

1 For the reasons stated below, the decision of the
2 Commissioner is REMANDED for further proceedings.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 Plaintiff filed an application for Disability Insurance
8 ("DIB") on October 25, 2010. (Administrative Record ("AR") 65).
9 Plaintiff alleged disability beginning on March 14, 2008, due to
10 severe chronic pelvic and abdominal pain, severe endometriosis,
11 severe endosalpingiosis, interstitial cystitis, liver
12 hemangiomas, non-alcoholic fatty liver disease,
13 arthritis/arthrosis and torn cartilage in the right knee and
14 hiatal hernia. (AR 65-66). Plaintiff's application was
15 initially denied on June 9, 2011 and denied on reconsideration on
16 November 10, 2011. (AR 96-99, 101-05). On November 17, 2011,
17 Plaintiff requested a hearing before an administrative law judge.
18 (AR 107-08). A hearing was held before Administrative Law Judge
19 ("ALJ") Mary L. Everstine on November 27, 2012 ("the ALJ
20 Hearing"), at which Plaintiff was represented by counsel. (AR
21 37, 39). Plaintiff testified at the hearing, as did her husband
22 Zachariah Baranek and Vocational Expert ("VE") David Van Winkle.
23 (AR 37-64). The ALJ issued an unfavorable decision on December
24 17, 2012, finding that Plaintiff was not disabled within the
25 meaning of the Social Security Act. (AR 14-25). Plaintiff
26 requested review of the ALJ's decision on January 7, 2013, which
27 the Appeals Council denied on September 15, 2014. (AR 1-10). As
28

1 a result, the ALJ's decision became the final decision of the
2 Commissioner. Plaintiff filed this action on May 6, 2015.

3
4 **III.**

5 **THE FIVE STEP SEQUENTIAL EVALUATION PROCESS**

6
7 To qualify for disability benefits, a claimant must
8 demonstrate a medically determinable physical or mental
9 impairment that prevents him from engaging in substantial gainful
10 activity and that is expected to result in death or to last for a
11 continuous period of at least twelve months. Reddick v. Chater,
12 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. §
13 423(d)(1)(A)). The impairment must render the claimant incapable
14 of performing the work he previously performed and incapable of
15 performing any other substantial gainful employment that exists
16 in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098
17 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

18
19 To decide if a claimant is entitled to benefits, an ALJ
20 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
21 The steps are:

- 22
- 23 (1) Is the claimant presently engaged in substantial
24 gainful activity? If so, the claimant is found
25 not disabled. If not, proceed to step two.
 - 26 (2) Is the claimant's impairment severe? If not, the
27 claimant is found not disabled. If so, proceed
28 to step three.

1 (3) Does the claimant's impairment meet or equal one
2 on the list of specific impairments described in
3 20 C.F.R. Part 404, Subpart P, Appendix 1? If
4 so, the claimant is found disabled. If not,
5 proceed to step four.

6 (4) Is the claimant capable of performing his past
7 work? If so, the claimant is found not disabled.
8 If not, proceed to step five.

9 (5) Is the claimant able to do any other work? If
10 not, the claimant is found disabled. If so, the
11 claimant is found not disabled.

12
13 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
14 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R.
15 §§ 404.1520(b)-404.1520(f)(1) & 416.920(b)-416.920(f)(1).

16
17 The claimant has the burden of proof at steps one through
18 four and the Commissioner has the burden of proof at step five.
19 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
20 affirmative duty to assist the claimant in developing the record
21 at every step of the inquiry. Id. at 954. If, at step four, the
22 claimant meets his burden of establishing an inability to perform
23 past work, the Commissioner must show that the claimant can
24 perform some other work that exists in "significant numbers" in
25 the national economy, taking into account the claimant's residual
26 functional capacity, age, education, and work experience.
27 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20
28 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). The Commissioner may do

1 so by the testimony of a vocational expert or by reference to the
2 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404,
3 Subpart P, Appendix 2 (commonly known as "the grids"). Osenbrock
4 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett).
5 When a claimant has both exertional (strength-related) and
6 nonexertional limitations, the grids are inapplicable and the ALJ
7 must take the testimony of a vocational expert. Moore v. Apfel,
8 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856
9 F.2d 1335, 1340 (9th Cir. 1988)).

10 11 IV.

12 THE ALJ'S DECISION

13
14 The ALJ employed the five-step sequential evaluation process
15 and concluded that Plaintiff was not disabled within the meaning
16 of the Social Security Act. (AR 14). At step one, the ALJ found
17 that Plaintiff had not been engaged in substantial gainful
18 employment since her alleged disability onset date of March 14,
19 2008. (AR 16).

20
21 At step two, the ALJ found that Plaintiff had the severe
22 impairments of history of endometriosis with multiple surgeries
23 for lysis of adhesions, nonalcoholic fatty liver disease,
24 hemangiomas of the liver, obesity, depression and anxiety. Id.
25 Plaintiff also alleged right knee arthritis and torn cartilage,
26 hiatal hernia, a cystocele, endosalpingiosis and interstitial
27 cystitis. (AR 16-17). However, objective medical evidence did
28 not show that these impairments more than minimally affected

1 Plaintiff's ability to perform work activities, and the ALJ
2 consequently found they were not severe impairments. (Id.). The
3 ALJ also found that endosalpingiosis and interstitial cystitis
4 were not medically determinable impairments because there were no
5 objective findings in the record confirming the diagnoses, and an
6 individual's own statements regarding her symptoms were
7 insufficient to establish the existence of an impairment. (AR
8 17).

9
10 At step three, the ALJ found that Plaintiff did not have an
11 impairment or combination of impairments that met or medically
12 equaled the severity of one of the listed impairments in 20
13 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d),
14 404.1525, 404.1526). (Id.). The ALJ specially considered
15 listing 5.05¹ in making this determination. (Id.). Though there
16 is no longer a listing for obesity, the ALJ also considered
17 Plaintiff's obesity in her assessment of Plaintiff's impairments
18 and their relationships to the listings' requirements. (Id.).
19 The ALJ also found that the severity of Plaintiff's mental
20 impairments did not meet or medically equal the criteria of
21 listings 12.04 and 12.06.² (Id.). The ALJ found that
22 Plaintiff's mental impairments did not cause at least two
23 "marked" limitation or one "marked" limitation and "repeated"
24 episodes of extended decompensation, and therefore the "paragraph
25

26 ¹ Listing 5.05 covers chronic liver disease. 20 C.F.R. Part
27 404, Subpart P, Appendix 1.

28 ² Listing 12.04 covers affective disorders and listing 12.06
covers anxiety-related disorders. 20 C.F.R. Part 404, Subpart P,
Appendix 1.

1 B" criteria were not satisfied. (AR 17-18). The ALJ also
2 determined that the evidence did not establish the presence of
3 "paragraph C" criteria. (AR 18). The ALJ then found that
4 Plaintiff had the residual functional capacity to perform light
5 work as defined in 20 C.F.R. 404.1567(b), except she was limited
6 to unskilled work. (AR 19). In reaching this decision, the ALJ
7 specified that she had considered all of Plaintiff's symptoms and
8 the extent to which they could reasonably be accepted as
9 consistent with the objective medical evidence and other
10 evidence, based on the requirements of 20 C.F.R. § 416.929 and
11 SSRs 96-4p and 96-7p. (Id.). The ALJ also stated that she
12 considered opinion evidence in her finding, in accordance with
13 the requirements of 20 C.F.R. § 416.927 and SSRs 96-2p, 96-5p,
14 96-6p and 06-3p. (Id.).

15
16 In assessing Plaintiff's credibility, the ALJ followed a
17 two-step process in which she first determined whether there was
18 an underlying medically determinable physical or mental
19 impairment(s) that could reasonably be expected to produce the
20 Plaintiff's pain or other symptoms. (Id.). Next, after the
21 underlying impairment(s) had been shown, she evaluated the
22 intensity, persistence and limiting effects of Plaintiff's
23 symptoms to determine the extent to which they limited
24 Plaintiff's functioning. (Id.). Here, the ALJ found that
25 Plaintiff's medically determinable impairments could reasonably
26 be expected to cause the alleged symptoms. (AR 21). However,
27 the ALJ also found that Plaintiff's statements regarding the
28 intensity, persistence and limiting effects of these symptoms

1 were not credible to the extent that they were incompatible with
2 Plaintiff's RFC. (Id.).

3
4 The ALJ reviewed Plaintiff's subjective complaints and found
5 inconsistencies that diminished her overall credibility and
6 suggested that her pain is not as severe or limiting as she
7 claims. (Id.). Although Plaintiff alleges that her abdominal
8 pain is so severe that she spends most of the day in bed and
9 cannot perform routine daily activities, the ALJ found that
10 objective medical evidence does not support her statement.
11 (Id.). Despite Plaintiff's complaints of severe abdominal pain,
12 imaging tests of Plaintiff's abdomen were largely normal, and
13 physical examinations revealed only mild to moderate tenderness
14 and often no abnormalities at all. (Id.). Treatment notes also
15 state that she "looks well" and is in no distress. (Id.). The
16 ALJ also noted that, although Plaintiff told the Agency that she
17 spent most of her day in bed and only got up to use the bathroom,
18 she has made conflicting statements to doctors that she could
19 ride a bike, walk, climb stairs and perform a home exercise
20 program. (Id.). The ALJ also opined that, despite having
21 visited a number of specialists, Plaintiff has only received
22 conservative medical treatment. (Id.). Additionally,
23 Plaintiff's treatment has primarily consisted of oral pain
24 medications, and there is some evidence that Plaintiff's
25 dependence on narcotics affected her functioning. (Id.).
26 However, the ALJ did opine that Plaintiff "does experience some
27 abdominal pain associated with her history of endometriosis and
28

1 her liver impairments...this pain is not as severe or as limiting
2 as she claims." (Id.).

3
4 The ALJ also questioned statements from Plaintiff's husband
5 at the hearing regarding her limitations. (Id.). Plaintiff's
6 husband testified that Plaintiff's pain would prevent her from
7 working for "even an hour per day." (Id.). Although his
8 statements were consistent with Plaintiff's, the ALJ found them
9 unpersuasive because they were unsupported by objective medical
10 evidence. (Id.). The ALJ opined that the evidence as a whole
11 suggested that Plaintiff's pain was not as severe or limiting as
12 she claimed. (Id.).

13
14 The ALJ also reviewed the specific findings of Plaintiff's
15 physicians and questioned objective medical evidence. (Id. at
16 22). The ALJ gave great weight to the opinion of state agency
17 examining physician Taylor, who opined that Plaintiff could stand
18 and walk for no more than six hours in an eight hour day, but
19 could sit without limitation. (Id.). Dr. Taylor also opined
20 that Plaintiff could lift and carry twenty pounds occasionally
21 and ten pounds frequently, and could crawl and kneel only
22 occasionally. (Id.). State agency reviewing physicians Betcher
23 and Dodson imposed additional environmental restrictions on
24 Plaintiff, indicating that she must avoid vibration and extreme
25 cold. (Id.). However, there is no evidence in the record that
26 Plaintiff's conditions are exacerbated by vibration or extreme
27 cold, and the ALJ accordingly granted the opinions some weight.
28 (Id.). The ALJ also gave just some weight to the opinion of

1 hepatic specialist and examining physician Ahmed because he
2 restricted Plaintiff from contact sports and heavy activity but
3 did not fully explain what activities Plaintiff may do despite
4 her impairments. (Id.). The ALJ ultimately assessed limitations
5 consistent with the medical evidence and Dr. Taylor's
6 recommendations. (Id. at 24).

7
8 The ALJ also gave the opinion of Plaintiff's treating
9 physician, Deanna Price, little weight. (Id. at 22-23).
10 Although Dr. Price had seen Plaintiff on many occasions, the ALJ
11 opined that her opinions were inconsistent with the medical
12 evidence and her own examination reports. (Id. at 23). The ALJ
13 described the medical evidence showing that Plaintiff has a
14 greater capacity for sitting, standing, walking, lifting,
15 carrying and other postural tasks than Dr. Price noted. (Id.).
16 The ALJ also noted that, despite Dr. Price's restrictions on
17 Plaintiff, she did not describe any significant abnormalities in
18 Plaintiff's presentation and often opined that she "look[ed]
19 well." (Id.). Dr. Price also opined that Plaintiff's symptoms
20 were so severe that they would interfere with the attention and
21 concentration needed to complete work tasks, however no doctor
22 had otherwise noted that Plaintiff had difficulties with
23 attention and concentration that would prevent her from
24 completing simple work tasks. (Id.). The ALJ also found that
25 there was no objective evidence that Plaintiff struggled to
26 manage stress or adhere to a schedule. (Id.).

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1 The ALJ reviewed the findings of examining psychologist Mair
2 and state agency reviewing psychiatrist Walls. (Id.). Dr. Mair
3 found that Plaintiff could perform work tasks without
4 difficulties, but her ability to complete a normal workweek was
5 moderately impaired. (Id.). However, the ALJ found that
6 objective evidence does not suggest that Plaintiff's depression
7 and anxiety inhibit her ability to complete a normal workweek.
8 (Id.). Despite this incongruence, the ALJ gave Dr. Mair's
9 opinion some weight because other portions of it were well-
10 supported by the evidence. (Id.). Dr. Walls noted that
11 Plaintiff had a "more than moderate" limitation in persistence,
12 but could complete a normal workday and week when taking
13 medications. (Id.). The ALJ opined that Dr. Walls's opinion
14 reiterated much of Dr. Mair's opinion, and gave the opinion some
15 weight. (Id.).
16

17 At step four, the ALJ found that Plaintiff was unable to
18 perform past relevant work as an accountant, a bookkeeper and an
19 office manager. (Id. at 24). The ALJ found that all of these
20 jobs exceeded Plaintiff's RFC because they were performed at the
21 skilled level, and Plaintiff was restricted to unskilled work.
22 (Id.).
23

24 At step five, the ALJ found that, considering Plaintiff's
25 age, education, work experience and RFC, she could perform jobs
26 that exist in significant numbers in the national economy.
27 (Id.). The ALJ considered Plaintiff's age, education, work
28 experience and RFC in conjunction with the Medical-Vocational

1 Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2, ("the
2 grids) to arrive at this finding. (Id.). The ALJ found that
3 Plaintiff was "not disabled" under the grids because she is able
4 to substantially perform the full range of light work, despite
5 her non-exertional limitation to unskilled work. (Id. at 24-25).
6 Because the limitation to unskilled work is only a "slight
7 erosion" in her ability to perform light work, the ALJ found that
8 Plaintiff was not disabled within the meaning of the Social
9 Security Act. (Id. at 25).

10
11 **V.**

12 **STANDARD OF REVIEW**

13
14 Under 42 U.S.C. § 405(g), a district court may review the
15 Commissioner's decision to deny benefits. "The court may set
16 aside the Commissioner's decision when the ALJ's findings are
17 based on legal error or are not supported by substantial evidence
18 in the record as a whole." Auckland v. Massanari, 257 F.3d 1033,
19 1035 (9th Cir. 2001) (citing Tackett, 180 F. 3d at 1097); Smolen
20 v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v.
21 Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

22
23 "Substantial evidence is more than a scintilla, but less
24 than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson
25 v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
26 evidence which a reasonable person might accept as adequate to
27 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;
28 Smolen, 80 F.3d at 1279). To determine whether substantial

1 evidence supports a finding, the court must “consider the record
2 as a whole, weighing both evidence that supports and evidence
3 that detracts from the [Commissioner’s] conclusion.” Auckland,
4 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
5 Cir. 1993)). If the evidence can reasonably support either
6 affirming or reversing that conclusion, the court may not
7 substitute its judgment for that of the Commissioner. Reddick,
8 157 F.3d at 720-21 (citing Flaten v. Sec’y of Health & Human
9 Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

10
11 **VI.**

12 **DISCUSSION**

13
14 Plaintiff contends that the ALJ improperly rejected the
15 opinion of Plaintiff’s treating physician, that the ALJ’s finding
16 on Plaintiff’s RFC is incomplete and not supported by substantial
17 evidence and that the ALJ improperly rejected the testimony of
18 both Plaintiff and her husband. (Memorandum in Support of
19 Complaint (“MSC”), Dkt. No. 14, at 2-3). Plaintiff also contends
20 that the ALJ erred in failing to obtain evidence from a
21 vocational expert at step five of the evaluation process because
22 Plaintiff has significantly severe non-exertional impairments.
23 (Id.). The Court agrees that the ALJ improperly relied on the
24 grids in determining Plaintiff’s disability status. Therefore,
25 the ALJ’s decision should be reversed and this action remanded
26 for further proceedings.

1 The ALJ Improperly Relied On The Grids In Determining
2 Plaintiff's Disability Status

3
4 At step five of the sequential evaluation process, the
5 burden shifts to the Commissioner to show that "the claimant can
6 perform a significant number of other jobs in the national
7 economy," taking into consideration claimant's RFC, age,
8 education and work experience. Hoopai v. Astrue, 499 F.3d 1071,
9 1074-75 (9th Cir. 2007) (quoting Thomas v. Barnhart, 278 F.3d
10 947, 955 (9th Cir. 2002)). The Commissioner can show that there
11 are a significant number of other jobs in the national economy
12 that the claimant can perform by taking the testimony of a
13 vocational expert, or by using the grids. Tackett, 180 F.3d at
14 1101 (citing Desrosiers v. Sec'y of Health & Human Servs., 846
15 F.2d 573, 577-78 (Pregerson, J., concurring) (9th Cir. 1988)).
16 The grids "consist of a matrix of [the four factors] and set
17 forth rules that identify whether jobs requiring a specific
18 combination of these factors exist in significant numbers in the
19 national economy." Hoopai, 499 F.3d at 1075 (alteration in
20 original) (quoting Heckler v. Campbell, 461 U.S. 458, 461-62
21 (1983)).

22
23 Where a claimant's qualifications correspond to the job
24 requirements indicated by the grids, the grids "direct a
25 conclusion as to whether work exists that the claimant could
26 perform." Id. (quoting Heckler, 461 U.S. at 462). If the grids
27 completely and accurately represent the claimant's limitations
28

1 and the claimant is able to perform the full range of jobs in a
2 given category, the ALJ may rely solely on the grids to show the
3 availability of jobs for the claimant. Tackett, 180 F.3d at
4 1101-02. When the grids do not match the claimant's
5 qualifications, the ALJ can use the grids as a framework to
6 determine what work exists that the claimant can perform, or the
7 ALJ can rely on testimony from a vocational expert. Hoopai, 499
8 F.3d at 1075. Although an ALJ can use the grids without
9 vocational expert testimony when a claimant alleges a non-
10 exertional limitation, "the grids are inapplicable when a
11 claimant's non-exertional limitations are sufficiently severe so
12 as to significantly limit the range of work permitted by the
13 claimant's exertional limitations." Id. (internal quotations and
14 alterations omitted). If a non-exertional limitation is
15 sufficiently severe so as to limit the range of work permitted by
16 the claimant's exertional limitations, a vocational expert's
17 testimony is required. Id. at 1076. Examples of non-exertional
18 limitations are pain, postural limitations, or environmental
19 limitations. Tackett, 180 F.3d at 1102.

20
21 Here, Plaintiff's non-exertional impairments are
22 sufficiently severe so as to limit her capacities in ways not
23 contemplated by the grids, and the grids are therefore
24 inapplicable. The ALJ found that Plaintiff had the RFC to
25 perform light work, except she was limited to unskilled work.
26 (AR 19). Plaintiff alleges that she suffers severe abdominal
27 pain that prevents her from performing even routine daily
28 activities. (AR 173-75). Although the ALJ opined that "this

1 pain is not as severe or as limiting as she claims," the ALJ also
2 noted that "the claimant does experience some abdominal pain
3 associated with her history of endometriosis and her liver
4 impairments." (AR 21). Because the grids do not completely and
5 accurately represent Plaintiff's limitations, and because her
6 pain is sufficiently severe so to as limit Plaintiff beyond her
7 exertional limitations, the testimony of a vocational expert is
8 necessary to determine Plaintiff's ultimate disability status.
9 Tackett at 1101-02; see also Penny, 2 F.3d at 958 ("As a
10 consequence of the ALJ's error in discrediting Penny's complaints
11 of pain, the Secretary erroneously relied on the medical
12 vocational grids to determine that there were jobs in the
13 national economy that Penny is capable of performing.").

14
15 Plaintiff was also diagnosed with depression and anxiety,
16 which limited her to unskilled work. (AR 20). Because Plaintiff
17 was limited to unskilled work, she was unable to perform the full
18 range of jobs classified as "light work." (AR 25). Therefore,
19 jobs existed in the national economy that she could perform. See
20 Tackett, 180 F.3d at 1101-02. Although mild or moderate
21 depression is generally not a sufficiently severe non-exertional
22 limitation that significantly limits a claimant from doing work
23 beyond the exertional limitation, the ALJ found that Plaintiff's
24 depression and anxiety did prevent her from doing the full range
25 of light work. Hoopai, 499 F.3d at 1077. The ALJ found that
26 Plaintiff was only able to perform unskilled light work as a
27 result of her depression and anxiety. (AR 20). As such, the
28

