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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Abir Qafisheh,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-18-00133-TUC-EJM

**ORDER**

15 Plaintiff Abir Qafisheh brought this action pursuant to 42 U.S.C. § 405(g) seeking  
16 judicial review of a final decision by the Commissioner of Social Security  
17 (“Commissioner”). Plaintiff raises four issues on appeal: 1) the Administrative Law Judge  
18 (“ALJ”) erred by finding Plaintiff’s anxiety and depression non-severe and not including  
19 any mental health limitations in the residual functional capacity (“RFC”) assessment; 2)  
20 the ALJ gave inappropriate weight to the treating physician opinion; (3) the ALJ failed to  
21 provide clear and convincing reasons to discount Plaintiff’s subjective symptom testimony;  
22 and 4) the ALJ failed to resolve a conflict between the vocational expert (“VE”) testimony  
23 and the Dictionary of Occupational Titles (“DOT”). (Doc. 16).

24 Before the Court are Plaintiff’s Opening Brief, Defendant’s Response, and  
25 Plaintiff’s Reply. (Docs. 16, 20, & 21). The United States Magistrate Judge has received  
26 the written consent of both parties and presides over this case pursuant to 28 U.S.C. §  
27 636(c) and Rule 73, Federal Rules of Civil Procedure. The Court finds that the ALJ erred  
28 in finding Plaintiff’s mental impairments were not severe at Step Two of the evaluation

1 process and failing to include any nonexertional limitations in the RFC assessment. This  
2 error was not harmless, and the Court will remand this matter for further administrative  
3 proceedings.

#### 4 **I. Procedural History**

5 Plaintiff filed a Title II application for social security disability benefits on July 28,  
6 2014 and a Title XVI application on November 30, 2016. (Administrative Record (“AR”)  
7 447, 488). Plaintiff alleged disability beginning on June 9, 2012 based on depression, back  
8 injury, knee injury, fibromyalgia, arthritis, pancreatitis, and hepatitis C. (AR 342).  
9 Plaintiff’s application was denied upon initial review (AR 341) and on reconsideration (AR  
10 354). A hearing was held on November 30, 2016 (AR 291), after which ALJ Yasmin Elias  
11 found, at Step Four, that Plaintiff was not disabled because she could perform her PRW as  
12 a waiter. (AR 38). On July 28, 2017 the Appeals Council denied Plaintiff’s request to  
13 review the ALJ’s decision. (AR 12).<sup>1</sup>

14 Plaintiff’s date last insured (“DLI”) for DIB purposes is December 31, 2015. (AR  
15 342). Thus, to be eligible for benefits, Plaintiff must prove that she was disabled during the  
16 time period of her alleged onset date (“AOD”) of June 9, 2012 and her DLI of December  
17 31, 2015.

#### 18 **II. Factual History<sup>2</sup>**

19 Plaintiff was born on July 10, 1961, making her 50 years old at the AOD of her  
20 disability. (AR 342). She has one year of college and past relevant work as a caterer helper  
21 and a waiter. (AR 473).

##### 22 **A. Treating Physicians**

23 On November 5, 2014 Plaintiff had a crisis assessment at Pasadera Behavioral  
24 Health. (AR 1124). Plaintiff reported depression, anxiety, isolating, overeating, fear of  
25 leaving the house, stomach problems and frequent urination due to anxiety, and nightmares.

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26 <sup>1</sup> Plaintiff filed a subsequent application for Title XVI benefits on November 6, 2017 based  
27 on a new condition. Plaintiff was diagnosed with Stage IVB liver cancer on November 19,  
2018, and on December 11, 2018 the ALJ issued a fully favorable decision. *See* Doc. 22.

28 <sup>2</sup> While the undersigned has reviewed the entirety of the record in this matter, the following  
summary includes only the information most pertinent to the Court’s decision on Plaintiff’s  
claims on appeal.

1 Plaintiff stated that two weeks prior a child she babysat drowned and now she has a panic  
2 attack every time she sees the pool. Plaintiff also reported a history of childhood  
3 molestation and emotional abuse. Plaintiff was described as clearly depressed, frequently  
4 tearful, and had difficulty with receptivity to feedback. (AR 1126). She was also noted to  
5 be restless and anxious and frequently excused herself to use the restroom. Plaintiff was  
6 diagnosed with anxiety disorder and depressive disorder with a GAF of 45 and was referred  
7 to COPE Community Services. (AR 1127–28).

8 On November 7, 2014 Plaintiff had a psychiatric evaluation at COPE. Her affect  
9 was anxious, her mood was anxious and depressed, and she was crying. (AR 1141). She  
10 was observed to be very emotional and crying, dressed in pajamas, and had an odor of  
11 urine. (AR 1312). Plaintiff described worsening anxiety, depression, and panic over the  
12 last year, with severe symptoms for the last 3-4 months. (AR 1141). She was treated for  
13 depression and anxiety 10 years prior but recently had a traumatic event that set her back  
14 when the neighbor child she cared for drowned. (AR 1167, 1312). She reported feeling  
15 hopeless and worthless, had low energy, nightmares, and had anxiety about being out of  
16 the house, in crowds, and waiting in line. (AR 1141). Plaintiff also reported a history of  
17 abuse and rape. (AR 1141, 1161). The diagnosis was major depressive disorder,  
18 generalized anxiety disorder, and PTSD. (AR 1168). Plaintiff was prescribed Citalopram  
19 and referred for therapy. (AR 1142).

20 COPE progress notes document the following:

21 On December 30, 2014 Plaintiff was anxious, depressed, shaking, and crying. (AR  
22 1139, 1317). She reported that nightmares were a primary concern and she had them most  
23 nights; she was afraid to go out after dark; she had odd experiences attributed to possibly  
24 picking up a spirit after the child's death; and she was forgetful and isolating. (AR 1139,  
25 1317). Plaintiff's PTSD, depression, and anxiety were documented as worsening, and her  
26 social phobia was stable or improved. (AR 1140). She was prescribed Prazosin for  
27 nightmares and Citalopram was increased. (AR 1148, 1186, 1316).

28 On December 31, 2014 Plaintiff reported she was afraid of the dark, that someone

1 was watching her when she was sleeping, she heard scratching noises in the wall, things  
2 were appearing and disappearing, and she heard voices trying to harm her. (AR 1319).

3 On February 4, 2015 Plaintiff was seen for a therapy assessment. (AR 1329).  
4 Plaintiff reported that she was in the hospital for a week following a recent overdose and  
5 given diagnoses of possible pancreatitis, seizure, and heart attack or stroke. Plaintiff had  
6 an anxious and euthymic mood and was anxious to receive help.

7 On February 10, 2015 Plaintiff reported experiencing anxiety and depression 7/7  
8 days per week. (AR 1331).

9 On March 13, 2015 Plaintiff reported a lot of social anxiety symptoms, avoiding  
10 social interaction, and was unable to leave her home. (AR 1335, 1337). She was depressed  
11 and her affect was restricted. (AR 1335, 1337). She had nightmares and stated the boy's  
12 spirit was moving things in her house and she heard scratching in the walls and got up  
13 constantly at night to see if a cat was stuck behind the dresser. (AR 1337).

14 On April 28, 2015 Plaintiff reported having difficulty leaving the house and feeling  
15 nervous about everything. (AR 1344).

16 On May 5, 2015 Plaintiff stated there were ghosts in her apartment; she was afraid  
17 to sleep in her bedroom because she heard noises and felt something on the bed; she had  
18 nightmares and difficulty sleeping through the night; anxiety about leaving the house; and  
19 fearfulness of attending therapy groups. (AR 1345).

20 On May 7, 2015 Plaintiff reported she continued to feel depressed and anxious daily  
21 and wanted to feel better so she could start leaving the house. (AR 1348).

22 On May 22, 2015 Plaintiff was anxious and tearful, reported increased anxiety and  
23 needing hours to prepare herself to leave the house, and had nightmares and difficulty  
24 sleeping. (AR 1350).

25 On June 9, 2015 Plaintiff reported not feeling well due to lack of sleep due to  
26 nightmares, anxiety about being out of the house, and fatigue. (AR 1351). She was  
27 depressed and anxious and reported scratching in her walls, difficulty sleeping due to fear  
28 of spirits, leaving the TV and lights on all night, and finding doors that she had locked were

1 unlocked.

2 On June 12, 2015 Plaintiff reported nightmares, hearing voices, and was afraid to  
3 leave the house. (AR 1353). She was observed to be disheveled and anxious with blunt  
4 affect. A prescription for Olanzapine was added. (AR 1354).

5 On July 7, 2015 Plaintiff stated she couldn't get out of bed due to depression. (AR  
6 1356).

7 On July 21, 2015 Plaintiff was anxious and depressed and reported feeling hopeless,  
8 sad, paranoia, and difficulty leaving the house. (AR 1358).

9 On September 1, 2015 Plaintiff felt things hadn't improved: she slept sporadically,  
10 woke every hour, slept on the couch because she was afraid to go in her room, had panic  
11 attacks when going outside and isolated at home, and wasn't doing any housework or  
12 anything she enjoyed. (AR 1362).

13 On October 13, 2015 Plaintiff reported she tried to sleep in her room for a few days  
14 but she was seeing and hearing ghosts. (AR 1364).

15 On December 9, 2015 Plaintiff reported an increase of vivid dreams that made her  
16 feel disconnected and unsure of what was real; short-term memory loss; difficulty leaving  
17 the house; irritation; and lack of energy. (AR 1368). Plaintiff was observed to be depressed  
18 as evidenced by tearfulness, lack of energy, rumination on negative self-worth, and self-  
19 report of sleeping.

20 On December 14, 2015 Plaintiff had elevated levels of anxiety, depression, and  
21 insomnia; was avoiding sleeping in her bedroom because of hearing voices; had vivid  
22 dreams; and did not want to leave the house. (AR 1369).

23 On February 4, 2016 Plaintiff reported nightmares and feeling afraid, unsafe, and  
24 that people were out to get her. (AR 1376). Plaintiff's symptoms and functioning were  
25 documented as improved and she reported increasing the number of times she left the  
26 house.

27 On March 3, 2016 Plaintiff stated she wanted to put therapy on hold because her  
28 dad was ill and she needed to take care of him. (AR 1379). On March 10, 2016 Plaintiff

1 reported she was doing well. (AR 1380).

2 At a March 29, 2016 service plan meeting at COPE, Plaintiff reported feeling  
3 depressed and anxious 7/7 days per week. (AR 46).

4 Anxiety and depression were also observed by Plaintiff's treating physician, Dr.  
5 Subbureddiar, on multiple occasions. *See* AR 595 (chronological index of evidence).

6 B. State Agency Consulting Physicians

7 On January 19, 2015 Plaintiff saw Dr. Johnson for a psychiatric consultation. (AR  
8 1265). Plaintiff reported seeking disability based on fibromyalgia, back injury, left  
9 shoulder pain, and extreme anxiety, and described a six-month history of anxiety and  
10 depression. She was enrolled with COPE for the past three months and taking Citalopram  
11 and Prazosin. (AR 1266). On exam, Dr. Johnson noted Plaintiff's general attitude was  
12 cooperative and friendly, her eye contact was good, and her mood was mildly depressed  
13 with affect appropriate to mood state. Plaintiff reported a history of symptoms dating back  
14 ten years and said they returned recently after the drowning death of a child she babysat  
15 and the death of her ex-husband. Plaintiff reported anxiety, paranoia, low energy and  
16 motivation, social withdrawal, decreased concentration, and worry about ending up in a  
17 wheelchair. (AR 1266–67). Dr. Johnson assessed anxiety disorder and opined that  
18 Plaintiff's anxiety likely developed because of her chronic health problems and was  
19 aggravated by psycho-social stressors. (AR 1267). She opined that based solely on  
20 Plaintiff's present levels of psychological and cognitive function, Plaintiff's prognosis for  
21 a successful return to the workforce was good, and that Plaintiff did not have a condition  
22 that would impose limitations for 12 continuous months. (AR 1267–68). Dr. Johnson did  
23 not review Plaintiff's mental health records from COPE. (AR 1267).

24 C. Plaintiff's Testimony

25 The initial disability determination form notes that when Plaintiff was asked about  
26 her depression, Plaintiff stated that her daughter filled out the form and listed depression  
27 without asking her. (AR 345). Plaintiff stated she felt awful physically and was depressed  
28 about not being able to do the things she used to do, but that she did not have actual

1 depression. (AR 345). On reconsideration, Plaintiff reported that depression had become a  
2 daily problem, that she was giving up hope, had worsening fears and paranoia, and little  
3 motivation to leave the house. (AR 356, 539).

4 On a function reported dated September 24, 2014 Plaintiff reported she had  
5 problems sleeping due to bad dreams. (AR 510). On a function reported dated December  
6 24, 2014 Plaintiff reported anxiety caused her to have nightmares nightly and that she could  
7 only sleep two hours at a time. (AR 546). She further reported that she did not do  
8 housework or go outside due to depression and anxiety, did not like to be around a lot of  
9 people, did not handle stress well, and was fearful of leaving her house. (AR 548, 551).

10 On a disability report dated March 5, 2015 Plaintiff reported that she was unable to  
11 be around a lot of people and that she avoided public places and only left her home if she  
12 had to. (AR 366). On a disability reported dated November 30, 2016, Plaintiff reported  
13 receiving therapy and medication management at COPE for anxiety, depression, panic  
14 attacks, and agoraphobia. (AR 477).

15 At the hearing before the ALJ, Plaintiff testified that she takes a lot of anxiety  
16 medication, that she does not have the patience to read a book or be in line at the grocery  
17 store, she has a hard time leaving the house, and she can't go somewhere where there are  
18 too many people or she feels like she's boxed in. (AR 306). She does not drive because she  
19 gets confused and panics in traffic. (AR 307). When she tries to leave her apartment, she  
20 gets full blown anxiety and it takes her an hour or two to talk herself into leaving. (AR  
21 311).

22 Plaintiff feels very depressed and has had traumatic events in her life including a  
23 friend that committed suicide and a neighbor child that she used to babysit who drowned  
24 on a day she was supposed to watch him. (AR 311). She hears the voice of the little boy in  
25 her room; she hears her name whispered and things brushing against her neck; she thinks  
26 he is playing tricks on her and blames herself for his death. (AR 313). Plaintiff has bad  
27 dreams that give her anxiety and wake her up, and she can't sleep in her bedroom anymore  
28 because she feels there are ghosts or spirits in there. (AR 312-13). Plaintiff takes

1 medication for hallucinating and bad nightmares, but the doctor is going to increase her  
2 dose because it isn't working. (AR 313). She does not have thoughts of suicide, but of  
3 despair and that her life is over. (AR 316).

4 In January 2015 Plaintiff had an overdose and was in intensive care, but she denied  
5 that she tried to take her life. (AR 312). She stated that the empty pill bottles the EMTs  
6 found around her were there because she does not discard her empty bottles right away.  
7 (AR 314).

8 A letter written on Plaintiff's behalf by her landlord states that Plaintiff is extremely  
9 anxious and lashes out at people, her neighbors and family no longer talk to her, she has  
10 nightmares, and is extremely paranoid and delusional and has trouble leaving the house.  
11 (AR 49-50). She often finds herself locked in her room or a public restroom crying and  
12 avoiding people. (AR 50). A postscript from the landlord states that it took several days to  
13 compose the letter because of Plaintiff's ranting and raving and her impatience with not  
14 being able to concentrate.

15 D. Vocational Testimony

16 At the hearing before the ALJ, Elena Sala testified as a vocational expert. She stated  
17 that Plaintiff's past work as a waiter and caterer helper was classified as light. (AR 329).

18 The ALJ asked Sala to assume an individual with Plaintiff's education and work  
19 experience who could perform light work with the following limitations: never climb  
20 ladders, ropes, or scaffolds, and occasionally climb ramps or stairs, balance, stoop, kneel,  
21 crouch, or crawl. (AR 330). Sala testified that such a person could do Plaintiff's past work  
22 as a caterer and waiter. (AR 330). For the second hypothetical, the ALJ added a limitation  
23 to occasional overhead reaching with both upper extremities. (AR 331). Sala testified that  
24 such a person could not do the caterer helper job because it required frequent reaching,  
25 though the job did not specify whether it was above head reaching. (AR 331). The ALJ  
26 then clarified that she meant no reaching above shoulder level, and Sala stated that the  
27 caterer helper job would be eliminated but a person could still do the waiter job. (AR 331).  
28 For the third hypothetical, the ALJ added a limitation to simple, unskilled work with only



1 occasional contact with the public and coworkers. (AR 331). Sala testified Plaintiff's past  
2 work could not be performed but that she could perform other jobs including shipping and  
3 receiving weigher, router clerk, and mail clerk. (AR 332–33).

4 On questioning by Plaintiff's attorney, Sala testified that if there was a limitation to  
5 occasional reaching in general, not just overhead reaching, that would eliminate Plaintiff's  
6 PRW and the jobs of mail clerk and shipping and receiving. (AR 334–36). Sala further  
7 stated that the limitation for overhead reaching would only eliminate the caterer helper job  
8 because waiters don't do overhead reaching, and if they do, it would be less than  
9 occasional. (AR 334). If a limitation to sedentary work was added to the ALJ's third  
10 hypothetical, there would be no jobs available for Plaintiff. (AR 337).

11 E. ALJ's Findings

12 The ALJ found that Plaintiff had the severe impairments of degenerative disc  
13 disease, chronic liver disease, chronic cholecystitis, chronic pain syndrome with narcotic  
14 dependence, and impingement/tendinitis of the left shoulder. (AR 26).

15 The ALJ found that Plaintiff's anxiety disorder and affective disorder were not  
16 severe because they caused no more than minimal limitations on her ability to perform  
17 basic mental work activities. (AR 27). The ALJ also considered the Paragraph B criteria  
18 set out in the social security disability regulations for evaluating mental disorders. *See* 20  
19 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.00.<sup>3</sup> The ALJ found Plaintiff had mild limitation in  
20 understanding, remembering, or applying information and would have would have mild

21 \_\_\_\_\_  
22 <sup>3</sup> Mental impairments are evaluated using the technique outlined in 20 C.F.R. § 404.1520a.  
23 The Commissioner must first evaluate the claimant's symptoms, signs, and laboratory  
24 findings to determine whether the claimant has a medically determinable mental  
25 impairment. 20 C.F.R. § 404.1520a(b). If the Commissioner determines that the claimant  
26 does have a medically determinable mental impairment, the Commissioner must specify  
27 the findings that substantiate the presence of the impairment, and then rate the degree of  
28 functional limitation resulting from the impairment. *Id.* The Commissioner considers four  
areas of functional limitation: ability to understand, remember, or apply information;  
interact with others; concentrate, persist, or maintain pace; and adapt or manage oneself.  
20 C.F.R. § 404.1520a(c)(4). The degree of limitation is rated as none, mild, moderate,  
marked, or extreme. *Id.* The Commissioner then determines the severity of the mental  
impairment. 20 C.F.R. § 404.1520a(d). If the Commissioner rates the degree of limitation  
as "none" or "mild," the Commissioner will generally conclude that the impairment is not  
severe, unless the evidence otherwise indicates that there is more than a minimal limitation  
in the claimant's ability to do basic work activities. *Id.*

1 limitation with tasks such as following one or two step oral instructions, asking and  
2 answering questions, and using reason and judgment to make work-related decisions. (AR  
3 27). The ALJ also found Plaintiff had mild limitations in interacting with others regarding  
4 tasks such as cooperating with others, asking for help, and responding to requests. The ALJ  
5 further found that Plaintiff had mild limitations in concentration, persistence, or  
6 maintaining pace, and would have no more than mild limitation with tasks such as working  
7 at an appropriate and consistent pace, changing activities, and completing tasks in a timely  
8 manner. Finally, the ALJ found Plaintiff had mild limitation in adapting or managing  
9 oneself and would have no more than mild limitation with tasks such as responding to  
10 demands, setting realistic goals, and maintaining personal hygiene and attire appropriate to  
11 a work setting. (AR 27–28).

12 The ALJ found that Plaintiff’s statements concerning the intensity, persistence, and  
13 limiting effects of her symptoms were not entirely consistent with the medical and other  
14 evidence of record, and thus the statements affected her ability to work “only to the extent  
15 they can reasonably be accepted as consistent with the objective medical and other  
16 evidence.” (AR 34).

17 The ALJ gave great weight to the state agency medical consultants who opined that  
18 Plaintiff did not have a severe mental impairment because they are “highly qualified  
19 physicians and psychologists who are experts” in evaluating SS disability claims. (AR 29).  
20 The ALJ also gave great weight to CE Dr. Johnson’s opinion because the opinion was  
21 “consistent with the claimant’s mental health treatment records as a whole, which reveal  
22 grossly conservative mental health treatment.” (AR 29).

23 The ALJ found that Plaintiff had the RFC to perform light work with the following  
24 limitations: never climb ladders, ropes, or scaffolds; occasionally climb ramps or stairs,  
25 balance, stoop, kneel, or crawl; and occasionally reach above shoulder level bilaterally.  
26 (AR 30). The ALJ determined Plaintiff could perform her PRW as a waiter. (AR 38). The  
27 ALJ therefore concluded Plaintiff was not disabled. (AR 38).

28 . . .

1           **III. Standard of Review**

2           The Commissioner employs a five-step sequential process to evaluate SSI and DIB  
3 claims. 20 C.F.R. §§ 404.920, 416.1520; *see also Heckler v. Campbell*, 461 U.S. 458, 460–  
4 462 (1983). To establish disability the claimant bears the burden of showing he (1) is not  
5 working; (2) has a severe physical or mental impairment; (3) the impairment meets or  
6 equals the requirements of a listed impairment; and (4) the claimant’s RFC precludes him  
7 from performing his past work. 20 C.F.R. §§ 404.920(a)(4), 416.1520(a)(4). At Step Five,  
8 the burden shifts to the Commissioner to show that the claimant has the RFC to perform  
9 other work that exists in substantial numbers in the national economy. *Hoopai v. Astrue*,  
10 499 F.3d 1071, 1074 (9th Cir. 2007). If the Commissioner conclusively finds the claimant  
11 “disabled” or “not disabled” at any point in the five-step process, she does not proceed to  
12 the next step. 20 C.F.R. §§ 404.920(a)(4), 416.1520(a)(4).

13           Here, Plaintiff was denied at Step Four of the evaluation process. Step Four requires  
14 a determination of whether the claimant has sufficient RFC to perform past work. 20 C.F.R.  
15 §§ 404.1520(e), 416.920(e). RFC is defined as that which an individual can still do despite  
16 her limitations. 20 C.F.R. §§ 404.1545, 416.945. A RFC finding is based on the record as  
17 a whole, including all physical and mental limitations, whether severe or not, and all  
18 symptoms. Social Security Ruling (SSR) 96-8p. If the ALJ concludes the claimant has the  
19 RFC to perform past work, the claim is denied. 20 C.F.R. §§ 404.1520(f), 416.920(f).

20           The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),  
21 1383(c)(3). The court may overturn the decision to deny benefits only “when the ALJ’s  
22 findings are based on legal error or are not supported by substantial evidence in the record  
23 as a whole.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001). As set forth in  
24 42 U.S.C. § 405(g), “[t]he findings of the Secretary as to any fact, if supported by  
25 substantial evidence, shall be conclusive.” Substantial evidence “means such relevant  
26 evidence as a reasonable mind might accept as adequate to support a conclusion,”  
27 *Valentine*, 574 F.3d at 690 (internal quotations and citations omitted), and is “more than a  
28 mere scintilla, but less than a preponderance.” *Aukland*, 257 F.3d at 1035. The

1 Commissioner’s decision, however, “cannot be affirmed simply by isolating a specific  
2 quantum of supporting evidence.” *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)  
3 (citations omitted). “Rather, a court must consider the record as a whole, weighing both  
4 evidence that supports and evidence that detracts from the Secretary’s conclusion.”  
5 *Aukland*, 257 F.3d at 1035 (internal quotations and citations omitted).

6 The ALJ is responsible for resolving conflicts in testimony, determining credibility,  
7 and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). “When  
8 the evidence before the ALJ is subject to more than one rational interpretation, [the court]  
9 must defer to the ALJ’s conclusion.” *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190,  
10 1198 (9th Cir. 2004). This is so because “[t]he [ALJ] and not the reviewing court must  
11 resolve conflicts in evidence, and if the evidence can support either outcome, the court may  
12 not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019  
13 (9th Cir. 1992) (citations omitted).

14 Additionally, “[a] decision of the ALJ will not be reversed for errors that are  
15 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The claimant bears the  
16 burden to prove any error is harmful. *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011)  
17 (citing *Shinseki v. Sanders*, 556 U.S. 396 (2009)). An error is harmless where it is  
18 “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d  
19 1104, 1115 (9th Cir. 2012) (citations omitted); *see also Stout v. Comm’r Soc. Sec. Admin.*,  
20 454 F.3d 1050, 1055 (9th Cir. 2006). “[I]n each case [the court] look[s] at the record as a  
21 whole to determine whether the error alters the outcome of the case.” *Molina*, 674 F.3d at  
22 1115. In other words, “an error is harmless so long as there remains substantial evidence  
23 supporting the ALJ’s decision and the error does not negate the validity of the ALJ’s  
24 ultimate conclusion.” *Id.* (internal quotations and citations omitted). Finally, “[a] claimant  
25 is not entitled to benefits under the statute unless the claimant is, in fact, disabled, no matter  
26 how egregious the ALJ’s errors may be.” *Strauss v. Comm’r Soc. Sec. Admin.*, 635 F.3d  
27 1135, 1138 (9th Cir. 2011).

28 . . .

1           **IV. Discussion**

2           Plaintiff argues that the ALJ erred by failing to find that her depression and anxiety  
3 were severe impairments, and by failing to include any mental health limitations in the  
4 RFC. Plaintiff also argues that the ALJ erred by assigning little weight to Dr.  
5 Subbureddiar's treating physician opinion and by failing to give clear and convincing  
6 reasons to discount her subjective symptom testimony. Finally, Plaintiff argues that the  
7 ALJ failed to resolve a conflict between the VE's testimony and the DOT regarding  
8 whether Plaintiff could perform her PRW as a waiter. Plaintiff requests that the Court  
9 remand this matter for rehearing and additional VE testimony.

10           The Commissioner argues that the ALJ reasonably found no mental health  
11 impairments because no doctor opined that Plaintiff had any limitations due to her  
12 depression and anxiety. The Commissioner further argues that the ALJ reasonably  
13 discounted Dr. Subbureddiar's opinion because it was inconsistent with the treatment  
14 record, and that the ALJ reasonably relied on the VE's testimony that an individual limited  
15 to occasional overhead reaching could do the job of waiter. Finally, the Commissioner  
16 argues that substantial evidence supports the ALJ's conclusion that Plaintiff's testimony  
17 regarding her limitations was not reliable based on the objective medical evidence,  
18 conservative treatment record, and Plaintiff's ADL.

19           The Court concludes that the ALJ erred in finding that Plaintiff's medically  
20 determinable mental impairments were not severe at Step Two of the sequential evaluation  
21 process and failing to include any nonexertional limitations in the RFC assessment. This  
22 error impacted the ALJ's evaluation of Plaintiff's subjective symptom testimony and the  
23 hypotheticals posed to the VE. Consequently, the error was not harmless because it  
24 ultimately impacted the ALJ's Step Four nondisability finding. Because questions remain  
25 regarding whether in fact Plaintiff was disabled within the meaning of the SSA during the  
26 relevant time period, and because Plaintiff's subjective symptom testimony is best  
27 reassessed in light of the record as a whole, the Court finds that remand for further  
28

1 administrative proceedings is appropriate.<sup>4</sup>

2 A. Step Two Finding

3 “At step two of the five-step sequential inquiry, the Commissioner determines  
4 whether the claimant has a medically severe impairment or combination of impairments.”  
5 *Smolen v. Chater*, 80 F.3d 1273, 1289–90 (9th Cir. 1996). “An impairment is not severe if  
6 it is merely ‘a slight abnormality (or combination of slight abnormalities) that has no more  
7 than a minimal effect on the ability to do basic work activities.’” *Webb v. Barnhart*, 433  
8 F.3d 683, 686 (9th Cir. 2005) (quoting S.S.R. No. 96–3(p) (1996)). Basic work activities  
9 are “the abilities and aptitudes necessary to do most jobs” including:

10 (1) Physical functions such as walking, standing, sitting,  
11 lifting, pushing, pulling, reaching, carrying, or handling; (2)  
12 Capacities for seeing, hearing, and speaking; (3)  
13 Understanding, carrying out, and remembering simple  
14 instructions; (4) Use of judgment; (5) Responding  
appropriately to supervision, co-workers, and usual work  
situations; and (6) Dealing with changes in a routine work  
setting.

15 20 C.F.R. § 140.1521(b). “To satisfy step two’s requirement of a severe impairment, the  
16 claimant must prove the existence of a physical or mental impairment by providing medical  
17 evidence consisting of signs, symptoms, and laboratory findings; the claimant’s own  
18 statement of symptoms alone will not suffice.” *Orellana v. Astrue*, 547 F. Supp. 2d 1169,  
19 1172 (E.D. Wash. 2008) (citing 20 C.F.R. §§ 404.1508; 416.908).

20 “[T]he step-two inquiry is a de minimis screening device to dispose of groundless  
21 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing *Bowen v. Yuckert*,  
22 482 U.S. 137, 153–54 (1987)). “An impairment or combination of impairments may be  
23 found ‘not severe *only if* the evidence establishes a slight abnormality that has no more  
24 than a minimal effect on an individual’s ability to work.’” *Webb v. Barnhart*, 433 F.3d 683,  
25 686 (9th Cir. 2005) (quoting *Smolen*, 80 F.3d at 1290). Thus, “an ALJ may find that a  
26 claimant lacks a medically severe impairment or combination of impairments only when  
27 his conclusion is ‘clearly established by medical evidence.’” *Webb*, 433 F.3d at 687

28 <sup>4</sup> Because the Court will remand this matter for further administrative proceedings on an  
open record, the Court declines to address the other issues raised by Plaintiff in her appeal.

1 (quoting SSR 85-28).

2 The Supreme Court has recognized that including a severity requirement at Step  
3 Two of the sequential evaluation process “increases the efficiency and reliability of the  
4 evaluation process by identifying at an early stage those claimants whose medical  
5 impairments are so slight that it is unlikely they would be found to be disabled even if their  
6 age, education, and experience were taken into account.” *Bowen*, 482 U.S. at 153.  
7 However, an overly stringent application of the severity requirement violates the SSA by  
8 denying benefits to claimants who do meet the statutory definition of disabled. *Corrao v.*  
9 *Shalala*, 20 F.3d 943, 949 (9th Cir. 1994).

10 Here, the ALJ found that Plaintiff lacked a medically severe mental impairment at  
11 Step Two despite objective medical evidence from COPE consistently documenting  
12 Plaintiff’s depression, anxiety, and PTSD, as well as Plaintiff’s own testimony regarding  
13 her symptoms. In contrast to the ALJ’s characterization of Plaintiff’s mental health  
14 treatment as “infrequent and grossly conservative,” the record documents that Plaintiff  
15 regularly attended appointments at COPE from the end of 2014 through the beginning of  
16 2016. (AR 29). And, as this Court has observed, “[t]he fact that Plaintiff has had limited  
17 mental health treatment is not a sufficient sole reason to find that her mental impairments  
18 are not severe at Step Two.” *Cook v. Colvin*, 2016 WL 3961710, at \*5 (D. Ariz. July 22,  
19 2016) (citing *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (“[I]t is a questionable  
20 practice to chastise one with a mental impairment for the exercise of poor judgment in  
21 seeking rehabilitation.”)).

22 Further, while the ALJ noted that some of Plaintiff’s exams revealed an anxious  
23 mood and blunt affect and others documented fair concentration, appropriate affect, normal  
24 speech, appropriate mood, and fair insight and judgment, the ALJ’s decision ignores  
25 Plaintiff’s repeated reports of symptoms including fear of leaving the house, nightmares,  
26 hearing voices, and believing spirits were out to get her and trying to trick her. (AR 29).  
27 Nothing in the record suggests that Plaintiff was malingering or exaggerating her mental  
28 health symptoms. *See Webb*, 433 F.3d at 688 (“there is no inconsistency between Webb’s

1 complaints and his doctors' diagnoses sufficient to doom his claim as groundless under the  
2 de minimis standard of step two." And, if the ALJ was unable to clearly determine the  
3 extent to which Plaintiff's mental health impairments affected her ability to work, the ALJ  
4 should have developed the record to further assess Plaintiff's nonexertional limitations and  
5 her ability to perform work existing in the national economy. *See Webb*, 433 F.3d at 687  
6 (the ALJ has an affirmative duty to supplement the medical record to the extent that it is  
7 incomplete; "duty is triggered by ambiguous evidence, the ALJ's own finding that the  
8 record is inadequate or the ALJ's reliance on an expert's conclusion that the evidence is  
9 ambiguous.").

10 B. RFC

11 Plaintiff argues that even if her anxiety and depression are not severe at Step Two,  
12 the ALJ erred by failing to include any mental health limitations in the RFC. The Court  
13 agrees.

14 RFC is "the most [a claimant] can still do despite her limitations," and includes  
15 assessment of the claimant's "impairment(s), and any related symptoms, such as pain,  
16 [which] may cause physical and mental limitations that affect what she can do in a work  
17 setting." 20 C.F.R. § 404.1545(a)(1). The ALJ was required to assess Plaintiff's RFC based  
18 on all the record evidence, including medical sources, examinations, and information  
19 provided by Plaintiff. 20 C.F.R. §§ 404.1545(a)(1)–(3), 416.945(a)(1)–(3). Further, "[i]n  
20 determining a claimant's residual functional capacity, the ALJ must consider all of a  
21 claimant's medically determinable impairments, including those that are not severe."  
22 *Ghanim v. Colvin*, 763 F.3d 1154, 1166 (9th Cir. 2014).

23 Here, although the ALJ found Plaintiff had mild limitations in each of the four areas  
24 of mental functioning under the Paragraph B criteria, the ALJ failed to include any  
25 nonexertional limitations in the RFC.<sup>5</sup> For example, the ALJ found Plaintiff would have

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26 <sup>5</sup> The Court also notes that in making her analysis under the Paragraph B criteria, the ALJ  
27 cited solely to findings from Plaintiff's CE with Dr. Johnson and failed to note any of  
28 Plaintiff's treatment records from COPE. While Defendant contends that no treating  
physician opined as to any specific mental limitations, it also does not appear from the  
record that Plaintiff's mental health providers were ever asked to complete a mental RFC  
assessment.



1 mild limitation in following one to two-step instructions, answering and asking questions,  
2 using reason and judgment to make work-related decisions, cooperating with others, asking  
3 for help and responding to requests, and working at a consistent pace. (AR 27). The RFC  
4 reflects none of these findings, and the hypotheticals posed to the VE fail to account for  
5 how Plaintiff could perform her PRW as a waiter if these nonexertional limitations were  
6 included.<sup>6</sup> Moreover, the RFC does not include any mental limitations based on Plaintiff's  
7 testimony and wholly ignores Plaintiff's consistent and persistent reports of serious  
8 depression and anxiety symptoms including nightmares, auditory hallucinations, and fear  
9 of leaving her home.

10 In sum, the Court finds that the record "includes evidence of problems sufficient to  
11 pass the de minimis threshold of step two," *Webb*, 433 F.3d at 687, and "there is not the  
12 total absence of objective medical evidence necessary to preclude a step two finding of a  
13 'severe' mental impairment." *Orellana*, 547 F. Supp.2d at 1174. Furthermore, even if  
14 Plaintiff's mental impairments are not severe at Step Two, the ALJ erred by failing to  
15 include any nonexertional limitations in the RFC assessment. *See Cook*, 2016 WL  
16 3961710, at \*7 (ALJ erred by failing to provide sufficient reasons to find plaintiff's mental  
17 impairments non-severe at Step Two and failing to consider mental impairments in  
18 determining RFC). Accordingly, the Court finds that this matter should be remanded for  
19 further administrative proceedings to continue the five-step sequential evaluation process.

## 20 **V. Remedy**

21 A federal court may affirm, modify, reverse, or remand a social security case. 42  
22 U.S.C. § 405(g). Absent legal error or a lack of substantial evidence supporting the ALJ's  
23 findings, this Court is required to affirm the ALJ's decision. After considering the record  
24 as a whole, this Court simply determines whether there is substantial evidence for a  
25 reasonable trier of fact to accept as adequate to support the ALJ's decision. *Valentine*, 574  
26 F.3d at 690.

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27 <sup>6</sup> When the ALJ added a limitation to simple, unskilled work with only occasional contact  
28 with the public and coworkers, Sala testified such a person could not perform Plaintiff's  
PRW but could do other jobs. (AR 331-33). However, the ALJ did not make an alternate  
Step Five finding in this matter.

1 “‘[T]he decision whether to remand the case for additional evidence or simply to  
2 award benefits is within the discretion of the court.’” *Rodriguez v. Bowen*, 876 F.2d 759,  
3 763 (9th Cir. 1989) (quoting *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)). “Remand  
4 for further administrative proceedings is appropriate if enhancement of the record would  
5 be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). Conversely, remand  
6 for an award of benefits is appropriate where:

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

14 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). “Even if those requirements are  
15 met, though, we retain ‘flexibility’ in determining the appropriate remedy.” *Burrell v.*  
16 *Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting *Garrison*, 759 F.3d at 1021).

17 “[T]he required analysis centers on what the record evidence shows about the  
18 existence or non-existence of a disability.” *Strauss v. Comm’r Soc. Sec. Admin.*, 635 F.3d  
19 1135, 1138 (9th Cir. 2011). “Administrative proceedings are generally useful where the  
20 record has not been fully developed, there is a need to resolve conflicts and ambiguities, or  
21 the presentation of further evidence may well prove enlightening in light of the passage of  
22 time.” *Treichler v. Comm’r Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (internal  
23 quotations and citations omitted). “Where there is conflicting evidence, and not all essential  
24 factual issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*  
25 “In evaluating [whether further administrative proceedings would be useful, the Court  
26 considers] whether the record as a whole is free from conflicts, ambiguities, or gaps,  
27 whether all factual issues have been resolved, and whether the claimant’s entitlement to  
28 benefits is clear under the applicable legal rules.” *Id.* at 1103–04. “This requirement will  
not be satisfied if ‘the record raises crucial questions as to the extent of [a claimant’s]  
impairment given inconsistencies between his testimony and the medical evidence in the  
record,’ because ‘[t]hese are exactly the sort of issues that should be remanded to the

1 agency for further proceedings.” *Brow-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015)  
2 (quoting *Treichler*, 775 F.3d at 1105).

3 Here, the Court finds remand for further administrative proceedings is appropriate.  
4 The ALJ erred in finding that Plaintiff’s mental health impairments were non-severe at  
5 Step Two and failing to include any nonexertional limitations in the RFC. Consequently,  
6 issues remain regarding Plaintiff’s RFC and her ability to perform work existing in  
7 significant numbers in the national economy during the relevant time period. However,  
8 although Plaintiff’s depression and anxiety may be considered severe, this Court offers no  
9 opinion as to whether Plaintiff is disabled within the meaning of the Act. “The touchstone  
10 for an award of benefits is the existence of a disability, not the agency’s legal error.”  
11 *Brown-Hunter*, 806 F.3d at 495. Plaintiff’s RFC and subjective symptom testimony are  
12 best reassessed in consideration of the entire record, and on remand the ALJ shall give  
13 further consideration to all of the previously submitted medical testimony and lay  
14 testimony and continue the sequential evaluation process to determine whether Plaintiff is  
15 in fact disabled. Additionally, the ALJ is required to consider all of Plaintiff’s alleged  
16 impairments, whether severe or not, in the assessment on remand. SSR 86–8p, 1996 WL  
17 374184, at \*5 (“In assessing RFC, the adjudicator must consider limitations imposed by all  
18 of an individual’s impairments, even those that are not ‘severe.’”).

19 “Viewing the record as a whole [this Court] conclude[s] that Claimant may be  
20 disabled. But, because the record also contains cause for serious doubt, [the Court]  
21 remand[s] . . . to the ALJ for further proceedings on an open record.” *Burrell*, 775 F.3d at  
22 1142. The Court expresses no view as to the appropriate result on remand.

## 23 **VI. Conclusion**

24 In light of the foregoing, **IT IS HEREBY ORDERED** that the Commissioner’s  
25 decision is remanded back to an ALJ on an open record with instructions to issue a new  
26 decision regarding Plaintiff’s eligibility for disability insurance benefits.

27 The Clerk of Court shall enter judgment accordingly and close its file on this matter.

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Dated this 15th day of January, 2019.

  
Eric J. Markovich  
United States Magistrate Judge