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

7 Case No. 2:16-cv-09076 (VEB)

8 PATRICIA COE,

9 Plaintiff,

DECISION AND ORDER

10 vs.

11 NANCY BERRYHILL, Acting  
12 Commissioner of Social Security,

Defendant.

13  
14 **I. INTRODUCTION**

15 In April of 2013, Plaintiff Patricia Coe applied for Disability Insurance  
16 benefits and Supplemental Security Income benefits under the Social Security Act.  
17 The Commissioner of Social Security denied the applications.<sup>1</sup>

18 <sup>1</sup> On January 23, 2017, Nancy Berryhill took office as Acting Social Security Commissioner. The  
19 Clerk of the Court is directed to substitute Acting Commissioner Berryhill as the named defendant  
in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

1 Plaintiff, proceeding *pro se*, seeks judicial review of the Commissioner's  
2 denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

3 The parties consented to the jurisdiction of a United States Magistrate Judge.  
4 (Docket No. 11, 12). On January 5, 2018, this case was referred to the undersigned  
5 pursuant to General Order 05-07. (Docket No. 28).

## 7 II. BACKGROUND

8 Plaintiff applied for benefits on April 1, 2013, and April 11, 2013, alleging  
9 disability beginning January 2, 2009. (T at 162-87).<sup>2</sup> The applications were denied  
10 initially and on reconsideration. Plaintiff requested a hearing before an  
11 Administrative Law Judge ("ALJ").

12 On February 12, 2015, a hearing was held before ALJ John Moreen. (T at 45).  
13 Plaintiff appeared with an attorney and testified. (T at 49-67). The ALJ also  
14 received testimony from Elizabeth Brown-Ramos, a vocational expert. (T at 68-73).

15 On June 17, 2015, the ALJ issued a written decision denying the applications  
16 for benefits. (T at 26-44). The ALJ's decision became the Commissioner's final  
17 decision on October 20, 2016, when the Appeals Council denied Plaintiff's request  
18 for review. (T at 1-8).

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19 <sup>2</sup> Citations to ("T") refer to the administrative record transcript at Docket No. 22.

1 On December 7, 2016, Plaintiff, acting by and through the Law Offices of  
2 Rohlfing & Kalagian, LLP, Laura E. Krank, Esq., of counsel, filed this action  
3 seeking judicial review of the Commissioner’s denial of benefits. (Docket No. 1).  
4 The Commissioner interposed an Answer on July 25, 2017. (Docket No. 21).

5 On April 25, 2017, Attorney Krank moved to withdraw as counsel for  
6 Plaintiff. The Commissioner filed a motion for summary judgment on June 29, 2017.  
7 (Docket No. 20). The Magistrate Judge assigned to this case as that time granted  
8 Attorney Krank’s motion to withdraw on October 24, 2017 (Docket No. 23), and  
9 advised Plaintiff that she need to respond to the Commissioner’s motion and file her  
10 own motion. (Docket No. 24). Plaintiff submitted voluminous medical records to  
11 the Commissioner, which were filed on January 10, 2018. (Docket No. 30).

12 After reviewing the pleadings, motion papers, and administrative record, this  
13 Court finds that the Commissioner’s decision must be reversed and this case must be  
14 remanded for further proceedings.

### 15 16 **III. DISCUSSION**

#### 17 **A. Sequential Evaluation Process**

18 The Social Security Act (“the Act”) defines disability as the “inability to  
19 engage in any substantial gainful activity by reason of any medically determinable

1 physical or mental impairment which can be expected to result in death or which has  
2 lasted or can be expected to last for a continuous period of not less than twelve  
3 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
4 claimant shall be determined to be under a disability only if any impairments are of  
5 such severity that he or she is not only unable to do previous work but cannot,  
6 considering his or her age, education and work experiences, engage in any other  
7 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
8 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and  
9 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

10 The Commissioner has established a five-step sequential evaluation process  
11 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
12 one determines if the person is engaged in substantial gainful activities. If so,  
13 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
14 decision maker proceeds to step two, which determines whether the claimant has a  
15 medically severe impairment or combination of impairments. 20 C.F.R. §§  
16 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 If the claimant does not have a severe impairment or combination of  
18 impairments, the disability claim is denied. If the impairment is severe, the  
19 evaluation proceeds to the third step, which compares the claimant’s impairment(s)

1 with a number of listed impairments acknowledged by the Commissioner to be so  
2 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),  
3 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or  
4 equals one of the listed impairments, the claimant is conclusively presumed to be  
5 disabled. If the impairment is not one conclusively presumed to be disabling, the  
6 evaluation proceeds to the fourth step, which determines whether the impairment  
7 prevents the claimant from performing work which was performed in the past. If the  
8 claimant is able to perform previous work, he or she is deemed not disabled. 20  
9 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual  
10 functional capacity (RFC) is considered. If the claimant cannot perform past relevant  
11 work, the fifth and final step in the process determines whether he or she is able to  
12 perform other work in the national economy in view of his or her residual functional  
13 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon the claimant to establish a *prima facie*  
16 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup>  
17 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden  
18 is met once the claimant establishes that a mental or physical impairment prevents  
19 the performance of previous work. The burden then shifts, at step five, to the

1 Commissioner to show that (1) plaintiff can perform other substantial gainful  
2 activity and (2) a “significant number of jobs exist in the national economy” that the  
3 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

4 **B. Standard of Review**

5 Congress has provided a limited scope of judicial review of a Commissioner’s  
6 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,  
7 made through an ALJ, when the determination is not based on legal error and is  
8 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
9 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).

10 “The [Commissioner’s] determination that a plaintiff is not disabled will be  
11 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*  
12 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial  
13 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119  
14 n 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d  
15 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence as a  
16 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*  
17 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and  
18 conclusions as the [Commissioner] may reasonably draw from the evidence” will  
19 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review,

1 the Court considers the record as a whole, not just the evidence supporting the  
2 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir.  
3 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

4 It is the role of the Commissioner, not this Court, to resolve conflicts in  
5 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
6 interpretation, the Court may not substitute its judgment for that of the  
7 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
8 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
9 set aside if the proper legal standards were not applied in weighing the evidence and  
10 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
11 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
12 administrative findings, or if there is conflicting evidence that will support a finding  
13 of either disability or non-disability, the finding of the Commissioner is conclusive.  
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 15 **C. Commissioner’s Decision**

16 The ALJ determined that Plaintiff had not engaged in substantial gainful  
17 activity since January 2, 2009, the alleged onset date, and met the insured status  
18 requirements of the Social Security Act through December 31, 2012 (the “date last  
19 insured”). (T at 21). The ALJ found that Plaintiff had multiple non-severe medical

1 impairments, but no impairments considered “severe” as defined under the Act.  
2 However, the ALJ continued the sequential evaluation because he concluded that  
3 Plaintiff’s dysthymia (persistent mild depression) prevented her from returning to  
4 her past relevant work. (Tr. 31).

5 The ALJ concluded that Plaintiff did not have an impairment or combination  
6 of impairments that met or medically equaled one of the impairments set forth in the  
7 Listings. (T at 34).

8 The ALJ determined that Plaintiff retained the residual functional capacity  
9 (“RFC”) to perform work at all exertional levels, but could perform no more than  
10 simple repetitive tasks and could have only occasional contact with others. (T at 34).

11 The ALJ found that Plaintiff could not perform her past relevant work as a  
12 teacher aide, branch library clerk, or after-school instructional assistant. (T at 36).  
13 However, considering Plaintiff’s age (39 years old on the alleged onset date),  
14 education (at least high school), work experience, and residual functional capacity,  
15 the ALJ found that jobs exist in significant numbers in the national economy that  
16 Plaintiff can perform. (T at 36).

17 Accordingly, the ALJ determined that Plaintiff was not disabled within the  
18 meaning of the Social Security Act between January 2, 2009 (the alleged onset date)  
19 and June 17, 2015 (the date of the decision) and was therefore not entitled to



1 benefits. (T at 37-38). As noted above, the ALJ’s decision became the  
2 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request  
3 for review. (T at 1-8).

#### 4 IV. ANALYSIS

##### 5 A. *Pro Se Status*

6 As a threshold matter, this Court is mindful that Plaintiff is proceeding *pro se*.  
7 A *pro se* litigant’s pleadings are construed more liberally than pleadings prepared by  
8 counsel. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652  
9 (1972); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

10 A *pro se* litigant should receive leniency with respect to non-compliance with  
11 technical or procedural rules, but “a *pro se* litigant is not excused from knowing the  
12 most basic pleading requirements.” *Am. Ass'n of Naturopathic Physicians v.*  
13 *Hayhurst*, 227 F.3d 1104, 1107-08 (9th Cir. 2000); *Draper v. Coombs*, 792 F.2d  
14 915, 924 (9th Cir. 1986).

15 After her lawyer was relieved, Plaintiff was given a further opportunity to file  
16 a motion for summary judgment and to file opposition to the Commissioner’s  
17 motion. (Docket No. 24). Plaintiff was cautioned that failure to comply could result  
18 in dismissal of this action. (Docket No. 24). Plaintiff requested and received an  
19 extension of time to January 4, 2018. (Docket No. 27). Plaintiff filed a letter with

1 the Court on December 27, 2017, but the Magistrate Judge assigned to this case at  
2 that time rejected the filing based on non-compliance with Local Rule 83-2.5, which  
3 forbids a party from sending letters to the Court. (Docket No. 29). Plaintiff  
4 thereafter sent Commissioner’s counsel a large volume of documents, which  
5 Commissioner’s counsel filed on January 10, 2018. (Docket No. 30).

6 Although Plaintiff did not comply with the directive to file a summary  
7 judgment motion and did not formally respond to the Commissioner’s motion, this  
8 Court elects not to dismiss this action for procedural non-compliance and will  
9 review the Commissioner’s decision to determine whether it is supported by  
10 substantial evidence.

11 **B. Medical Opinion Evidence before the ALJ**

12 In disability proceedings, a treating physician’s opinion carries more weight  
13 than an examining physician’s opinion, and an examining physician’s opinion is  
14 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,  
15 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
16 1995). If the treating or examining physician’s opinions are not contradicted, they  
17 can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If  
18 contradicted, the opinion can only be rejected for “specific” and “legitimate” reasons  
19

1 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d  
2 1035, 1043 (9th Cir. 1995).

3 The courts have recognized several types of evidence that may constitute a  
4 specific, legitimate reason for discounting a treating or examining physician’s  
5 medical opinion. For example, an opinion may be discounted if it is contradicted by  
6 the medical evidence, inconsistent with a conservative treatment history, and/or is  
7 based primarily upon the claimant’s subjective complaints, as opposed to clinical  
8 findings and objective observations. *See Flaten v. Secretary of Health and Human*  
9 *Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

10 An ALJ satisfies the “substantial evidence” requirement by “setting out a  
11 detailed and thorough summary of the facts and conflicting clinical evidence, stating  
12 his interpretation thereof, and making findings.” *Garrison v. Colvin*, 759 F.3d 995,  
13 1012 (9<sup>th</sup> Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9<sup>th</sup> Cir. 1998)).  
14 “The ALJ must do more than state conclusions. He must set forth his own  
15 interpretations and explain why they, rather than the doctors’, are correct.” *Id.*

16 In August of 2014, Dr. Jair Wong, an internal medicine specialist, completed a  
17 new patient assessment for Plaintiff. He noted a diagnosis of major depressive  
18 disorder, recurrent episode, mild degree, but reported that Plaintiff was not taking  
19 any medications and had no complaints. (T at 464).

1 Dr. Rosa Colonna, a psychologist, performed a consultative psychological  
2 evaluation in March of 2015. Dr. Colonna assessed no limitation as to  
3 understanding, remembering, or carrying out simple instructions and mild  
4 limitations with respect to complex tasks. (T at 504). She opined that Plaintiff  
5 would have mild limitation as to social interactions. (T at 505).

6 Dr. Colonna diagnosed dysthymia and assigned a Global Assessment of  
7 Functioning (“GAF”) score<sup>3</sup> of 60 (T at 511), which is indicative of moderate  
8 symptoms or difficulty in social, occupational or educational functioning. *Metcalf*  
9 *v. Astrue*, No. EDCV 07-1039, 2008 US. Dist. LEXIS 83095, at \*9 (Cal. CD Sep’t  
10 29, 2008). Dr. Colonna opined that Plaintiff would benefit from supportive  
11 psychotherapy and might struggle in a competitive job market due to a “mild  
12 inability to interact appropriately with supervisors, coworkers, and peers.” (T at  
13 512).

14 Dr. Sandra Francis, a non-examining State Agency review physician,  
15 concluded that Plaintiff had mild, non-severe affective disorder with mild limitation  
16 as to activities of daily living, social functioning, and maintaining concentration,  
17 persistence, or pace. (T at 84).

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18 <sup>3</sup> “A GAF score is a rough estimate of an individual's psychological, social, and occupational  
19 functioning used to reflect the individual's need for treatment.” *Vargas v. Lambert*, 159 F.3d 1161,  
1164 n.2 (9th Cir. 1998).

1 If this were the only medical opinion evidence of record, this Court would  
2 conclude that the ALJ's decision was supported by substantial evidence. However,  
3 the record was supplemented by additional, material evidence submitted to the  
4 Appeals Council.

5 **C. Additional Evidence**

6 After the ALJ issued his decision, Plaintiff provided the Appeals Council with  
7 a medical source statement (mental) form completed by Dr. Nagwa Azer, her  
8 treating family physician. Dr. Azer reported diagnoses of major bipolar depression,  
9 attention disorder, and post-traumatic stress disorder. (T at 681). Dr. Azer assessed  
10 marked limitation as to understanding and remembering short, simple instructions  
11 and moderate limitation with respect to complex or detailed instructions. (T at 681).

12 Dr. Azer assessed moderate limitations as to Plaintiff's ability to engage in  
13 social interactions, with marked impairment in her ability to perform at a consistent  
14 pace without more than regular breaks in a workday. (T at 682). Dr. Azer also  
15 completed an assessment of Plaintiff's physical limitations, wherein he opined that  
16 Plaintiff's impairments would likely cause her to be absent from work more than 4  
17 days per month. (T at 697).

18 The Appeals Council is required to consider "new and material" evidence if it  
19 "relates to the period on or before the date of the [ALJ's] hearing decision." 20

1 C.F.R. § 404.970(b); see also § 416.1470(b). The Appeals Council “will then  
2 review the case if it finds that the [ALJ]'s action, findings, or conclusion is contrary  
3 to the weight of the evidence currently of record.” 20 C.F.R. § 404.970(b); see §  
4 416.1470(b).”

5 In the Ninth Circuit, when the Appeals Council considers new evidence in the  
6 context of denying the claimant’s request for review, the reviewing federal court  
7 must “consider the rulings of both the ALJ and the Appeals Council,” and the record  
8 before the court includes the ALJ’s decision and the new evidence. *Ramirez v.*  
9 *Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d 967, 971 (9th  
10 Cir. 1996).

11 Because the Appeals Council’s decision to deny the claimant’s request for  
12 review is not a “final decision” by the Commissioner, the federal courts have no  
13 jurisdiction to review it. Rather, the question is whether “the ALJ’s decision is  
14 supported by substantial evidence after taking into account the new evidence.”  
15 *Acheson v. Astrue*, No. CV-09-304, 2011 U.S. Dist. LEXIS 25898, at \*11 (E.D.  
16 Wash. Mar. 11, 2011); see also *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d  
17 1228, 1233 (9th Cir. 2011). If the new evidence creates a reasonable possibility that  
18 it would change the outcome of the ALJ’s decision, then remand is appropriate to  
19

1 allow the ALJ to consider the evidence. *Mayes v. Massanari*, 276 F.3d 453, 462 (9th  
2 Cir. 2001).

3 This Court finds that the new evidence creates a reasonable possibility that it  
4 would change the outcome of the ALJ's decision. The Commissioner asserts that  
5 Dr. Azer's assessments are "check-box" forms that should be afforded little weight.  
6 This is not correct. Dr. Azer actually provided several pages of notes that described  
7 his observations, summarized his assessment of Plaintiff's present illnesses,  
8 described her past history, set forth the findings of a mental status examination,  
9 explained his assessment of her current level of functioning, and provided a  
10 prognosis. (T at 684-87). Although the assessment was provided after the ALJ's  
11 decision, medical reports "containing observations made after the period for  
12 disability are relevant to assess the claimant's disability." *Smith v. Bowen*, 849 F.2d  
13 1222, 1225 (9th Cir. 1988) (citing *Kemp v. Weinberger*, 522 F.2d 967, 969 (9th Cir.  
14 1975)); see also *Lingenfelter v. Astrue*, 504 F.3d 1028, 1034 n.3 (9th Cir. 2007)  
15 (noting that "reports containing observations made after the period for disability are  
16 relevant to assess the claimant's disability"). Moreover, because Dr. Azer was  
17 Plaintiff's treating provider it is possible and, indeed, likely, that the assessment was  
18 based in part on observations made prior to the ALJ's decision.

1 The ALJ based his decision in material part on the “absence of any doctor’s  
2 opinion supporting [Plaintiff’s] claim for disability.” (T at 35). The assessment of  
3 Dr. Azar, a treating physician, supports Plaintiff’s claim and creates a reasonable  
4 possibility of a different outcome. As such, a remand is required.

5 **D. Remand**

6 In a case where the ALJ's determination is not supported by substantial  
7 evidence or is tainted by legal error, the court may remand the matter for additional  
8 proceedings or an immediate award of benefits. Remand for additional proceedings  
9 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from  
10 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379  
11 F.3d 587, 593 (9th Cir. 2004).

12 Here, this Court finds that remand for further proceedings is warranted. While  
13 Dr. Azar’s assessment creates a reasonable possibility of a different outcome, there  
14 is conflicting evidence and the Commissioner is not necessarily required to accept  
15 Dr. Azar’s opinion regarding the full extent of Plaintiff’s limitations. Rather, the  
16 ALJ will need to make a full assessment, based on the record as supplemented by  
17 Dr. Azar’s opinion, regarding Plaintiff’s residual functional capacity. In addition,  
18 further review, including follow-up with Dr. Azar, may be necessary for an  
19 assessment as to the onset of disability, if disability is established.



1  
2 **V. ORDERS**

3 IT IS THEREFORE ORDERED that:

4 Judgment be entered REVERSING the Commissioner's decision and  
5 REMANDING this action for further proceedings, and it is further ORDERED that

6 The Clerk of the Court shall file this Decision and Order, serve a copy upon  
7 Plaintiff *pro se*, and CLOSE this case.

8 DATED this 12<sup>th</sup> day of April 2018,

9  
10 /s/Victor E. Bianchini  
11 VICTOR E. BIANCHINI  
12 UNITED STATES MAGISTRATE JUDGE  
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