id.* The statement describes  
14 Kuchenberg’s functional limitations as “occasional difficulties” with understanding and  
15 memory, “difficulties with concentration . . . interpersonal relations,” “labile affect,” and  
16 “rigidity that interferes with her ability to adjust.” *Id.*

17 The record contains a letter from La Frontera staff including Bruce Roberts, M.D., dated  
18 May 20, 2009. (Tr. 395). The letter gives Kuchenberg’s diagnosis as Major Depression  
19 Disorder, Recurrent and opines that “[a]lthough Ms. Kuchenberg has been able to maintain part-  
20 time employment, she does not have the mental ability to work a sufficient amount of hours to  
21 meet the most basic of financial obligations.” *Id.*

22 On June 8, 2009, Kuchenberg appeared with counsel at a hearing before ALJ Lauren R.  
23 Mathon. (Tr. 20). At the time of the hearing, Kuchenberg was 45 years old and had completed  
24 2 years of college. (Tr. 25, 35).

25 Kuchenberg testified that she is single and lives alone. (Tr. 34). She does her own  
26 cooking, laundry, and cleaning. (Tr. 50).

27 She explained she is unable to work because of “overwhelming depression” and PTSD.  
28 (Tr. 26). She has panic attacks three times a week. (Tr. 34). She has memory problems she

1 attributes to a vehicle accident in high school. (Tr. 31). Kuchenberg also has fibromyalgia and  
2 chronic diarrhea. (Tr. 30). She had lap band surgery in January of 2006 for morbid obesity.  
3 (Tr. 51, 469).

4 Kuchenberg also has back pain and neck pain. (Tr. 47). She estimated she can stand for  
5 20 minutes before she needs to sit down. (Tr. 48). She finds it difficult to lift a 24-pack of  
6 water. (Tr. 49).

7 Kuchenberg currently works 4 hours per week as a disc jockey and six hours per week  
8 as a receptionist for her girlfriend's beauty salon. (Tr. 28, 29). She explained she could not  
9 work full-time because she does not have the stamina or "mental durability." (Tr. 29). She  
10 does, however, try to attend a musical jam session twice a week. (Tr. 33, 156).

#### 11 12 CLAIM EVALUATION

13 Social Security Administration (SSA) regulations require that disability claims be  
14 evaluated pursuant to a five-step sequential process. 20 C.F.R. §§ 404.1520, 416.920; *Baxter*  
15 *v. Sullivan*, 923 F.2d 1391, 1395 (9<sup>th</sup> Cir. 1991). The first step requires a determination of  
16 whether the claimant is engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4),  
17 416.920(a)(4). If so, then the claimant is not disabled, and benefits are denied. *Id.* If the  
18 claimant is not engaged in substantial gainful activity, the ALJ proceeds to step two which  
19 requires a determination of whether the claimant has a "medically severe impairment or  
20 combination of impairments." 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).

21 In making a determination at step two, the ALJ uses medical evidence to consider  
22 whether the claimant's impairment more than minimally limits or restricts his or her "physical  
23 or mental ability to do basic work activities." *Id.* If the ALJ concludes the impairment is not  
24 severe, the claim is denied. *Id.* Upon a finding of severity, the ALJ proceeds to step three  
25 which requires a determination of whether the impairment meets or equals one of several listed  
26 impairments that the Commissioner acknowledges are so severe as to preclude substantial  
27 gainful activity. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); 20 C.F.R. Pt. 404, Subpt. P,  
28 App.1. If the claimant's impairment meets or equals one of the listed impairments, then the

1 claimant is presumed to be disabled, and no further inquiry is necessary. *Ramirez v Shalala*,  
2 8 F.3d 1449, 1452 (9<sup>th</sup> Cir. 1993). If the claimant’s impairment does not meet or equal a listed  
3 impairment, evaluation proceeds to the next step.

4 The fourth step requires the ALJ to consider whether the claimant has sufficient residual  
5 functional capacity<sup>2</sup> (RFC) to perform past work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).  
6 If yes, then the claim is denied. *Id.* If the claimant cannot perform any past work, then the ALJ  
7 must move to the fifth step which requires consideration of the claimant’s RFC to perform other  
8 substantial gainful work in the national economy in view of claimant’s age, education, and work  
9 experience. 20 C.F.R. §§ 404.1520(a)(4); 416.920(a)(4).

10 In determining whether the claimant retains the ability to perform other work, the ALJ  
11 may refer to the Medical Vocational Guidelines (“the grids”) promulgated by the SSA. *See* 20  
12 C.F.R. Pt. 404, Subpt. P, App.2; *Desrosiers v. Secretary of Health and Human Services*, 846  
13 F.2d 573, 576-577 (9<sup>th</sup> Cir. 1988). The grids categorize jobs according to their exertional  
14 requirements such as sedentary work, light work, or medium work. *Tackett v. Apfel*, 180 F.3d  
15 1094, 1101 (9<sup>th</sup> Cir. 1999). The grids calculate whether or not the claimant is disabled based  
16 on the claimant’s exertional ability, age, education, and work experience. *Id.* The grids are a  
17 valid basis for denying claims where they completely and accurately describe the claimant’s  
18 abilities and limitations. *Id.* at 1101-02. If the claimant has only exertional limitations, the  
19 claim may be resolved based only on the grids. *Lounsbury v. Barnhart*, 468 F.3d 1111, 1115  
20 (9<sup>th</sup> Cir. 2006).

21 If the claimant has significant non-exertional limitations, the grids do not apply. *Penny*  
22 *v. Sullivan*, 2 F.3d 953, 958-959 (9<sup>th</sup> Cir.1993). “Non-exertional limitations are limitations that  
23 do not directly affect a claimant’s strength.” *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9<sup>th</sup> Cir.  
24 1988). Mental limitations, for example, are non-exertional. *Id.* at 1340-41. If significant non-  
25 exertional limitations prevent the claimant from performing the full range of work in any  
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28 <sup>2</sup> Residual functional capacity is defined as that which an individual can still do despite his or  
her limitations. 20 C.F.R. §§ 404.1545, 416.945.

1 exertional category, the ALJ must take the testimony of a vocational expert to deny the claim.  
2 *Id.* at 1341.

3 If the claimant has both exertional and non-exertional limitations, the ALJ must consult  
4 the grids first before considering the testimony of a vocational expert at step five. *Lounsbury*  
5 *v. Barnhart*, 468 F.3d 1111, 1115 (9<sup>th</sup> Cir. 2006). If the grids direct a finding of disability, that  
6 finding must be adopted by the Commissioner. *Lounsbury*, 468 F.3d at 1116.

### 7 8 The ALJ's Findings

9 At step one of the disability analysis, the ALJ found Kuchenberg “has not engaged in  
10 substantial gainful activity since May 2, 2007, the alleged onset date . . . .” (Tr. 11). At step  
11 two, she found Kuchenberg has “the following severe impairments: depression, posttraumatic  
12 stress disorder, degenerative joint disease (neck and lumbar and cervical spine), and  
13 fibromyalgia . . . .” (Tr. 11). At step three, the ALJ found Kuchenberg’s impairments did not  
14 meet or equal the criteria for any impairment found in the Listing of Impairments, Appendix 1,  
15 Subpart P, of 20 C.F.R., Part 404. (Tr. 12). The ALJ then analyzed Kuchenberg’s residual  
16 functional capacity (RFC). (Tr. 14). She found Kuchenberg “has the residual functional  
17 capacity to perform unskilled to semi-skilled medium work . . . .” (Tr. 14). At step four, the  
18 ALJ found Kuchenberg could perform her past relevant work as a customer service  
19 representative. (Tr. 16). At step five, the ALJ found, in the alternative, that Kuchenberg was  
20 not disabled by using the grids. (Tr. 17).

### 21 22 STANDARD OF REVIEW

23 An individual is entitled to disability benefits if he or she demonstrates, through  
24 medically acceptable clinical or laboratory standards, an inability to engage in substantial  
25 gainful activity due to a physical or mental impairment that can be expected to last for a  
26 continuous period of at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). “[A]  
27 claimant will be found disabled only if the impairment is so severe that, considering age,  
28 education, and work experience, that person cannot engage in any other kind of substantial

1 gainful work which exists in the national economy.” *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir.  
2 1993) (quoting *Marcia v. Sullivan*, 900 F.2d 172, 174 (9<sup>th</sup> Cir. 1990)).

3 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),  
4 1383(c)(3). The decision to deny benefits “should be upheld unless it contains legal error or is  
5 not supported by substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007).  
6 Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept  
7 as adequate to support a conclusion.” *Id.* It is “more than a mere scintilla but less than a  
8 preponderance.” *Id.*

9 “Where evidence is susceptible to more than one rational interpretation, the ALJ’s  
10 decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing court must consider  
11 the entire record as a whole and may not affirm simply by isolating a specific quantum of  
12 supporting evidence.” *Id.*

13 In evaluating evidence to determine whether a claimant is disabled, the opinion of a  
14 treating physician is entitled to great weight. *Ramirez v. Shalala*, 8 F.3d 1449, 1453-54 (9<sup>th</sup> Cir.  
15 1993). The Commissioner may reject a treating physician’s uncontradicted opinion only if he  
16 sets forth clear and convincing reasons for doing so. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
17 1995). If the treating physician’s opinion is contradicted by another doctor, the Commissioner  
18 may reject that opinion only if he provides specific and legitimate reasons supported by  
19 substantial evidence in the record. *Lester*, 81 F.3d at 830. No distinction is drawn “between  
20 a medical opinion as to a physical condition and a medical opinion on the ultimate issue of  
21 disability.” *Rodriguez v. Bowen*, 876 F.2d 759, 761 n.7 (9<sup>th</sup> Cir. 1989).

22 “The opinion of an examining physician is, in turn, entitled to greater weight than the  
23 opinion of a non[-]examining physician.” *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996).  
24 “[T]he Commissioner must provide ‘clear and convincing’ reasons for rejecting the  
25 uncontradicted opinion of an examining physician.” *Id.* “[T]he opinion of an examining doctor,  
26 even if contradicted by another doctor, can only be rejected for specific and legitimate reasons  
27 that are supported by substantial evidence in the record.” *Id.* at 830-31.

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1 “Where medical reports are inconclusive, questions of credibility and resolution of  
2 conflicts in the testimony are functions solely of the [Commissioner].” *Magallanes*, 881 F.2d  
3 747, 751 (9<sup>th</sup> Cir. 1989) (punctuation omitted). The Commissioner’s finding that a claimant is  
4 less than credible, however, must have some support in the record. *See Light v. Social Security*  
5 *Administration*, 119 F.3d 789 (9<sup>th</sup> Cir. 1997).

6 The ALJ need not accept the claimant’s subjective testimony of disability, but if she  
7 decides to reject it, “she must provide specific, cogent reasons for the disbelief.” *Lester*, 81  
8 F.3d at 834. “Unless there is affirmative evidence showing that the claimant is malingering, the  
9 Commissioner’s reasons for rejecting the claimant’s testimony must be clear and convincing.”  
10 *Id.* “General findings are insufficient; rather, the ALJ must identify what testimony is not  
11 credible and what evidence undermines the claimant’s complaints.” *Id.*

### 12 13 DISCUSSION

14 Kuchenberg argues first that the ALJ improperly discounted the opinion of her treating  
15 physician, Bruce Roberts, M.D., and adopted the less restrictive opinion of the non-examining  
16 state agency physician Goldberg. Roberts is a treating physician, and his opinion should trump  
17 the opinion of a non-examining physician unless the ALJ provides “specific and legitimate  
18 reasons that are supported by substantial evidence in the record.” *Lester v. Chater*, 81 F.3d 821,  
19 830-31 (9<sup>th</sup> Cir. 1996); *see also Widmark v. Barnhart*, 454 F.3d 1063, 1067 (9<sup>th</sup> Cir. 2006)  
20 (applying the “specific and legitimate” test).

21 In this case, the ALJ offered the following reasons for discounting the treating  
22 physician’s opinion:

23 [T]he undersigned finds that the medical source statement by treating physician  
24 at La Frontier [sic] Center is not entitled to controlling weight. His assessment  
25 of the claimant’s impairments is considerably restrictive, is unsupported by  
treatment notes, and fails to specify the limits of the claimant’s impairments that  
preclude full[-]time work.

26 (Tr. 16). The court finds these justifications sufficient.

27 As the ALJ noted, Roberts’ opinion letter is exceedingly brief. *See* (Tr. 395). It is  
28 entirely conclusory without any supporting reference to the treatment record. *Id.* It fails to

1 specify Kuchenberg's various impairments or how they affect her ability to perform work  
2 related tasks. *Id.* These are specific and legitimate reasons for discounting the opinion of the  
3 treating physician. *Batson v. Commissioner of Social Security Administration*, 359 F.3d 1190,  
4 1195 (9<sup>th</sup> Cir. 2004) (“[A]n ALJ may discredit treating physicians’ opinions that are conclusory,  
5 brief, and unsupported by the record as a whole. . . or by objective medical findings. . . .”);  
6 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001) (“[A]n ALJ need not accept a  
7 treating physician’s opinion that is conclusory and brief and unsupported by clinical findings.”).

8 For her second claim of error, Kuchenberg argues the ALJ improperly discounted the  
9 opinion of her examining physician, Noelle Rohen, Ph.D. In her report, Rohen offered the  
10 following conclusions:

11 Ms. Kuchenberg presents with chronic history of posttraumatic stress disorder  
12 and depression that fairly regularly become severe. . . . Claimant historically has  
13 had a very hard time maintaining regular full[-]time work attendance, though she  
14 does okay with part[-]time and appears motivated to work. . . . With regard to  
work, it is expected that claimant will continue to struggle as she reportedly has  
in the past, performing fairly well at work when she is able to go, but not  
managing regular attendance on a full-time sustained basis.

15 (Tr. 290-91). The ALJ discounted Rohen’s opinion explaining as follows:

16 Likewise, the consultative examiner’s opinion is not entitled to significant weight.  
17 She indicated that the claimant would have a difficult time managing regular  
18 attendance on a full[-]time sustained basis. . . . She further determined that the  
19 claimant would have limitations for twelve months and explained that, while she  
20 does have good understanding and memory, social interaction and adaptation, she  
has poor sustained concentration and persistence. . . . Her conclusions are  
unsupported by the evidence. The record shows that the claimant has been able  
to manage two jobs and outside activities for a significant length of time and that  
she has demonstrated little evidence of problems with her memory and recall.

21 (Tr. 16).

22 The ALJ found that Kuchenberg’s ability to manage two jobs and outside activities was  
23 inconsistent with Rohen’s opinion that Kuchenberg lacks the persistence and concentration  
24 required for full-time employment. There is, however, no evidence that these two jobs  
25 combined with Kuchenberg’s outside activities require the same amount of mental stamina  
26 necessary for full-time employment. Kuchenberg works at the radio station for four hours per  
27 week. (Tr. 28). It is an environment that she knows well and is not stressful for her. (Tr. 28).  
28 She also works as a receptionist for her friend’s beauty salon four to eight hours per week. (Tr.

1 29). Together, these jobs total only eight to twelve hours of work per week. This is far short  
2 of the amount of work necessary for full-time employment. *See Rollins v. Massanari*, 261 F.  
3 3d 853, 859 (9<sup>th</sup> Cir. 2001) (“An ability to keep to an 8-hour a day, 5-day a week schedule  
4 without accumulating too many absences is a pre-requisite for many jobs.”). Kuchenberg also  
5 participates in social activities during the week, but recreational activities are generally not  
6 performed with the same persistence and pace that is required on the job. *See also Fair v.*  
7 *Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989) (“[M]any home activities are not easily transferable  
8 to what may be the more grueling environment of the workplace, where it might be impossible  
9 to periodically rest or take medication.”); *Baumgarten v. Chater*, 75 F.3d 366, 369 (8<sup>th</sup>  
10 Cir.1996) (Isolated activities such as pulling weeds, mowing the lawn, painting a ceiling and  
11 housecleaning or grocery shopping do not indicate that a plaintiff could perform full-time  
12 competitive work.). The fact that Kuchenberg is able to work eight to twelve hours per week  
13 and participate in social activities is not a specific and legitimate reason to discount Rohen’s  
14 opinion that Kuchenberg cannot work full-time. *See also Reddick v. Chater*, 157 F.3d 715, 724  
15 (9<sup>th</sup> Cir. 1998) (“This court has noted that occasional symptom-free periods—and even the  
16 sporadic ability to work— are not inconsistent with disability.”) (punctuation omitted).

17 The ALJ also noted that there was little evidence that Kuchenberg had problems with  
18 memory or recall. She did not, however, explain why this fact was somehow inconsistent with  
19 Rohen’s opinion as to Kuchenberg’s persistence and concentration.

20 The ALJ improperly discounted the opinion of Kuchenberg’s examining physician,  
21 Noelle Rohen. (Tr. 16). The decision of the ALJ therefore is not supported by substantial  
22 evidence and free from legal error. The court does not reach Kuchenberg’s remaining claims  
23 of error.

24 The Commissioner suggests Rohen’s opinion is inconsistent with other aspects of the  
25 record such as Kuchenberg’s application for unemployment benefits or vocational rehabilitation.  
26 (Doc. 13, pp. 17-18). The ALJ, however, did not advance these arguments in her decision. The  
27 court, therefore, cannot consider them. *Connett v. Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003);  
28 *Pinto v. Massanari*, 249 F.3d 840, 847-48 (9<sup>th</sup> Cir. 2001).

1           The ALJ failed to give specific and legitimate reasons for crediting the opinion of the  
2 state agency non-examining physician over the opinion of Kuchenberg’s examining physician,  
3 Noelle Rohen. Accordingly, Rohen’s opinions should be credited as a matter of law. *Benecke*  
4 *v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir.  
5 1996) (“Where the Commissioner fails to provide adequate reasons for rejecting the opinion of  
6 a treating or examining physician, we credit that opinion as a matter of law.”).

7           “Where we conclude that a claimant’s testimony or a doctor’s opinion should have been  
8 credited and, if credited, would have led to a finding of eligibility, we may order the payment  
9 of benefits.” *Regennitter v. Commissioner*, 166 F.3d 1294, 1300 (9<sup>th</sup> Cir.1999); *see also Moore*  
10 *v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 925 (9<sup>th</sup> Cir. 2002) (remanding for payment of  
11 benefits where the ALJ improperly rejected the testimony of the plaintiff’s examining  
12 physicians). In this case, the ALJ improperly discounted the opinion of Kuchenberg’s  
13 examining physician. Crediting this opinion leads necessarily to a finding of disability.

14           Rohen opined that Kuchenberg’s mental impairment was so severe that she was limited  
15 to part-time work. (Tr. 290-91). Kuchenberg cannot work full-time and is therefore disabled.  
16 *See SSR 96-8p; see also Rollins v. Massanari*, 261 F. 3d 853, 859 (9<sup>th</sup> Cir. 2001) (“An ability  
17 to keep to an 8-hour a day, 5-day a week schedule without accumulating too many absences is  
18 a pre-requisite for many jobs.”); *Bladow v. Apfel*, 205 F.3d 356, 359 (8<sup>th</sup> Cir. 2000).

19           There are no outstanding issues to be resolved. Remand of the case would serve no  
20 useful purpose. *See Smolen v. Chater*, 80 F.3d 1273, 1292 (9<sup>th</sup> Cir. 1996) (“We may direct an  
21 award of benefits where the record has been fully developed and where further administrative  
22 proceedings would serve no useful purpose.”). A finding of disability should be entered. *See*  
23 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004).

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IT IS ORDERED that Kuchenberg's motion for summary judgment filed on April 21, 2011, is GRANTED. (Doc. 12) The final decision of the Commissioner is reversed. The case is remanded for payment of benefits.

The Clerk of the Court is instructed to enter judgment accordingly and close this case.

DATED this 1<sup>st</sup> day of July, 2011.

  
\_\_\_\_\_  
Glenda E. Edmonds  
United States Magistrate Judge