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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11
12 JUDITH ANNE PRICCO,
13 Plaintiff,

14 v.

15 CAROLYN W. COLVIN,
16 ACTING COMMISSIONER OF SOCIAL
17 SECURITY ADMINISTRATION,
Defendant.

) No. CV 13-8713-PLA

) **MEMORANDUM OPINION AND ORDER**

18
19 **I.**

20 **PROCEEDINGS**

21 Plaintiff filed this action on December 4, 2013, seeking review of the Commissioner's denial
22 of her application for Disability Insurance Benefits. The parties filed Consents to proceed before
23 the undersigned Magistrate Judge on January 6, 2014, and January 15, 2014. Pursuant to the
24 Court's Order, the parties filed a Joint Stipulation on August 15, 2014, that addresses their
25 positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation
26 under submission without oral argument.
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II.

BACKGROUND

Plaintiff was born on March 11, 1966. [Administrative Record (“AR”) at 31, 144.] She has at least a high school education and past relevant work experience as a bulk food packager. [AR at 30, 74.]

On August 18, 2010, plaintiff filed an application for a period of disability and Disability Insurance Benefits alleging that she has been unable to work since June 24, 2009. [AR at 24, 153.] After the application was denied initially, she filed a timely request for a hearing before an Administrative Law Judge (“ALJ”). [AR at 24, 85-86.] A hearing was held on January 18, 2012, at which time plaintiff appeared represented by her mother, Cheryl Pricco, a non-attorney representative [AR at 38-39],¹ and testified on her own behalf. [AR at 24, 38-39, 40-73.] Plaintiff’s mother, and a vocational expert (“VE”), also testified. [AR at 24, 71-76.] On February 24, 2012, the ALJ issued a decision concluding that plaintiff was not under a disability from June 24, 2009, through the date of the decision. [AR at 24-32.] Plaintiff requested review of the ALJ’s decision by the Appeals Council. [AR at 17-18.] On September 23, 2013, the Appeals Council denied review. [AR at 5-10.] This action followed.

III.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622 F.3d 1228, 1231 (9th Cir. 2010).

¹ Plaintiff takes issue with the ALJ’s classification of plaintiff’s mother as her non-attorney representative, asserting that she was “essentially unrepresented because the ALJ classifies [her mother] as a ‘witness’ and even goes as far as rejecting Cheryl Pricco’s testimony.” [JS at 4 n.2.] This issue has no bearing on the Court’s decision.

1 determine whether the claimant is currently engaged in substantial gainful activity; if so, the
2 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in
3 substantial gainful activity, the second step requires the Commissioner to determine whether the
4 claimant has a “severe” impairment or combination of impairments significantly limiting her ability
5 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.
6 If the claimant has a “severe” impairment or combination of impairments, the third step requires
7 the Commissioner to determine whether the impairment or combination of impairments meets or
8 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., pt. 404, subpt.
9 P, app. 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the claimant’s
10 impairment or combination of impairments does not meet or equal an impairment in the Listing,
11 the fourth step requires the Commissioner to determine whether the claimant has sufficient
12 “residual functional capacity” to perform her past work; if so, the claimant is not disabled and the
13 claim is denied. Id. The claimant has the burden of proving that she is unable to perform past
14 relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case
15 of disability is established. The Commissioner then bears the burden of establishing that the
16 claimant is not disabled, because she can perform other substantial gainful work available in the
17 national economy. The determination of this issue comprises the fifth and final step in the
18 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966
19 F.2d at 1257.

20

21 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

22 In this case, at step one, the ALJ found that plaintiff had not engaged in substantial gainful
23 activity since her alleged onset date, June 24, 2009.² [AR at 26.] At step two, the ALJ concluded
24 that plaintiff has the severe impairment of depressive disorder, not otherwise specified. [Id.] At
25 step three, the ALJ determined that plaintiff does not have an impairment or a combination of
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28 ² The ALJ concluded that plaintiff meets the insured status requirements of the Social Security Act through December 31, 2014. [AR at 26.]

1 impairments that meets or medically equals any of the impairments in the Listings.³ [Id.] The ALJ
2 further found that plaintiff retained the residual functional capacity (“RFC”)⁴ to perform a full range
3 of work at all exertional levels, but with the following nonexertional limitations: plaintiff is limited
4 to simple work, cannot have public contact, and can have occasional contact with peers and
5 supervisors. [Id.] At step four, based on plaintiff’s RFC and the VE’s testimony, the ALJ
6 concluded that plaintiff “is capable of performing past relevant work as a bulk food packager.” [AR
7 at 30.] Accordingly, the ALJ determined that plaintiff was not disabled at any time from June 24,
8 2009, through the date of the decision. [AR at 32.]

9
10 **V.**

11 **THE ALJ’S DECISION**

12 Plaintiff contends that the ALJ’s RFC assessment is not supported by substantial evidence
13 or free of legal error. [Joint Stipulation (“JS”) at 4.] Specifically, plaintiff contends that the ALJ
14 impermissibly rejected the opinions of her treating physicians in finding that plaintiff can perform
15 simple work with no public contact and occasional contact with peers and supervisors. [JS at 4-
16 15, 22-23.] As explained below, the Court agrees with plaintiff and remands the matter for further
17 proceedings.

18
19 **A. EVALUATION OF MEDICAL EVIDENCE**

20 Plaintiff contends that the ALJ failed to provide specific and legitimate reasons for rejecting
21 the June 28, 2010, report of treating psychiatrist, Thomas Curtis, M.D. [JS at 10-14], and the May
22 4, 2011, opinion of treating psychologist, Jim Grace, Ph.D. [JS at 6-7].

23
24 _____
25 ³ See 20 C.F.R. pt. 404, subpt. P, app. 1.

26 ⁴ RFC is what a claimant can still do despite existing exertional and nonexertional
27 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). “Between steps
28 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which
the ALJ assesses the claimant’s residual functional capacity.” Massachi v. Astrue, 486 F.3d 1149,
1151 n.2 (9th Cir. 2007).

1 "There are three types of medical opinions in social security cases: those from treating
2 physicians, examining physicians, and non-examining physicians." Valentine v. Comm'r Soc. Sec.
3 Admin., 574 F.3d 685, 692 (9th Cir. 2009); see also 20 C.F.R. §§ 404.1502, 404.1527. "As a
4 general rule, more weight should be given to the opinion of a treating source than to the opinion
5 of doctors who do not treat the claimant." Lester, 81 F.3d at 830; Turner v. Comm'r of Soc. Sec.,
6 613 F.3d 1217, 1222 (9th Cir. 2010). "The opinion of an examining physician is, in turn, entitled
7 to greater weight than the opinion of a nonexamining physician." Lester, 81 F.3d at 830; Ryan,
8 528 F.3d at 1198.

9 "[T]he ALJ may only reject a treating or examining physician's uncontradicted medical
10 opinion based on clear and convincing reasons." Carmickle, 533 F.3d at 1164 (internal quotation
11 marks and citation omitted); Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006). "Where
12 such an opinion is contradicted, however, it may be rejected for specific and legitimate reasons
13 that are supported by substantial evidence in the record." Carmickle, 533 F.3d at 1164 (internal
14 quotation marks and citation omitted); Ryan, 528 F.3d at 1198. The ALJ can meet the requisite
15 specific and legitimate standard "by setting out a detailed and thorough summary of the facts and
16 conflicting clinical evidence, stating his interpretation thereof, and making findings." Reddick, 157
17 F.3d at 725. The ALJ "must set forth his own interpretations and explain why they, rather than
18 the [treating or examining] doctors', are correct." Id.

20 1. Background and Opinions of Plaintiff's Treating Doctors

21 On June 24, 2009, plaintiff was hospitalized at Aurora Behavioral Hospital in Covina. [AR
22 at 27, 265.] She was found to be immobilized, overwhelmed, and withdrawn. [AR at 265.] She
23 was diagnosed with anxiety and situational depression. [Id.] Plaintiff was hospitalized for five
24 days and, upon release, entered into an outpatient program. [Id.]

25 Plaintiff was again hospitalized in August 2009 for five days at the same facility, and this
26 time she was diagnosed with PTSD. [AR at 27, 265-66.] Upon release, she re-entered the
27 outpatient therapy program, attending in September and October 2009. [Id.]

1 Plaintiff treated with Dr. Curtis from September 29, 2009, through February 7, 2012, in
2 connection with her worker's compensation claim. [AR at 215-58, 313-20.] On June 28, 2010,
3 Dr. Curtis provided a "Primary Treating Physician's Evaluation and Permanent and Stationary
4 Report with Psychological Test Results and with a Request for Authorization for Further
5 Psychiatric Treatment." [AR at 224.] He reviewed plaintiff's work history, including the issues that
6 led to her seeking care for her emotional symptoms, which included depression; anxiety;
7 withdrawal; irritability; impatience; disturbed sleep; diminished self esteem; feelings of
8 worthlessness, emptiness, inadequacy, and pessimism; dizziness; palpitations; and abdominal
9 distress, especially whenever her workplace was mentioned or thought about. [AR at 225-27.]
10 Dr. Curtis stated that although plaintiff appeared to make progress with the psychiatric and
11 psychological treatment she received, her symptoms worsened and she was hospitalized for a
12 second time in August 2009 when she heard that her employers wanted to meet with her. [AR
13 at 227-28.] As part of his evaluation, Dr. Curtis completed a mental status examination in which
14 he detailed the following symptoms: guarded presentation with visible depression; rambling,
15 distressed speech; anxious thought process; depleted appearance due to depression; diminished
16 cognitive functioning; distracted and defective in concentration, attention, and short-term memory;
17 forgetful of recent conversations; attention drifts; and difficulty staying focused on one task. [AR
18 at 231.] He opined that it "appeared most likely" that plaintiff's cognitive deficits were caused by
19 "overwhelmed psychological coping mechanisms." [Id.] Dr. Curtis also noted that plaintiff was
20 oriented to the day of the week and date; could not retain recollection for a few minutes of three
21 simple items; could not accurately perform simple calculations; was not sufficiently able to
22 accurately recall past serial U.S. presidents; and her capacity for psychological insight and good
23 psychological judgment were essentially unimpaired. [AR at 231-32.]

24 Dr. Curtis administered various and numerous psychological tests. [AR at 232-36.] The
25 results of the Beck Anxiety Inventory revealed a severe level of anxiety; the results of the Beck
26 Hopelessness Scale revealed a moderate level of hopelessness; the results of the Minnesota
27 Multiphasic Personality Inventory revealed a valid profile for depression; and the results of the
28 Multiscore Depression Inventory revealed severe depression. [AR at 234-36.] Dr. Curtis

1 concluded that plaintiff's psychological test results "confirmed residual abnormal levels of anxiety,
2 hopelessness and depression with low energy, cognitive impairment, guilt, low self-esteem, social
3 introversion, pessimism and a sad mood." [AR at 237.] He diagnosed her with Depressive
4 Disorder, Not Otherwise Specified, with anxiety, post-traumatic reaction and psychiatric episodes
5 of dissociation with amnesia, and assessed a Global Assessment of Functioning Score of 45. [AR
6 at 237-38.]⁵ He concluded that plaintiff was temporarily totally disabled on an emotional basis
7 from her last day of work on June 23, 2009, to the date of his report and continuing until her
8 condition becomes more stabilized "in the near future." [AR at 241.] He opined that there may
9 be some further slow change in a positive direction, but that it would not be expected that "further
10 substantial recovery or deterioration would be anticipated in the next year beyond the estimate
11 of permanent emotional impairment set forth below [in his report,] assuming the provision of
12 continuing supportive psychotherapy on an as-needed basis." [Id.]. He found no fiscal incentives
13 or malingering for secondary gain. [Id.] He indicated that plaintiff suffered from a moderate
14 impairment in activities of daily living and concentration, persistence and pace; and a marked
15 limitation in social functioning and adaptation (deterioration or decompensation in complex work-
16 like settings). [AR at 242.]

17 On December 1, 2010, Dr. Grace, a psychologist with the California Counseling Center,
18 wrote a six-page letter describing plaintiff's condition at that time, detailing her work history and
19 the factors that eventually led to her leaving her job and subsequent hospitalizations. [AR at 263-
20 68.] After the second hospitalization, plaintiff started seeing Dr. Grace, receiving treatment three
21 to four times per month in relation to her worker's compensation action.⁶ [AR at 266.] Dr. Grace

23 ⁵ A Global Assessment of Functioning ("GAF") score is the clinician's judgment of the
24 individual's overall level of functioning. It is rated with respect only to psychological, social, and
25 occupational functioning, without regard to impairments in functioning due to physical or
26 environmental limitations. See American Psychiatric Association, Diagnostic and Statistical
27 Manual of Mental Disorders ("DSM-IV"), at 32 (4th ed. 2000). A GAF score in the range of 41-50
28 indicates serious symptoms or any serious impairment in social, occupational, or school
functioning (e.g., unable to keep a job). DSM-IV, at 34.

⁶ There was testimony from plaintiff's mother that Dr. Grace was plaintiff's doctor even
(continued...)

1 stated that plaintiff was making “steady progress toward recovery in practically all her regular”
2 activities of daily living; her PTSD symptoms had “greatly lessened”; she practices her cognitive
3 behavioral therapy; she is improving her assertiveness in relating with others, including family
4 members; she enjoys supporting her fifteen-year-old daughter in school and dancing; she still has
5 difficulty with work-related involvement or material and her PTSD symptoms are triggered by work-
6 related discussions or situations, i.e., her symptoms are “situational & work related”; and the
7 “influence stemming from her work-related stress would have to be deemed minimal in impact,”
8 on her interpersonal interactions outside of work. [AR at 267.]

9 On May 4, 2011, Dr. Grace wrote a one-page letter stating that he had been treating
10 plaintiff regularly since September 2, 2009, pursuant to her traumatic experience at work. [AR at
11 269.] He also noted that although plaintiff had made some gains in terms of daily functioning, she
12 “continues to show symptoms of depression, anxiety, withdrawal, poor concentration,
13 immobilization & low motivation.” [Id.] She still needs “the assistance of a medication regimen,”
14 taking Prozac and Wellbutrin, and “the lack of closure to her Work. Comp. case has not assisted
15 her progress.” [Id.] Dr. Grace found plaintiff “to be temporarily disabled & unable to proceed with
16 her life & gainful employment.” [Id.] Dr. Grace treated plaintiff from September 2009 through
17 January 2012. [AR at 263-69, 322-431.]

18
19 **2. The ALJ Failed to Provide Specific and Legitimate Reasons for Rejecting the**
20 **Opinions of Dr. Curtis**

21 The ALJ gave limited weight to the opinions of Dr. Curtis because (1) his “extremely
22 restrictive limitations” are not supported by the evidence; (2) there is no evidence that plaintiff
23 “requires around-the-clock in-home support services because of her mental impairment; and (3)
24 Dr. Curtis’ opinion is “contradicted by Dr. Grace’s December 2010 letter stating that the claimant
25

26 ⁶(...continued)

27 before the worker’s compensation action was initiated. [AR at 53 (“Dr. Grace was her doctor
28 before the workman’s comp attorney . . . [and] Dr. Grace stayed on board because it wasn’t
advisable to switch her from that doctor.”).]

1 had varied activities of daily living and that the claimant's post-traumatic stress disorder symptoms
2 had greatly lessened." [AR at 29.] The Court finds that these reasons are not specific and
3 legitimate or supported by substantial evidence.
4

5 **a. Dr. Curtis' Opinions Are Supported by the Evidence**

6 Plaintiff was hospitalized twice in 2009 for five days each time. [AR at 265.] In June 2010,
7 Dr. Curtis, plaintiff's treating psychiatrist from September 29, 2009, through February 7, 2012 [AR
8 at 217-23, 313-20], administered an extensive battery of psychological tests. [AR at 215-58.] In
9 fact, Dr. Curtis is the only physician of record to administer such tests.⁷

10 Additionally, Dr. Curtis' report and findings are consistent with his own treatment notes.
11 For instance, in December 2009, Dr. Curtis reported that plaintiff had visible anxiety and
12 depressed expressions [AR at 27 (citing AR at 222)], and in March 2010, Dr. Curtis noted
13 emotional withdrawal and visible anxiety [AR at 28 (citing AR at 220)]. Other treatment records
14 later submitted to the Appeals Council and, therefore, not before the ALJ, show that Dr. Curtis
15 made similar observations on various dates between June 2010 and February 2012. [See, e.g.,
16 AR at 315 (February 7, 2012: emotional withdrawal, visible anxiety), 316 (August 1, 2011: visible
17 anxiety, depressed expressions), 317 (April⁸ 26, 2011: emotional withdrawal, visible anxiety,
18 depressed expressions), 318 (November 16, 2010: emotional withdrawal, visible anxiety), 319
19 (April⁹ 2, 2010: emotional withdrawal, visible anxiety), 320 (June 29, 2010: emotional withdrawal,
20 visible anxiety).] In June 2010, Dr. Curtis completed his permanent and stationary report,
21 including the results of numerous psychological tests. [AR at 224-58.] Dr. Curtis diagnosed
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25 ⁷ Dr. Bagner, the consulting examiner to whom the ALJ assigned "some weight," relied only
26 on his review of Dr. Curtis' report and his own March 14, 2011, mental status examination of
27 plaintiff. [AR at 280-83.]

28 ⁸ Although somewhat unclear, the date on this note appears to be 4/26/11. [AR at 317.]

⁹ Although somewhat unclear, the date on this note appears to be 4/2/10. [AR at 319.]

1 plaintiff with depressive disorder, not otherwise specified, and assessed a GAF score of 45,¹⁰
2 finding she had moderate limitations in maintaining concentration, persistence, or pace, and a
3 marked limitation in adaptation. [Id.] Based on his extensive testing, Dr. Curtis found plaintiff
4 temporarily totally disabled on an emotional basis from her last day of work on or about June 23,
5 2009, to the time of his evaluation and continuing until her condition becomes more stabilized.
6 [AR at 241.]

7 Accordingly, Dr. Curtis' findings are supported by the evidence and this was not a specific
8 and legitimate reason for discounting Dr. Curtis' opinion.

9
10 **b. Around-the-Clock In-Home Support**

11 The ALJ also rejected Dr. Curtis' opinion because there was no evidence that plaintiff
12 needed "around-the-clock" in-home support services. [AR at 29.] However, Dr. Curtis does not
13 suggest that such services were warranted. Nor are such services required for a finding of
14 disability. Moreover, the Ninth Circuit has made it clear that a claimant need not be "utterly
15 incapacitated to be eligible for benefits" Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)
16 (internal citations omitted).

17 Accordingly, this was not a specific and legitimate reason for discounting Dr. Curtis'
18 opinion.

19
20 **c. Dr. Curtis' Opinions are Consistent with Dr. Grace's 2010 Letter and**
21 **Plaintiff's Alleged Daily Activities**

22 The ALJ rejected Dr. Curtis' opinion because it was contradicted by Dr. Grace's December
23 2010 letter, which indicated that plaintiff engaged in varied activities of daily living and that her
24 post-traumatic stress disorder symptoms had greatly lessened. [AR at 29.]

25 _____
26 ¹⁰ The ALJ used the difference between Dr. Curtis' GAF assessment of 45 and Dr. Bagner's
27 GAF assessment of 60 as evidence supporting the ALJ's finding that Dr. Curtis' opinion was not
28 supported by the evidence. Because the Court finds that other sufficient evidence supported Dr.
Curtis' opinions, the Court declines to consider the implication, if any, of the difference between
these GAF scores.

1 As will be discussed in more detail below [see supra, Part V.A.3.a], the Court finds that the
2 ALJ improperly characterized Dr. Grace's December 2010 letter, as well as plaintiff's ability to
3 perform her activities of daily living as contrasted with her continued symptoms when faced with
4 work-like situations or thoughts.

5 This reason for rejecting Dr. Curtis' opinion, therefore, fails based on that reasoning. It was
6 not a specific and legitimate reason for discounting Dr. Curtis' opinion.

7
8 **3. The ALJ Failed to Provide Specific and Legitimate Reasons for Rejecting the**
9 **May 2011 Opinions of Dr. Grace**

10 The ALJ gave "significant weight" to the December 2010 opinion of Dr. Grace, "because
11 he provided a detailed description of the claimant's symptoms." [Id.] He gave "limited weight" to
12 Dr. Grace's May 2011 letter because (1) "it is not consistent with the overall record, including the
13 claimant's testimony and the testimony of the claimant's mother," and (2) the ALJ found it
14 troubling that Dr. Grace reported "fairly good functioning in December 2010," and "poor functioning
15 in May 2011 without providing any reason for the change." [AR at 29.]

16
17 **a. Dr. Grace's May 2011 Letter Is Consistent with the Overall Record**

18 A review of the record shows that Dr. Grace's May 2011 opinion was not "inconsistent with
19 the overall record." In fact, given the evidence of record, that opinion appears to be entirely
20 consistent with Dr. Curtis' findings and, contrary to the ALJ's finding, not inconsistent with Dr.
21 Grace's December 2010 findings.

22 Dr. Grace's earlier December 2010 report indicated that plaintiff had steadily improved with
23 regard to her regular activities of daily living, and that she had also improved her assertiveness
24 in dealing with others. However, contrary to the ALJ's assertion that Dr. Grace, in his 2010 report,
25 "specifically stated that any influence stemming from [plaintiff's] work-related stress would have
26 to be deemed minimal in impact" [AR at 28], read in context, what Dr. Grace actually stated was
27 that plaintiff's "*deeply* stressed behavior" is "situational & work related," that "[e]ven discussion of
28 treatment at work or returning to work site bring[s] a reaction," but that this reaction did not appear

1 to carry over into her interactions “*outside of work related situations*,” to affect her interpersonal
2 interactions with others, including her family. [AR at 267 (emphases added.) Dr. Grace then
3 concluded that “[a]ny influence [*on plaintiff’s family interactions*] from [plaintiff’s] work-related
4 stress would have to be deemed minimal in impact.” [Id.] This statement is significantly different
5 from the ALJ’s suggestion that Dr. Grace opined that plaintiff’s work-related stress generally has
6 minimal impact or influence on her life.

7 Moreover, notwithstanding any improvement in her activities of daily living, Dr. Grace’s
8 December 2010 report also noted plaintiff’s “difficulty with work related . . . involvements or
9 material,” and reported that plaintiff was still experiencing “panic, shaking, palpitations, vomiting,
10 etc.” when confronted with work-related situations. [Id.] He stated that when admitted to Aurora
11 Behavioral Hospital in June 2009, plaintiff was “immobilized, overwhelmed & withdrawn,” and was
12 diagnosed with anxiety and situational depression. [AR at 265.] Her symptoms when hospitalized
13 in August 2009 for a second time were “mainly depressive in nature and were similar to [the] June
14 episode.” [Id.] Dr. Grace’s May 2011 letter is consistent with these statements in that it reflects
15 that plaintiff still experiences symptoms of depression, anxiety, withdrawal, poor concentration,
16 immobilization, and low motivation. [AR at 269.] Additionally, as discussed in more detail below,
17 Dr. Grace’s own treatment notes between January and May 2011 are consistent with these
18 findings. [See discussion supra Part V.A.3.b.]

19 Nor are Dr. Grace’s opinions inconsistent with plaintiff’s or her mother’s testimony. Plaintiff
20 reported that she was able to drive her daughter to school, go to her daughter’s performances,
21 do some light chores, assist with cleaning, do some gardening, play with her dogs, and shop [AR
22 at 29 (citing AR at 176-83, 263-69)], and Dr. Grace indicated plaintiff had made progress with
23 regard to her regular activities of daily living in his December 2010 report [AR at 266], as well as
24 in his May 2011 report, which also indicated plaintiff had made some gains “in terms of daily
25 functioning.” [AR at 269.] In fact, Dr. Grace’s December 2010 and May 2011 reports, and Dr.
26 Curtis’ June 2010 report, all portray plaintiff as a person who, although she suffers from PTSD,

1 depression, and anxiety, is generally capable of performing her activities of daily living but suffers
2 a severe increase of symptoms when confronted with *work-related situations or stresses*.¹¹

3 Based on the foregoing, this too was not a specific and legitimate reason, supported by
4 substantial evidence of record, for discounting the opinions of Dr. Grace.

5
6 **b. Dr. Grace's Treatment Notes Provide Evidence of Plaintiff's Functioning**
7 **Between December 2010 and May 2011**

8 The ALJ states that it is "troubling" that Dr. Grace's December 2010 report shows "fairly
9 good" functioning, but that the May 2011 report reflects "poor functioning," without providing any
10 reason for the change. [AR at 29.]

11 Preliminarily, for the reasons discussed above, the Court does not agree that the
12 December 2010 report shows "fairly good" functioning overall, or that these two reports actually
13 show a significant difference in functioning. Although Dr. Grace's December 2010 report certainly
14 is more detailed than his later report, both reflect Dr. Grace's opinion, as discussed above, that
15 plaintiff experiences mental health symptoms when confronted with work-related stresses, yet had
16 otherwise been making improvement in her daily living functions. Moreover, various treatment
17 notes from Dr. Grace, submitted to the Appeals Council and made part of the record,¹² provide

18
19 ¹¹ With regard to her subjective symptoms, plaintiff testified that she could sleep all day and
20 stay isolated, and has a hard time completing simple things. [AR at 67, 70.] Her mother testified
21 that plaintiff is a completely different person, does not even have enough confidence anymore to
22 answer the phone, and has no friends and no social life. [AR at 71.] While these statements may
23 have some relevance with respect to plaintiff's and her mother's credibility when contrasted with
24 plaintiff's activities of daily living, neither Dr. Grace nor Dr. Curtis found marked impact on
25 plaintiff's daily activities from her work-related PTSD. Moreover, the ALJ found that plaintiff's
26 "credibility is poor," without ever specifically stating what complaints he found to be less than
27 credible. The ALJ at least implicitly appeared to discount plaintiff's subjective complaints such
28 as her desire to be isolated or to sleep all day, while accepting her statements regarding her
activities of daily living. [AR at 29.]

¹² When the Appeals Council "considers new evidence in deciding whether to review a
decision of the ALJ, that evidence becomes part of the administrative record, which the district
court must consider when reviewing the Commissioner's final decision for substantial evidence."
Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1163 (9th Cir. 2012). When the Appeals

(continued...)

1 evidence that between January and June 2011, plaintiff was continuing to experience subjective
2 symptoms. [See, e.g., AR at 337 (June 13, 2011: back on Prozac and Wellbutrin; wants to put
3 her life back together; wants to get over depression; fearful of doing wrong; wants to get back to
4 being more confident and more able to enjoy things); AR at 338 (May 9, 2011: Dr. Grace's mental
5 status examination on that date showed that plaintiff was still depressed, anxious, having difficulty
6 concentrating on steps to take, and co-dependent, although she was having a positive response
7 to cognitive behavioral therapies); AR at 341 (April 27, 2011: "good days & bad days;" "while
8 focus is on satisfying activities doing OK but when down time or no focus frequent crying;"
9 difficulty getting things done; hard to get involved; "[s]till not back to desired state"); AR at 342
10 (March 15, 2011: "on [a] Recov scale 1-10 I'm a 0/10"; "[L]ife up in the air a lot"; "Little stuff
11 annoying me"); AR at 344 (March 28, 2011: "Have felt more relief at stating my case at hearing";
12 "felt good re the way I said my piece"); AR at 349 (January 13, 2011: still having some negative
13 feelings; lack of motivation).]

14 The Commissioner argues that these same records submitted to the Appeals Council
15 "actually support the ALJ's decision," because they show that plaintiff "had an upcoming job
16 interview, was walking her dogs every other day, was re-doing her house, and had limitations on
17 finding a job because of her dogs but was nonetheless exploring different job possibilities. (JS
18 at 20 (citing AR at 338, 342, 345, 348, 349). The Court does not agree with this characterization,
19 especially given the records discussed above that show continuing symptoms. In fact, the records
20 cited by defendant to support this proposition actually show that many of these notes were not a
21 reflection of an increase in plaintiff's functioning, but were things that were being explored
22 between Dr. Grace and plaintiff as "where to go from here" goals or action items. For instance,
23 on May 9, 2011, possible goals suggested during the treatment session were to explore Citrus
24 College or Cal Poly for courses as a vet assistant or park ranger. [AR at 338.] This same note,
25 written after Dr. Grace's second letter, also indicated that Dr. Grace's mental status examination

26
27 ¹²(...continued)

28 Council declines review, the ALJ's decision becomes the final decision of the Commissioner, and the district court reviews that decision for substantial evidence based on the record as a whole. Id. at 1161-62.

1 of that date found plaintiff still depressed, anxious, having difficulty concentrating on the steps to
2 take, and co-dependent. [*Id.*] On March 28, 2011, although plaintiff reported no developments
3 on the job front because of her dogs, she also described herself as a 0 on a recovery scale of 1-
4 10, frustrated, depressed and anxious. [AR at 342.] A February 7, 2011, note only cryptically
5 reports: “Redoing house” with no further explanation. [AR at 345.] That note, along with the
6 January 10, 2011, note, reflects that plaintiff may have had a job interview in Long Beach for a
7 sales position, although the Court finds no further mention of that interview in the record. [AR at
8 345, 348.] Finally, walking her dog every other day was also just a “what’s next” goal for plaintiff
9 in a January 3, 2011, note. [AR at 349.]

10 Based on the foregoing, this was not a specific and legitimate reason, supported by
11 substantial evidence of record, for discounting the May 2011 opinion of Dr. Grace.

12
13 **4. The ALJ Failed to Provide Adequate Explanation for the Controlling Weight**
14 **Given to the Opinions of the Consulting Examiner and the Non-Examining**
15 **Psychologist**

16 If a treating physician’s opinion is not giving controlling weight because it is not well
17 supported or because it is inconsistent with other substantial evidence in the record, the ALJ is
18 instructed to consider the factors listed in 20 C.F.R. § 404.1527(c)(2)-(6) in determining what
19 weight to accord the opinion of the treating physician. 20 C.F.R. § 404.1527(c). Those factors
20 include the “[l]ength of the treatment relationship and the frequency of examination” by the treating
21 physician; and the “nature and extent of the treatment relationship” between the patient and the
22 treating physician. *Id.* § 404.1527(c)(2)(i)-(ii). When an examining physician provides
23 independent clinical findings that differ from the findings of the treating physician, such findings
24 are substantial evidence. *Tonapetyen v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Orn v.*
25 *Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (when an examining physician provides independent
26 clinical findings that differ from the findings of the treating physician, such findings are substantial
27 evidence). “The opinion of a nonexamining physician cannot by itself constitute substantial
28 evidence that justifies the rejection of the opinion of . . . a treating physician.” *Lester*, 81 F.3d at
831; *see Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) (finding that the nonexamining

