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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Melissa Caves,

No. CV 12-513-TUC-CRP

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Plaintiff,

**ORDER**

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vs.

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Carolyn W. Colvin, Acting Commissioner  
of the Social Security Administration,

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Defendant.

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Plaintiff has filed the instant action seeking review of the final decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Magistrate Judge has jurisdiction over this matter pursuant to the parties' consent. *See* 28 U.S.C. § 636(c). Pending before the Court are Plaintiff's Opening Brief (Doc. 17) ("Plaintiff's Brief"), Defendant's Opposition to Plaintiff's Opening Brief (Doc. 18) ("Defendant's Brief"), and Plaintiff's Reply (Doc, 19). For the following reasons, the Court remands this matter for an immediate award of benefits.

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**BACKGROUND**

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In March 2009, Plaintiff protectively filed applications for disability insurance benefits and supplemental social security income under the Social Security Act. (Administrative Record ("AR.") 28, 174, 181). Plaintiff was born in 1982 and has earned a Bachelor of Arts degree. (AR. 81; Plaintiff's Brief, p. 4). Plaintiff worked from October

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1 2008 to December 2008 as a substitute teacher<sup>1</sup>, in September 2008 as a clerk at a temp  
2 agency, in May 2008 as a cashier trainer at a convenience store, in April 2008 in data entry,  
3 in December 2007 as a cashier at a hotel, from September 2007 to October 2007 as a  
4 dispatcher, and from September 2006 to August 2007 as a cashier at a video store. (AR.  
5 208). Plaintiff lives with her sister. (AR. 60).

6 Plaintiff asserts that she has been unable to work since March 1, 2008 due to  
7 migraines, depression, bipolar disorder and OCD. (AR. 207). After Plaintiff's applications  
8 were denied initially and on reconsideration, she requested a hearing before an  
9 Administrative Law Judge. (AR. 101, 105, 111, 114, 118). On October 19, 2010, Plaintiff,  
10 who was represented by counsel, her sister, and vocational expert ("VE") Ruth Van Vleet  
11 testified before ALJ George Reyes ("ALJ"). (AR. 51-96). On December 14, 2010, the ALJ  
12 issued his decision finding Plaintiff was not disabled under the Social Security Act. (AR.  
13 28-37). Thereafter, Plaintiff requested Appeals Council Review and submitted additional  
14 evidence which the Appeals Council considered in making its determination to deny her  
15 request for review.<sup>2</sup> (AR. 1-5). Upon the Appeals Council denial of Plaintiff's request for  
16 review, the ALJ's December 14, 2010 decision became the final decision of the  
17 Commissioner.

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21 <sup>1</sup>Plaintiff described her stint as a substitute teacher as follows: "The first assignment  
22 I went out on, I was there about an hour and started having a panic attack and had to call my  
23 sister to come get me." (AR. 62). Although Plaintiff attempted to work again as a substitute  
24 teacher, she was not given further opportunities: "after repeated attempts on my part and I  
was unable to do the job because of panic attacks. And I was very upset and start throwing  
up, and so they would have to send me home." (*Id.*).

25 <sup>2</sup>When the Appeals Council accepts and considers new evidence in deciding a request  
26 for review, that evidence becomes part of the administrative record which the district court  
27 must consider when reviewing the Commissioner's final decision for substantial evidence.  
28 *See Brewes v. Commissioner of Social Security Administration*, 682 F.3d 1157, 1163 (9<sup>th</sup> Cir.  
2012); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9<sup>th</sup> Cir 1993). Therefore, the Court considers  
Plaintiff's additional evidence accepted by the Appeals Council.

1 Plaintiff then initiated the instant action, raising the following three grounds for relief:  
2 (1) the ALJ failed to account for nurse practitioner Amy Tees' opinion concerning Plaintiff's  
3 absences from work due to migraine headaches; (2) the ALJ erroneously rejected the 2010  
4 opinion of treating psychiatrist, Steven J. Bupp, M.D.; and (3) substantial evidence did not  
5 support the ALJ's reliance on the opinion of Agency examining psychologist James  
6 Armstrong, Ph.D.

7 **STANDARD**

8 The Court has the "power to enter, upon the pleadings and transcript of the record, a  
9 judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
10 Security, with or without remanding the cause for a rehearing." 42 U.S.C. §405(g). The  
11 factual findings of the Commissioner shall be conclusive so long as they are based upon  
12 substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g), 1383(c)(3); *Tommasetti*  
13 *v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may "set aside the  
14 Commissioner's denial of disability insurance benefits when the ALJ's findings are based  
15 on legal error or are not supported by substantial evidence in the record as a whole." *Tackett*  
16 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted).

17 Substantial evidence is "more than a mere scintilla[,] but not necessarily a  
18 preponderance." *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d 871,  
19 873 (9th Cir. 2003)); *see also Tackett*, 180 F.3d at 1098. Further, substantial evidence is  
20 "such relevant evidence as a reasonable mind might accept as adequate to support a  
21 conclusion." *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Where "the evidence can  
22 support either outcome, the court may not substitute its judgment for that of the ALJ."  
23 *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992)).  
24 Moreover, the Commissioner, not the court, is charged with the duty to weigh the evidence,  
25 resolve material conflicts in the evidence and determine the case accordingly. *Matney*, 981  
26 F.2d at 1019. However, the Commissioner's decision "cannot be affirmed simply by  
27 isolating a specific quantum of supporting evidence." *Tackett*, 180 F.3d at 1098 (quoting  
28 *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir.1998)). Rather, the Court must "consider

1 the record as a whole, weighing both evidence that supports and evidence that detracts from  
2 the [Commissioner’s] conclusion.” *Id.* (quoting *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir.  
3 1993)).

4 **DISCUSSION**

5 SSA regulations require the ALJ to evaluate disability claims pursuant to a five-step  
6 sequential process. 20 C.F.R. §§404.1520, 416.920. To establish disability, the claimant  
7 must show she has not worked since the alleged disability onset date, she has a severe  
8 impairment, and her impairment meets or equals a listed impairment or her residual  
9 functional capacity (“RFC”)<sup>3</sup> precludes her from performing past work. Where the claimant  
10 meets her burden, the Commissioner must show that the claimant is able to perform other  
11 work, which requires consideration of the claimant’s RFC to perform other substantial  
12 gainful work in the national economy in view of claimant’s age, education, and work  
13 experience.

14 **THE ALJ’S REJECTION OF TREATING DR. BUPP’S OPINION**

15 The ALJ found that Plaintiff had the following severe impairments: migraine  
16 headaches, obesity, bipolar disorder, obsessive-compulsive disorder, and anxiety disorder.  
17 (AR. 30). He determined that Plaintiff had the RFC to perform medium work, except that  
18 she should not use ladders, ropes or scaffolds and she must avoid exposure to hazards such  
19 as dangerous machinery and unprotected heights. (AR. 32). He also found that although  
20 Plaintiff “can attend and concentrate during an 8-hour day with breaks every two hours in  
21 a customary manner[,...] Claimant is limited to simple tasks that are not performed in a fast-  
22 paced production environment and involve only simple work-related decisions. Claimant is  
23 limited to only occasional conversation or interpersonal interaction with her supervisors or  
24 coworkers and further limited to only incidental public contact.” (*Id.*). The ALJ found that  
25 Plaintiff had no past relevant work, but based upon testimony from the VE, Plaintiff “would  
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27 <sup>3</sup>RFC is defined as that which an individual can still do despite his or her limitations.  
28 20 C.F.R. §§ 404.1545, 416.945.

1 be able to perform the requirements of representative light unskilled occupations such as  
2 janitor....” (AR. 36).

3 In reaching his decision, the ALJ gave “little weight” to the opinion of Plaintiff’s  
4 treating psychiatrist Dr. Bupp, and gave “substantial weight” to the opinion of examining  
5 psychologist Dr. Armstrong. (AR. 35). Plaintiff argues that the ALJ erroneously rejected  
6 Dr. Bupp’s opinion.

7 It is well-settled that the opinions of treating physicians, like Dr. Bupp, are entitled  
8 to greater weight than the opinions of examining or non-examining physicians. *Andrews v.*  
9 *Shalala*, 53 F.3d 1035, 1040-1041 (9<sup>th</sup> Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 751  
10 (9<sup>th</sup> Cir. 1989) (“We afford greater weight to a treating physician's opinion because he is  
11 employed to cure and has a greater opportunity to know and observe the patient as an  
12 individual.”)(internal quotation marks and citation omitted); *see also* 20 C.F.R §§ 404.1527,  
13 416.927 (generally, more weight is given to treating sources). An ALJ may reject a treating  
14 physician’s uncontradicted opinion only after giving “‘clear and convincing reasons’  
15 supported by substantial evidence in the record.” *Reddick v. Chater*, 157 F.3d 715, 725 (9<sup>th</sup>  
16 Cir. 1998) (*quoting Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995)). Additionally, “[a]  
17 treating physician's opinion on disability, even if controverted, can be rejected only with  
18 specific and legitimate reasons supported by substantial evidence in the record.” *Id.*; *see also*  
19 *Holohan v. Massanari*, 246 F.3d 1195, 1202-1203 (9<sup>th</sup> Cir. 2001).

20 In September 2010, Dr. Bupp opined that since March 1, 2008, Plaintiff has been  
21 markedly limited in her abilities to: understand and remember detailed instructions; carry out  
22 detailed instructions; maintain attention and concentration for extended periods; perform  
23 activities within a schedule, maintain regular attendance and be punctual; sustain an ordinary  
24 routine without special supervision; complete a workday and workweek without interruptions  
25 from psychologically based symptoms and perform at a consistent pace without more than  
26 the normal rest periods; accept instructions and respond appropriately to criticism from  
27 supervisors; maintain socially appropriate behavior and adhere to basic standards of neatness  
28 and cleanliness; respond appropriately to changes in the work setting; and set realistic goals

1 or make plans independently of others. (AR. 169-171). Dr. Bupp also opined that Plaintiff  
2 was moderately limited in five other areas. (*Id.*). Dr. Bupp further indicated that Plaintiff  
3 “continued to deteriorate. She is unable to function for any gainful employment.” (AR. 171  
4 (also indicating Plaintiff could work 0 hours 0 days per week and would be expected to miss  
5 work 30 days per month<sup>4</sup>)). He states that these limitations would last more than 12 months.  
6 (*Id.*).

7 The ALJ rejected Dr. Bupp’s opinion because his “treatment records are inconsistent  
8 with the GAF scores and his opinion is extreme compared with his treatment observations  
9 that claimant was improving while on medication and subsequently deteriorated with stress  
10 and anxiety when her mother moved into town.” (AR. 35). The ALJ also stated that Dr.  
11 Bupp noted no complaints of pain or other symptoms from Plaintiff consistent with his  
12 opinion. (*Id.*). He found “Dr. Bupp’s and/or claimant’s credibility questionable when his  
13 treatment records indicate claimant had increased contact with her mother and claimant was  
14 caring for her mother, yet in her testimony the claimant denies this was the case....Either Dr.  
15 Bupp or the claimant is incorrect in this important fact because if the claimant is taking care  
16 of her mother, then she is probably able to care for herself.” (*Id.*).

17 Instead, the ALJ gave substantial weight to examining psychologist Dr. Armstrong’s  
18 June 2009 opinion that Plaintiff’s memory was within normal limits and her sustained  
19 concentration and persistence, social interaction, and adaptation were within normal limits,  
20 but subject to bipolar interference. (AR. 35, 317-18).

21 Plaintiff challenges each reason the ALJ provided for rejecting Dr. Bupp’s opinion.  
22 Dr. Bupp began treating Plaintiff at CODAC Behavioral Health Services in approximately  
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24 <sup>4</sup>Plaintiff does not rely on Dr. Bupp’s statements that Plaintiff could work 0 hours per  
25 week and was unable to function for any gainful employment in this litigation. (Plaintiff’s  
26 Reply, p. 5). Such opinions are on an issue that is reserved for the Commissioner. *See* 20  
27 C.F.R. § 404.1527(d)(1)-(3); *McLeod v. Astrue*, 640 F.3d 881, 884 (9<sup>th</sup> Cir. 2011) (“although  
28 a treating physician’s opinion is generally afforded the greatest weight in disability cases, it  
is not binding on an ALJ with respect to the existence of an impairment or the ultimate  
determination of disability.” (citation and internal quotation marks omitted)).

1 2008. (*See* AR. 68 (at October 2010 hearing, Plaintiff testified that Dr. Bupp had been her  
2 treating psychiatrist for two years)). Prior to seeing Dr. Bupp, Plaintiff had been treated  
3 beginning in 2002 through her college counseling service at the University of Oklahoma  
4 where she was diagnosed with major depression, recurrent; anxiety disorder, NOS; and  
5 migraine headaches. (AR. 297 (Plaintiff was referred for psychiatric evaluation by a school  
6 counselor due to problems with depression)). From 2002 to 2006, Plaintiff was treated  
7 through college counseling services by Baiba Ercum, M.D., who throughout that time noted  
8 Plaintiff's complaints of depression, anxiety, OCD regarding hand washing, over-eating,  
9 insomnia, and nightmares, and prescribed medications for same including Zoloft, Paxil,  
10 Lexapro, Trazodone, Alprazolam, Clonazepam, Zyprexa. (AR. 298-99, 302). Plaintiff also  
11 attended counseling. (*Id.*). Plaintiff ultimately decided to withdraw from university to move  
12 to Arizona "to receive family support." (AR. 301; *see also* AR. 299 (Plaintiff moved from  
13 Oklahoma to Arizona to live with her sister)). Dr. Ercum last saw Plaintiff on January 19,  
14 2006. (AR. 299). Dr. Ercum's final diagnoses were: obsessive compulsive disorder, severe;  
15 post-traumatic stress disorder; major depression, recurrent; eating disorder, NOS; personality  
16 disorder, NOS; migraine headaches; and exogenous obesity. (AR. 300).

17 Plaintiff's therapist during treatment in Oklahoma, Jason White, Ph.D., wrote in a  
18 January 20, 2006 Termination Summary Report that Plaintiff presented with depression,  
19 anxiety (including obsessive-compulsive disorder), family conflict and social isolation, past  
20 sexual assault/molestation<sup>5</sup>, and childhood experiences of trauma and abuse. (AR. 301).  
21 Plaintiff attended 3 crisis sessions and 106 individual counseling sessions. (AR. *Id.*). When  
22 Plaintiff terminated treatment, she "was experiencing severe symptoms of obsessive-  
23 compulsive disorder and resulting disruptions of functioning. [Plaintiff] was depressed."  
24 (*Id.*). As to future therapeutic recommendations, Dr. White indicated that Plaintiff "has an  
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27 <sup>5</sup>The record reflects Plaintiff's report that she was sexually assaulted by her cousin  
28 when she was five years of age. (*See* AR. 315 (reporting full penile penetration), 393).

1 extensive history of family conflict, abuse (physical, sexual, and verbal/emotional), and  
2 trauma. Trust is difficult as a result.” (*Id.*).

3 In late January 2006, soon after leaving Oklahoma, Plaintiff sought mental health  
4 treatment at CODAC Behavioral Health. (*See* AR. 393 (indicating January 31, 2006 as “Date  
5 of Initial Assessment/Last Review”). Notes dating back to April 2007 reflect that Plaintiff  
6 was taking Ativan for anxiety, Prozac for OCD and depression, and Risperdal for mood  
7 instability. (AR. 417). By August 2007, Nurse Practitioner Bonnie Hoff noted that Plaintiff  
8 was taking Prozac, Risperdal, Lamictal, Lorezapam, and had been assessed a GAF score of  
9 49. (AR. 413). Plaintiff also received individual therapy at CODAC. (*See e.g.*, 393, 398-99,  
10 401-03).

11 By January 2009, Dr. Bupp had diagnosed: major depressive disorder, severe without  
12 psychotic features; and OCD. (AR. 380). At that time, Plaintiff was taking Risperdal,  
13 Prozac, Effexor, and Trazadone. (*Id.*). Throughout early 2009, Dr. Bupp assessed Plaintiff’s  
14 GAF score at 45. (AR. 370, 378-9). By July 2009, Dr. Bupp’s diagnoses: included major  
15 depressive disorder, severe without psychotic features; OCD; PTSD; obesity, and other  
16 neurological disorders. (AR. 363). In addition to prescribing Ambien for insomnia, Prozac  
17 for OCD, Effexor for depression and anxiety, and Lorazepam for anxiety, he had also started  
18 Lithium for mood swings. (*Id.*). Plaintiff’s GAF score increased to 50. (AR. 364). By  
19 March of 2010, Dr. Bupp’s diagnoses included bipolar/major recurrent depression, severe  
20 without psychotic features; OCD; PTSD; obesity; and other neurological disorders. (AR.  
21 556-57). At that time, Plaintiff was taking Lorazepam, Prozac, Effexor, Lithium-carbonate,  
22 and Amitriptyline. (AR. 557). He noted that Plaintiff’s mother had moved to town and  
23 Plaintiff’s functioning and symptoms had worsened, she was exhausted and presented as  
24 “sick and depressed” on mental status examination. (*Id.*). He assessed a GAF score of 45.  
25 (*Id.*). Although in May of 2010, Plaintiff reported less panic attacks and OCD, Dr. Bupp  
26 questioned whether “that is due to improvement on some dimensions or just depression  
27 overriding[.]” (AR. 553 (also noting that Plaintiff was depressed and “doesn’t not hold her  
28 head up straight due to weariness.”)). In June 2010, Plaintiff presented with “depression and

1 stress out of control” and reported “much increased OCD—sounds like defense structure (goes  
2 and cleans).” (AR. 550). Her GAF score remained at 45. (*Id.*). In October 2010, Dr. Bupp  
3 added a prescription for Selegiline. (AR. 592). Dr. Bupp’s treatment notes through late 2011  
4 reflect Plaintiff’s continued depression, tearfulness, hypomania, and irritability. (AR. 570-  
5 71, 575, 577, 584). By November 2011, Plaintiff was taking Lorazepam for anxiety,  
6 Lamictal for mood swings, and Prozac for depression. (AR. 571).

7 When rejecting Dr. Bupp’s opinion, the ALJ stated that his “treatment records are  
8 inconsistent with the GAF scores...” (AR. 35). Plaintiff argues that the ALJ improperly  
9 rejected Dr. Bupp’s opinion “based on an unidentified [GAF] score.” (Plaintiff’s Brief, p.  
10 13 (“The ALJ did not cite any specific GAF score.”)). Plaintiff further argues that “[a] GAF  
11 score does not have a direct correlation to the severity requirements in mental disorders  
12 listings.” (*Id.* (citing 65 Fed.Reg. 50746, 50764-65 (2000))). Defendant counters that Dr.  
13 Bupp’s assessed GAF scores “were regularly 45...indicating serious symptoms but not  
14 necessarily indicating that Plaintiff was entirely incapable of all work[.]”, thus, such score  
15 was inconsistent with Dr. Bupp’s “extreme” opinion. (Defendant’s Brief, p. 14 (citing AR.  
16 35-36)).

17 Citing the *Diagnostic and Statistical Manual of Mental Disorders IV*, the ALJ  
18 recognized that a GAF “score within the range of 41-50...demonstrate[s] serious symptoms  
19 or any serious impairment in social, occupational or school functioning.” (AR. 34). It is  
20 arguable that Defendant misinterprets the ALJ’s opinion given that the ALJ states that GAF  
21 scores of 45 are “not consistent with mental status evaluations of notes such as judgment OK,  
22 ‘mood fair’, calm affect, and deliberate affect and memory intact.” (*Id.*). The ALJ also  
23 stated that even when treatment notes indicated “apparent improvement...[Plaintiff] was still  
24 classified as having a GAF of 50.” (*Id.*). Thus, it could be argued that the ALJ was  
25 suggesting that Dr. Bupp’s low GAF scores were inconsistent with his findings regarding  
26 Plaintiff’s mental status rather than, as Defendant posits, not extreme enough to support the  
27 conclusion that Plaintiff is unable to work. In either event, Plaintiff is correct that the Social  
28 Security Administration has not endorsed GAF scores as a method for evaluating the severity

1 of impairments. See 65 Fed.Reg. 50746, 50764–65 (Aug. 21, 2000); see also *Cowen v.*  
2 *Commissioner of Social Sec.*, 400 Fed.Appx. 275, 277 n.1 (9<sup>th</sup> Cir. 2010) (same); *Vose v.*  
3 *Astrue*, 2007 WL 4468720, \*17 (D.Ariz. Dec.17, 2007) (“[C]ourts have specifically held that  
4 a GAF score does not directly correlate to disability.” (citations omitted)). Moreover, when  
5 defining GAF scores within the range of 41-50, the ALJ omitted parenthetical information  
6 that did correlate to Dr. Bupp’s observations as follows: a GAF score within the range of 41-  
7 50 denotes “[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent  
8 shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g.,  
9 no friends, unable to keep a job).” American Psychiatric Association, *Diagnostic and*  
10 *Statistical Manual of Mental Disorders*, p. 32 (4<sup>th</sup> ed.). The record, including records from  
11 CODAC, is clear that Plaintiff carries a diagnosis of OCD by CODAC providers, has been  
12 unable to keep a job, and endorsed suicidal ideation at times. (See e.g. AR 83-84 (Plaintiff  
13 testified that while in college she was unable to keep jobs due to panic attacks and OCD);  
14 AR. 378 (in note cited by the ALJ, at AR. 34, to undercut GAF score, Dr. Bupp wrote that  
15 Plaintiff’s “OCD needs reassurance”); AR. 382 (Plaintiff is “currently unable to maintain  
16 long-term employment due to symptoms.”); AR. 390 (Plaintiff “has been in treatment since  
17 2006 and has not been able to fin[d] employment....She did work[] at a video store but she  
18 was not able to keep up with the work, so she quiet [sic].”); AR. 393 (Plaintiff “continues to  
19 struggle with finding and securing a job due to ongoing severe migraines and depression.”  
20 and also noting Plaintiff’s statement that “anxiety leads to OCD symptoms.”); AR. 394  
21 (Plaintiff “reported continuously checking of doors and oven; symptoms interfere w/  
22 functioning.”); AR. 395 (noting Plaintiff “is here due to her inability to cope [with] the  
23 outside world” and “watch/monitor closely due to s[ui]cidal i[deation].”<sup>6</sup>); AR. 399 (Plaintiff  
24 started job at convenience store and quit the same day because she “couldn’t take the stress.  
25 It’s like I’m not really the one who’s doing it; like an out of body experience.”); AR. 401

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27 <sup>6</sup>Plaintiff testified that in December 2008, the same month and year that this  
28 psychiatric progress note was created, she “was put in a kind of halfway house kind of  
situation through [CODAC for one week]...because I was suicidal.” (AR. 58-59).

1 (Plaintiff reported anxiety regarding starting a new job the next day, she stated her bulimia  
2 had returned and she felt out of control); AR. 550 (Plaintiff reported “much increased  
3 OCD...(goes and cleans.)”); AR. 570 (some suicidal ideation but no plan, “mostly musings  
4 as it would end suffering”).

5 The ALJ also found Dr. Bupp’s opinion “extreme compared with his treatment  
6 observations that claimant was improving while on medication and subsequently deteriorated  
7 with stress and anxiety when her mother moved into town.” (AR. 35). The Ninth Circuit has  
8 been clear that when “discussing mental health issues, it is error to reject a claimant’s  
9 testimony merely because symptoms wax and wane in the course of treatment. Cycles of  
10 improvement and debilitating symptoms are a common occurrence, and in such  
11 circumstances it is error for an ALJ to pick out a few isolated instances of improvement over  
12 a period of months or years and to treat them as a basis for concluding a claimant is capable  
13 of working.” *Garrison v. Colvin*, \_\_ F.3d \_\_, 2014 WL 3397218 at \*18 (9<sup>th</sup> Cir. July 14,  
14 2014); *see also Holohan v. Massanari*, 246 F.3d 1195, 1206 (9<sup>th</sup> Cir. 2001) (The treating  
15 physician’s “statements must be read in context of the overall diagnostic picture he draws.  
16 That a person who suffers from severe panic attacks, anxiety, and depression makes some  
17 improvement does not mean that the person’s impairments no longer seriously affect her  
18 ability to function in a workplace.”). Thus, “[r]eports of ‘improvement’ in the context of  
19 mental health issues must be interpreted with an understanding of the patient’s overall well-  
20 being and nature of her symptoms.” *Garrison*, \_\_ F.3d \_\_, 2014 WL 3397218 at \*18 (citing  
21 *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9<sup>th</sup> Cir.2008)).

22 While Dr. Bupp noted Plaintiff’s improvement from time to time, Plaintiff’s diagnoses  
23 of severe major depression and OCD remained constant, and subsequent diagnoses of Bipolar  
24 Disorder and PTSD were made adding further to Plaintiff’s constellation of mental health  
25 issues. Moreover, as discussed above, Plaintiff’s GAF scores remained within the 45 to 50  
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1 range, except for a period in 2011 when it dropped to 38<sup>7</sup> upon Plaintiff's presentation with  
2 suicidal ideation (AR. 570), suspected "shift to irritable-hypomania" (AR. 575), and  
3 dysphoric mania with "spotty" memory and "definite cognitive struggle." (AR. 577). There  
4 is simply no basis in the record that any noted improvement was of such magnitude and  
5 lasted for such duration so as to undermine Dr. Bupp's September 2010 opinion regarding  
6 Plaintiff's abilities to function. Moreover, in discounting that the arrival of Plaintiff's mother  
7 could negatively affect any progress Plaintiff may have been making, the ALJ overlooks the  
8 very fact that such a new and significant<sup>8</sup> stressor in Plaintiff's life, instead, supports  
9 Plaintiff's reports of increased depression, OCD and panic attacks as well as Dr. Bupp's  
10 findings during this time which included depressed mood, disgusted, or blunted affect,  
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12 <sup>7</sup>A GAF score ranging between 31 and 40 signifies: "Some impairment in reality  
13 testing or communication (e.g., speech is at times illogical, obscure or irrelevant) OR major  
14 impairment in several areas such as work or school, family relations, judgment, thinking or  
15 mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child  
16 frequently beats up younger children, is defiant at home, and is failing at school)." American  
Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, p. 32 (4<sup>th</sup>  
ed.).

17 <sup>8</sup>The record supports the conclusion that the arrival of Plaintiff's mother on the scene  
18 could constitute a significant stressor given Plaintiff's report that her mother suffered from  
19 bipolar disorder since Plaintiff was a child (AR. 393), in 2009 her mother attempted suicide  
20 and left a note blaming Plaintiff (AR. 57), and that Plaintiff "has an extensive history of  
21 family conflict, abuse (physical, sexual, and verbal/emotional), and trauma." (AR. 301).  
22 Plaintiff testified that being around her mother exhausts her because "[m]y mother reminds  
23 me of my abusive childhood, and I have nightmares about that. And I don't sleep well."  
24 (AR. 64; *see also* AR. 542 (CODAC assessment and planning note of Plaintiff's report of  
25 "continued anger and frustration with her mother and states that being around her mother  
26 triggers PTSD symptoms more often than when she is alone. However, [Plaintiff] reports  
27 reduction in nightmares and a decrease in negative self-talk.")). Maria Ornelas, BHA, AA,  
28 at CODAC noted that Plaintiff "was not doing well. She seemed very exhausted and  
overwhelmed because she is having to care for her mother whom [sic] is bip[olar] and  
depressed. [Plaintiff] would like to coordinate care with mothers [sic] C[ase] M[anager] to  
get some kind of relief and assistance." (AR. 547). Additionally, Plaintiff testified that when  
her mother arrived in Tucson and "got an apartment, she was not able to live on her own.  
So [Plaintiff] and [her] sister did have to step in and call her CM, her case manager, and try  
to get her help because she was suicidal." (AR. 64).

1 diminished judgment and insight. (*See* AR. 551-57).

2 The ALJ also rejected Dr. Bupp’s opinion because he “noted no complaints of pain  
3 or other symptoms from [Plaintiff] in his treatment notes consistent with his opinion.” (AR.  
4 35). As Plaintiff persuasively points out, Dr. Bupp is a psychiatrist and did not treat Plaintiff  
5 for physical pain. (Plaintiff’s Brief, p. 13). Moreover, Dr. Bupp and other CODAC  
6 providers noted Plaintiff’s continued reports of migraines.<sup>9</sup> (*See e.g.*, AR. 392, 393, 403,  
7 589).

8 In supporting the ALJ’s statement, Defendant argues that “Dr. Bupp’s extreme  
9 opinion was entirely contradicted by Plaintiff’s statements to Dr. Bupp and other CODAC  
10 therapists regarding her daily activities and aspirations.” (Opposition, p. 15). As examples,  
11 Defendant cites Plaintiff’s statements that “she was looking for a job, was engaged in  
12 vocational rehabilitation, was interested in pursuing a master’s degree or publishing a book,  
13 was able to complete activities of daily living, and was able to handle her personal care...”,  
14 and that she was “planning on going to a concert, and was looking in to [sic] online dating,  
15 traveling, and writing a book.” (*Id.*).

16 Defendant’s reliance on Plaintiff’s statements to CODAC providers about her  
17 aspirations does not undercut Dr. Bupp’s findings and opinions. The record is clear that  
18 although Plaintiff did look for a job, and sometimes found employment, she did not maintain  
19 such employment. As to Plaintiff’s other aspirations, Plaintiff succinctly points out that  
20 “[s]uggestions by a person with bipolar disorder to engage in such activities are not even a  
21 scintilla of evidence for full-time work capacity.” (Reply, p. 7; *see also* AR. 65 (Plaintiff  
22 testified that she did look into online dating but decided her sister could not afford it and that  
23 she never looked into traveling or writing or researching book)). The record reflects  
24 Plaintiff’s statement that she had no trouble dressing or with personal hygiene, except  
25 sometimes when she is manic. (AR. 316). That Plaintiff is able to attend to her personal care

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27 <sup>9</sup>Despite records from CODAC referencing Plaintiff’s report that she suffered from  
28 migraines, the ALJ nonetheless discounted Plaintiff’s credibility in part because she “did not  
mention migraine headaches during treatment sessions at CODAC.” (AR. 33).

1 needs and engage in activities of daily living does not necessarily correlate to the ability to  
2 sustain full-time work. *See* SSR 96-8p (to be disabled, the claimant must not be able to  
3 perform sustained full-time work). The Ninth Circuit has repeatedly asserted that “[o]ne  
4 does not need to be 'utterly incapacitated' in order to be disabled." *Vertigan v. Halter*, 260  
5 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989));  
6 *see also* *Vick v. Commissioner of Soc. Sec.*, 57 F.Supp.2d 1077, 1086 (D. Or. 1999) (“If  
7 claimant's activity is in harmony with her disability, the activity does not necessarily indicate  
8 an ability to work.”) Thus, “[e]ngaging in activities, including household chores, is not  
9 necessarily inconsistent with a finding of disability.” *Vick*, 57 F.Supp.2d at 1085. Nor is  
10 there any suggestion in the record that Plaintiff spends a *substantial* part of her day engaged  
11 in pursuits involving the performance of functions that are transferrable to a work setting.  
12 *See Fair*, 885 F.2d at 603. The Honorable Richard Posner succinctly summarized this point:

13       The critical differences between activities of daily living and activities in a  
14       full-time job are that a person has more flexibility in scheduling the former  
15       than the latter, can get help from other persons..., and is not held to a minimum  
16       standard of performance, as she would be by an employer. The failure to  
17       recognize these differences is a recurrent, and deplorable, feature of opinions  
18       by administrative law judges in social security disability cases.

19 *Bjornson v. Astrue*, 671 F.3d 640, 647 (7<sup>th</sup> Cir. 2011). This observation is consistent with  
20 *Vertigan* and *Fair*. In the instant case, Plaintiff’s ability to attend to her personal care do not  
21 negate Dr. Bupp’s assessed limitations.

22       The ALJ also rejected Dr. Bupp’s opinion based on the issue of whether Plaintiff  
23       cared for her mother. The ALJ found “Dr. Bupp’s and/or [Plaintiff’s] credibility was  
24       questionable...” because Dr. Bupp noted Plaintiff’s increased contact with her mother and  
25       that she was caring for her mother while Plaintiff “denie[d] this was the case.” (AR. 35). The  
26       ALJ misstates the record. First, it is reasonable to conclude that Plaintiff’s mother’s move  
27       to Tucson resulted in increased contact between the two as reflected in the CODAC  
28       treatment notes. At the hearing, Plaintiff testified that she had given her mother money, “but  
I have not been like her physical caregiver in the home with her....” (AR. 58). Additionally,  
the ALJ read from a June 2010 treatment CODAC assessment and service planning note by

1 Maria Ornelas, BHT, AA, stating that: “‘Member needs assistance in coordination of care  
2 with mother [sic] C[ase] M[anager]...Member was not doing well. She seemed exhausted  
3 and overwhelmed because she was having to care for her mother, whom [sic] is bip[olar] and  
4 depressed. Member would like to coordinate care with mother’s CM to get some kind of  
5 relief and assistance.’”<sup>10</sup> (AR. 63-64). He then asked Plaintiff whether she was “in fact  
6 taking care of [her] mother?” to which Plaintiff replied:

7 A.[Plaintiff]: I was helping her after she, she had moved here, she moved to  
8 Tucson and, me and my sister had not seen her in a couple of  
9 years. We spoke to her doctors, and her doctors said that she  
10 would be able to live on her own. But when she got here and  
11 got an apartment, she was not able to live on her own. So me  
12 and my sister did have to step in and call her CM, her case  
13 manager, and try to get her help because she was suicidal.

11 Q. [ALJ]: You said you were helping her. Were you helping her in any  
12 other way besides what you just told us?

13 A. No.

14 Q. Then why were you exhausted?

15 A. My mother reminds me of my abusive childhood, and I have  
16 nightmares about that. And I don’t sleep well.

16 (*Id.*). Plaintiff’s testimony is consistent with the treatment note the ALJ read into the record.  
17 The evidence of record does not suggest that Plaintiff was caring for her mother beyond that  
18 reflected in Plaintiff’s testimony which indicates she sought assistance with aspects of her  
19 mother’s care and may have provided financial assistance. Moreover, the ALJ’s comment  
20 that if Plaintiff can care for her mother, then she “is probably able to care for herself” (AR.  
21 35), does not undermine or conflict with Dr. Bupp’s opinion or the record as a whole. As  
22 discussed above, there is no suggestion in the record that Plaintiff spends a substantial part  
23 of her day engaged in pursuits, such as caring for her mother or herself, which involve the

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25 <sup>10</sup>The note quoted by the ALJ is at AR. 547 which is marked as page 21F9 of the  
26 record. The ALJ stated the note was in the record at page 21F3. (AR. 64). However, the  
27 note that appears at 21F3 (AR. 541) does not contain the language quoted by the ALJ,  
28 although the provider did note Plaintiff’s report of “continued frustration with her mother and  
sister, which remind her of her childhood and increase her PTSD symptoms somewhat.”  
(AR. 541).

1 performance of functions that are transferrable to a work setting. *See Fair*, 885 F.2d at 603.

2 On the instant record, the ALJ has failed to articulate specific and legitimate reasons  
3 supported by substantial evidence of record to reject Dr. Bupp's September 2010 opinion and  
4 Defendant's reliance on examining psychologist Dr. Armstrong's 2009 opinion does not alter  
5 this conclusion. Defendant argues that the ALJ properly favored Dr. Armstrong's opinion  
6 over Dr. Bupp's. Upon examination on June 1, 2009, Dr. Armstrong found that Plaintiff's  
7 "answers to question based on the seven DSM-IV criteria for mania suggest that she meets  
8 or has recently met all or almost all of these criteria. She does have persistently elevated,  
9 expansive, or irritable moods, lasting 1 week or any duration if hospitalized...." (AR. 315).  
10 He found it doubtful that Plaintiff met the full criteria for PTSD: "Specifically, I doubt that  
11 she meets Criteria F – 'The disturbance causes clinically significant distress or impairment  
12 in social, occupational, or other important areas of functioning.'" (*Id.*). Dr. Armstrong's  
13 diagnostic impression was Bipolar I Disorder; OCD now more or less in remission with  
14 medication; "Victim of sexual abuse, allegedly"; and Anxiety Disorder NOS. (AR. 317). He  
15 noted that Plaintiff would be capable of managing benefits, "but perhaps only marginally."  
16 (AR. 318). Dr. Armstrong opined that Plaintiff's sustained concentration and persistence,  
17 social interaction, and adaptation were within normal limits "today" but were "subject to  
18 bipolar interference." (AR. 317-18). Dr. Armstrong does not define or further discuss what  
19 he means by "subject to bipolar interference" or how often such interference might be  
20 expected to occur. The frequency of such interference may well impact the ability to sustain  
21 full time employment, especially given Dr. Armstrong's statement that Plaintiff experiences  
22 "persistently elevated, expansive, or irritable moods..." lasting up to one week, which met  
23 DSM-IV criteria for mania. (AR. 315).

24 Defendant contends that "the ALJ assessed a residual functional capacity that was in  
25 line with the record as a whole when he limited Plaintiff to attending and concentrating for  
26 two hour periods, simple tasks that did not need to be performed in a fast-paced environment  
27 and involved only simple work-related decisions, and occasional interaction with supervisors  
28 and co-workers and incidental contact with the public." (Defendant's Brief, p. 18). There

1 is simply no basis on this record for the ALJ to conclude that the limitations he assessed were  
2 consistent with functioning “subject to bipolar interference.” Moreover, because the ALJ  
3 has failed to state specific and legitimate reasons to reject Dr. Bupp’s opinion, there is no  
4 basis to believe that although Dr. Armstrong found that Plaintiff presented with the ability  
5 to function within normal limits on the one day he examined her, such finding could  
6 undermine Dr. Bupp’s opinion based upon his multiple contacts with Plaintiff and her years  
7 of treatment at CODAC. Arguably, Dr. Armstrong’s acknowledgment that Plaintiff  
8 experienced “bipolar interference” could suggest limitations in line with Dr. Bupp.  
9 Regardless, the substantial evidence of record simply does not support the ALJ’s rejection  
10 of Dr. Bupp’s opinion, nor does it support the ALJ’s RFC assessment.

11 **REMAND FOR AN IMMEDIATE AWARD OF BENEFITS**

12 It is well-settled that “[w]here the Commissioner fails to provide adequate reasons for  
13 rejecting the opinion of a treating or examining physician, we credit that opinion as a matter  
14 of law.” *Lester*, 81 F.3d at 834 (citation omitted); *Hammock v. Bowen*, 879 F.2d 498 (9<sup>th</sup>  
15 Cir. 1989) (applying credit-as-true rule to medical opinion evidence). *See also Garrison*, \_\_  
16 F.3d. \_\_, 2014 WL 3397281, \*19-\*22 (9<sup>th</sup> Cir. July 14, 2014) (reaffirming the credit-as-true  
17 rule).

18 Defendant argues that the credit-as-true rule is not authorized under the Social  
19 Security Act. (Defendant’s Brief, p. 19 n.11). However, in applying the credit-as-true rule,  
20 the Ninth Circuit recently pointed out that “[t]he Social Security Act...makes clear that courts  
21 are empowered to affirm, modify, or reverse a decision ‘with *or without* remanding the cause  
22 for a rehearing.’ 42 U.S.C. §405(g)....Accordingly, every Court of appeals has recognized  
23 that in appropriate circumstances courts are free to reverse and remand a determination by  
24 the Commissioner with instructions to calculate and award benefits.” *Garrison*, \_\_ F.3d. \_\_,  
25 2014 WL 3397218, at \*19 (emphasis in original) (citations omitted). The *Garrison* court  
26 went on to state that in appropriate circumstances, the court is empowered to apply the credit-  
27 as-true rule and remand the matter with instructions to calculate and award benefits. *Id.* at  
28 \*20 (providing history and rationale supporting remand for award of benefits where evidence

1 is credited as true).

2 “Remand for further administrative proceedings is appropriate if enhancement of the  
3 record would be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593, (9<sup>th</sup> Cir. 2004) (citing  
4 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2000)). Conversely, remand for an award of  
5 benefits is appropriate where:

6 (1) the record has been fully developed and further administrative proceedings  
7 would serve no useful purpose; (2) the ALJ has failed to provide legally  
8 sufficient reasons for rejecting evidence, whether claimant testimony or  
9 medical opinion; and (3) if the improperly discredited evidence were credited  
10 as true, the ALJ would be required to find the claimant disabled on remand.

11 *Garrison*, \_\_ F.3d \_\_, 2014 WL 3397218 at \*20 (footnote and citations omitted); *see also*  
12 *Benecke*, 379 F.3d at 593(citations omitted). The *Garrison* court also noted that the third  
13 factor “naturally incorporates what we have sometimes described as a distinct requirement  
14 of the credit-as-true rule, namely that there are no outstanding issues that must be resolved  
15 before a determination of disability can be made.” *Id.* at \*20 n. 26 (citing *Smolen v. Chater*,  
16 80 F.3d 1273, 1292 (1996)). Thus, where the test is met, the Ninth Circuit “take[s] the  
17 relevant testimony to be established as true and remand[s] for an award of benefits[,]”  
18 *Benecke*, 379 F.3d at 593 (citations omitted), unless “the record as a whole creates serious  
19 doubt as to whether the claimant is, in fact, disabled with the meaning of the Social Security  
20 Act.” *Garrison*, \_\_ F.3d \_\_, 2014 WL 3397218 at \*21 (citations omitted).

21 Here, remand for an immediate award of benefits is appropriate. The record has been  
22 fully developed and remand for further administrative proceedings would serve no useful  
23 purpose. The VE testified that “there wouldn’t be any jobs” for a person with Plaintiff’s  
24 education and background who was subject to the marked<sup>11</sup> limitations identified by Dr.

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25 <sup>11</sup>Defendant “note[s] that ‘moderate’ and ‘marked’ limitations are not appropriate for  
26 inclusion in the residual functional capacity assessment (or any underlying hypothetical  
27 question proffered to the vocational expert)...because they ‘do not describe function and do  
28 not usefully convey the extent of capacity limitations.’” (Defendant’s Brief, p. 13 n.9 (citing  
*Programs Operations Manual System*, DI 24510.065.B1, 2001 WL 1933372)). At the  
hearing when Plaintiff’s counsel posed his hypothetical question using the term “markedly  
limited”, the ALJ clarified with the VE whether “the term markedly limited had any

1 Bupp. (*Id.* at p. 77). *See e.g. Garrison*, \_\_\_ F.3d \_\_\_, 2014 WL 3397218 at \*22 n. 28 (where  
2 the VE answered that a person with the plaintiff’s residual functional capacity (“RFC”)  
3 would be unable to work, “we can conclude that [the plaintiff] is disabled without remanding  
4 for further proceedings to determine anew her RFC.”). On this record, crediting Dr. Bupp’s  
5 opinion as true results in the unquestionable conclusion that Plaintiff is disabled under the  
6 Act.

7 Nor, considering the record as a whole, is there reason for serious doubt as to whether  
8 Plaintiff is disabled. For example, the ALJ’s finding that Plaintiff was not fully credible does  
9 not cast any serious doubt on the record as whole as to whether Plaintiff is disabled. The  
10 ALJ stated that although Plaintiff claimed she suffered from migraines on a frequent basis,  
11 she rarely complained of migraines to her primary care physician, Dr. Bhat, and she never  
12 complained about migraines during treatment sessions at CODAC. (AR. 33). There is no  
13 dispute that Plaintiff was treated for migraines at the Center for Neurosciences, primarily by  
14 Nurse Practitioner Amy Tees who prescribed various medications and herbal remedies.  
15 Although the ALJ takes issue that Plaintiff “rarely” mentioned migraines to Dr. Bhat, the  
16 record is clear that Plaintiff sought referral from Dr. Bhat to Nurse Practitioner Tees for  
17 treatment of migraines. (*See e.g.* AR. 439). Moreover, Plaintiff also informed CODAC  
18 providers that she suffered from migraines. (*See e.g.*, AR. 392, 393, 403, 590). On at least  
19 one occasion, she missed a CODAC appointment because she was suffering from a migraine.  
20 (AR. 403). Another CODAC note states: “more migraines—given gabapentin.” (AR. 590).  
21 This is not a case where the Plaintiff can be disbelieved because she did not report a problem  
22 or seek treatment for same.

23 The ALJ also noted that examining Dr. Armstrong, who conducted a psychological  
24 \_\_\_\_\_  
25 vocationally relevant meaning to [her].” (AR. 76). The VE testified that the form in which  
26 Dr. Bupp identified Plaintiff’s limitations “says what markedly limited is, meaning they’re  
27 unable to perform the activity at all, or unable to preform it 50 percent of the time. So it does  
28 define it.” (*Id.*). On the instant record, use of the term “markedly limited” does not  
invalidate the question posed or the VE’s response.

1 evaluation, commented that Plaintiff did not complain of pain or appear to be in pain during  
2 examination. (AR. 33; *see also* AR. 312). Such finding has no significance to Plaintiff's  
3 credibility given that she did not allege she was experiencing a migraine or other symptoms  
4 during the examination.

5 With regard to Plaintiff's mental impairments, the ALJ appeared to rely on GAF  
6 scores to cast doubt upon Plaintiff's credibility. The Court has already discussed the  
7 significance of GAF scores in the context of Dr. Bupp's opinion. On this record, the GAF  
8 scores and contemporary medical records do not undercut Plaintiff's credibility. The ALJ  
9 also cited Plaintiff's statement that "she has no deficits in housework and denied any manic  
10 spending sprees. She stated she had no cognitive trouble with her personal hygiene, but  
11 sometimes forgets when she is manic." (AR. 34). Plaintiff has stated that it takes her longer  
12 to complete household chores "due to her manic or depressed state." (AR. 31). As discussed  
13 *supra*, the ability to see to personal hygiene or engage in household chores is not necessarily  
14 inconsistent with a finding of disability. The substantial evidence of record does not  
15 establish or remotely suggest that Plaintiff has engaged in activities on a sustained basis that  
16 involve the performance of functions that are transferrable to a work setting.

17 In sum, when considering the record as a whole, there is no reason for serious doubt  
18 as to whether Plaintiff is disabled. Plaintiff's treating psychiatrist opined that Plaintiff was  
19 markedly limited in several areas. The ALJ failed to set forth specific and legitimate reasons  
20 supported by substantial evidence for rejecting that opinion. When a hypothetical question  
21 was posed to the VE incorporating the marked limitations found by Dr. Bupp, the VE  
22 testified that such limitations would preclude Plaintiff from working. Plaintiff is, therefore,  
23 entitled to benefits.

#### 24 **CONCLUSION**

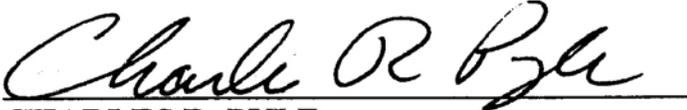
25 The record is fully developed. The ALJ erroneously rejected treating Dr. Bupp's  
26 September 2010 opinion. The VE testified that a person with Plaintiff's background subject  
27 to the marked limitations imposed by Dr. Bupp would not be able to work. On the instant  
28

1 record, there is no serious doubt about whether Plaintiff is disabled.<sup>12</sup> Accordingly,

2 IT IS ORDERED that this action is REMANDED to the Commissioner for immediate  
3 calculation and award of benefits.

4 The Clerk of Court is DIRECTED to enter Judgment accordingly and to close its file  
5 in this matter.

6 DATED this 12<sup>th</sup> day of September, 2014.

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9 **CHARLES R. PYLE**  
10 **UNITED STATES MAGISTRATE JUDGE**

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<sup>12</sup>Because Plaintiff has established that she is disabled under the Act in light of the ALJ's erroneous rejection of Dr. Bupp's opinion, there is no need to address Plaintiff's alternative argument that the ALJ improperly rejected nurse practitioner Tees' opinion regarding Plaintiff's migraines.