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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ILENE A. ZAUSS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social
Security Administration,

Defendant.

Case No. CV 15-8788 SS

MEMORANDUM DECISION AND ORDER

**I.
INTRODUCTION**

Ilene A. Zauss ("Plaintiff") seeks review of the decision of the Commissioner of the Social Security Administration ("Commissioner" or "Agency") denying her application for Supplemental Security Income benefits. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated

1 below, the Commissioner's decision is REVERSED and REMANDED for
2 further administrative proceedings consistent with this decision.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 On June 25, 2012, Plaintiff filed an application for
8 Supplemental Security Income ("SSI"). (Administrative Record
9 ("AR") 53). Plaintiff alleged that she became unable to work as
10 of September 14, 2008, (AR 55, 40), due to various conditions
11 including bi-polar disorder, cervical cancer, fatty liver, high
12 blood pressure, high cholesterol, chronic sphenoid sinusitis, acid
13 reflux, asthma, and migraine headaches, (AR 136). The Agency
14 denied the application on January 25, 2013. (AR 71-72).

15
16 On March 18, 2013, Plaintiff requested a hearing, (AR 89),
17 which administrative law judge ("ALJ") Dean Yanohira held on March
18 14, 2014. (AR 22). At the close of the hearing, the ALJ noted
19 that Plaintiff's treating psychiatrist Dr. Fazal Mirza, M.D., at
20 Rio Hondo Mental Health Center, had not provided a medical source
21 statement or updated treatment records. (AR 51). The ALJ indicated
22 that he would keep the record open until April 14, 2014, to allow
23 Plaintiff's counsel to submit the statement and records. (AR 51).
24 Plaintiff submitted updated treatment records from Dr. Mirza as
25 well as other records from Rio Hondo Medical Center but no medical
26 source statement. (AR 14). On May 8, 2014, the ALJ issued a
27 decision denying benefits. (AR 9-21). Plaintiff sought review of
28 the ALJ's decision before the Appeals Council, which the Council

1 denied on October 2, 2015. (AR 1-4). The ALJ's determination then
2 became the final decision of the Commissioner. (AR 1). Plaintiff
3 filed the instant action on November 11, 2015. (Dkt. No. 1).
4

5 **III.**

6 **FACTUAL BACKGROUND**

7
8 Plaintiff was born on September 1, 1964. (AR 25, 54). On
9 September 14, 2008, the alleged date of disability onset, she was
10 forty-four years old. (AR 40, 55). Plaintiff completed the
11 eleventh grade, but did not graduate from high school. (AR 25,
12 137). At the time of the hearing, Plaintiff lived in a house with
13 her mother and brother. (AR 37). In the sixteen years prior to
14 the alleged onset of her disability, Plaintiff worked as an
15 appointment setter, clerical employee, office manager, union
16 payroll clerk, and telephonic surveyor. (AR 137, 146, 158).
17

18 **A. Mental Health History¹**

19
20 Plaintiff received mental health treatment in the early 1980s,
21 in 1992, in mid-2005, and from August 2011 through the date of the
22 hearing on March 14, 2014. (AR 28-29, 62).
23

24 On August 25, 2011, Plaintiff was seen at Telecare Corporation
25 Mental Health Urgent Care at Long Beach. (AR 198-213). Plaintiff
26 reported symptoms of depression, anxiety, helplessness,
27

28 ¹ The Court does not describe Plaintiff's medical history, because
it is not relevant to the claims at issue.

1 hopelessness, lack of self-worth, confusion, lack of focus,
2 paranoia, and being overwhelmed. (AR 205-06). Staff referred
3 Plaintiff to Rio Hondo Mental Health Center for a psychiatric
4 evaluation. (AR 209).

5
6 From October 2011 to January 2013, Plaintiff received
7 treatment from Dr. Mirza. (AR 228-29, 352-66). On October 19,
8 2011, Dr. Mirza diagnosed Plaintiff with bipolar disorder (most
9 recent episode mixed without psychotic features) and polysubstance
10 abuse (the latter in remission) and assigned Plaintiff a global
11 assessment of functioning ("GAF") score of 48.² (AR 258, 228).
12 Dr. Mirza prescribed Plaintiff Geodon and Benadryl. (AR 230-38,
13 353). On September 19, 2012, Dr. Mirza noted that Plaintiff's
14 concentration was impaired, her motor activity was restless, her
15 speech was pressured, loud, and excessive, her affect was labile,
16 and her judgment and insight were "minimum." (AR 229). Dr. Mirza,
17 however, also noted that Plaintiff's memory, cooperation, fund of
18 knowledge, and thought associations were average or unimpaired,
19 and that Plaintiff appeared to be capable of managing her own
20 funds. (AR 229). Dr. Mirza's treatment notes from October 2011
21 through December 2013 consistently indicate that Plaintiff
22 complained of mood swings, anxiety, depression, pressured speech,
23 insomnia, and easy irritability/frustration. (AR 230-38, 258, 314-
24 16, 353-55, 449-57). Treatment records from 2013 assess

25
26 ² A GAF score of 41-50 indicates "serious symptoms (e.g., suicidal
27 ideation, severe obsessional rituals, frequent shoplifting) OR any
28 serious impairment in social, occupational, or school functioning
(e.g., no friends, unable to keep a job)." American Psychiatric Association, Diagnostic and Statistical
Manual of Mental Disorders, 32 (4th ed.).

1 Plaintiff's attention, concentration, memory, insight, and
2 judgment as "marginal." (AR 449-57 (records from January 3, April
3 29, June 24, September 3, October 28, and December 17, 2013)).
4

5 In January 2014, Plaintiff began receiving psychiatric
6 treatment from Dr. Jun Yang, M.D., at Rio Hondo Mental Health
7 Center. (AR 411). Dr. Yang's treatment records from January and
8 February 2014 indicate a change in Plaintiff's medications to
9 Wellbutrin XL, Abilify, Topamax, and Restoril. (AR 447-48).
10 Records also identify Plaintiff's target symptoms as mood swings
11 and irritability. (AR 445). Dr. Yang assigned Plaintiff a global
12 assessment of functioning score of 50. (AR 444).
13

14 **B. State Agency Consultative Opinion**
15

16 On January 22, 2013, the state agency medical consultant
17 Howard S. Leizer, Ph.D., reviewed, inter alia, Plaintiff's mental
18 health records from Dr. Mirza and assessed Plaintiff's mental
19 residual functional capacity. (AR 67-69). The consultant assessed
20 Plaintiff's ability to remember locations and work-like procedures
21 and her ability to understand and remember short and simple
22 instructions as "not significantly limited" and her ability to
23 understand and remember detailed instructions as "moderately
24 limited." (AR 67). Regarding her ability to sustain concentration
25 and persist in activities, the consultant assessed Plaintiff's
26 ability to carry out short and simple instructions, perform
27 activities within a schedule, maintain regular attendance and be
28 punctual within customary tolerances, sustain an ordinary routine

1 without special supervision, work in coordination with or in
2 proximity to others without being distracted, and make simple work-
3 related decisions as "not significantly limited." (AR 68). He
4 further assessed her ability to carry out detailed instructions
5 and complete a normal workday/workweek without interruptions from
6 psychologically-based symptoms and perform at a consistent pace
7 without an unreasonable number and length of rest periods as
8 "moderately limited." (AR 68). The consultant assessed
9 Plaintiff's ability to interact appropriately with the general
10 public as "moderately limited" and her ability to ask simple
11 questions or request assistance, accept instructions and respond
12 appropriately to criticism from supervisors, get along with
13 coworkers without distracting them or exhibiting behavioral
14 extremes, and maintain socially appropriate behavior and adhere to
15 basic standards of neatness and cleanliness as "not significantly
16 limited." (AR 68). The consultant assessed Plaintiff's ability
17 to respond appropriately to changes in the work setting as
18 "moderately limited" and her ability to be aware of normal hazards
19 and take appropriate precautions, travel in unfamiliar places or
20 use public transportation, and set realistic goals or make plans
21 independently of others as "not significantly limited." (AR 69).

22
23 The consultant relied upon the following to support these
24 conclusions: Plaintiff "plays with her dog," "[s]he has no
25 problems with personal care besides dressing, shaving and other,"
26 "[s]he is able to fix meals, complete household duties, talk to
27 her mom, ride in a car, use public transportation, go out alone,
28 drive (but doesn't have a car), shop in stores, and count change."

1 (AR 65-66; accord AR 66-69). The consultant acknowledged that
2 Plaintiff's treating psychiatrists' assessments of her mental
3 limitations were more restrictive than his findings. (AR 69). The
4 consultant opined, however, that the global assessment of
5 functioning scores assigned by her treating psychiatrists "lack[ed]
6 specificity and may not be reflective of functioning over time."
7 (AR 70). The consultant concluded that "the evidence suggests
8 [Plaintiff] is capable of simple, unskilled, nonstressful tasks
9 that do[] not require frequent interaction with others." (AR 69).

10
11 **C. Plaintiff's Relevant Testimony**

12
13 At the hearing on March 14, 2014, Plaintiff testified that
14 she is unable to work due to anxiety, depression, bipolar disease,
15 chronic dry eyes, and heel spurs. (AR 27-28, 32-33). Plaintiff
16 testified that she "can't sit still for a minute without these
17 anxiety attacks coming on. I get depressed and then the bipolar,
18 you know, it kicks in." (AR 27). Plaintiff testified that she
19 has been receiving mental health treatment at Rio Hondo Mental
20 Health Center, including counseling and psychiatric medication to
21 treat her anxiety and depression, once a month for a little over
22 two years. (AR 28-29). Plaintiff was treated by Dr. Mirza until
23 approximately two months prior to the March 14, 2014 hearing, at
24 which time she began seeing Dr. Yang. (AR 29-30). Plaintiff also
25 had been involuntarily hospitalized in a psychiatric ward in the
26 early 1980s. (AR 28). Plaintiff testified that the medication
27 Geodon, which she was taking prior to switching medications at the
28 beginning of 2014, "was working." (AR 31).

1
2 Plaintiff further testified that she lives in a house with
3 her mother and brother and is able physically and independently to
4 care for herself when she wants to do so. (AR 37-38). Plaintiff
5 stated that she is not able to stand for long and that she cannot
6 walk far because of pain caused by her heel spurs. (AR 38).
7 Plaintiff sometimes has to crawl to the bathroom. (AR 39).
8 Plaintiff testified that she does not do household chores because
9 she keeps to herself in her room, but admitted that she cleans her
10 own room as best as she can and that her room is "not really dirty."
11 (AR 38). Plaintiff does not very often leave the house unless she
12 has to do so. (AR 38). Plaintiff does not socialize and does not
13 have friends. (AR 39). In addition, she does not often deal with
14 people, only close family at home, and she testified that she would
15 not be able to work with or around people because she does not
16 "even get along with the people [she lives] with." (AR 39-40).

17
18 **IV.**

19 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

20
21 To qualify for disability benefits, a claimant must
22 demonstrate a medically determinable physical or mental impairment
23 that prevents her from engaging in substantial gainful activity
24 and that is expected to result in death or to last for a continuous
25 period of at least twelve months. Reddick v. Chater, 157 F.3d 715,
26 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The
27 impairment must render the claimant incapable of performing the
28 work she previously performed and incapable of performing any other

1 substantial gainful employment that exists in the national economy.
2 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42
3 U.S.C. § 423(d) (2) (A)).

4
5 To decide if a claimant is entitled to benefits, an ALJ
6 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The
7 steps are as follows:

8
9 (1) Is the claimant presently engaged in substantial
10 gainful activity? If so, the claimant is found not
11 disabled. If not, proceed to step two.

12 (2) Is the claimant's impairment severe? If not, the
13 claimant is found not disabled. If so, proceed to
14 step three.

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

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

23 (5) Is the claimant able to do any other work? If not,
24 the claimant is found disabled. If so, the claimant
25 is found not disabled.

1 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
2 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R.
3 §§ 404.1520(b)-(g) (1) & 416.920(b)-(g) (1).

4
5 In between steps three and four, the ALJ must determine the
6 claimant's residual functional capacity ("RFC"). 20 CFR
7 416.920(e). To determine the claimant's RFC, the ALJ must consider
8 all of the claimant's impairments, including impairments that are
9 not severe. 20 CFR § 416.1545(a)(2).

10
11 The claimant has the burden of proof at steps one through
12 four, and the Commissioner has the burden of proof at step five.
13 Bustamante, 262 F.3d at 953-54. "Additionally, the ALJ has an
14 affirmative duty to assist the claimant in developing the record
15 at every step of the inquiry." Id. at 954. If, at step four, the
16 claimant meets her burden of establishing an inability to perform
17 past work, the Commissioner must show that the claimant can perform
18 some other work that exists in "significant numbers" in the
19 national economy, taking into account the claimant's RFC, age,
20 education, and work experience. Tackett, 180 F.3d at 1098, 1100;
21 Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1),
22 416.920(g)(1). The Commissioner may do so by the testimony of a
23 vocational expert or by reference to the Medical-Vocational
24 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
25 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d
26 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
27 (strength-related) and non-exertional limitations, the Grids are
28 inapplicable and the ALJ must take the testimony of a vocational

1 expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing
2 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

3
4 **V.**

5 **THE ALJ'S DECISION**

6
7 The ALJ employed the five-step sequential evaluation process
8 and concluded that Plaintiff was not disabled within the meaning
9 of the Social Security Act. (AR 16). At step one, the ALJ found
10 that Plaintiff had not engaged in substantial gainful employment
11 since her application for benefits date of June 25, 2012. (AR 11).
12 At step two, the ALJ found that Plaintiff had the severe impairments
13 of bipolar disorder, right plantar fasciitis fibromatosis,
14 recurrent corneal filaments in both eyes, right heel spur, and
15 obesity. (AR 11). At step three, the ALJ found that Plaintiff
16 did not have an impairment or combination of impairments that met
17 or medically equaled one of the listed impairments in 20 C.F.R.
18 Part 404, Subpart Part P, Appendix 1 (20 C.F.R. §§ 416.920(d),
19 416.925-26). (AR 11). The ALJ found that Plaintiff had not alleged
20 that any of her impairments met or medically equaled the severity
21 of one of the listed impairments and that there was not any
22 objective medical evidence in the record indicating that any of
23 her severe impairments met or medically equaled any of the listed
24 impairments. (AR 11).

25
26 The ALJ then found that Plaintiff had the RFC to perform
27 sedentary work as defined in 20 C.F.R. § 416.967(a) with the
28 following non-exertional limitations: "Occasional climbing (but

1 no climbing ladders, ropes or scaffolds); occasional stooping,
2 kneeling, crouching and crawling; no exposure to hazards as defined
3 in the Dictionary of Occupational Titles (DOT); limited to
4 unskilled, simple and repetitive tasks; only incidental work-
5 related interactions with coworkers; and only brief and superficial
6 contact with the public." (AR 12). In making this finding, the
7 ALJ "accord[ed] great weight to the opinion of the State agency
8 medical consultant that Plaintiff was capable of light exertion
9 work with occasional postural activities and the need to avoid
10 hazards and that she was capable of unskilled, simple and
11 repetitive tasks with limited contact with coworkers, supervisors,
12 and the general public. (AR 14). The ALJ reasoned that the
13 consultant was "familiar with the Social Security Disability
14 program," reviewed Plaintiff's records through the report date,
15 and considered the Plaintiff's complaints as well as the objective
16 findings. (AR 14). The ALJ acknowledged that Plaintiff submitted
17 new records after the hearing that the consultant had not reviewed,
18 but determined that the findings from these records did not justify
19 any changes to the consultant's assessment. (AR 14). The ALJ
20 characterized the records as indicating only that Plaintiff's
21 medications and her mental symptoms were limited to irritability.
22 (AR 14).

23
24 Although the ALJ accorded great weight to the state
25 consultant's opinion, the ALJ credited only "some of [Plaintiff's]
26 subjective complaints and functional limitations to the extent that
27 they [were] consistent with the treatment records." (AR 14).
28 According to the ALJ, Plaintiff's "poor work history prior to the

1 alleged onset date" did not enhance her credibility. ((AR 14).
2 The ALJ questioned whether Plaintiff's unemployment was "due to
3 medical impairments as opposed to a lifestyle choice." (AR 14).
4 The ALJ noted that another blemish to her credibility was that
5 Plaintiff "began seeking treatment only after filing for disability
6 benefits, not as of her alleged onset date." (AR 14).

7
8 The ALJ further noted that while Dr. Mirza's treatment records
9 indicate a diagnosis of bipolar disorder and polysubstance abuse
10 in remission, "[a]ll of Dr. Mirza's notes[] indicate no side
11 effects with medication and the same prescriptions for Geodon and
12 Benadryl." (AR 14). The ALJ further indicated that in his letter
13 dated September 19, 2012, Dr. Mirza indicated that Plaintiff's
14 "functioning . . . included some impairment in concentration," but
15 also that Plaintiff's "memory, cooperation, fund of knowledge, and
16 thought associations were not significantly impacted by her mental
17 condition." (AR 14). The ALJ further indicated that the more
18 recent treatment records that Plaintiff did submit from Dr. Mirza
19 indicated only a change to her medications, and "[t]he most recent
20 records from February 2014 seem to indicate that [Plaintiff's]
21 mental symptoms at that time was [sic] irritability." (AR 14).
22 The ALJ concluded that there was "no treating, examining, or
23 reviewing medical opinion that advocates for functional limitations
24 beyond those delineated in the residual functional capacity." (AR
25 15).

26
27 At step four, the ALJ determined that Plaintiff had no past
28 relevant work. (AR 15). At step five, considering Plaintiff's

1 age, education, work experience, and RFC, the ALJ found that
2 Plaintiff could perform jobs that existed in significant numbers
3 in the national economy. (AR 15-16). According to the vocational
4 expert, Plaintiff was able perform the requirements sorter,
5 assembler, and polisher. (AR 16). Therefore, the ALJ concluded
6 that Plaintiff was not under a disability as defined by 20 C.F.R.
7 §§ 404.1520(g) and 416.920(g). (AR 16).

8 9 VI.

10 STANDARD OF REVIEW

11
12 Under 42 U.S.C. § 405(g), a district court may review the
13 Commissioner's decision to deny benefits. The court may set aside
14 the Commissioner's decision when the ALJ's findings are based on
15 legal error or are not supported by substantial evidence in the
16 record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th
17 Cir. 2001) (citing Tackett, 180 F.3d at 1097); Smolen v. Chater,
18 80 F.3d 1273, 1279 (9th Cir. 1996).

19
20 "Substantial evidence is more than a scintilla, but less than
21 a preponderance." Reddick, 157 F.3d at 720 (citation omitted). It
22 is "relevant evidence which a reasonable person might accept as
23 adequate to support a conclusion." (Id.) (citations omitted). To
24 determine whether substantial evidence supports a finding, the
25 court must "'consider the record as a whole, weighing both evidence
26 that supports and evidence that detracts from the [Commissioner's]
27 conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v.
28 Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can

1 reasonably support either affirming or reversing that conclusion,
2 the court may not substitute its judgment for that of the
3 Commissioner. Reddick, 157 F.3d at 720-21 (citation omitted).

4
5 **VII.**

6 **DISCUSSION**

7
8 Plaintiff asserts that (1) the ALJ failed to seek a
9 consultative examination or consult a medical expert to determine
10 the severity of Plaintiff's mental impairments and ALJ improperly
11 relied only on the state agency's consultative opinion that was
12 based on a partial review of the records, (Plaintiff's Mem. In
13 Supp. of Compl. ("Pl's Mem.") at 2, 3, 6); and (2) the ALJ did not
14 provide specific and legitimate reasons supported by substantial
15 evidence to reject the opinion and findings of Plaintiff's treating
16 psychiatrist Dr. Mirza, (id. at 2-6). For the reasons discussed
17 below, the ALJ's decision is REVERSED.

18
19 **A. The ALJ Failed To Satisfy His Duty To Develop The Record**

20
21 Plaintiff contends that the ALJ failed to seek a consultative
22 examination or consult a medical expert to determine the severity
23 of Plaintiff's mental impairments and improperly relied only on
24 the State Agency doctor's opinion that was based on an incomplete
25 review of Plaintiff's mental health records. (Pl's Mem. at 2, 3,
26 6).

1 While a claimant has the burden of demonstrating a disability,
2 the ALJ has an affirmative duty fully and fairly to develop the
3 record in a social security case. Tonapetyan v. Halter, 242 F.3d
4 1144, 1150 (9th Cir. 2001); Reed v. Massanari, 270 F.3d 838, 841
5 (9th Cir. 2001); see also Sims v. Apfel, 530 U.S. 103, 110-11
6 (2000) (“Social Security proceedings are inquisitorial rather than
7 adversarial”; “[i]t is the ALJ’s duty to investigate the facts and
8 develop the arguments both for and against granting benefits.”).
9 The duty is heightened when the claimant is unrepresented or
10 mentally ill and thus unable to protect her own interests.
11 Tonapetyan, 242 F.3d at 1150. An ALJ may discharge the duty to
12 conduct an appropriate inquiry in several ways, including
13 “subpoenaing the claimant’s physicians, submitting questions to
14 the claimant’s physicians, continuing the hearing, or keeping the
15 record open after the hearing to allow supplementation of the
16 record.” Id. (citation omitted). An ALJ also may order a
17 consultative examination to supplement an inadequate medical
18 record. Reed, 270 F.3d at 841 (citing 20 C.F.R. §§ 404.1519,
19 416.919). The duty to conduct an appropriate inquiry, however, is
20 only triggered by evidence that is insufficient or ambiguous.
21 Tonapetyan, 242 F.3d at 1150; see also Widmark v. Barnhart, 454
22 F.3d 1063, 1068-69 (9th Cir. 2006) (duty triggered by a gap in the
23 medical evidence); Reed, 270 F.3d at 842 (duty to order a
24 consultative examination triggered where additional evidence is
25 needed or there is an ambiguity or insufficiency in the evidence).

26
27 Here, the ALJ did not fully satisfy his duty to conduct the
28 appropriate inquiry. While the ALJ kept the record open for 30

1 days to allow Plaintiff the opportunity to supplement the record
2 with a medical source statement from Dr. Mirza, cf. Tonapetyan,
3 242 F.3d at 1150; Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir.
4 1998) (as amended), the ALJ failed to order a consultative
5 examination.

6
7 While the ALJ generally has “‘broad latitude in ordering a
8 consultative examination,’” Reed, 270 F.3d at 842 (quoting Diaz v.
9 Sec’y of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990)),
10 “[s]ome kinds of cases[] do ‘normally require a consultative
11 examination,’” id. (quoting 20 C.F.R. §§ 404.1519a(b)(1), (4),
12 416.919a(b)(1), (4)). The cases requiring a consultative examiner
13 are those in which “‘additional evidence needed is not contained
14 in the records of the claimant’s medical sources,’ and those
15 involving an ‘ambiguity or insufficiency in the evidence that must
16 be resolved.’” Id. (quoting 20 C.F.R. §§ 404.1519a(b)(1), (4),
17 416.919a(b)(1), (4)). The decision whether to order a consultative
18 examination “turn[s] on an assessment of the quality of previously
19 rendered medical opinions.” Reed, 270 F.3d at 844. This is “an
20 issue open to contest, and one that cannot be resolved by an ALJ
21 without analysis from other medical professionals.” Id.

22
23 The ALJ specifically recognized that there was a gap in the
24 mental health evidence because Plaintiff’s treating psychiatrist
25 Dr. Mirza had not submitted a medical source statement. (AR 14).
26 Therefore, other than the opinion of the state non-examining
27 consultant, the record is devoid of any other function-by-function
28 comprehensive mental residual capacity analysis. Cf. Reed, 270

1 F.3d at 844 (noting that record was “barren” of “analysis from
2 other medical professionals” and thus devoid of the criterion upon
3 which the decision to appoint a consultative examiner “turned”);
4 id. at 843, n.2. The state examiner based his function-by-function
5 mental assessment of Plaintiff’s residual capacity on a review of
6 the record, which included a review of Dr. Mirza’s treatment
7 records from 2012 but not his treatment records from 2013 and not
8 on any medical source statement from Dr. Mirza. The decision to
9 order a consultative examination “turn[s] on an assessment of the
10 quality of previously rendered medical opinions.” Reed, 270 F.3d
11 at 844. Here, however, there were no comprehensive analyses from
12 other medical professionals of plaintiff’s mental functional
13 limitations or their impact on Plaintiff’s ability to sustain
14 employment from which the ALJ could assess that quality. Cf. id.
15 Moreover, the ALJ did not identify any other evidence (substantial
16 or otherwise) to support his reliance upon the state consultant’s
17 functional assessment of Plaintiff’s mental limitations.

18
19 Instead, the ALJ erroneously noted that Plaintiff began seeking
20 psychiatric help only after applying for disability benefits and
21 inaccurately characterized Plaintiff’s mental health treatment
22 records from 2014 as indicating that her symptoms were limited to
23 irritability. (AR 15). These characterizations are not accurate.
24 The evidence establishes that Plaintiff received psychiatric
25 treatment pursuant to an involuntarily psychiatric hospitalization
26 in the early 1980s and that she received mental health treatment
27 in 1992 and mid-2005. (AR 28, 62). The records of Plaintiff’s
28 treating psychiatrists Dr. Mirza and Dr. Yang also establish that

1 Plaintiff had a serious mental health condition that included a
2 diagnosis of bi-polar disorder as well as mental limitations that
3 were significant. (See, e.g., AR 449-57 (treatment records from
4 2013 repeatedly assessing Plaintiff as having only "marginal"
5 attention, concentration, memory, insight, and judgment)).
6 Moreover, contrary to the ALJ's finding that recent 2014 records
7 indicate only irritability as Plaintiff's symptoms, Dr. Yang's
8 records from early 2014 specifically note that Plaintiff's target
9 symptoms are both mood swings and irritability. (AR 445). In
10 addition, Dr. Mirza's treatment notes throughout 2013 consistently
11 indicate that Plaintiff complained of mood swings, anxiety,
12 depression, pressured speech, insomnia, and easy
13 irritability/frustration and his notes consistently assess
14 Plaintiff as having the limitations of "marginal" attention,
15 concentration, memory, insight, and judgment. (AR 449-57). The
16 ALJ relied upon his erroneous characterization of Plaintiff's most
17 recent mental health records to conclude that the state
18 consultant's opinion would not have been different had he reviewed
19 Plaintiff's most recent mental health records from 2013 and 2014.
20 (AR 14).

21
22 On these facts, the ALJ did not have sufficient evidence to
23 discredit Mr. Mirza's findings and instead credit the state
24 consultant's mental functional limitations. The ALJ, therefore
25 had a duty to order a consultative examination. Cf. Reed, 270 F.3d
26 at 842, 843 & n.2 (the ALJ failed to satisfy his duty to develop
27 the record when he failed to order a consultative examination
28 because the record before the ALJ did not contain any assessment

1 of the claimant's limitations on a function-by-function basis);
2 see also Garcia v. Comm'r of Soc. Sec., 768 F.3d 925, 931 (9th Cir.
3 2014) (the ALJ's duty to develop the record included ordering a
4 complete set of IQ scores for the claimant who had an intellectual
5 disability).

6
7 Moreover, the ALJ's failure to order the necessary consultative
8 examination prejudiced Plaintiff. Cf. McLeod v. Astrue, 640 F.3d
9 881, 886 (9th Cir. 2011) (even if an ALJ fails to develop record,
10 a claimant must still show a substantial likelihood of prejudice
11 to merit remand). The ALJ did not have a basis for assessing the
12 quality of the state consultant's mental residual functional
13 capacity, cf. Reed, 270 F.3d at 844, and he did not consider all
14 of the evidence fairly. In addition, the ALJ indicated that if
15 Dr. Mirza provided a medical source statement consistent with his
16 treatment notes, the ALJ "probably" would "go with" Dr. Mirza's
17 opinion because he is Plaintiff's treating source. (AR 51).
18 Because an examining consultative physician's opinion is entitled
19 to greater weight than that of a non-examining state physician,
20 see infra § VII.B, there is a substantial likelihood that the ALJ
21 might similarly have credited any contrary opinion of a
22 consultative examiner over that of the state non-examining
23 consultant. The circumstances here, for these reasons, show a
24 substantial likelihood that the ALJ's failure to appoint a
25 consultative examiner prejudiced Plaintiff. Accordingly, remand
26 is required.

1 **B. The ALJ Failed To Provide Specific And Legitimate Reasons**
2 **Supported By Substantial Evidence To Reject The Treating**
3 **Physician's Opinion**
4

5 Plaintiff claims that the ALJ did not provide specific and
6 legitimate reasons to reject the opinion of Dr. Mirza, Plaintiff's
7 treating psychiatrist. (Pl's Mem. at 2-6). The Court agrees.
8

9 There are three types of medical opinions in social security
10 cases: The opinions of (1) treating physicians, who examine and
11 treat, (2) examining physicians, who examine but do not treat, and
12 (3) non-examining physicians who neither examine nor treat.
13 Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir.
14 2009). Treating physicians are given the greatest weight because
15 they are "employed to cure and [have] a greater opportunity to know
16 and observe the patient as an individual." Magallanes v. Bowen,
17 881 F.3d 747, 751 (9th Cir. 1989); Thomas v. Barnhart, 278 F. 3d
18 947, 956-57 (9th Cir. 2002); Connett v. Barnhart, 340 F.3d 871,
19 874 (9th Cir. 2003). Accordingly, where the treating physicians'
20 opinion is refuted by another doctor, the ALJ may not reject this
21 opinion without providing specific and legitimate reasons supported
22 by substantial evidence in the record. Lester v. Chater, 81 F.3d
23 821, 830-31 (9th Cir. 1995); see also Orn v. Astrue, 495 F.3d 625,
24 632 (9th Cir. 2007); Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194,
25 1198 (9th Cir. 2008); compare Lester, 81 F.3d at 830 (where the
26 treating physician's opinion is not refuted by another doctor, the
27 ALJ must provide clear and convincing reasons for rejecting the
28 treating physician's opinions); Holohan v. Massanari, 246 F.3d

1 1195, 1202 (9th Cir. 2001) (same). The opinion of a non-examining,
2 non-treating physician does not constitute substantial evidence to
3 justify rejecting the opinion of either an examining or a treating
4 physician unless it is consistent with and supported by other
5 evidence in record. Lester, 81 F.3d at 831; Morgan v. Comm'r of
6 Soc. Sec., 169 F.3d 595, 600-01 (9th Cir. 1998); Tonapetyan, 242
7 F.3d at 1149 (citing Magallanes, 881 F.2d at 752). An ALJ need
8 not accept the opinion of any physician, including a treating
9 physician, if that opinion is brief, conclusory, and inadequately
10 supported by the clinical findings. Thomas, 278 F.3d at 957; see
11 also Batson v. Comm'r of Soc. Sec., 359 F.3d 1190, 1195 (9th Cir.
12 2004); Tonapetyan, 242 F.3d at 1149.

13
14 The ALJ in the present case failed to articulate specific and
15 legitimate reasons supported by substantial evidence for rejecting
16 Dr. Mirza's more restrictive assessment of Plaintiff's mental
17 capacity in the areas of attention, concentration, memory, insight,
18 and judgment as "marginal," (AR 449-57), and crediting the state
19 consultant's assessment of moderate or not significant limitations
20 in the areas of memory, understanding, and sustained concentration
21 and persistence, (AR 14, 67, 68). To satisfy his burden of
22 providing specific and legitimate reasons supported by substantial
23 record evidence to reject Dr. Mirza's findings, the ALJ was
24 required to "set[] out a detailed and thorough summary of the facts
25 and conflicting clinical evidence, stating [his] interpretation
26 thereof, and making findings." Orn, 495 F.3d at 632 (citations
27 omitted). An "ALJ must do more than offer conclusions. He must
28 set forth his own interpretations and explain why they, rather than

1 the doctors', are correct.'" Id. (quoting Reddick, 157 F.3d at
2 725). The ALJ did not comply with these standards.

3
4 The ALJ discounted Dr. Mirza's findings in part because, while
5 Dr. Mirza's "treatment notes indicate[d] diagnoses of bipolar
6 disorder and polysubstance abuse, in remission," the records
7 indicated "no side effects with medication and the same
8 prescriptions for Geodon and Benadryl." (AR 14). To the extent
9 the ALJ relied upon this reason to support a rejection of Dr.
10 Mirza's findings regarding the severity of Plaintiff's mental
11 limitations, the ALJ failed to explain why the absence of side
12 effects or the prescription medications themselves would support
13 his rejection of Dr. Mirza's opinions.

14
15 The ALJ also discounted Dr. Mirza's findings by placing too
16 much weight upon Dr. Mirza's letter dated September 19, 2012, in
17 light of the total record. The ALJ reasoned that while in his
18 letter Dr. Mirza noted that Plaintiff's concentration was impaired,
19 he also "noted that [Plaintiff's] memory, cooperation, fund of
20 knowledge, and thought associations were not significantly impacted
21 by her mental condition." (AR 14). While the letter characterizes
22 Plaintiff's memory and thought associations as "unimpaired" and
23 her fund of knowledge as "average," (AR 229), Dr. Mirza's
24 subsequent treatment records from 2013 consistently assess
25 Plaintiff as having only "marginal" attention, concentration,
26 memory, insight, and judgment. (AR 449-57). The ALJ's reliance
27 upon the September 2012 letter to the exclusion of more recent
28 evidence in the record did not constitute a specific and legitimate

1 reason supported by substantial record evidence to reject Dr.
2 Mirza's findings from 2013. Cf. Gallant v. Heckler, 753 F.2d 1450,
3 1455-56 (9th Cir. 1984) (ALJ cannot attempt to justify a conclusion
4 by "ignoring competent evidence in the record that suggests an
5 opposite result"); Ryan v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198
6 (9th Cir. 2008) ("[A] reviewing court must consider the entire
7 record as a whole and may not affirm simply by isolating a
8 "specific quantum of supporting evidence."") (quoting Robbins v.
9 Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)); see also
10 Reddick, 157 F.3d at 722-23.

11
12 The ALJ also characterized Dr. Mirza's treatment records from
13 2013 as indicating only a change to her medications, and the 2014
14 records as revealing only the mental symptom of irritability. (AR
15 14). To the extent the ALJ relied upon this characterization of
16 Plaintiff's most recent records to support a rejection of Dr.
17 Mirza's findings, the reason was not supported by substantial
18 record evidence. As discussed, Dr. Yang's records from early 2014
19 identified Plaintiff's target symptoms as both mood swings and
20 irritability. (AR 445). Moreover, Dr. Mirza's treatment records
21 from 2013 consistently indicate that Plaintiff complained of mood
22 swings, anxiety, depression, pressured speech, insomnia, and easy
23 irritability/frustration and repeatedly assess Plaintiff as having
24 the limitations of "marginal" attention, concentration, memory,
25 insight, and judgment. (AR 449-57).

26
27 Finally, the ALJ could not rely on the state consultant's less
28 restrictive findings as a reason to reject Dr. Mirza's more

1 restrictive findings. The state consultant's opinion could not
2 constitute substantial evidence to reject Dr. Mirza's findings
3 unless it was consistent with and supported by other evidence in
4 record. Cf. Lester, 81 F.3d at 831; Morgan, 169 F.3d at 600-01;
5 Tonapetyan, 242 F.3d at 1149. The ALJ, however, neither determined
6 that nor explained how the consultant's opinion was consistent with
7 and supported by other record evidence in the record. The ALJ,
8 thus, failed to satisfy his burden of stating his interpretation
9 of the facts and clinical evidence and explaining why his
10 interpretations were correct. Cf. Orn, 495 F.3d at 632.

11
12 The ALJ failed to support his rejection of Dr. Mirza's more
13 restrictive findings regarding Plaintiff's mental limitations with
14 specific and legitimate reasons supported by substantial evidence
15 in the record. Dr. Mirza's findings, as Plaintiff's treating
16 psychiatrist for over two years, were entitled to greater weight
17 than those of the non-examining state consultant. The ALJ could
18 not reject Dr. Mirza's findings without providing specific and
19 legitimate reasons supported by substantial record evidence. Cf.
20 Lester, 81 F.3d at 830-31. The ALJ, however, did not articulate
21 specific and legitimate reasons for rejecting Dr. Mirza's findings
22 in favor of the state consultant's or in favor of the ALJ's own
23 conclusion that Plaintiff suffered from "moderate deficiencies in
24 concentration, persistence or pace resulting in failure to complete
25 tasks in a timely manner." (AR 15). ALJ simply opined that there
26 was "no treating, examining, or reviewing medical opinion that
27 advocates for functional limitations beyond those delineated in
28 the residual functional capacity." (AR 15). Remand is required.

1 **C. Remand is Appropriate**

2
3 Whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's
5 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
6 2000). Before a court may remand a case to the ALJ with
7 instructions to award benefits, three requirements must be met:
8 "(1) the record has been fully developed and further
9 administrative proceedings would serve no useful purpose; (2) the
10 ALJ has failed to provide legally sufficient reasons for rejecting
11 evidence, whether claimant testimony or medical opinion; and (3)
12 if the improperly discredited evidence were credited as true, the
13 ALJ would be required to find the claimant disabled on remand.'" Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting
14 Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014)). "Even if
15 those requirements are met, though, [the Court] retain[s]
16 'flexibility' in determining the appropriate remedy." Id. (quoting
17 Garrison, 759 F.3d at 1021). "In particular, [the Court] may
18 remand on an open record for further proceedings 'when the record
19 as a whole creates serious doubt as to whether the claimant is, in
20 fact, disabled within the meaning of the Social Security Act.'" Id. (quoting Garrison, 759 F.3d at 1021).
21

22
23 Where, as here, the record has not been fully developed and
24 the circumstances suggest that further administrative review could
25 remedy the Commissioner's errors, remand for further proceedings
26 is the proper remedy.
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VIII.

CONCLUSION

Accordingly, IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order and the Judgment on counsel for both parties.

DATED: August 26, 2016

 /S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

THIS MEMORANDUM DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR ANY OTHER LEGAL DATABASE.